[HIGH COURT OF AUSTRALIA.]

LANGLEY . . . . . APPELLANT;
PLAINTIFF,

AND

FOSTER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 3, 4, 7, 14.

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

Contract — Specific performance — Agreement for lease — Illegality — Intention of parties — Conditional lease under Crown Lands Acts — Breach of condition — Sub-lease for other than grazing purposes — Crown Lands Act (*N.S.W.*), (48 *Vict. No.* 18), *secs.* 96, 98 — *Timber Licenses Act* (*N.S.W.*), (*No.* 22 *of* 1902), *Regulations February* 1902.

Sec. 96 of the *Crown Lands Act* 1884 provides *inter alia* that every lease under the Act shall be liable to forfeiture upon breach of any condition annexed to the lease. Sec. 98, sub-sec. (I.) provides that no such lease other than a special lease shall confer any right to sub-let the leased land for other than grazing purposes or to prevent the entry and removal of material by authorized persons; and sub-sec. (III.) provides that no lease shall prevent any authorized persons from cutting or removing timber from the land under lease, conditional leases being excepted from the sub-section as regards taking or removing timber or other material for building purposes. Sec. 133 provides that any person cutting timber other than firewood not for sale from any Crown lands shall be liable to a penalty, and that no lessee under the Act shall obstruct any authorized person from entering them. Regulations made under the *Timber Licenses Act* provide for the issue of licences or permits to cut and remove timber from Crown lands, subject to the proviso that in the case of land under conditional lease a special authority from the Minister or Forest Officer is necessary.

The respondent, the holder of certain conditionally purchased and conditionally leased lands, entered into an agreement to lease to the appellant the lands so held, with the right to cut and remove timber, and the right to construct a tramway across the lands for the removal of timber.

In a suit by the appellant for a specific performance of this agreement;

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Held, following *Bank of Australasia* v. *Breillat*, 6 Moo. P.C.C., 152, that, even if the agreement were unlawful or invalid or incapable of enforcement as to the conditional lease, the appellant would have been entitled to specific performance as to the conditional purchases; but

Held, further, that the agreement, so far as it related to the conditionally leased land did not necessarily import any illegal action, but was capable of being construed as an agreement by the respondent to give, so far as he lawfully might, consent to the appellant's cutting timber and laying a tramway across that land, and not to offer any objection to the appellant's obtaining a licence or permit for those purposes, and to do or concur in any acts necessary for either purpose, and, in the absence of any evidence of intention to break the law, should be so construed, and the appellant, therefore, was entitled to have it specifically enforced.

The agreement to allow timber to be cut and tramways to be constructed on the conditional lease was not a breach of a condition annexed to the lease rendering the lease liable to forfeiture under sec. 96; and, though by virtue of sec. 98 it in itself conferred no rights upon the appellant as against the Crown, yet it was not an idle stipulation, inasmuch as without it the authority of the Minister to cut timber might have been withheld, and the appellant could not have conveyed over the land any timber other than that cut upon the land.

Decision of *A. H. Simpson* C.J. in Equity: *Langley* v. *Foster*, (1905) 5 S.R. (N.S.W.), 678, reversed.

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

This was a suit by the appellant, W. Langley, saw mill proprietor, for specific performance of an agreement by which the respondent, A. W. J. Foster, who was the registered proprietor of three conditional purchases, numbered respectively 28, 37 and 97, and a conditional lease numbered 43, at Coff's Harbour, agreed to lease to the appellant those several portions, comprising about 702 acres, for ten years, on the following terms and conditions:— "Rent to be £24 per annum to be paid in advance; any further increase of rent rendered necessary by the Government Regulations to be borne by the said W. Langley. The aforesaid W. Langley to have the right to construct and use tramways on said land for the purpose of removing timber, and to have the right to cut and remove timber on said land at a royalty of sixpence per hundred super feet for all mill logs, and the same royalty for all hewn timber as now charged by the Government on timber

off Crown lands; royalty to be paid every three months, but monthly accounts to be rendered to A. W. J. Foster aforesaid. Provided that the whole of the marketable timber be removed from one place at a time in a systematic manner so that the land may be cleared and put under grass, which right may be exercised from time to time by the said A. W. J. Foster and his servants. The said W. Langley to have the use of tramway only for a further period of ten years at the price agreed upon aforesaid." Then followed provisions for the payment of rent and for cancellation of the lease and re-entry by the lessor on failure by the lessee to carry out his part of the agreement, and the agreement concluded thus:—"Nothing in this agreement shall authorize the said W. Langley to draw timber from across the land mentioned except by means of the tramway hereinbefore mentioned. All fences to be repaired and kept in repair, and claims of adjoining holders for erection of boundary fences to be met by the aforesaid W. Langley."

The defence was that, by virtue of the Crown Lands Acts and the conditions and provisions of the conditional lease, that lease was liable to forfeiture upon breach of any of the provisions or conditions thereof, and that, by virtue of the Crown Lands Acts and the provisions and conditions of the lease, the defendant was prevented from removing any timber from the lands comprised in the conditional lease and from sub-letting for other than grazing purposes, and that consequently he was unable to grant a valid lease of those lands in terms of the agreement, and therefore ought not to be ordered to specifically perform the agreement. The defendant, however, by his statement of defence offered to specifically perform the agreement so far as it related to the conditional purchases, and to grant a lease for grazing purposes of the conditionally leased lands upon the terms of the agreement so far as the Crown Lands Acts and the provisions and conditions of the conditional leases would permit, and to allow the plaintiff any abatement of rent that the Court might think proper, and to pay the plaintiff's costs up to the time of perusal of the statement of defence.

The plaintiff replied that he did not claim to be entitled to a lease valid against the Crown for other than grazing purposes,

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and that he had applied for a special lease from the Crown to construct a tramway over the lands in the conditional leases; and that the intention of the parties was not to provide for cutting timber on those lands but to permit the plaintiff as against the defendant to construct the tramway upon them, with a view to an application by the plaintiff for a special lease from the Crown. For the rest the plaintiff joined issue.

On the suit coming on for hearing the defendant made another offer to compromise on terms somewhat less favourable to the plaintiff than the offer contained in the statement of defence. This was refused, and after argument, *A. H. Simpson* C.J. in Equity, decided that the agreement was illegal and dismissed the suit, but without costs. As regards the offer contained in the statement of defence, he held that the plaintiff, having brought the suit to a hearing, was not entitled to regard the offer as a continuing one, and he therefore refused to make a decree in terms of that offer: *Langley* v. *Foster* (1).

It was from this decision that the present appeal was brought.

Further reference to the facts, as they appeared from the evidence given at the hearing of the suit, will be found in the judgments.

