[HIGH COURT OF AUSTRALIA.]

EDWARD O'KEEFE, JOHN O'KEEFE, ANDREW STANISLAUS O'KEEFE AND GERALD JAMES McKENNA PLAINTIFFS, } APPELLANTS;

AND

JAMES LESLIE WILLIAMS . . . . DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 11, 12, 15, 16, 17, 26.

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

Crown Lands Act of 1884 (*N.S.W.*) (48 *Vict. No.* 18), *sec.* 81—*Crown Lands Act of* 1895 (*N.S.W.*) (58 *Vict. No.* 18), *sec.* 4—*Occupation licence—Rights of holder—Grant by Crown of annual lease of lands held under occupation licence—Eviction of licensee by annual lessee—Liability of Crown for breach of covenant of quiet enjoyment—Derogation from grant—Relationship between Crown and holder of Crown lands—Landlord and tenant—Disturbance of possession of lessee by assignee of lessor—Damages—Cost of legal proceedings—Recovery of rent paid to lessor by assignee—Practice—Amendment of pleadings at the trial.*

In 1899 the plaintiffs' testator, Andrew O'Keefe, was entitled to the exclusive occupation of certain Crown lands as the holder of occupation licences, which operate as a demise for a year renewable at the option of the licensee, the licence fees being payable in advance. O'Keefe did not pay the licence fees for 1900 at the time appointed by a gazette notice, and on 6th January 1900 it was notified that his occupation licences had not been renewed for that year. This notification—as it was subsequently held—was inoperative, as the licence fees demanded were not then legally due. On 12th January, however, O'Keefe interviewed an officer of the Lands Department as to the non-renewal of his licences, and paid the licence fees demanded into the Treasury, the money being placed to a suspense account, pending the decision of the Minister. On 20th January the Minister approved a minute reversing the non-renewal of the licences for 1900, "subject to any conflicting interests that may have arisen since 31st December last, and to any annual lease applications lodged since that date." This reversal was gazetted on 14th February. In the interval between 20th January and 14th February one Malone applied for an annual lease of

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portion of O'Keefe's holding. This application was opposed by O'Keefe, but was granted by minute of the Executive Council dated 19th November 1900, and Malone entered under this lease and dispossessed O'Keefe. O'Keefe subsequently obtained a verdict in an action of trespass against Malone, it being held by the Privy Council in 1903 that when the annual lease was granted O'Keefe was entitled to the exclusive occupation of the whole of the land. O'Keefe paid the licence fees for the whole area for 1901, and in November 1901 he tendered the fees in full for 1902, but the Crown refused to accept them except for the area not included in the portion leased to Malone. O'Keefe having died, the plaintiffs, his executors, brought this action against the Crown, alleging a breach by the Crown of an agreement with O'Keefe that, in consideration of his paying the licence fees demanded, the notification of the non-renewal of his occupation licences should be revoked, and that he should be permitted quietly to enjoy the lands free from interference on the part of the Crown, or any person claiming under it by matter subsequent to the said payment. At the trial of this action before *Cohen* J., the plaintiffs applied to add a count alleging a breach by the Crown of an implied agreement not to derogate from the renewed licences. This application was refused, and *Cohen* J., being of opinion that the plaintiffs had not proved a breach of the express agreement alleged in the first count, entered a verdict for the defendant, but assessed the damages to which the plaintiffs would be entitled if successful in the action. This decision was affirmed by the Full Court.

Held, that there was no evidence of a breach of the express agreement alleged in the first count, but that the amendment asked for by the plaintiffs at the trial should have been allowed, as the proposed count was merely an alternative statement of the rights of the parties based upon the admitted facts.

Held, by *Griffith* C.J., *Barton* and *Isaacs* JJ. (*Higgins* J. dissenting) that there had been a breach of an implied agreement by the Crown not to derogate from O'Keefe's rights under the occupation licences, for which the plaintiffs were entitled to recover as damages the expenditure incurred by their testator by reason of the loss of the portion of the land granted to Malone, and so much of the damages and costs of the trespass action as they were unable to recover from Malone.

Per Griffith C.J. and *Isaacs* J.—In a demise by the Crown under the Crown Lands Acts a contractual obligation is to be implied that the Crown will not disturb, or authorize the disturbance of, the lessee in his occupation, and will not do anything in derogation of the rights conferred by the statutory contract.

The functions of the Minister with respect to granting occupation licences are ministerial not judicial.

A disturbance of the possession of the lessee by an assignee of the lessor claiming under an assignment subsequent to the lease is a breach of the lessor's implied covenant for quiet enjoyment.

Per Griffith C.J.—If the plaintiffs' testator were regarded as being in law in

possession of the land during the period in question, the Crown would not be entitled to retain as against them the rent received for the use of the land from Malone.

Per Higgins J.—As against the Crown no covenant for quiet enjoyment is to be implied from the licence, and there was in fact no breach on the part of the Crown of any duty not to derogate from the grant. It is not derogation from a grant to issue another grant which is invalid—although it may be a breach of a covenant for quiet enjoyment.

Decision of the Supreme Court: *O'Keefe* v. *Williams*, 10 S.R. (N.S.W.), 253, reversed.

APPEAL by the plaintiffs, who were the executors of Andrew O'Keefe, from a decision of the Supreme Court, by which a rule *nisi* obtained by the plaintiffs to set aside a verdict for the defendant, and to enter a verdict for the plaintiffs, or for a new trial, was discharged, upon the grounds—(1) that the Supreme Court should have held as a matter of law that the agreement sued on in the first count had been proved, and should have entered a verdict for the plaintiffs for the damages contingently assessed at the trial; (2) that the declaration should have been amended by adding the count which the plaintiffs sought to add at the trial, and a verdict found for the plaintiffs for the damages assessed at the trial; (3) that failing the recovery of substantial damages the plaintiffs were entitled to nominal damages.

In 1899 the plaintiffs' testator was entitled to the occupation of two tracts of Crown land held by him under occupation licence and preferential occupation licence granted respectively under sec. 81 of the *Crown Lands Act of* 1884 which provides for the issue by the Governor of occupation licences, and that such licences shall entitle the licensee to occupy for grazing purposes a resumed area, or vacant lands, or any portion thereof, subject to certain specified conditions; and sec. 4 of the *Crown Lands Act* 1895 which provides that, upon the determination by effluxion of time of the extended term of a pastoral lease, the holder of the lease shall, on payment of a licence fee, be entitled to occupy the lands under a preferential occupation licence.

The action was brought against a nominal defendant on behalf of the Government for an alleged breach by the Crown of a contract to permit the plaintiffs' testator quietly to enjoy the said

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lands held by him under occupation licence, and preferential occupation licence respectively. There was also a count for money had and received, under which the plaintiffs claimed a refund of rents paid by O'Keefe and also moneys received by the Crown as rent from other persons for the same land during the period in which it was alleged that the plaintiffs' testator had the exclusive right of occupation.

The case was tried before *Cohen* J. At the trial the plaintiffs applied to add a third count, alleging an implied agreement for quiet enjoyment. This application was refused by the learned Judge, who held that there was no evidence of any express agreement for quiet enjoyment to support the first count, and found a verdict for the defendant. He, however, contingently assessed the damages to which the plaintiffs would be entitled if successful in the action.

The facts are stated in the judgment of *Griffith* C.J.

Canaway, for the appellants. The payment made by O'Keefe on 12th January, and its acceptance by the Minister on 20th January, constituted an express contract between O'Keefe and the Crown as from the latter date. The contract was that O'Keefe should be entitled to the land, subject to any conflicting rights that had accrued up to 20th January. It was no part of the bargain that O'Keefe's title to the land should be subject to an application for an annual lease on 12th February. Under the *Crown Lands Acts Amendment Act* 1891, 55 Vict. No. 1, sec. 3 (6), the reversal of the forfeiture operated as from 20th January. The Privy Council have held that this was in effect a demise of the land to O'Keefe: *O'Keefe* v. *Malone* (1). Assuming that the agreement was merely to grant a licence, that licence involved an agreement for quiet enjoyment, and that agreement has been broken. By the Executive Council minute of 23rd January the recommendation that occupation licences should be granted to O'Keefe was approved, subject to any annual lease applications that had been lodged. The word "grant" in New South Wales has its common law meaning and in a lease implies a covenant for quiet enjoyment. This was not merely a demise,

(1) (1903) A.C., 365, at p. 377.

but a demise at a rent paid in advance, and amounted to a purchase of the right of exclusive occupation of the land. The enjoyment of the land is the *quid pro quo* for the rent which the Crown had received: *Buckley* v. *Taylor* (1).

The contract, if between subject and subject, would have involved an agreement for quiet enjoyment: *Markham* v. *Paget* (2). Under the circumstances of this case a similar agreement should be implied as against the Crown. The right to occupy for grazing purposes means the exclusive right to occupy: *O'Keefe* v. *Malone* (3). The claim is not limited to mere quiet enjoyment. Anything done in derogation of the exclusive right of occupation will render the Crown liable: *Windsor and Annapolis Railway Co.* v. *The Queen* (4). A grantor or contractor cannot so act as to frustrate the purpose of the grant or contract. Under the implied covenant the plaintiffs are indemnified against the acts of the covenantor, whether lawful or unlawful, and the acts of a stranger, if lawful: *Lloyd* v. *Tomkies* (5). The obligation to be implied must be determined by what must necessarily have been contemplated by the parties: *Lyttelton Times Co.* v. *Warners Ltd.* (6); *Swan on Quiet Enjoyment*, p. 24. The rights under the occupation licence are contractual: *O'Keefe* v. *Williams* (7). It is of the essence of the grant of an occupation licence that quiet enjoyment should be implied. Otherwise if a tort were committed by the Crown, and the licensee died, there would be no remedy. Apart from any agreement, it is an implication from the Act itself that the Crown should respect the rights it purports to confer.

Assuming that the grant of an occupation licence involves a promise that the licensee shall have exclusive occupation, the question is, was there disturbance of O'Keefe's occupation? Eviction by a person claiming through the lessor is a breach of a covenant for quiet enjoyment: *Williams* v. *Gabriel* (8); *Davies* v. *Town Properties Investment Corporation Ltd.* (9). "Lawfully claiming" does not mean "validly claiming." It includes per-

(1) 2 T.R., 600, at p. 603.
(2) (1908) 1 Ch., 697.
(3) (1903) A.C., 365.
(4) 11 App. Cas., 607.
(5) 1 T.R., 671.
(6) (1907) A.C., 476.
(7) 5 C.L.R., 217.
(8) (1906) 1 K.B., 155.
(9) (1902) 2 Ch., 635.

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sons claiming under a lease wrongfully given by the lessor. It only excludes persons wilfully intruding. The Crown expressly authorized the Malones to enter, and has later maintained their title against O'Keefe.

The appellants should have been allowed to add the proposed new count. The facts relevant to the question it raises are admitted. The counts were originally framed as widely as possible, so as to raise the question of quiet enjoyment both under the occupation licence itself, and also by virtue of the agreement under which the occupation licence was granted. Even if the question is now raised for the first time, I ask leave to add the count. The *Common Law Procedure Act* 1899, sec. 260, says that all necessary amendments "shall be made" to determine the matters really in controversy between the parties.

As to the damages, the appellants are entitled to the costs of ejecting the intruders put in by the Crown. The test is the reasonableness of the litigation. The fact that the appellants were successful shows that it was reasonable. The title was put in question by the trespass action. The principle is the same whether it is ejectment or trespass.

[He referred to *Agius* v. *Great Western Colliery Co.* (1); *Lock* v. *Furze* (2); *Rolph* v. *Crouch* (3); *Child* v. *Stenning* (4); *Williams* v. *Burrell* (5); *Smith* v. *Compton* (6).

[ISAACS J. referred to *Henderson* v. *Squire* (7); *The Millwall* (8)].

[GRIFFITH C.J. referred to *Grosvenor Hotel Co.* v. *Hamilton* (9)].

The appellants are willing to set off the £160 they saved in rent for 1901 and 1902 against the £1,055, the cost of feeding the sheep.

