[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR LANDS . . . APPELLANT;

AND

ROBERT EDWARD PRIESTLEY . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 5, 6, 18.

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

Crown Lands—Improvement lease—Forfeiture—Reservation from sale or lease—Crown Lands Act 1884 (*N.S.W.*) (48 *Vict. No.* 18), *secs.* 96, 136—*Crown Lands Act* 1895 (*N.S.W.*) (58 *Vict. No.* 18), *sec.* 26—*Crown Lands* (*Amendment*) *Act* 1908 (*N.S.W.*) (*No.* 30), *sec.* 42.

When an improvement lease has been forfeited under sec. 96 of the *Crown Lands Act* 1884, the land included in the lease becomes Crown land reserved from sale or lease until otherwise notified in the *Gazette*, within the meaning of sec. 136 of that Act, as amended by sec. 42 of the *Crown Lands* (*Amendment*) *Act* 1908.

Decision of the Supreme Court: *In re Priestley*, 11 S.R. (N.S.W.), 107, reversed.

APPEAL by the Minister for Lands from the decision of the Supreme Court allowing an appeal by the respondent from the decision of the Land Appeal Court upon a case stated.

By notice in the *Government Gazette* of 27th January 1910 an improvement lease, which had been granted under sec. 26 of the *Crown Lands Act* 1895, was declared to be forfeited. On 28th April 1910 the respondent Priestley applied for a conditional purchase and conditional lease of certain lands within the boundaries of the forfeited improvement lease. On 14th June 1910 the local land board allotted to the respondent the land applied for by him in virtue of the said applications. On 4th

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July 1910 the Minister for Lands, under the provisions of sec. 59 of the *Crown Lands Act* 1895, applied to the Land Appeal Court for disallowance of the applications upon the ground that the lands applied for had on forfeiture of the improvement lease became reserved from sale or lease until otherwise notified in the *Gazette*, and that, no notification having been published, such lands were not available for conditional purchase or lease. The Land Appeal Court held that the lands were reserved from sale or lease. The Supreme Court, on appeal from the Land Appeal Court, held that they were not: *In re Priestley* (1).

Ralston K.C., and *Hanbury Davies*, for the appellant. The Supreme Court held that sec. 136 of the *Crown Lands Act* 1884 applied to conditional purchases and conditional leases, but did not apply to improvement leases, which were first created by the *Crown Lands Act* 1895. Sec. 136 is clearly divisible into two parts. The first part provides that, where a conditional purchase is forfeited, all rights held by virtue of it are also forfeited. It deals only with the consequences of forfeiture. Secs. 48 to 54 deal with applications for conditional leases. Sec. 38 provides for the forfeiture of a conditional purchase and sec. 96 for the forfeiture of a lease or licence. Sec. 136 deals with all these cases. Improvement leases are first dealt with by sec. 26 of the *Crown Lands Act* 1895. Sec. 1 (*c*) of that Act provides that it shall be read with the *Crown Lands Act* 1884 (and other Acts), and shall form part of the said Acts, to the extent to which they are unrepealed. The provisions of the Act of 1895 relating to improvement leases must therefore be read as if they were included in the Act of 1884. The construction of amending Acts was considered by this Court in *Sweeney* v. *Fitzhardinge* (2); *Minister for Lands* (*N.S.W.*) v. *Bank of New South Wales* (3); and *Mackinnon* v. *Attorney-General for New South Wales* (4). If improvement leases are regarded as a form of tenure under the Act of 1884, the latter part of sec. 136 provides that land forfeited shall become Crown land, and, as amended by sec. 42 of the Amending Act of 1908, that it shall be reserved from sale or

(1) 11 S.R. (N.S.W.), 107.
(2) 4 C.L.R., 716.
(3) 9 C.L.R., 322.
(4) 9 C.L.R., 503.

lease until otherwise notified in the *Gazette*. The general words in the latter part of the section are not limited to the particular holdings mentioned in the earlier part of the section, and that they include improvement leases. The principle of construction to be adopted in the case of a section containing two distinct provisions was considered in *Doolan* v. *Midland Railway Co.* (1), and *Cohen* v. *South Eastern Railway Co.* (2). The Crown Lands Acts are intended to be read as a code, and leases created by a later Act are governed by the general provisions as to leases in the earlier Act. [They also referred to *In re O'Brien* (3).]