Gordon K.C. and *Loxton* (*Clive Teece* with them), for the appellant. The agreement in this case is similar to that which was in question in *Hutchinson* v. *Scott* (2), which was held by this Court to be capable of being legally performed. In order to avoid an agreement on the ground of illegality it must be shown that it is incapable of being performed in a legal manner, or that it was the intention of the parties that it should be performed in such a way as to break the law: *Haines* v. *Busk* (3); *Sewell* v. *Royal Exchange Assurance Co.* (4); *Waugh* v. *Morris* (5); *Hallam* v. *Harvey* (6). The agreement is for a lease with an incidental licence to remove timber. Sec. 98 does not prohibit the making of such a lease as this, it merely makes it invalid as against the Crown to the extent to which it is in excess of the powers of the grantor. A sub-lease conferring powers

(1) (1905) 5 S.R. (N.S.W.), 678.
(2) 3 C.L.R., 359.
(3) 5 Taunt., 521.
(4) 4 Taunt., 856.
(5) L.R. 8 Q.B., 202.
(6) (1901) 1 S.R. (N.S.W.), (Eq.), 155.

which it is beyond the lessor's power to grant may entitle the original lessor to intervene; but as between the sub-lessee and his immediate lessor it is binding. [They referred to 48 Vict. No. 18, secs. 25, 26, 28, 51, 96.] Cutting timber on Crown lands without proper authority is prohibited by sec. 133. Sec. 115 provides for the making of regulations for the issue of licences to cut and remove timber, and further provision is made by the Act No. 22 of 1902. Secs. 90 and 92 of 48 Vict. No. 18 provides for licences to construct tramways. [They referred also to Regulation 213 of June 3rd 1895, under the Crown Lands Acts of 1884, 1889 and 1895.] From these it appears that without a licence the conditional lessee could neither have removed timber nor constructed a tramway, and could not have given another the right to do either of these things without reference to the Crown. This agreement was executed to give the appellant, as far as the respondent could do so, the power to exercise whatever rights he could get from the Crown. If the conditional lessee withheld his consent, the appellant could not obtain from the Crown a special lease to construct a tramway: Regulation 213, *supra*. It is no answer to a suit for specific performance to say that the sub-lessee has not yet obtained this authority from the Crown. It certainly is no ground for a defence of illegality. Even if there were illegality as regards the conditional lease, affecting some of the powers granted by the intending lessor, that would not render the agreement wholly incapable of enforcement. It could be enforced with the necessary modifications. The terms of the lease are separable. But the agreement is not necessarily illegal, and there is no evidence of any intention by the parties that the permits and licences necessary to make possible the legal carrying out of the agreement should not be duly obtained. The respondent gives the grazing rights, and in addition undertakes not to oppose the granting of the necessary authorities and licences to the respondent for the other purposes mentioned in the agreement. [They referred also to *Ah Wye* v. *Lock* (1), and *Jaques* v. *Stafford* (2).]

Dr. Cullen K.C. and *R. K. Manning*, for the respondent. If

(1) 3 V.R. (E.), 112.

(2) 11 N.S.W. L.R., 127.

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the appellant had accepted the offer made at the trial he would have had all that he now claims. Having failed in obtaining what he claimed in the suit, he ought not to be allowed to ask now for something less which he has already rejected, and which, if he had accepted it, would have ended the suit.

[O'CONNOR J.—Does not that only affect the question of costs? If he was entitled to what he now asks, we cannot say that he is not entitled to anything at all, because he did not accept it before.]

To force the respondent to execute a grazing lease would not give the appellant what he really wants, that is, a right of way over the conditional leases. A lessee has no right to give an easement of that kind over the leased land for the benefit of land of a stranger. This was in reality a lease for tramway purposes.

[GRIFFITH C.J.—Can you show that such a lease is unlawful? Provided that it does not injure the reversion what objection is there to it? What right has a lessor to prevent a lessee from allowing another to go over the land?]

The Act deals specially with tramways, and gives the Crown the right to grant leases for that purpose. Sec. 98 clearly puts it out of the power of a conditional lessee to grant a sub-lease for tramway purposes. Therefore the real purpose of the lease was something obnoxious to the Statute, and the agreement is illegal. *Hutchinson* v. *Scott* (9) is distinguishable. In that case questions of estoppel arose, and the agreement had been executed. But specific performance will not be granted where the result will be to compel the defendant to do something illegal, or even something which is merely invalid.

[GRIFFITH C.J.—Does the illegality, if it exists, vitiate the whole contract? Is there anything on the face of the contract to show that it is for an unlawful purpose? The Court is not astute to discover illegality.]

An offer by the defendant to execute a lease for grazing purposes with a consent to allow the appellant, as far as the respondent was concerned, to do anything else which he might obtain permission from the Crown to do, was refused. If the permission to cut and remove timber and construct tramways is left out, the result will be something totally different from what

(1) 3 C.L.R., 359.

the parties really bargained for. If it is included, it will compel the respondent to do something which will entail a forfeiture of his lease. The restriction in sec. 98 is a condition of the lease, and sec. 96 makes the lease forfeitable upon breach of any of the conditions.

[O'CONNOR J.—An Act of Parliament is not to be construed in such a way as to work a forfeiture unless the Court is compelled to so construe it.

GRIFFITH C.J.—If the legislature has for a number of years made use of a particular form of words to declare a forfeiture, is it not a very strong argument that it did not intend it when it used different words? In the case of all conditions, for a breach of which forfeiture was imposed, there was a provision for waiver. Here there is none.]

The Crown need not insist upon forfeiture, but there is nothing peculiar about sec. 96 to make it inapplicable to the provisions of sec. 98. It is in form a condition: *Stroud, Judicial Dictionary*, 2nd ed., p. 365; *Re John Cutler* (1). A person will not be compelled to do something which he is not legally entitled to do, or which will lay him open to an action at the suit of another, or deprive him of his estate. [They referred to *Fry on Specific Performance*, 4th ed., p. 178; *Harnett* v. *Yeilding* (2); *Willmott* v. *Barber* (3); *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (4); *Langton* v. *Hughes* (5).]

[GRIFFITH C.J.—Where the promises are divisible, the legal promises can be enforced: *Bank of Australasia* v. *Breillat* (6).]

There can be no separation here without making a new contract altogether. If all that the appellant wants is to cut and remove timber and to construct tramways, the contract is really unnecessary. The Crown could issue a licence without consulting the respondent: *Timber Licenses Act* 1902, No. 22.

[GRIFFITH C.J. referred to *Timber and Quarry Regulations* March 1895 and February 1903, providing for the consent of the conditional lessee in case of licence to cut timber.]

