[HIGH COURT OF AUSTRALIA.]

O'KEEFE AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

WILLIAMS . . . . . RESPONDENT,
NOMINAL DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 29, *Dec.* 2, 3, 9.

Griffith C.J. Barton and Isaacs JJ.

Crown Lands Act 1884 (*N.S.W.*) (48 *Vict. No.* 18), *secs.* 5, 6—*Crown Lands Act* 1889 (*N.S.W.*) (53 *Vict. No.* 21), *sec.* 33—*Crown Lands Act* 1895 (*N.S.W.*) (58 *Vict. No.* 18), *sec.* 49—*Occupation licence—Relationship between Crown and licensee—Agreement by Crown not to disturb licensee—Implication of covenant for quiet enjoyment—Powers of Minister with respect to Crown lands—Estoppel—Res judicata.*

An occupation licence under the Crown Lands Acts is an annual tenure of land, in respect of which the licensee pays fees subject to re-appraisement, and which is renewable under certain conditions from year to year. The holder of such a licence agreed with the Government that there should be a re-appraisement of the licence fees, but before the re-appraisement the Government demanded payment at the original rates. The licensee failed to pay the amounts claimed, and the Government published a notification in the *Government Gazette* that the licence had not been renewed. The result of the notification, if valid, was that the lands in question became Crown lands available for occupation under annual lease.

In an action by the licensee against the Government for damages for breach of contract the declaration alleged that the licensee then agreed with the Government that, in consideration of his paying the fees demanded, the notification should be withdrawn and he should be permitted, subject to the provisions of the Crown Lands Acts, to quietly enjoy the area so long as the licence should be renewed, free from interference, disturbance, or eviction by the Government or persons claiming under it by matter subsequent to the payment of the fees in question. The fees were paid by the licensee, but the notification was not revoked, and an annual lease was granted to another person of portion of the area.

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By the decision of the Privy Council in *O'Keefe* v. *Malone*, (1903) A.C., 365, the Crown was not entitled to the fees demanded in respect of the lands in question, and the licensee was, therefore, entitled to remain in possession under his licence.

Held, on demurrer to the declaration, that it disclosed a good cause of action. The agreement, regarded as an agreement by the Crown for valuable consideration not to do any act in violation of the rights of the licensee, was a valid exercise of the power of the Executive to make contracts with respect to the lands of the Crown within the limits imposed by Statute; and, if the rights of the parties had been doubtful, the contract would have been good as a compromise of a *bonâ fide* dispute. Even if the Crown had been entitled to the fees demanded, and the licence had therefore become liable to forfeiture for breach of the condition of payment of fees, the agreement on the part of the Crown would have been justifiable as an exercise by the Minister of the power of waiver conferred by sec. 6 of the *Crown Lands Act* 1891.

Quære, whether there is an implied covenant for quiet enjoyment in the tenure created by an occupation licence under the Crown Lands Acts.

The local Land Boards, subject to appeal to the Land Court, have jurisdiction to entertain applications for annual leases of Crown lands, and to make recommendations thereon to the Minister.

Held, that, where the lands, as to which an application for an annual lease was made, were lawfully held under an occupation licence, though the area was by the Crown Lands Acts liable to disposition by the Crown in certain ways adversely to the licensee, yet it was not Crown lands available for annual lease, and was consequently not subject to the jurisdiction of the Land Board for the purpose of such an application, and, therefore, an erroneous decision to the contrary by the Land Court did not create an estoppel as between the licensee and the Crown in any subsequent proceedings with respect to the same area.

Per Griffith C.J.—The Crown is not a party to the proceedings before a Land Board on such an application, and, therefore, in any case between a subject who had been a party and the Crown, estoppel could not arise, owing to want of mutuality.

Decision of the Supreme Court: *O'Keefe* v. *Williams*, (1907) 7 S.R. (N.S.W.), 304, reversed.

APPEAL from a decision of the Supreme Court of New South Wales.

