

rather than that of the Supreme Court. I feel it unnecessary, in view of the very full statement which has been made by my learned brother the Chief Justice on the facts, to further elaborate my reasons. It only remains for me to say that I entirely concur in the view that, in the receiving of these payments, the appellants were acting in a *bonâ fide* way as that phrase is explained by the judgment in the case to which I have referred. I, therefore, agree that the appeal must be allowed, and the judgment of the Chief Justice in the Court below restored.

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O'Connor J.

Appeal allowed. Order appealed from discharged. Order of the Chief Justice restored. Respondent to pay the costs of the appeal.

Solicitors, for appellants, *Atthow & McGregor.*

Solicitors, for trustee (respondent), *Thynne & Macartney.*

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<p><i>Foll Taxes, Commissioner of (NT) v Langensyere Council Inc (1992) 23 ATR 370</i></p>	<p><i>Appl Taxes, Commissioner of v Langensyere Council Inc (1992) 83 NTR 32</i></p>	<p><i>Appl Taxes, Commissioner of (NT) v Langensyere Council Inc (1992) 2 NTR 76</i></p>
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[HIGH COURT OF AUSTRALIA.]

THE SYDNEY HARBOUR TRUST COM-
MISSIONERS } APPELLANTS;
PLAINTIFFS.

AND

WAILES AND OTHERS RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

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SYDNEY,
May 13.

Sydney Harbour Trust Act 1900 (No. 1 of 1901), sec. 27—Vesting of lands the property of the Crown in the Commissioners—Proclamation by Governor in Council—Title in Commissioners without conveyance—Ejectment.

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

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Sec. 27 of the *Sydney Harbour Trust Act* 1900 vests in the Sydney Harbour Trust Commissioners certain lands enumerated, and provides that the Governor may at any time vest in the Commissioner any further lands the property of the Crown deemed to be necessary for the purpose of carrying out the provisions of the Act.

Held, that under that section the Governor had power to vest lands the property of the Crown in the Commissioners by Order in Council, and, that a proclamation by the Governor in Council declaring that land which had been resumed by the Crown under the *Public Works Act* 1900 was deemed to be necessary and should be thereby vested in the Commissioners for the purposes of the Act was sufficient evidence that the land had become vested in the Commissioners without any grant or further conveyance.

Decision of the Supreme Court: *Sydney Harbour Trust Commissioners v. Wailes*, (1907) 7 S.R. (N.S.W.), 567, reversed.

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

The appellants were plaintiffs in an action of ejectment against the respondents. At the trial the presiding Judge directed the jury to find a verdict for the plaintiffs. The respondents then moved the Full Court to set aside the verdict and enter a nonsuit on the grounds that, the land claimed having become the property of the Crown by resumption, there was no evidence that the title of the Crown to the land was conveyed to or vested in the appellants, and that there was no evidence that the land was deemed to be necessary for the purpose of carrying out the provisions of the *Sydney Harbour Trust Act* 1900. The Full Court set aside the verdict and ordered a nonsuit to be entered: *Sydney Harbor Trust Commissioners v. Wailes* (1), and from that decision the present appeal was brought.

The facts and the material sections of the Acts are set out in the judgment of *Griffith* C.J.

Knox K.C. (*Garland* with him), for the appellants. The only point taken at the trial was that there was no evidence that the lands were deemed to be necessary. The Full Court granted a nonsuit on a point not taken at the trial. [He referred to *Mutual Life Insurance Co. of New York v. Moss* (2).]

(1) (1907) 7 S.R. (N.S.W.), 567.

(2) 4 C.L.R., 311, at p. 322.

[ISAACS J.—That turned only on questions of fact. But, where it is a question of law and the objection taken is to something which could not have been cured at the trial, the rule does not apply.]

Nevill v. Fine Art and General Insurance Co. (1), dealt with a question of law as to privilege and the rule was applied there.

