[HIGH COURT OF AUSTRALIA.]

PERPETUAL TRUSTEE COMPANY LIMITED Appellants;
Plaintiffs,

AND

ORR AND OTHERS . . . . . Respondents.
Defendants,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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Sydney, *May* 7, 15, 16, 17.

Griffith C.J., Isaacs and Higgins JJ.

Landlord and tenant—Action for rent—Plea of eviction by title paramount from portion of land demised—Apportionment—Equitable replication—Right of adjoining owner to foreshore—Crown Lands Act 1884, *secs.* 63, 68, 90.

In an action for rent due under a lease of land fronting the sea shore the defendants pleaded eviction by title paramount of the Crown from a portion of the land demised, consisting of a strip 100 feet wide above high water mark, and claimed apportionment of rent in consequence. The plaintiffs replied, on equitable grounds, that their predecessors in title had been in possession of the whole of the lands demised, and by virtue of their possession had a certain interest in the strip, and had title to the residue of the lands, which title and possession entitled them to a preferential right appurtenant to lease the strip from the Crown, and that by the lease to the defendants this interest and right passed to them, as well as the benefit of a restrictive covenant as to other adjacent lands of the lessors, and that the defendants always had possession of the lands demised, first by virtue of the lease, and afterwards by virtue of the lease and of a lease obtained from the Crown of the strip by virtue of their title to and possession of the residue, and paid the plaintiffs full rent after the alleged eviction, excepting the rent claimed in the action, and that the plaintiffs, relying upon the performance by the defendants of the covenant to pay rent, had observed the restrictive covenant, and given the defendants the benefit of the preferential right of lease of the strip, and that the apportionment claimed was therefore inequitable.

Held, that, assuming that the plaintiffs had a preferential right of some kind over the strip under the Crown Lands Acts by virtue of their title to the

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adjoining land, they were not entitled to an unconditional and perpetual injunction against the defendants setting up the eviction, and the replication was therefore bad.

Held, also, that the facts alleged did not amount to an argumentative traverse of the eviction.

The plaintiffs claimed title under a Crown grant which described the land granted as bounded by the waters of Port Hunter with the following exception: "saving and reserving to His Majesty all such part of the land as may be within 100 feet of high water mark."

Semble, that though under sec. 63 of the *Crown Lands Act* 1884, the grantees had some rights over the foreshore by virtue of their title to the adjoining land, and the power of the Crown to grant the foreshore to persons other than the grantees was to that extent limited, at any rate until the conditions stated in sec. 68 should have happened, the Crown had power, under sec. 90, to grant a lease of the foreshore for the purposes mentioned in that section to persons other than the grantees, without obtaining their concurrence.

Decision of the Supreme Court: *Perpetual Trustee Co. Ltd.* v. *Orr*, (1906) 6 S.R. (N.S.W.), 679, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales, on a demurrer by the defendants to an equitable replication.

The appellants, assignees of the reversion of a lease of certain lands, with patent slip, wharves, engines, plant, and machinery thereon, sued the respondents, assignees of the term, to recover £262 10s., three quarters' rent under the lease. The defendants pleaded as to £229 3s. 4d., portion of the amount claimed, that before the rent became due, "all that portion of the said lands being and lying within 100 feet of the high water mark of the waters of Port Hunter were Crown lands and the Attorney-General for the State of New South Wales filed an information of intrusion against the plaintiffs . . . . claiming, amongst other lands, the said portion of land hereinbefore referred to as Crown lands which then of right ought to have been in the hands and possession of Her then Majesty Queen Victoria and . . . . obtained judgment against the plaintiffs that Her then Majesty should recover possession of the said land and afterwards and before the committing of the alleged breach herein pleaded to" the Attorney-General took the like proceedings against the defend-

ants in respect of the same portion of the lands, and recovered judgment to have possession of that portion of the lands and damages, and the defendants upon that yielded up possession to the Crown, and that £229 3s. 4d. is the sum which, upon a fair apportionment of the whole rent, would have become due and payable as rent in respect of the portion of the lands from which they had been so evicted, if the eviction had not taken place.