As to the second count, the claim is to recover the rent received by the Crown from Malone and £920 in respect of the rent paid by O'Keefe. This is not an alternative claim: *Morrison* v. *Chadwick* (10). In addition to the suspension of the rent the lessee is entitled to recover damages.

(1) (1899) 1 Q.B., 413.
(2) L.R. 1 C.P., 441.
(3) L.R. 3 Ex., 44.
(4) 11 Ch. D., 82.
(5) 1 C.B., 402.
(6) 3 B. & Ad., 189, 407.
(7) L.R. 4 Q.B., 170.
(8) (1905) P. 155, at p. 176.
(9) (1894) 2 Q.B., 836.
(10) 7 C.B., 266.

[ISAACS J. referred to *Foa on Ejectment*, p. 168].

O'Keefe was forced to pay rent in advance under threat of forfeiture, and should now be entitled to recover it.

The rent would not be properly apportionable on the mere reduction of area, because the intrusion severed O'Keefe's land: *Neale* v. *Mackenzie* (1); *McCulloch* v. *Abbott* (2). The Crown is liable to refund moneys improperly received: *Rex* v. *Bannatyne & Co.* (3); *Lorimer* v. *The Queen* (4); *Stevenson* v. *The Queen* (5). As to the rent paid by the Malones, the appellants claim to recover that as money wrongfully received. *Indebitatus* will lie for receipt of rent by one who has no title: *Arris* v. *Stukeley* (6); *Hasser* v. *Wallis* (7); *Monypenny* v. *Bristow* (8).

Upon the admitted facts the Court is in a position to enter a verdict.

Piddington and *Harry M. Stephen*, for the respondent. Notice was given to O'Keefe on 30th September that if his rent was not paid within 60 days the land would be thrown open to annual lease. The Crown at that time *bonâ fide* believed that, pending re-appraisement, the rent must be paid at the former rate. O'Keefe forgot to pay this rent. He subsequently paid the amount claimed in order to obtain the Minister's indulgence. The money was paid into a suspense account. There was therefore no payment until 15th February, when the money was carried to the consolidated revenue: *White* v. *Coupland* (9). The money was provisionally received pending further consideration, and reference to the Lands Department. There was no specific offer on either side, and no contract between O'Keefe and the Crown. It was not decided in *O'Keefe* v. *Malone* (10) that there was a contract on 20th January. The acceptance of the money was purely conditional, subject to the safeguarding of the rights of the public. The money was paid to the Department for acceptance according to the practice of the Department. If there was any contract it was to reinstate O'Keefe, and as this was

(1) 1 M. & W., 747.
(2) 6 N.S.W. L.R., 212.
(3) 20 N.Z. L.R., 232.
(4) 1 W. & W. (L.), 244.
(5) 2 W.W. & aB. (L.), 176.
(6) 2 Mod., 260.
(7) 1 Salk., 28.
(8) 2 Russ. & M., 117.
(9) 15 N.S.W. L.R., 281.
(10) (1903) A.C., 365.

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done there would be no breach. If O'Keefe's offer was to pay the money, provided he got back the whole of the lands without any conditions, that offer was never accepted by the Crown.

The proposed amendment should not be allowed. In the Court below any claim arising from the relationship of landlord and tenant was abandoned. The appellants are now attempting to set up a new issue not raised by the pleadings, and expressly abandoned in the Court below. With full knowledge of the existence of a cause of action the appellants elected not to adopt it. Where a party lies by, and has brought his action in an imperfect form, an amendment should not be allowed by the Judge at the trial: *Queensland Investment and Land Mortgage Co.* v. *Grimley* (1); *Tildesley* v. *Harper* (2); *Macdougall* v. *Knight* (3); *James* v. *Watts* (4).

[ISAACS J. referred to *Australian Steam Navigation Co.* v. *Howard Smith & Co.* (5).]

A further ground for resisting the application is that if the amendment had been allowed at the trial the defendant could have given further evidence in mitigation of damages. In any event, therefore, a new trial should be granted. Assuming the amendment is allowed, a covenant for quiet enjoyment cannot be implied against the Crown in this case: *Moore and Scroope* v. *Western Australia* (6).

[ISAACS J. referred to *Lyttelton Times Co.* v. *Warners Ltd.* (7).]

It must arise by necessary implication from the presumed intention of the parties: *Hamlyn & Co.* v. *Wood & Co.* (8). The question is, is the Crown liable in contract for every erroneous decision of its Minister? The Minister acts judicially, and if he acts *bonâ fide* the Crown is not liable. A foundation must be shown in the Statute for the implication. If the Crown ejected O'Keefe, and put Malone in possession of the land, they would be liable. But they are not liable in contract for the acts of Malone merely because such acts have been rendered possible by the action of the Minister, not acting negligently. If O'Keefe can sue the Crown, *a fortiori* Malone can. The Crown is not in the position

(1) 4 Q.L.J. Supp., 1.
(2) 10 Ch. D., 393.
(3) 14 App. Cas., 194.
(4) 8 S.C.R. (N.S.W.), 81.
(5) 14 App. Cas., 318.
(6) 5 C.L.R., 326.
(7) (1907) A.C., 476, at p. 481.
(8) (1891) 2 Q.B., 488.

of an ordinary landlord. It must grant an annual lease if the land is not held under licence. In a grant from the Crown there is no such implied covenant as would exist as between subject and subject.

[HIGGINS J. referred to *Feather* v. *The Queen* (1).]

Sec. 6 of the Act of 1884 states the whole measure of the Crown's obligations. At the time that Act was passed no covenant for quiet enjoyment would be implied in the absence of the word "demise." If any covenant is to be implied it would not be the ordinary covenant for quiet enjoyment. The entry by a person under a lease issued subsequently to that of the original lessee is a tortious entry for which the lessor would not be liable under a covenant for quiet enjoyment.

[ISAACS J. referred to *Cohen* v. *Tannar* (2).]

The covenant does not at all apply to a subsequent lease. Coming in under a title, means coming in under a valid title, that is a title given by the lessor prior to the original lease. In the case of an entry by a prior title the lessee can have no remedy except against the lessor. In case of an entry by a subsequent title he has a complete remedy against the trespasser. No necessity arises in such a case for implying a covenant against the lessor.

[ISAACS J. referred to *Holder* v. *Taylor* (3).

HIGGINS J. referred to *Budd-Scott* v. *Daniell* (4).]

The word "lawfully" means valid as against the lessee.

[Reference was also made to *Harrison, Ainslie & Co.* v. *Muncaster* (5); *Edge* v. *Boileau* (6); *Aldin* v. *Latimer Clark, Muirhead & Co.* (7); *Minister for Mines* v. *Harney* (8); *Davis* v. *Town Properties Investment Corporation Ltd.* (9); *Hall* v. *Burgess* (10); *Anderson* v. *Oppenheimer* (11); *Parsons* v. *Scutts* (12).]

As to the damages, the Crown is not liable for the costs of the action in *O'Keefe* v. *Malone* (13), as the litigation was unreason-

(1) 5 B. & S., 257, at p. 283.
(2) (1900) 2 Q.B., 609.
(3) Hob., 12.
(4) (1902) 2 K.B., 351.
(5) (1891) 2 Q.B., 680.
(6) 16 Q.B.D., 117.
(7) (1894) 2 Ch., 437.
(8) (1901) A.C., 347.
(9) (1903) 1 Ch., 797.
(10) 5 B. & C., 332.
(11) 5 Q.B.D., 602.
(12) 6 W.N. (N.S.W.), 81.
(13) (1903) A.C., 365.

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able. If an amendment is allowed a new trial should be granted, in order that the respondent may have an opportunity of giving evidence as to damages which he was not in a position to give at the last trial.

Canaway, in reply. The provision in sec. 81 of the Act of 1884 that the licensee "shall be entitled to occupy the land for grazing purposes," import a statutory promise that the Crown will not defeat that right: *Dering* v. *Farington* (1); *Seddon* v. *Senate* (2); *Ward* v. *Audland* (3); *Anning* v. *Anning* (4).

The same implication arises against the Crown as in a case between subject and subject: *Attorney-General of Victoria* v. *Ettershank* (5). The intention of the legislature, that the occupation licensee should have the exclusive right of occupation, cannot be given effect to if he cannot enforce this right by an action against the Crown. The cause of action set up by the proposed amendment has never been abandoned by the plaintiffs.

Cur. adv. vult.

August 26.

GRIFFITH C.J. Before dealing with the important question of law of which the appellants have for four years vainly sought to obtain a determination in this action, it is necessary to refer in some detail to the history of the litigation. It will be convenient, however, at the outset to state briefly the relevant facts, none of which are in controversy.

In 1899 Andrew O'Keefe (the appellants' testator), was entitled to the exclusive occupation of two adjoining tracts of Crown land under the tenure called occupation licence. His right to one of them arose under the *Crown Lands Act* 1884, sec. 81, the other under the *Crown Lands Act* 1895, sec. 4. It does not appear that any instruments of title were actually issued to him. Under the Statutes mentioned the licences were to be annual licences for the calendar year, but were renewable at the option of the licensee. The rates of licence fees demanded were required to be published in the *Gazette*, and if within 60 days after pub-

(1) Freem. K.B., 367.
(2) 13 East. 63.
(3) 16 M. & W., 862.
(4) 4 C.L.R., 1049.
(5) L R. 6 P.C., 354.

lication the fees were not paid, the Minister might refuse to renew the licence. By regulation the fees were made payable in advance before 1st December in each year. Land under licence might be withdrawn from it in certain events, but not otherwise, and if the land was not so withdrawn, the licence was renewable as of right, on payment of the licence fee. In September 1899 a notice was published in the *Gazette* by which the licence fees claimed to be payable by O'Keefe were specified, and it was stated that licences on which fees should remain unpaid on 31st December would be notified in the *Gazette* as not having been renewed for 1900, and that the lands would thereupon be open for the purposes of the Crown Lands Acts from 31st December. O'Keefe did not pay the licence fees before 31st December, and on 6th January 1900 it was notified in the *Gazette* that his occupation licences had not been renewed for 1900. It was held by the Judicial Committee in the case of *O'Keefe* v. *Malone* (1) that the notification was inoperative, inasmuch as by reason of circumstances to which it is not now necessary to refer O'Keefe was not in default in not paying the fees before 31st December.

The legal position therefore was that he continued to be entitled to exclusive occupation of the land as before. He, however, not unnaturally, thought that the notification of 6th January was intended to operate as a notice of the Minister's intention to refuse a renewal of the licences, and on 12th January he went to the Lands Office, and after an interview with the officer charged with such business paid the licence fees, at the rate demanded, into the Treasury. The Treasury receipt was headed "Suspense Account" and had at the foot the words "Awaiting reference to Lands Department." There is reason to think that O'Keefe had in fact forgotten to pay the fees in December. His payment on 12th January was in effect, and probably in express terms, accompanied by a request that the licence might be re-instated by the Minister as the Minister had power to do. The *Crown Lands Act* 1891 authorizes the Minister to reverse any forfeiture, and provides that a renewal shall be notified in the *Gazette* as soon as practicable, but that the date of renewal shall be the date of the Minister's approval thereof. In *O'Keefe* v. *Malone* (1) the

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

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Judicial Committee expressed the opinion that this Act applies to occupation licences, and this Court expressed a similar opinion on the argument of an appeal in the present case (1).

On 20th January 1900 the Minister approved of the reversal of the refusal to renew "subject to conflicting claims and annual lease applications since 31st December." The effect of the approval was to re-instate, (if re-instatement of a title still in existence had been necessary), O'Keefe's title as from 20th January. The renewal was not notified in the *Gazette* until 14th February, but the delay in the publication could not affect the date at which the re-instatement became effective. It followed that from 20th January O'Keefe had, *quâcumque viâ*, a good title to occupy the lands in question.

In the interval, however, between 20th January and 14th February certain persons named Malone had made application under the provisions of sec. 33 of the *Crown Lands Act* 1889 for annual leases of part of the land. Under that section only land "not held under lease or licence" is open to annual lease. O'Keefe objected to the applications, but after some delay they were granted, under a minute of the Executive Council dated 19th November 1900. The Malones entered under them and dispossessed him. O'Keefe paid his rent or licence fees for 1901 in full for the whole area. On 15th November 1901 he tendered the rent for 1902 in full, but the Government refused to accept it except for the area left after taking out the land leased to the Malones.