Whitfeld and *Pike*, for the respondent. The words "whenever land shall be forfeited," in sec. 136, are limited by the context, and apply only to the particular class of holdings mentioned in the earlier part of the section. The words "shall become Crown lands" are wholly inapplicable to land held under any kind of lease, except conditional lease. Land held under improvement lease never ceases to be Crown land. Sec. 136 is not a general or declaratory section. Various forms of leases were created by the Act of 1884, and that Act contains special provisions dealing with their forfeiture, which are inconsistent with sec. 136. By sec. 79 the disposal of land on the expiration of a pastoral lease is dealt with. Homestead leases can only be dealt with under sec. 83, and annual and special leases under sec. 85 (4) and sec. 90. Thus the forfeiture of every kind of lease is provided for except conditional leases. These methods of dealing with the various classes of leases are imperative and exclusive: *Blackburn* v. *Flavelle* (4). Sec. 136 therefore does not apply to them. That section was passed to meet the difficulty raised in *Blackburn* v *Flavelle* (4) as to the meaning of the words "be liable to be sold by auction" and "may then be sold by auction" in secs. 18 and 20 of 25 Vict. No. 1. It was held under sec. 13 of that Act that a forfeited selection could not be reselected, but could only be disposed of by the Crown by auction. Sec. 136 provides that conditionally purchased land, on forfeiture of the conditional

(1) 2 App. Cas., 792.
(2) 2 Ex. D., 253.
(3) 12 N.S.W.L.R., 45.
(4) 6 App. Cas., 628.

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purchase, shall revert to the Crown under a new title. The forfeiture of a lease is not the forfeiture of land under sec. 136. The word "land" refers to land the title to which has been divested from the Crown, such as conditionally purchased land. Form 88 provides that upon the forfeiture of an improvement lease "the said term of years shall absolutely determine." The forfeiture of such leases is therefore expressly dealt with, and such forfeiture is not treated as a forfeiture of land, but of a term of years. Secs. 79, 81, 83, 90, 96, all speak of the forfeiture of a lease as distinct from the forfeiture of land. In *Jaques* v. *Stafford* (1) it was held that the meaning of "Crown lands" in sec. 86 of the Act of 1884 was controlled by the context, and was not governed by the definition in sec. 4.

Ralston, K.C., in reply. Even the forfeiture of a conditional purchase is not strictly a forfeiture of the land, but only of the present right to possession. The fee simple passes only on the issue of the grant. In various sections a forfeited lease is spoken of as forfeited land: as in sec. 135 of the Act of 1884, sec. 32 of the Act of 1889 and sec. 41 of the Act of 1895. If sec. 136 only deals with conditional purchases it is meaningless, because sec. 38 provides that on forfeiture the conditionally purchased land shall revert to the Crown and become Crown lands.

Cur. adv. vult.

Dec 18.

GRIFFITH C.J. The question for determination in this case is whether an improvement lease forfeited under sec. 96 of the *Crown Lands Act* 1884 falls within the language of sec. 136 of that Act, as amended by the *Crown Lands (Amendment) Act* 1908. The short facts are that an improvement lease was forfeited, and that the respondent applied for part of the land as a conditional purchase and a conditional lease, before the land had been notified as open for application. The Local Land Board held that the land might be applied for, although it had not been notified as open. The Land Appeal Court were of opinion that the land was not available for selection. The Supreme Court

(1) 11 N.S.W.L.R., 127.

held that it was, and this appeal is brought by the Minister from that decision.

Improvement leases were a new form of tenure created by the *Crown Lands Act* 1895, which provides, by sec. 1, that that Act shall be read with the *Crown Lands Act* 1884 (and numerous other Acts) "and shall form part of the said Acts and each and every of them to the extent to which and so far as the provisions of any of the said Acts are unrepealed." The result is that the provisions relating to improvement leases must be read as part of the Act of 1884, and as if they had been inserted in that Act.

The Act of 1884 is entitled "an Act to regulate the alienation, occupation and management of Crown lands and for other purposes," and dealt with the whole subject of Crown lands. It dealt with existing tenures, provided for the sale of lands by auction, and created new tenures called conditional purchases and conditional leases. It also dealt with pastoral leases (sec. 78), homestead leases (sec. 82), scrub leases (sec. 87), special leases (secs. 89, 90 and 92), and contained various other provisions. By sec. 4 of that Act "Crown lands" are defined as "lands vested in Her Majesty and not permanently dedicated to any public purpose or granted or lawfully contracted to be granted in fee simple under this Act or any of the Acts hereby repealed," and upon this definition much of the argument addressed to us has been based. Lands held under pastoral lease, homestead lease, scrub lease and special lease are Crown lands within that definition, because the land has not been contracted to be granted in fee simple. It has been held that land conditionally purchased is lawfully contracted to be granted in fee simple, and is therefore not Crown land. It is suggested, also, that land held under conditional lease ceases to be Crown land. But there can be no doubt that when land had been demised under any of the provisions of this Act, and a valid contract had been made between the Crown and the tenant as to the right of ownership for a term of years, it could not be demised or dealt with over again under other provisions of the Act. Accordingly the Supreme Court of New South Wales held in *Jaques* v. *Stafford* (1), that land under pastoral lease could not be taken up as a conditional purchase because, although it fell

(1) 11 N.S.W. L.R., 127.