To this plea the plaintiffs pleaded for a replication on equitable grounds that the lessors, their predecessors in title, were in possession of the whole of the lands mentioned, including the strip alleged in the plea to be within 100 feet of high water mark called the foreshores, and claimed to have a certain interest in the foreshores by virtue of their possession, which they had "long held, and believed that they would for a long time thereafter hold, without any interference or interruption whatever"; and "were entitled of right to the residue of the said lands and premises and claimed, as the fact was, that in the event of their said possession of and interest in the said foreshores being determined then they were entitled by reason of their said possession and title to the said residue of the said lands and premises to a certain preferential right appurtenant to the said residue to lease the said foreshores from the Crown" and "were also possessed of and entitled of right to certain other lands known as the Stockton Estate adjacent to the said lands and premises and all these facts" the lessees "before and at the time of the making of the said lease well knew"; and the lessors "in consideration of and in reliance upon the covenant by" the lessees "to pay rent . . . let and demised to" the lessees "the whole of the said lands and premises and covenanted for themselves and their assigns that they or their assigns &c. would not during the continuance of the said lease and demise lease any portion of the estate . . . known as the Stockton Estate to any person or persons for the purpose of or to be used as a slip or other convenience for repairing or building ships or vessels save and except as there was or were used or employed for such purposes. And . . . gave possession . . . and the said preferential right of lease of the said foreshores passed by the said lease and by the possession so given thereunder to" the lessees and their assigns, and the

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lessees and their assigns and the defendants "always until the expiration of the term of the said lease had possession of the said lands and premises in the first place by virtue of the said lease and afterwards by virtue of the said lease and of a lease of the said foreshores obtained from the Crown by the defendants by virtue of their title to and possession of the said residue of the said lands and premises under the said lease as aforesaid" and the lessees "and their assigns and the defendants always paid to the" lessors or their assigns "including the plaintiffs the full rent reserved by the said lease with the exception of the rent claimed herein which is the rent claimed for the last nine months of the said term of 23 years. And . . . the plaintiffs have always in reliance upon the performance by" the lessees "and their assigns and the defendants of their said covenant for the payment of rent performed the restrictive covenant on their part regarding the granting of leases of the other parts . . . of the said Stockton Estate and have given the . . . defendants the benefit of the said preferential right of lease as aforesaid, and . . . the said benefits so rendered under the said lease having been accepted by" the lessees &c. "and the defendants entirely and without diminution or apportionment it is inequitable that the said rent in consideration of which they were so rendered as aforesaid should be apportioned or diminished after the expiration of the said lease."

The defendants joined issue and demurred. The plaintiffs joined in demurrer and demurred to the defendants' plea.

The Supreme Court, after argument, gave judgment on the demurrer for the defendants: *Perpetual Trustee Co.* v. *Orr and others* (1). From this decision the plaintiffs now appealed.

Dr. Cullen K.C. (*E. M. Stephen* with him), for the appellants. The lessors, as grantees of the land adjoining the 100 feet reservation, had a preferential right under the Crown Lands Acts to have a grant or lease of the foreshore. At any rate, the Crown had no power to deal with that strip adversely to the lessors without their concurrence. [He referred to 25 Vict. No. 1, secs. 3, 6, 9, 12; 39 Vict. No. 13, sec. 38; 48 Vict. No. 18, secs. 63, 64,

(1) (1906) 6 S.R., 679.

89, 90.] The respondents, therefore, by virtue of their lease, and with the concurrence of the lessors obtained the lease of the foreshore from the Crown. That is alleged in the replication. Equity will not allow them to have that benefit and repudiate the lessors' title. They stand in a fiduciary relationship to the lessors, and must account to them for the benefit they have derived from the original lease: *Cuthbertson* v. *Irving* (1); *Griffith* v. *Owen* (2). The replication is good as a traverse of the eviction. On the facts alleged there was never a cessation of the original possession. The lessees are on that ground estopped from setting up the eviction of their lessors. At any rate they cannot complain of being evicted from the foreshore. They knew the risk when they took the lease, and took that risk on themselves. The lessors also had the benefit of the restrictive covenant as to the Stockton Estate, and retained it by virtue of the lease of the residue of the lands originally leased. Under these circumstances equity would grant an unconditional perpetual injunction against the lessees claiming an apportionment.

