[HIGH COURT OF AUSTRALIA.]

S. A. HUTCHINSON AND ANOTHER . APPELLANTS;
DEFENDANTS,

AND

CATHERINE SCOTT . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 19, 20, 21.

Griffith C.J., Barton and O'Connor JJ.

Mining on Private Lands Act 1894 (*N.S.W.*) (57 *Vict. No.* 32), *sec.* 33—*Conditional lessee—Agreement to allow use of land for gold mining—Illegality—Intention of parties—Estoppel.*

The holder of a conditional lease under the *Crown Lands Act* 1884, executed an agreement purporting to be made under sec. 33 of the *Mining on Private Lands Act* 1894, by which he agreed, in return for a certain rent and royalty, to allow another to use and occupy a portion of his conditionally leased land for the purpose of mining for gold. By various mesne assignments the appellants became the holders of the conditional lease and the respondent acquired the rights of the other party to the agreement. Rent was duly paid by the respondent under the agreement and accepted by the appellants. In a suit by the respondent for an injunction restraining the appellants from trespassing upon the land the subject of the agreement, the appellants set up the defence that the agreement was an unauthorized attempt to dispose of gold the property of the Crown, and was therefore illegal and void.

Held, that though the agreement may have been incapable of operating as a lease under the *Mining Acts*, and therefore invalid as against the Crown, it was not on that account illegal in such a sense as to render it absolutely void, but was binding upon the parties to it and their privies, and the appellants were, under the circumstances, estopped from setting up that it was invalid.

In order to avoid on the ground of illegality a contract which is capable of being performed in either a legal or an illegal manner, it is necessary to show that the parties intended that it should be illegally performed. In the absence of such proof it will be presumed that the parties intended that the agreement should be carried out without breaking the law.

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HUTCHINSON v. SCOTT.

Decision of *A. H. Simpson*, C.J., in Eq.: *Scott* v. *Hutchinson* (1905) 5 S.R. (N.S.W.) 484, affirmed.

APPEAL from a decision of *A. H. Simpson* Chief Judge in Equity, New South Wales.

In May, 1897, Samuel Seberry, a conditional lessee of a certain block of land under the Crown Lands Acts, entered into an agreement with one F. T. Winters, the material portion of which is as follows:—"Whereas it has been agreed between the parties hereto that the said S. Seberry for the consideration hereinafter appearing shall enter into this agreement under the provisions of section 33 of the *Mining on Private Lands Act* 1894 with the said F. T. Winters. Now it is witnessed that for the consideration hereinafter stated the said S. Seberry hereby gives and grants unto the said F. T. Winters his executors and assigns full liberty power and authority to take and retain possession of the land more particularly described in the schedule hereto" (being 15 acres of the conditional lease already mentioned) "for the purpose of searching for gold and other minerals and for all other mining purposes for the term of twenty years from the day of the date hereof, and in consideration of the premises and powers liberties and privileges hereby granted the said F. T. Winters hereby agrees to pay to the said S. Seberry the yearly sum of £15 to be payable in advance &c., and also to pay to the said S. Seberry one-sixteenth part of the net profits to be obtained from the sale of the gold or other minerals raised from the said land" &c. Certain rights of ingress and egress over the lands comprised in the rest of the conditional lease were given to Winters, with liberty to erect all necessary buildings and machinery for the purpose of carrying on mining operations. In February, 1902, Seberry transferred his interest in the conditional lease to S. A. Hutchinson, one of the appellants, who in April of the same year transferred to his wife, the other appellant. In July, 1902, Winters transferred his rights under the agreement to David Scott. The latter, in November of the same year, transferred to C. S. McPhillany, who in May, 1903, transferred to the respondent. The respondent and her predecessors in title were in possession of the land the subject of the agreement, and paid rent to the appellants and their pre-