[O'CONNOR J.—The question always is whether, if the point had been taken at the trial, the defect could have been remedied. This point, if well founded, must have been fatal.]

Sec. 27 of the *Sydney Harbour Trust Act* 1900 empowers the Governor to vest lands the property of the Crown in the Commissioners by proclamation. The Commissioners are merely an agency of the Crown, and the process of vesting involved nothing more than a transfer of the land from one government department to another. It is merely for the purpose of administration. It is unreasonable to suppose that the legislature intended that a conveyance or grant was to be executed by the Governor in Council. The legal estate was not in the Governor, but in the constructing authority under the *Public Works Act* 1900. The natural meaning of the words of sec. 27 is that the Governor may declare land to be vested in the Commissioners and by virtue of that the land shall be so vested. Sec. 28 clearly assumes that proclamation is the method of withdrawing land from the Commissioners under sec. 27, and indicates by implication that the same method is to be followed in the case of vesting. Proclamation is the method recognized in other Acts for vesting lands in public authorities in cases similar to the present, and there is no reason why it should not be adopted here.

Dr. Cullen K.C. (*Delohery* with him), for the respondents. This is merely a question of title. If the appellants choose to proceed by ejectment they must show their title just as any private individual. There is nothing in sec. 27 to displace the common law rule that title to land must be transferred by conveyance. The only effect of the proclamation, if it affects the title at all, is to transfer the equitable title from one department to another.

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[GRIFFITH C.J.—The words “shall vest” mean, *primâ facie*, that the legal estate shall vest.]

The section does not say that the land shall become vested, but that the Governor may vest them, and this he can do only by adopting the appropriate method of conveyance. The legal estate cannot come to the Commissioners without a grant. It does not follow that, because proclamation is expressly provided in sec. 28 for the case of withdrawal, it is intended to be the method for vesting under sec. 27. This may be a *casus omissus*, but that is a matter for the legislature. As it stands, sec. 27 merely empowers the Governor to “vest” the land in the Commissioners; it does not mention the method of vesting. [He referred to *Heydon v. Lillis* (1).]

[GRIFFITH C.J. referred to *Trustees Act* 1898, No. 4, sec. 29.]

Under that Act the Court has power to make a vesting order. The Governor is not empowered by sec. 27 to make such an order. He must take the steps required by law for the purpose of vesting. Though the Commissioners are an agency of the Crown, they are a corporation capable of holding property in the same way as an individual. [He referred also to *Chitty Prerog. of Crown*, c. xvi., sec. 2, p. 389; and the *Public Works Act* 1900, sec. 37.]

GRIFFITH C.J. This is an action for ejectment in which the plaintiffs, who are the appellants, had to prove their title. The title they set up is this:—The land in question had been resumed under the *Public Works Act* 1900 by the Governor by a proceeding called a notification of resumption. The notification was in the form of a proclamation which set out that the lands resumed shall be vested in the Minister for Works as trustee for the Crown, by virtue of sec. 27 of that Act. The *Sydney Harbour Trust Act* 1900 provides by sec. 27 that certain lands enumerated “shall be vested in the Commissioners upon trust for the purposes of this Act.” Then follows a proviso that the Governor “may at any time vest in the Commissioners any further lands the property of the Crown, deemed to be necessary, and may remove from the Commissioners such lands as may be found unnecessary for the purpose of carrying out the provisions of this Act.”

