[HIGH COURT OF AUSTRALIA.]

WILLIAMS . . . . . APPELLANT;
DEFENDANT,

AND

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES (ON THE RELATION OF COCKS AND OTHERS) . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 5, 6, 7, 8, 9.
MELBOURNE, *June* 19.

Barton A.C.J., Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Crown Lands—Waste lands of the Crown—Lands dedicated or set apart for a public use—Alteration of use—Interest of public—New South Wales Constitution Act 1855 (18 & 19 *Vict. c.* 54), *secs.* II., III.

Practice—Parties—Action by Crown as representing one set of persons against Crown as representing another set of persons—Action to enforce a public trust as to Crown land—Claims against the Government and Crown Suits Act 1912 (*N.S.W.*) (*No.* 27 *of* 1912), *sec.* 3, 4.

Prior to the New South Wales *Constitution Act* 1855, Government House, Sydney, and the land on which it stands were used by the Crown for a residence for the Sovereign's representative in New South Wales.

Held, that they were not so dedicated or set apart as to confer on the public, either of New South Wales or of the United Kingdom, any right against the Crown to have them used for that purpose.

Held, further, that the land was "waste land of the Crown" within the meaning of the *Constitution Act* 1855, and that by virtue of that Act the control and management of it passed to the legislature of New South Wales, and, subject to the legislature, to the Executive Government.

Sec. 3 (1) of the *Claims against the Government and Crown Suits Act* 1912 provides that "Any person having or deeming himself to have any just claim

or demand whatever against the Government of New South Wales" may petition the Governor to appoint a nominal defendant, and that the Governor may appoint a nominal defendant accordingly. Sec. 4 provides that "the petitioner may sue such nominal defendant at law or in equity in any competent Court, and every such case shall be commenced in the same way, and the proceedings and rights of the parties therein shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject."

Held, that an action may be brought in the Supreme Court of New South Wales under those sections by the Crown as representing one set of persons against the Crown as representing another set of persons and in respect of competing rights.

Where an action was brought under those sections by the Attorney-General for New South Wales on the relation of certain persons against a nominal defendant as representing the Government of New South Wales, alleging that certain land in New South Wales belonged to the King in his Imperial right, and was impressed with a trust in favour of the public, either of New South Wales or of the United Kingdom, and claiming a declaration to that effect, and a consequent injunction,

Held, that the Attorney-General for New South Wales did not represent the King in his Imperial right, whether as owner or as trustee, that such right was the foundation of the suit, and that the non-representation of the Crown in that right was fatal to the suit.

Quære, per Higgins J., whether the Attorney-General for New South Wales can succeed in an information against the Government of New South Wales for a trespass to which, as a member of the Government, he is a consenting party; and *quære*, whether in his capacity of adviser of the Governor he can sue himself in his capacity of adviser of the Governor.

Decision of the Supreme Court of New South Wales: *Attorney-General* v. *Williams*, 13 S.R. (N.S.W.), 295, reversed.

APPEAL from the Supreme Court of New South Wales.

On the relation of Arthur Alfred Clement Cocks, Sir William McMillan and Thomas Henley, an information was filed by the Attorney-General of New South Wales against James Leslie Williams (a nominal defendant appointed under the *Claims against the Government and Crown Suits Act* 1912 to represent the Government of New South Wales), which was as follows:—

1. In or about the year 1812 it was publicly proclaimed by His Excellency Governor Macquarie, the then Governor of New South Wales, that certain lands in New South Wales, extending from the present Circular Quay to Woolloomooloo Bay, had been enclosed and were reserved as a Government domain.

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2. In or about the year 1817 a portion of the said enclosed and reserved lands was utilized for the purpose of building stables for the use of the Governor, the said stables being the present Government House stables.

3. In or about the year 1829 the then Governor of New South Wales, His Excellency Governor Darling, caused to be duly published in the *Government Gazette* a list of the lands set apart for public purposes, which list included the said enclosed and reserved lands.

4. In or about the year 1832 an official report was made by the Surveyor-General of the Colony that it was expedient to erect a new residence for the Sovereign's representative in New South Wales, that certain portions of the said enclosed and reserved lands should be sold and the proceeds expended in the building of the said proposed residence.

5. In or about the year 1836 a Committee of the Legislative Council of New South Wales was duly appointed to consider the question of a site for the said proposed residence, and the said Committee by its report recommended as such site an area of land including what are now known as Government House Grounds, which forms a portion of the said enclosed and reserved lands.

6. Acting upon the said reports, portions of the said reserved and enclosed lands in Phillip Street, near Circular Quay, were sold, and the proceeds of such sales, together with a sum of money voted for the purpose by the said Legislative Council and certain money supplied by the authorities in England, were devoted to building the said proposed residence upon the said site for the Sovereign's representative aforesaid, which is the present Government House.

7. The said house and grounds became ready for occupation in or about the year 1845, and have ever since that time until 1st December 1912 been occupied as a residence for the Sovereign's representative in New South Wales.

8. The informant submits that the said house and grounds were, by virtue of the matters hereinbefore set out, permanently dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales, and that it is not within the

powers of the Government of New South Wales or the Governor in Council to interfere with or alter the said public purpose or to use or cause or allow to be used the said house and grounds for any purpose other than the public purpose aforesaid.

9. By an arrangement made between the Government of the Commonwealth of Australia and the Government of New South Wales, the said house and grounds were from the year 1900 to 1st December 1912 occupied as his residence in New South Wales by the Governor-General of the said Commonwealth as the representative of the Sovereign; the said arrangement has recently come to an end, and the members of the Government of New South Wales, after having met in Cabinet, have determined and announced publicly that the said house and grounds shall no longer be used as a residence for the Sovereign's representative in New South Wales but shall be devoted to some other purpose, and by reason of such determination the said house and grounds are now no longer used as a residence for the Sovereign's representative in New South Wales. The said grounds have recently been officially thrown open by the said Government and are now being used by members of the public.

10. The informant fears that, unless restrained by the order and injunction of this Court, the Government of New South Wales will carry this determination into effect so as to permanently exclude the Sovereign's representative in New South Wales therefrom contrary to the public purpose to which the said house and grounds were dedicated.

The informant therefore prays:

1. That it may be declared that the said house and grounds are vested in His Majesty the King, dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales;
2. That it may be declared that neither the Government of New South Wales nor the Governor in Council has power to interfere with or alter the said purpose to which the said house and grounds are dedicated;
3. That the defendant, as nominal defendant for and on behalf of the Government of New South Wales, the Ministers, officers, and servants of the Crown may be

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restrained by the order and injunction of this Court from using or causing or allowing to be used the said house and grounds for any purpose other than the public purpose of a residence for the Sovereign's representative in New South Wales;

4. That the defendant may be ordered to pay the costs of this suit;
5. That the informant may have such further or other relief as the nature of the case may require.

The informant then moved for an interlocutory injunction in the terms set out above, and, by consent, that motion was turned into a motion for a decree and was heard upon evidence before three Judges (*Cullen* C.J., *Simpson* C.J. in Eq., and *Street* J.), who made a decree declaring that the house and grounds in question are vested in His Majesty the King, dedicated to the public purpose of a residence for His Majesty's representative in New South Wales, and that the action or concurrence of His Majesty's Imperial Government is necessary to divert the same from such purpose, and ordering that the defendant as nominal defendant for and on behalf of the Government of New South Wales and the officers and servants of the said Government be restrained by the order and injunction of the Court from any unauthorized interference with that purpose, and further ordering that the defendant should pay the informant's costs: *Attorney-General* v. *Williams* (1).

From this decision the defendant now appealed to the High Court.

It was admitted by counsel for the appellant that it was the intention of the Government to apply the stables to the purpose of an academy of music, that the division fence between the Government House Grounds and the Botanic Gardens was removed by the Government, and that there was no executive minute in respect of what the Government had done.

The material facts are stated in the judgment of *Barton* A.C.J.

D. R. Hall A.A.-G. and *Blacket* K.C. (with them *J. A. Browne*), for the appellant. The facts disclose no interest in the subject

(1) 13 S.R. (N.S.W.), 295.

matter of the suit which would entitle any person to sue: *Colliery Employés Federation of the Northern District, New South Wales*, v. *Brown* (1). No right of the public has been invaded. The suit is not one which can be brought under the *Claims against the Government and Crown Suits Act* 1912. That Act is limited in its operation to specific wrongs to individuals, and does not provide a remedy for wrongs done to the public: *Farnell* v. *Bowman* (2). The only remedy for acts of the Government which injure the public is through Parliament. Unless it can be shown that what is complained of is an act of the King, an action cannot be brought under the *Claims against the Government and Crown Suits Act*: See *Enever* v. *The King* (3). Having brought the action under that Statute, the respondent cannot now deny that the act complained of is an act of the King. In order to make it an act of the King, it is sufficient that it is done by a Minister, and it is not necessary to have an executive minute. The executive minute is only one method of proving that the King's representative has concurred. It should be presumed that proper relations exist between the King's representatives and his Ministers: See *Keith's Responsible Government in the Dominions*, vol. I., pp. 148-150. Every act of a Minister in the course of his official duties is an act of the King, and an executive minute is only necessary when it is required by a Statute: See *Dicey's Law of the Constitution*, 6th ed., p. 8. The present suit is one by the King against the King. The relators take no part in it beyond guaranteeing the costs of the Attorney-General: *Attorney-General* v. *Ironmongers' Co.* (4). The King cannot sue himself in the same right, and in this suit the King as represented by the Attorney-General cannot be distinguished from the King as represented by the nominal defendant. If the King in his Imperial right desires to sue the Ministers or the Government of New South Wales, the Attorney-General of New South Wales is not a proper plaintiff.

Government House and Grounds were at the time of the passing of the *Constitution Act* 1855 waste lands of the Crown, and the control of them as such then became vested in the Govern-

(1) 3 C.L.R., 255, at p. 266.
(2) 12 App. Cas., 643, at p. 649.
(3) 3 C.L.R., 969.
(4) 2 Beav., 313, at p. 328.

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ment of New South Wales. The term "waste lands" had the same meaning in that Act as in 5 & 6 Vict. c. 3, and not the meaning it had in 9 & 10 Vict. c. 104, that is to say, the exception was of lands "dedicated and set apart," not "dedicated or set apart," for public use: See *Attorney-General* v. *Eagar* (1). The setting apart then contemplated is such as would require an Act of Parliament to alter it.

The land in question was not dedicated to a public use. There are none of the features present to constitute dedication. No one received the benefit of the dedication. The public never accepted it. No rights in the land have been acquired by the public as against the Crown. Land is dedicated to a public use only when a personal right is conferred on the public or a particular section of it. The use of the house and grounds as a Government House conferred no right on the Governor to have them as a residence, nor any right on the public to have them so used.

The concurrence of the Imperial Crown is not necessary to divert the land from its original purpose. Its management, even if it is not waste land of the Crown, has been left to the Executive Government, and the Imperial Crown has concurred in its being so managed, and, if the land was dedicated or set apart by public proclamation, the State Government could in the same way alter the purpose of the dedication or setting apart. If the Imperial authorities had any claim to Government House and Grounds they would have been included in the Order in Council of 26th October 1899 and surrendered to the Government of New South Wales. [They also referred to *Toy* v. *Musgrove* (2); *Musgrove* v. *Chun Teeong Toy* (3); *Keith's Responsible Government in the Dominions*, p. 171; *Davidson* v. *Walker* (4).]

Knox K.C. (with him *F. J. Bethune*), for the respondent. The only question on the pleadings and the evidence is whether the Ministers acting as Ministers have power to divert this land from its present use. When a Minister purports to do an act by virtue of his office, and that act is wrongful, a person injured by it may bring an action under the *Claims against the Government and*

(1) 3 S.C.R. (N.S.W.), 234.
(2) 14 V.L.R., 349, at p. 396.
(3) (1891) A.C., 272.
(4) 1 S.R. (N.S.W.), 196.

Crown Suits Act. The choosing of the site and the building of Government House was with the idea of permanency. At the time when the Governor first went into residence there, the land and building had become irrevocably dedicated to the purpose of a residence for the King's representative. The Governor, outside his duties as head of the Government, is an Imperial officer and has Imperial duties. That being so, land and buildings used for his residence cannot be put in the same category as land and buildings used for such purposes as a post office. They fall within the class of lands used for Imperial purposes just as did land used for military purposes. From the time the Governor first went into residence the public had a right to have the house and land used for the Governor's residence, or, at any rate, a right to complain if some one without authority interfered with their use for that purpose. In England the word "dedication" in its technical sense is limited to highways, and in that sense it implies permanence and, perhaps, irrevocability except by an Act of Parliament or a writ *ad quod damnum.* In regard to a park the word "dedication" in its popular sense is an apt word to use. In either sense a dedication may be made by any method appropriate to indicate the intention. The interest of the public in land dedicated to a public purpose is not a proprietary right, but it is an interest in seeing that the land is not interfered with except in due course of law: *London County Council* v. *Attorney-General* (1). Apart from dedication it is sufficient to say that, by reason of what has been done, there has been created an interest in the public which will support a suit by the Attorney-General to prevent the diversion of the land from its proper purpose. The providing of this house and land by the King for the purposes of a residence for his representative is a benefit to the public of New South Wales. [He referred to *Attorney-General* v. *Vivian* (2); *Attorney-General* v. *Compton* (3); *Attorney-General* v. *Cockermouth Local Board* (4); *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.* (5); *Attorney-General* v. *London and North Western Railway Co.* (6); *Attorney-General* v. *Ash-*

(1) (1902) A.C., 165.
(2) 1 Russ., 226, at p. 235.
(3) 1 Y. & C.C.C., 417.
(4) L.R. 18 Eq., 172, at p. 176.
(5) 21 Ch. D., 752.
(6) (1900) 1 Q.B., 78.

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borne Recreation Ground Co. (1); *Devonport Corporation* v. *Tozer* (2); *Secretary of State for War* v. *Wynne* (3); *Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales* (4); *Dominion of Canada* v. *Province of Ontario* (5).]

[HIGGINS J. referred to *Attorney-General* v. *M'Carthy* (6).]

The King has set apart this house and land for a residence for his representative until, at any rate, he declares his intention to the contrary. Until then the community have an interest in seeing that the house and land are not used for any other purpose, and the Attorney-General on behalf of the public may sue to restrain any interference with that interest by an unauthorized person.