decessors in title. In June, 1904, certain litigation took place between the female appellant and the respondent in connection with the rent claimed under the agreement, and in the same year that appellant claimed to have determined the tenancy by notice. After that date the appellant, S. A. Hutchinson, endeavoured to take forcible possession of the 15 acres on his own and on his wife's behalf. The respondent then brought a suit in Equity in which she prayed that the appellants might be restrained from trespassing on the land in question, and from procuring the concurrence of the Minister for Mines in a certain agreement or lease alleged to have been made between the two appellants, and purporting to be made in pursuance of sec. 11 of the *Mining Laws Amendment Act* 1896, for the purpose of giving the appellant, S. A. Hutchinson, the right to occupy for mining purposes a certain portion of the 15 acres in question, and that the appellants might be restrained from interfering with the respondent's enjoyment of the land in question, with a claim for damages. It was contended on behalf of the appellants at the hearing of the suit that the agreement of May, 1897, was invalid, and that the appellants were not estopped from denying its validity. His Honour the Chief Judge in Equity decided against the appellants and made a decree as asked, with costs: *Scott* v. *Hutchinson* (1).

From this decision the present appeal was brought.

The material parts of the sections of the Acts referred to appear in the judgments.

Harvey for the appellants. The agreement of May, 1897, was illegal and void. Conditional leases are not within sec. 33 of the Act 57 Vict. No. 32, which was the first Act to confer upon the owners of private lands in general the right to grant licences for the purpose of mining for gold upon their lands. A conditional lessee is not an owner within the meaning of the section; see definition sec. 2. Moreover under sec. 33 the power given is to make agreements for the use of the land for mining purposes "as if it were Crown land." That implies that the mining regulations must be complied with, and that the person with whom the agreement is made must take up a claim or area of some kind under the

(1) (1905) 5 S.R. (N.S.W.), 484.

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Mining Act 1874, and the agreement should provide for this being done. The agreement in question was not a compliance with the requirements of the section in that respect. Power to grant ordinary leases or agreements for the use of land for gold mining purposes was not conferred upon owners of private lands until 60 Vict. No. 40, sec. 11. That section does not include land held under conditional lease. Provision is made for such land in sec. 7; it is to be private land within the meaning of that Act and of the Act of 1874, if it has been so declared by proclamation in the *Gazette*. The 15 acres in question were not proclaimed until the day after the agreement was made, and therefore were not available for the purpose, and the agreement was inoperative. The approval of the Minister is necessary for the validity of a lease, and that has not been obtained. Then sec. 98 of the *Crown Lands Act* 1884 makes it illegal for the holder of land under conditional lease to grant a lease or licence for it to be used for other than pastoral purposes. The agreement was therefore not merely invalid, but illegal and absolutely void. Gold in the soil, unless expressly alienated by the Crown, is the absolute property of the Crown, and it is illegal for any person to remove it from his own or any other land, without the authority of the Crown. There is always an implied reservation of this metal in a grant of land by the Crown. Any agreement by which a person, who has not obtained the authority of the Crown, attempts to give another person power to dig for and carry away gold is absolutely void.

[He referred to *Ah Wye* v. *Lock* (1); *Shannahan* v. *Shire of Creswick* (2); *Clarke* v. *Pitcher* (3); 37 Vict. No. 13, secs. 123, 124; 48 Vict. No. 18, secs. 48, 50; 53 Vict. No. 21.]

[GRIFFITH C.J. referred to *Crowe* v. *Wehl* (4), and *Plant* v. *Rollston* (5).]

The preamble to the Act (57 Vict. No. 32) shows that it was the intention of the legislature to declare that all mining for gold on private lands, as well as on Crown Lands, was thenceforth to be deemed illegal, unless done under the authority of the Crown. Before the Act the law as to gold mining on private lands was

(1) 3 V.R. (E.), 112.
(2) 8 V.L.R. (L.), 342; 4 A.L.T., 85.
(3) 9 V.L.R. (L.), 128; 5 A.L.T., 17.
(4) 11 Q.L.J., 50.
(5) 6 Q.L.J., 98.

doubtful, the Crown not having asserted its right, but the Act was to settle the doubt once for all, and establish for the future the title of the Crown to gold in the soil.