The tenure of the conditional lessee is not analogous to that of a tenant by a common law title. The latter may perhaps be

(1) 8 L.C.C. (N.S.W.), 176.
(2) 2 Sch. & Lef., 549, at p. 554.
(3) 15 Ch. D., 96.
(4) (1900) 2 Ch., 352; (1901) 2 Ch., 37.
(5) 1 M. & S., 593.
(6) 6 Moo. P.C.C., 152.

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compelled in some cases to perform a contract so far as he can, leaving out that part which is in conflict with the terms of his tenure, but a conditional lessee is a holder under a statutory tenure and every provision of the Statute conferring the title is part of the instrument, and any attempt by the lessee to go beyond the rights so conferred has no effect whatsoever, even between himself and the contractee, and if the contract is executory it will not be enforced by decree for specific performance. [He referred to *Dowager Duchess of Sutherland* v. *Duke of Sutherland* (1).]

[GRIFFITH C.J. referred to *Cleaton* v. *Gower* (2).]

Gordon K.C., in reply. If the agreement is capable of being read in two senses, one of which is unlawful and the other lawful, it should be construed in the latter sense unless it is shown by evidence that the other construction is the one really intended by the parties: *Waugh* v. *Morris* (3); *Hutchinson* v. *Scott* (4); *Clarke* v. *Pitcher* (5). And if a contract is capable of being carried out in a lawful manner the fact that it is executory does not prevent the application of this principle.

The offer made by the defendant at the hearing of the suit would have made the removal of timber from the conditional lease compulsory. The plaintiff could not have been expected to accept that.

The restriction in sec. 98 is not a condition for the breach of which forfeiture is imposed by sec. 96. The "conditions" referred to in the latter section are those of fencing, residence, improvement, and payment of instalments, which are spoken of all through the Act as "conditions." [He referred to 48 Vict. No. 18, sec. 48; 58 Vict. No. 18, sec. 33; Regulations 101, 119, 120 of 3rd June 1895.]

Cur. adv. vult.

14th May.

GRIFFITH C.J. This was a suit for specific performance of an agreement by which the defendant agreed to grant to the plaintiff a lease for a term of ten years of land described as portions 28,

(1) (1893) 3 Ch., 169.
(2) Finch, 164.
(3) L.R. 8 Q.B., 202.
(4) 3 C.L.R., 359.
(5) 9 V.L.R. (L.), 128; 5 A.L.T., 17.

37, 97, and 43, comprising in all about 702 acres, on certain terms. The rent was to be £24 per annum, payable in advance. The plaintiff, the intended lessee, was to have the right to construct tramways over the land for the purpose of removing timber, and the right to cut and remove timber at a certain royalty. The timber which was marketable was to be removed by the lessee from one place at a time in a systematic manner, so that the land might be cleared and put under grass, which right might be exercised by the lessor or his servants. There was a provision that the lessee should have the use of the tramway for a further period of ten years at the same price, and there was also a stipulation that nothing in the agreement should authorize the lessee to convey timber across the land except by means of the tramway. All fences were to be kept in repair by the lessee. Of the four portions of land, three were what are called conditional purchases. As to them undoubtedly the lessor had absolute power to dispose of them or to grant any rights over them by lease or otherwise. The fourth was what is called a conditional lease. That was stated in the evidence to be upon the sea-coast, and to be bounded on the west by a road. Across the road, and immediately opposite this portion, was a block of land comprising the other three portions. The defendant having refused to carry out the agreement, the suit was brought by the plaintiff for its enforcement.

The defence set up was, substantially, that the agreement was unlawful, it being contended that the law not only does not authorize, but positively forbids, any such agreement being made with respect to a conditional lease. That view was accepted by the learned Chief Judge in Equity, and the suit was dismissed, and it is from that decision that the present appeal is brought.

The sections of the Crown Lands Acts to which it is necessary to refer are these: Sec. 48 of the *Crown Lands Act* 1884 lays down the conditions under which a conditional purchaser may obtain a conditional lease of adjoining land. In this case the lands in question were separated by a road from the land held by the defendant under conditional purchase, but they may be treated as adjoining for the purposes of the Act. Section 98 provides that:—"The following provisions shall govern all leases and licences granted under this Act and the holders of

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such leases or licences namely:"—(this, therefore, applies to the conditional lease in question) "(I.) No lease or licence other than special leases" (which this is not) "shall confer any 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: (II.) Lessees . . . may take from land under lease . . . to them . . . such timber and other material for building and other purposes upon the land under lease . . . as may be required by them as tenants: (III.) No lessee or licensee shall prevent other persons duly authorized in that behalf either from cutting or removing timber or material for building or other purposes or from searching for any mineral within the land under lease or licence. Provided that nothing in this sub-section shall apply to a conditional lease as regards the taking or removal of timber or other material for building purposes." Sec. 133, as amended by the Act of 1889, provides *inter alia* that "Any person unless lawfully claiming under any subsisting lease or licence or otherwise," that is without some lawful title, ". . . . who shall be found occupying any Crown land . . . . by cutting timber other than firewood not for sale thereon" shall be liable on conviction to a penalty: "Provided that it shall not be lawful for the holder of any leasehold under this Act to obstruct any . . . authorized person from entering upon such leasehold whenever such . . . authorized person may require to do so." It follows, of course, that the removal of timber from the conditional lease in question, except by an authorized person, is unlawful. Sec. 115 provides that the Governor may make regulations for the issue of licences or rights or permits to cut and remove timber on Crown lands whether held under lease or licence or not. It follows from these sections, first, that the conditional lessee, the defendant, could not grant a valid lease of this land for any but grazing purposes; secondly, (apparently,) that he could not himself remove timber from the land under lease for the purposes of sale; thirdly, that he could not authorize any one else to do so, so as to give a valid authority. Further, it follows that he could not prevent any person duly authorized in that behalf from removing such timber. The point as to illegality

taken by the defendant is that, the law being as I have stated, the agreement, so far as it relates to the conditional lease, was for an unlawful purpose, or for two unlawful purposes, inasmuch as it was granted, not only for other than grazing purposes, but for the purpose of permitting the sub-lessee to remove timber which the conditional lessee himself could not remove, and also for the purpose of granting something in the nature of an easement, namely, the right to lay a tramway over the land, which it was not lawful for the conditional lessee to do, as it was inconsistent with the prohibition to be implied from the section. Reference was made to sec. 90 of the Act, by which it is provided that the Governor may grant special leases for tramway purposes, whatever that may mean. It is said that such a right can only be obtained by means of a special lease from the Governor. I take leave to remark here that I doubt very much whether sec. 90 authorizes the Crown to grant such rights over land held under conditional lease, unless the land has been first resumed for that purpose. However, it is not necessary to decide that point, and I do not express any definite opinion upon it. But the case of *Jaques* v. *Stafford* (1) goes a very long way in support of that view.