This land, for whatever it has been set aside, has never come under the dominion of the Government of New South Wales. It is not "waste land" of the Crown within the meaning of the *Constitution Act*, for it was either "dedicated and set apart" or "dedicated or set apart" for a public purpose. That this land is not waste land is settled by *Attorney-General* v. *Eagar* (7). The basis of that decision was that the land in question was at the time the *Constitution Act* came into force vested in the King and devoted by him to a public purpose. That case cannot be distinguished on the ground that the land there was held for a charity, because every purpose beneficial to the public is a charity: *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (8). Even if this land was not "dedicated and set apart" for a public use within the meaning of the *Constitution Act*, it was then vested in the King of Great Britain and Ireland, and was held by him for the benefit of the community, and was then used *de facto*, and would probably be used for a considerable length of time, and in fact continued to be used, for a purpose partly Imperial. By the *Constitution Act* there was no grant of land, but by implication the control of property used in the affairs entrusted to the new agency thereby created passed to that agency. The Government House and Grounds were not

(1) (1903) 1 Ch., 101.
(2) (1903) 1 Ch., 759.
(3) (1905) 2 K.B., 845, at p. 850.
(4) 6 C.L.R., 469, at p. 499.
(5) (1910) A.C., 637, at p. 645.
(6) 11 V.L.R., 617.
(7) 3 S.C.R. (N.S.W.), 234.
(8) (1891) A.C., 531, at p. 583.

necessary for the purposes of the Government of New South Wales, and the control of them did not pass to the Government.

This suit is properly framed as to parties. The King in different capacities may be both plaintiff and defendant: *Attorney-General* v. *Mayor of Bristol* (1); *Attorney-General* v. *Ironmongers' Co.* (2); *Attorney-General* v. *Dean and Canons of Windsor* (3); *Attorney-General and Receiver-General for Jersey* v. *Turner, Solicitor-General for Jersey* (4); *Attorney-General* v. *Duke of Richmond, Gordon and Lennox* (*No.* 2) (5); *Attorney-General* v. *Vivian* (6). The claim being one on behalf of the public, this Court will not allow a technical objection as to parties to prevail but will even now, if amendment is necessary, order it to be made: See *Robertson's Civil Proceedings by and against the Crown*, p. 15.

Blacket K.C., in reply. The setting apart which was necessary to take land out of the class of waste lands of the Crown was a setting apart from the lands of the Crown which still remain available for being dealt with by the Crown, and it must be similar to a dedication to the extent that a right in the public adverse to the Crown must have been created. The public use contemplated is a use by the public and not a use on behalf of the public. [He referred to *Scales* v. *Pickering* (7); *Attorney-General* v. *Bradford Corporation* (8).]

Cur. adv. vult.

The following judgments were read:—

June 19.

BARTON A.C.J. This case comes before us as an appeal from a decree of the Supreme Court of New South Wales, by which, on 20th March last, it was declared that the house and grounds mentioned in the respondent's information are vested in the King and dedicated to the public purpose of a residence for His Majesty's representative in New South Wales, and that the concurrence of the Imperial Government is necessary to divert them

(1) 2 Jac. & W., 294, at p. 312.
(2) 2 My. & K., 576, at p. 578.
(3) 24 Beav., 679, at pp. 690, 694; 8 H.L.C., 369, at p. 437.
(4) (1893) A.C., 326.
(5) (1907) 2 K.B., 940, at pp. 953, 964.
(6) 1 Russ., 226.
(7) 4 Bing., 448.
(8) 75 J.P., 553.

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from that purpose, and it was ordered that the nominal defendant on behalf of the Government of New South Wales, and the officers and servants of that Government, be restrained from any unauthorized interference with that purpose.

The respondent's information was filed on the relation of three citizens. The object of the suit is to preserve the house and grounds in question, usually called the Inner Domain, for the purpose of a residence for the King's representative in this State.

It was first objected on the part of the nominal defendant that the Crown represented by the Attorney-General cannot proceed against the Crown represented by the nominal defendant, and that, in effect, the King is in this case suing himself. This objection, however, seems to me to fail. The rights represented by the Attorney-General and those represented by the nominal defendant are distinct rights, and in such a case it cannot be said that the Courts give no remedy for the invasion of one such right by the wrongful assertion of another: See *Attorney-General* v. *Dean and Canons of Windsor* (1); *Attorney-General* v. *Mayor of Bristol* (2); *Attorney-General* v. *Duke of Richmond, Gordon and Lennox (No. 2)* (3). In the present case the Attorney-General sues as representative of the King as *parens patriæ*, claiming redress for an alleged grievance of some of his subjects, and the nominal defendant opposes as representative of the Executive Government. These are different rights, and I think the Courts are open to the assertion of them respectively in such a suit as this, nor do I think that there is anything in the *Claims against the Government and Crown Suits Act* which prevents the Courts from entertaining such a suit. It is said that the relators have no interest. But the Attorney-General can proceed on information, even though it appears in the course of the case that the relators have no interest in the subject matter of the suit: *Attorney-General* v. *Vivian* (4); see also *Attorney-General* v. *Logan, per Vaughan Williams* J. (5). Beyond doubt, also, the Attorney-General can, either on relation or by himself, maintain an action to restrain an illegal act which in its nature tends to

(1) 24 Beav., 679, at pp. 694, 703.
(2) 2 Jac. & W., 294, at pp. 309-311.
(3) (1907) 2 K.B., 940, at p. 971.
(4) 1 Russ., 226.
(5) (1891) 2 Q.B., 100, at p. 106.

the injury of the public, and an injunction will be granted in his favour in such a case, though no evidence of actual injury be given: *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.* (1), and cases there cited; see also *Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales* (2). Whether the act complained of is illegal in the present case, is another matter. It is for the Attorney-General alone to decide in what cases he ought to sue on behalf of relators, though it is for the Court to say whether his action is maintainable: See *London County Council* v. *Attorney-General* (3).

But with regard to the competency of the suit there is a far more substantial question which requires close consideration. It is the informant's case that the house and grounds in question are vested in the King in right of the Crown of the United Kingdom—that is to say, that they are not subject to the executive action of the Crown as the Government of New South Wales. That is equally the informant's case, whether the Crown of Great Britain and Ireland is regarded as owner or as trustee, and the decree appealed from recognizes that the case is in that position. Are, then, the rights of the Crown of the United Kingdom to be determined in the Courts of New South Wales in a suit to which it is not a party? Since, in launching his action, the Attorney-General recognizes the Crown as a proper plaintiff and a proper defendant in the same case according to its several rights, it becomes more apparent that when his information discloses rights of the Crown in respect of the sovereignty of Great Britain and Ireland, those rights are ignored unless it is made a party to the suit. The Attorney-General of New South Wales as informant represents only rights of the Crown as *parens patriæ* in New South Wales. The nominal defendant asserts opposing rights of the Crown in this State. It is inherent in the case made by the informant that the rights alleged to have been invaded are rights of the Crown of the United Kingdom, and, to quote the information, "that it is not within the powers of the Government of New South Wales or the Governor in Council to

(1) 21 Ch. D., 752.
(2) 6 C.L.R., 469, at p. 499.
(3) (1902) A.C., 165.

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interfere with or alter" the purpose for which the house and grounds are alleged to have been set apart. The Attorney-General of New South Wales cannot usurp either the ownership or the trust of the Crown in respect of an Imperial right, and, for the reasons stated, it is my opinion that it is a fatal defect in the suit as launched, that the Crown of the United Kingdom is not represented either as plaintiff or as defendant, and I prefer the view that it is in the first of these capacities that it should have been represented.

Although the defect pointed out is a matter of substance, I do not think that such a suit as this should be disposed of on that ground alone. The merits disclose other grounds for dismissing it. It is reasonable to suppose that it may be carried beyond this Court, and I propose, therefore, to state my views on a question which goes to the root of the matter, and which was the principal subject of argument. The information submits that Government House and Grounds had long before the matters complained of become "permanently dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales," a public purpose from which it denies the right of the Government of this State to divert them. The decree appealed from declares that the house and grounds are dedicated to this public purpose. On the argument before us counsel for the informant repudiated altogether any intention to rely on dedication in its technical sense, as applied, for instance, to the creation of a highway, and he pointed out that on the hearing he had not put the case on that ground. What he contended was that the land had been dedicated in the sense of a setting apart for a public purpose, an appropriation permanent as to all parties but the owner, but revocable by him. I shall consider the case as if that were the ground of the informant's claim.

In Governor Phillip's Commission, bearing date 2nd April 1787, the following passage occurs:—

"And We do hereby likewise give and grant unto you full power and authority to agree for such lands tenements and hereditaments as shall be in Our power to dispose of and grant to any person or persons upon such terms and under such moderate quit rents services and acknowledgments to be thereupon reserved

unto Us according to such instructions as shall be given to you under Our Sign Manual which said grants are to pass and be sealed by Our Seal of Our said Territory and its dependencies and being entered upon record by such officer or officers as you shall appoint thereunto shall be good and effectual in law against Us Our heirs and successors."

The Instructions first issued are silent on the matters now involved, but the Additional Instructions issued in 1789 contain this paragraph:—

"You are also to cause a proper place in the most convenient part of each township to be marked out for the building a Town sufficient to contain such a number of families as You shall judge proper to settle there, with Town and pasture lots convenient to each tenement, taking care that the said Town be laid out upon or as near as conveniently may be to some navigable river or the sea coast; and You are also to reserve to Us proper quantities of land in each township, for the following purposes, viz., for erecting fortifications and barracks, or for other military or naval purposes, and more particularly for the building a Town Hall, and such other public edifices as You shall deem necessary, and also for the growth and production of naval timbers, if there are any woodlands fit for that purpose."

There is not in either document any specific power given to reserve land for a Governor's residence and grounds, but it seems difficult to resist the implication of such authority; and for the purposes of this case I will assume it to have existed.

Counsel for the informant relied on three acts as evidencing an actual setting apart of lands, including provision for the Governor's place of residence. The first was an indorsement by Governor Phillip in 1792 upon a plan of the settlement which he had caused to be prepared. On this plan there had been traced a line running from the head of what is now known as Darling Harbour to the head of Woolloomooloo Bay, then called Garden Cove. Along this line, partly above it and partly below it, are these words: "the boundary line of Sydney Common, within which (as all the ground is retained for the use of the Crown, and is common land for the inhabitants of Sydney) no land can be granted." Immediately below that indorsement is the following

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in the handwriting of Governor Phillip:—"This line, which is the boundary line, is intended to run from the head of the cove which is to the west of Sydney Cove to the head of Garden Cove—Garden Cove is the second cove to the eastward, Farm Cove being between the two—of this the Lieutenant Governor was informed before I left the country, and the boundary line was traced by the surveyor when the map was made. A. Phillip, Sydney, 2nd December 1792." Captain Phillip sailed for England on 11th December, and on 23rd July in the following year he resigned the Governorship. Settlement, which had begun in the neighbourhood of Sydney Cove, was extending southward, and by 1807 the town, as appears by a map, presently to be mentioned, contained numerous buildings of which the original Government House and garden, and various official residences and stores, were in an area of no great extent due south of the cove; and west and south of these were the residences and places of business of the people, which had obviously been placed on land granted or leased by the Crown, with the exception of a few intrusions.

The second setting apart was, as the informant contends, made by Governor Bligh on 26th July 1807 by proclamation or "general order" in the *Government Gazette*, which recited that Governor Phillip had by instructions from His Majesty's Ministers drawn two lines of demarcation in the vicinity of Sydney, within which no leases or grants of land or buildings were to be given, the said land being the property of the Crown. This proclamation extended to the 5th of the ensuing November a notice to the occupiers of a number of houses adjacent to Government House, "which had been built on land particularly marked out as making part of the Domain of the Governor's Residence," to quit possession of the houses and remove the materials, "the said ground being wanted for Government purposes." A tracing, made by James Meehan, assistant surveyor of land, by order of Governor Bligh, and dated 31st October 1807, was also put in evidence. It purported to be made from a Government plan of Sydney. On it are two lines which the informant maintains are those referred to in the proclamation, and this does not seem to be disputed. The outer or southernmost one of these corresponds, and is, I think, identical, with

the outer boundary line already referred to as appearing on Governor Phillip's plan. Along the upper side of this line are the following words:—"Boundary line within which all the ground is reserved for the Crown and for the use of the town of Sydney"; and below the line are the following words:—"N.B. It is the orders of Government that no ground within the boundary line is ever granted or let on lease, and all houses built within the boundary line are and are to remain the property of the Crown.

"December 2nd 1792,

"Sydney. (Signed) A. Phillip."

Having regard to the descriptions of this line as found on the plan of Phillip and the tracing prepared by Meehan, it seems that the land north of the line not occupied by roads, houses and other buildings, and lands already granted or leased, was originally intended as a common for the townspeople, with the exception, as will be seen, of the land used or reserved for the purposes of Government House.

The other or inner line begins at the top of a street running south of east, which intersects the ends of two other streets. Evidently these latter are O'Connell Street and Bligh Street, and the first mentioned street is Bent Street. This line pursues for most of its length the direction still held by the path which intersects what is now the Domain Cricket Ground, and passes down towards Woolloomooloo Bay. Along its course are the following words:—"Ditch marked out by Governor Phillip and now made by Governor Bligh." Across the land to the north of this, which extends to the west side of Garden Cove or Woolloomooloo Bay, and embraces the shores of the Harbour round to and including the east side of Sydney Cove, are the words "ground absolutely necessary for the use of Government House, but leases improperly granted on it, it is now improving."

The tracing shows upon the area thus described several rectilinear numbered portions, no doubt representing the "leases improperly granted on it," and buildings are indicated on a few of them. Probably these buildings are some of those referred to in Governor Phillip's proclamation of 26th July 1807, and which were to be removed by the 5th of the ensuing November. The

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area is to the back or east of that then occupied by the first Government House, garden and shrubbery. There were no buildings east of the western end of the ditch marked out by Phillip and made by Bligh.

In the course of a despatch of 31st October 1807 to the then Secretary of State for the Colonies, Governor Bligh said:—"When Governor Phillip quitted this Colony he left a memorandum, as may be seen in the plan of the town sent herewith, that no part of Sydney should be leased away, but the whole to be considered the property of the Government. In June 1801 Governor King issued a General Order that leases might be granted for five years. After his departure—and I had begun to make my remarks as circumstances arose—I found several leases given and renewed in January 1806, for fourteen years, which were liable and wanted for Government purposes."

