H. C. OF A. 1907.

LEE FAN v. DEMPSEY.

Isaacs J.

be supported, and if that decision be wrong the appellant's case must fall.*

Appeal dismissed.

Solicitors, for the appellant, *Penny & Hill.*

Solicitor, for the respondent, *Barker* (Crown Solicitor).

N. G. P.

[HIGH COURT OF AUSTRALIA.]

MOORE AND SCROOPE . . . . APPELLANTS; SUPPLIANTS,

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Pastoral lease—Reservation of power to "sell"—Homestead and grazing leases—Conditional "sale"—Dispossession—Quiet enjoyment — Breach of covenant—Lease under regulations — Alteration of regulations and new legislation — Australian Waste Lands Act (18 & 19 *Vict. c.* 56)*—Crown Lands Regulations 2nd March* 1887 (*W.A.*)*—Constitution Act* 1890 (*W.A.*), (53 & 54 *Vict. c.* 26), *sec.* 4 (2)*—Homesteads Act* 1893 (*W.A.*), (57 *Vict. No.* 18)*—Land Act* 1898 (*W.A.*), (62 *Vict. No.* 17).

H. C. OF A. 1907.

PERTH, *Oct.* 28, 29, 30; *Nov.* 4.

Griffith C.J., Barton and Isaacs JJ.

In pursuance of a power vested in the Crown to dispose of Crown lands in Western Australia under conditions prescribed by the Regulations then in force "or by any Regulations amending or substituted for the same," a pastoral lease was granted in 1887, containing a reservation to the Crown of a right to sell the land comprised in the lease; and the Regulations also contained a similar reservation of a power to sell subject to the provisions of the

*NOTE:—Sec. 40 (1) of the *Police Offences Act* 1890 (Vict.), under which *Wilson* v. *Benson* and *Wilson* v. *Travers* were decided, has been repealed by the *Police Offences Act* 1907 (Vict.) and a new provision substituted. See secs. 3 and 4 of the amending Act. [ED.]

Regulations. By the Western Australian *Constitution Act* 1890, the right to dispose of Crown lands and to make regulations was transferred to the autonomous government then established; but all contracts made by the Crown and all vested rights already accrued relating to Crown lands prior to that Act were expressly saved from interference. In pursuance of the *Homesteads Act* 1893 and the *Land Act* 1898, which created new forms of conditional alienation of Crown lands not in use in 1887, the Government granted homestead and grazing leases to other persons, who by virtue thereof entered and took possession of the land of the pastoral lessees.

Held, that, assuming that a covenant for quiet enjoyment was implied in the pastoral lease, and that the homestead or grazing leases followed by dispossession would, if inconsistent with the rights of the pastoral lessee have been breaches of such a covenant (as to which *quære*), no breach had been committed by the Government of the covenant. The homestead and grazing leases were not infringements of the *Constitution Act* 1890, as they were "sales" within the meaning of the Crown's reservation of the power to sell contained in the pastoral lease and the Regulations. The pastoral lessee having no power under his lease to acquire the fee, his land remained "Crown lands," subject to be sold or otherwise disposed of under the Regulations, whether those in force in 1887 or as altered by subsequent amendments of the Regulations or by statutory enactments creating new forms of alienation. No covenant could be implied in the pastoral lease against the Crown, that it would not take advantage of such alterations of the Regulations as might take place subsequent to the granting of the lease.

Steere v. *The Minister for Lands*, 6 W.A.L.R., 178, over-ruled in part.

Decision of the Supreme Court varied.

The suppliants, pastoral lessees of Crown lands, sued the Government of Western Australia for damages for alleged breach of an implied covenant for quiet enjoyment, by granting homestead and grazing leases over land held by the suppliants, of which the new lessees dispossessed them. The Supreme Court of Western Australia, following their prior decision in *Steere* v. *The Minister for Lands* (1), held that the homestead and grazing leases were unlawfully granted and void; but that the Crown was not answerable for the dispossession by lessees claiming thereunder. The suppliants appealed to the High Court. The material facts and enactments relating to the case are set out in the judgment of *Griffith* C.J. hereunder.

Pilkington K.C. and *Stawell*, for the appellants. Assuming that *Steere* v. *The Minister for Lands* (1) is good law, the Crown is

(1) 6 W.A.L.R., 178.

H. C. OF A. 1907.

MOORE AND SCROOPE v. THE STATE OF WESTERN AUSTRALIA.

liable for its unlawful conduct in giving authority to third persons to disturb the pastoral lessee's possession.

The pastoral lease granted in 1887, under 18 & 19 Vict. c. 56, sec. 7, embodied the Regulations in force at that time. It constituted the contract between the parties, and its terms could not be altered subsequently without liability for compensation. At the dates when the Regulations and the pastoral lease were drawn up, homestead and grazing leases were unknown forms of demise, and could not be granted in derogation of the pastoral lease before its expiration. The *Constitution Act* 1890 (W.A.) (53 & 54 Vict. c. 26), secs. 3 and 4, expressly save from alteration all rights arising from any land contracts previously made with the Crown; and under the existing law there is no power in the Government or Parliament to resume or take away land granted or leased before the *Constitution Act* 1890; the contracts under which these lands are held could only be varied by Imperial Act or other appropriate alteration of the *Constitution Act* 1890, not by any local Acts.