I will deal first with the question of illegality, which is the point on which the learned Chief Judge in Equity decided the case. He held, with reluctance, that the agreement was not an agreement to grant a lease for grazing purposes, and, therefore, that it was unauthorized and invalid. He added (2): "The agreement is for the lease of four pieces of land at a certain rent; the agreement is not separable, and if the agreement is illegal as to one portion of the land it is invalid as a whole."

Assuming that the agreement is invalid as to the conditional lease, and assuming further that to that extent it is unlawful, I do not think that it follows that the plaintiff was not entitled to some relief in this suit. But I do not think that sec. 98 makes it unlawful to grant a lease, even if it is expressed to be for other than grazing purposes, in the sense that the person making such a lease renders himself liable to be punished. It may be that if he makes an attempt to grant such a lease it is futile, and, of

(1) 11 N.S.W. L.R., 127.

(2) (1905) 5 S.R. (N.S.W.), 678, at p. 682.

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course, no Court will attempt to enforce the performance of an agreement which the law says shall be inoperative. But assuming that the agreement is unlawful in the sense that it is prohibited, it does not follow that the plaintiff is not entitled to some relief, as was pointed out by the Privy Council in *Bank of Australasia* v. *Breillat* (1), on appeal from the Supreme Court of New South Wales. "From *Pigot's Case* (2) to the latest authorities, it has always been held that, when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal, and some illegal, at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot." It makes no difference, in my opinion, whether the illegality is by common law or by Statute. Assuming, therefore, that this stipulation, in so far as it relates to the conditional lease, was illegal, that is no reason why its performance as to the conditional purchases should not be enforced. And, apart from the question of illegality, if the stipulation is to do something which the intending lessor cannot do because he is purporting to deal with a larger estate than he has, the Court of Chancery long ago laid down the doctrine that, if a man assumes to give more than he can give, that is no reason why he should not be compelled to give what he can. That was in the case of *Cleaton* v. *Gower* (3). So that, as far as the conditional purchases are concerned, there can be no objection to the enforcement of the agreement.

It is said, however, that to grant a lease of these would be futile, because as a matter of fact the conditionally leased land lies between the conditional purchases and the sea, and the main object of the proposed lease is to give the lessee the right of passage for timber growing on the conditional purchases, which he desires to get to the sea or to a sea port. It is necessary, therefore, to consider whether the agreement as to the conditional lease is one that can be enforced by a Court of law. If it is entirely futile, or if it is against any provision of the Act, then the Court will, so far, refuse to enforce it. The first objection is that to grant a lease for anything but grazing purposes is a breach

(1) 6 Moo. P.C.C., 152, at p. 201. (2) 6 Rep., 26.
(3) Finch., 164.

of a condition of the conditional lease, for a breach of which the lease becomes forfeitable, and that the Court will not compel a lessee to execute a sub-lease which will destroy his own title. That is no doubt true. It is necessary, then, to consider whether the proposed lease would or would not authorize the doing of something, or make it a term of the lease that the sub-lessee should be at liberty to do something, which would be a breach of a condition by which the conditional lease would become forfeitable. The provision as to forfeiture for breach of condition is contained in sec. 96. In construing that section it must be borne in mind that there is no presumption in favour of forfeiture. The Courts always lean against it. That section states the circumstances under which a lease shall become forfeitable. It provides that: "Every lease shall be liable to forfeiture if any rent be not paid within the prescribed period or upon breach of any condition annexed to such lease," &c. Is this prohibition then a condition annexed to the lease? It is no doubt in one sense an incident of the lease. So it is an incident of most leases that the lessee shall not have power to commit waste. But that is not properly treated as a condition of the lease unless it is expressly made one. If the construction suggested is adopted, this remarkable result would follow, that if a pastoral lessee lets a small piece of land, half an acre, for instance, to a market gardener for market gardening purposes or for growing vegetables for his home, his whole lease becomes forfeitable. I cannot believe that that was the intention of the legislature. It is a historical fact that in the old days it was prescribed in the Order in Council that lessees should not cultivate their land under penalty of forfeiture. Certainly there is no trace of any such policy in later legislation. On the contrary it has become the policy of the legislature to encourage cultivation. The denial of the power to grant sub-leases for other than grazing purposes is certainly stated in plain words, but, in my opinion, in the provision for forfeiture on breach of a condition the term "condition" is used in its technical sense, that is, a condition to be performed by the lessee with regard to the land, and does not refer to a breach of a mere negative provision restricting the powers of the lessee. When we find in the Act a distinct enactment, directing that a lessee shall not do certain things, such a

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provision may be considered as a condition if the context shows that it was so intended. But I am of opinion that a breach of this provision is not a breach of a condition upon which the lease becomes forfeitable. Another way in which there is said to be a breach of a condition is that the lease agreed to be given purports to grant a right to the plaintiff to remove timber, and it is clear that the plaintiff cannot do so without a licence. Again, with respect to the tramway, it is said that the conditional lessee cannot authorize a person to lay a tramway through the land, as that may be to the injury of the Crown. But, if that is the true construction, it shows only that the stipulations on that point are ineffectual. In my opinion, therefore, the objection that these stipulations are breaches of conditions of the lease fails.

There remains the other point, that the lease, if granted, would be idle and would confer no right on the plaintiff, and, it is contended, the Court will not grant specific performance of such an agreement. Again I assent to the proposition. The Court will not grant specific performance of an agreement which confers no enforceable rights. It is said that the stipulation as to the timber is unlawful because taking timber from such lands without a licence is forbidden. No doubt that is so. But is it necessary to construe the provision in the agreement as a provision that the lessee shall remove the timber without a licence? The words are: [His Honor then read that portion of the agreement relating to the right to cut timber and continued.] Is it to be said that that necessarily imports an illegal purpose? In my opinion, those words do not necessarily import any illegality. It must be taken to have been in the knowledge of the parties that, so far as the conditional lease was concerned, the timber could not be removed except by a licensee. But the chance of a person removing timber would depend upon the chance of his getting a licence. Moreover, a licensee, if he got permission to cut the timber on the land, could take it away across the land, but he would have no authority to construct a tramway on the land for that purpose. So that the rights that a licensee would have apart from the agreement would not be exactly the same as those he would have under it.

Now, as to the suggestion that the permission to remove timber necessarily imports something illegal. The proper rule

for the construction of such an agreement is laid down in *Sheppard's Touchstone*: "That if the words may have a double intendment, and the one standeth with the law, and the other is against law, that it be taken in that sense which is agreeable to law." If, therefore, these words can be construed in a sense agreeable to the law, they ought to be so construed. Moreover, it must, I think, be taken to have been in the contemplation of the parties that the timber could not be removed without a licence, and it must also be taken that it was the intention of the parties that it should be obtained. Sufficient authority for that view is to be found in the case of *Waugh* v. *Morris* (1), and in the case of *Hutchinson* v. *Scott* (2) in this Court.