Mr. *Knox* urged the facts of 1807 as constituting a second setting apart, relating both to an outer and to an inner and more restricted area, which inner area was to be reserved for the purpose of a Governor's residence and grounds.

The demarcation of 1792 included, but of course greatly exceeded in area, the land now in question, and, as pointed out, it is evident from the plan of 1807 that the land intended for the use of Government House lay to the north of the ditch marked thereon.

On 25th May 1825 Governor Brisbane drew the attention of Earl Bathurst, the Secretary of State, to the necessity for the erection of a suitable residence for the Governor in Sydney, the then Government House being dilapidated and unfit for its purpose. He pointed out that one-half of Sydney Cove had been reserved by the Government, and suggested that it was desirable to sell or let on building leases the whole of the water side of the Domain along the Cove as far as Fort Macquarie, the revenue from the sale of this part of the Domain being applied towards the erection of a suitable Government House. Earl Bathurst, before he could have received this despatch, gave to Governor Darling, who was then on the point of departure to the Colony as Governor Brisbane's successor, an authority by despatch of 30th June 1825 to construct a new Government House, or to

convert into a permanent residence the Gothic building which had been erected by Governor Macquarie for stables. It may be mentioned that this building, which has ever since been used as the stables belonging to the house, is the structure which it is now proposed to convert into a conservatorium of music. On 19th February 1826 Lord Bathurst sent to Governor Darling a copy of Sir Thomas Brisbane's despatch, and expressed the opinion that the views entertained by that Governor on the subject were judicious. No action was, however, taken on the authority contained in the despatch of the previous June.

On 8th June 1829 Governor Darling notified in the *Gazette* a list of "certain parcels in the town of Sydney which have been heretofore reserved for certain public purposes." This list contains, as paragraph 43, a description of part of the lands marked off upon Governor Phillip's plan and by a corresponding line on Meehan's plan, the remainder, being roughly the portion west of Elizabeth Street, having apparently been cut out of the public reservation.

Another portion of the Government Domain was soon afterwards devoted to public recreation, for in the *Gazette* of 13th September 1831 appears the notification of Governor Bourke dated 9th September, stating that the grounds in the Government Domain near Anson's Point (now known as Mrs. Macquarie's Chair) have been laid out in walks for the recreation of the public, and "the Domain will be open for carriages on Tuesday next the 13th inst." Carriages and horsemen, it was notified, might enter the Domain near the School of Industry (that is, by the present gate at the top of Bent Street) or at the Woolloomooloo gate at the southern boundary of the Domain. It thus appeared that the portion of the Domain reserved for Government House and Grounds was exclusive of all the grounds mentioned in this notice.

On 2nd November 1832 Governor Bourke, in a despatch to Lord Goderich, had recommended the erection of a new Government House and the enclosure therewith of an area of about 47 acres, and the reply of the Earl of Aberdeen, dated on 25th March 1835, nearly 2½ years later, conveys the consent of His Majesty's Government to the proposal. Governor Bourke

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was accordingly authorized to dispose of the land of which Governor Brisbane had in 1825 recommended the sale, and to apply the proceeds towards the erection of a new Government House, and the fencing in of the portion of the Domain immediately adjoining it.

It is the transactions from 1835 to 1845, however, on which the informant mainly relies.

On 12th August 1836 a Committee of the Legislative Council, consisting of the Chief Justice, the Colonial Secretary, the Auditor-General and two other members, reported to the Governor and the Legislative Council on the plan and estimate for a new Government House. They recommended the site on which the present Government House has since been built, and pointed out that it would have, among other advantages, "about 50 acres of surrounding pleasure grounds." This estimate of the area of the grounds to be allotted to the new residence did not include the land on the east side of the Cove, which was about 20 acres in extent. Action was taken on the report. Building was commenced on the new site, and the 20 acres, including the site of the old Government House, was subdivided and sold as sites for business premises.

Two other alterations had been made since 1807 in the area of the Government reservation. In 1810 part of the area had been taken by Governor Macquarie for the erection of a general hospital; and about 1816 another portion had been taken by the same Governor for the establishment of Botanical Gardens. (It is still used for that purpose, with the addition of about 5 acres of the grounds of Government House, thrown into the area of the Botanical Gardens in 1900 by the Government of the Colony.)

The new Government House having been completed, Governor Gipps appears to have occupied it in 1845; for a despatch of his to Lord Stanley, written on the point of moving into it, is dated 15th June in that year. Governor Gipps and succeeding representatives of royalty appear to have occupied with the house an area of 47 acres. The occupancy now in question is shown on a Government Lands Office plan of 1894, put in evidence, as about 35 acres, portion of the Inner Domain having been taken in 1879 for an exhibition building and grounds. Mr. *Knox* con-

tends that the appropriation of the 47 acres, which included the site of the new Government House, was a third setting apart, this time by itself, of this area, which had been included in the two reservations of 1792 and 1807, and even irrespective of these earlier acts, he says, that which was done after the Report of the Select Committee, together with the uninterrupted user up to 1912 of the house and grounds for the public purpose stated in the information, is sufficient to establish the right in respect of which the information has been filed.

On the part of the State Government it is maintained that the lands in question never lost their character of Crown lands, or, as they were termed in the early days of the Colony, "waste lands of the Crown." What counsel for the informant calls a setting apart for a particular public purpose, permanent save for the Crown's right of revocation, is called by the defendant's counsel a mere application of Crown land to a particular use of the Crown, for its own purposes, lasting merely so long as the Crown did not choose to alter the use of it or to sell or lease it. It is altogether denied that there was any purpose for the benefit of the public as distinguished from what is commonly called a public purpose, such as the purpose of building a Government office. For the informant it is said that the setting apart for the particular public purpose asserted by him was tantamount to a trust in favour of the aggregation of people resident in New South Wales. Indeed, he likened it to a charitable trust, for it was created, he says, for such a public purpose as falls within the fourth class of Lord *Macnaghten's* category of such trusts: See *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1). If the informant's view is correct and the lands are not Crown lands in right of New South Wales, the Government of this State may not have any right to divert them from the purpose for which they were set apart. That is a separate question, and I will consider it at a later stage in this opinion. If, on the other hand, the defendant's contention is the right one, the land, on the passing of the *Constitution Act* in 1855, passed out of the control of the Crown of the United Kingdom and may be used by the Executive

(1) (1891) A.C., 531, at p. 583.

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Government of this State for any purpose which is not in contravention of the Crown Lands Acts.

Up to the passage of the New South Wales *Constitution Act* in 1855 (18 & 19 Vict. c. 54) the successive grants of legislative power to the Colony carefully reserved to the Crown of the United Kingdom, subject of course to any Imperial Statute, the lands belonging to the Crown within the Colony, and their entire control and management. In 1855 there were in force two Acts of the Imperial Parliament relating to the waste lands of the Crown in the Australian Colonies. The first of these, 5 & 6 Vict. c. 36 (1842), restricted the disposing authority of the Crown to "conveyance or alienation by way of sale," under regulations to be prescribed, and it made various provisions for the disposal and management of such waste lands. It also enacted that the gross proceeds of sale, less the expenses of carrying the provisions of the Act into effect, should be applied to the public service of the respective Colonies in such manner as Her Majesty or the Commissioners of her Treasury should direct, with the proviso that half of such proceeds was thereby appropriated towards defraying the expense of bringing immigrants to the respective Colonies. But even such funds were to be expended by the Lords Commissioners of the Treasury or persons authorized by them. Thus it was incompetent to the legislature of the Colony or any person authorized by it to appropriate any part of the money arising from the sale of Crown lands. Sec. 3 reserved the right to Her Majesty, or any persons acting under her authority, to except from sale and either reserve to her or dispose of in the public interests such lands as might be required for any of the specified purposes, which did not include a residence for the Governor. Sec. 20 provided that nothing in the Act should affect any contract promise or engagement made by or on behalf of Her Majesty with respect to any lands before the time at which the Act should take effect. This section was not altered or referred to by the amending Act of 1846. Sec. 23 provides that " by the words 'waste lands of the Crown,' as used in the present Act, are intended and described any lands situate therein, and which now are or shall hereafter be vested in Her Majesty, . . . and which have not been already granted or lawfully contracted

to be granted . . . in fee simple, or for an estate of freehold, or for a term of years, and which have not been dedicated and set apart for some public use."

This Act was amended by 9 & 10 Vict. c. 104 (1846), which empowered the Queen to demise any waste lands of the Crown in New South Wales, South Australia, or Western Australia, for fourteen years or less, or to grant for like periods licences to occupy waste lands for rents or services and upon conditions to be authorized, but subject to rules and regulations to be prescribed. This Act made various provisions regarding the occupation of waste lands, the ejection of intruders, the protection of officers, &c., and empowered the Queen to delegate to the Governor of any of the Colonies named all or any of the powers thereby vested in Her Majesty, with necessary exceptions. The Governor, therefore, could not exercise any control over Crown Lands under the authority of the local legislature. This Act by sec. 9 provided :—"The words 'waste lands of the Crown,' as employed in this Act, are intended to describe any lands in the said Colonies, . . . which now are or hereafter shall be vested in Her Majesty, . . . and which have not been already granted or lawfully contracted to be granted . . . in fee simple, and which have not been dedicated or set apart for some public use."

It will be seen that these two Acts differ in the meaning they give to the term "waste lands of the Crown." The difference most material to this case is in the use in the Act of 1842 of the words "dedicated *and* set apart," and in the Act of 1846, of the words "dedicated *or* set apart;" but there is another difference. In the earlier Statute lands granted or contracted to be granted for an estate of freehold less than the fee, or for years, are included in the meaning of waste lands. It is to be especially noted that the definition is in each case only for the purposes of the Act. Coming now to the *Constitution Act of* 1855 we find a marked change in the attitude of the Imperial Parliament to the people of the Colony. They were no longer to be held in tutelage as to the use or disposal of the lands of the territory which they had colonized. They had themselves, through their legislature, framed a Constitution (17 Vict. No. 41) giving themselves ample powers of self-government. They were to have two Houses of

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Parliament, one of them elective, with power to make laws "for the peace, welfare, and good government of the said Colony in all cases whatsoever." And they were no longer to be excluded from dealing with the lands of the Colony. Sec. 43 empowered the legislature of the Colony "to make laws for regulating the sale, letting, disposal, and occupation of the waste lands of the Crown within the said Colony." And sec. 58 provided that the Act should have no force or effect until certain enactments relating to the Colony and repugnant to "this Act" should have been repealed, "and the entire management and control of the waste lands belonging to the Crown in the said Colony . . . and also the appropriation of the gross proceeds of the sales of such lands, and of all other proceeds and revenues of the same, from whatever source arising" should have been vested in the legislature of the Colony. The Bill was reserved for the Royal Assent, and it was found that it was not competent to Her Majesty to assent to it without the authority of Parliament for that purpose. Accordingly the Act 18 & 19 Vict. c. 54, giving the Queen the necessary authority, was passed by the Parliament, and the reserved Bill was appended to it as a schedule. Sec. II. made certain repeals, and vested in the legislature of New South Wales the entire management and control of the waste lands in the terms of sec. 58 of the reserved Bill. But sec. II. concludes with this proviso:—"Nothing herein contained shall affect or be construed to affect any contract or to prevent the fulfilment of any promise or engagement made by or on behalf of Her Majesty, with respect to any lands situate in the said Colony, in cases where such contracts, promises, or engagements shall have been lawfully made before the time at which this Act shall take effect within the said Colony nor to disturb or in any way interfere with or prejudice any vested or other rights which have accrued or belong to the licensed occupants or lessees of any Crown lands within or without the Settled Districts," &c. The Acts of which the local Legislative Council had required the repeal were repealed accordingly, with the temporary exception of the two Waste Lands Acts already cited. At this time the lands of the Colony were being administered under Imperial authority by virtue of Orders in Council made under these two Acts. The

Acts were, in view of sec. II., no longer operative to withhold the management or control, or the disposal of the proceeds, of Crown Lands from the local legislature, or to prevent it from making laws on the subject. But the Acts themselves were specifically repealed before the Constitution came into force, in terms of 17 Vict. No. 41, sec. 58; and the Orders in Council ceased to have effect in 1861, upon the passing of two local Statutes of that year —the *Crown Lands Alienation Act* and the *Crown Lands Occupation Act*: See the second section of each Act.

I have already pointed out that the definitions of "waste lands of the Crown" found in the Acts of 1842 and 1846 were given for the purposes of those Acts alone. Those purposes differed. The first Act was to authorize sales, the second to authorize leases and licences to occupy. Both the 18 & 19 Vict. c. 54 and the 17 Vict. No. 41 are destitute of any definition of the term, and although the high authority of two eminent law officers of the Crown in England is adduced for the position that the term "waste lands," as used in the New South Wales Constitution and the covering Act, is to be interpreted by the definitions in the Imperial Acts of 1842 and 1846, we have to construe this legislation for ourselves, and, in doing so, we cannot regard any such opinion as a binding authority. If the term "waste lands of the Crown" were in any way a cryptic expression as applied, in a territory which the Crown has acquired by possession, to lands with which the Crown has not parted, there might be some need of a definition. The reason for which the term was defined, though differently, in the two Imperial Acts dealing with waste lands was evidently that it was considered necessary to limit the meaning of the term in each case for the immediate purposes of the legislation. Similarly, Crown lands have been defined in the Colonial Acts dealing with them as a subject matter. But in this legislation as to the Constitution a definition was not of such primary necessity. The definitions in the Acts of 1842 and 1846 were restrictive, for the purpose of preventing lands from being dealt with as waste which had been made the subject, to put it broadly, of disposal or contract for a freehold or chattel interest or had been dedicated or set apart for some public use. But the proviso to sec. II. of the Act of 1855 covers all the cases

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in which lands of any kind, including waste lands, are not to be dealt with by the Colonial legislature by way of disposal, contract or otherwise. It is a provision similar to that of sec. 20 of the *Waste Lands Act* of 1842, and, in view of it, the absence of the restrictions imposed by the definition in the latter Act is the more significant. It is the sole limitation upon the power of the Colonial legislature to deal with "any lands . . . situate in the said Colony." If in the result the term "waste lands" has been used in the law of the Constitution in a less restricted sense than in the Acts of 1842 and 1846, that is only what might have been expected. It must be remembered that the grant made in sec. II. of 18 & 19 Vict. c. 54, was in the terms of the demands of the colonists made in secs. 43 and 58 of the Bill they had presented for the Royal Assent, and it was natural that they should formulate them more amply so far as the Crown lands were concerned than would have been the case had they been ready to accept the restrictions imposed by the definitions in the Acts of 1842 and 1846. They were prepared to honour the contracts and engagements of the previous regime, but no reason seems to exist why they should have been content to leave the management of lands set apart for public purposes in any other hands than those of the new Government to which they were entrusting the execution of public purposes generally. Waste lands of the Crown, where not otherwise defined, are simply, I think, such of the lands of which the Crown became the absolute owner on taking possession of this country as the Crown had not made the subject of any proprietary right on the part of any citizen. It has not been, nor can it be, contended, that the land in question has been made the subject of any such proprietary right, and as it does not come within the proviso to sec. II. of the 18 & 19 Vict., it seems to me that it passed under the control of the legislature of New South Wales on the institution of responsible Government.