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within the definition of Crown land, and although the Act provided that Crown lands with certain exceptions might be taken up, yet the term "Crown lands" used in that context could not be held to include Crown lands in the lawful occupation of another person under a binding contract with the Crown. The interpretation clause provides, as might be expected, that the expressions defined are to have the defined meanings unless the context otherwise requires. So that we are not fettered by the terms of the definition of "Crown lands" if the context requires a different meaning.

Sec. 96 of the Act of 1884 provides that every lease shall be liable to forfeiture for nonpayment of rent or breach of any condition annexed to the lease. Sec. 136, upon which the question to be determined in this case arises, was, as originally enacted, in these words, "Every forfeiture of land conditionally purchased, whether under this Act or any of the said repealed Acts, shall be deemed to operate as a forfeiture of all additional conditional purchases held in virtue of such first mentioned land, as well as of all conditional leases or rights attached to the land so forfeited, and whenever any land shall be forfeited under this Act such land shall become Crown land, and may be dealt with as such, but no forfeiture of any purchase or lease under this Act or any Act hereby repealed shall take effect until the expiration of 30 clear days after notification of such forfeiture in the *Gazette*." From that time until the present it has been accepted law that the forfeiture must be effectuated by notification in the *Gazette*. By the Act of 1908 sec. 136 is amended by inserting certain words, so that the latter part of the section now reads:—"And whenever any land shall be forfeited under this Act such land shall become Crown land reserved from sale or lease until otherwise notified in the *Gazette*, and may be dealt with as such," &c. So that, if the land held under improvement lease in this case became, upon forfeiture of the lease, Crown land within the meaning of sec. 136, it was automatically reserved from sale or lease until otherwise notified, and the applicant was not entitled to apply for it. The relevant words to be considered are:—"Whenever any land shall be forfeited under this Act such land

shall become Crown land reserved from sale or lease until otherwise notified in the *Gazette* and may be dealt with as such."

The Supreme Court held that this section only applied to land held under conditional purchase or conditional lease which is appurtenant to a conditional purchase, and that the section merely provided that the conditional lease should fall with it. No doubt this construction is right as to the first part of the section. But the question really arises upon the words in the latter part of the section "whenever land shall be forfeited under this Act." These words are general in their form. The respondent's contention is that they are limited by the context, and apply only to the class of land dealt with in the earlier part of the section. In *Cohen* v. *South Eastern Railway Co.* (1), *Mellish* L.J., speaking of certain words general in their terms said:—"Those words in their plain and natural meaning incorporate sec. 7, as well as every other section of the Act. Then why should it be excepted? The only reason is that this clause is not contained in a separate section by itself, but is contained at the end of sec. 16; and therefore it is said that it is to be confined to the subject-matter to which the previous parts of sec. 16 relate. I am not aware that there is any such rule of construction of an Act of Parliament. If some absurdity or inconvenience followed from holding it to apply to the whole Act, it might be reasonable to confine the incorporation to clauses relating to some particular subject matter; but if there is no inconvenience from holding that the incorporation includes sec. 7 as well as the other sections, we ought to hold that it does." He added an observation which I think is very pertinent to this case. "For my own part, so far from thinking there is any inconvenience, I think the direct contrary." Another instance of a similar rule being applied is afforded by a very recent case, *R.* v. *Godstone Rural Council* (2), in which a general clause at the end of a long section dealing with a particular subject matter was held to extend to the whole matter embraced in its words, which was much wider. In my opinion, as a matter of construction, sec. 136 when the Act was passed extended to every case where land was forfeited, and applied to every case to which sec. 96 applied.

(1) 2 Ex. D., 253, at p. 260.

(2) (1911) 2 K.B., 465.

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Another ingenious argument was based upon the word "become" in the phrase—"Whenever any land shall be forfeited such lands shall become Crown land" the contention being that that word can only apply to land which has ceased to be Crown land, and are therefore only applicable to conditional purchases, or possibly to conditional leases, but not to Crown land held under any other form of tenure. But although in one sense land which has never ceased to be Crown land cannot be said to "become" Crown land, yet the context may indicate that this narrow construction should not be adopted. The section provides that lands which have been forfeited "shall become Crown land, and may be dealt with as such," that is, as I understand it, in any way in which Crown lands may be dealt with under the Acts in force for the time being, and such a provision is just as necessary in regard to land held under one form of tenure as another. I think therefore that this argument fails.