The *Homesteads Act* 1893 (57 Vict. No. 18), sec. 18, which gives power to grant homestead leases, and the *Land Act* 1898 (62 Vict. No. 37), sec. 68, which gives power to grant grazing leases, cannot be construed as a statutory authority to derogate from pastoral leases existing when the Act was passed. The granting of these homestead and grazing leases on the suppliants' land was a breach of the covenant for quiet enjoyment; even though such leases are invalid at law, they are a distinct authority to enter and dispossess, as the tenants are required by both the Acts to go into possession and make improvements on the land: *Budd-Scott* v. *Daniell* (1); *Williams* v. *Gabriel* (2); *Harrison, Ainslie & Co.* v. *Lord Muncaster* (3); *Sanderson* v. *Berwick-upon-Tweed (Corporation of)* (4); *Jenkins* v. *Jackson* (5); *Winter* v. *Baker* (6); *Norton on Deeds*, (1906 ed.), p. 485; *Windsor and Annapolis Railway. Co.* v. *The Queen* (7).

The contract contained in Scroope's pastoral lease included a reservation to the Crown of a right to "sell" any of the land

(1) (1902) 2 K.B., 351.
(2) (1906) 1 K.B., 155.
(3) (1891) 2 Q.B., 680, at p. 684.
(4) 13 Q.B.D., 547, at p. 551.
(5) 40 Ch. D., 71.
(6) 3 T.L.R., 569.
(7) 11 App. Cas., 607, at p. 613.

comprised therein. The homestead and grazing leases were not "sales" of the land; they were, at most, leases with a right to purchase the fee. Such rights must, with respect to the pastoral lease, be construed under the Regulations in force in 1887, which did not recognize as sales such dealings as the homestead and grazing leases: *Johnson* v. *Thomson* (1).

The principle that Regulations are to be taken to be subject to the power of amendment and substitution applies only in company law: *British Equitable Assurance Co.* v. *Baily* (2); such power is not incorporated in any of the Regulations in force in 1887, and could never have been in the contemplation of the parties at that time. The *Homestead Act* 1893 can be construed so as not to affect the pastoral leases granted before 1893, as there are numbers since that date to work upon; it would only be taken to authorize the present breach of contract if it specifically did so. The "right to sell" reserved in the pastoral lease contract and in the Regulations must mean a "right to sell under the Regulations" as they then existed, otherwise the right of the pastoral lessee to compensation under the Regulations for his improvements would be gone.

"Conditional purchases" are not true sales; much less are homestead and grazing leases sales, within the meaning of the reservation: *Bouvier's Law Dictionary*, "*Sale*"; *Kansas Pacific Railway Co.* v. *Dunmeyer* (3); these new special tenures, created by local Statutes, are the very thing against which the *Constitution Act* 1890, sec. 4 (2) was enacted to protect the old tenures held from the Crown: *Constitution Act* (N.S.W.) (18 & 19 Vict. c. 54), Schedule sec. 58; *Australian Waste Lands Act* (18 & 19 Vict. c. 56), sec. 5.

Even if these homestead and grazing leases were lawfully authorized, yet the Crown is liable for the breach of covenant for quiet enjoyment; the power to dispossess pastoral lessees, if validly authorized, was still a general power, not compulsory, and the individual breach is wrongful: *Brewster* v. *Kitchell* (4).

[GRIFFITH C.J.—But the legislature may have obliterated that implied covenant.]

(1) 6 W.W. & aB. (M.), 18.
(2) (1906) A.C., 35.
(3) 113 U.S., 629.
(4) 1 Salk, 198.

H. C. OF A. 1907.

MOORE AND SCROOPE v. THE STATE OF WESTERN AUSTRALIA.

The Crown covenanted not to derogate from its grant "during the term of the lease," not "while the law remains as it is"; a covenant is only repealed by change of the law where breach of the covenant is made compulsory: *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (1). These Acts are not an authority to override existing titles subject to statutory compensation, if any; private property can only be taken in that way if expressly so enacted by a plenary legislature: *Baker on United States Constitution*, 1891 ed., p. 184. If it is necessary to consider the Crown's power of legislation and revocation, the Crown must be taken to have covenanted not to exercise, in such a way as to derogate from its grant, any new powers of revocation conferred by subsequent legislation. The pastoral lease was not a conveyance or executed contract, but an executory contract, with various active covenants and reservations continuing during the term. As to costs, *Parker* C.J. deprived the appellants of costs merely because they preferred to go to Court instead of to arbitration. That is not "good cause" under the Rules: *Huxley* v. *West London Extension Railway Co.* (2); *Beckett* v. *Styles* (3); *Forster* v. *Farquhar* (4).

Draper and *Northmore*, for the respondent. The Crown did nothing unlawful or in breach of the pastoral lessee's rights in granting the homestead and grazing leases. The land scheme established under the Regulations was to grant a right to occupy land under pastoral lease so long as such land was not otherwise required for sale or other better tenures. Regulation 3 contained power to substitute other Regulations, so that pastoral leases were held subject to the Regulations from time to time in force: *British Equitable Assurance Co.* v. *Baily* (5). If the power to sell pastoral leased lands is only under the Regulations as existing in 1887, then the subsequent repeal of the only Regulations on conditional sales, the conditional purchase Regulations, leaves these lands open only to direct sale for cash. But the contemplated alteration of the Regulations was effected by the *Homesteads Act*

(1) 7 App. Cas., 178, at p. 188.
(2) 14 App. Cas., 26.
(3) 5 T.L.R., 88.
(4) (1893) 1 Q.B., 564.
(5) (1906) A.C., 35.

1893 and the *Land Act* 1898. The reservation of power to sell in the pastoral lease covered these homestead and grazing leases, which were really conditional sales, under which the fee simple was in time acquired after performance of prescribed conditions: *Land Act* 1898 (62 Vict. No. 37), sec. 68 (7), (8); *Bennett* v. *Wyndham* (1); *Homesteads Act* 1893 (57 Vict. No. 18), secs. 19-29.