The appellants, executors of the estate of Andrew O'Keefe, were plaintiffs in an action against the respondent, as nominal defendant on behalf of the Government. The declaration alleged that the testator had become the holder by assignment of an occupation licence and a preferential occupation licence under the

Crown Lands Acts 48 Vict. No. 18, sec. 81, and 53 Vict. No. 21, sec. 33; and that, in consideration of the testator making certain payments in respect of fees wrongfully demanded by the Government for the lands held under the licence, the Government agreed, *inter alia*, to permit him to quietly enjoy the lands during the year 1900 and any succeeding years in respect of which the licence might be renewed free of disturbance or eviction by the Government or any person claiming under it by matters subsequent to the payment mentioned, and that the Government in breach of this agreement gave annual leases of portions of the area to other persons, and put the testator to great expense &c. in consequence. The material portions of the declaration are more fully stated in the judgment of *Griffith* C.J. The defendant pleaded, *inter alia*, estoppel by a judgment of the Land Court that the lands in question were available for annual lease, in a proceeding at which the testator appeared as an objector. The plaintiffs demurred to the plea on the ground that the determination of a Land Board or Land Court in an application for an annual lease cannot work an estoppel, as their function is advisory only. Defendant joined in demurrer and gave notice of intention to object to the declaration as being bad in substance upon the ground that the agreement sued upon was void.

After argument the Supreme Court gave judgment for the defendant on the demurrer: *O'Keefe* v. *Williams* (1).

From this decision the present appeal was brought.

Canaway, for the appellants. An occupation licence is equivalent to a demise by parol; there is no real distinction between a lease and a licence in respect of their incidents under the Crown Lands Acts. [He referred to 48 Vict. No. 18, secs. 81, 128; 53 Vict. No. 21, sec. 33; 58 Vict. No. 18, sec. 4.] The Crown being in the position of landlord in respect of the Crown estate, its lessees or licensees have the rights and liabilities of tenants as against the Crown, except so far as it is expressly provided to the contrary by Statute. [He referred to *The Queen* v. *Mayor of City of Wellington* (2); *Kickham* v. *The Queen* (3); *McCulloch*

(1) (1907) 7 S.R. (N.S.W.), 304. (2) 15 N.Z.L.R., 72.
(3) 8 V.L.R. (E.), 1.

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v. *Abbott* (1); *Blackburn* v. *Flavelle* (2); *Blackwood* v. *London Chartered Bank of Australia* (3).] There being the relationship of landlord and tenant, the principles of law governing that relationship apply. Every demise by parol contains an implied covenant for quiet enjoyment. [He referred to *Bandy* v. *Cartwright* (4); *Hall* v. *City of London Brewery Co. Ltd.* (5); *Robinson* v. *Kilvert* (6); *Jones* v. *Lavington* (7); *Budd-Scott* v. *Daniell* (8); *Roberts* v. *Birkley* (9); *Lamb* v. *Evans* (10); *Amer. and Eng. Encyc. of Law*, 1st ed., vol. IX., p. 964. The Crown is in the same position as a private landlord in this respect: *Macdonald* v. *Tully* (11); *Ricketson* v. *Smith* (12); *Ricketson* v. *Cook* (13); *Farnell* v. *Bowman* (14).

[GRIFFITH C.J.—But the Crown can only deal with the land in the ways prescribed by the Statute. How can you say that a covenant is implied that it will not do what it cannot legally do?

BARTON J.—The covenant for quiet enjoyment is only as against persons lawfully claiming under the landlord.]

That is, lawfully claiming as between the landlord and the person claiming. Even though the Crown had no statutory right to effectively interfere with O'Keefe's possession, they might attempt to do so and cause him serious actual disturbance.

[GRIFFITH C.J.—But if the Crown attempted to do so, would it not be a trespass rather than a breach of covenant? Does not a breach of covenant for quiet enjoyment import an eviction by title paramount.]

It may be both a trespass and a breach of covenant.

[ISAACS J. referred to *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Anderson* (15); *Long Eaton Recreation Grounds Co.* v. *Midland Railway Co.* (16); *Child* v. *Stenning* (17); *Brashier* v. *Jackson* (18).]