The next contention was that the forfeiture of a lease is not the forfeiture of land, and does not fall within the meaning of the words "Whenever any land shall be forfeited." That argument did not impress me, but it was entirely answered by Mr. *Ralston*, who pointed out that in various sections of the Crown Lands Acts the term "forfeiture of land" is expressly used in reference to the forfeiture of leases. In certain cases the Minister may declare any conditional purchase or leasehold forfeited: sec. 135. It may be suggested that a conditional leasehold is an exceptional case. Perhaps so, but I do not think so. Sec. 32 of the Act of 1889, which deals with what was to happen on forfeiture of any conditional purchase or lease, after making certain provisions, says "any such forfeiture of land," may be dealt with in a particular way. In the Act of 1891 the title of which is "To validate certain forfeitures and certain reversals of forfeitures of land sold or leased by the Crown and to declare the effect of such forfeiture," sec. 2 provides that forfeiture includes "the lapse or voidance of any contract with the Crown for the purchase or leasing of Crown Land." The Act of 1895, sec. 41, deals with certain persons disqualified from acquiring land under various tenures, including leasehold, and concludes with a provision that if a person fails to comply with the

conditions he shall "absolutely forfeit all land the subject of the application."

I have no doubt, therefore, that when an improvement lease is forfeited under sec. 96, it is a case of the forfeiture of land within the meaning of sec. 136. In my opinion these words are of general application, and mean that whenever any land, held under whatever tenure, is forfeited, it shall fall into the category of disposable Crown lands. That being so, upon the forfeiture of an improvement lease the Act of 1908 makes an automatic reservation of the land from selection until it is notified as available. For these reasons I think that the decision of the Land Appeal Court was right and should be restored. The appeal should, therefore, be allowed, and the question submitted answered in the affirmative.

BARTON J. read the following judgment. Improvement Lease No. 1757 was forfeited by *Gazette* notice of 27th January 1910.

Three months later—on the 28th April—the respondent applied for, and on the 14th June the Land Board allotted to him, a conditional purchase and a conditional lease of land within the limits of the forfeited improvement lease. At the time of the application and allotment there had not been any *Gazette* notification that this land was open for sale and lease, or for either purpose. These are the whole of the facts.

The respondent says that on the forfeiture the land was open to selection. The Minister disputes this, relying on the second branch of sec. 136 of the *Crown Lands Act* 1884.

The whole section reads thus: "Every forfeiture of land conditionally purchased whether under this Act or any of the said repealed Acts shall be deemed to operate as a forfeiture of all additional conditional purchases held in virtue of such first mentioned lands as well as of all conditional leases or rights attached to the lands so forfeited; and whenever any land shall be forfeited under this Act such land shall become Crown land reserved from sale or lease until otherwise notified in the *Gazette* and may be dealt with as such, but no forfeiture of any purchase or lease under this Act or any Act hereby repealed shall take

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effect until the expiration of thirty clear days after notification of such forfeiture in the *Gazette*."

The first part of this section deals only with the consequences of the forfeiture of lands held under conditional purchase, in relation to other lands and rights held by virtue of the conditional purchase, and therefore does not touch the present case, which relates to the effect of the forfeiture of an improvement lease. The second branch, according to the respondent, does not touch the case either, for he says that branch is restricted to the subject matter of the first. If so, the words "whenever *any land* shall be forfeited under *this Act*" mean "whenever *any land conditionally purchased* shall be forfeited under *this section*."

Counsel for the Minister, however, point to the comprehensiveness of the terms "any land" and "this Act," as showing that the second part of the section is not to be read in the restrictive sense attributed to it by the respondent.

If the Minister is right, the improvement lease when forfeited became "Crown land reserved from sale or lease until otherwise notified in the *Gazette*," and was not, therefore, in the absence of such a notification, open to selection when the respondent applied for it. But if the respondent is right the forfeiture of the improvement lease left the land the subject of it merely open, like other Crown land unaffected by sec. 136, to alienation by the ordinary method of conditional purchase.

The words "reserved from sale or lease until otherwise notified in the *Gazette*" are an amendment inserted in the section by the *Crown Lands (Amendment) Act* 1908; see sec. 42 and the Schedule.

An improvement lease is a tenure created by sec. 26 of the *Crown Lands Act* 1895, which Act by sec. 1 (*c*) is to be read with the Act of 1884 and the several Lands Acts named in that section and passed in the years 1886 and 1891 and intervening years, and is to "form part of the said Acts and each and every of them, to the extent to which, and so far as, the provisions of any of the said Acts are unrepealed." For the purposes of this case, then, an improvement lease is in the same position as if it had been a tenure authorized by the Act of 1884 to be granted.