Even if these homestead and grazing leases were not "sales," yet there was nothing unlawful in granting them under the Acts which authorized them. Sec. 4 of the *Constitution Act* 1893 did not cut down the plenary power of legislation given by sec. 2 to make laws for the "peace, order, and good government" of the State: See *Powell* v. *Apollo Candle Co.* (2). The saving of existing contracts on Crown lands was only intended to prevent the change of Constitution from operating to invalidate existing titles; these still remained liable, as always, to alteration by the existing legislative authority. If the statutory alterations are valid, then the persons aggrieved must resort for compensation to the provisions, if any, contained in those enactments and nowhere else: *Brand* v. *Hammersmith and City Railway Co.* (3). The Acts under which the homestead and grazing leases were granted clearly authorized the exercise of the leasing power over the pastoral lease as Crown lands; and the breach of the implied covenant being thus directly authorized, no action will lie.

Even if the leases were void, the Crown is still not liable in this action. The intruding lessees would be mere trespassers, whereas the covenant is only against intrusion by persons lawfully claiming under the lessor: *Sanderson* v. *Berwick-upon-Tweed (Corporation of)* (4).

[ISAACS J.—*Calvert* v. *Sebright* (5) shows also that the covenant refers to the future as well as the past.]

The Crown is not estopped, as an individual would be, from setting up that the leases were invalid.

If the *Constitution Act* 1890, sec. 4 (2) limits the Crown to non-interference with existing titles, any such interference is

(1) 23 Beav., 521.
(2) 10 App. Cas., 282.
(3) L.R. 4 H.L., 171, at p. 196.
(4) 13 Q.B.D., 547.
(5) 15 Beav., 156.

H. C. OF A. 1907.

MOORE AND SCROOPE v. THE STATE OF WESTERN AUSTRALIA.

outside the scope of the Crown's authority, and only the individual agent of the Crown can be made responsible. Actions lie against the Crown for breach of covenant only where that breach was validly authorized: *Crown Suits Act* 1898 (62 Vict. No. 9), sec. 33; *Broom's Legal Maxims*, 7th ed., p. 38—"*Rex non potest peccare.*"

No covenant for quiet enjoyment can be implied against the Crown: *Dart on Vendor and Purchaser*, 7th ed., p. 575; *Sugden on Vendor and Purchaser*, 14th ed., p. 575. Any instrument derogating from the Crown's grant will be supposed not to have been intended, and will be treated as void; the true remedy is against the intruding lessees, who are presumed to have "deceived" the Crown: *Alton Woods' Case* (1); *Cumming* v. *Forrester* (2); *Staunford on the Prerogative*, cited in *Clode on Petition of Rights*, p. 105. *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (3) is distinguishable; the Crown there was bound at common law to respect a contract, but was not thereto limited or compelled by the Constitution, and the Governor of Canada was acting within his authority, although doing a wrongful act, in interfering with a contract which the Act in question did not oblige him to affect.

Pilkington K.C., in reply. The Governor of Western Australia was exercising a general power of leasing conferred on him by the *Homestead Act* 1893 and the *Land Act* 1898, in the same way and to the same extent as in *Windsor and Annapolis Railway Co.* v. *The Queen* (4).

The grazing leases were certainly not such "sales" as were in the contemplation of the parties in 1887; and the purchase of the lands was purely at the option of the lessees, who were never even bound to pay the rents, as the leases were deeds poll executed only by the Minister. The leases were merely occupation licences conditional on payment of the rents.

The idea that the pastoral lease was to be held subject to by-laws variable from time to time was never within the contemplation of the parties; Regulation 59, under which the

(1) 1 Rep. 27*a*.
(2) 2 Jac. & W., 334, at p. 342.
(3) 7 App. Cas., 178.
(4) 11 App. Cas., 607.

pastoral lease was granted, contained nothing about alterations, and Regulation 3 was not meant to be incorporated into it.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. In this case the suppliants (the appellants) claim damages against the Crown for breaches of an alleged contract in the nature of a covenant for quiet enjoyment, which, they contend, is contained in a pastoral lease of Crown lands in Western Australia issued under the law in force in the year 1887, before the grant of a Constitution to the Colony, the alleged breaches being the issue of certain homestead leases and grazing leases of part of the demised land to other persons under laws passed by the Parliament of Western Australia after the grant of the Constitution, followed by entry of the new lessees and dispossession of the suppliants. The Full Court, following a previous decision in the case of *Steere* v. *The Minister for Lands* (1), held that the homestead leases and grazing leases were void, on the ground that the latter leases were, if valid, infringements of the rights conferred by the pastoral leases, and that the local Parliament was incompetent to pass a law authorizing such dispositions of land in any way inconsistent with titles granted before the Constitution ; but they also held that, the leases being void, the Crown was not responsible in damages for the loss occasioned to the pastoral lessee by the entry of the homestead lessees and grazing lessees, and the consequent dispossession of the pastoral lessee. By the law of Western Australia a petition of right will not lie, nor can a suit be brought in any other form against the Crown, in respect of a tort except in a limited class of cases, which does not include such a dispossession as that complained of. The suppliants' case must therefore depend upon the existence and the breach of some contract. I have already said that the contract set up is in the nature of a covenant for quiet enjoyment. The pastoral lease uses the word "demise," and it is said that that word imports such a covenant. This is no doubt true in the case of ordinary leases. The covenant is, however, not express but implied. An

(1) 6 W.A.L.R., 178.

H. C. OF A. 1907.

MOORE AND SCROOPE v. THE STATE OF WESTERN AUSTRALIA.