[O'CONNOR J. referred to *R.* v. *Wilson* (1) on the question of the ownership of gold before severance from the soil.]

That being the law, as declared by Act of Parliament, the female appellant is not estopped from setting up the illegality of the agreement, although it was made by her predecessor in title, and although she has received rent under it. Even the parties to a contract are not estopped against an Act of Parliament: *Barrows' Case* (2); *Fairtitle* v. *Gilbert* (3); *Gaslight and Coke Co.* v. *Turner* (4). An agreement to do what is unlawful or prohibited cannot acquire strength by lapse of time or estoppel. Even if Mrs. Hutchinson is estopped from setting up illegality, her husband is not. He went on the land by virtue of a miner's right, not only by virtue of the licence from his wife. Even as a trespasser he is entitled to remain in possession except as against a person who shows title. Under the agreement there is no title in the respondent or in any other person except upon compliance with the requirements of the Act. The respondent has done nothing to complete her title as against the Crown or persons going on the land by authority of the Crown. At present her rights, if she has any, are only against the other party to the agreement, or his successor in title, Mrs. Hutchinson. Hutchinson is a stranger to the title of his wife, and therefore is not affected by anything which might operate as estoppel against her.

Gordon K.C. (with him *Loxton*), for the respondent. The agreement was not illegal in the sense of being unlawful and void. The utmost objection that can be taken to it is that it is *ultra vires* and therefore invalid, that is to say that it confers no rights, *as against the Crown*, upon the person with whom it is made. A grant in fee of land by the Crown confers on the grantee the right to the possession of a royal mine, that is to say a title as against all the world except the Crown. The grantee may deal with it as the owner until the Crown intervenes. The prohibition

(1) 12 S.C.R. (N.S.W.), 258.
(2) 14 Ch. D., 432, at p. 441.
(3) 2 T.R., 169.
(4) 6 Bing. N.C., 324.

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in the *Crown Lands Act* 1884, sec. 98, does not make the agreement void, it merely protects the rights of the Crown. At the most it would render the agreement invalid, it would not affect the question of estoppel. But there may be an agreement binding on both of the parties to it although a third party has the right to interfere and prevent its being carried out. In order that estoppel may be excluded, there must be not merely invalidity in this sense, but illegality. In almost all cases of estoppel there is invalidity; the only question being whether a particular person can take advantage of the invalidity or not. If the agreement does not necessarily tend to illegality it is not unlawful in the sense of being absolutely void. Here the conditional lessee had certain rights over the land, beyond those of an ordinary lessee, and he was entitled to sublet these rights to another person, upon the assumption that the sub-lessee would obtain the proper authority from the Crown for whatever use he intended to make of the land. There is nothing in the agreement to imply that the sub-lessee was to do anything unlawful or in an unlawful manner. It was capable of being performed without infringing any law, and the only reasonable construction of the reference to the *Mining on Private Lands Act* 1894 is that nothing was to be done without proper authority from the Crown. The onus is on the appellants to show that the agreement was not capable of being performed in a lawful manner: *Clarke* v. *Pitcher* (1). [He referred also to *Plant* v. *Rollston* (2) and *Day Dawn Block and Wyndham G. M. Co. Ltd.* v. *Plant* (3).]

The appellants are not entitled to set up the invalidity of the agreement. There is privity of estate between them and the original grantor, and, in addition to that, the appellants have done everything possible, by way of adoption of the agreement and by acceptance of rent, to estop themselves by their own conduct from raising such a defence. [He referred to *Doe d. Biddle* v. *Abrahams* (4); *Cole on Ejectment* (1857 ed.), p. 215.] Hutchinson can only justify under his wife. He only claimed the right to enter by her authority. Being merely a trespasser he cannot contend that the person in possession before him was wrongfully there.

(1) 9 V.L.R. (L.), 128.
(2) 6 Q.L.J., 98.
(3) 11 Q.L.J., 53.
(4) 1 Stark., 305.