On 22nd May 1901 O'Keefe commenced an action against one of the Malones (in whom all four annual leases were then vested) for trespass. The leases were set up by way of defence. O'Keefe obtained a verdict for £45, which was set aside by the Supreme Court of New South Wales: *O'Keefe* v. *Malone* (2), and restored by the Judicial Committee (3).

O'Keefe having died, this action was brought on 15th December 1905 by the appellants, his executors, against the respondent, who had been appointed during O'Keefe's lifetime on his petition to be nominal defendant on behalf of the Government.

(1) 5 C.L.R., 217.

(2) 2 S.R. (N.SW.), 91.

(3) (1903) A.C., 365.

I have stated the relevant facts, and now pass to the history of the litigation.

The declaration in the action contained two counts. In the first count the plaintiffs, after setting out facts showing that Andrew O'Keefe was entitled to the land in question under occupation licences, alleged an agreement between him and the Government that the licence fees for the year 1900 and succeeding years should be determined by fresh appraisement (as the law allowed), that the cost of the re-appraisement should be borne by him, that in consideration of his bearing such cost and paying the licence fees at the rate to be so determined he should be entitled to continue to occupy the land, and that no demand for the licence fees for 1900 should be made until after the appraisement. I pause here to say that under the decision of the Judicial Committee in *O'Keefe* v. *Malone* (1) his right to continue in occupation arose as a matter of law upon the facts alleged. The count then went on to state that O'Keefe paid the cost of the re-appraisement and occupied the lands, but that the Government nevertheless demanded the licence fees before the re-appraisement had been made, and on non-payment published a notification that the licences had not been renewed. It then proceeded to allege a further agreement between the Government and O'Keefe that in consideration of his forthwith paying the amount demanded the notification should be revoked within a reasonable time after payment, and as from its date, and that he should be permitted quietly to enjoy the lands during the year 1900 and succeeding years free from interference, disturbance and eviction on the part of the Government, or any person claiming under it, by matters subsequent to the payment, and averred that he forthwith paid the amounts demanded, and that all conditions were performed entitling him to performance of the agreement. It assigned as breaches that the Government did not revoke the notification within a reasonable time after payment, and did not permit him to enjoy the lands free from interruption or eviction, but notified that annual leases of 7,680 acres of the land had been granted to other persons, accepted rent for that land, authorized the lessees

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

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to evict him from the land, and compelled him to bring an action to establish his title.

This count may be divided into four distinct parts, which may be thus summarized: (1) An allegation of a statutory engagement on the part of the Government by virtue of which O'Keefe was entitled to the exclusive possession of the land during the whole period in question; (2) An allegation of a positive agreement by the Government for valuable consideration not to disturb him during part of that period; (3) An allegation of a further positive agreement by the Government for valuable consideration not to disturb him during another part of the period; (4) An allegation of disturbance. In view of the law as declared in *O'Keefe* v. *Malone* (1), the arguments set up in the second and third allegations were agreements not to do acts which the Government could not lawfully do. If these allegations were omitted, there would still remain the allegation of the statutory engagement for exclusive occupation, and the allegation of disturbance of it.

There was also a count for money had and received, under which the plaintiff claimed (so far as is now material) to recover the amount of the rent received by the Government from the Malones in respect of the land which was in law his property during the period for which they were received.

The defendant pleaded to the first count that the Government did not promise as alleged, that O'Keefe did not pay the amounts demanded for licence fees as alleged, and that the Government revoked the notification of 6th January within a reasonable time after the alleged payment and as from the date thereof, and they denied the alleged eviction. He also pleaded a plea by way of estoppel. To the last plea the plaintiff demurred. The defendant joined in demurrer, and gave notice that he would object that the first count was bad in substance on the ground that the agreement sued upon was void as being *ultra vires* of the Government.

Upon the argument of the demurrer before the Supreme Court (2), it was contended for the plaintiffs that the declaration set out a sufficient cause of action, namely, that the Crown accepted O'Keefe as tenant, and dealt with him on that footing, but did

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

(2) 7 S.R. (N.S.W.), 304.

not permit him quietly to enjoy the land, and were privy to his being turned out of possession.

Authorities were cited to establish the position that the creation of a tenancy implies an agreement on the lessor's part that the lessee shall not be disturbed in his tenancy by any act of the lessor subsequent to its creation, and it was urged that such an agreement should be implied against the Crown. It was also contended that the "further agreement" alleged in the declaration did not enlarge the original liability.

For the defendant it was contended that the plaintiffs' only right of action was against the trespasser, and that the Crown had no power to enter into the positive agreement alleged. The Court gave judgment for the defendant. *Darley* C.J. was of opinion that there was never any contract or agreement between O'Keefe and the Government, nor any relationship of landlord and tenant, so that there could not be an implied agreement for quiet enjoyment. He expressed no opinion on the validity of the positive agreement alleged. *Cohen* J. also thought that there was no implied agreement for quiet enjoyment. *Pring* J. thought that the "further agreement" alleged was invalid as being unauthorized by the Crown Lands Acts.

On appeal to this Court (1) the question whether an agreement for quiet enjoyment can be implied against the Crown was again argued, but the Court did not think it necessary to decide it. They held that the positive further agreement as alleged was a valid agreement. On appeal to His Majesty the decision was affirmed (2). Counsel for the appellants again raised the question of an implied agreement for quiet enjoyment. Lord *Loreburn* L.C., delivering the opinion of the Judicial Committee, said incidentally that the question was not raised by the pleadings, but I do not think that this is to be taken as a judicial decision on the point. I understand him to have meant that as the pleadings stood it was not necessary to decide the question.

In the meantime the case had come on for trial before *Cohen* J. and a jury. It was agreed that all the facts should be ascertained, and that all questions of law should be reserved. At a later stage the jury were discharged by consent. All the relevant

(1) 5 C.L.R., 217. (2) (1910) A.C., 186.

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facts, as I have stated them, were established by evidence. At the close of the plaintiffs' case their counsel asked to amend by adding a count, of which a draft was submitted, and which, after stating facts showing Andrew O'Keefe's right to the exclusive occupation of the land in question under occupation licences, alleged that the Government made a wrongful demand upon him for the payment of moneys in respect of the renewal of the licences and notified in the *Gazette* that they had not been renewed, that afterwards he tendered the money claimed on the terms that the notification should be revoked and that occupation licences should be granted to him subject to any conflicting interests that might have arisen since 31st December 1899, and to any applications for annual leases lodged since that date, that the Government accepted the money on those terms (the acceptance preceding the time when any money actually became due) and revoked the notification and granted to O'Keefe occupation licences for 1900 subject as aforesaid. It then alleged that the Government "in derogation of the right conferred on him by the acceptance of the money and the renewal of the licences" purported to grant annual leases to other persons, repeating in effect the fourth allegation of the first count. The amendment was resisted by the defendant's counsel. Plaintiffs' counsel submitted that no new case was being made, and referred to authorities dealing with the question of what is a derogation from a grant. *Cohen* J. reserved his opinion on the application to amend, but after the close of the evidence refused it. The points of law were then argued, and the plaintiffs' counsel cited and relied on cases relevant only to the question of an implied agreement for quiet enjoyment arising from the relation of landlord and tenant. The learned Judge gave judgment for the defendant, but found specially the facts relevant to the damages, if any, recoverable by the plaintiffs.

In my opinion the amendment ought to have been allowed. Assuming that the question of the plaintiffs' right to maintain an action as for a breach of an implied agreement for quiet enjoyment could not be raised on the first count, the new count did not raise any new facts, but merely sought to put another complexion upon the legal rights flowing from the uncontroverted

facts. I confess to some surprise at the strenuous opposition offered before us on behalf of the Crown to allowing an amendment which would enable this question, which had already been twice argued, and which was distinctly raised by the facts, to be decided in this action. Such a course differs from that which my experience had led me to expect in litigation to which the Crown is a party. I think, therefore, that the case should be treated as if the amendment had been made. This count alleged distinctly that the Government committed the acts complained of in derogation of the rights conferred on O'Keefe by the renewal of the licences. The question of those rights is, therefore, in my opinion now open for discussion and decision.

I return to the history of the litigation. The plaintiffs obtained from the Supreme Court a rule *nisi* to enter judgment for them, which was discharged after argument. The learned Chief Justice, who delivered the judgment of the Court, thought that the contract alleged in the first count was not a contract to be implied from any relation existing between the parties, such as that of landlord and tenant, but an express contract brought into existence by agreement between the parties. Regarding it from this point of view, he thought that the express (or, as I prefer to call it, positive) contract had not been proved. And, regarding the first count from the same point of view, I do not see my way to dissent from this conclusion. The positive agreement alleged in the third allegation of the count is set up as arising by necessary implication from the offer of the rent for 1900, accompanied by a request for re-instatement, and followed by the acceptance of the money and the re-instatement. But, when the facts are regarded from this point of view, we must put ourselves in the position of the negotiating parties. I think it is clear that both parties, O'Keefe and the Minister, acted on the assumption that the former had no legal right, but was asking for a grace. I also think that on the facts an agreement to grant that grace should be implied, and this Court held (1) that such an agreement could be lawfully made. But what was the grace? In my opinion it was merely that the licences should be re-instated with whatever legal consequences might ensue from the re-instatement, but no

(1) 5 C.L.R., 217.

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more. The same evidence which established this agreement proved its performance, for the licences were re-instated as promised. There was therefore no breach of it. The learned Chief Justice then proceeded to deal with the proposed new count, which he discussed, coming to the conclusion that it was not substantially different from the first count, and that the same result followed. He seems to have treated the matter on the assumption that if the count had raised a different point of law arising upon the same facts the amendment should have been allowed. For reasons which I have already given I think that one of two alternative views must be adopted: either the first count did raise the question of the alleged implied agreement for quiet enjoyment, in which case no amendment was necessary, or it did not. If it did, the question should be determined upon it. If it did not, the question was distinctly raised by the proposed amendment.

The only difficulty which I have felt on this part of the case is raised by an observation in the judgment of the learned Chief Justice to the effect that counsel for the plaintiffs did not seek to base his claim upon anything implied from the relationship of landlord and tenant, or anything done under the Crown Lands Acts by the parties. But, after hearing what was said by Mr. *Canaway* and Mr. *Piddington* on this point, I am satisfied that the learned Chief Justice was under some misapprehension. I have already pointed out that from the first argument of the demurrer to the end of the trial the plaintiffs had vainly endeavoured to get a decision on the question of this implied agreement.

One of the grounds taken in the rule *nisi* was that contracts to the effect alleged in the first count and the proposed third count arose by implication of law from the relations and dealings between the plaintiffs' testator and the Government as appearing by the evidence. Mr. *Canaway* told us that he said to the Full Court that the plaintiffs' case rested on three bases: (1) those stated, (2) those intended, and (3) those resulting as matter of law, and that the new count rested on the third basis, and that he cited authorities to the Full Court to show that the word "grant" implies in New South Wales a covenant for quiet enjoyment. Mr. *Piddington* accepted the accuracy of this state-

ment, with the addition that Mr. *Canaway* said to the Full Court that he did not rely on the relation of landlord and tenant.

In my opinion the allegation in the proposed third count that the Government did the acts complained of in derogation of the rights conferred on O'Keefe by the renewal of the licences clearly raised the question whether any and what rights were conferred by the licences, and I do not think that the plaintiffs are estopped from asking to have that question determined by this Court. The case seems to me very like a case in which a plaintiff should sue a husband for the price of necessaries supplied to his wife, the declaration alleging both that they were necessaries and that the defendant expressly promised to pay for them. If in such a case it were admitted or found by the jury that the goods were necessaries, but the positive agreement were negatived, the plaintiff would nevertheless be entitled to judgment.