But if I am wrong in my view of the meaning of "waste lands of the Crown," and if the term is to be interpreted as including lands "dedicated or set apart for public purposes," and assuming also that these lands have been set apart for public purposes in the sense contended for by the informant, I am of

opinion that in that case also they passed under the control of the legislature of New South Wales. In the first place, it does not seem to me that the argument of Mr. *Knox* establishes any right enforceable by the Attorney-General as representative of the *parens patriæ*. I cannot think that in respect of this particular area as a place of residence for the King's representative in New South Wales the people of New South Wales can look upon themselves as entitled to some beneficial right or interest. It is of course not asserted that they have any proprietary interest. How then is their interest defined? If it is not proprietary, how can it be a right to have the Governor's residence located there and nowhere else; and, if it is not proprietary, under what head does it fall? It seems to me both undefined and indefinable, and I cannot see that it is the subject of any trust, the position for which *Attorney-General* v. *Eagar* (1) was cited. The case resembles that of *Dominion of Canada* v. *Province of Ontario* (2), in this respect—that the informant here, like the appellants there, failed to bring the claim "within some recognized legal principle:" See *per* Lord *Loreburn* L.C. (3). It may be that a wrong is threatened, or has even been begun. On that it is not for this Court to pronounce an opinion unless it is an invasion of some right recognized by the law, for we can deal only with legal rights and wrongs. Throughout the case for the informant it seems to me that insufficient weight has been given to the first section of the Constitution, which prescribes that within New South Wales "Her Majesty shall have power, by and with the advice and consent of the" Legislative "Council and Assembly, to make laws for the peace, welfare, and good government of the said Colony in all cases whatsoever." There is no restriction. True, it was thought necessary, because of the previous exclusion of the legislature from the control of the Crown lands, to provide specially that such control should be given to the new legislature to which for the first time the Executive Government was to be responsible. I question whether the first section would not have been amply sufficient in that behalf, if coupled with the repeal

(1) 3 S.C.R. (N.S.W.), 234. (2) (1910) A.C., 637.
(3) (1910) A.C., 637, at p. 645.

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of the Imperial Waste Lands Acts which did take place. No one doubts that sec. 1 has empowered the local legislature to deal with other lands held by the Crown for public purposes. And, acting under responsibility to the legislature and subject to Statute, the Executive Government has managed, controlled, and used them. Yet, beyond sec. 1, there is nothing in the Constitution which provides for the taking over of public departments, or of the lands held in connection with them, or for the taking over of any other lands still vested in the Crown but applied to public uses. The right to deal with all these properties was granted in the right to legislate "in all cases whatsoever." It is impossible to suppose that while the legislative power became vested in the Colonial authority the executive control remained intact in Imperial hands. I fail to see how any distinction can be drawn between the land in question and the other land and buildings which at the time of the Constitution were used by the Crown for public purposes and which have ever since been administered by the Government responsible to the local legislature. That I believe to be the position in this case, and I am of opinion that the Executive Government of this State is entitled to put the house and grounds in question to any use not expressly or impliedly forbidden by the terms of its Crown Lands Acts or any other of its laws.

For these reasons I think that the appeal must be allowed and the suit dismissed.

ISAACS J.

(*A*) PARTIES.

I entertain no doubt that it is competent to the Crown as representing the rights of one set of persons, to sue the Crown as representing another set of persons. The Crown as guardian of charities may sue the Crown as claiming *jure coronæ* a right adverse to a charity. The principle on which the Crown sues as *parens patriæ* is stated by Lord *Cranworth* L.C. and Lord *Wensleydale* in *St. Mary Magdalen College, Oxford*, v. *Attorney-General* (1). It is that the objects of the charity are *cestuis que trustent*, and the suit by information of the Attorney-General is,

(1) 6 H.L.C., 189.

in truth, a suit by them, and he is only an instrument to enforce their rights. In that case the House of Lords held that the Attorney-General suing for the King as *parens patriæ* was bound by the *Statute of Limitations*.

It simply means that in such case he sues on behalf of persons having their own distinct rights. A suit by the Crown on behalf of one portion of the King's Dominions, or of one aggregation of his subjects, against the Crown on behalf of another portion of the King's Dominions, or of a different aggregation of his subjects, is now familiar, and rests on the same principle. Not only is it more in accord with the theory of our law to regard the matter so, rather than appeal to the conception of separate juristic existences of the same Sovereign ; but neglect to observe the principle may lead to obscurity and confusion both in the formal and the substantive branches of the present case.

The real foundation of the informant's claim is that the King in right of New South Wales has not and never had any property in, or right of disposal in respect of, the land upon which Government House stands, and the 47 acres round it ; that the land belongs to His Majesty in his Imperial right only, that is, as King of the United Kingdom of Great Britain and Ireland ; and that in that right His Majesty has long since devoted it as a residence for the Governor of New South Wales. Upon that foundation, the contention is based that any attempt by His Majesty, in right of his State of New South Wales, to apply the land to any other purpose is unlawful, and should be restrained. Strictly speaking, and here we must speak strictly, it means that the Crown as representing New South Wales has no right of ownership whatever in respect of the property—not even as a Governor's residence.

As a technical cause of action there is in that contention the allegation of a right, which entitles the King to sue the King—provided always the right claimed is properly represented. The proper representation of necessary parties is substance, not form: See and compare *Kharagmal* v. *Daim* (1), *Chan Kit San* v. *Ho Fung Hang* (2), and *Ponnamma* v. *Arumogam* (3).

(1) (1905) L.R. 32 I.A., 315. (2) (1902) A.C., 257, at p. 261.
(3) (1905) A.C., 383, at pp. 389, 391.

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But to assert that the exclusive title and right of disposal rest in the Imperial Government is to exclude any interest in the Colonial Government, and to deny its competency to complain of invasion of ownership.

Once assume the right is Imperial, and therefore beyond the sphere of power belonging to the King in his local character, I am unable to perceive any legal justification for the King in his local character, whether suing *jure coronæ* or as *parens patriæ* (that is, of the local *patria*), to pursue the right and claim its vindication. The passivity of the true owner, where a wrong is being done to him, gives no warrant to a stranger to that right to interfere. The matter seems to me quite clear; but the contrary view entertained by the Supreme Court, and the earnestness and ability of the argument by which that view was maintained in the appeal, require a close examination of the position.

The authorities cited at the bar, and referred to by the learned Judges of the Supreme Court, doubtless establish that in respect of differing rights the Crown may be on both sides of the record. Nevertheless, there always remains the fundamental requirement of a competent plaintiff—a plaintiff legally interested in the right set up and the relief claimed.

To take a recent and interesting example:—Suppose while the Governor-General of Australia resided in this Government House by arrangement between the Federal and State Governments, the latter acting *jure coronæ*, the Attorney-General of New South Wales suing, as here, on behalf of the public of the State claimed a declaration of illegality and an injunction, as he does now, what would the answer have been? Either that the State Government had the power it professed to exercise, or that the Imperial Government alone could validly complain. The illegality of the use for the Governor-General, if the informant is right in his present contention, would be clear, for it is as much a diversion from the only lawful use as the contemplated use by the defendant. It is nothing to the point to assume the Home Government assented—there may or may not be grounds for the assumption; but, to test the point of parties, we have to assume the contrary.

The only possible suggestion to support the presence of the

informant was that advanced by Mr. *Knox*, namely, that the land was—say in 1835 or 1836—set apart and devoted by the Crown to the use of the Governor of the State for the benefit of the people of New South Wales, and that this suit is maintained by the King, not *jure coronæ*, but in right of the aggregation of people called the public of New South Wales. But that suggestion only adds further complication. It at once destroys the notion of any "Imperial purpose," because it excludes the public of the whole Empire, other than of New South Wales, from the trust it virtually asserts. The purpose so limited is one of a Colonial public nature.

And then one has to inquire what is the trust—how to reduce it to a recognizable legal form. The respondents—to use the words of Lord *Loreburn* L.C. for the Privy Council in *Dominion of Canada* v. *Province of Ontario* (1)—"must bring their claim within some recognized legal principle." I said substantially the same thing in *State of South Australia* v. *State of Victoria* (2). What, then, is the supposed trust? It is not a right of property, for that, *ex hypothesi*, remains intact in the Crown. It is not a right of enjoyment of the *res*, because it implies exclusion of the public except by permission. It is not a right of usufruct; it is not the right of compelling the Governor to live there; nor is it a right to prevent the State Government from providing him with a residence elsewhere—otherwise his present occupation at Cranbrook is unlawful. It is, in fact, nothing but a supposed surrender by the Crown of the right to use its own public property, if used at all, in any but the one way—a surrender based on no consideration, accompanied with no easement or servitude, or grant of any fragment of ownership. I am utterly unable to classify the alleged right, or to identify its position in our system of law.

Nor, with great respect, am I able to accept the view presented by the learned Chief Justice of New South Wales. His Honor says (3):—"In the case of a residence provided for the King's representative, the public are only benefited in the same sort of way as they are in the case of offices or residences provided for

(1) (1910) A.C., 637, at p. 645. (2) 12 C.L.R., 667, at p. 715.
(3) 13 S.R. (N.S.W.), 295, at p. 309.

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the carrying on the ordinary executive government of the State or Commonwealth, any difference being only one of degree. . . . When such lands and buildings have once been provided, I conceive that the public would have an interest in seeing that they are not diverted from that purpose without lawful authority."

In a sense, no doubt, the public are interested in seeing public property lawfully dealt with; but, unless the interest is of a special nature, it is an interest the protection of which resides in the Crown as the representative of the whole community, and not in the Crown in its parental character, but in the Crown as Sovereign, and as the legal owner of the property, and the only owner whom the law can recognize. Indeed, the view of the learned Chief Justice passes by—I say it with all deference—the radical distinction underlying the subject. The public interests in Crown property may be collectively national, as, for instance, in the Consolidated Revenue Fund or in Parliament House; or they may be of an individual though general character, as in the right of passage along a highway or in the entrance to a building or park, or in participation in a charitable fund. In the first class the public interests are identical with and indistinguishable from those of the Crown: no differentiation can possibly be imagined. In the second, the interests are diverse from and possibly in conflict with the claims of the Crown. It is only for the mutual ascertainment and protection of *competing rights* that the Crown is admitted to sue the Crown. It is obvious that to extend the doctrine of *parens patriæ* to cover the whole field by including also the first class would obliterate a well established distinction founded on substance and reason, and would introduce aimless and indescribable confusion into the law. For individual injury by the Crown, for individual injury to the Crown, the protection of rights which the public enjoy as against the Crown as well as against individuals, there are ample means of redress. But to provide redress for a supposed wrong done by the Crown to itself in the same right, for a violation by the Crown of its own *jura regia*, is an unprecedented and unthinkable proceeding.

Indeed, his Honor's doctrine appears to me to prove too much. If it be a sound view that Crown property appropriated for the local residence of the Governor, or for a gaol or a railway station

is *ipso facto* dedicated to the local public for that use and purpose, then equally is it true that Crown property appropriated for an Imperial purpose, as distinguished from a local purpose, is dedicated to the Imperial public. It cannot be that the appropriation of territory in a Crown Colony for an Imperial purpose, as distinct from a local purpose, is thereby dedicated for that purpose to the local public. If dedicated at all, it must be to the public of Great Britain and Ireland. As this property is taken to have been dedicated to an Imperial purpose, in that distinctive sense, and retained in Imperial hands for that purpose, it follows from the doctrine enunciated that it is the public of Great Britain and Ireland who are the persons really interested. If they are not, then it must be because the basis of the litigation—the Imperial purpose—is a mistaken one.

The dedication is said by Mr. *Knox* to be in the nature of a public charity—to be really in law what, in other words, I would term a trust. If it be so, then it is necessary to consider its full nature when constituted, say, in 1835 or 1836.

At that time, if dedicated or devoted or clothed with a trust, to hold the land as a Governor's residence, the trust must have been commensurate with the purpose; and as the purpose of sending Governors was and still is unlimited in point of time, so also must we consider the trust. It is, therefore, irrevocable even by the King regarded Imperially: it would be a breach of faith or a breach of the trust to depart from the purpose. And in that event the Imperial King, unless admitting the irrevocable trust, must be, at least, a defendant.

To condense, then, the informant's position as to parties, it is this:—The Crown of England has from 1835 or 1836 held, and it still holds, this land in trust for a purpose which is in the legal nature of a public charity, the objects being the public of New South Wales, and the purpose being the non-user of the premises unless by the State Governor. And, further, though the Imperial Government stands by observant, but inactive, and though the State Governor is contentedly, and perhaps preferably, occupying another residence, the local Government is, even in the absence, and without the consent, and perhaps against the will, of the real owner, charged with the parental duty of enforcing the rights of

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the objects of this novel and negative charity, because the property is impressed with the trust.

I can only say, with the deepest respect for the contrary opinion, that I am wholly unable to perceive any right of complaint resident in the present informant, even assuming the unlawfulness of the local Government's interference with the property as against the Imperial authorities.

Before passing from this branch it is not unimportant to inquire: (1) Is the Imperial Government, though absent from the suit regarding its own alleged property, to be now considered bound by the assumption of a public trust affecting it, which is necessarily involved in the decision of the Supreme Court? and (2) Would the Imperial Government have been bound by a decision adverse to its proprietorship at all—an issue lying at the root of the whole proceedings?

These are questions the palpable answers to which go far to show that the absence of the Imperial Government is of itself fatal to the respondent's cause.