Harvey, in reply, referred to *Everest and Strode on Estoppel*, 1884 ed., pp. 204, 205, 227 and cases there cited.

GRIFFITH C.J. This is a suit brought by the respondent against the appellants on the Equity side of the Supreme Court of New South Wales to obtain an injunction restraining the appellants from committing and continuing trespasses upon certain land, 15 acres in extent, of which the respondent claimed to be the lessee, and from procuring the concurrence of the Minister for Mines in any agreement purporting to allow the appellants or either of them to interfere with the respondent's enjoyment of the land, and for damages. The defendants, the present appellants, were the successors in title of one Seberry, who was the holder of a conditional lease, under the *Crown Lands Act* 1884, of the land in question. The respondent was the successor in title to one Winters, with whom Seberry had made an agreement under seal, in the form of a lease, dated 11th May, 1897, by which Seberry granted to Winters "full liberty and power and authority to take and retain possession of the land" in question "for the purpose of searching for gold, and other minerals and for all other mining purposes for the term of 20 years," at a yearly rental of £15 to be payable in advance half-yearly in instalments of £7 10s. each. Winters, the lessee, agreed also to pay to Seberry one sixteenth part of the net profits to be obtained from the sale of the gold or other minerals raised from the land. By various mesne assignments the title to the land was claimed to be vested in the appellants. Whether the legal estate passed to them or not is immaterial, because rent had been paid by the present respondent to the appellant, Mrs. Hutchinson, and accepted by her for a period covering that in which the trespasses complained of were committed.

Various objections were taken to the plaintiff's right to recover. The principal objection is that the agreement relied upon by the plaintiff is invalid or void, and that the Court should give no aid to its enforcement.

The title of Seberry was a conditional lease, and in sec. 98 of the *Crown Lands Act* 1884, it is provided that "no lease or licence other than special leases" (which this is not) "shall confer any

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right to remove material from the leased land or to sublet such land for other than grazing purposes or to prevent the entry and removal of material by authorized persons." That provision seems to be directed, not to the purpose of declaring that an attempted lease should be void or unlawful, or of preventing any attempt to exercise those rights from succeeding as between the leaseholder and persons deriving title from him, but to render any such transactions ineffective as against the Crown. The lessee or conditional lessee could not give a good title against the Crown, any more than a lease by any person not the owner would give a good title as against the owner. But there is nothing unlawful in the mere fact of a person who has no title giving a lease of land of which he is in possession, and there is nothing in that section to exclude the common law doctrine that a man cannot derogate from his own grant. A person giving possession of land to another and accepting rent under an agreement cannot be heard to deny that that other person is his tenant. That was not seriously pressed for the appellants. But it was contended that the lease, if properly called a lease, was void because it was executed for an illegal purpose, that is to say for the purpose of searching for gold. The argument was put in this way. A gold mine is a royal mine and belongs to the Crown, and it is therefore unlawful for a subject to work such a mine; consequently any lease by any person of a gold mine to another for the purpose of working it is unlawful. There is no case in which such a doctrine has been laid down. The last case in which the subject was dealt with was that of the *Attorney-General* v. *Morgan* (1), a suit by the Attorney-General to restrain the defendants from raising working or getting from a mine known as the *Gwynfynydd* mine in Wales any gold or gold ore, silver or silver ore, or quartz, or other substances containing those metals, without the licence of the Commissioners of Woods, Forests, and Land Revenues. There was also a claim for an account of all gold or silver already taken from the land. The injunction was granted as to removing the metals, but was limited to that; it was not granted as to the raising of the metals. After that, while the suit was still pending, the land was conveyed to a company, so that the main question failed, and the suit was only

(1) (1891) 1 Ch., 432.