It is not disputed by the respondents that the land in question was the property of the Crown within the meaning of that section, but it is said that the words "the Governor may at any time vest in the Commissioners any further lands" imports the meaning that the operation must be carried into effect by an appropriate conveyance at common law. What actually occurred was that the Lieutenant-Governor with the advice of the Executive Council issued a proclamation declaring that it was deemed necessary to vest the land in the Commissioners for the purposes of the Act, and further declaring that upon the publication of this proclamation in the *Government Gazette* the said land should be vested in the Commissioners for the purposes of the said Act. The respondents say that had not the effect of vesting the lands in the Commissioners so as to give them a title and to enable them to maintain an action for ejectment. In my opinion, the meaning of the proviso to sec. 27 is that the Governor, with the advice of the Executive Council, may do some act in that capacity which shall have the immediate effect of vesting the land in the Commissioners without anything further. That seems to me to be the literal meaning of the term. The word "vest" is used as a transitive verb, indicating that something is to be done the effect of which is to result in vesting. Similar language is used in the *Trustee Act* 1898, sec 29, which, dealing with vesting orders, provides that in specified cases the Court may make an order vesting lands in certain persons. No one doubts that when that order is made the land is vested in those persons, and they are the legal owners as declared by the order. But then it is said that, although that may be so, there must be some intermediate conveyance—that the Governor is to use the proper means to carry his powers into effect. I apprehend that, when power is given to the Governor in Council to do an act to bring about a certain result, it means that he is to use the means provided to carry his power into effect. The powers of the Governor are carried into effect by Order in Council. The Governor in Council has not the capacity to make a grant of Crown lands. The learned Judges of the Supreme Court appear to have thought that the term "property of the Crown" was equivalent to Crown lands. I cannot take that view. It seems

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to me that the words cover all property of which the Crown is the formal owner—waste lands of the Crown, or lands which are the property of the Crown vested in some statutory corporation as trustee for the Crown. I think, therefore, that if the Governor in Council makes an order that such lands as these shall be vested in the Commissioners, the result is that they are vested in them just as much as if by an order of the Court the lands in question were vested in certain persons. That construction is confirmed by the subsequent words of the Act. Sec. 27 goes on to say that the Governor in Council may resume from the Commissioners such lands as may be found unnecessary for carrying out the provisions of the Act, and sec. 28 provides for withdrawing any lands from the Commissioners:—"Upon the publication in the *Gazette* of a proclamation withdrawing any lands from the Commissioners under the provisions of the next preceding section, the lands so described shall vest in the persons who would be entitled to the same and subject to the like limitations, powers, and authorities as if this Act had not passed. For the purposes of this section, the word 'persons' shall be deemed to include the Crown, or any person or corporation entitled to hold land on behalf of the Crown." In other words, the lands shall revest in their former owner. Now, it is true that sec. 28 says nothing about a proclamation vesting lands in the Commissioners, but it does, in fact, prescribe that if lands are to be divested from the Commissioners and revested in their former owners it is to be done by proclamation.

It is said that that suggests that the vesting was to be done by the same process as the divesting. There may be a weakness in that argument, but the argument is fortified by the fact that for many years it has been the practice to vest lands in public authorities such as these Commissioners, the Railway Commissioners, and the Minister for Public Works, by proclamation, or notification, as it is sometimes called. Therefore, it is not an unfamiliar mode of procedure.

The result is that the Governor in Council was authorized to vest the lands directly in the Commissioners by act of the Executive Council without any further conveyance. It may be contended that the operative instrument is the Order in Council. As to that I think that the proclamation, which is the public notifica-

tion of an act of State, is sufficient evidence of the antecedent act which is notified by it. But no such point was raised in the case, and it cannot be raised now. I am of opinion that the substantial point raised—whether the Governor in Council can in a case of this sort vest lands in the Commissioners without conveyance—must be answered in favour of the plaintiffs. For these reasons I think that the decision of the Supreme Court was erroneous, and that the plaintiffs showed a good title to maintain the action.

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O'CONNOR J. I am of the same opinion. The *Sydney Harbour Trust Act* creates a corporation consisting of three Commissioners, to which is handed over the administration of what is really a government department, and in sec. 27, which confers on the corporation certain control over lands, is the proviso now under consideration. That proviso gives the Governor power at any time to vest in the Commissioners any further lands the property of the Crown deemed to be necessary for carrying on their operations. Another of these statutory corporations created for the purpose of carrying on a department of Government is incorporated under the *Public Works Act* 1900. That is the Minister for Works as the "constructing authority." Certain lands were vested in the Minister for Works as the constructing authority, and it was deemed advisable to vest them in the Harbour Trust Commissioners under the provisions of sec. 27. That vesting was carried out by a proclamation by the Governor in Council the effect of which was to transfer the property in the lands from one corporation, representing the Crown in one function of Government, to another corporation representing the Crown in carrying on another function of Government.