Knox K.C. (*Dr. Coghlan* with him), for the respondents. The appellants cannot succeed unless it appears from the replication that under the circumstances set up equity would grant an injunction against setting up the plea of eviction, without any conditions whatever. It must appear that no diminution whatever can be made from the rent claimed. The mere fact that the defendants had some benefit from the restrictive covenant in the lease, over and above the enjoyment of the residue of the lands, and therefore are not entitled to a full proportionate abatement of the rent, creates no estoppel, nor does it make the defence bad or inequitable. The extent of the apportionment is a matter for the jury. The replication is bad unless it supports a claim for an injunction without terms.

[ISAACS J. referred to *Mines Royal Societies* v. *Magnay* (3).]

Assuming that the lessees stand in the fiduciary relationship contended for by the appellants, the lessees would, at any rate, be entitled to an indemnity to the extent of the expense incurred in

(1) 4 H. & N., 742; 6 H. & N., 135. (2) (1907) 1 Ch., 195.
(3) 10 Ex., 489.

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obtaining the lease from the Crown, and other losses owing to the defect in the plaintiffs' title: *Rowley* v. *Ginnever* (1).

[HIGGINS J. referred to *Giddings* v. *Giddings* (2); *In re Biss*; *Biss* v. *Biss* (3).]

There is no such relationship arising out of the mere existence of the tenancy, and the replication does not allege that the defendants had knowledge of the reservation in the grant, or of any agreement between the lessors and lessees as to the obtaining of the lease from the Crown. There is, therefore, no equity against the defendants.

[HIGGINS J. referred to *Cooper* v. *Phibbs* (4).]

There is no estoppel, legal or equitable. [He referred to *Willmott* v. *Barber* (5).] The replication cannot be read as a traverse of the eviction. It admits it, but seeks to avoid the effect of it by setting up an alleged equity. The possession under the original lease cannot be said to have continued as to the foreshore. There is no need for an actual walking out under the old tenure and a formal entry under the new. There was at least a constructive eviction: *Mayor of Poole* v. *Whitt* (6).

[GRIFFITH C.J. referred to *Delaney* v. *Fox* (7).

ISAACS J. referred to *Carpenter* v. *Parker* (8); *Fawcett on Landlord and Tenant*, 2nd ed., p. 211.]

The Crown Lands Acts give the plaintiffs no preferential right over the foreshore. That was wholly excepted from the grant: *Attorney-General for New South Wales* v. *Dickson* (9). Being excepted, it was Crown land and could be leased by the Crown for any of the purposes mentioned in sec. 90 of the Act 48 Vict. No. 18, without reference to the adjoining owner. The reservation of this strip excluded the plaintiffs from any privileges that might have attached to riparian ownership. The part under the sea was leased under sec. 89. The plaintiffs had no preferential rights over that because they were not owners of the frontage. [He referred to *Shore* v. *Wilson* (10); *Smith* v. *Renwick* (11).]

(1) (1897) 2 Ch., 503.
(2) 3 Russ., 241.
(3) (1903) 2 Ch., 40.
(4) L.R. 2 H.L., 149, at p. 170.
(5) 15 Ch. D., 96.
(6) 15 M. & W., 571.
(7) 2 C.B.N.S., 768.
(8) 3 C.B.N.S., 206.
(9) (1904) A.C., 273, at p. 277.
(10) 9 C. & F., 365.
(11) 3 N.S.W. L.R., 398.

Cullen K.C., in reply, referred to 48 Vict. No. 18, secs. 65, 66, 67, 68.

[ISAACS J. referred to *Lord* v. *Clyne* (1); *Stockport Waterworks Co.* v. *Potter* (2); *Ormerod* v. *Todmorden Mill Co.* (3); *Chadwick* v. *Manning* (4); *George Whitechurch Ltd.* v. *Cavanagh* (5); *Bullen and Leake, Precedents of Pleadings*, 3rd ed., p. 568.

HIGGINS J. referred to *Pickard* v. *Sears* (6).]

17th May.