In considering whether the second branch of sec. 136 is con-

fined to the same subject matter as the first branch, it must be borne in mind that, if the words indicate the wider scope, it must be accepted, unless there exists a context which overcomes their ordinary meaning. (See *Cohen* v. *South Eastern Railway Co.* (1); also *O'Keefe* v. *Malone* (2)). Here, I think, the wider scope is plainly indicated. In terms, the first branch is restricted to the forfeiture of land conditionally purchased, but the second refers to any land, of whatever tenure, over which the Crown has had, under the Act as a whole, a right of forfeiture for any cause, which right it has exercised. It is urged for the respondent that "land" means only land of freehold tenure, such as an original or additional conditional purchase, so that the forfeiture of "land" means the forfeiture of a freehold. If that be correct, it is said that, as the only freeholds held subject to forfeiture under the Lands Acts are conditional purchases, the subject matter of each branch of the section is identical. But in this section itself the forfeiture of leases is spoken of as a forfeiture of land, for the proviso that "no forfeiture of any purchase or lease" shall take effect till after thirty clear days from gazettal is a qualification of the immediately preceding direction as to what is to happen "whenever any land shall be forfeited." The word "land," indeed, is used often in these Acts to designate lands of less than freehold tenure. Thus by sec. 29 of the Act of 1889, the Minister is, on the application of any homestead or pastoral lessee, to cause to be issued to him "a lease for the land held by him," *i.e.*, as such lessee. In sec. 32 of the same Act there are provisions for the course to be taken "upon the forfeiture of any conditional or other purchase, or forfeiture or surrender or expiration of any conditional or other lease," &c., and the section then directs what is to be done with "any such forfeited or surrendered or expired lands." Similar instances are to be found in the title of the Act of 1891, in sec. 41 of the Act of 1895, and elsewhere in the series of Statutes. I think, therefore, that the argument that "land" includes only lands of freehold tenure—and in this connection only conditionally purchased lands—lacks foundation.

(1) 2 Ex. D., 253, *per Mellish* L.J., at p. 260.

(2) (1903) A.C., 365, *per* Lord *Davey*, at p. 374.

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Another argument for the respondent rested on the words "shall become Crown lands." Lands under lease from the Crown are still Crown lands as defined by sec. 4 of the Act of 1884, and so, it is urged, they cannot "become" Crown lands upon forfeiture, and thus an improvement lease, or any lease, cannot be within the section. The second branch, then, is confined to freeholds, and to the only class of freeholds which can be forfeited under the Act, *i.e.*, conditional purchases. But it is clear from the proviso that forfeited leases are within the class of "land . . . forfeited under this Act," and lands within that class are to "become Crown lands"; so that a meaning must be found for the expression which will include forfeited leaseholds. That meaning may be found by looking at this portion of the section as it stood before the amendment. Forfeited "land shall become Crown land and may be dealt with as such." The object was to bring back forfeited land, whether it had been freehold or leasehold, into the category of the Crown land which the law authorized to be dealt with in one way or another—and the phrase was rather clumsily devised to bring both into the category. Though the forfeited leasehold land does not in strictness become Crown land *simpliciter*, as the forfeited freehold does, it becomes again Crown lands which "may be dealt with as such," *i.e.*, are subject to the methods of disposal authorized by the particular provisions of the Acts—a condition which did not exist before the forfeiture. The insertion in the Act of 1908 of the words "reserved from sale or lease until otherwise notified in the *Gazette*" did not therefore alter the meaning of the words "Crown lands" which "may be dealt with as such," but merely suspended until notification the disposal of them previously sanctioned.

A third line of argument, adopted to restrict the second branch of sec. 136 within the scope of the first branch, was that the consequences of the forfeiture of every class of leasehold had been laid down in other parts of the Act, and therefore to give the second branch an extension beyond the limits of the first was to suppose that Parliament had in this instance made a provision which, in relation to some cases, was merely tautological, and which in relation to others gave sanction to the disposal of forfeited leases by methods excluded by the provisions made in

other parts of the Acts for the disposal of various classes of forfeited leaseholds. The case of *Blackburn* v. *Flavelle* (1) was cited in support of the latter part of this argument, but I do not think it applies to the present position. As I have already indicated, the provision under discussion does not single out or point to any particular method of disposal. It merely aims to ensure that the land is disposable *sub modo* by throwing it back into the category of Crown lands which may be dealt with, but reserved from sale or lease until a notification to the contrary is gazetted. After that notification it may be disposed of in conformity with the Acts. Of course every method of disposal to the public authorized by the Lands Acts is by way either of sale or lease; for even an occupation licence is in substance a demise. Where any method of disposal is provided exclusively and specially, the section does not purport to enact anything in conflict with that method. Where, however, there is no special provision, the forfeited land is ordinary Crown land, and I take it that such land is open to selection in the ordinary way, but only after the prescribed *Gazette* notice. Here there has been no such notice.

The objection of tautology, if it is well founded, is not a formidable one. It is well answered by *Maxwell*, who says at p. 445 (3rd ed.):—"The use of tautologous expressions is not uncommon in Statutes, and there is no such presumption against fullness or even superfluity of expression, in Statutes or other written instruments, as amounts to a rule of interpretation controlling what might otherwise be their proper construction."

I am of opinion, for the above reasons, that the second branch of the section is not restricted as the respondent contends, that the question in the special case should have been answered in the affirmative, and that the appeal should be allowed.

O'CONNOR J. read the following judgment. The question submitted by the Land Appeal Court for the decision of the Supreme Court is stated at the end of the special case in these words:—"Whether on the forfeiture of the improvement lease the lands formerly embraced therein became reserved from sale and lease under the provisions of sec. 136 of the *Crown Lands*

(1) 6 App. Cas., 628.