continued on the question of costs. The suit was for the purpose of determining whether the defendant had done anything wrong, and was consequently liable for the costs. That was the material matter. Mr. Justice *North* reviewed the law on the subject at considerable length; but I shall only refer to one or two passages. He quotes (1) from the celebrated *Case of Mines* (2), in which twelve judges in 1568 decided authoritatively "that by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen, or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore." The first part of that passage has never been dissented from; as to the second part, "with liberty to dig and carry away," &c. I know of no instance recorded in which the Crown has exercised that right. It was denied by Lord *Hardwicke* in *Lyddall* v. *Weston* (3). At any rate there is no instance in which the Crown has asserted the right to enter land for that purpose. It has been undoubtedly the practice in many parts of the British Empire for owners of private land to look for gold and to take it away without being interfered with by the Crown. It was not held in *Attorney-General* v. *Morgan* (4) that it was unlawful, in the sense of being an offence, but that the Crown were entitled to restrain a subject from taking away the gold without a licence. In the Court of Appeal the decision of Mr. Justice *North* was affirmed. The defendants relied upon certain Statutes to which it is not necessary to refer. The difficulty that arises as to the right of the Crown to enter, and also as to the rights of the subject in possession of the land, has given rise to legislation in various parts of the British dominions, and various Statutes, commonly called Mining on Private Lands Acts, have been passed to deal with the matter. Their double purpose is to authorize gold seekers, having the authority of the Crown, to enter as against the owner of the freehold and search for gold, and to provide statutory means of enforcing the Crown's supposed right of entry. Another object is to give a good title as against the Crown to the gold when

(1) (1891) 1 Ch., 432, at p. 444.
(2) Plowd., 310.
(3) 2 Atk., 20.
(4) (1891) 1 Ch., 432.

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taken. But there is nothing in these Statutes to render taking the gold any more unlawful than it was before. I hesitate very much to come to the conclusion that it is unlawful for the owner of private land to dig for gold on the land, except in the sense that in doing so he commits an actionable wrong which the Crown may restrain by injunction, or for which it may recover damages. But, assuming that it is unlawful, the question remains whether it renders a lease, which is wrong in that sense, unlawful in the sense that it is incapable of enforcement, although it is in form an agreement for the mere purpose of enabling the lessee to do what the lessor himself might have done in a lawful manner by complying with the statutory conditions. The learned Chief Judge in Equity was of the opinion that the lease was not unlawful in that sense, on the ground that there was no evidence of any intention on the part of lessor or lessee that the lessee should break the law.

The law on this point has long been settled. I may assume for the purpose of the present discussion that the unauthorized digging for gold was unlawful in the sense of unlawfulness which avoids a contract. In the case of *Sewell* v. *Royal Exchange Assurance Co.* (1), decided in 1813 in the Court of Common Pleas, the doctrine was clearly laid down. That was a case of a policy of insurance on a ship. The insurance was in respect of an unlawful voyage, being at the time of the continental system. A Statute prohibited the voyage under the conditions under which it was to be made. But it was held that that fact did not of itself avoid the charter party, nor did the fact that the ship was foreign built, because the defect in each case might be cured on the return voyage. Lord *Mansfield* said (2): "This vessel clearly is not entitled to the privileges of a British ship, but is to be considered as an alien ship. As such, she could not come to England with the cargo in question; were it not that by the Statute 49 Geo. 3 c. 60, his Majesty has power to license ships to a trade directly contrary to the act of navigation, *i.e.*, to authorize alien ships to bring home this sort of cargo. *Non constat*, that this captain would have performed this voyage without obtaining such a licence. If there were any officer in the Azores authorized to grant it, the master might obtain it there: if not, he might wait till such a licence was sent out to him from England. It does not

(1) 4 Taunt., 856.

(2) 4 Taunt., 856, at p. 864.

appear to us by any evidence that the charter-party bound him to sail on his homeward voyage, before he should obtain this licence. The sort of licence to be obtained, is a licence to import; therefore it was not necessary to obtain it till just before the act of importation: it does not refer to the act of sailing homeward, but of bringing in the goods;" and therefore the objection failed. The same principle was applied in *Haines* v. *Busk* (1), which was also a case of an insurance policy. Indeed the doctrine is as old as the time of Coke. In *Porter's Case* (2), a distinction was drawn between the case of a direction which might be legally performed by licence, although illegal without, and one which was altogether illegal and void. In the case of *Waugh* v. *Morris* (3), Lord *Blackburn*, delivering the judgment of the Court, said: "We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to shew that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance." The same principle was followed by the Supreme Court of Victoria in the cases referred to by Mr. Justice *Simpson*: *Ah Wye* v. *Locke* (4); and *Clarke* v. *Pitcher* (5).