In short, the objection taken by the defendant is that the plaintiffs are claiming to recover in respect of a positive agreement not to do something which the Government were already bound by law not to do, and that as the positive agreement is not proved he must fail altogether. The plaintiffs on the other hand are asking for relief analogous to judgment *non obstante veredicto.*

So far as the proposed count sets up a positive agreement as distinct from an obligation to be implied from the nature of the tenure, I agree that the plaintiffs' case is open to the same answers that are applicable to the first count. There has been no breach of the only positive agreement that can be implied from the facts.

But I think, as I have already said, that the Court is bound to consider the other and much more important question whether any and what contractual obligation is to be implied against the Government towards the holders of occupation licences, and I much regret that we have not had the advantage of the opinion of the Supreme Court on the point.

It was contended that if the new count were now allowed to be added the defendant might be prejudiced unless a new trial were also granted. The only reason adduced in support of this

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argument was that the defendant was so confident of success upon the first count as it originally stood that he was not fully prepared to deal with the question of damages. But that question was distinctly raised, and there is no difference, so far as regards the measure of damages, between the positive and the implied agreement. The defendant called evidence on the point, and he must be taken to have known that the Court ought to allow, and would allow, any amendment of the pleadings necessary to raise substantially the real question between the parties in another mode of formal statement. If the defendant for such a reason really failed to call available evidence on a point which was distinctly in issue, I do not think that he is entitled to ask for a fresh trial on that ground.

I pass now to the merits of the case.

It has been recognized for many years that the relationship between the Crown and the holders of Crown lands under the Land Acts of the Australian States is of a contractual nature. See for instance *Attorney-General of Victoria* v. *Ettershank* (1); *Davenport* v. *Reg.* (2); *Fisher* v. *Tully* (3); *Minister of Mines* v. *Harney* (4). In the last-named case a subject recovered heavy damages against the Crown for refusal to grant a mining lease in pursuance of a statutory engagement arising upon the facts. The terms "promise," "engagement" and "contract" have been commonly used in Australian legislation to denote this statutory obligation. See, for instance, sec. 128 of the *Crown Lands Act* 1884. The mutual rights and obligations of the Crown and the subject depend, of course, upon the terms of the Statute under which they arise, and it is quite immaterial whether a formal instrument of title has been issued or not, unless the Statute makes the issue essential. If the instrument of title when issued purported to confer greater rights than those authorized by the Statute, it would be *pro tanto* inoperative. If it omitted to mention the rights actually conferred by the Statute the omission would have no effect. The rights of the plaintiffs in the present case depend upon sec. 81 of the *Crown Lands Act* 1884 and sec. 4 of the Act of 1895. The first-named section provides that on the

(1) L.R. 6 P.C., 354.
(2) 3 App. Cas., 115.
(3) 3 App. Cas., 627.
(4) (1901) A.C., 347.

happening of certain prescribed conditions the holder of a run "shall be entitled to occupy" the land in question "for grazing purposes," and shall be entitled to an occupation licence on compliance with certain further conditions. The secondly-named section provides that on compliance with prescribed conditions the holder of a pastoral lease in the Central Division "shall be entitled to occupy" the land in question "under a preferential occupation licence," which is subject to the provisions of the Act of 1884 with some qualifications. As to the nature and duration of the tenure under these licences it is sufficient for the present purpose to say that the right of occupation is exclusive, and that the tenure is terminable in certain defined events only. In my opinion the substantial relation between the Crown and the holder of an occupation licence is that of landlord and tenant. An opinion to that effect was expressed by the Judicial Committee in the case of *O'Keefe* v. *Malone* (1). If and so far as that expression of opinion is not binding on this Court I respectfully adopt it. The question, then, is whether, as between the Crown and a subject to whom the Crown has contracted to give the exclusive occupation of land, there is to be implied an obligation in the nature of a promise not to disturb him in that occupation. In the case of an express contract in similar terms between subject and subject, I have no doubt that such a promise would be implied. See the cases cited and referred to by *Swinfen Eady* J. in *Markham* v. *Paget* (2). Every contract between subject and subject involves an obligation, implied if not expressed, that neither party shall do anything to destroy the efficiency of the bargain which he has made. The implied covenant or agreement for quiet enjoyment in the case of a demise of land is merely an instance of the application of this rule.

It is, however, contended that this doctrine is not applicable to a statutory contract entered into by the Crown in New South Wales with respect to Crown lands. Such a contract, it is said, confers upon the lessee an absolute right to possession as against all the world, so that any person who attempts to interfere with it is a mere wrongdoer, against whom the lessee can obtain com-

(1) (1903) A.C., 365. (2) (1908) 1 Ch., 697.

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plete redress in a Court of law by ejectment or action for damages: There is therefore no necessity to imply any contractual obligation on the part of the Crown to do an act which, if done, would be of no legal effect: And, since the ground for implying an obligation not expressed is that the intention of the parties to the contract could not otherwise be carried out, the absence of necessity forbids the implication. It is further said that, even if there is an implied obligation as contended by the plaintiffs, any subsequent dealing with the land by the Crown is absolutely ineffectual, so that any damages which the first lessee may sustain from disturbance by the man claiming under a void title is not the natural consequence of the issue of the void title.

The first argument, if sound, would apply to negative, in the case of a lease between subject and subject, any implied covenant against disturbance by a person claiming under a subsequent lease from the lessor himself, since, the title being already in the first lessee, the lessor could not confer a valid title upon anyone else. It is, however, settled that the words "lawfully claiming," used in express covenants, and read into the implied covenant, mean claiming under an authority which is lawful as between the covenantor and the person doing the act.

There is no doubt that a disturbance by an assignee of the lessor claiming under an assignment subsequent to the lease is a breach of the covenant for quiet enjoyment. (See, for instance, *Hall* v. *Burgess* (1); *Aldin* v. *Latimer Clark, Muirhead & Co.* (2); *Williams* v. *Gabriel* (3)).

In my opinion, when one man is put in possession of land by another, full effect cannot be given to the intention of the parties without implying an obligation that the lessor shall neither disturb the possession himself nor authorize its disturbance by others. It is nothing to the purpose to say that he cannot lawfully authorize a disturbance. Undisturbed possession is something more than disturbed possession plus a consequent right of action against the disturber, and a lessee is entitled to both rights. I think, therefore, that the same necessity for the implication exists in this case as in any other.

(1) 5 B. & C., 332.
(2) (1894) 2 Ch., 437.
(3) (1906) 1 K.B., 155, at p. 158.

I do not know of any ground in reason or authority for applying different canons to the construction of contracts between the Crown and a subject and contracts between subject and subject.

It was further contended that the functions of the Minister for Lands under the Crown Lands Acts are of a quasi-judicial character, and that the implied agreement set up by the plaintiffs is in the nature of an agreement not to make a mistake in the exercise of such quasi-judicial functions. In my opinion there is no foundation whatever for this argument. The functions of the Minister in this respect are purely administrative.

For these reasons I am of opinion that a contractual obligation is to be implied in the case of a demise by the Crown under the Australian Crown Lands Acts, to the effect that the Crown will not disturb or authorize the disturbance of the lessee in his occupation.

It is not necessary to consider whether the obligation is co-extensive in all respects with that imposed by the implied covenant for quiet enjoyment as between subject and subject. It may be that under the circumstances of the country the implication of a covenant for title would be excluded. In the case of Crown lands an implied contract that the lessee should not be disturbed by any person claiming under the Crown by an earlier title would be in effect a covenant for title. It might be contended with some force that when the Crown is unable by reason of a prior alienation or demise to perform its statutory contract the rule in *Flureau* v. *Thornhill* (1) would apply. In this view, as no one would contend that the Crown could retain the money received as rent the consideration for which had failed, the matter is not of much consequence, and I do not further pursue it.

The obligation of the Crown may also, I think, be put in another way, as an obligation not to do anything in derogation of the rights conferred by the statutory contract. An actual eviction or disturbance by a lessor or by his authority would clearly be such a derogation, and would, I think, be actionable as such. The proposed new count distinctly puts forward this view. Such an obligation is in substance a contractual obligation,

(1) 2 Bl. W., 1078.

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although possibly an action on the case might lie for a breach of it.

This, then, being the obligation of the Crown, has there been a breach? I have already pointed out that a disturbance of possession by an assignee of the lessor claiming under an assignment subsequent to the lease is a breach of the implied covenant for quiet enjoyment. And, apart from the terms of an express or implied agreement, a person who authorizes or instigates another to do an act which, if done by himself, would be wrongful, is himself liable. It is not necessary that the relation of principal and agent should exist between them. The arrest of a man under a void warrant affords a familiar illustration.

It is contended, as already said, that, even so, the damage complained of does not arise from the breach.

The same argument was addressed to the Court of Queen's Bench by very learned counsel in the case of *Edge* v. *Boileau* (1), but was rejected by the Court. In that case a lessor had given notice to the lessee's under-tenants not to pay rent to the lessee. *Pollock* B. said:—"It is impossible, as it seems to me, to hold that, under the circumstances of this case, and having regard to what actually followed, this notice can be treated as no more than a mere false and idle claim or threat of which no notice might be taken. To my mind there is evidence of a substantial disturbance of the plaintiff's quiet enjoyment of the property demised." And again: "I can understand that there might be circumstances under which such a notice might be treated as a mere idle threat and as not amounting to a breach of the covenant for quiet enjoyment because there was no substantial interference with the enjoyment. Here I think that there is a substantial interference with the rights of the plaintiff, and one which might very well affect the value of his property."

Under the circumstances of the present case I think that the entry by the Malones was a wrongful act for which the Government are responsible, and are therefore liable in damages. What was done amounted to active assertion by the Government of Malone's title as against O'Keefe. I express no opinion on the question whether the mere issue of the annual leases and entry

(1) 16 Q.B.D., 117, at p. 120.

under them would of itself have been sufficient to establish the plaintiffs' case.

For these reasons I am of opinion that the plaintiffs are entitled to have judgment entered for them.

The remaining question is as to the measure of damages. *Cohen* J. found that by reason of being dispossessed O'Keefe was obliged to incur, at a time subsequent to that in respect of which he recovered judgment against Malone, expenditure amounting to £1,076 2s. 6d. As against this he had in his hands a sum of £160, the amount which, as counsel agree, was due by him for rent of the land of which he was dispossessed, and which the Government refused to accept. The actual amount by which he is out of pocket in this respect is therefore £916 2s. 6d.

They claim also to recover the damages not recovered from Malone and the costs of O'Keefe's action against him. These damages were assessed at £45, and the taxed costs were £745 6s. 4d.—together £790 6s. 4d. As against this the plaintiffs have received from his bankrupt estate a dividend of £73 12s. 2d., and it is admitted that no further dividends are likely to be paid. So far as the dividend is attributable to the damages I think that the plaintiffs are entitled to recover the difference from the Government. As to the costs, the test is, in my opinion, whether entering upon the litigation was under the circumstances reasonable, so that the incurring of the costs of it was a natural and reasonable consequence of the breach by the Government of their statutory obligation. See *Rolph* v. *Crouch* (1). I think, therefore, that so far as these costs were not recoverable from Malone they are recoverable in this action.

The difference between £790 6s. 4d. and £73 12s. 2d. is £716 14s. 2d.

I think, therefore, that the plaintiffs are entitled to recover these two sums, making together £1,632 16s. 8d., and that a verdict for them should be entered accordingly as of the date of the trial.

As to the terms on which the amendment should be allowed I think that the plaintiffs should pay so much of the defendant's costs of the action, if any, as are exclusively attributable to the

(1) L.R. 3 Ex., 44.

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first count, to be set off against the plaintiffs' costs. The plaintiffs should have their costs of the action except such as are exclusively attributable to that count.

In the view which I take of the substantial merits of the case it is not necessary to deal at length with the count for money had and received. It is sufficient to say that, in my opinion, if the case were to be treated as between the plaintiffs and the Crown on the footing that the plaintiffs were in possession *de jure* of the land during the whole period in question, the Crown would not be entitled to retain as against them moneys which they have received for the use of land which was *de jure* the land of the plaintiffs, but of which the Crown's other tenants had *de facto* occupation: *Hasser* v. *Wallis* (1). Allowance would have to be made for the rent saved by the plaintiffs, but I think that they would be entitled to recover the excess of rent received by the Crown.