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Act 1884." Improvement leases were first authorized by sec. 26 of the *Crown Lands Act* 1895. They are granted on the recommendation of the local Land Board in respect of lands which, by reason of the circumstances referred to in the section, cannot be made fit for settlement without the expenditure of a large sum of money. Amongst the conditions directed by various sub-sections to be inserted in an improvement lease is one for its determination upon any breach by the lessee of its covenants and provisions. When the recommendation of the local Land Board is adopted, and the lease is issued, the estate created differs in no way from any other lease of Crown lands. It is to be noted that the Act creating this form of lease makes no express provision as to what is to be done with land if the lease should be forfeited for breach of conditions. The first section of the Act however declares that it shall be read with, and become part of, certain then existing land Acts expressly mentioned—amongst them the Act of 1884. I take it to be the settled law of New South Wales that the election of the Government to exercise its right of forfeiture for breach of conditions in a lease must be notified in the *Government Gazette*. In *In re O'Brien* (1), *Darley* C.J., speaking of a forfeiture of a conditional lease says:—"There is no doubt that the Crown is not bound to forfeit the land, but, when it has elected so to forfeit, such forfeiture must be notified in the *Gazette*. It has been laid down by *Sir Alfred Stephen*, in *Drinkwater* v. *Arthur* (2), that the proper way to notify such election is by means of the *Government Gazette*." It was contended by counsel for the Minister that, when with respect to an improvement lease the Government elects to forfeit for breach of any condition, it must notify its election in the *Government Gazette* and that thereafter all the sections of the Act of 1884, general in their terms and relating to forfeitures, must apply. He cited in illustration sec. 96 of the Act of 1884 which enables the Government to forfeit a lease for non-payment of rent and also gives the lessee the right to have the forfeiture stayed on making a certain payment within three months of the due date of the rent. Counsel for the respondent did not deny the applicability of sec. 96, but strongly contended against the

(1) 12 N.S.W. L.R., 45, at p. 48. (2) 10 S.C.R. (N.S.W.), 193.

applicability of sec. 136. The Land Appeal Court adopted the view put forward on behalf of the Government and held that sec. 136 did apply. The Supreme Court on appeal held that it did not. This Court has now to decide whether the view of the Supreme Court was right. Before considering the section in detail it is necessary to observe that the words now relied on "reserved from sale or lease until otherwise notified in the *Gazette*" were not in the section as it originally stood in the Act of 1884. They were added by sec. 42 of the amending Act of 1908 which by its second section declares that it is to be construed with the principal Acts, which the next succeeding section defines in substance to be all the Crown Lands Acts then in force. We must therefore take sec. 136 as it stands as expressly recognized and adopted with an amendment by the Act of 1908. The section is now, and has been since 1884, a part of the existing statutory system enacted for the administration of Crown lands and must be interpreted as part of that system. It was properly conceded by counsel for the Crown that the first part of the section relates to conditional purchases and conditional leases only, and its obvious purpose is to declare the effect of forfeiture of an original conditional purchase on lands held as appendant to it. Then follow these words (I quote the section as it now stands), "and whenever any land shall be forfeited under this Act such land shall become Crown land reserved from sale or lease until otherwise notified in the *Gazette* and may be dealt with as such but no forfeiture of any purchase or lease under this Act or any Act hereby repealed shall take effect until the expiration of thirty clear days after notification of such forfeiture in the *Gazette*."

The words "and whenever any land shall be forfeited under this Act" being general, are *primâ facie* wide enough to include an improvement lease, or any other kind of lease, as well as a conditional purchase or a conditional lease.

It is a first rule of statutory interpretation that words and phrases are taken *primâ facie* to have been used in their technical meaning, if they have acquired one, and in their popular meaning, if they have not; and from this presumption it is not allowable to depart even where the words or phrases are susceptible of another

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meaning, unless adequate grounds are found for concluding that that interpretation does not give the real intention of the legislature. Such reasons may be found in the history or cause of the enactment, in the context, or in the consequences that would result from the liberal interpretation. The contention on behalf of the Crown is that the cause and history of the enactment are in favour of, rather than against, the reading of the words, "whenever any land shall be forfeited under this Act" in their ordinary and natural sense, that is to say in the sense which will include every kind of lease, and not, as the respondents argue, conditional purchases and conditional leases only. The Act of 1884 dealt with all forms of tenure by which Crown lands were then held, and in respect of those held on terms requiring the observance of conditions by the applicant or holder there was, speaking generally, a liability to forfeiture. One object of the latter part of sec. 136 in its original form was undoubtedly to stop the immediate taking up of Crown lands by new holders in those cases in which the lands became available for new applications immediately on the *Gazette* notification of forfeiture. The prevention of the immediate intrusion of new interests binding the land immediately on forfeiture was of obvious advantage both to the Crown and to the person who held at the time of forfeiture. During the thirty days grace automatically allowed by the section there was time for the Crown to consider further action, and there was time for the person, whom the forfeiture when it became effective would deprive of his holding, to take steps under the Act for staying the forfeiture, or, if that were impossible, to move his stock, and in other ways adjust his position. The amendment made by the Act of 1908, though it went much further, was a step in the same direction. Its effect was that when at the expiration of the thirty days the forfeiture became effective, the forfeited lands did not become without further action open to new applications. They remained covered by the automatic reserve from sale or lease which the notification of forfeiture itself created. No reason was shewn, nor could be shewn, why the benefits of the section both in its original form and as amended in 1889 should be confined to conditional purchases and conditional leases. The disadvantage to the