For these reasons, I am of opinion that the objection as to illegality fails. As to the tramway, there is no foundation for that suggestion.

I will deal now with the point that the agreement is idle so far as concerns the attempt to give a right to cut and remove timber and to construct a tramway. In construing the agreement we must inquire what was the law at the time when it was made. In the regulations of 11th February 1903, which repeal all previous timber regulations, it was provided, Regulation 3, that a timber licence "shall not apply to lands permanently dedicated to any public purpose, nor without the special authority of the Minister or the Forest officer to any Crown Lands or species of timber which may be exempted by Regulation, or which may be notified in the Gazette as exempt from its operation, or to any of the following Crown Lands, viz:—. . . Lands held under conditional or special or settlement or industrial lease, except any such lands included in a timber reserve."

So that this land was not land in respect to which anybody could obtain as of right a permit to take timber and go through it for that purpose. Before doing so it was necessary to obtain the special authority of the Minister or Forest officer. Having regard to the fact that, by the regulations in force immediately before these, the holders of licences were not allowed to take timber at all without the consent of the lessee, it might be reasonably contemplated that the Crown would not give a licensee an authority to go upon the

(1) L.R. 8 Q.B., 202. (2) 3 C.L.R., 359.

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land without first consulting the holder of the conditional lease. That may be taken to have been in the contemplation of the parties, and, applying the rule laid down in *Sheppard's Touchstone*, that may well be considered as a stipulation that not only will the conditional lessee offer no objection to the holder of the licence going on the land, but that he will do all in his power to facilitate it. Such an agreement as that is not idle, and there is ample consideration. Then with regard to the tramway. It appears that the real object of the parties was to enable the plaintiff to cut timber that was growing on the conditional purchases, and take it away across the other land to his saw mill. He cannot take the timber to that mill without crossing the conditional lease. Is then a stipulation that he may construct a tramway over the lease for that purpose an idle stipulation? No doubt, a person who has a licence to cut timber on a conditional lease is also authorized to remove it, because the Act expressly says so. But he certainly has no authority to construct a tramway on the land, and he has no authority to take any other timber across the land. If the holder of a timber licence attempts to carry any other timber across the land than that which he has cut upon it, he is clearly liable to an action for trespass. The stipulation, therefore, as to the tramway is by no means an idle stipulation. It is a stipulation that not only entitles him to construct a tramway, so far as the conditional lessee can authorize him to do so, but also entitles him to convey upon it any timber that he may cut outside the land. That is not idle; it is a very valuable consideration. The question whether this should be held a valid stipulation or an idle one ought to be determined in accordance with the recognized rule of law that a document should, if possible, be so construed as to give effect to the intention of the parties, and not in such a way as to defeat that intention. Applying this rule, I think that this agreement should be construed as an agreement that, so far as the lessor, the defendant, lawfully may, he agrees that the lessee, the plaintiff, shall have permission to cut timber on and lay a tramway across the conditional lease, and that the lessor will not offer any objection to the plaintiff obtaining a licence to cut timber on the conditional lease or obtaining such permission as may be necessary to lay a tramway, and that he will do or concur

in any acts that may be necessary for either purpose. That, I think, effectuates the intention of the parties.

In my opinion the proper order is to declare that the agreement ought to be specifically performed, and to direct the defendant to execute a lease accordingly, the lease to be settled by the Judge if the parties differ.

I have stated the construction that, in my opinion, ought to be put upon the stipulation in order to avoid any difficulty that may hereafter arise. According to the practice of the Court the defendant should pay the costs up to the hearing, further consideration being reserved, with liberty to apply.

BARTON J. The questions in this case arise mainly under the words of sec. 98 of the *Crown Lands Act* 1884. [His Honor read the section and continued:] The agreement was made between the parties in January of last year, Foster, named in the agreement, being the holder of three conditional purchases numbered 28, 37 and 97, and of a conditional lease, numbered 43, the lessee named Langley, being a member of the firm of Langley Brothers, proprietors of a saw mill. The agreement is simple enough down to a certain point, that is to say, so far as it purports to be a mere lease of the several portions named for ten years at the rent named. But a difficulty arises afterwards in respect of the following provisions: [His Honor read that portion of the agreement relating to the right to construct tramways and cut timber and continued:] Before dealing with the question of the tramways and the cutting and removal of timber, I would like to remove any impression that may have been produced by a remark which I made during the argument that the following words are as obscure as His Honor the Chief Judge in Equity appears to have thought they were. I refer to the words of the proviso: "that the whole of the marketable timber be removed from one place at a time in a systematic manner so that the land may be cleared and put under grass, which right may be exercised from time to time by the said . . . Foster and his servants." I do not think now that the words are as obscure as His Honor thought they were. They are, in my opinion, capable of a clear and definite meaning, which is that the marketable timber is to be

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removed in a systematic manner in order to allow Foster the respondent to have the right to clear the land and put it under grass. It does not follow that the right to clear away the undergrowth, after the cutting of the timber, and to plant grass, is to be read as a reservation of the grazing rights. I think that the general words, operating as a complete lease of the land, should still prevail, subject to the right of Foster to clear away the undergrowth and lay down grass after the timber is removed. That may be in order to improve the land which will fall in to the lessor at the expiration of the period of ten years. I think that that is what the parties intended by what they have said.

As I have mentioned, the first three portions are conditional purchases and the fourth is a conditional lease. It is as to the fourth, the lease, that the difficulty has arisen. The contention of the respondent is that that difficulty permeates the whole agreement. There are thus two questions arising upon the case. One is: is the agreement illegal, and by reason of that illegality, unenforceable? The second is: if it is not illegal, can and ought it to be specificially performed? I think that His Honor the Chief Justice has quoted conclusive authority to show that illegality in part does not necessarily vitiate the whole agreement. Passing from that I wish, on the question of illegality, to refer to the case of *Haines* v. *Busk* (1), which was cited at the Bar, in which it was held that "it is no answer to an action by a broker for commission for procuring freight, that the charter-party procured was such, that if the charterer failed to obtain certain licences, the voyage would be illegal. In that case a very full judgment was delivered by *Gibbs* C.J. who spoke very strongly in disapproval of the defence set up, which was similar to that set up in the present case—because the defendant here relies on the illegality of his own contract—and he dealt in this way with the facts (2):—"The defendant, the owner of a ship, desires to have her employed in a lucrative trade, and applies to the plaintiff to obtain employment for her. The plaintiff succeeds in procuring for her such an employment as the defendant wishes to obtain, and when the plaintiff applies for a compensation, the defendant says, 'I will make you no compensation; not because

(1) 5 Taunt., 521.