The question is whether the transfer from one corporation to the other was lawfully carried out by the proclamation; that depends upon what meaning is to be placed on the word "vest," as used in the proviso to sec. 27. Governor in that section means the Governor with the advice of the Executive Council. Now, the Governor with the advice of the Executive Council was not the owner or holder of land vested in the constructing

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authority. The Governor acting as the representative of His Majesty, and not with the advice of the Executive Council, would be the proper authority to make a grant of land which was in the hands of the constructing authority for the interest which His Majesty might have in that land. The Governor in Council had no property in the land, and therefore could not make any such grant proclamation. When an Act gives power to the Governor to vest, it must have been intended that that vesting should be by the same method as that to be followed when the action is to be taken by the Governor with the advice of the Executive Council. When the Governor acts with the advice of the Executive Council, the only way in which he can carry out vesting strictly would be by Order in Council. That is recognized by sec. 34 of the *Interpretation Act* 1897, which provides that "Judicial notice shall be taken of every proclamation or order by the Governor with the advice of the Executive Council made or purporting to be made in pursuance of any Act or Imperial Act and published in the *Gazette*."

So that every act done by the Governor with the advice of the Executive Council and notified in the *Gazette* must be accepted judicially by all the Courts as a notification that the act was that of the Governor acting with the advice of the Executive Council.

Now, that being so, it appears to me that, to interpret the words the Governor "may vest" in the narrow way it is sought to interpret them by the respondents in this case, would be to wrest entirely the meaning of the section from the ordinary grammatical construction of the words. The ordinary grammatical construction is that the Governor in Council, by such action as may be appropriate, shall vest in the Commissioners these lands. This is further borne out by sec. 28, which recognizes that the method by which the withdrawal from the Harbour Trust Commissioners of land which the Governor, with the advice of the Executive Council, thinks should be withdrawn, shall be by proclamation. I think the provision implies something more than that. It will be noticed that in the proviso of sec. 27, which gives power to the Governor to vest land in the Commissioners and also to remove from their control lands

found unnecessary, there is no mention of the method by which that is to be effected. Neither does the next section provide any method. But it recognizes that a proclamation is the method by which the withdrawal shall be effected, because it mentions that that proclamation will have the effect of withdrawal, and the further effect of revesting the lands in persons who were, before the original order, entitled to them. I think it is impossible to read sec. 28 without coming to the conclusion that the legislature must have had in their minds that, both in the case of the vesting and the withdrawal of lands from the Commissioners, the proper method was by Order in Council followed by proclamation.

For these reasons I agree that the proper method was used by the Governor in Council for carrying out the vesting of this property, and that being so, the title was legally in the Sydney Harbour Trust Commissioners, and the Supreme Court were in error in deciding to the contrary.

ISAACS J. read the following judgment. The only question of substance is whether the plaintiffs have the legal title to the land, possession of which they claim. The proclamation containing the direction and declaration upon which they rely has already been referred to. The *Sydney Harbour Trust Act* 1900 calls into existence a corporate body—that is the plaintiffs—and they are to all intents and purposes a department of the Government.

The Act, by sec. 27, straightway vests in them certain lands, without waiting for the form of a grant by the Crown direct or by any person on behalf of the Crown. The vesting is upon trust for the purposes of the Act, and it is obvious that the vesting is not really a change of ownership, but only a convenient method of conferring upon the new governmental agency both the requisite interest and possession of the lands which up to that time the legislature thought necessary for the purpose. That is all the Crown land which up to that point the Commissioners could get.