Apart from the implication of a covenant, there was an express agreement by the Crown not to disturb the licensee. Such an

(1) 6 N.S.W.L.R., 212.
(2) 1 N.S.W.L.R., 58.
(3) L.R. 5 P.C., 92.
(4) 8 Ex., 913; 22 L.J. Ex., 285.
(5) 2 B. & S., 737; 31 L.J.Q.B., 257.
(6) 41 Ch. D., 88.
(7) (1903) 1 K.B., 253.
(8) (1902) 2 K.B., 351.
(9) 14 V.L.R., 819.
(10) (1893) 1 Ch., 218.
(11) 1 Q.L.J. (Supp.), 21.
(12) 16 N.S.W.L.R., 221.
(13) 20 N.S.W.L.R., 438.
(14) 12 App. Cas., 643.
(15) (1898) 2 Ch., 394.
(16) (1902) 2 K.B., 574.
(17) 11 Ch. D., 82.
(18) 6 M. & W., 549.

agreement is valid. It is ancillary to the kind of tenure created by the Crown Lands Acts, and effectuates the intention of the legislature. The power of the Crown to contract is limited only by Statute. There was valuable consideration for the Crown's promise. There was a *bonâ fide* dispute as to the Crown's right to the payments claimed, and the agreement made was a compromise. It in no way conflicted with the provisions of the Crown Lands Acts, and was not against public policy.

[ISAACS J. referred to *Callisher* v. *Bischoffsheim* (1); *Miles* v. *New Zealand Alford Estate Co.* (2).]

Piddington (*H. M. Stephen* with him), for the respondent. The declaration sets up an express agreement, not an implied covenant, to deal with Crown lands in a particular manner. That agreement is *ultra vires*. By secs. 5 and 6 of the 48 Vict. No. 18 the Crown may not deal with Crown lands except in accordance with the provisions of the Crown Lands Acts.

[GRIFFITH C.J.—The second agreement alleged has nothing to do with the Crown Lands Acts. An agreement not to alienate lands in violation of the Act may or may not be nugatory, but it is not on that account unlawful.]

This agreement was to deal with the lands in a way contrary to the provisions of the Act. The Minister had no power to make a compromise. If he thought that under the Act the Crown had a right to the sums claimed, he was bound to insist upon the payment.

[GRIFFITH C.J. referred to *Davenport* v. *The Queen* (3).]

The Executive are virtually trustees to deal with the Crown estate as the law requires. The effect of the agreement alleged is to dispose of Crown lands to the prejudice of other claimants, contrary to the Statute. 53 Vict. No. 21, sec. 33 gives the first applicant a right to the lease, and the Crown's agreement with O'Keefe would defeat that right. [He referred to *Martin* v. *Baker* (4); *King* v. *McIvor* (5).] The declaration merely shows an agreement to issue a licence, not a right to have a licence. It does not allege compliance with the provisions of sec. 81 of 48

(1) L.R. 5 Q.B., 449.
(2) 32 Ch. D., 266.
(3) 3 App. Cas., 115.
(4) 1 Knox, 418 (N.S.W.).
(5) 4 N.S.W. L.R., 43.

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Vict. No. 18. The consideration offered by O'Keefe is an illegal consideration, and at the best the Crown simply agreed to do what the law required, so that there was no consideration for O'Keefe's promise.

[ISAACS J.—Does it lie in the Minister's mouth to say that ?]

In order to constitute a valid contract there must be mutuality. If there was any consideration for the Crown's promise the Crown was not entitled to accept it or to exact it. The grant of tenures is not a matter of contract, but of statutory right on the one side and duty on the other. Such a contract is contrary to public policy. It is virtually an agreement not to treat the lands as Crown lands.

[GRIFFITH C.J.—But they were not Crown lands as between O'Keefe and the Crown until notification, and the Crown had no right to lease them to another.]

As regards the implication of a covenant for quiet enjoyment, the occupation licence is not a demise but a statutory tenure, with statutory incidents, and such a covenant cannot be implied, nor would it be in the power of the Crown to make it. [He referred to *O'Keefe* v. *Malone* (1); *Edols* v. *Tearle* (2); 48 Vict. No. 18, secs. 95, 126; 53 Vict. No. 21, sec. 10; 58 Vict. No. 18, secs. 10, 49.] If the Statute authorizes interference with the licensee no action will lie in respect of it, (see sec. 33 of 53 Vict. No. 21), and if it does not authorize it the interference is a trespass, not a breach of contract. [He referred to *Williams* v. *Gabriel* (3).] This action cannot be treated as one of trespass, and if it could, the person to whom the lease was granted was not the agent of the Crown to commit a trespass.