BARTON J. When the facts of this case are considered in the light of the judgment in *O'Keefe* v. *Malone* (2), it is impossible to doubt that when the Department granted the annual leases to the Malones, O'Keefe was and had been from the inception of his tenancy "entitled to occupy" lands which were the subject of the Barham licences, and which included those the subject of the annual leases. He was the Crown's lessee, for in the view of the Judicial Committee, founded on the enactments which were cited in this case, an occupation licence, exclusive and transferable as it is, and held, as it is, for a defined period upon a payment which is nothing but a rent, is "not distinguishable from a demise" (3). It is clear that the relationship between the Crown and those who hold lands under it in pursuance of the Lands Acts is contractual. It is scarcely necessary to show this where the instance is a lease, but as the proposition has been disputed, I may refer, among many examples, to the definitions of "Crown lands," "lease" and "vacant land" in the Act of 1884, to sec. 128 of the same Act, and the definition of "forfeiture" in the Act of 1891, sec. 2, to show that the legislature has throughout treated

(1) 1 Salk., 28.
(2) (1903) A.C., 365.
(3) (1903) A.C., 365, at p. 377.

as contracts the dealings between the Crown and the subject which result in the acquisition by the latter of holdings under the Acts. The Courts, both here and in England, have recognized the contractual nature of dealings in land between the Crown and its subjects under the Crown Lands Acts of the several States. It is enough to refer to *The Attorney-General of Victoria* v. *Ettershank* (1), where a leaseholder under the Victorian Land Acts claimed a grant in fee from the Crown, and it was held that the claim arose out of a contract with Her Majesty within the meaning of the *Crown Remedies and Liability Statute* 1865. The right to the grant, although created by Statute, was held to have been conferred upon the holder of the lease as a statutory right annexed to the lease and an implied term of the contract.

The contract here was to give O'Keefe the right to exclusive occupation of these Barham areas for a year, and to renew that right from year to year, subject to certain defined rights of alienation, so long as he paid the full rent required by or under the Statute. Lands held on this tenure are not open to annual leases: Act of 1889, sec. 33. It will be convenient first to consider what, if any, obligation not to disturb the holder in his occupation would be implied from such a relationship between two subjects, and next whether the implication, if it so exists, is prevented from arising where the Crown is the party sought to be charged with the obligation.

A principle involved in all contracts between subject and subject is that it must be presumed to be the intention of each to give efficacy to the agreement. Hence it is generally to be implied, where nothing is expressly provided in that regard, that each party agrees to abstain from any act which would deprive the contract of its efficacy. In *The Moorcock* (2), *Bowen* L.J. states the rule in these terms: "An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure

(1) L.R. 6 P.C., 354. (2) 14 P.D., 64, at p. 68.

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of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have." Where the necessity is established, the implication is, I think, a matter of law. See also *Hamlyn & Co.* v. *Wood & Co.* (1). There are in the books many instances of the application of the rule, and many again in which it has been recognized, but where the absence of necessity has rendered it inapplicable to the particular case. An instance of its application by this Court is to be found in the case of *Anning* v. *Anning* (2).

The judgment of *Swinfen Eady* J. in *Markham* v. *Paget* (3), contains an interesting review of the cases, in the course of which he deals with two branches of the rule, that relating to the implied obligation upon a grantor not to derogate from his grant, and that relating to the implied covenant or contract by a lessor for the quiet enjoyment of the demised premises by the lessee. As to the first, he considers the case of *Grosvenor Hotel Co.* v. *Hamilton* (4), "an authority for a person being liable in damages for the breach of an implied obligation not to derogate from his grant." In the last mentioned case *Lindley* L.J., after expressing himself to that effect in favour of the defendant's counterclaim, an opinion in which *Lopes* and *Davey* L.JJ. agreed, said (5) "An action therefore will not lie on the ground of implied covenant" (for there was in that case an express but limited covenant for quiet enjoyment, which excluded the implication of a wider one necessary to the support of the counterclaim on that ground), "but it will lie on the ground I have stated," *i.e.*, that the plaintiff, the landlord, had derogated from his grant. "Before the Judicature Acts," his Lordship added, "the action would have been an action on the case." *Davey* L.J. (6) put the counterclaim, on the facts, as "a cause of action founded, not on an implied

(1) (1891) 2 Q.B., 488.
(2) 4 C.L.R., 1049.
(3) (1908) 1 Ch., 697, at p. 712.
(4) (1894) 2 Q.B., 836.
(5) (1894) 2 Q.B., 836, at p. 840.
(6) (1894) 2 Q.B., 836, at p. 841.

covenant for quiet enjoyment, but on nuisance or trespass. A grantor cannot derogate from his grant." And he referred to cases of interference by a grantor with the stability of the premises granted, such as *Caledonian Railway Co.* v. *Sprot* (1), and *Elliot* v. *North Eastern Railway Co.* (2), where Lord *Chelmsford* pointed out that " whether voluntary or compulsory, every grant must carry with it all that is necessary to the enjoyment of the subject matter of it." I do not read the expressions of the learned Lords Justices in *Grosvenor Hotel Co.* v. *Hamilton* (3) as laying down that an obligation on the part of a grantor not to derogate from his grant may not be implied as a matter of contract. They meant, I think, that where the acts of derogation amount to nuisance or trespass the proper remedy before the Judicature Acts would have been an action for nuisance or trespass. There is nevertheless an implied contract not to frustrate the purposes of the express agreement. In *Markham* v. *Paget* (4), *Swinfen Eady* J. went on to review the authorities as to implied contracts for quiet enjoyment, and came to the conclusion not only that the then defendant's conduct amounted to a derogation from her grant, but that, where an owner "agrees to let" by a tenancy agreement, a contract for quiet enjoyment without interruption by the grantor or anyone claiming under her, where the agreement includes no such express term, is implied. His Lordship's review of the authorities included *Budd-Scott* v. *Daniell* (5), the most recent case, where the defendant counterclaimed for breach of an implied contract for quiet enjoyment. There was a written agreement not under seal, whereby the plaintiff " agrees to let " a house for a year. In the King's Bench Division Lord *Alverstone* C.J., with whom *Darling* and *Channell* JJ. concurred, considered that on principle and common sense an agreement for quiet enjoyment ought to be implied, and held that where there is a letting a covenant for quiet enjoyment is to be implied from the mere relationship of the parties. In this he agreed with the opinion expressed by Lord *Russell of Killowen* C.J. in *Baynes & Co.* v. *Lloyd & Sons* (6).

(1) 2 Macq., 449.
(2) 10 H.L.C., 333.
(3) (1894) 2 Q.B., 836.
(4) (1908) 1 Ch., 697.
(5) (1902) 2 K.B., 351.
(6) (1895) 1 Q.B., 820, at p. 826.

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That opinion, however, was not necessary to the determination of the last named case, as the plaintiff failed because any implied covenant had determined with the interest of the lessor, which had expired. Though the Court of Appeal affirmed the decision of the Court below on the ground stated (1), *Kay* L.J., in delivering the judgment of the Court, said: "The weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease." In *Budd-Scott* v. *Daniell* (2), however, Lord *Alverstone* C.J. said that the Court was not bound to treat these observations of the Court of Appeal as of binding authority, since they were merely dicta: while *Channell* J. pointed out that they were different from what he had always understood to be law, and from what all the text book writers had understood to be the law up to that time.

If the case were one between subject and subject I should be of opinion, on the undisputed facts, that an action lay against the grantor here for derogating from his grant, and probably that an action lay against him for breach of an implied contract for quiet enjoyment without interruption by the grantor or anyone lawfully claiming under him by matter subsequent to the grant—claiming lawfully, that is, as between such third person and the grantor. What then is the difference, if any, arising in such a case as this from the fact that the grantor is the Crown? The relation is the contractual one of landlord and tenant, and there is nothing in the Lands Acts to exclude the ordinary implications of law, one of which the Judicial Committee made in *Ettershank's Case* (3). The implied obligation either arises from necessity, or admittedly it does not arise at all. It is said that there is no necessity for the implication as between the tenant and the Crown, because the former has his remedy by action against any disturber of his possession. I cannot adopt that argument. The Crown has authorized this disturbance, for the annual leases told the Malones that they, and they alone, were entitled to the possession. By letting the land over the head of its own tenant, then in possession, to the Malones, and by thus

(1) (1895) 2 Q.B., 610, at p. 615. (2) (1902) 2 K.B., 351.
(3) L.R. 6 P.C., 354.

assuming dominion in the shape of a right to dispose of the possession to them, it has brought about an eviction of its tenant and his executors. If the implication is negatived then the Crown, after making such a contract as exists in this case, will be free to do all in its power to frustrate its own contract, and free to do the like in other cases, while the holders of land under the Statutes will have no remedy to check the repetition by it of such acts against any holder. That would be to arm the Crown with enormous powers of oppression and confusion, complaint against the exercise of which could in all such cases be met by the answer to which the argument of Mr. *Piddington* amounts; "The Crown has merely blundered: it is not responsible when it honestly blunders into setting its contracts at nought: sue the disturber himself." I think this would be to place the landlord in a position in which he could with impunity render his contracts worthless to his tenants, and if an implication of the kind arises of necessity when the grantor is a subject, I see nothing to exclude it when the grantor is the Crown.

I come now to the question of amendment. The proposed new count, alleging acts of the Government in derogation of the rights conferred on the plaintiffs by the acceptance of their rents and the renewal of their licences, has been already summarized by his Honor. It was put forward at the trial, at the close of the plaintiffs' case, and the application to amend was argued. It was pointed out that no new facts were to be alleged, but that the desire was to place in an alternative form the legal rights arising upon the undoubted facts. *Cohen* J., after considering the matter, refused the application at the close of the evidence, when the facts on which the count was based had not been controverted in any material particular. The refusal to amend was one of the grounds on which the plaintiffs unsuccessfully moved the Supreme Court for a verdict to be entered for them, or for a new trial. Had the amendment been granted, the defence to the new count must have been substantially the same as was offered to the first count, and the measure of damages was in my opinion identical. The principle stated by *Bramwell* L.J. in *Tildesley* v. *Harper* (1) is applicable to amendments sought under the Common Law Pro-

(1) 10 Ch. D., 393, at p. 397.

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cedure Acts of this State. "My practice," he said, "has always been to give leave to amend unless I have been satisfied that the party applying was acting *malâ fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." I think the amendment should have been granted. What then ought we to do, seeing that it has not taken a place among the issues? If it can be done at this late stage without injustice—and I am clear that it can—and if we can see that the omission to include the count in the declaration as filed has done the defendant no injury that cannot be compensated for by costs — and I am clear on that point also—we ought to treat the case as if the amendment that should have been made had been in fact made.

Treating, then, the declaration as including the count for disturbance in derogation of the plaintiff's right under his licences, which I think is a good count, I am of opinion that the facts afford no defence to it. As to the money count I add nothing to the remarks of the Chief Justice.

I am of opinion on the whole case that the plaintiffs were entitled to succeed at the trial, and that their appeal should be allowed.

On the questions of damages and costs, I agree with his Honor as to the judgment that should be entered.

ISAACS J. With respect to the first count, and assuming but not deciding (see *Newfoundland Steam Whaling Co.* v. *Newfoundland (Government of)*) (1) all else in the appellants' favour, the only special contract they have proved was at most an agreement to revoke the forfeiture of the licences, and to renew them subject to some rights the limitation of which is disputed, and in the circumstances not material. The revocation and renewals took place, and as held by the Privy Council in *O'Keefe* v. *Malone* (2), the renewals operated as from 20th January 1900. Therefore there was no breach of the only contract the facts could establish.

Mr. *Canaway* contended for a necessary implication from the contract of a promise for quiet enjoyment. But at all events in

(1) (1904) A.C., 399. (2) (1903) A.C., 365.

New South Wales where the old strictly legal and technical aspect of this matter is still undisturbed by any equitable considerations which might affect it under the *Judicature Act*, such an actual promise cannot be imported into the agreement. See *per Alderson* B. in *Brashier* v. *Jackson* (1). On the first count therefore the appellants fail.