Griffith C.J.

implied covenant or contract is held to arise, when, and only when, it appears that without it the intention of the parties with regard to the main object of the bargain would be frustrated. A covenant by a lessor for quiet enjoyment is not the same thing as a covenant that he will not grant a later lease to any other person. Since the lessor has already parted with the estate demised, any attempt by him to dispose of it, or any part of it, to another person would be futile. There is, therefore, no necessity to imply a covenant not to do such a futile act. Whether the entry of a person claiming under such an ineffectual attempt would operate as a breach of the implied covenant for quiet enjoyment or not is a different question.

I proceed to examine the suppliants' title, with a view of discovering whether any and, if any, what covenant can be implied from its terms. Before the grant of the Constitution the waste lands of the Crown in Western Australia were administered and disposed of under Regulations made by Order in Council under the authority of the Act 18 & 19 Vict. c. 56. The Regulations material to the present case were proclaimed on 2nd March 1887. Regulation 3 authorized the Governor in the name and on behalf of Her Majesty to "dispose of the Crown lands within the Colony in the manner and upon the conditions prescribed by these Regulations or by any Regulations amending or substituted for the same." The term "Crown lands" was defined by Regulation 2 to mean "the waste lands of the Crown within the Colony, that is to say, lands vested in Her Majesty and not for the time being dedicated to any public purpose or granted in fee simple or with a right of purchase under these or any previous Regulations." Part V. deals with pastoral leases, which were to be for a term of years expiring on 31st December 1907. Regulation 59 was as follows:—"A pastoral lease shall give no right to the soil or to the timber, and shall immediately determine over any land which may be reserved, sold, or otherwise disposed of under these Regulations." Regulation 61 provided that "the right is reserved to the Commissioner with the approval of the Governor . . . to sell any mineral land comprised within the limits of any pastoral lease whatever, and to sell any other portion of such lease, subject to the provisions of

these Regulations, at any time and with a right of immediate entry." Regulation 115 was as follows:—"In order to promote the construction of railways or other public works or the introduction and establishment of new industries and commercial undertakings of public utility, or for otherwise promoting the settlement of the Colony, the Governor in Council may grant special concessions of land in fee simple or otherwise, in any portion of the Colony, and may grant special concessions to cut and remove timber from Crown lands for any period, and such concessions may include special privileges, and shall be subject to any subsidy, rent, fees, conditions, or reservations as the Governor in Council may prescribe. Provided that any concession under this clause shall be subject to the approval of the Legislative Council." In my opinion this was a power which might have been exercised under the reservations in Regulation 61 with respect to lands comprised in a pastoral lease, and the exercise of which might have been dealt with by future Regulations.

Part IV. of the Regulations, which was headed "Alienation," included provisions for the sale of land by auction, and also for sale upon conditions of residence and improvement, to which I shall have occasion to call attention in more detail. It is sufficient for the present to say that the conditional purchaser became entitled to a grant in fee simple on payment of the prescribed price and on performance of the prescribed conditions. The holder of a pastoral lease acquired no such right. It follows that land held under a pastoral lease granted under these Regulations continued to be Crown lands within the definition in Regulation 2, and consequently continued to be land which the Governor was authorized to dispose of in the manner and upon the conditions "prescribed by these Regulations or any Regulation amending or substituted for them."

The form of pastoral lease was prescribed in a Schedule to the Regulations (Schedule 9), which may be referred to for the purpose of construing them. The lease, which is in the name of the Sovereign, witnesses that the Sovereign, in the exercise of the powers given by the Act of 18 & 19 Vict. c. 56, and the Regulations, "doth demise and lease" unto the lessee the land

H. C. OF A. 1907.

MOORE AND SCROOPE v. THE STATE OF WESTERN AUSTRALIA.

Griffith C.J.

described in the Schedule for the specified term, subject to certain reservations expressed in the following words:—"Except and always reserved to Us, Our Heirs and Successors, full power during the term hereby granted, from time to time to sell to any person or persons all or any unsold portion of the said demised premises, subject to any claim for improvements that may be lawfully made in pursuance of the said Regulations . . . and also to . . . resume and enter upon or dispose of in such other manner as for the public interest to Us, Our Heirs and Successors, may seem best, such part or parts of the said demised premises as may be required for . . . otherwise facilitating the improvement and settlement of the Colony . . . also to sell any mineral land comprised within the said demised premises, and, subject to the rights of the lessee aforesaid, to license to occupy, or to sell any other portion of the said premises at any time, and with a right of immediate entry." It is not disputed by the suppliants that under these reservations the Crown had power to sell any of the land comprised in the lease, but it is contended that the sale contemplated was an absolute immediate sale for cash only and not a conditional sale, and that, even if a conditional sale was included, the reservation only extended to a sale upon the particular conditions specified in Part IV., and would not authorize a sale on any conditions that might be prescribed by future Regulations.

If this view is correct, the lease created an estate in the land which could not be diminished by the Crown by means of any disposition of the land inconsistent with the continuance of the estate so created. A covenant not to make such an ineffectual disposition could not, because it need not, be implied. If, on the other hand, the reserved power of sale extended to any sale that might be made in pursuance of future Regulations, the implied covenant, to be of any service to the suppliants, must be that the Crown would not exercise to the prejudice of the lessee the power of making new Regulations for the sale of land on different terms, or, at least, that it would not dispose of the leased land under any such new Regulations. It is difficult, and I think impossible, to imply such a covenant against the Crown.