The inquiry, therefore, as to the substantive right of the Executive Government of New South Wales to do the threatened act is, in my opinion, futile so far as the present action is concerned. But my opinion as to the informant's competency may be wrong, and for that and other obvious reasons it is desirable to express our opinions upon the main issue. Though an opinion adverse to the informant's assertion of Imperial title could not bind the Imperial Government in its absence, yet it would bind the informant in this action.

(*B*) THE SUBSTANTIVE RIGHT.

(1) *Formal Executive Act.*—In view of some of the earlier arguments, and of some observations in the judgment of one of the learned Judges of the Supreme Court, it is necessary to clear the ground of one misconception. The absence of what has been called "executive authority" for the determination of Ministers to apply the land to the new purposes, has no relevance whatever. It might have been of importance had the suit been against individuals. But it is not. No individual is made defendant. It is a suit against the Crown, whom, and whom alone, the nominal defendant does or can represent; and in the third para-

graph of the prayer for relief, as well as in the formal decree, the intention to so regard him is placed beyond controversy. The distinction between an individual defendant and the Crown defendant is clear from *Nireaha Tamaki* v. *Baker* (1).

(2) *The Decree.*—The decree (1) declares that the house and grounds "are vested in His Majesty the King, dedicated to the public purpose of a residence for His Majesty's representative in New South Wales"; (2) declares "that the action or concurrence of His Majesty's Imperial Government is necessary to divert the same from such purpose"; and (3) orders an injunction against the defendant as nominal defendant for and on behalf of the Government of New South Wales and the officers and servants of the said Government—in other words, against the King representing New South Wales and his servants in that character—against any unauthorized interference with that purpose. It is a decree denying the substantive right of the Crown on behalf of New South Wales to divert the land from the stated purpose. But nothing turns on the question of executive authority.

The decree assumes the contemplated act to be that of the Crown itself, so far as it can act locally. The Crown is in law the Executive; the Governor is the administrator of the Government (sec. IX. of 18 & 19 Vict. c. 54). He has a council to advise him in executive matters called the Executive Council, but, as it is assumed the contemplated act will be done by him though advised by his Executive Council, we must either assume that a formal order is unnecessary or that it will be made. This case, then, cannot be determined on the absence of executive formalities.

The real question is: Can the decree be substantially supported in law?

The first declaration consists of two parts: (*a*) that the house and grounds are vested in His Majesty the King—I take that to mean by virtue of his Imperial right; (*b*) that they are dedicated to the public for the purpose of a residence for the Governor of New South Wales—that, of course, means the public of New South Wales. The rest of the decree is consequential on those two findings. And the problem here is: Are those two findings correct?

(1) (1901) A.C., 561, at pp. 575-576.

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(3) *Grounds of the Decree.*—The conclusions of the learned Chief Justice and *Street* J. certainly, and perhaps of *Simpson* C.J. in Eq. also, were founded upon two considerations which, taken together, are thought to cover the whole ground.

One is—that when about 1835 or 1836, or at all events before 1842, the land in controversy—say 47 acres—was "dedicated or set apart" for the purpose of a Government House, the Imperial Government, which controlled the Colony, and the Governor, as its agent, dedicated or set apart the land for what was then and still is an Imperial purpose, and therefore—there is much virtue in the "therefore"—for the Imperial Government. That, it is said, vests the land definitely in the Imperial Government to start with, and, unless it is divested from that Government either by Statute or grant or despatch, it remains vested in the Home authorities.

The second consideration is of a negative character. It is—that, notwithstanding the grant of responsible government in 1855, the Colonial Government obtained no right to or control over this land. It is said that the Act 18 & 19 Vict. c. 54 did not by the general plenary grant of legislative jurisdiction confer proprietary rights; so that those rights, if then granted, must be sought elsewhere: that the Act gave the Colony the entire management and control of "the waste lands belonging to the Crown in the said Colony," preserving certain rights, but not of any other Crown lands; that the expression "waste lands" there used must be understood as it is defined in the Acts 5 & 6 Vict. c. 36 and 9 & 10 Vict. c. 104, and that, consequently, as this land was not within that definition, because dedicated or set apart for a public purpose, it was never placed under the proprietorship or management or control of the local Government, and still remains Imperial property.

On these two considerations, the executive "setting apart" of the land while New South Wales was still controlled from the Colonial Office, and the effect of the legislative grant of responsible government—together with a third consideration, not adverted to in argument, viz., the present New South Wales Constitution—the matter depends.

In my opinion, it is quite impossible to arrive at a just appre-

ciation of the position, whether of fact or of law, unless the circumstances are viewed as they occurred with the contemporary surroundings. *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1), which is much relied on by *Cullen* C.J. and by Mr. *Knox*, is a signal example of the necessity of following this course; and, for that and another important reason, that case is a valuable precedent for the present case.

Before summarizing the various events one or two introductory observations must be made, because they indicate, so to speak, the soil upon which the events themselves were to operate.

(4) *The Crown's Title to Colonial Lands.*—It has always been a fixed principle of English law that the Crown is the proprietor of all land for which no subject can show a title. When Colonies were acquired this feudal principle extended to the lands oversea. The mere fact that men discovered and settled upon the new territory gave them no title to the soil. It belonged to the Crown until the Crown chose to grant it. Professor *Jenks*, in his *History of the Australasian Colonies*, at p. 59, observes that this purely technical and antiquarian fiction settled a question of the first magnitude.

There was, as he says, "no Statute, no struggle, no heated debate. The Crown quietly assumed the ownership of Australian land." I should add, this doctrine received very practical application when the Crown, by Governor Bourke's proclamation, approved by the Colonial Office, refused to recognize Batman's treaty with the native chiefs in 1835, and notified that persons found in possession of the lands would be treated as trespassers and intruders. So we start with the unquestionable position that, when Governor Phillip received his first Commission from King George III. on 12th October 1786, the whole of the lands of Australia were already in law the *property* of the King of England.

It follows that no act of appropriation, or reservation, or setting apart, was necessary to vest the land in the Crown.

The effect of any specific reservation or setting apart must depend upon the purpose and object with which it was made. This receives illustration in the *British Columbia Case* (1).

(1) (1906) A.C., 552.

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(5) *Waste Lands of the Crown.*—Then the expression "waste lands" of the Crown, apart from legislative definition, appears to have been understood long before Phillip's time down to 1842 to designate Colonial lands not appropriated under any title from the Crown. It is found in a despatch in 1800 from Lieutenant-Governor Milnes of Lower Canada to the Duke of Portland (*Egerton and Grant's Canadian Constitutional Development*, p. 115); in 1829 in the New South Wales Act 10 Geo. IV. No. 6. In 1836 Mr. Wakefield, in giving evidence to the House of Commons Committee, on whose report the Act 5 & 6 Vict. c. 36 was framed and passed, constantly referred to the "waste lands" of Australia as opposed to the land appropriated, that is, by settlers: See, for instance, questions 995 and 1006 (printed by order of the House of Commons, 1st August 1836). I need hardly say my reference to these and similar materials is not for the purpose of construing the Acts, but to ascertain the prior sense in which terms used in the Acts were used, and, particularly, in materials before Parliament when the Acts were passed. See also the term "waste lands" in question 1002 in relation to the public lands of the United States. In Mr. Merivale's lectures on "*Colonization and Colonies*," delivered in 1839, 1840 and 1841, a critical period so far as this case is concerned, the term is freely used in its full general sense—see, for instance, pp. 107 and 432, which will be referred to later in another connection.

Finally, the term is used in Earl Grey's despatch to Governor Fitzroy of 29th November 1846: See *House of Commons Papers* 1847, vol. XXXVIII., p. 497.

(6) "*Set Apart*," *its Meaning and Effect.*—Another expression found in the Act of 1842 requires reference. I mean the words "set apart." After full consideration, that term appears to me to denote merely a segregation in fact, a laying aside from the general mass. It does not necessarily involve the creation of a right in another; though in many cases it is the preliminary step to the creation of such a right.

But the setting apart is complete before and independently of the creation of any rights. The term as will be seen was used as early as 1763.

Before the Act of 1842 was passed, the term was freely used

before the Select Committee referred to, in the sense of setting aside in fact: See, for instance, questions 1711 to 1724 in the evidence of Mr. Kelsey of the Colonial Office. Indeed, it is shown in that evidence that in some cases after reserves had been "set apart" for various purposes, as for villages or clergy, the reservations were abandoned, and the land fell, in the language of Sir George Grey (question 1720), "into the mass of general undisposed of land in the Colony"—which is only a comprehensive definition of "waste lands of the Crown." And the importance of that evidence is that it was material before Parliament in framing its enactments.

I have looked at various decisions, among which I may mention *In re Ponsford and Newport District School Board* (1), the *British Columbia Case* (2), and *Attorney-General for the Province of Quebec* v. *Attorney-General for the Province of Ontario* (3); and I feel quite convinced that to satisfy the words "set apart," as used in 1842 and since, no creation of an adverse right is necessary.

Turning now to Governor Phillip's Instructions of 25th April 1787, we find they directed him to reserve to the Crown proper quantities of land for named purposes, not including any mention of a Government residence. Those that were mentioned were not peculiar to Australia, except so far as they were necessary to a perfectly new country. Most of them find their counterpart in secs. 46 and 54 of the Instructions of 7th December 1763 to Governor Murray of Quebec: *Egerton and Grant*, pp. 15 and 16.

Phillip had also, by a clause towards the end of his Additional Instructions of 20th August 1789, directions to "set apart" land for a church (See *Historical Records of New South Wales*, vol. I., part 2, p. 259). This followed clause 47 of Murray's Instructions of over 25 years before.

There is no doubt that in 1792 Phillip set apart a large tract of land for public purposes generally; in 1807 Bligh enclosed a portion of this from the rest; and in about 1835 or 1836, or at all events before 1842, the 47 acres now in question were "set

(1) (1894) 1 Ch., 454.
(2) (1906) A.C., 552, at p. 556.
(3) (1910) A.C., 627.

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apart" in fact as a residence for the Governor of New South Wales, and so they have remained until recently.

The first point made by the informant is that the 47 acres were reserved as Imperial property, and are still so; or, even if Colonial in title, were impressed with a trust in favour of the public for an Imperial purpose.

It is a mere truism to say that the title of the King to the lands of the Colony was in right of his Sovereignty of the Colony, in other words in right of the Colony. They were His Majesty's Colonial lands. To transfer land to him in right of the United Kingdom only must depend on some overt act, and the onus of proving this lies on the informant. The setting apart is said to be this overt act. But it is necessary to ask what object the Crown had in view in so setting apart the land. Was it set apart from all other Colonial lands, and as the special property of the Mother Country, attached, so to speak, specifically to the Colonial Office, in the same way as, in the *British Columbia Case* (1), Deadman's Island, as the facts were held to show, was specifically attached to the Home Government, the War Office, for the purpose of defending the Empire? The facts there were—that the reserve was for military purposes; that the history of the country was one of conquest and of special solicitude from a military and naval standpoint; that an Imperial officer, Colonel Moody R.E., was specially detailed to serve there with a party of Royal Engineers, though he acted also as Commissioner of Lands; that, in selecting the site of a capital, he reported on the necessity of protecting it; that his plans were laid by the Home Government before the Admiralty and the War Office, and approved; that he was in direct communication with the War Office; and that the Colonial Office had to turn to the War Office for a schedule of the reserved lands for transfer; and the Home Government showed they regarded the lands as theirs specially by transferring them. In these circumstances—not merely because the reserve was of a military nature—the Judicial Committee concluded that the object of the original reservation was to secure the land to the Home Government for military operations operated or directed by the Imperial Government.

(1) (1906) A.C., 552.

But, with great deference, it is a great fallacy to say that the local habitation of a Governor, which is as purely incidental to his official presence as is his daily sustenance, is an Imperial purpose in the same sense as the site of a naval base or fortification to defend a Colonial capital from foreign foes. On the latter, the safety of the national fleet or the defeat of an enemy may depend; the protection of a military station may involve the honour of the Empire or determine the fate of war.

Even between military posts there is a difference. Had the military reserve been one intended merely to guard against the Indians, there would have been no necessary conclusion that the title of the land was intended to be vested, so to speak, in the War Office. The Judicial Committee treated the question as a pure question of fact dependent on the special circumstances, and so I treat the present one.

(7) *How Government House Lands were Set Apart.*—I have carefully examined the evidence with a view of ascertaining (*a*) whether this reservation or setting apart of the 47 acres was in order to appropriate them to the Home Government as such, or merely to allot them as part of the Colonial Domain to the Governor as an official residence; and (*b*) whether there was any dedication or trust in favour of the public contemplated.

I have come, unhesitatingly, on both points to a conclusion adverse to the informant. The salient features of the documents are all that are necessary to mention.

In 1792 Governor Phillip under special instructions from the Home Government—for no general instructions on this subject appear—reserved by marking on a plan a large tract for "public purposes," specially indicating a portion for the Governor's residence.

In 1807 Governor Bligh issued a proclamation notifying persons who had built houses on what he termed "part of the Domain of the Governor's Residence" to remove, adding "the said grounds being wanted for *Government purposes.*" I will only observe that there is so far nothing indicative of what one would have expected to find if the informant's case were correct, namely, a special appropriation to the Home Government; but,

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on the contrary, the expression "Government purposes" would ordinarily suggest local Government purposes.

In 1811, 7th September, a public notice was issued stating that Garden Island should be comprised in and considered in future as "part of the Government Domain."

In 1816 Governor Macquarie gave public warning against trespassing by injuring the trees, shrubs, &c., on the "Government Domain," but intimating there was no objection to innocent recreation. There is still no sign of specific appropriation to the Home Government, and no dedication for any purpose. The recreation appears to be permissive only.

On 25th May 1825 Governor Brisbane wrote to Lord Bathurst on "the very important subject of the Government Domain as it is called in Sydney," and the want of a suitable "Government House and Public Offices." Note the conjunction of the two sets of buildings. The writer states that "it will be perceived by referring to Captain King's chart of Port Jackson that one half of Sydney Cove in which Sydney Harbour is situated has been *reserved by Government.*" He manifestly means reserved from sale. He proceeds to say it affords a pleasing prospect; but that the other half of the Cove is needed for commercial purposes. He then suggests disposing of the whole of the water side of the Domain, and applying the revenue from the sales to erecting a suitable residence for the Governor in Sydney, instead of the then present Government House, which was very dilapidated and might be converted into public offices; the suggestion included a proposal to convert the Gothic stables into a Government residence. He adds it would be a great gain to the public and to commerce, and a saving of expense to the Government.