The second is the common money count.

The reclamation of moneys paid for rent by O'Keefe cannot be sustained. First as to strict law. The payment was voluntary, there being no element which the law would recognize as compulsion. I can perceive no recognized ground for demanding its return. Regarding the matter from the standpoint of fairness, the appellants have no just cause to recover any of this money. They have in the result paid no more than a fair proportion of rents, having regard to the area actually occupied, and to the standard of apportionment fixed for an analogous situation by the legislature in sec. 81 (IV.) of the Act of 1884.

As to the Malone rents, it is plain, and was conceded, that if the damages be otherwise calculated upon the basis of full compensation for deprivation, that is of restoring the appellants to the position in which they would have been if they had been left undisturbed, these moneys cannot be recovered by the appellants.

Claiming the moneys so received appears to me equivalent to an adoption of the act of leasing to the Malones; and cannot stand together with treating that act as wholly unauthorized. How far the appellants, if they failed otherwise, could, in view of their inconsistent attitude in the action against the Malones, and in this action, succeed at all in adopting the receipt of the rents as a receipt on their behalf, is in the view I take of the whole case unnecessary to be determined.

The real contest takes place over the count sought to be added by amendment. The first question is whether, notwithstanding the refusals to amend, leave ought now to be given to add it to the declaration. Mr. *Piddington* stoutly objected to it on two grounds: first, that learned counsel for the appellants had all through the action rested his case on express contract, and not on implication arising from the relation of landlord and tenant; and

(1) 6 M. & W., 549, at p. 557.

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next, that the Crown thinking so little of the appellants' cause of action as framed, took but slight trouble to obtain evidence as to damage; whereas the new count, though presenting no difference in measure or elements of damage, was so much more serious that the respondent ought to have a further opportunity of seeking for testimony to mitigate damages which a member of the bar formerly acting for the Malones had informed learned counsel for the Crown could be obtained, but of which the Crown had no further knowledge.

I do not think these objections ought to prevail. The learned primary Judge apparently thought the term "express contract" in the judgment of the learned Chief Justice (1) meant a contract whereby the defendant promised in so many words that the tenant should have quiet enjoyment. His Honor's discretion was therefore not exercised on the matter in its full aspect. Mr. *Canaway* of course did not mean that, because, while the new count obviously covered more circumstances as the foundation of the alleged contract, it showed on the face of it that that contract was averred to consist of the implied obligations arising from the acceptance of the money and the renewal of the licences "in manner aforesaid," that is in the circumstances there already mentioned. The learned counsel apparently thought, rightly or wrongly, he could not rely for any implied contract upon the fact of renewal alone, and consequently persevered in repeating the antecedent facts in combination with the renewal and calling the whole an express contract, manifestly in the sense of a special contract, though not explicitly containing the precise words of the covenant or promise relied on. The refusal of the learned Judge therefore being based on a misconception is the more easily open to review. But even if it were not, there being nothing but the merest technicality in the objection, no possible prejudice to the defendant being suggested, no really novel claim, issue or fact being advanced, the new count consisting simply of a better and fuller legal statement of uncontroverted facts, with the same results dependent upon the same circumstances, and upon almost the same formal allegations of fact, I fail to see how

(1) 5 C.L.R., 217, at p. 223.

the amendment, if leading to a just determination of the matters really in issue, could at the trial properly be refused.

The *Common Law Procedure Act* 1889, No. 21, sec. 260, provides that all such amendments as are necessary for the purpose of determining in the *existing suit* the real question in controversy between the parties *shall* be so made, that is in the manner there already stated. The real question was whether a wrong had been done to O'Keefe by the Crown in issuing leases to the Malones notwithstanding that O'Keefe was the Crown's licensee.

No one suggested that the bargain said to have been made and violated was other than implied, and whether it was implied from the circumstances exclusive of the renewal as in the first count, or inclusive of the renewal as in the new count, was not the real question in the controversy between the parties. That was a lawyer's construction or mode of urging his clients' claims, but it is to my mind altogether hopeless to sustain it as being the true contest between the parties themselves. It was the mere husk, not the kernel. Parliament has required necessary amendments to be made so as to determine the real controversy in the existing suit, and that is not satisfied by refusing an amendment which, if the matter is still open to litigation at all, throws the party over to another suit. In my opinion the amendment should have been granted at the trial; the Crown not only had been called upon to meet the same issues as to the damages, but did not meet them, and I regard the argument that but little trouble was taken to secure evidence as not one to which any weight should be given. That might bar any amendment however formal in almost any case. No such suggestion was made at the trial.

But at the trial alone could any prejudice possibly have arisen to the respondent by amending. The request was made after the respondent had moved for a nonsuit which was "formally" refused. Evidently the appellants then saw a danger of the merits being defeated by a technical defect. The respondent had not then entered upon his case, and suggested no inconvenience, beyond that of meeting a different presentation in law of the same facts. In the Full Court, whatever the argument was, no

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harm could possibly have arisen to the respondent beyond the costs. Again the divergent apprehensions of what was meant in this Court by the term "express contract" appear to have had weight, and still the learned counsel for the appellants clung to his view that the circumstances preceding the renewal of the licence were essential to his client's success, in establishing his contract, though as in the new count—he trusted not merely to these, but to their combination with the renewal itself. The Full Court rejected the whole count, on the basis that the evidence showed no express contract in the strict sense.

Thus the case of amendment is very far from being suddenly sprung upon the respondent in this Court for the first time. If it had been, I still think that the circumstances are such as to make it more just to grant the amendment than to refuse it, upon the principles laid down by the Judicial Committee of the Privy Council in *Connecticut Fire Insurance Co.* v. *Kavanagh* (1).

If the Crown, in answer to the specific inquiry put by this Court, had indicated any substantial testimony whatever, having a fair probability of existence, and such relevancy to the question of damage as to appreciably affect it in respondent's favour if believed, I might have been disposed to grant the Crown a further opportunity of advancing it, if only for greater certainty that no injustice would be done by making the amendment. But no such indication was given. Nothing was suggested but the vaguest possibility of some indefinite evidence as to the land not being able to sustain so many sheep as the appellants asserted, only the most shadowy supposition that it could be obtained; the Crown knew nothing of its existence and gave no reason for not ascertaining and presenting it on the former occasion, except that it had great confidence in its legal position having regard to the technical form of action, &c., as stated in the declaration, and therefore put forward only a slight effort to offer testimony. The Court has really no substantial ground whatever for ordering a re-trial of the issue of damages—the possible existence of better evidence resting on mere conjecture.

I now proceed to consider the rights of the appellants with the third count added. The position was contested step by step.

(1) (1892) A.C., 473, at p. 480.

The real substance of the appellants' case is that the Crown made a lease to O'Keefe entitling him to exclusive possession and then broke it by giving Malone authority to enter and occupy, paying rent for such occupation to the Crown, and that this authority was acted upon to appellants' damage.

Did the issue of the licences—for we must treat the case as if the Crown had in fact issued them—create a contractual relation between the Crown and O'Keefe which comprised as terms of agreement the rights annexed to the licences by the Act? In the former appeal in this case (1), I expressed the opinion that O'Keefe's right to get the licences was a contractual right. I there in some detail stated my reasons, and cited authorities, and notably *Attorney-General of Victoria* v. *Ettershank* (2), and I shall repeat but one passage as expressing my views:—"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" (3). And that involves the position that the Crown may contract to give a lease, and may contract by a lease. It cannot contract either for or by a lease in any terms contrary to the Statute; and where the Statute declares what rights the lease when granted shall confer, in other words declares its legal effect, the Crown when granting such a lease grants those rights. To the authorities quoted in the case referred to, I add *Blackmore* v. *North Australian Co.* (4). There it was held by the Judicial Committee that written documents of private sale under the South Australian *Northern Territory Act* of 1863 of land orders, which as the Act declares entitled the purchasers to grants of land, did, *together with the Statute*, constitute a contract in the strict sense, the breach of which entitled the respondents to claim interest. The Act itself contained a provision that a purchaser was entitled within five years to select his quantity out of surveyed lands. Their Lordships not only held there was a contract into which the statutory provision entered, but that it was a contract creating an absolute right to have within the period stated an opportunity afforded

(1) 5 C.L.R., 217, at p. 228.
(2) L.R. 6 P.C., 354.
(3) 5 C.L.R., 217, p. 230.
(4) L.R. 5 P.C., 24.

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to make the prescribed selection, and that the Government were liable in damages for not surveying. Said Lord *Penzance*, who delivered the judgment (1):—"All contracts must be construed according to the surrounding circumstances, and a reasonable conclusion arrived at, as to what, looking at those circumstances, the parties intended." And accordingly the Judicial Committee, to use their words, held (1) "there was a positive contract on the part of the Government to survey the land within five years, to permit the selection by the purchaser, and, when selected, to make the grant." Accordingly interest was allowed, in other words damages, for loss of use of the money.

In *O'Keefe* v. *Malone* (2) the Judicial Committee expressed the view, which, though expressly left open for reconsideration by that tribunal, meanwhile binds this Court, that the grant of an occupation licence is a contract even within the meaning of the Act of 1891. Their Lordships also held, and on this point I think without reservation, that it is that species of contract known as a lease, because it confers an exclusive and transferable licence to occupy land for a defined period. Similarly the Privy Council held in *Glenwood Lumber Co.* v. *Phillips* (3) that "if the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

Then it was suggested that you must construe a grant strictly against the grantee from the Crown. That rule and its limitation with reference to this class of case may be illustrated by two examples. In *Chappelle* v. *The King* (4) the Privy Council by Lord *Macnaghten* expressed this view, that a mining licence giving an exclusive right of entry upon a claim and the exclusive rights to the proceeds, but not conveying any surface rights or ownership in the soil, gave a right not exclusive of the Crown, but a right exclusive of all persons other than the Crown. But in *Falkland Islands Co.* v. *The Queen* (5) it was held that a licence to depasture stock on terms defined in the instrument for twenty

(1) L.R. 5 P.C., 24, at p. 45.
(2) (1903) A.C., 365, at p. 377.
(3) (1904) A.C., 405, at p. 408.
(4) (1904) A.C., 127, at p. 135.
(5) 2 Moo. P.C.C. N.S., 266.

years and upon an annual rental was a lease. Sir *John Romilly* M.R. for the Committee, said (1), "though this is entitled a licence to depasture stock, it is in law a demise of the land therein contained," and accordingly it was held that as even against the Crown the grantee had the exclusive right to kill animals *ferœ naturæ*, although nothing was said in the licence about such animals.

I take it therefore as established that in the case of a lease by the Crown the ordinary necessary incidents of such a contract attach as much as if the grantor were a subject. And in *Feather* v. *The Queen* (2) it is conceded that there passes even against the Crown whatever is matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant.

Learned counsel for the respondent bestowed much care upon the contention that the duty was imposed by the Act upon the Minister to entertain and determine applications for grants of annual leases, and so long as he did so *bonâ fide* he discharged his duty, and therefore the only implication to be made in the case of a grant was that the Minister would not *malâ fide* issue a conflicting title. But that construction is impossible. In the first place it confuses the official duty of the Minister towards the Sovereign as his agent to deal with Crown lands according to law, with the duty of the Crown to its lessees, though acting necessarily by its agent, not to break the contracts it has made with them. No one could reproach a Minister with breach of duty to his principal, merely because he made a *bonâ fide* mistake of fact or law in the transaction of public business; but if that mistake leads to a breach of contract, I see nothing in the Act to absolve the Crown from the usual consequences. The case of *Blackmore* v. *North Australian Co.* (3) and of *Minister of Mines* v. *Harney* (4) are opposed to the respondent's contention. Besides, the test suggested would be impracticable. The Crown's liability cannot surely depend upon what view a jury may take of the honesty of a Minister, after ransacking the public records of a Department, and inquiring into all the con-

(1) 2 Moo. P.C.C. N.S., 266, at p. 272.
(2) 6 B. & S., 257, at p. 283.
(3) L.R. 5 P.C., 24.
(4) (1901) A.C., 347.