In the case of *British Equitable Assurance Co. Ltd.* v. *Baily* (1) the question was whether the appellants, a life assurance company, ought to be held to have entered into an implied contract with the respondent, a policy holder, that they would not alter their by-laws to his prejudice. Lord *Macnaghten* said:—"Now the whole question in the case is, did the appellant company contract with the respondent to the effect of depriving themselves of the right (which they had under their constitution) to make this change?" So here the question would be, "did the Crown by the lease in question contract with the lessee that it would not exercise its right to alter the conditions of sale of land in Western Australia so far as regards the demised premises?" As I have said, it is impossible to answer this question in the affirmative. It follows that the reservations included a power to sell the land under any conditions that might be prescribed by future Regulations, whatever the term "sell," as used in the reservations, may mean.

I proceed to consider whether the homestead and grazing leases in question were "sales" within the meaning of the Regulations of 1887 and the reservations in the suppliants' lease. By the Act 53 & 54 Vict. c. 26 Her Majesty was authorized to assent by Order in Council to a Draft Bill conferring a Constitution on the Colony of Western Australia as set out in the Schedule. Sec. 3 of the Act was as follows:—"The entire management and control of the waste lands of the Crown in the Colony of Western Australia, and of the proceeds of the sale, letting, and disposal thereof, including all royalties, mines, and minerals, shall be vested in the legislature of that Colony." Sec. 4 repealed the 7th section of the Act 18 & 19 Vict. c. 56 by which the power to make Regulations for the disposition of Crown lands in Western Australia was vested in Her Majesty, but provided that all Regulations made under that section and in force at the commencement of the Act should continue in force until altered or repealed in pursuance of the powers conferred by it (*i.e.*, by sec. 3). The second part of sec. 4 is as follows:—"Nothing in this Act shall affect any contract or prevent the fulfilment of any promise or engagement made before the time at which this Act takes effect in the Colony

(1) (1906) A.C., 35, at p. 39.

H. C. OF A. 1907.

MOORE AND SCROOPE v. THE STATE OF WESTERN AUSTRALIA.

Griffith C.J.

of Western Australia on behalf of Her Majesty with respect to any lands situate in that Colony, nor shall disturb or in any way interfere with or prejudice any vested or other rights which have accrued or belong to the licensed occupants or lessees of any Crown lands within that Colony."

The second section of the scheduled Bill provided that it should be lawful for Her Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly to make laws for the peace, order and good government of the Colony of Western Australia. These words confer a plenary power of legislation, except so far as their effect may be cut down by an enactment of equal authority. It is contended, however, by the appellants, and it was so held by the Supreme Court in *Steere's Case* (1), that they are cut down by the proviso to sec. 4 of the enabling Act, so that, with regard to land which was at the commencement of the *Constitution Act* the subject of any contract, promise or agreement made under the Regulations, the local legislature had no authority to pass any law which would prejudicially affect any such contract, promise or agreement.

The Royal Assent to the Constitution was proclaimed on 21st October 1890. In 1893 the legislature passed an Act, called the *Homesteads Act* (57 Vict. No. 18), by which certain of the Regulations of 1887 relating to the conditional sale of land were repealed and others substituted. The new conditions were framed on the same lines as the old, but were easier, and offered greater inducements to intending settlers. In 1898 a general *Land Act* (62 Vict. No. 37) was passed, under which a new mode of conditional sale of land called a grazing lease was established. The conditions differed from those under the *Homesteads Act*, but were framed on the same lines. In both cases, as under the Regulations, the title began with a lease, but, on performance of the prescribed conditions and payment of the full price, the purchaser or lessee became entitled to a grant in fee simple.

The power to grant such leases was, by the Act, to extend to all Crown lands, which term was defined as bearing the same meaning as in the Regulations of 1887 with some exceptions not material to the present case. In execution of the powers thus

(1) 6 W.A.L.R., 178.

formally granted several homestead leases and grazing leases were issued in respect of land comprised in the suppliants' lease, and the new lessees entered and dispossessed the pastoral lessee. It is in respect of this dispossession that damages are claimed.

I proceed to consider the meaning of the term "sell" as used in the Regulations and in the reservations in the lease. Regulation 45 authorized the Governor in Council to define and set apart any Crown lands as an agricultural area, and to declare it open to selection under the provisions of the Regulations.

Regulation 46 provided that such areas should be "disposed of" under certain prescribed conditions, (*a*) to (*k*), which included residence. Condition (*a*) spoke of the "price" of the land. Condition (*h*) said that after a prescribed time "provided that an amount equal to the full 'purchase money' has been expended on the land in prescribed improvements, and further provided that the full 'purchase money' has been paid," a Crown Grant shall issue. Regulation 49 provided that land in the South Western Division of the Colony (in which the land in question is situated) might be "sold" without conditions of residence but subject to the other conditions "prescribed by Clause 46 of these Regulations." Regulation 52 restricted the alienation of land in certain other parts of the Colony except for specified purposes, or except within specially declared areas. It provided that within specially declared areas land might be "sold" under certain conditions. Condition (*a*) said that land within an area shall only be "disposed of" after survey under prescribed conditions of improvement. Condition (*b*) fixed the "price," which was to be payable in ten yearly instalments. A lease for ten years was to be issued to the applicant for the land. Condition (*i*) provided that at the expiration of the lease or at any time after its issue, provided that (amongst other things) an "amount equal to the full purchase money" had been expended on prescribed improvements, and further provided that the "full purchase money" had been paid, a Crown grant should issue. Regulation 53 provided that certain persons in certain districts might apply to "purchase" for a homestead an area of prescribed dimensions on the same terms and conditions as "prescribed for purchase" under Regulation 52. Regulation 54 authorized land within the South Western Division

H. C. OF A. 1907.

MOORE AND SCROOPE v. THE STATE OF WESTERN AUSTRALIA.