Now, in considering whether this contract was capable of being carried out without a breach of the law, if we look to see what was the intention of the parties, we find it abundantly manifested by the agreement itself. Now, in the case which I have just cited, in determining whether there was an intention to break the law, knowledge of the law was held to be an important element. But it is to be remarked that this agreement, which is alleged to be unlawful, is expressly stated to be made under the provisions of sec. 33 of the *Mining on Private Lands Act* 1894, so that the parties, on the face of the agreement, so far from evincing an intention to break the law, have clearly indicated their intention to abide by the law.

(1) 5 Taunt., 521.
(2) 1 Rep. 16*b*, at p. 25*a*.
(3) L.R. 8 Q.B., 202, at p. 208.
(4) 3 V.R. (E.), 112.
(5) 9 V.L.R. (L.), 128.

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The *Mining on Private Lands Act* 1894, dealt with the subject of mining on private property. It empowered wardens to grant to holders of miners' rights authority to enter private land which had been brought under the provisions of the Act, and search for gold or other metals. It also authorized the Governor in Council to grant leases of private lands for the purposes of mining thereon. Sec. 33 provides that:—"The owner of any private land not applied for or occupied for mining purposes under the provisions of this Act shall be at liberty to enter into an agreement in writing with any holder of a miner's right or mineral licence giving such holder power to take possession of such land for mining purposes as if it were Crown land, and with respect to the area which may be so taken possession of, the form of measurement, the mode of defining the boundaries thereof, the labour conditions, and the lapsing of title for non-compliance therewith, such land shall be held and worked, subject to the regulations of the Mining Board in force for the time being, and it shall not be necessary to obtain a mining lease under the provisions of this Act for such private land so occupied as aforesaid under miners' rights and mineral licences: Provided that every such agreement shall within fourteen days thereafter be registered with the Mining Registrar for the district in which such land is situated, in accordance with regulations to be made by the Governor." This agreement was registered accordingly. So that the parties, so far from intending to violate the law, intended to obey the law. They thought, erroneously perhaps, that their agreement was within that section. According to the doctrine stated by Lord *Blackburn* in the case of *Waugh* v. *Morris* (1), it is necessary, in order to avoid a contract which is capable of being illegally or legally performed, to show a wicked intention to break the law. It is quite clear that in this case, so far from desiring or intending to break the law, it was the intention, perhaps ineffectual, of the parties to obey the law. In my opinion the objection, that this agreement was illegal and therefore void, fails. It is not necessary to say whether it could operate under sec. 33. The objection is that it is illegal, but it must be taken that the parties intended that the lessee should do everything necessary to make searching

(1) L.R. 8 Q.B., 202.

for gold legal. It would be a singular thing that the parties, under these circumstances should be held to have intended to break the law. My opinion is that the objection fails, and, that failing, and it being admitted that there is no other substantial point, my conclusion is that, as the relationship of landlord and tenant existed at the time of the trespass, the landlord cannot derogate from his own grant and treat the tenant as a trespasser.

I am of opinion therefore that the learned Judge was right and that the appeal should be dismissed.

BARTON J. I am of the same opinion.

O'CONNOR J. I am of the same opinion.

It appears to me that it is quite unnecessary to go into any of the questions raised as to the validity of the agreement of the 11th May, 1897. The matter may be decided on the simple ground that has been dealt with by the Chief Judge in Equity.