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fidential relations of the political head with its officers and others. The true position is much simpler. An occupation lease is granted to one person. The law says (Act 1889, sec. 33) that Crown lands not held under lease or licence and not reserved from lease or licence shall be open to annual lease. The Crown is presumed to know whether its lands are of the description which the law permits to be granted on annual lease, and if it assumes to let lands which are already held from it under licence, it acts illegally, and if damage ensues therefrom, it must compensate its rightful tenant for the breach. The principle applicable to such a case is not doubtful. It might be summed up in one phrase of *Bowen* L.J. in *Birmingham, Dudley and District Banking Co.* v. *Ross* (1) that "a grantor having given a thing with one hand is not to take away the means of enjoying it with the other."

I do not think this case depends upon whether you can find among the Crown's undertakings what is technically called an implied covenant for quiet enjoyment. I do not regard this as a technical matter at all. But I fully acknowledge the principle, which is enunciated beyond my power of question in *Douglas* v. *Baynes* (2):—"The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied." The true question in this case rests upon a broad foundation of honesty and common sense. As expressed by Lord *Watson* in the "*Blairmore*" *Sailing Ship Co.* v. *Macredie* (3):—"The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil."

In addition to this quotation I would refer to the other authorities I mentioned in the former appeal (4), supporting the same principle. It makes no difference whether a grant is voluntary or compulsory under the powers of a Statute, the same rule

(1) 38 Ch. D., 295, at p. 313.
(2) (1908) A.C., 477, at p. 482.
(3) (1898) A.C., 593, at p. 607.
(4) 5 C.L.R., 217, at p. 230.

applies: *Elliot* v. *North Eastern Railway Co.* (1); and *London and North Western Railway Co.* v. *Evans* (2).

Now was or was not the act of re-letting the land, and thereby authorizing Malone to enter and take possession and exercise all the rights attached by the Statute to an annual lease, an act in derogation of the previous grant to O'Keefe?

According to the principle laid down by *Bowen* L.J. in *The Moorcock* (3) it was, because an exclusive right of possession connotes that the grantor will not attempt to interfere with it. Lord Justice *Bowen's* observations were adopted and applied against the Crown by *Farwell* L.J. in *City of Dublin Steam Packet Co.* v. *The King* (4).

Every exclusive licence or right imports a negative, and the person who confers it impliedly enters into a negative undertaking to do nothing to contravene it. For instance, *Giffard* L.J. said in *Catt* v. *Tourle* (5) a grant of an exclusive right like that of supplying a particular public-house with ale contained in a covenant is equivalent to a negative covenant, and enforceable as such. In *Heap* v. *Hartley* (6) *Fry* L.J. said of an exclusive licence to use a patent but in terms which have general application, "the true nature of an exclusive licence is this. It is a leave to do a thing, *and a contract not to give leave to anybody else to do the same thing.*"

Metropolitan Electric Supply Co. Ltd. v. *Ginder* (7) was a case where the defendant agreed to take the whole of the electric energy required for his premises from the company. *Buckley* J., after quoting an important judgment of Lord *Selborne*, said (8): "He agrees to take the whole from A., which necessarily implies that he will not take from B. As a matter of *construction* therefore, not by express words but by necessary implication, I think there is here *an agreement not to take from others.*"

And Lord *Blackburn* in *Doherty* v. *Allman* (9), says:—"I think myself the true construction of saying I will maintain a storehouse involves the negative—I will not pull it down." And

(1) 10 H.L.C., 333, at p. 357.
(2) (1893) 1 Ch., 16, at p. 27.
(3) 14 P.D., 64, at p. 68.
(4) 24 T.L.R., 798, at 801.
(5) L.R. 4 Ch., 654, at p. 661.
(6) 42 Ch.D., 461, at p. 470.
(7) (1901) 2 Ch., 799.
(8) (1901) 2 Ch., 799, at p. 806.
(9) 3 App. Cas., 709, at p. 731.

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see *Carr* v. *Benson* (1), and the cases referred to in *Anning* v. *Anning* (2). When, therefore, the Crown grants licences or leases which, as the Privy Council has said with regard to these licences, are such as carry with them the exclusive right to occupy the land, the essence of the bargain is that the Crown will not do anything to interfere with the grantee's occupation. The lease to Malone purported to authorize him not merely to interfere with O'Keefe's possession, but to occupy exclusively, which involved total eviction of O'Keefe, and this happened. The Crown took rent from Malone as its tenant, and declined to recognize O'Keefe, in respect of the land granted to Malone. The lease to Malone was one of the overt assertions by the Crown that it was not bound by the licence to O'Keefe, and formed a real link in the chain of events by which he was ousted.

It was a breach of the Crown's contractual obligation stated in the words of *Fry* L.J., already quoted (3), "not to give leave to anybody else to do the same thing."

This being a breach of contract, followed by the natural, the expected and indeed the intended consequences of eviction, I see no want of any ingredient to give a cause of action against the Crown. *Cohen* v. *Tannar* (4) is an instance where such an act involves liability if followed by damage, and the observations of Lords Justices *Brett* and *Cotton* in *Anderson* v. *Oppenheimer* (5) are in the same direction. *Edge* v. *Boileau* (6) is a similar instance.

I attach no importance to the fact that O'Keefe might have resisted Malone as a transgressor. It is not for the Crown to say so.

When in the name of the Sovereign and under the Great Seal of the State the Executive arms a man with all the forms and insignia of full authority to enter and take possession of Crown lands, denying the right of another to hold it, it surprises, but by no means convinces, me to hear it said by those who represent the Crown that the only proper course for the dispossessed man to have taken was open defiance; and that treating the authority as a nullity he should have resisted it with force if necessary as

(1) L.R. 3 Ch., 524, at p. 533.
(2) 4 C.L.R., 1049, at pp. 1072-1074.
(3) 42 Ch. D., 461, at p. 470.
(4) (1900) 2 Q.B., 609.
(5) 5 Q.B.D., 602.
(6) 16 Q.B.D., 117.

an unlawful assumption of power, and that not having adopted that militant attitude, his only resort for redress is against the second grantee who acted in full reliance upon his grant from the Crown.

In the case of a private individual such an inconsistent course of conduct is not permitted. *Lloyd* v. *Tomkies* (1) is a clear authority that a landlord who under an assertion of right disturbs his tenant's possession is liable as for breach of covenant for quiet enjoyment against his *lawful* interruption. Having entered in assertion of a right he could not be heard to say it was unlawful, and so throw the tenant on an action for trespass. And in my opinion the Crown cannot escape the consequences of its unjust claim of right by now asserting its invalidity. I do not say that estoppel can be set up in the face of a Statute so as to sustain a forbidden transaction as legal and then found a claim upon it as a binding transaction, but that is quite different from holding the Crown to the character it assumed when committing the breach of contract which was the *fons et origo* of the appellants' loss.

There remains the question of damages. The appellants' right is contested to recover the costs for which they obtained judgment against, but not payment from, Malone. "Every expense which is a necessary consequence of the breach of contract, ought to be allowed," *per Tindal* C.J. in *Hodges* v. *Earl of Litchfield* (2). On the respondent's own argument it was necessary to sue Malone, and if so, reasonable costs were a necessary expense. *Henderson* v. *Squire* (3) is in principle a clear authority in appellants' favour. The only ground suggested for refusing these costs was that O'Keefe ought to have appealed to the Supreme Court from the Land Appeal Court's determination in Malone's favour. But that seems to offer no solid reason for saying that O'Keefe took an unreasonable course. The learned primary Judge apparently did not think so. And the Crown made no suggestion then to O'Keefe to appeal to the Supreme Court, but simply by letter of 17th December 1900 warned him against litigating his rights without carefully considering his

(1) 1 T.R., 671.

(2) 1 Bing. N.C., 492, at p. 501.

(3) L.R. 4 Q.B., 170.

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position. He did litigate, the event has justified him, and the Crown is, in my opinion, bound to place him, to the extent of damages sustained and taxed costs incurred in his effort to obtain restitution of his land, in the same position as if the Crown's contract had been performed. I agree that the appeal should be allowed and the judgment entered as proposed by the learned Chief Justice.

HIGGINS J. I take it as established, as between the parties to this action, that the contract alleged in the first count of the declaration is valid. I mean the contract alleged, that in consideration of O'Keefe paying certain amounts the notice in the *Gazette* of 6th January 1900 should be revoked, and he be permitted to quietly enjoy the land. The precise issue of law raised is stated at p. 313 of 7 S.R. (N.S.W.); and it has been found in favour of the plaintiffs by this Court, and again by the Judicial Committee of the Privy Council. I think it only right thus to preface my remarks, as there is a certain aspect of the alleged contract which was not presented to the Court apparently and which I should like to consider fully should any similar contract be presented to us. At present, I am not convinced that, if the Governor in Council has power to revoke a *Gazette* notice, or power to revoke a forfeiture, he has also power to make a contract to that end, so as to bind the land, or his successors, or the Crown. A discretionary power of such a kind should ordinarily remain unfettered by any promise until the power is exercised; and a power to revoke a forfeiture, or to renew a licence, does not, at first sight, seem necessarily to involve a power to make a contract for the exercise of that power.

Now, looking at the contract alleged in the first count, I concur with the Supreme Court of New South Wales that there was not any such contract in fact. As the Chief Justice of New South Wales says (1), there is "nothing to show that the Government was bound by any promise that it would or would not do something within its power." The parties did not approach the transaction with contracting minds at all. From the evidence of de Low, an officer of the Lands Department, it appears that

(1) 10 S.R. (N.S.W.), 253, at p. 263.

O'Keefe called, said that his occupation licences had been notified in the *Gazette* as not renewed, and asked what he should do. The officer suggested that he should tender the fees to the Treasury. O'Keefe did so, and it was received on the terms of this receipt (Ex. O): "*Suspense account.* The Treasury 12 Jan. 1900. Received from Mr. O'Keefe the sum of £407 9s. 7d. sterling for rent on occupation licences Nos. 651 and 651 a. *Awaiting reference to Lands Department.*" There was in this no contract. O'Keefe had said that he had forgotten to pay the rent; and he evidently hoped that the Minister of Lands would accept it, though late. As he says, the payment "slipped his memory" (see Ex. H). It turns out, from the opinion of the Judicial Committee in *O'Keefe* v *Malone* (1), that it was unnecessary for O'Keefe to pay this money; but that fact does not alter the actual attitude of the parties. Then, on 20th January, the Minister approved of a departmental minute as follows:—"The licence fees for 1900 having been paid into the Treasury, the non-renewal of the above occupation licences, and preferential occupation licences, may now be reversed, subject to conflicting claims and annual lease applications since 31st December." In accordance with this decision, a *Gazette* notice was issued on 14th February, stating that so much of the notice in the *Gazette* of 6th January as related to the non-renewal of the licences "is hereby cancelled." This cancellation, however, is "subject to any conflicting interests that may have arisen since 31st December last, and also subject to any annual lease application that may have been lodged since that date." In the meantime, on 12th February, an application was put in by the Malones for annual leases of part of the land; and hence arose the action for trespass against the Malones, which was settled by the decision in *O'Keefe* v. *Malone* (1). The facts are fully detailed by Lord *Davey* in that case.

It is, to my mind, perfectly clear that neither O'Keefe nor the Minister, in this transaction, were making any contract. A bargain was not in their minds at all. The Minister did not ask for the money; but the Treasury received it into a suspense account until the Minister of Lands should decide what he should do. The Minister did not bargain that if the money were paid he

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

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would exercise his power to reverse the non-renewal; but he reversed it. This is not a question as to the parties being *ad idem*; it is a point even (if possible) more fundamental—the parties had no idea of bargaining in the matter. Of course, the Crown became bound by the terms of the licence when renewed; but it did not bind itself to exercise its power of renewal—or its supposed power to reverse the non-renewal—before it actually exercised the power. The Judge of first instance has found, and there is no ground for setting aside his finding, that there was no proof of any express agreement—express, as distinguished from being implied from the relation of landlord and tenant.