Griffith C.J.

to be "sold" on certain other conditions of improvement, to be fulfilled within seven years. Regulation 55 provided that land might be "disposed of" on other conditions.

I think that it clearly appears from the provisions to which I have referred that in the Regulations the words "sell" and "dispose of" are used, indiscriminately and interchangeably, to denote a contract for the alienation of Crown lands, whether for cash or on conditions, and I think that in the reservations in the pastoral lease the same words must have the same extended meaning. I think, therefore, that in Regulation 61 the reserved right to "sell subject to the provisions of these Regulations" must be construed as meaning a right to sell in the same sense, subject to any rights reserved by the Regulations to the pastoral lessee on such a sale. I think also that the word "sold" in Regulation 59 must receive the same construction, and that the words "under these Regulations" in the same Regulation include a reference to Regulation 3 which authorizes a sale under any amended Regulations.

It follows, in my opinion, that alienation under the provisions now contained in the *Homesteads Act* 1893, and the *Land Act* 1898, under which the homestead leases and grazing leases objected to were granted, would, if they had been issued under amended Regulations to the same effect, have been within the reservations in the suppliants' lease, and that, being in fact made under the powers conferred by the *Constitution Act* and the *Enabling Act*, they are equally within those reservations.

This conclusion is fortified by the historical fact that for more than a quarter of a century before the Regulations of 1887 were made the alienation of Crown lands upon conditions of residence and improvement had been a recognized mode of disposition in other Australian Colonies, and was always regarded as a sale.

It also follows, in my opinion, that *Steere's Case* (1) was wrongly decided on this point, and should, so far, be overruled.

I am therefore of opinion that the suppliants have failed to establish any breach of any implied contract on the part of the Crown. It follows that so much of the judgment as declared that the homestead leases and grazing leases in question are void

(1) 6 W.A.L.R., 178.

was erroneous, and that the judgment should be varied by omitting that declaration. I must not, however, be taken to assent to the notion that such a declaration could in any event be made in a suit to which the lessees are not parties.

In the view which I take of the construction of the lease it is unnecessary to deal with the question of the competency of the legislature of Western Australia to pass a law impairing the rights of private persons under titles granted before the Constitution, or with the question whether the grant by a lessor of a subsequent lease of the same land followed by dispossession of the first lessee by the second under the supposed authority of his lease would be a breach of a covenant for quiet enjoyment.

BARTON J. I have had the advantage of reading the judgment of the Chief Justice, and consider its reasoning conclusive. I am, therefore, of opinion with His Honor that the judgment should be varied in favour of the Crown by omitting the declaration as to the homestead leases and grazing leases, and that the appeal should be dismissed.

ISAACS J. The homestead leases and the grazing leases impeached by the suppliants were issued under the provisions of the *Homesteads Act* 1893 and the *Land Act* 1898. Those Acts authorize the grant of leases out of Crown lands. The definition of Crown lands in the *Homesteads Act* is as they are defined by the Land Regulations proclaimed on 2nd March 1887, unless the context otherwise requires. Those Regulations defined Crown lands to be lands vested in the Crown, not dedicated to any public purpose, or granted or lawfully contracted to be granted in fee simple, or with a right to purchase under the Regulations. There is no context in the Act requiring any other definition.

Crown lands are defined by the *Land Act* 1898, unless the context necessarily requires, to be substantially as defined by the Regulations, with the addition that they are not to be land held under lease or licence under the *Goldfields Act* or *Mineral Lands Act*.

The lands held by the suppliants under pastoral lease were

H. C. OF A. 1907.

MOORE AND SCROOPE v. THE STATE OF WESTERN AUSTRALIA.

Isaacs J.

therefore, *primâ facie*, clearly within the competency of the Crown to grant as homestead or grazing leases.

But the validity of these leases is challenged for the following reasons. First, it is said that lands held under the suppliants' pastoral lease must be excluded from the definition of Crown lands for this purpose, because to grant the leases in question out of such lands would be a breach of an implied covenant for quiet enjoyment, and therefore the legislature could not have intended the power to extend so far.

This contention turns out to be immaterial, because, on a proper construction of the pastoral lease and the law relating to the contested leases, the latter do not appear to conflict with the former. But, apart from that, I could not accede to this argument, because the words of the legislature are too precise to admit of hesitation; and it is to be noticed that leased land intended to be excepted, as for instance land leased under the *Goldfields Act*, is expressly mentioned.

So far as the construction of the two Land Acts is concerned, there cannot be a doubt that they purport to authorize the issue of the leases. It was also urged in the same connection that, assuming the bare power existed, the Crown must be taken to have impliedly covenanted not to exercise it against the pastoral lessee, as it would be inconsistent with the grant. It does not seem to me very important whether this contention is rested on the doctrine of an implied covenant for quiet enjoyment or on the rule that a grantor cannot derogate from his own grant: See *per Lindley* L.J. in *Robinson* v. *Kilvert* (1).

But this and the previous argument are met by the same answer. If a Statute gives specific authority to do an act in circumstances actually contemplated by Parliament, and which if the act be done must necessarily constitute it a breach of contract, it cannot be said to be unlawful; and the remedy, if any, must be found in some statutory provision. For this the case of *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Anderson* (2) is a distinct authority with special relevance to this case. The company were assignees of the reversion of land of which their assignor had granted a lease to the defendant

(1) 41 Ch. D., 88, at p. 95. (2) (1898) 2 Ch., 394.

with an express covenant for quiet enjoyment. In the exercise of their statutory powers the company executed some works which, it was assumed, would have been a breach of the covenant but for the Act of Parliament. It was held by the Court of Appeal that no action lay for the breach of the covenant, because the works were authorized by Statute. This principle was confirmed by another Court of Appeal in *Long Eaton Recreation Grounds Co. Ltd.* v. *Midland Railway Co* (1). In the first of these cases compensation might have been, and in the second it was successfully, claimed under the *Lands Clauses Consolidation Act* 1845, but no action lay as for a wrongful act.