(2) 5 Taunt., 521, at p. 526.

you have not done your duty to me, but because the thing which I desired you to do, is illegal.'" He then characterizes the defence again as a dishonest one, but states that it must prevail if it is good in law. Then he discusses the nature of the defence further and says this:—"Is it then necessary that she must at all events make an illegal adventure?" He then dealt with the various stipulations of the contract said to be illegal and went on:—"And if this agreement, such as it is, could have been legally performed, by taking certain steps afterwards, the plaintiff is in that case entitled to recover a compensation for procuring the contract. *Non constabat* at the time when the plaintiff discharged his duty, that whatsoever was necessary to legalize the voyage would not be gotten." (Just in the same way, here, *non constat* that what was necessary to legalize the carrying out of the agreement would not be gotten). "Under the 16th section of this Statute," (the 43 Geo. III. c. 153, which made amendments in the 12 Car. II. c. 18) "a licence might be obtained for the specific goods in the specific ship, which is issued in numerous instances after a general order legalizing the goods. It does not at all appear that there was any contract that a licence should not be procured from the privy council, but only that the licence should not be on board the ship. We have before decided (*Sewell* v. *Royal Exchange Assurance Co.*) (1) that the subjects may make a contract which may be rendered lawful before it is completed. The defendant insists that if there be any one course of voyage which the shipowner is obliged to pursue in case the charterer elects it, and if that course be illegal, the whole contract is illegal." [His Honor continued to read from the judgment, concluding with the passage.] "The charterer and owner together had it clearly in their power to render the voyage legal. There is no evidence that they meant to pursue any prohibited traffic; the contrary inference is afforded by the facts. We are, therefore, of opinion that the plaintiff is entitled to recover a compensation for the service he has performed." I have cited that case at some length because, although the facts are of a different class from those of the present case, the contract in that case being a contract of charter, nevertheless the

(1) 4 Taunt., 856.

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principle involved was clearly the same, and it is, I think, worth while to make the full citation. In the case of *Waugh* v. *Morris* (1), another case of a charter party, in which it was stipulated that the ship should load a cargo of pressed hay in France and proceed direct to London. On arriving at that port the master was unable to land the hay at the wharf by reason of an Order in Council under the *Contagious Diseases (Animals) Act* 1869, forbidding hay from a French port to be landed in the United Kingdom. The Order was made some time before the charter party was entered into, but neither party knew of it. It was contended that the contract was for an illegal purpose and void. It was held that as the contract was not made knowingly with the intention to violate the law, and as it could be carried out, as it ultimately was, without violating the law, it was not void. In his judgment, *Blackburn* J. said (2):—"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 show 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." I think those remarks are entirely applicable here. I see nothing in this contract which is incapable of being performed within the law by obtaining the necessary authority from the Crown, which covers these branches of the defendant's promise. That being so, I think both the cases which I have cited are entirely applicable, the one last cited more particularly, because it deals with the question of the absence of any wicked intention to violate the law, such as would be necessary, according to the Court, to avoid the contract, and because of the absence of any such evidence of intention in this case.

On the question of illegality I do not intend to refer to any other authorities except *Scott* v. *Hutchinson* (3), which was before this Court as *Hutchinson* v. *Scott* (4). In that case the agreement was held to be subject to the assertion of its rights by the Crown.

(1) L.R. 8 Q.B.,, 202.
(2) L.R. 8 Q.B., 202, at p. 208.
(3) (1905) 5 S.R. (N.S.W.), 484.
(4) 3 C.L.R., 359.

Are these authorities inapplicable by reason of the form of the agreement in the present case? That question necessitates reference to the *Crown Lands Act* 1884, sec. 98, which provides: [His Honor read the section and continued:] So, I take it, the principle applicable here is that the contract must be read as being intended to be executed with due regard to the law. So read, the provisions as to the making of tramways and the cutting of timber are no more than licences in addition to the lease, which is effectually granted by the earlier part of the agreement. The words following after "Provided," even if construed as Dr. Cullen contends they should be, do not, as I have pointed out, amount to a reservation of the grazing right, and are therefore not incompatible with a grazing lease.

Now, as to the question of the provisions of the agreement, it is said that the performance of them is likely to result in forfeiture under sec. 96 of the *Crown Lands Act* 1884 which provides: [His Honor read the section and continued:] It is contended that the words, "upon breach of any condition annexed to such lease" apply in this case, because the subletting of this land, if it is a subletting, and I take it on that basis as regards the cutting of timber and laying the tramways, is a breach of a "condition annexed to such lease"; that the provision of sec. 98, sub-sec. (1) is a condition; and, therefore, that the enforcement of the stipulation would lay the lease open to forfeiture. I am unable to accede to the contention that the restriction on the right to sublet for other than grazing purposes is a condition within the meaning of sec. 96. For I think that, where the legislature in this Act has intended to prescribe anything as a condition, it has said clearly what it means. It may be allowed that all of the New South Wales Lands Acts are very difficult to construe, but I do not think that there is any difficulty in respect of the use of the word "condition" in those Acts. With respect to conditional purchases we may see in what sense the word is used from a consideration of sec. 13. That section recognizes the performance of the requirements as to residence and improvements as "conditions" of a conditional purchase under the repealed Acts. These are substituted for the conditions under those Acts. It will be seen that these are of three kinds, residence, improvements such

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as fencing, and payment of instalments of purchase money. Now, further dealing with the matter of conditional purchases, we find in secs. 32, 33, 34, 35, and 39 the "Conditions and Obligations of Conditional purchasers," dealt with. In them we find that, when the Act speaks of conditions, it names them as conditions without any ambiguity. There a conditional lessee comes into notice. In all the sections dealing with this matter, we find a distinction drawn between conditions on the one hand, and obligations imposed by other provisions of the Act on the other. I refer to these sections for the purpose of showing that, when it is intended to impose a penalty for breach of a prohibition, there is an explicit provision to that effect, and in all these sections the Act seems to recognize the necessity for express words when imposing forfeiture for a breach of anything which is not a condition in a lease.

In sec. 90, which has been referred to in another connection, provision is made for the granting of special leases by the Governor, the terms of grant, and causes of forfeiture. It deals with them in a specific way in each case. As to the special lease under sec. 90 which may be granted for special purposes, including tramway purposes, power is given to the Governor to annex to any such lease special conditions. Then there is a proviso dealing with rentals, and the section concludes with a provision that the lease may be forfeited if it is not used *bonâ fide* for the purpose for which it was granted or default is made in any "condition," that is to say, any condition expressed in the lease. So that it seems to me that this Statute all through draws a clear distinction between conditions and provisions which are not conditions, and that, when it speaks of a condition annexed to a lease, it speaks of that in a way, as I take it, which necessitates the conclusion that only that is to be regarded as a condition without which the lease will be forfeited.