Now, I attach much importance to this document. It betrays no suspicion of any differentiation of title between the site of the then Government House and the rest of the Domain; its suggestion to sell parts, and to turn the then existing site of Government House into public offices, is inconsistent with any notion of dedication for Imperial purposes, or in any way to the public. The transfer to public offices does not appear to be any radical change of title or object—they are both "Government purposes;"

and the final words indicate that the arrangement, including the new Government House, will be of great *local* advantage.

It is obvious that if the original site of Government House were reserved for "an Imperial purpose" in the distinctive sense contended for, that fact would have been known and referred to by the Governor, and, as it was not, it would be very unlikely that the new house would be treated differently from the first.

On 30th June 1825 Lord Bathurst authorizes the construction of a new Government House, as he deemed it very "essential to the public service that His Majesty's representative in that distant quarter of the world should be accommodated with a convenient and suitable residence." That is the strongest expression I can find in informant's favour, but it is consistent with either view. Lord Bathurst there speaks not of land but of the condition of the building, wherever it may be; he is stating the reason operating in his mind, not for vesting land in the Home Government but entirely *alio intuitu*, for authorizing expense in building a new house.

On 8th June 1829 Governor Darling publishes for general information a list of land reserved for "public purposes," and includes this land.

On 2nd November 1832 Governor Bourke reports on the existing Government House, and suggests erecting a new house on a different site and "giving up to the public" a portion then enclosed in Government gardens for quays, &c.

He says:—"I considered in what way a new house might be built with least expense to the *public*"—language extremely unlikely if he knew that the site had been or was intended to be taken away from the public, and specially vested in the Home authorities.

He says, further, that "the land about 47 acres to be enclosed as the Government Grounds" are, with a small exception, not fertile; and that Grose Farm, containing about 200 acres, should be allotted also for the use of the Governor. So that the genesis of the enclosure of the 47 acres is here found, with no intimation of vesting in the Home Government, and with the mention of Grose Farm in such a connection that, if the 47 acres were intended to be so vested, Grose Farm was similarly intended; and if the public

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were to be *cestuis que trustent* of the 47 acres, they could hardly escape the same fate with respect to the 200. The Imperial purpose would be poorly served by providing a fine house for the Governor and leaving him to starve. But the Governor says of the farm:—"The expense of labour and implements for the management of this farm should be borne by the Governor; that of supporting the new farm buildings now upon it should be charged to the public"—again, the "public," not as the objects of a public charity but as persons paying for important services rendered locally by His Majesty's representative.

In August 1836 the Committee of the Legislative Council report favourably, and, *inter alia*, state that £25,000 will be required and may be provided by the sale of Government land, and 20 acres, part of the Inner Domain, may be "dedicated" to the improvement of part of Sydney for streets, &c. "Dedication" there first makes its appearance; and, as to 20 acres other than these, the Chief Justice would scarcely have signed a report in those terms had there already been a dedication of land for any other purpose, or if he had heard of any specific appropriation to the Home Government. The whole proceeding so far is "Colonial," with, of course, the necessity, in the then mode of government, of the Home authorities' approval.

The new house was finished in 1845, just as Governor Gipps was on the point of leaving for England, and in his parting despatch to Lord Stanley there appears no trace of Imperial ownership in the special sense, and no suggestion of a trust for the public excepting that, as is said in *Calvert on Parties*, p. 26, "according to the principles of our law the interest of the public is vested in the Crown."

(8) *How the Lands have been since treated by both Governments.*—From that time onwards to 1855 no indication is given that the position is altered as to title or trust. During all that time the property was treated as if it were Colonial property.

In the *Appropriation Act* 1832 (No. 17), among the ordinary Colonial purposes, appears an item of £500 for the furniture for the reception rooms of Government House, Sydney; in the *Appropriation Act* 1834 (No. 5), we find a significant item, "not exceeding £600 to defray the expense of furniture for Government

Houses and the several Public Offices." These buildings are thus classed together.

In the *Appropriation Act* 1835 (No. 5) the language is to my mind practically decisive. Under the general heading for "Miscellaneous Services for 1836" there is an item indicated by the marginal note "£1,500 for repairs to Public Buildings." The item is, "not exceeding £1,500 to defray the expense of casual repairs to *Government Houses Courts of Justice and other Colonial Public Buildings.*" It is to be noted, too, that the Parramatta House was never considered, according to the argument, an Imperial property. Yet it was a Government Domain. See *Appropriation Act* 1836 (No. 5), in which a sum of £676 0s. 10d. was voted for it. In the same Act appears the vote of £10,000 to defray in part the expense of building a new Government House at Sydney. The item appears under the head of "Miscellaneous Services for 1837," and is included in Colonial purposes, being inserted between a vote for Sydney firemen and one for accommodation for Botanic Garden workmen. A noticeable item is the last, namely, £600 for the Royal Engineer Commanding "whilst employed upon Colonial Services." In the Act of 1837 (No. 4) the same important phraseology occurs as above italicized in the Act of 1835.

In 1838, while the old Government House and the Parramatta House continued, the *Appropriation Act* of that year (No. 15) provided £500 "to defray the expense of furniture for Government Houses and Public Offices," drawing no distinction between them, and mingling them with other ordinary public buildings as Courts, lunatic asylums, &c. So in 1839 (Act No. 24), 1840 (Act No. 20) and 1841 (Act No. 7). In 1842 (Act No. 12) there is under the heading of "Department of Public Works and Buildings" and wedged between the "Colonial Architect's Department" and "New Gaol and Court House Darlinghurst," the item "£2,500 towards defraying the expense of building the new Government House Sydney"; in 1843 (Act No. 20) under "Public Works and Buildings," and inserted between "Colonial Architect" and "New Custom House," we find "the further sum of £1,000 towards defraying the expense of building the new Government House Sydney"; in 1844 (Act No. 13), between the "Road over the Blue

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Mountains" and "Removing and repairing the Clock and Carters' Barracks," there is "the further sum of £500 towards completing the new Government House, Sydney"; in 1845 (Act No. 24) £450 for erecting a Guard-house at the new Government House, Sydney, and £250 for providing iron entrance gates to the new Government House. That was the year when Sir George Gipps was to move in. Succeeding Appropriation Acts provided similarly for sums for the enclosures, fences, and ornamental shields of arms down to 1853.

It is history that the Home Government ceased before 1850 to contribute to the expenses of the Colonial Government: See *Jenks's History of the Australasian Colonies*, at p. 229, and *Earl Grey's Colonial Policy of Lord John Russell's Administration*, vol. I., p. 43. It would be, indeed, a strange notion that the Home Government distrustfully insisted on remaining the owner of the property for the purpose of ensuring a proper home for its Imperial servant, and yet abandoned the cost and responsibility of the matter to the Colonial Government.

That is certainly not characteristic of the British Colonial Office, and is not supported by anything the Home authorities ever did or ever said. It is noteworthy that, with reference to the present controversy, the Home Government has not—so far as we have heard—given the least sign of a claim to this property. If there had been any impression of title in the Colonial Office, one would have expected to have some direct evidence of it; in this regard the absence of such a claim is significant. It is notorious, and the Appropriation Acts of New South Wales show, that the Colonial Government have always maintained the premises as if they were their own: See, for instance, the early Act of 1856-1857 (No. 42), the Supplementary Service; the Act of 1858, under Establishments of Secretary for Lands and Public Works.

(9) *Responsible Government.*—In 1855 responsible government was obtained by New South Wales. There had been a protracted and heated struggle between the Home authorities and the colonists as to the grant of full powers of self-government. By successive steps the local powers had widened—first direct Crown rule, and then in 1823 a limited legislature, in 1828 a further advance, in 1842 representative institutions, but a denial of any

right to interfere with the land question, and in 1850 a further grant, with a denial of the same right. The insistence of the public for complete powers, added to the revolutionary change on the subject of emigration, which took place on the discovery of gold, led to the final concession.

No one can read the despatch of Lord John Russell to Governor Denison of 20th July 1855 (printed by command 24th July 1856, and see *New South Wales Parliamentary Handbook*, 7th ed., p. 195), transmitting the new Constitution of that year—and more especially the last paragraph of that despatch—without the deepest conviction of the confidence, the unrestricted confidence, which the mother country reposed in the people of her distant possession. I say this because the suggestion was made throughout the argument that the Home Government took care to hold in its own hands the residence of its Imperial representative, for fear the local authorities should leave him without appropriate shelter.

And it is said that this was so notwithstanding the change to responsible Government.

(10) *The Land Sales Act*, 5 & 6 *Vict. c.* 36.—Until 1855 the Home Government held these 47 acres, together with all its other Crown lands, jealously in its own power. This was not by reason of any mistrust, but as a matter of high policy. To briefly elucidate this, is to clear the way to a proper understanding of the Acts 5 & 6 Vict. c. 36 and 9 & 10 Vict. c. 104, which have been strangely misunderstood. That would be trifling if it did not lead to a misconstruction of the Constitution of 1855.

As a matter of history the land of the Colony down to 1831 was entirely administered by the Governor at his discretion or according to directions received from the Colonial office.

In that year Lord Ripon's regulations introduced the principle of public sale and certain principles of action. At that period, and for some years afterwards, a serious question of public policy was agitated in England and more and more strenuously contested in the Colony, namely, how far the Crown should pursue the notion prevalent among Imperial statesmen of the time that the Colonies should be developed, not merely with a view to their own advantage, but also, and largely, with a view to find a home for the surplus population of the United Kingdom and a market

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for its manufactures. The right of disposal of the public lands was most carefully preserved as an Imperial means of effecting the desired object. In 1836 a Select Committee of the House of Commons investigated the problem of how best to secure this composite purpose. Its report was followed by a principle formulated in 1840, namely, that "the Crown lands in the Colonies are held in trust not merely for the existing colonists, but for the people of the British Empire collectively." At the same time it was admitted that public local claims should be the first charge, and emigration projects should come next.

These matters were before Parliament when it undertook the new legislation, and it is apparent that it was for the purpose of definitely laying down these principles that the Act of 5 & 6 Vict. c. 36 was passed in 1842. Sec. 19 appropriates the gross proceeds of the lands less certain expenses to "the public service of the . . . Colonies," provided one-half is applied to emigration from the United Kingdom to the Colony. This Act (see sec. 2) was a Parliamentary fetter on the existing absolute power of the Crown. It fixed the policy by prescribing the method of sale and application of proceeds. But it strictly maintained the Home Government's control of the undisposed of lands, termed "waste lands," as against Colonial control.

Parliament defined "waste lands of the Crown," but expressly added "as used in the present Act," and said that by those words so used were intended and described any lands situate therein then or thereafter vested in the Crown, which were not already granted or contracted to be granted, or "dedicated and set apart for some public use."

It is extremely material to bear in mind that the Act was a *restriction* on the power of the Home Government to dispose of the waste lands and apply the proceeds, but it did not in any manner profess to confer any such power on the Colonial legislature. It was intended as a just and permanent settlement of a much vexed question which received at the time great public prominence. See, for instance, *Merivale's Colonization and Colonies*, at p. 433, and *Earl Grey's Colonial Policy of Lord John Russell's Administration*, vol. I., p. 303, letter VII.

The Colony obtained fixed rights with regard to the proceeds,

but the exclusiveness of the Home Government's powers of disposal was maintained. At the same time provisions of mandatory character were inserted, requiring the Governor to convey and alienate in fee simple to the purchasers thereof "any waste lands of the Crown" in the Colony, subject to the prescribed regulations (sec. 5).

So sweeping and compulsory a clause needed qualifications; and such were inserted in sec. 3, which preserved the discretionary right of the Crown to except lands for public uses, and in sec. 23, which was not discretionary, but binding, and which gave the definition of the expression "waste lands of the Crown" *as used in that Act*—so as to prevent, *inter alia*, any demand being possibly made as a statutory right, by a would-be purchaser, for lands reserved or set apart for public purposes. It is to be remembered that there was no detraction in the Act from the power of the Crown to abandon the public purpose for which any waste lands were set apart—provided always no adverse rights had arisen. A tract of waste forest land marked out on a map, and formally set aside for a future township, or reservoir, or police station, was still waste land of the Crown in fact and in ordinary parlance, but it was *reserved* waste land. If, however, the reservations were formally revoked, and the purpose abandoned, the land naturally fell back into the general stock of Colonial waste lands. Instances of this have been already mentioned in connection with Mr. Kelsey's evidence in 1836. It was altogether in the discretion of the Crown to reserve, or to cancel a reserve, and thus throw the particular lands into the purchasable mass. There was nothing in the Act 5 & 6 Vict. c. 36, so far as I can see, to prevent the Crown from abandoning its purpose in respect of the 47 acres, and then selling them as ordinary waste lands; though until abandonment no claim could be made to purchase them: See *per Wise* J. in *The Attorney-General* v. *Eagar* (1). Such a right has never been parted with, except under specific provisions in the New South Wales Lands Acts. The prohibition to sell except under the statutory regulations and conditions extended only to waste lands within the definition; but while these lands were set apart they were outside the definition and were also outside the prohibition,

(1) 3 S.C.R. (N.S.W.), 234, at p. 268, lines 8 to 11.

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which latter was immaterial, but what was material was that they were outside a would-be purchaser's reach.

If the Crown chose to make them available by bringing them within the definition, just as private lands subsequently surrendered to the Crown would be, there was nothing to cut down the Royal right to sell subject to the Statute.

The all important consideration, in fine, with respect to the Act 5 & 6 Vict. c. 36, which it may be mentioned was passed in June of 1842, is that it represented a distinct line of policy—that of maintaining, under regulation, the exclusive Home right of disposing of waste lands.

This fact of exclusive right was emphasized in the following month of July, when the Act 5 & 6 Vict. c. 76 was passed enlarging the constitutional power of the Colony. Sec. 29, enabling the legislature to enact laws for the peace, welfare, and good government of the Colony, forbade any interference with the sale or other appropriation of the lands belonging to the Crown within the Colony or the revenue thence arising. Note, the prohibition is not merely as to "waste lands" as defined previously, but as to the lands belonging to the Crown, all of which might—in the opinion of Parliament—have otherwise come within its purview.