GRIFFITH C.J. This was an action by the appellants against the respondents for rent reserved upon a lease for a term of 23 years from 1st June 1882 at a yearly rent, payable quarterly, granted by the appellants' predecessors in title to the respondents' predecessors in title, by which the lessees covenanted to pay the rent on specified dates. The defendants as to a portion of the rent claimed, which was for part of the last year of the term, alleged, in effect, that before the rent became due portion of the land, namely, all that portion lying within 100 feet of the high water mark of the waters of Port Hunter, Newcastle, were Crown lands, and that the Attorney-General for New South Wales recovered judgment against the plaintiffs in an action of intrusion, and subsequently recovered judgment against the defendants in an action for intrusion, in respect of the same portion, with damages. The plaintiffs pleaded a replication upon equitable grounds to which it will be necessary to refer later, but which I need not now state in detail. In effect, they set up that under the Crown Lands Acts in force in New South Wales the plaintiffs were entitled to a preferential right appurtenant to the rest of the land to acquire that strip of land from the Crown, and that the defendants by taking advantage of that preferential right had obtained from the Crown a lease of the 100 feet, and say that under these circumstances the plea of eviction followed by diminution of the rent is not applicable. In the Crown grant, which was produced to us, and to which we are allowed to refer, the parcel of land granted to the plaintiffs' predecessors in title is described as bounded by the waters of Port Hunter with an exception in

(1) 2 N.S.W. L.R., 36.
(2) 3 H. & C., 300.
(3) 11 Q.B.D., 155.
(4) (1896) A.C., 231.
(5) (1902) A.C., 117, at p. 130.
(6) 6 A. & E., 469.

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these words:—"Saving and reserving to His Majesty all such part of the land as may be within 100 feet of high water mark." The effect of a reservation in that form has been stated by the Judicial Committee of the Privy Council in *Attorney-General for New South Wales* v. *Dickson* (1), where Lord *Lindley*, in delivering the opinion of the Judicial Committee, said:—"The effect of this last reservation is not open to any serious controversy. If the strip in question belonged to the Crown at the date of the grant, the strip was excepted from the grant. The word 'reserving' would operate as an exception." The authorities quoted in support of this proposition were *Sheppards' Touchstone*, pp. 78 *et seq.*, and *Coke upon Littleton*, 143a.

The defendants contended that this strip of land was not included in the Crown grant at all. I think it must be conceded that that follows from what I have just read. But it is clear that Lord *Lindley* was not directing his mind to the question of any other consequences that might follow in New South Wales with regard to the power of the Crown to deal with the strip. The plaintiffs contend that the Crown cannot deal with land reserved under such circumstances, and rely upon various sections of the *Crown Lands Act* 1884. Sec. 63 of that Act provides that the Governor may authorize the rescission of any reservation of water frontage on the sea coast or other navigable water or of land adjoining such frontage contained in any Crown grant subject to such conditions and restrictions as he thinks fit. The land, the subject of such rescission, "may be granted" to the owner of the land contained in the Crown grant at a price to be fixed in the prescribed manner (in a former Act the words were "shall be granted"), provided that nothing in this section shall empower the Governor to grant any land used as a public thoroughfare or any land set apart for any public purpose. As I understand the judgment of the learned Judges of the Supreme Court, they thought that that section gave no preferential rights to the owners of the land comprised in the Crown grant. In the view I take of the case it is not necessary to pronounce any definite opinion on that subject; but, as at present advised, I think that the powers of the Crown to deal with land falling within that

(1) (1904) A.C., 273, at p. 277.

category are limited by the provisions of sec. 63 to a certain extent. The Act of 1884 provides for the reservation of land in various ways. Under sec. 103 the Governor may in certain cases reserve temporarily from sale Crown lands on either side of a railway. By sec. 104 he may reserve or dedicate Crown lands for any of a number of specified purposes. Sec. 63 makes no provision for reserving Crown lands, but recognizes the case where there has been a reservation of a water frontage on Crown lands or lands adjoining a water frontage. I am disposed to think, though I express no definite opinion on the subject, that, under the reservation referred to in sec. 63, where there has been such a reservation, though the lands are Crown lands, still they are not such Crown lands as can be disposed of for all the purposes that are open in the case of land that has not been the subject of previous disposition, using the term disposition in its widest sense, especially having regard to the proviso that the Crown cannot grant such land if it is used as a public thoroughfare or set apart and dedicated for any public purpose. Reference was also made to sec. 68, which provides that on an application for purchase under any of the last five preceding sections, including sec. 63, certain consequences shall follow, one of which is that if the applicant for purchase, which, in the case of sec. 63, would be the owner of the rest of the land originally described in the grant, should fail to complete, the right of purchase may be treated as having lapsed, and the land itself may be sold by auction, or otherwise disposed of pursuant to the provisions of the Act. There is no doubt that negative provisions may be inferred from positive words—there is ample authority for that—and I am disposed to think that under these circumstances the Crown could not grant the lands now in question to anybody except the original grantee until the conditions stated in sec. 68 had been fulfilled. Though I am disposed at present to take that view, it does not carry the plaintiffs very far, because the title which the defendants say they have obtained from the Crown is under a lease of some of this land, and by sec. 90 it is provided that the Governor may, amongst other things, lease Crown lands in specified areas for any of the purposes thereinafter specified for a term not exceeding fifteen years.