So that I cannot see that the attempt, successful or otherwise, to sub-let the lease for other than grazing privileges can be followed by that consequence of forfeiture which Dr. Cullen strenuously contended to be the effect of the 95th section. On that section he raised the objection that to enforce specific performance would drive the person ordered to perform the agreement into

a breach of the 98th and 96th sections. It seems to me that no such consequence would arise, and therefore that in that particular the argument fails.

With reference to the permission to cut timber and to lay a tramway as affected by the regulations of 1903, His Honor the Chief Justice has made the position abundantly clear, and I cannot add anything to what he has said, which seems to me conclusive. The conclusion to which I have come on the whole case is this, that this is not an attempt to enforce specific performance against an unwilling purchaser, but rather an attempt on the part of a willing purchaser to obtain relief against an unwilling vendor, who has made an agreement for a lease, upon an objection taken by that vendor that he cannot grant all that there is in the document because to do so would make him party to an illegality. It is a defence which I do not think the defendant was wise in setting up, and it is one which certainly ought not to be allowed to prevail if that result can be avoided. In my view it does not prevail. If there were any such illegality as the defendant contends, it would not vitiate the whole contract, but would leave part capable of being specifically performed. As it stands the contract does not necessarily involve an illegality, but is capable of being performed without illegality by obtaining the necessary authorities from the Crown. I am of opinion that it falls within the principle of the cases cited on that point.

I think, therefore, that the contract can be carried out with entire regard to the law, and that, as to the conditionally purchased land, the respondent could give all that he contracted to give, and, at the appellant's option, can clearly be held to that. As to the conditionally leased land, the respondent has given all that he can subject to the rights of the Crown, and the appellant, at his option, can have all that is contracted for subject to those rights.

O'Connor J. It is not denied that this is a contract which the Court would specifically enforce unless the objections raised by Dr. Cullen are to prevail. There are three objections. The first is, that to enforce this contract would be to command the doing of something involving a forfeiture of the respondent's lease.

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Secondly, that to enforce the contract would be to enforce the doing of something prohibited by law; and thirdly, that to enforce it would be to enforce a contract which, under the circumstances, must be nugatory. If any one of these objections were good the Court would not enforce specific performance of the contract. I am of opinion, however, that none of the objections can be upheld. The foundation of the first is that it is a condition of the lease that the conditional lessee shall not sublet the land for any purposes other than grazing purposes, and that for breach of that condition the lease is liable to forfeiture under sec. 96. There is no doubt that this contract is a lease or sub-letting of the land for purposes other than grazing purposes. So that, if that is a condition the violation of which leads to forfeiture under sec. 96, the contract is one which will not be enforced. But is it a condition "annexed to the lease" within the meaning of that section? Sec. 96 is as follows:—[His Honor read the section and continued:] In determining whether the restriction on the purposes for which the land may be sublet is a "condition annexed to the lease" we must consider what are the terms of the lease. There is no written lease, no formal agreement between the Crown and the conditional lessee, and neither in the form of application for a conditional lease, nor in the form of confirmation of the application are there any words of restriction or permission. Therefore we are thrown back upon the words of the Statute. That is to say, the conditional lessee holds under a statutory title, and the provisions of his holding are to be found within the four corners of the Statute. The words of sec. 98 (1) require particular attention. They are as follows: [His Honor read the sub-section and continued:] It is not every stipulation in a lease which is a condition. It was open to the legislature to make the restriction on subleasing a condition the violation of which would lead to forfeiture. The question is whether the legislature has done so. Now, a conditional lease is created by sec. 48 of the *Crown Lands Act* 1884, and there is only one section of the Act which directly annexes any condition to the estate thus created, and that is sec. 51. That provides that a conditional lessee shall be subject to the same conditions as to fencing as conditional purchasers,

and that the conditional purchaser may fulfil his "condition of residence" on his conditionally leased land. The only stipulations or provisions of the statutory lease under which the conditional leaseholder holds his land that are described as conditions in any of the Crown Lands Acts are the conditions there referred to, which may be generally described as conditions of residence, fencing, and improvement. It appears from many sections in the Act that these conditional leases, which are attached or appended to conditional purchases, are subject to the same conditions as conditional purchases. But the only conditions attached to conditional purchases are those relating to payment of instalments, residence, and improvements. And it would appear obvious that if the legislature had intended to punish by forfeiture the breach of a condition in a statutory lease it would have definitely prescribed and marked out the condition, the breach of which would entail such serious consequences, as it has done with reference to conditions of residence, payment, and improvement. My learned brother *Barton* has cited and commented with such detail on all the sections which bear on this question, that it is not necessary for me to go through them again. I merely wish to mention this, that in the Land Acts which followed that of 1884, wherever conditions are mentioned the three conditions as to residence, payments and improvements, to which I have referred are always mentioned together as the only conditions. Upon consideration of the words of sec. 98, I have no difficulty in coming to the conclusion that, if the provisions of that section were embodied in an agreement between parties, the restriction on subletting would not be in the form of a condition the breach of which would involve forfeiture. The Act might very well have provided directly that no conditional lessee shall sublet his land for other than grazing purposes, and it might then have been argued that that was a condition, the breach of which would result in forfeiture. But the Act, it appears to me, carefully avoids using any such expression. It says "no lease or licence other than special leases shall confer any 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."

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The natural meaning of an expression of that kind is merely to limit the powers which a lease gives over Crown lands. The legislature, in enacting the terms of these leases could impose any limitations it thought fit. In a conditional purchase the Crown always reserves the right to gold and silver, and sometimes the right to other metals. So in a conditional lease, the Crown gives an estate which does not confer on the lessee the right to deal with the whole beneficial use of the land, but with part of the beneficial use only, and it defines and limits the part of the beneficial use which cannot be dealt with by sec. 98 (1). I have, therefore, no difficulty in coming to the conclusion that the provision in question here is not a condition a breach of which renders the lease liable to forfeiture, but is merely a limitation of the powers which the lease confers upon the lessee.