(11) *The Act* 9 & 10 *Vict. c.* 104.—One well-known result of the Land Sales Act (5 & 6 Vict. c. 36) was that squatters could not afford to buy, at the price, the necessary tracts of lands for their runs. They simply occupied the land illegally. Difficulties arose, and these were met by the Act of 9 & 10 Vict. c. 104, which was the complement of the earlier Statute and part of the same policy: See Earl Grey's statement in a despatch to Governor Fitzroy dated 29th November 1846 (*House of Commons Papers*, 1847, vol. XXXVIII., pp. 499, 500), and *Merivale's Colonization and Colonies*, pp. 470, 471.

Observations similar to those addressed to the principal Act apply to this amending Act, and particularly may I refer to sec. 1, which speaks of "any waste lands of the Crown," and this necessitates the strict definition in sec. 9 of the words "waste lands of the Crown, as employed in this Act." When in 1850 the Act of 13 & 14 Vict. c. 59 was passed, the prohibition on the Colonial legislature was continued (sec. 14) against interfering

with the sale or appropriation of "the lands belonging to the Crown"—not the "waste lands as defined by the existing Acts." It will be seen, therefore, how revolutionary a change was effected by the Constitution of 1855.

(12) *Constitution of* 1855.—The long struggle for complete self-government had ended in the Colonial legislature itself framing a new Constitution and providing a civil list, but it was stipulated—as is recited in the preamble of the Imperial Act—that the new Constitution should not come into force until the Acts of 5 & 6 Vict. c. 36 and 9 & 10 Vict. c. 104 and 13 & 14 Vict. c. 59 and other Acts restricting the Colonial power over the Customs and otherwise affecting the Government of the Colony were repealed, and "the entire management and control of the waste lands belonging to the Crown in the said Colony . . ., and also the appropriation of the gross proceeds of the sales of any such lands, ... shall be vested in the legislature of the said Colony."

Sec. II. did so vest the required powers with certain exceptions. I stop there, for a moment, to observe that there is no syllable in that recital or in sec. II. to cut down the inherent meaning of the phrase "the waste lands belonging to the Crown in the Colony." It meant *all* the waste lands. The suggestion is that the definition contained in the two Acts 5 & 6 Vict. c. 36 and 9 & 10 Vict. c. 104 governed the words in the Act of 1855. With very great deference to such eminent men as Sir William Atherton and Sir Roundell Palmer, in their opinion dated 17th January 1862, I am forced to think otherwise. Their view that the definition did govern the later Act was not necessary to their opinion, and the history of the legislation and the events surrounding it do not seem to have been drawn to their attention, but the Acts were apparently collocated as if the Statutes in the case laid before them were all successive steps in the same process.

On the contrary, *the last was a complete reversal of policy*; it was the deliberate and final abandonment of a system of political control with reference to which the Acts had been framed, and it was the adoption of an entirely new line of action, a complete transfer of political power, and all the local control of the subject matter which that political power required. Not only was there

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no repetition of the definition contained in the former Acts, but the Imperial legislature, when transferring all legislative power over the waste lands of the Crown in New South Wales, was careful to state expressly what limitations it intended once and for all to place upon its grant of power. In sec. II. it set that out in the proviso in the words:—"That nothing herein contained shall affect or be construed to affect any contract or to prevent the fulfilment of any promise or engagement made by or on behalf of Her Majesty with respect to any lands situate in the said Colony, ... nor to disturb or in any way interfere with or prejudice any vested or other rights which have accrued or belong to the licensed occupants or lessees" under the repealed Acts or any Orders in Council—the latter referring to the squatters.

It is abundantly plain to me that, except for vested interests and the proceeds of lands already sold (see sec. 3 of 18 & 19 Vict. c. 56), the whole control and management of waste lands of New South Wales and their proceeds were parted with absolutely by the Crown, as well as all other powers of local government not expressly excluded as in sec. 45. The old Acts passed away with the policy of which they formed part, and the Colonial Government succeeded to control as if those Acts had never been passed.

In accordance with this plan, sec. 1 of the Constitution displayed a marked alteration. The power to make laws was now to be "in all cases whatsoever," and there was no longer any restriction as to Crown lands. Sec. 43 of the Constitution says:—"Subject to the provisions herein contained it shall be lawful for the legislature of this Colony to make laws for regulating the sale, letting, disposal, and occupation of the waste lands of the Crown within the said Colony."

The only limiting provisions material to this case are contained in the *proviso* to sec. 58, which are those in the proviso to sec. II. of the covering Act. Those limiting provisions long ago became exhausted, and sec. 8 of the *Constitution Act* 1902 significantly contains no limitation whatever. In *Attorney-General* v. *Eagar* (1) the Supreme Court of New South Wales held the Crown bound on the ground that the land was dedicated to charity and,

(1) 3 S.C.R. (N.S.W.), 234.

therefore, was really not land belonging to the Crown: See *per Stephen* C.J. (1) and *Milford* J. (2). The proviso to sec. 58 of the Constitution of 1855 operated (2); *per Wise* J. (3). These were the real and substantial grounds. It was not argued that the lands in controversy were not waste lands within the meaning of the Constitution, except on the ground that they were affected by a trust, and therefore were not really the property of the Crown. This, said the learned Chief Justice (4), was the real question. An *obiter dictum* of *Wise* J. (5), as to the meaning of "waste lands" in the Constitution, is not definite. That learned Judge, when Solicitor-General, did not, when giving his opinion in July 1857, think it necessary to refer to that. The reference by *Stephen* C.J. (6) to the 20th section of the Act 5 & 6 Vict. c. 36 appears to rest on a misapprehension of the purview of that section. It was to enable the Crown, notwithstanding the prohibitive vigour of the enactment, to sell lands on other terms if so promised to settlers or intending settlers previously.

(13) *Effect of New Constitution on Control of Lands.*—Now, it is true that the grant of legislative power contained in sec. 1 of the Constitution does not confer proprietorship. If it did, it would make the State the owner of all private property and of all persons in the territory.

But the fact that carries importance is that the King always owned the Colonial land *in right of his Colony*; that, even when the local legislature regulated public conduct in most things, there were reserved for Imperial control such departments of Colonial government as lands, and, to some extent, Customs, because trade was long considered an Imperial interest too (See *Lewis's Government of Dependencies*, pp. xliii. (*n.*) and li., and *Merivale's Colonization and Colonies*, pp. 192, 193). *Merivale*, p. 107, refers to "the control exercised by the mother State over the sale of all other waste lands" (that is, other than church reserves), as "perhaps the most important function of government in new countries."

(1) 3 S.C.R. (N.S.W.), 234, at p. 260.
(2) 3 S.C.R. (N.S.W.), 234, at p. 265.
(3) 3 S.C.R. (N.S.W.), 234, at p. 271.
(4) 3 S.C.R. (N.S.W.), 234, at p. 254.
(5) 3 S.C.R. (N.S.W.), 234, at p. 271, lines 2 *et seq.*
(6) 3 S.C.R. (N.S.W.), 234, at p. 259.

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The express statutory control of the sale and other disposal of the waste lands (sec. 43 of the Constitution) was transferred to the Colony not as a matter of *title*—as has been tacitly assumed —but as a matter of *governmental function*. It was given, not to the King in his Executive capacity, but to the *legislature*, which doubly evinces that it was not as a matter of title or property. If, indeed, it were necessary to be considered as a gift of property, and if, according to Mr. *Knox's* arguments, the maxim *expressio unius exclusio alterius* is to apply, then, if he is right also as to the definition of 5 & 6 Vict. c. 36 still continuing, it follows that not a single piece of land set apart for public purposes ever passed to the Colonial Government. The Supreme Court buildings, the post offices, the Treasury buildings, the gaols, &c., if that argument prevails, would all have remained Imperial property.

(14) *Nature of Governor's Office.*—Pressed with that difficulty, Mr. *Knox* declared he was not bound to contest it, though he declined to admit it, because he relied also on the Imperial nature of the Governor's office. In the end, that is all that can distinguish the matter from any other case of land reservation. Said learned counsel, the land was analogous to a military reserve, and, indeed, the Governor was Captain-General of the forces, and so the reservation for his residence must have been to the exclusive use, and therefore as the exclusive property, of the Home authorities. I have already indicated to some extent the distinction between a local residence of a Governor and a military reserve, but the differences are numerous and vital. First, let me observe that "though he may be styled commander-in-chief, he is not thereby invested, without a special appointment from the Sovereign, with the command of the regular forces in the Colony:" *Todd's Parliamentary Government in the British Colonies*, 2nd ed. (1894), p. 41; see also p. 375; and *Colonial Regulations*, reg. 4 (*Colonial Office List* 1912, p. 646).

It must be further borne in mind that the Commonwealth now has exclusive military power in Australia.

As to the general nature of a Governor's position: He is, of course, an Imperial officer in the sense that he receives his commission direct from the Sovereign. But the Lieutenant-Governor

—though a citizen of the Colony—is in the same position, and the Chief Justice or Senior Judge acting under a dormant commission is in no different situation.

Dr. *Todd's* work contains numerous and scattered references to the position of a constitutional Governor, as, for instance, at pp. 32, 33, 36, 52, 132, 626, 630, 679 and 819. From these, and from common knowledge and experience, it is undoubted that while the Governor is an Imperial officer of exalted rank and the local representative of the Sovereign, not as Viceroy, nor as even generally representing the King, but with authority limited by his commission and instructions and any relevant Act of Parliament (see *Musgrave* v. *Pulido* (1)). He is selected by, and owing a duty to, the Crown; his duty is as constitutional Governor of the Colony to which he is accredited. From the moment he arrives, he is also controlled by those practical constitutional understandings not reducible to written law which go to form responsible government. He is, in fact, a part of the Colonial Government, he is incorporated into its working system as an indispensable, and in theory the chief, element of its mechanism; and, though he is an Imperial officer, he is an officer whose primary function is to regard himself and to act as the head of the Colonial Government. His principal and daily duty is to follow his Minister's advice in conducting the political life of the community—the exceptions being exceptions only, and confined to Imperial interests, the responsibility for which he may transfer to his Principal, or to transparent improprieties, the responsibility for which he may transfer to Parliament or the people. He is an integral part of the Government, not an outside element controlling it.

Consistently with this, if questions of an Imperial nature present themselves, if matters of general Imperial policy or of the interests of other parts of the Empire are involved, he is warranted and may be bound to consult with his Sovereign through Constitutional channels; and he always is bound to obey his Instructions so far as they are not opposed to the law of the Constitution and of the Colony, which law he is present to assist

(1) 5 A.C., 102.

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in carrying into effect. But the overwhelming characteristic of a constitutional Governor's functions is that they are Colonial.

(15) *Constitutional Provisions as to the Governor.*—Those general considerations are verified in respect of New South Wales by reference to the Constitutions of 1855 and 1902. The former expressly made the Governor an organic portion of the legislature, and the executive officer of the Colony. The suggestion that for the protection of Imperial interests the land was required to be retained in the hands of the Home Government lest the Colonial legislature should refuse to provide any residence for him, is answered by the legal necessities of the Constitution itself. No vote, resolution or bill for the appropriation of revenue of any tax or impost, could be passed without a Governor's message (sec. 54); not a penny could be obtained from the Treasury without the Governor's warrant (sec. 55); Parliament could not meet after a general election until summoned by the Governor (sec. 24). No member of either House could sit or vote until he took oath before the Governor or someone appointed by him (sec. 33); and, of course, no law could be passed without the Governor's assent, except the Acts reserved, which always need personal assent of the Sovereign.

The Commonwealth Constitution, 1900, contemplates the Governor as an indispensable representative of his State for certain federal purposes.

The New South Wales Constitution of 1902 repeats the necessary functions of the Governor. Thus, though it is true the Governor's office is an Imperial purpose, still more must we recognize the existence, the welfare and the constitutional government of the State of New South Wales an Imperial purpose. If, however, it be replied that "Imperial" means as distinct from "Colonial," the reply is wasted, because, as shown, the functions of a Governor are more distinctly Colonial than Imperial in that contrasted sense.

His legislative functions are not and cannot be performed in his official residence; his executive functions rarely are; and, unless he is to be understood as not required to visit other portions of his Colony, his residence elsewhere must be equally Imperial with his residence in the capital.

The actual understanding of both legislatures, Imperial and Colonial, on the subject of the residence, is to some extent reached by a reference to the Governor's residence which was before the Imperial Parliament when the Act 18 & 19 Vict. c. 54 was passed.

On 17th September 1852 a Select Committee of the Legislative Council of New South Wales made a report in anticipation of the grant of responsible government. That was forwarded in a despatch by Governor-General Fitzroy to Sir John Pakington dated 1st November 1852, presented to the Imperial Parliament, and printed, by command, 14th March 1853. After referring to the Governor-General's new dignity and proposed salary, the report quotes, as applicable to the Colony, some observations by Lord Elgin relative to Canada, and this passage occurs:—"If the Governor-General adheres faithfully to the principles of constitutional government in the direction of public affairs, it becomes all the more necessary that his residence should be open to leading persons of different parties, and that he should be able by visiting different parts of the province, and taking a lead in works of public utility and benevolence which are not of a party character, to manifest personal sympathy with all sections of the community."

It would be hard to indicate more effectually the view that his place of residence was closely bound up with Colonial interests and considerations. The salary fixed by the Colonial legislature on the basis declared in the report was accepted by the Imperial Parliament, and appears in the schedule to the Constitution.

(16) *Effect of Responsible Government.*—The truth, then, is that when responsible government was introduced a vital change was made.

Lord Chancellor (then Mr.) Haldane, in his speech in May 1900, in the House of Commons, on the Commonwealth Constitution Bill, said:—"This Bill is permeated through and through with the spirit of the greatest institution which exists in the Empire, and which pertains to every Constitution established within the Empire—I mean the institution of responsible government, a government under which the Executive is directly responsible to—nay, is almost the creature of—the legislature." Now, when New

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South Wales in 1855 received this "the greatest institution" in the Empire, and with it the full control of the waste lands and the full control of her Customs, which she had not before (see 7 & 8 Vict. c. 72), and, as part of all this, the uncontrolled management of all land occupied by her public buildings, it would be marvellous indeed if there were refused to her the control of these 47 acres. Clearly that passed, not as specifically given over to the control of the legislature, but *as part of the governmental means and property taken over by the self-governing community.*

And if it were to be assumed that the original nature of the Governor's office meant Imperial control of the land, the transition to constitutional government, by parity of reason, meant Colonial control.

One word as to the Order in Council of 26th October 1899. This was apparently a clearing up of lands held for Imperial purposes. The lands in the first schedule had been granted to ordnance officers under 4 Vict. No. 2.