The plea of estoppel is good. O'Keefe and the Crown were parties to the proceedings before the Land Court, which decided that the lands in question were available for annual leases. [He referred to *Outram* v. *Morewood* (4); sec. 8. (3) of 48 Vict. No. 18.]

[GRIFFITH C.J.—In *O'Keefe* v. *Malone* (5) the Privy Council held that the land was not available for lease when leased to Malone. The Land Court therefore had no jurisdiction to decide as they did.

(1) (1903) A.C., 365, at p. 377.
(2) 7 N.S.W. L.R., 374; 8 N.S.W. L.R., 518.
(3) (1906) 1 K.B., 155.
(4) 3 East, 345.
(5) (1903) A.C., 365.

[ISAACS J. referred to *The Queen* v. *Hutchings* (1); *Wakefield Corporation* v. *Cooke* (2).]

It was a necessary ingredient in the matter which the Land Court had to decide, involving a question of fact, the decision of which was a condition precedent to the exercise of their jurisdiction. Their decision on such matters is final, between the present parties. [He referred to 48 Vict. No. 18, secs. 11, 13, 14, 17, 30, 31; *Attorney-General for Hong Kong* v. *Kwok-A-Sing* (3).] The decision of the Privy Council in *O'Keefe* v. *Malone* (4) does not affect the validity of this defence for the Crown in this case. The decision of the Land Court was that of a competent Court, binding the parties to it. [He referred to *The Queen* v. *Commissioners for Special Purposes of the Income Tax* (5).]

Canaway in reply. Estoppel does not extend to matters that are only incidentally or collaterally in question. Moreover the decision of the Land Court was erroneous, and the lands were not in fact or in law within their jurisdiction. Under such circumstances the appellants are not estopped: *Pearson* v. *Spence* (6).]

Cur. adv. vult.

1907 Dec. 9.

GRIFFITH C.J. This is an action brought by the plaintiffs against a nominal defendant on behalf of the Government for the breach of an express contract set out in the declaration. Amongst other pleas defendant pleaded that the plaintiff was estopped from making certain allegations for the success of his case, and he demurred to the plea. The Supreme Court held that the declaration was bad.

The nature of the contract was that the Government would not interfere with the plaintiffs in the occupation of certain land, which was in one sense Crown land, but to the occupation of which as against the Crown the plaintiffs were entitled. The nature of the plaintiffs' title was what is called an occupation licence, and a preferential occupation licence under the *Crown Lands Act*, which is an annual tenure, and is renewable. The nature

(1) 6 Q.B.D., 300.
(2) (1904) A.C., 31.
(3) L.R. 5 P.C., 179.
(4) (1903) A.C., 365.
(5) 21 Q.B.D., 313, at p. 319.
(6) 5 App. Cas., 70.

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and incidents of that tenure were discussed in the case of *O'Keefe* v. *Malone* (1) in the Privy Council with respect to the same piece of land as to which the agreement now in question was made.

The declaration sets out facts showing that, according to the decision of the Privy Council in that case, the plaintiffs were entitled as against the Crown to undisputed occupation of the land in question. They then allege by way of inducement some subsidiary agreement as to re-appraisement of the rent of the land, and that in breach of that subsidiary agreement the Government had demanded from them payment of certain licence fees which, under the decision of the Privy Council, were not payable, and, those fees not having been paid, notified in the *Gazette* that the plaintiffs' licences were not renewed. If that notification had been valid the land had become available to be taken up under another tenure called an annual lease, as indeed was actually done, in the belief that the notification was valid. Having set out these facts by way of inducement, the plaintiffs allege that the Government and they entered into a further agreement that in consideration that the plaintiffs would forthwith pay the amount demanded by the Government, the notification in the *Government Gazette* should be revoked within a reasonable time after payment, and as from the date of the payment, and that the plaintiffs should be permitted, subject to the provisions of the Acts, to enjoy the land during the year 1900 and any succeeding year in respect of which the occupation licence and preferential occupation licence should be renewed, free from interference, disturbance, or eviction, on the part of the Government or any person claiming under it by matter subsequent to the said agreement. They then go on to allege that they accordingly performed the contract on their part by paying the amount demanded and then allege as a breach that the Government did not revoke the proclamation as agreed, and did not permit the plaintiffs, subject to the provisions of the Acts, to quietly enjoy the land in question during the term specified, but on the contrary allowed it to be treated as open for annual lease, and granted annual leases of the same land to other persons, and authorized them to enter upon it and dispossess the plaintiffs.