The next objection is that the enforcement of this contract means the enforcement of something illegal. That involves the construction of the contract itself. As far as that is concerned it seems to me impossible to doubt the meaning of the contract. It is plain that it gives in the first place a lease of the land, and, if that portion of the contract stood alone, it no doubt would be interpreted as granting that kind of lease which the conditional lessee lawfully could give. But that provision is followed by one granting a right to construct and use a tramway on the land, to cut and remove timber from the land on payment of a royalty, and to use the tramway for the purpose of conveying timber across the land. Having regard to the facts to which these provisions must be applied, their meaning is perfectly plain. Langley, the appellant, is a sawmill owner. There is timber on the three conditionally purchased blocks mentioned in the agreement, as to which there is no difficulty. Between those blocks and the sawmill lies this conditional lease, and the mill owner must have a right to go over the conditional lease if the rights given in respect of the timber on the conditional purchases are to be of any value to him. Therefore the contract deals with the whole of the blocks, gives him the right to cut timber on them, and carry it over any of them by means of the tramway. Now, the law with regard to the enforcement of illegal contracts is very plain and has been illustrated over and over again, particu-

larly by the cases referred to during the course of the argument. It is this: if a contract can be carried out in one way only, and that way necessitates the doing of something prohibited by law, the Courts will not enforce it; but if the contract may be carried out in a legal manner, and also in an illegal manner, before a party can object to the enforcement of the contract by the Court, he must satisfy the Court that it was the intention of the parties to carry it out in an illegal manner. That was laid down in *Sewell* v. *Royal Exchange Assurance Co.* (1) and *Haines* v. *Busk* (2). Those were cases in which the voyages undertaken would be illegal if certain licences were not obtained, and the Court would not allow it to be assumed that the licences were not intended to be obtained, and, therefore, as the contracts could be carried out in a legal manner, the Court would not assume that it was the intention of the parties to carry it out in an illegal manner. There is no difficulty in applying those principles to this contract. The contract purports to deal with the land and the timber on the land. The conditional lessee has the power to give the right to deal with the land, so far as it may be necessary to occupy it for grazing purposes. For any rights beyond that the Crown must be applied to, and the Crown may give a licence to any person to have all those uses of the land which the conditional lessee has purported to give under the contract but which he himself cannot lawfully give. If the Crown licence is obtained, the contract is perfectly lawful, and there is no necessity to do anything unlawful in carrying it out. If the licence is not obtained, then the contract cannot be lawfully carried out to its full extent. The Court will not assume that the parties intended that the contract should be carried out without obtaining the licence. On the contrary, not only will the Courts not assume that, but they will assume that the parties intended to do all things necessary to enable them to carry out the contract legally. It appears to me that there is evidence of that intention in the contract itself, because when we refer to the provisions of the lease as to rent they read in this way: "Rent to be £24 per annum to be paid in advance; any further increase of rent rendered necessary by the Government Regulations to be borne by the said

(1) 4 Taunt., 856. (2) 5 Taunt., 521.

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W. Langley." There is only one increase of rent, using that word in its strict sense, which could be imposed, and that is on a reappraisement after a certain number of years, but that is not imposed under the Government regulations. The only increased charge that could be made under Government regulations is the charge made for a permit or licence under sec. 115 of the *Crown Lands Act* 1884, or the later Act of 1902, to allow timber to be cut on Crown lands. I can see no meaning which could be given to that portion of the contract unless it is that both parties contemplated that a permit would have to be obtained, and that certain payments would be thereby necessitated which were to be borne by Langley. So far, therefore, as relates to the objection that to carry out this contract would be to carry out an illegality, I agree with my learned brother the Chief Justice that we must construe the contract as embodying an implied term that the purposes described shall be carried out in a lawful manner, that is to say, that the licences and permits necessary to make its fulfilment lawful will be obtained. Applying to the contract that principle of construction, which is really the principle laid down in *Hutchinson* v. *Scott* (1), it is plain that the respondent's contention to the contrary must fail.

There remains the other objection that the enforcement of the contract will be nugatory because it is a contract to do something that is invalid, even if not unlawful. That objection is practically answered by the considerations I have already dealt with. It is only necessary to add that I entirely agree with my learned brother the Chief Justice that, so far as the respondent is concerned, the contract must be read as indicating an intention on his part to give all consents, and to take all steps that may be necessary to carry out the contract in its entirety. Under the timber regulations, it is necessary to obtain the leave of the Minister before the permit can be given to cut timber on conditional leases. That is a matter for consideration by the Minister. No doubt one of his first inquiries would be, how does the man in occupation of the land view the proposal? Does he consent or not? It is difficult to imagine circumstances in which the Minister would grant permission to cut timber on a condi-

(1) 3 C.L.R., 359.

tional lease if the lessee on reasonable grounds objected. In this case the possibility of that difficulty has been removed in advance. The millowner has taken the precaution of getting the consent of the lessee to his obtaining any permit that may be necessary for the carrying out of the contract. It is an important principle of law in dealing with contracts, that a party shall not be allowed to repudiate what he has agreed to. He may, if he can, show good reason why the Court should not enforce it. But, where the Court sees that, although there may be a valid reason against the enforcement of a portion of the contract, that portion is separable from the remainder, it will enforce the carrying out of that portion which can be legally performed. It appears to me that this contract can be legally carried out by the defendant, if the necessary permits are obtained. I am therefore of opinion that the contract ought to be enforced, and in the terms set out at the conclusion of the judgment of my learned brother the Chief Justice. In regard to costs it was contended that, a certain offer having been made in the course of the case and not accepted, the appellant, having succeeded only partially, ought not to be allowed any costs. I have read the offer (1), and it appears to me to be one which the millowner could not reasonably have been expected to accept. It would have given him no rights of cutting timber or laying tramways over the lease, and would have cut off the source of his timber supply from his sawmill. Therefore, with regard to the costs, I agree with the Chief Justice.

Appeal allowed. Declaration that the agreement ought to be specifically performed. Plaintiff to execute a lease accordingly, to be settled by the Master in case the parties differ. Defendant to pay a sum equivalent to abatement of rent from the date of tender to the expiration of the lease. Defendant to pay the costs of the suit up to the hearing. Further consideration reserved,

(1) (1905) 5 S.R. (N.S.W.), 678, at p. 679.

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with liberty to apply. Respondent to pay the costs of the appeal. Case remitted to the Supreme Court.

Solicitors, for the appellant, *Perkins & Fosbery.*

Solicitors, for the respondent, *John Williamson & Sons.*

C. A. W.

[PRIVY COUNCIL.]

THE COLONIAL BANK OF AUSTRALASIA LTD. . . . . } APPELLANTS;

AND

MARSHALL AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Banker and customer—Cheque—Fraudulent alteration of amount after signature—Duty of customer to take precautions against forgery.

PRIVY COUNCIL* 1906.

July 27.

Whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that a cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation.

Decision of the High Court (*Marshall* v. *The Colonial Bank of Australasia Ltd.*, 1 C.L.R., 632), affirmed.

Scholfield v. *Earl of Londesborough*, (1896) A.C., 514, followed.

APPEAL to His Majesty in Council from the decision of the High Court. (*Marshall* v. *The Colonial Bank of Australasia Ltd.* (1).)

**Present.*—The Earl of Halsbury, Lord Macnaghten, Sir Arthur Wilson, Sir Alfred Wills.

(1) 1 C.L.R., 632.