But then it is said that, assuming so much against the appellants, if the acts were valid, the *Imperial Western Australia Constitution Act* 1890, forbids the issue of the leases as being a contravention of sec. 4 (2) of the State Constitution (53 & 54 Vict. c. 26). That depends upon two considerations: whether the issue of the leases was in breach of the suppliants' contract with the Crown, and whether if it was the Parliament of Western Australia had power nevertheless to authorize their issue. The State Court in the present case followed the case of *Steere* v. *The Minister for Lands* (2) in 1904, which decided that a grazing lease, granted out of lands held under a pastoral lease issued before 1890, would interfere with and prejudice the rights of the pastoral lessee, and that consequently the issue of such a grazing lease was prohibited by the Constitution. Of course, if the grazing lease is not a breach of the contract by the pastoral lease, there is no such prohibition. I am of opinion that the issue of grazing leases under the *Land Act* 1898, or of a homestead lease, is not a violation of that contract, and therefore it is not necessary to consider the very serious argument that, if it were such a violation, the State Parliament is incompetent to authorize it.

The ground upon which the Supreme Court in *Steere* v. *The Minister for Lands* (2) rested its opinion that the grazing lease violates the contract under the pastoral lease, was that the only sales of land comprised within the pastoral lease, permitted by the terms of the contract, were sales in accordance with the

(1) (1902) 2 K.B., 574. (2) 6 W.A.L.R., 178.

H. C. OF A. 1907.

MOORE AND SCROOPE v. THE STATE OF WESTERN AUSTRALIA.

Isaacs J.

Regulations under which the lease was issued, and as a grazing lease was not issuable under the Regulations, but only by the Act of 1898, it fell outside the contract, and therefore outside the power of the Crown, and of the legislature.

With the greatest respect to the opinion of the learned Judges who came to that conclusion, I am unable to accept it.

The starting point from which to consider the question is sec. 7 of the Imperial Act 18 & 19 Vict. c. 56. That section provided that it should be lawful for Her Majesty "to regulate the sale, letting, disposal, and occupatian" of waste lands of the Crown, &c.

The Regulations of 2nd March 1887 provided in Part II., headed *Reserves*, for the disposal of lands in the public interest for certain enumerated objects; in Part IV. for *alienation*, including under that term sales by auction, free selection by conditional purchase by deferred payment and either with residence or without residence, or by conditional purchase by direct payment. Alienation is here evidently used as equivalent to sale, the consideration money being variously termed price or purchase money; and if, instead of *alienation*, Part IV. were headed *sale*, the matter would to this extent be beyond argument.

In Part V. pastoral leases were permitted, this is "letting." In Part VI. mineral lands were dealt with. Part VII. provided for licences for timber cutting. Part VIII. was miscellaneous and dealt with rents, transfers, improvements, special occupation under previous Regulations, special leases, special concessions, &c.

I have referred to these various matters somewhat minutely in order to point to the care with which the Regulations followed the 7th section of the Imperial Act, in regard to the classification of sales, letting, disposal and occupation. It is plain too that, independently of the heading under which they are found, conditional purchases of themselves, when regarded from the standpoint of the Crown, fall naturally under the denomination of sales. The conditions upon which title was ultimately to pass were the means by which the sales were "regulated" within the meaning of the 7th section.

The Regulations prescribed the form of pastoral lease, which is that held by the suppliants. It declares that "We . . . do by these presents demise and lease unto the said lessees . . .

except and always reserved to us . . . full power during the term hereby granted from time to time to sell to any person all or any unsold portion of the said demised premises, subject to any claim for improvements that may be lawfully made in pursuance of the said Regulations, . . . also to sell any mineral land comprised within the said demised premises; and subject to any rights of the lessees as aforesaid to license to occupy, or to sell any other portion of the said premises at any time and with a right of immediate entry."

The habendum runs thus :—" To have and to hold the premises hereby demised, except as aforesaid, and subject to the powers, reservation and conditions herein, and in the said regulations contained, and with all the rights, powers and privileges conferred by such of the regulations as are applicable hereto unto the said lessees," &c., for 21 years.

The learned Judges of the Supreme Court in *Steere's Case* (1) thought that the words " subject to any claim for improvements that may be lawfully made in pursuance of the said Regulations" showed clearly that the only power of sale contemplated was a sale under the Regulations, and therefore there could be no other except such as would be a violation of the contract. In my opinion, at the moment and until the Regulations were altered, the only sales possible were those specified in the existing Regulations, yet the power to sell, which was reserved, was a power to sell by any means by which the Crown could at any given time lawfully sell as between the Crown and a purchaser: such sale might be under the then existing Regulations or any future Regulations which the third of the Regulations of 2nd March 1887 reserved power to make; or to follow the concluding words of the 7th section of the Imperial Act as " Parliament shall otherwise provide." What concerned the pastoral lessee in that connection was not the method, or terms of sale by the Crown to another person, but the payment to him for improvements. What did it matter to the pastoral lessee if the land were sold outright by direct payment, or upon terms extending over twenty or fifty years, or by the medium of a transaction called a conditional purchase or a grazing lease? So long as payment

(1) 6 W.A.L.R., 178.

H. C. OF A. 1907.

MOORE AND SCROOPE v. THE STATE OF WESTERN AUSTRALIA.