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Amongst those purposes are boat houses, ferries, bathing places, building or repairing ships or boats. Putting the case for the plaintiffs at its highest, I do not think that the effect of the reservation relied upon can be put any higher than if the strip had been reserved for the purpose of a highway, except so far as regards the power to make a subsequent grant to the original grantee. And if, as might be perfectly natural under such circumstances, a portion of the land excepted might be leased by the Crown for the purposes of a ferry or a bathing place, it is difficult to see why a lease could not be granted for the purpose of building or repairing boats or ships. Therefore, as at present advised, I am inclined to think that the objection which has been taken to the lease as being in violation of the plaintiffs' right, cannot be supported, but I express no definite opinion on the point. I assume for the purpose of the rest of the case that the plaintiffs' contention on that point is sound, and that the Crown could not by grant, lease, or other disposition do anything detrimental to the plaintiffs' right to occupy this strip of land as to which they allege a preferential right.

Regarding the case from that point of view, the plaintiffs say that, they having this preferential right to the exclusion of all other persons, the Crown has in violation of that right purported to grant to the defendants a right to occupy that particular strip of land. Suppose they have done so. What follows? The replication is pleaded as an equitable one, and sets out certain facts as showing that, under the circumstances, the plaintiffs are entitled to an absolute and unconditional injunction to restrain the defendants from setting up the fact of their eviction by the Crown from portion of the land demised. Regarded from an equitable point of view it can only be taken to suggest that, under the circumstances stated, in view of the relationship of landlord and tenant which existed between the parties, and the law being as contended for by the plaintiffs, any right that the defendants acquired from the Crown must have been acquired by them in trust for the plaintiffs, not exactly as trustees for them, but by virtue of a *quasi*-fiduciary position. Assuming that this is so, although there is no authority for saying that a fiduciary relationship arises between landlord and tenant from the mere fact

of the existence of that relationship, Courts of Equity do not allow a *cestui que trust* to obtain from a trustee any benefit he has derived from the trust property by virtue of his position without indemnifying him against all liabilities incurred in respect of the trust, either already incurred or future. So that, under these circumstances, the plaintiffs would not be entitled to a perpetual and unconditional injunction. The case *Giddings* v. *Giddings* (1), referred to by my learned brother *Higgins* is ample authority for that proposition; and there are other later authorities to the same effect.

Then it was suggested that the replication might be regarded as setting up something in the nature of an equitable estoppel, that the defendants should not be allowed to set up the defence that they had been evicted from land which they had never ceased to occupy, and of which the beneficial ownership was still in them as lessees. But the difficulty still remains. Even if the defendants are trustees of the land and the plaintiffs are the beneficial owners, the obligation to indemnify still remains. So that, regarded as an equitable replication, I think it is bad. But it is suggested that the replication may be regarded as an argumentative traverse of the fact of eviction. Now it appears that the lessees were on the point of being evicted by title paramount of the Crown, but, the replication says, by taking advantage of the plaintiffs' supposed rights they obtained a new right to the possession of the land from the real owner. But, in my opinion, possession under the lease granted by the Crown under those circumstances could not be regarded, in law at least, without an agreement by the parties, as a continuance of the original possession under the plaintiffs. The effect of the eviction would not be altered by such a continuance of possession, and therefore the allegation does not amount to a traverse. So that the replication cannot properly be regarded as a good argumentative traverse of the facts alleged in the plea.

It is suggested, again, that it may be read as a confession and avoidance of the fact of eviction. But the fact of eviction entails the consequence of a corresponding cessation of the obligation to pay a portion of the rent, and if that obligation ceased,

(1) 3 Russ., 241.

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the only way to avoid the consequence would be by setting up some new contract to pay that portion of the rent, either an actual contract or one to be inferred from the circumstances by law. But in any case that would be a new contract, different from that alleged in the declaration. So regarded, therefore, the replication is a departure, and bad on that ground.