(1) (1903) A.C., 365.

It is to be noted that the agreement alleged is that the plaintiffs should be allowed to enjoy the land subject to the provisions of the Lands Acts. Now, under this particular tenure the occupation licence was good as between the Crown and the licensee, but land held under that tenure was liable to alienation under various provisions of the law. It was not liable to be alienated by annual lease. The agreement alleged, therefore, is, in effect, that the Government would not interfere with the occupation of the land by granting annual leases of it to other persons, that being the only form of alienation that was not permitted.

The Supreme Court held that the declaration was bad, on the ground, as I understand them, that it is not competent for the Minister to make any contract on behalf of the Crown with respect to Crown lands which is not expressly authorized by Statute. The learned Chief Justice gave a somewhat different reason for his decision.

On the argument before us it was contended for the plaintiffs that the declaration not only contained a statement of an express agreement with the Government, but also showed on its face an implied agreement in the nature of a covenant for quiet enjoyment, which, it was said, followed from the nature of the title which the plaintiffs had. Now, the implication of a covenant arises from necessity. What covenant, if any, it is necessary to imply in order to give effect to the relation between the Government and a subject in occupation of Crown land is an interesting question. It was argued at some length, and the contention raises a difficult point as to what would be a breach of such an implied covenant, but it is not necessary to answer it, as, in the view I take, the matter should be determined as a case of express contract. I entirely agree with the Supreme Court in the proposition that no Minister of the Crown has any authority to enter into any agreement for the disposition of an interest of the Crown in Crown lands which is not authorized by the law, and I agree that that applies to any interest which the Crown has power to dispose of; but it appears to me to have no relation at all to an agreement relating to the interest of a subject in land, which, although it is Crown land for certain

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purposes, is, as between the Crown and the subject, the property of the subject, and not of the Crown.

There is no reason why the Minister should not, for instance, agree with a subject as to the use and occupation of his lands, although they are for some purposes Crown lands, any more than if the lands were freehold. So it appears to me that the doctrine relied upon by the Supreme Court has no application to the case. The land in this instance, as between the Crown and the plaintiffs, was not Crown land; although for certain purposes it could be treated as Crown land, yet for certain other purposes it was not Crown land but the land of the plaintiffs, to which they had a good title. The subject matter of the title was therefore not Crown land within the meaning of the document in question. The question, therefore, is whether such an agreement as that alleged is within the general powers of the Executive Government. The question of the authority of the Minister does not arise under the *Crown Lands Act* at all, but depends upon the general authority of the officers of the Executive Government to make ordinary contracts relating to the administration of public affairs.

In substance, then, the case was this: The Crown claimed, wrongfully, to be entitled to dispossess a subject of his land in a particular manner. What they proposed to do would have been an unlawful, and, in one sense, an ineffectual act. He objected to their doing so, and thereupon an agreement was made for valuable consideration—because the money which he agreed to pay was not payable in point of law—that they would not do this unlawful act for a specified time. How can such an agreement as that be unlawful, or even invalid?

From another point of view it is a lawful settlement of a *bonâ fide* dispute. In either point of view the promise is good, and a breach of it is admitted.