The second schedule lands are stated to have been "reserved as appropriated or used for military and naval purposes but never granted for ordnance purposes."

Reading that statement with the recital of 40 & 41 Vict. c. 23, it appears that they were held in trust for the defence of the Colony within the meaning of that Act and that they were held by the Imperial authorities. That implies that the original reservation had, in fact, been practically to the Sovereign in his Imperial capacity; and that is a question of fact dependent, as in the *British Columbia Case* (1), on the circumstances. What these circumstances were we are not aware, and so the instance does not help, especially as to a reserve for civil purposes.

The third schedule: Garden Island was dedicated by the New South Wales Government under its own *Land Act* 1861.

In any event the agreement and its resulting conveyance go no further than the lands actually concerned, and I not think they help to any conclusion in this case.

I am of opinion the appeal should be allowed, and the action dismissed with costs.

(1) (1906) A.C., 552.

HIGGINS J. The terms of the decree, which is the subject of appeal, have been already stated by the Acting Chief Justice.

One of the grounds of appeal is that the property was not dedicated as declared in the decree; but I understand that in the Court below, as in this Court, the main argument has been on the other problems of the case. At all events, the dedication has been treated as clear; and the inference has been drawn that, if dedicated, the land was not "waste land" over which the Parliament of New South Wales was given control under the Constitution (18 & 19 Vict. c. 54, sec. II.; 17 Vict. No. 41 (N.S.W.)).

According to the case of the *Attorney-General* v. *Eagar* (1), and the opinions of the British Law Officers appended thereto, the meaning of the words "waste lands belonging to the Crown" used in sec. II. of the British enabling Act, is to be found in the definition contained in sec. 23 of the Act 5 & 6 Vict. c. 36; or, it may be, in that definition taken with the definition contained in sec. 9 of the amending Act 9 & 10 Vict. c. 104. There is some ground for the opinion that the true meaning of the words is broader than the definitions contained in these Acts; but, so far as the decision of this case is concerned, the narrower meaning may be admitted.

The Act 5 & 6 Vict. c. 36, sec. 23, provides that the waste lands of the Crown shall be disposed of by sale only, and in the manner prescribed; but the rights of Her Majesty are saved to except from sale and either to reserve or dispose of the lands for roads and certain other public purposes; and, by sec. 23 the words "waste lands of the Crown," as employed in the Act, mean any land situated in New South Wales and vested in the Queen, "and which have not been already granted or lawfully contracted to be granted to any person or persons in fee simple, or for an estate of freehold, or for a term of years, *and which have not been dedicated and set apart for some public use.*" By the amending Act (9 & 10 Vict. c. 104), power was given to grant lands for 14 years, or licences to occupy; and, by sec. 9, it was provided that "the words 'waste lands of the Crown,' *as employed in this Act*" (the amending Act), "are intended to describe any lands in the said Colonies whether within or without the limits allotted to settlers

(1) 3 S.C.R. (N.S.W.), 234.

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for location, and which . . . are . . . vested in Her Majesty, . . . and which have not been already granted or lawfully contracted to be granted by Her Majesty, . . . to any person or persons in fee simple, *and which have not been dedicated or set apart for some public use.*" For some reason the word "or" is substituted for "and" in the second definition; but in all other respects, and for the purposes only of the amending Act, the aim seems to be to enlarge rather than to narrow the class of waste lands. But the principal Act, with its definition of "waste lands," still remains. One may conjecture that the draftsman of the amending Act felt a difficulty in applying the word "dedication" to the appropriation of lands for purposes other than the purpose of highways; that he meant the words "set apart" to refer to the appropriation of lands for recreation or for hospitals or for public purposes other than the purpose of highways. But, whatever may have been the motive for the change of language, there is no doubt, to my mind, that both expressions, "dedicate" and "set apart"—"for some public use"—connote the giving to the public of some rights in the land which subtract from the Crown's full ownership; the appropriation of the land for some definite public purpose, not for public purposes generally; and for some estate or interest better than at mere will. Probably—though this is not so certain—the appropriation of the land for the public use must also be permanent. In the case of highways there can be no dedication unless permanent (*Corsellis* v. *London County Council* (1)); and the words "set apart" should take their colour and force from the context. Lands granted in fee are excepted from "waste lands" which the Crown may sell or lease; lands contracted to be granted are excepted; and lands dedicated and/or set apart for some public use are excepted. The object clearly is to preserve existing rights *against the Crown*; and there is no such existing right to be preserved unless the Crown has bound itself in some way to keep the land for some public use. If the Crown has built a house for one of its servants, there is nothing to prevent it from changing its intention at any moment, and letting in another servant, or pulling down the house. The servant has no right to the house as against the Crown; and what is more to the

(1) (1907) 1 Ch., 704; (1908) 1 Ch., 13.

purpose—the public have no right that can be recognized in a Court of law against the Crown.

Now, what evidence is there of any relinquishment of its full rights of ownership, on the part of the Crown? A number of documents, interesting historically, have been collected from the time of the first settlement by Governor Phillip onwards; and it is urged that, as the result of these documents, it is to be inferred that the land was permanently dedicated to the public use of a residence for the Governor. There has been no Act to that effect; there has been no proclamation to that effect; there has not been any matter of record or deed to that effect. There certainly has been a series of letters, covering several years, passing between the Governors and the Secretary of State for the Colonies, as to the provision of a residence for the Governors; and in 1845 Governor Gipps entered this residence. When pressed to say when the dedication was complete, Mr. *Knox* put this entry of Governor Gipps as being the latest date to which the dedication or setting apart could possibly be referred. But there is no evidence of anything in the nature of dedication. It is doubtful whether there can be any effectual dedication, or setting apart, or appropriation by the Crown for the purpose of such a residence, except by matter of record: *Chitty on Prerogative*, p. 389. In the case of *Attorney-General* v. *Eagar* (1) the dedication to the purposes of religion and education was made by letters patent executed by the Queen; and in these letters patent it was expressly provided that, if the corporation thereby created to be trustee should be dissolved, any lands granted to it should revert to Her Majesty to be held and applied to the same purposes of religion and education. Successive Governors "reserved"—held back—from sale a large but diminishing area of the frontage to the harbour, and the land in question was part of the area; but no evidence has been produced to show either that the Governors had power, or that they intended, to bind the Crown as to the purposes for which this land was to be used. The letters patent of the Governors have not been put in evidence, nor the commission, nor the instructions; but, by consent of the parties, we have looked at the letters patent issued to the first Governor,

(1) 3 S.C.R, (N.S.W.), 234.

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Governor Phillip, as set out in a book of historical records of New South Wales. Governor Phillip certainly seems to have had no power to dedicate, or even (with a few immaterial exceptions) to grant lands without valuable consideration; and unless further powers were granted to subsequent Governors, they had no power either. A Governor is a special, not a general, agent (*Musgrave* v. *Pulido* (1)); and the Governor of New South Wales had no such "autocratic power" with regard to Crown land as the Governor of British Columbia had (see *Attorney-General of British Columbia* v. *Attorney-General of Canada* (2)). But the solid ground on which to rest the decision of this case is, to my mind, this—that the royal will, so far as it is indicated by the facts before us, was, as to this land as yet kept back from sale, not to give the land at all, to the public any more than to private persons, but to retain it for the use of the royal servants, the Governors; and the fact that the Governors are to be treated as useful to the public of the Colony should not blind us to the essential fact that their position is that of special deputies of the King. The transaction of building and enclosing this residence was approved by the Queen, not *animo donandi* but *animo retinendi*. By the very next mail the Queen could have directed that the residence should be used for an admiral or for an asylum.

If this view is right, this land was "waste land belonging to the Crown" within the meaning of the Constitution; and, under the Constitution, it became subject to the power of the legislature of two houses thereby created. We have not been referred to any provision in the numerous and complicated Acts of New South Wales relating to Crown land that is in the nature of a dedication of this area of 47 acres, or that alters the rights of the King with respect thereto; and it has not been made clear where the power over this land really rests pending legislation of the New South Wales Parliament. By the Act 18 & 19 Vict. c. 54, sec. II., "the entire management and control of the waste lands belonging to the Crown in the said Colony and also the appropriation of the gross proceeds of the sales of any such lands and of all other proceeds and revenues of the same from whatever source" are vested in the legislature of the Colony (and see sec. 43

(1) 5 App. Cas., 102.

(2) (1906) A.C., 552, at pp. 554, 555.

of 17 Vict. No. 41, in the schedule). The Colonial legislature could make laws with respect to these lands; but what if there are no laws made applicable? If, by virtue of letters patent granted or other authority conferred before the Constitution, the Governor had power to manage the land, and to remove erections thereon (*cf.* 9 & 10 Vict. c. 104, sec. 10), that power was not affected by the Constitution, but remained. There is nothing in the Constitution to take away any power which the Governor had at the time of the Constitution (and see secs. 42 and 57 of 17 Vict. No. 41); but, under the instructions given by his principal, his duty was, in the execution of his powers, legal and discretionary, to consult with his Executive Council. That is to say, the Governor in Council can exercise the powers of the Governor; and the Governor in Council is the Government of New South Wales; and the nominal defendant Williams represents the Government. It is true that no evidence has been produced, no Act has been cited, to show that such a power of management was ever conferred on the Governor; but there is no issue raised by the information as to the rights of the King in the absence of dedication; there is no issue to which such evidence, or such an Act, would have been relevant. The information is based solely on the allegation of a permanent dedication of the land to the public purpose of a residence for the New South Wales Governors (par. 8); and the allegation has not been proved. As there was no dedication, this case must fail. Besides, if the right of the King to this land, in his capacity as ruler of all parts of the Empire, were to be tested by litigation as against the King in his right of New South Wales, the Attorney-General for New South Wales could not fitly represent the King in asserting the former right as against the Government of New South Wales—a Government of which the Attorney-General is himself a member, a Government which, as appellant, now seeks to have the information dismissed.

In this view of the merits of the case, it becomes unnecessary to speak more at length as to the unusual framework of this information. We have been relieved of some difficult questions by the appellant's admission that the Government—including the Governor—intended to open the grounds to the public. But, so

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far as I am personally concerned, I desire not to be taken as accepting the position that the Attorney-General for New South Wales, who is a member of the Ministry for New South Wales, can succeed in an information against the Government for an actual or threatened trespass to which, in the absence of evidence to the contrary, he must be taken to have been a consenting party: See *Burt* v. *British Nation Life Assurance Association* (1). Moreover, the Government of New South Wales is not a corporation; and if the name of the nominal defendant is to be treated as a short expression for the names of the Governor and the councillors who advise him, we find Mr. Holman, in his capacity of adviser of the Governor, suing himself in his capacity of adviser of the Governor. If the injunction granted should be disobeyed by the Government, Mr. Holman may be found in the position of moving for an attachment against himself. It is not a question of the King in one capacity suing the King in another capacity; it is a question of the Attorney-General suing himself. But I am glad that the case is to be decided on its merits; and, on the merits, I concur in the view that the appeal should be allowed.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. The informant's claim in this case is based on the hypothesis that there has been a dedication or setting apart of land by the Sovereign so as to constitute something in the nature of a trust for the benefit of the public of New South Wales, and that the right so created can be enforced, and any interference with its exercise can be prevented, by the Attorney-General of New South Wales suing on behalf of the public of New South Wales.

The Supreme Court of New South Wales were of opinion that this claim was well founded. The decree appealed against declares that the land in question is vested in the King dedicated to the public purpose of a residence for His Majesty's representative in New South Wales, and that the action or concurrence of the Imperial Government is necessary to divert it from such purpose;

(1) 4 De G. & J., 158.

it also enjoins the Government of New South Wales, its officers and servants from any interference with that purpose.

On a consideration of the evidence we find no ground for saying that there is any such right in the public of New South Wales. It is true that the land was reserved, and has long been used, as a residence and domain for the Governor of New South Wales; but the reservation was not intended to confer on the public of New South Wales any rights as against the Sovereign. Its intention and its effect were to retain the land for the purpose of the King's Government in the Colony. It created no right which could be enforced in a Court of law by any individual or set of individuals, or by the public of New South Wales; the Sovereign still retained complete and undivided ownership and dominion, and he alone could complain of any interference with the land or with the method of dealing with it. The reservation gave to the public no more than it would have given had the land been reserved and used for a post office, a Court of Justice, or a Custom house. Such purposes are commonly called public purposes, but the public has no right with respect to them which can be enforced in a Court of law, apart from the proprietary right which the Sovereign can enforce and defend.

This is enough to dispose of the case, for, if the public has no right which can be asserted in a Court of law, it is unnecessary to inquire whether the Government of New South Wales has interfered with the rights of the Imperial Government. Were it necessary to decide the question, we should be disposed to hold with our brother *Isaacs*, whose judgment we have had the advantage of reading, that the Imperial Government is no longer concerned with the land, and that the Government of New South Wales is within its legal rights in all that it has done or threatened to do.

In our opinion the appeal should be allowed.

POWERS J. I cannot add, nor do I think it necessary to add, any further reason why the appeal should be allowed on the merits. I do not propose to repeat any of the reasons already given. I concur in the opinions expressed by all my colleagues, that the appeal should be allowed.

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Appeal allowed. Order appealed from discharged. Suit dismissed with costs. Respondent to pay the costs of the appeal.

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

Solicitors, for the respondent, *Cope & Co.*

B. L.

[HIGH COURT OF AUSTRALIA.]

MAYBURY AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

PLOWMAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 1, 2, 3, 5.

Barton A.C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Assault and false imprisonment—Arrest—General power to apprehend person found committing offence—Special power to apprehend for offence in respect of inclosed land—Construction of consolidating Statute—Criminal Law Amendment Act 1883 (*N.S.W.*) (46 *Vict. No.* 17), *sec.* 429—*Crimes Act* 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 352—*Inclosed Lands Protection Act* 1854 (*N.S.W.*) (18 *Vict. No.* 27), *secs.* 1, 3—*Inclosed Lands Protection Act* 1901 (*N.S.W.*) (*No.* 33 *of* 1901), *secs.* 4, 6.

Sec. 352 (1) of the *Crimes Act* 1900 (N.S.W.) provides that: "Any constable or other person may without warrant apprehend, (*a*) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act."

Held, that sec. 352 (1) (*a*) of the *Crimes Act* 1900 applies to offences created by, and punishable under, other Statutes as well as to offences created by, and punishable under, the *Crimes Act* itself.