Then comes a proviso—which has a double function. It first enables the Governor to “vest” further Crown land in the Commissioners, and next enables him to “remove” from them land found to be unnecessary for the purposes of the Act.

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Sec. 28 declares that, upon publication of a proclamation withdrawing any lands, they shall vest, in substance re-vest, in the Crown or its agents as if the Act had not been passed.

It is quite plain that the whole arrangement, so far, as to the disposition of the Crown lands is entirely within the sphere of governmental proprietorship. The transfer in each case is departmental only. The Crown is not really parting with its land, and the legislature, besides using the word "vest" and not "grant," a word hardly appropriate in the circumstances, was well aware of the procedure usual in New South Wales for many years when the Government wished to confer title upon itself, whatever the particular department or agency might be. Take for instance sec. 36 of the *Public Works Act* 1900, where Crown land is appropriated, and private land is resumed, by mere force of a *Gazette* notification. Sec. 38 is quite analogous to the present case. It provides that (*inter alia*) Crown land vested in any corporation or person on behalf of the Sovereign or for public purposes by virtue of any Statute shall by force of the notification be divested from that corporation or person, and vested in the constructing authority.

Again sec. 37 of the *Sydney Harbour Trust Act* enables the Commissioners themselves, subject to the Governor's approval, and to Parliament voting the necessary funds, to resume certain private lands, and on mere public notification the land becomes vested in them.

The power of the Governor to remove Crown lands from the Commissioners by proclamation, which at once re-vests them in the public Crown agencies which previously owned them, is quite in the same direction.

It would, therefore, be a strange thing, an anomalous thing, to require the Governor to issue a formal grant to the Commissioners in the case of a mere departmental transfer of lands for certain public purposes.

The formal word "grant," not having been used, ought not to be implied, and it is not strictly adhering to the common law to require the Governor to issue a grant of property. The legal estate is, if strict law is to be adhered to, not in the Crown but in a Minister as corporation sole. It is suggested that the words

"the Governor may at any time vest" should be read as "The Governor may at any time procure the Minister or other legal owner on behalf the Crown to grant." This does more violence to the words of the section than the interpretation suggested by the appellants. The usual procedure was followed in this case, a procedure more appropriate to an act by the Governor in Council than a grant would be. I therefore agree on this point with my learned brothers.

As to the point that the objection was not taken at the trial, I do not think that at all debars a party from relying on such an objection as the present, which if good is incurable by anything that the plaintiffs could have done at the trial. In *Devine v. Holloway* (1) a similar question was raised. It appears that on the appeal before the Privy Council it was urged for the appellants that a certain Act of New South Wales Parliament was repugnant to an Imperial Statute. Then the passage runs (2):—"Mr. *Bovill* Q.C., for the respondents, interposed. This point was never raised in the Court below, and cannot be taken in the appellate Court: *Kay v. Marshall* (3). Lord *Cranworth*: If it is patent on the face of the pleadings we may take judicial notice of it." In *Archambault v. Archambault* (4) the Privy Council thus states the rule:—"The inconvenience of raising for the first time on a final appeal a point which has not been the subject of consideration in the Courts below has been frequently pointed out both here and in the House of Lords. Certainly it is a rule of practice at this Board that a new point will not be entertained by their Lordships which might have been met by evidence in the Courts below." This is consonant with justice, and ought, in my opinion, to be followed.

For these reasons I am of the same opinion as my learned colleagues.

Appeal allowed. Order appealed from discharged. Rule nisi for nonsuit discharged with costs. Respondents to pay the costs of the appeal.

(1) 14 Moo. P.C.C., 290.
(2) 14 Moo. P.C.C., 290, at p. 298.

(3) 8 C. & F., 245.
(4) (1902) A.C., 575, at p. 583.

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

Solicitor, for the respondents, *A. H. Delohery.*

C. A. W.

END OF VOL. V.