I have pointed out that on the face of the declaration it appears that the plaintiffs had a good title, and that what the Government proposed to do was unlawful. But suppose that the contention of the Government had been right and that the Government were entitled to dispossess the plaintiffs, though that, as I have pointed out, has been held by the Privy Council not to

be the law. If it had been, then the agreement would have been expressly authorized by the law. The attention of the Judges of the Supreme Court was not called to this point, but sec. 6 of the *Crown Lands Act Amendment Act* 1891 provides that in any case in which any licence "becomes liable to forfeiture by reason of the non-fulfilment of any condition annexed by law to such . . . licence, but in which the Minister shall be satisfied that such non-fulfilment has been caused by accident, error, mistake, inadvertence, or other innocent cause, and that such forfeiture ought therefore to be waived, it shall be lawful for the Minister to declare that such forfeiture is waived, either absolutely or upon such conditions as he may see fit to declare, and the forfeiture shall thereupon be waived accordingly," and so on. Now the only condition in this licence was the payment of rent at a prescribed time and in a prescribed manner. If there had been a default on the part of the plaintiffs, that would be a ground for forfeiture which could have been waived by the Minister upon such conditions as he might see fit to declare. If he was entitled to declare the conditions for the acceptance of the plaintiffs, it was not unlawful to negotiate with the plaintiffs as to what conditions should be imposed. So that if the Government's contention had been right and there was strictly speaking a right to forfeit these lands, the agreement not to do so would have been within the express powers of sec. 6.

I think, therefore, the declaration discloses a good cause of action.

With respect to the plea, which set out that the Land Court had decided that this was Crown land available for annual lease, and that, therefore, the plaintiffs were estopped from suing, the foundation of that plea is that the Land Court had jurisdiction to determine whether the piece of land was Crown land. There is no provision of the law cited to us that in any way supports that contention. The plea alleges that the plaintiffs became a party to some proceedings of the Land Court, and the Crown also became a party. The plaintiffs, it is true, appeared before the Land Court and objected that it had no jurisdiction to entertain the matter because the land was the plaintiffs'. That was only as to a portion of the land, which in itself would have been

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fatal to the plea. But, further, an estoppel must be between the same parties, and if the plaintiffs had made a mistake in litigating the matter in the Court below, that does not enable the Crown to set up the plea of estoppel as against them unless the Crown was a party. The Crown is not a party to proceedings in the Land Court. There is no proceeding between the Crown and its subjects in the Land Court, and therefore the Court has no jurisdiction to bind them. There is nothing in the Statutes to support the contention that a proceeding of the Land Appeal Court is in any way conclusive between the Crown and its subjects.

For these reasons I am of opinion that the plaintiffs are entitled to judgment on the demurrer.

BARTON J. I am of the same opinion.

ISAACS J. read the following judgment. The plaintiffs' claim rests on breach of contract, and I think, moreover, the declaration aims, not at the breach of a contractual obligation to be implied from the original relation of the parties, but only at the breach of the alleged new and separate special contract, made upon fresh consideration.

The defendant impeaches the contract alleged as illegal or *ultra vires*.

In the first place the statutory right, which had passed from the Australian Mortgage Land and Finance Co. Ltd. to Andrew O'Keefe, and which must be taken to imply that all the conditions of the Act entitling the runholder to the occupation licences had been fulfilled, was in my opinion a contractual right. I agree with the observations on this point made by *Denniston* J. speaking for the Court of Appeal in *The Queen* v. *Mayor of the City of Wellington* (1). The learned Judge said:—"The Governor, on behalf of the Crown, deals with the lands of the Colony under the directions of the legislature, to which legislation the Crown is of course a party. If, therefore, the legislature creates an obligation on the Crown, with its assent, to convey land to a specified person or body, upon and in consideration of such person or body doing something on his or its part, it seems to us that

(1) 15 N.Z.L.R., 72, at p. 86.

that constitutes an agreement or contract on the part of the Crown."

So in *Kettle* v. *The Queen* (1), *Sir Robert Molesworth* said:—"I think, when a Victorian Act, assented to by the Queen, authorizes persons of a certain description, having their rights authenticated by the Board of Land and Works, to proceed to the district land officer, and (subject to regulations as to competition) select defined lands, and pay him a year's rent for it, and thereby become entitled to a certain interest in the land, that the transaction completed by payment constitutes a claim or demand founded on and arising out of a contract entered into on behalf of Her Majesty, or by the authority of her local Government, within the meaning of the Act 241, sec. 7."