Crown and the hardship to holders arising from the throwing open of forfeited lands immediately on *Gazette* notification of forfeiture, needed remedy as much in the case of leases generally, as in the case of conditional purchases and conditional leases. To limit the *primâ facie* operation of the section so as to shut out cases coming within the general objects of the remedy would be to commit the fault referred to by *Bowen* L.J., in *R.* v. *Justices of Liverpool* (1), where he says, speaking of a narrowing interpretation of general words adopted in another case, "One objection which to my mind is almost conclusive against it is this, that so to construe the section is reading into it words which limit its *primâ facie* operation and make it do something different from and smaller than what its terms express. Now certainly we should not readily acquiesce in a non-natural construction which limits the operation of the section so as to make the remedy given by it not commensurate with the mischief which it was intended to cure."

The respondent's counsel, on the other hand, deny that the object of the legislature was so wide as to include forfeitures in respect of tenures other than conditional purchases and conditional leases, and they find the limiting words in sec. 136 itself. The argument is, first, taking the section in its original form, that a lease never ceases to be Crown lands within the meaning of the *Crown Lands Act*, and that it is unnecessary in regard to that form of tenure to declare that upon notification of forfeiture it shall become Crown lands, and that the section must be limited to those tenures in respect of which such a declaration is necessary; that it is necessary only in cases where from the nature of the tenure the whole interest and right of possession has passed from the Crown to the holder, and has to pass back again to the Crown on forfeiture; that in case of conditional purchases and conditional leases, but not in the case of leases, the whole interest and right of possession passes away from the Crown to the holder; and that therefore the section must be taken to have been intended by the legislature to apply to the former cases only. The argument is no doubt often used and used effectively that the legislature will not in general be

(1) 11 Q.B.D., 638, at p. 649.

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assumed to have used superfluous language. But the reply is often justified that the legislature not infrequently does use superfluous language. *Maxwell on Statutes*, 3rd ed., at p. 445 says:—"But the use of tautologous expressions is not uncommon in Statutes, and there is no such presumption against fulness, or even superfluity of expression, in Statutes, or other written instruments, as amounts to a rule of interpretation, controlling what might otherwise be their proper construction." In *Craies' on Statutes* (2nd ed.) some expressions of judicial opinion on the same matter are gathered at p. 111. "'It may not always be possible,' said *Jessel* M.R., in *Yorkshire Insurance Co.* v. *Clayton* (1), 'to give a meaning to every word used in an Act of Parliament,' and many instances may be found of provisions put into Statutes merely by way of precaution. 'Nor is surplusage, or even tautology, wholly unknown in the language of the legislature.' 'A Statute,' said Lord *Brougham*, in *Auchterarder* v. *Lord Kinnoull* (2), 'is always allowed the privilege of using words not absolutely necessary.'"

But whatever weight may have been allowed to that contention before 1908, it has, I think, entirely lost its force since the addition to the section of the words added by the *Crown Lands Act* of that year. Assuming that it would have been surplusage to declare in the Act of 1884 that a forfeited lease which had never ceased to be Crown lands should become Crown lands on forfeiture, it is clear that the words of the amendment added in 1908 aim at a further and another object than that aimed at by the section in its original form. But for the amendment the forfeited lands after the expiration of the thirty days would fall into one or other of the classes of the Crown lands open to application. The amendment of 1908 automatically prevents that happening by giving to the notification of forfeiture the effect of reserving from sale or lease until otherwise notified all lands forfeited under the Act. As to that provision, the argument that the language of the legislature would, on the construction for which the Crown is contending, be surplusage, has no foundation, and I cannot see in the section under consideration or in any of the Acts which constitute the system regulating the

(1) 8 Q.B.D., 421, at p. 424. (2) 6 Cl. & F., 646, at p. 686.

administration of Crown lands any reason why the words of the section as amended should not be interpreted in their natural meaning, which will include improvement leases as well as every other form of holding which can be forfeited under the Act.