The defendants' predecessor in title having made this agreement, and the defendants themselves having recognized it by the acceptance of rent and in other ways which, under ordinary circumstances, would estop them from denying its binding effect on them, the question is whether the law of estoppel applies under the circumstances of this case. There is no doubt that the principle of estoppel does not apply where the Act done or the agreement made involves the doing of something illegal, in the sense of being something which the law prohibits. But the law has never gone to the extent of saying that, where two parties have entered into an agreement as to which there may be some difficulty of performance in accordance with law, the agreement is therefore void, and the party who has taken advantage of it is entitled to say that his own grant is void. As was pointed out by Mr. Gordon, a very large number of cases of estoppel arise out of some informality which one of the parties, after having taken advantage of the agreement, seeks to set up. If the informality did not exist, it would not be necessary to resort to the doctrine of estoppel. Certainly it would be a very extraordinary defect in the law if a defendant, who has acted under all the circumstances in the way in which these defendants have, could take up the

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position that the document which their predecessor in title executed, and which has been recognized by them in so many ways, was void. I take the same view as the learned Chief Judge in Equity that, so far from these documents showing an intention to do anything wrong or break the law, everything was intended to be done, and was really done, as far as possible, in compliance with the law, and on the supposition, perhaps erroneous, that the law had been in every detail complied with. As was pointed out by Mr. Harvey, there was at one time some legal difficulty in deciding whether the holder of a conditional lease could make an agreement under sec. 33, I presume because of the restriction which the Act of 1884 places on the leasing powers of holders of that particular kind of holding. That was removed by the seventh section of 60 Vict. No. 40, an Act to amend the law relating to Mining on Private Lands, which empowered the holder of conditionally leased land to make a lease under the Act, if the Governor by proclamation declared such lands to be private lands within the meaning of the *Mining on Private Lands Act* 1894. The agreement recites, and recites truly, that the conditional lease had been brought under the operation of the Act by proclamation in the *Gazette* of even date, that is, the day on which the agreement was executed, and then recites that it had been agreed between the parties that they should enter into an agreement under the 33rd section of the *Mining on Private Lands Act* 1894. So that Seberry waited until the land was so proclaimed, so as to give him authority to make an agreement under sec. 33, then purported to make the agreement under that section, and the agreement was duly registered. Under those circumstances, whatever may be said as to the validity of the title conveyed, it is quite clear that there was no intention to break the law, and certainly not the kind of intention mentioned in the case cited by my learned brother the Chief Justice, which must exist before you can have a breaking of the law in the sense of committing an illegal act. Under those circumstances, as there was no illegal act, but, at the very worst, merely an invalidity, I am of the opinion that the defendants cannot be allowed to contravene their own grant, and are estopped by their conduct from asserting that the title given by their pre-

decessors in title, and which they themselves have so completely recognized, is bad, and the agreement invalid.

I think, therefore, that the appeal should be dismissed.

Appeal dismissed with costs.

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Loxton, for the respondent, asked that the order as to the female appellant should be limited as in *Scott* v. *Morley* (1).

Order made as asked.

Solicitor, for the appellants, *A. Nicholson.*

Solicitor, for the respondent, *C. M. Boyce* for *A. R. Cummins.*

C. A. W

Foll Brown v Brown (1906) 4 CLR 395

[HIGH COURT OF AUSTRALIA.]

THOMAS EDWIN BROWN . . . . APPELLANT;

AND

MARY BROWN AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 28, 29; *Dec.* 1.

Griffith C.J., Barton and O'Connor JJ.

Matrimonial Causes Act (*N.S.W.*), (*No.* 14 *of* 1899), *sec.* 60—*Decree of judicial separation—No order as to maintenance of child—Subsequent proceedings for maintenance under Deserted Wives and Children Act* (*N.S.W.*), (*No.* 17 *of* 1901), *secs.* 4, 7—*Jurisdiction of inferior Court—Res judicata—Prohibition.*

Evidence Act (*N.S.W.*), (*No.* 11 *of* 1898), *secs.* 16, 23—*Proof of proceedings before magistrates—Certificate or certified copy—Signature of officer—Interpretation Act* (*N.S.W.*), (*No.* 4 *of* 1897), *sec.* 31.

(1) 20 Q.B.D., 120, at p. 132.