That Act was the *Crown Remedies Act* enabling a suit to be brought against the Crown if founded on contract.

The Attorney-General of Victoria v. *Ettershank* (2) was a case where the Privy Council dealt with an objection that a claim by a leaseholder to a grant in fee, to which a Statute entitled him, was not a claim founded on contract. Their Lordships said:—"It was said that the right to the grant of the fee was not given by contract but by Statute. It is true that the right is created by the Statute, but it is conferred upon the holder of a lease, and accrues to him by reason of such lease, and only upon payment of the full rent agreed to be paid under it. It is a statutory right annexed to the lease, and an implied term of the contract, and therefore may be properly said to be founded on and to arise out of it."

The principle of those observations conclusively establishes that the right which Andrew O'Keefe had to the licences was by contract with the Crown.

The Crown Lands Acts bear internal testimony to the fact that the legislature appreciated and recognized this principle. Not only have words of ordinary contractual connotation, such as sale, purchase, auction sale, conditional purchase, lease, and licence, been employed, but in various places the very word "contract" or "contracted" is used.

For example in the Act of 1884 by sec. 4 the expression "Crown

(1) 3 W.W. & aB. (E.), 50, at p. 59. (2) L.R. 6 P.C., 354, at p. 372.

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Lands" includes lands "lawfully *contracted* to be granted in fee simple." "Lease" means land not alienated by or held under any lease or *promise* of lease or licence from the Crown. Again in sec. 128 reference is made to "*any promise engagement or contract* from or with the Crown or its *agents* lawfully authorized in that behalf."

In the Act of 1891 sec. 2, "Forfeiture" includes the lapse or avoidance of any contract with the Crown, &c.

It may fairly be said that the whole frame of the *Crown Lands Act* shows that the legislature has merely enacted the method and conditions upon which the Crown may contract for the disposal of its interest in the public lands.

Now, it being the clear duty of the Crown to perform its obligation to O'Keefe, one other principle pertinent to the matter may with advantage be referred to. In every contract there is an obligation, implied where not expressed, that neither party shall do anything to destroy the efficacy of the bargain he has entered into. If authority were necessary for so obvious a proposition it is found in such cases as *Stirling* v. *Maitland* (1); *Hamlyn & Co.* v. *Wood & Co.* (2); *Hooper* v. *Herts* (3); and *Anning* v. *Anning* (4); and latest of all, *The Lyttelton Times Co. (Ltd.)* v. *Warners (Ltd.)* (5).

The Crown, however, according to the allegations in the declaration, insisting on certain payments which in law it had no right to demand, was about to break its obligations to O'Keefe, and he, in order to induce the Crown to forbear from committing an illegal act to his prejudice, consented to pay and did pay the sums demanded as the consideration for a special promise by the Government to desist from their intention. The Government took his money and have ever since retained it, but nevertheless persisted in granting to the persons permission to enter, in pursuance of which those persons entered and caused damage to the plaintiffs.

It is said that the agreement so set up is either illegal or *ultra vires*. In my opinion it is neither. It cannot be illegal to

(1) 5 B. & S., 840.
(2) (1891) 2 Q.B., 488.
(3) (1906) 1 Ch., 549.
(4) 4 C.L.R., 1049.
(5) 23 T.L.R., 751.

agree to refrain from illegality. The Lands Acts place restrictions on the disposal of Crown lands, but so long as the conditions imposed by the legislature are observed, and no unlawful course is entered upon, the Minister, to whom the Crown deputes the function of dealing with the public in connection with those lands, must surely have powers that are at least as wide as those impliedly possessed by the business manager of some private individual in the conduct of the business.

Whether we accept the situation as it actually was, namely, that the Government undertook for valuable consideration not to do what it would have been illegal to do and to do what it was already bound to do, or whether it be assumed that, contrary to what has been determined by the law, the Government was correct in demanding the higher rent on pain of forfeiture, and was exercising its power of waiver, for a consideration which was only one form of condition, the agreement set up was quite within the authority of the Government. Therefore, whether the basis of the agreement sued on be prior contractual obligation, or a merely statutory duty towards O'Keefe, or be the exercise of the power of waiver or compromise of the Crown's right of forfeiture, the same conclusion is reached. If the bargain was illegal, what law did it contravene? If *ultra vires*, it must be *ultra vires* of the Crown itself, and how is that to be established? How is the original and inherent right of the Crown to make contracts relative to its lands fettered except by the restriction of the Lands Acts, all of which were complied with here?