Then it was suggested that the replication may be regarded as setting up an estoppel by representation, whereby the defendants are estopped from taking advantage of the cessation of the obligation to pay the full rent. But they could only be so estopped by some conduct amounting to a representation that the covenant is still in force, and such a representation would not be a representation of an existing fact at all. The representation necessary to be established would be a representation that there had not been an eviction, and that would have had to be followed by some change in the position of the plaintiffs, which would affect the plaintiffs detrimentally unless effect were given to the representation. The replication, therefore, cannot stand on that ground.

It appears to me that the only way to get rid of the consequences of the fact of eviction, otherwise than by a new contract to pay the full rent, would be by showing some sort of tripartite agreement between the three parties, the Crown, the lessors, and the lessees, that the right of the Crown should not be enforced, but that the lessees should continue in possession under their original title from the lessors. If that were proved, probably the original estoppel arising between landlord and tenant would not be displaced by what would otherwise have been an eviction. But I do not think the replication, however it may be read, can be construed as setting up such a tripartite agreement. The replication is based upon the legal consequences supposed to follow upon the state of the title, which, in my opinion, do not follow without express agreement. I am, therefore, unable to see any ground on which the replication can be supported, and I think the judgment of the Supreme Court was right, and the appeal should be dismissed.

ISAACS J. The only question necessary for decision is whether

this replication can be supported in law. In my opinion it cannot, and for this reason, that, regarding it in the most favourable light for the plaintiffs, a Court of Equity would not grant a perpetual and unconditional injunction restraining the defendants from setting up their plea of partial eviction and apportionment. The question is really determined by the case of *Mines Royal Societies* v. *Magnay* (1). The plaintiffs have averred many circumstances which they claim render it inequitable to raise the defence of apportionment, but they do not show that, taking the replication as it stands, nothing remains to be done except for the defendants to pay the rent. They may or may not have a case for specific performance, or injunction, or declaration in equity, but a court of law has not, under the procedure in force in this State, the means of dealing with the whole matter "so as to do justice between the parties:" sec. 98 of the *Common Law Procedure Act* 1899; nor, for the reasons given by the learned Chief Justice, can the replication be regarded as amounting to an estoppel. The replication, therefore, cannot stand, even if the plaintiffs' arguments as to their preferential rights to a grant or a lease under the Crown Lands Acts be correct.

As to that branch of the case, while unwilling to determine it under present circumstances, I must not by any means be taken as acquiescing in the decision of the Supreme Court that the plaintiffs have no preferential rights whatever to a lease, and that no such preferential rights as they claim are known to the law. I am not at present prepared to accept the view that the Crown, under sec. 90 of the Act of 1884, has not the power, or has only the power, subject to a prior right of the plaintiffs, to lease to other persons for purposes in that section, Crown lands the subject of reservation in the Crown grant. On the other hand, I am certainly not disposed to adopt without further consideration the other extreme view that the Crown is absolutely at large to lease those lands independently of the plaintiffs, and for any purpose outside the purposes included in sec. 90. It may be that sec. 63 gives the Crown grantee a qualified right of preference over other persons who desire the land for purely private purposes, that is, where no public advantage is or may be served.

(1) 10 Ex., 489.

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But, quite consistently with this qualification, it is one distinctly possible view that the Crown might itself, as to those lands which it has expressly retained, utilize them for its own, that is, public purposes, or might, under sec. 90 lease them to others to use for such purposes as Parliament in that section has indicated would be useful to the public.

As already stated, however, I am not required to decide anything as to this, and only refer to the matter that no titles may be regarded as granted or taken or refused under any supposed approval by this Court of the unqualified view laid down by the Supreme Court of the State.