Two other arguments used by the respondent's counsel are worthy of examination. Mr. *Whitfeld* contended that the Act of 1884 has in various sections enacted expressly what the Crown is to do with land comprised in forfeited leases of various kinds, and that in respect of those leases the course directed to be taken is inconsistent with the application to such leases of sec. 136. He took as an illustration an ordinary pastoral lease under sec. 78 of the Act of 1884. Sec. 79 directs that the land on the surrender or forfeiture of the lease may be relet or may be subdivided and let by auction or tender as a pastoral lease, or may be declared in the *Gazette* to be a resumed area. Another illustration was sec. 83, which provides that, on the forfeiture or expiration of a homestead lease, the land comprised therein may again be leased as a homestead lease. He also referred to sub-sec. 4 of sec. 85, by which an annual lease, the rent of which is not paid, becomes liable to forfeiture and sale at auction or by tender. The answer to the argument is, I think, quite plain. In regard to all these instances the special provisions of the Act must be followed; the general provisions of sec. 136 will be applicable only in so far as they are not inconsistent with any special provision and sec. 136 must be read with these provisions. But I can see nothing inconsistent with the application of sec. 136 to the case of a forfeited pastoral lease, for instance, in the fact that under it the land in the lease becomes automatically reserved until the Government has, to adopt the words of the amendment, "otherwise notified." The words of the amendment in their natural meaning will include any dealing with the land comprised in the forfeited lease which is authorized by the Crown Lands Acts. Similarly the other sections relating to leases referred to by respondent's counsel may be read in conformity with and not as inconsistent with sec. 136. It is to be noted, however, that there are at least two classes of leases under the Act of 1884 in respect of which the Act of 1884 has made no express provision as to how the lands comprised in them are to be dealt with after forfeiture,

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namely, scrub leases under sec. 87, and special leases under sec. 90. In both cases the only provision made is that for breach of condition or non-payment of rent the leases are liable to be forfeited. The utmost effect that can be given to Mr. *Whitfeld's* argument is that, where in the case of any form of lease the application of sec. 136 would be inconsistent with any special provision of any of the Crown Lands Acts relating to that form of lease, the special provision must prevail. But no such instance has been referred to, and, as it is clear that neither the Act of 1895 nor any subsequent enactment has given any express direction as to what is to be done after forfeiture with land comprised in an improvement lease, there is nothing to prevent the application of sec. 136 to such land immediately the notification of forfeiture appears. The operation of the section, in my opinion, therefore, is to reserve the land comprised in the lease from sale or lease until the Government makes notification in the *Government Gazette* of some dealing with the land authorized by the *Crown Lands Act* which again throws it open to new application. Mr. *Pike's* argument, founded on the expression in the section "whenever any land shall be forfeited," was ingenious and very well put. But it rests on an assumption which the language of the Lands Acts does not justify. It assumes that throughout the Lands Acts a distinction is drawn, as has been done in sec. 136, between the forfeiture of land and the forfeiture of a lease. His argument was that the former expression is used only when the whole interest and right of possession has passed out of the Crown into the holder, as in the case of a conditional purchase or conditional lease. He contends that in that case the expression "land forfeited" would be applicable, but that where, as in the instance of forfeiture of a lease, there is no taking back of the land, the Crown never having parted with it, there is no forfeiture of the land, but only a determination of the lessee's interest described in the section as a forfeiture of the lease. The contention, therefore, is that as sec. 136, on the face of it, applies only to cases in which the land itself is forfeited it cannot apply to the forfeiture of a lease. Mr. *Ralston*, in reply, effectively, to my mind, disposed of the argument by pointing out that the uniformity of expression throughout the Acts upon which Mr.

Pike's argument is based has no existence. He cited in illustration sec. 135 of the Act of 1884, where a conditional purchase or a leasehold may be declared forfeited. Both are referred to later in the section as forfeited lands. Similarly in other sections which he mentioned the expression "forfeited land" is applied indifferently to land comprised in a forfeited conditional purchase or in forfeited leases other than conditional leases.

For these reasons I am of opinion that section 136 applies to the case of a forfeited improvement lease, that the decision of the Land Appeal Court was right, and should be upheld, and that the appeal from the Supreme Court allowed.

Appeal allowed.

Solicitor, for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor, for the respondent, *S. R. Skuthorpe*, Coonamble, by *Collins & Mulholland.*

C. E. W.

Foll *Reading v Federal Commissioner of Land Tax* (1912) 14 CLR 217

[HIGH COURT OF AUSTRALIA.]

ARCHER AND ANOTHER . . . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . RESPONDENT.

Land Tax—Assessment—Land vested in trustees—Trusts created by will—Trust for sale—Life tenants and remaindermen—Interests of beneficiaries prior to sale—Trust "for the benefit of a number of persons"—Deductions—Shares into which the land is "in the first instance" distributed—Land Tax Assessment Act 1910 (*No.* 22 *of* 1910), *sec.* 33.

Under a codicil to the will of a testatrix who died before 1st June 1910 trustees were directed to hold land upon trust for sale, and to stand possessed of the proceeds of sale upon trust for her children living at her decease,