ISAACS J.

for improvements as provided by the Regulations was secured, the terms of the bargain between the Government and the purchaser could not possibly affect the pastoral lessee. I find it difficult to understand how the pastoral lessee could have any vested right in the method by which the Crown sold to a third person. That was no business of his. He must be taken to know that under sec. 7 of the Imperial Act the power always existed to make new Regulations regarding the sale of lands, which the Crown had power to sell at all, as well as the power of Parliament to otherwise provide which was in fact, though unnecessarily, expressly referred to. The words relied on by the Supreme Court have full operation to protect the pastoral lessee if limited to payment for improvements, and not extended to qualify the Crown's methods of selling Crown lands. The other extracts from the lease, already quoted, strongly support the view I have just expressed. So long as the Crown sells the land, it may, without any violation of the contract with the suppliants, sell it upon any terms and conditions which Parliament may authorize. No issue arises or could arise in this case as to payment for improvements. The only material question remaining is whether the homestead and grazing leases are properly to be termed sales. The *Homesteads Act* 1893 is intituled "An Act to provide facilities for permanent settlement by free grants of land for household farms and by homestead leases," &c. Homestead leases are for thirty years at a rent ranging from one penny to three pence per acre per annum; section 21 declares that "the said rents shall respectively be due and be paid in advance on the 1st day of March in every year." It is true that, in case of failure to pay regularly or with a fine if in arrear, his lease and the land and improvements shall be forfeited. But he is under a statutory obligation to pay, whatever may be the statutory remedy for non-payment. Section 23 requires him also to comply with conditions which obviously point to the intention of his permanently retaining the land as against the Crown. By sec. 25, if he has duly paid his rent and observed the conditions, he is entitled on payment of fees to a Crown grant of the lands. Section 26 permits him to accelerate the granting of title. Sec. 29 recognizes rights properly attributable to a virtual purchaser

of the land. Broadly looked at, the issue of a homestead lease is only the first step in a continuous and connected process by which the Crown transfers for a fixed price its land to a permanent settler. A homestead lessee would undoubtedly regard the land as his, subject only to payment of the deferred price, and compliance with the conditions. There is no intention that his interest in the land shall terminate in thirty years; on the contrary the intention is that it shall then or sooner ripen by virtue of his contract into absolute ownership. It therefore answers more properly to a "sale" than to a "letting" within the meaning of the 7th section of the Act 18 & 19 Vict. c. 56, the Regulations, and the lease. To use the words of Lord *Herschell*, L.C. in *Helby* v. *Matthews* (1): "Unless there were a breach of contract by the party who engaged to make the payments the transactions necessarily resulted in a sale." Here the lessee applied for a lease on the basis of an Act of Parliament requiring him to pay the rent regularly during the whole period, and, unless there was a breach of that and other obligations, the transaction necessarily resulted in a sale.

In *McEntire* v. *Crossley Bros.* (2), there was an agreement by which the "owners and lessors" as they were called of a gas-engine agreed to let, and the "lessee" as he was called agreed to hire the engine at a rent to be paid by instalments amounting in all to £240; upon payment in full the agreement was to be at an end and the engine to become the property of the lessee, but until payment in full to remain the sole and absolute property of the lessors. It was also agreed that in case of failure to pay any of the instalments the lessors might elect either to recover the balance due, or instead resume possession of the engine and sell it, and, after retaining out of the purchase-money all expenses and the balance remaining due, pay the surplus to the lessee. It was held that looking at the substance of the agreement it was one of sale and purchase, though the property did not pass till full payment. Lord *Watson* said (3):—"Although the words 'lessors' and 'hirer' are used and the word 'rent' also occurs, it is perfectly plain that the agreement is one of sale and purchase, and nothing else."

(1) (1895) A.C., 471, at p. 478. (2) (1895) A.C., 457.
(3) (1895) A.C., 457, at p. 467.

H. C. OF A. 1907.

MOORE AND SCROOPE v. THE STATE OF WESTERN AUSTRALIA.

ISAACS J.

There are, of course, points of difference between that bargain and the bargain arising in a homestead lease, but there is also considerable resemblance, and, looking at the substance in either case, each seems to me alike in this that it amounts to an agreement to sell the property the subject matter of the transaction. The policy of the Land Acts requires some guarantee that a homestead lessee will permanently settle, and this guarantee is found by the legislature in his compliance with the conditions of sale.

As to the grazing lease, the statutory provisions in sec. 68 of the *Land Act* 1898 are, if anything, even stronger to show that the nature of the transaction is essentially a sale.

In the result, the issue of the challenged leases is no breach of agreement with the pastoral lessee, because, when regarded in their substance, they are a kind of conditional purchase and sale, differing only in form from the conditional purchases and sales provided for in the Regulations of March 1887, and therefore the appeal should be dismissed except to the extent mentioned.

It follows that the decision in the case of *Steere* v. *The Minister for Lands* (1) cannot be supported inasmuch as a grazing lease is not a breach of the Crown's contract in the pastoral lease—the other branch of that case being as I have said immaterial to consider. It is also, in the view I have taken, useless to discuss, and therefore I offer no opinion, how far an implied covenant for quiet enjoyment is broken by a subsequent grantee from the same lessor, entering the demised property under a claim of right by virtue of the grant. Such a question could not arise where, as here, the original lease expressly reserved to the lessor the right to make the grant and so empowered the act complained of.

Appeal dismissed. Judgment appealed from varied by omitting declaration of invalidity of homestead and grazing leases in question.

Solicitors, for the appellants, *James & Darbyshire.*
Solicitor, for the respondent, *Barker* (Crown Solicitor).

N. G. P.

(1) 6 W.A.L.R., 178.