HIGGINS J. This is a demurrer to an equitable replication, a question as to the sufficiency of the pleadings. Briefly stated the plaintiffs sue for £262 10s. rent for the final nine months of a lease for 23 years from 1st June 1882. The land was granted in fee simple in 1835, but in the grant there was a "saving and reserving" of a strip of land 100 feet wide above the high water mark of Port Hunter. The defendants pleaded that as to this strip of the land the Crown by virtue of the title paramount recovered judgment against the plaintiffs for possession in 1895, and afterwards recovered judgment against the defendants, and that the defendants yielded up possession to the Crown, and that, on a fair apportionment of the whole rent of the land leased, £229 3s. ought to be deducted in respect of the strip of 100 feet. The plaintiffs then made a long replication, and a keen contest has taken place as to its full meaning and effect. The learned Chief Justice has described it, but I see no way of doing full justice to it except by setting it out in the report in full. This equitable replication has been supported by elaborate and subtle arguments which I cannot examine in detail within a judgment of reasonable limits. I propose to base my decision on the point that, even if the facts alleged in the replication, taken with the laws as to Crown lands to which we have been referred, give to to the plaintiffs any right in equity or otherwise to prevent the deduction of an apportioned part of the rent, no perpetual injunction against such deduction, or against anything else, would be granted by a Courty of Equity except on conditions:

and under the New South Wales practice no equitable pleading can be supported unless it alleges facts in which an absolute and unconditional perpetual injunction would be granted. In the present case no Court of Equity would grant a perpetual injunction unless on the terms that the plaintiffs pay the rent paid by the defendants for the new lease granted by the Crown, and indemnify the defendants against the covenants. The nearest analogy that I can think of is the case of a constructive trust, and the form of the decree in such a case is set out in *Giddings* v. *Giddings* (1). The decree there was, in substance, that upon the death of the tenant for life the remainderman became entitled to the benefit of the lease acquired by the tenant for life subject to the payment of a rateable proportion of the fine paid on the renewal, and subject also to the payment of rent; and it was referred to the Master to inquire and ascertain and certify the amount of the fines paid by the tenant for life, and to compute interest thereon, and to approve of a proper assignment to be executed by the defendant to the plaintiff of the subsisting term and interest, and to approve of a proper deed of indemnity to be executed by the plaintiff against the payment of the yearly rent and the performance of the covenants in the lease. I may refer also to the cases referred to in *Lewin on Trusts*, 10th ed., p. 197, to *Keech* v. *Sandford* (2), and to *Rowley* v. *Ginniver* (3). There are many cases which illustrate the strictness with which the Courts of common law in England, so long as they adhered to the system of pleading to which the State of New South Wales still adheres, treated pleadings on equitable grounds. Where the machinery of the Courts of common law did not enable them to do final and complete justice between the parties by means of a perpetual unconditional injunction, the pleading was held to be bad: *Gorely* v. *Gorely* (4). But, although I do not discuss the other points which have been referred to in this case, I think it well to state, above all in a matter of title, to prevent any misapprehension, that I am not satisfied that the lessors had under

(1) 3 Russ., 241.
(2) 2 Wh. & Tud. L.C. in Eq. (7th ed.), vol. II., p. 693.
(3) (1897) 2 Ch., 503.
(4) 1 H. & N., 144.

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the Crown Lands Acts any preferential right to a lease of the 100 feet, or that the Crown could not grant a lease thereof to a stranger. I am certainly not prepared to differ from the Full Court on this point. But, even if there was such a preferential right, I cannot find any fiduciary or other obligation on the part of the defendants, having got the new lease (and for this purpose we must assume the new lease to be valid), to treat the lease as having been obtained for or in the interests of the lessors. The replication, it is true, alleges that the new lease was "obtained by the defendants by virtue of their title to and possession of the said residue of the said lands under the said lease." This is rather an allegation of law than of fact. I do not see a basis for it in law; and, even if it be treated as an allegation of fact, why should that fact give the benefit of the new lease to the plaintiffs, whether they take on themselves the burden of the covenants or not? The cases are collected in *In re Biss*; *Biss* v. *Biss* (1). Nor do I see any ground for treating the defendants as estopped (as the plaintiffs contend) from insisting on a deduction of an apportioned part of the rent; for I can find no representation of an existing fact on which the plaintiffs acted; and there is no allegation of any contract.

I may be permitted to add that, in my opinion, fully one half of the time and labour which this case has involved could, in all probability, have been saved to the Court and to counsel if, as under the English Judicature Acts, the same Court could deal freely with equitable and legal rights, so as to do justice once and for all between the parties litigating.

Appeal dismissed with costs.

Solicitor, for the appellants, *F. A. Davenport.*

Solicitor, for the respondents, *C. A. Coghlan.*

C. A. W.

(1) (1903) 2 Ch., 40.