Section 6 of the Act of 1884 is in these terms:—"The Governor on behalf of Her Majesty may grant dedicate reserve lease or make any other disposition of Crown lands but only for some estate interest or purpose authorized by this Act and subject in every case to its provisions." The remainder of the section is immaterial. What is alleged here cannot be said to contravene that section. If not *ultra vires* of the Crown itself, who could exercise the power? Is it the King in person, or the Governor? By what means could the Crown delegate its authority better and more completely than by entrusting the power of bargaining with the public, as has been done, to the officers, political and permanent, who conduct the Lands Department of the State?

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Isaacs J.

Subject to the provisions of the Crown Lands Acts, the Minister of the Crown charged with the administration of those Acts represents the Crown. It is not unworthy of notice that the Privy Council in *Attorney General of Victoria* v. *Ettershank* (1), on the question of waiver and forfeiture, laid stress on the fact that Ettershank on applying for his lease was led to believe by the President of the Land Board that it would be issued for an existing interest which he might safely purchase.

It is unnecessary at this stage of the case to pursue the investigation further with respect to the declaration, because it is sufficient for the moment to determine that it discloses a good cause of action.

With regard to the 5th plea, that can be very shortly dealt with. The jurisdiction of the Land Board, and through it the Land Appeal Court, depended entirely on the question whether or not the land was Crown lands under lease and licence. If it was, the Land Board's decision, and that of the Land Appeal Court, were immaterial and may be disregarded. It was sought to support the plea of estoppel on the ground that these tribunals must have determined at the outset that the lands were available, and therefore were not held under lease or licence, and that this binds O'Keefe. In my opinion, the vice of that argument consists in this, that it overlooks the one fundamental and decisive consideration, namely that, granting the tribunals would for the purpose of the day form their own opinion on the point, yet it is not a matter which has by the legislature been made directly cognizable by them. The consequences of making the determination of a Land Board or Land Appeal Court final and conclusive as to whether any land in New South Wales, public or private, was available or not available for annual lease so as to affect existing titles, are too apparent to need extended comment.

The principle upon which *Reg.* v. *Hutchings* (2), and its converse case, *Wakefield Corporation* v. *Cooke* (3), were decided, determines the point against the plea.

(1) L.R. 6 P.C., 354. (2) 6 Q.B.D., 300.
(3) (1904) A.C., 31.

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The case of *Pearson* v. *Spence* (1), cited by Mr. *Canaway*, is quite in point in support of his contention.

I agree that the appeal should be allowed, and that the demurrers to declaration and plea be decided in favour of the plaintiffs.

Appeal allowed. Judgment for defendant discharged and entered for plaintiffs. Respondent to pay costs of appeal.

Solicitors, for the appellants, *Villeneuve-Smith & Dawes.*

Solicitor, for the respondent, *The Crown Solicitor for New South Wales.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

IRVING (COLLECTOR OF CUSTOMS FOR THE STATE OF QUEENSLAND). COMPLAINANT, } APPELLANT;

AND

JENGORA NISHIMURA AND ANOTHER . DEFENDANTS, RESPONDENTS.

ON APPEAL FROM THE DECISION OF A POLICE MAGISTRATE EXERCISING FEDERAL JURISDICTION.

H. C. OF A. 1907.

BRISBANE, *Oct.* 4.

Griffith C.J., Barton and Isaacs J.J.

Customs Act 1901 (*No.* 6 *of* 1901), *secs.* 233, 250, 255—*Unlawfully having possession of goods—Evidence of possession—Importation—Knowledge.*

The fact that a person has certain packages of goods in his possession, which he is in the act of importing into Australia, is evidence that he is aware of the contents of such packages and is in possession of such contents within the meaning of sec. 233 of the *Customs Act* 1901.

(1) 5 App. Cas., 70.