But what as to an implied agreement—an agreement for quiet enjoyment,—to be implied in occupation licences? This is a much more difficult subject, in several aspects. No such agreement, or covenant, is alleged in the declaration as it stands. But the plaintiffs at the close of their case asked for leave to amend their declaration by adding a count which envelopes, in a cloud of words, a reference to rights *under* the licences: "and afterwards the said Government in derogation of the rights conferred upon the said Andrew O'Keefe by the acceptance of the said moneys, and the renewal of the said preferential occupation licence and occupation licence respectively, in manner aforesaid purported to grant annual leases," &c. Still not one word as to any implied covenant. Plaintiffs' counsel, when asking for leave to amend, informed the Judge that "the proposed count rests on the same facts as the first count. No new case is being made. It is the same case stated in a different form." After reserving his decision on this application, the learned Judge declined leave to amend "under all the circumstances." On the application of the plaintiffs to the Full Supreme Court for a verdict or a new trial, the Full Court said that the same remarks apply to the proposed count as to the first count. *Cullen* C.J. speaks of it as a count framed as an express contract "because *counsel for the plaintiffs did not seek to base his claim upon anything implied from the relationship of landlord and tenant or anything done under the Crown Lands Acts* by the parties." In my opinion, it is our duty to accept, unreservedly, this statement of the attitude taken by plaintiffs' counsel before the Full Court. The Full Court, under

these circumstances, were, as it seems to me, right in saying that even if the new count were added, the evidence failed to support it; and in refusing to say that the learned primary Judge was wrong in declining to allow the amendment.

As I have stated, an examination of the proposed third count discloses that it makes no claim against the defendant for the breach of any covenant, express or implied, for quiet enjoyment. It certainly contains words which, when severed from the rigmarole of their context, may be taken as charging the Government with certain acts done "in derogation of the rights" conferred by the renewal of the occupation licences. The acts complained of are purporting to grant annual leases, accepting rent therefor, authorizing the (supposed) lessees to take possession, repudiating the title of O'Keefe, compelling him to bring an action to recover possession. There is no covenant for quiet enjoyment alleged; and the acts alleged are not acts which would constitute a breach of such a covenant. It is not derogation from a grant to issue another grant which is invalid (under the final words of sec. 33 of the Act of 1889); or to accept rent thereunder; or to authorize the (supposed) lessee to take possession; or to "repudiate" the title of O'Keefe; or to compel him to bring an action to recover possession. To derogate from a grant is a different thing from breaking a covenant for quiet enjoyment. If the lessor purport to grant to another a lease which is invalid, he does not thereby derogate from his grant. But if that other enter on the land on the faith of the invalid lease, and if the lessor has covenanted for quiet enjoyment against not only his own acts, but the acts of persons "claiming under" him, the lessor is liable under his covenant.

To my mind, it is a grave error to treat the obligation not to derogate from one's grant as if it were a mere replica of the obligation under a covenant for quiet enjoyment. There would be no need to express such a covenant, there would be no need to imply such a covenant, if the grantor were already under the same obligation from the very nature of his grant. The two kinds of obligation may cover, indeed, much of the same ground; but they do not coincide. The obligation not to derogate from a grant is in some respects wider, in other respects narrower, than

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the obligation under a covenant for quiet enjoyment. For instance, a covenant for quiet enjoyment usually—if not always—applies to persons "claiming under" the lessor; but the obligation not to derogate from a grant does not. A man must not derogate from his grant by interfering with the grantee's enjoyment of the land granted; but there is no interference by the grantor unless it be the interference of the grantor. Of course I include interference by the grantor's agents. The Malones, the trespassers, were not the Crown's agents, and the Crown is not responsible for their trespasses, as a master is responsible for his servant's trespasses. The trespasses were not committed on behalf of the Crown. It is true that the Malones held supposed annual leases from the Crown; and that they claimed a right to enter and use the land under leases from the Crown which turn out to be void. Under such circumstances, if there were an ordinary covenant for quiet enjoyment, express or implied, in the occupation licence, the Crown would, in my opinion, be liable for Malones' trespasses as being trespasses committed by persons "claiming under" the Crown. But it is one thing to promise "I shall not interfere with you," and quite another thing to promise "No one claiming under me shall interfere with you." It is one thing for a master to get a servant to do an act on his behalf; it is quite another thing for a lessor to give a stranger permission—for whatever that permission is worth—to do that act on his own behalf. In *Grosvenor Hotel Co.* v. *Hamilton* (1) the Court of Appeal awarded damages against a landlord for derogation from his grant, the covenant for quiet enjoyment not being applicable to the grievance. The landlord had seriously injured the leased premises by vibration, vibration caused by pumping operations in supplying water to the hotel which he carried on on adjoining land.

But, as *Lindley* L.J. was careful to point out (2), "the house was *demised by the person who caused the vibration*, and he cannot defeat the grant contained in the lease." That case is no authority for saying that the Crown when it leases to A. is responsible in damages for trespass committed by B. under an invalid lease issued to B.

(1) (1894) 2 Q.B., 836.

(2) (1894) 2 Q.B., 836, at p. 840.

The Crown did not make O'Keefe's title less valid than it was before; and the Crown did not—although its supposed lessees did—interfere with O'Keefe's enjoyment under that title. The damages here claimed are damages for the trespasses committed by the Malones; the Crown did not commit these trespasses.

But Mr. *Canaway* has intimated that he applies, even at this late stage, if the Court should think it necessary, for leave to add another count, simply raising a case of breach of an implied covenant for quiet enjoyment. Nothing in this case has caused me more perplexity than the question whether it is proper to allow such an amendment at this stage, in the circumstances of this case, and especially in view of the very definite statement of *Cullen* C.J. (1) that "the plaintiffs did not seek to base their claim upon anything implied from the relationship of landlord and tenant." But I understand that under the New South Wales practice we have no power to dismiss this action without prejudice to another action; and that if the plaintiffs have a just cause of action, they will be shut out for ever from enforcing it unless the amendment be made. All the material facts are before the Court that could be proved under the new count. Even on the issue as to damages the defendant adduced evidence. Defendant's counsel, indeed, has been informed that further evidence could be brought in mitigation of damages; but there is nothing definite, and he had the opportunity at the trial of putting in all the evidence that he had. Personally, I am strongly in accord with the views expressed by *Bramwell* L.J. in *Tildesley* v. *Harper* (2)—that a Judge should give leave to amend unless "satisfied that the party applying was acting *malâ fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." Therefore, but with much doubt, I should allow the amendment.

But the question remains, should a covenant for quiet enjoyment be implied? It has to be remembered that this is an action between the Crown and its subject—that the occupation licence was "issued" (or is to be treated as "issued") by the Crown to O'Keefe. *Primâ facie*—to say the least—the Crown is not to be treated as having made in any grant a covenant by implica-

(1) 10 S.R. (N.S.W.), 253, at p. 264. (2) 10 Ch. D., 393, at p. 397.

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tion. The Crown is only bound by its express covenants. "Nothing passes except that which is expressed, or which is matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant:" *Feather* v. *Regina* (1); and see *per* Lord *Selborne*, *Dixon* v. *London Small Arms Co.* (2). By express covenant I mean a covenant which is expressly stated, or which is to be found in the words used by applying the ordinary rules of construction of documents (as in *Lord* v. *Commissioners of Sydney* (3)). A covenant which is found, on the proper construction of the words used, is quite different from a covenant which is thrust into a document by implication of law; and an implied covenant for quiet enjoyment is of the latter class. In a country such as Australia, where the Crown enters into direct transactions with its subjects in so many directions, this question, whether the Crown is to be fixed with contracts which the words of its grant or other documents do not express, becomes of very great importance. The rule exempting the Crown may be old fashioned, may to some seem absurd; but it is none the less binding. It is stated even in the recent *Digest of the Laws of England*, which has been brought out under the guidance of the *Earl of Halsbury* (see, *e.g.*, vol. VI., 410, 479, 496). The Crown is not bound by laches or by estoppels, though the subject is; nor is it bound by fictions of law: (*Godbolt*, 299; *Jenkins*, 287; *Hobart*, 339; *Case of Banne Fishery* (4); *Chitty, Prerog.*, 381). It will be observed that the principle to which I refer is not the mere principle of construction, that where Crown grants are doubtful in meaning they ought to be interpreted in the manner most favourable to the Crown. There is here no question of construction of words at all. The question is whether a covenant, of which there is not the slightest suggestion in the words used, is to be treated as inserted in the Crown's licence simply because it would be treated as inserted in a lease granted by one subject to another.

At the same time, if there is anything in the provisions of the Crown Lands Acts of New South Wales which shows that this covenant is to be implied, the principle which favours the Crown

(1) 6 B. & S., 257, at p. 283.
(2) 1 App. Cas., 632, at p. 659.
(3) 12 Moo. P.C.C., 473.
(4) Davies, 149.

would be excluded. I have examined the Crown Lands Acts, in particular sec. 81 of the Act of 1884, and sec. 4 of the Act of 1895, and I can find nothing to exclude the principle, nothing tending to make us imply the covenant. Sec. 81 is very long: but, substantially, it says that a runholder "shall be entitled" to an occupation licence if he apply for it, and deposit certain money on account of the first year's licence fee, and afterwards pay the difference between that amount and the amount of the fee as appraised, and if he pay the subsequent annual fees as appraised. If any of the land be leased or sold by the Crown, the licensee's right of occupation *pro tanto* ceases, and he becomes entitled to a proportionate refund and reduction. The Act of 1895 (sec. 4) throws no further light on the subject. It will be noticed that the Minister is to "issue" occupation licences. This means some document of licence; but I understand that no such document has been issued in this case, or in any case. The alleged covenant thus appears not merely a shadow, but a "shadow's shadow." At all events, the right of the holder of an occupation licence cannot be greater than if a licence had in fact been issued to him. If a document of licence had been drawn up, I presume that it would have purported, as in pursuance of the *Crown Lands Act* 1884, to "licence A.B. to occupy for grazing purposes all that piece of land," &c. Why should we here imply any further obligations on the part of the Crown? As the result of the licence the licensee cannot be treated as a trespasser by the Crown; other people cannot get (valid) annual leases, or other titles, and other people who enter for grazing purposes may be treated as trespassers. These are distinct privileges; why should we imply some covenant? We have no right to imply it unless as a matter of *necessary* inference from the language of the document: *Douglas* v. *Baynes* (1). In the extremely complex provisions of the Crown Lands Acts, nothing is more probable than that the Crown lands officers should frequently make mistakes in granting titles—as in this very case. As in this very case, they may think that certain land is not under occupation licence, and may grant an annual lease to another. As in this very case, the occupation licensee may assert

(1) (1908) A.C., 477, at pp. 481-2.

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his rights in an action for trespass, recover possession and get judgment for damages against the trespasser; but why is there *necessarily* implied any covenant on the part of the Crown against disturbance? I may add that I cannot find in the Crown Land Acts any indication of any covenants on the part of the Crown in respect of any of its titles.

I should like to make it clear that I admit the existence of a statutory contract between the Crown and the runholder when the runholder makes his application and pays his deposit as in *Blackmore* v. *North Australian Co.* (1); *Attorney-General of Victoria* v. *Ettershank* (2). That is trite law, which no one disputes. But it is a contract for a licence, as in *Ettershank's Case* (2) it was a contract for a grant in fee simple, and as soon as the licence has been issued, or as soon as the grant in fee simple has been made, the contract has been completed, and the rights and liabilities of the Crown and the runholder thereafter depend upon the licence or on the grant in fee. The only contract here is for a licence of the nature provided in the Act, and the only liability of the Crown thereafter must be found in the licence, either expressly or by necessary intendment.

For these reasons I cannot concur with my learned brothers as to the result of this appeal. I think that there is no contract for quiet enjoyment, and—as already stated—I cannot see, on the facts, any breach on the part of the Crown of the duty not to derogate from its grant. The money counts cannot, in my opinion, be sustained, at all events in the form in which they appear in the pleadings and in the particulars thereunder, and as submitted in the grounds of appeal.

Appeal allowed.

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

Solicitors, for respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

C. E. W.

(1) L.R. 5 P.C., 24.

(2) L.R. 6 P.C., 354.