Will. IV. c. 27, which enacts that the right to bring an action shall be deemed to have first accrued when the owner of the paper title shall have been dispossessed or have discontinued his possession. Now, the dispossession and discontinuance contemplated by this section have been held to connote the existence of a person to be protected by the Statute who has dispossessed such owner and kept him dispossessed for a period of twelve years, or the abandonment of possession for such a period by the owner and the possession by some other person during the same period: *M'Donnell* v. *M'Kinty* (1); *Trustees Executors and Agency Co.* v. *Short* (2). We think on the evidence that the defendant has not established this possession by himself as apart from the alleged want of possession by the plaintiffs and their predecessors in title, and on this ground also we think he has failed to establish his right to protection under the *Statutes of Limitation.*

The appeal, in our opinion, should be dismissed with costs.

Appeal dismissed with costs.

Solicitors, for appellant, *R. S. Haynes & Co.*
Solicitor, for respondents, *A. S. Canning.*

N. McG.

(1) 10 Ir. L.R., 514.

(2) 13 App. Cas., 793.

[HIGH COURT OF AUSTRALIA.]

BULL AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . } RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1913.

SYDNEY, *Nov.* 17, 18, 19; *Dec.* 1.

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

Crown Lands—Alienations not authorized by Statute—Whether void or voidable—Improvement lease—Extension—Lease to commence at future date—Recovery of land by Crown—Reimbursement of expenditure induced by Crown—Crown Lands Act 1884 (*N.S.W.*) (48 *Vict. No.* 18), *secs.* 5*, 6*—*Crown Lands Act* 1895 (*N.S.W.*) (58 *Vict. No.* 18), *secs.* 26*, 44*—*Crown Lands Act Amendment Act* 1903 (*N.S.W.*) (*No.* 15 *of* 1903), *sec.* 31.

* By sec. 5 of the *Crown Lands Act of* 1884 it is provided that "Crown lands shall not be sold leased dedicated reserved or dealt with except under and subject to the provisions of this Act."

By sec. 6 it is provided that "The Governor on behalf of Her Majesty may grant dedicate reserve lease or make any other disposition of Crown lands but only for some estate interest or purpose authorized by this Act and subject in every case to its provisions."

By sec. 26 of the *Crown Lands Act of* 1895, as amended by sec. 31 of the *Crown Lands Act Amendment Act* 1903, it is provided that "The Governor may, upon the recommendation of the Local Land Board, under this section, grant leases of Crown lands, which, by reason of inferior quality, heavy timber, scrub," &c., "are not suitable for settlement until improved, and can only be rendered suitable by the expenditure of large sums in the improvement thereof. The granting of the leases shall be subject to the provisions hereunder contained:—"

Then are set out the following provisions (*inter alia*):—

"(I.) The term of the lease shall not exceed 28 years, and shall commence from the date of the execution of the lease. (III.) The amount bid at a sale by public auction of the lease or offered by an accepted tender shall be the yearly rent of the lease; . . . .

Held, by *Barton* A.C.J., *Gavan Duffy* and *Rich* JJ. (*Isaacs* J. dissenting), that sec. 44 of the Act of 1895 does not operate so as to give validity to a purchase or lease which in form and substance is not authorized by the legislature, and which is therefore forbidden by sec. 6 of the *Crown Lands Act* 1884, but merely enables validity to be given to a purchase or lease which without its aid would be invalid because some provision of the law in the course of or incidental to the transaction has not been complied with.

Decision of the Supreme Court of New South Wales (*A. H. Simpson* C.J. in Eq.): *Attorney-General* v. *Bull*, 13 S.R. (N.S.W.), 23, reversed on this point.

Pursuant to sec. 26 of the *Crown Lands Act* 1895 certain improvement leases of Crown lands, each for a term of 12 years, were in December 1898 granted by the Governor to the predecessor of the defendants. In June 1904 the Governor in Council ordered that the terms of the leases should be extended for a period of 16 years from the termination of the original leases

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(VI.) The Governor may on application as prescribed extend the term of any scrub or inferior land lease granted under the Principal Acts to a term not exceeding 28 years on such terms and conditions as he may think fit, but such term shall be computed from the commencement of such lease under those Acts . . ."

By sec. 44 of the Act of 1895 it is provided that "Any purchase or lease of Crown lands purporting to have been heretofore made or granted under the provisions of the repealed Acts or the Principal Act, shall not be held to be void by reason of any breach or non-observance of the provisions of the said Acts, but every such breach or non-observance as aforesaid (if of a nature to affect the validity of the purchase or lease) shall render the same voidable only at the instance of the Crown.

"If any such purchase or lease as aforesaid appears to be voidable at the instance of the Crown, the Minister may . . . refer the case to the Local Land Board, which shall investigate the matter and find whether or not the said purchase or lease be voidable; and where the said purchase or lease is found to be voidable, the Governor may, by a notification in the *Gazette*, declare the same to be void, and the same shall thereupon become void to all intents and purposes: Provided always that if the application for such purchase or lease has been confirmed by a Local Land Board, the Minister may, in manner hereinafter provided, refer to the Land Appeal Court the decision of the Local Land Board confirming the same.

"If the Crown elects to sustain any such purchase or lease as aforesaid, the Governor may, by notification in the *Gazette*, declare that the purchase or lease shall cease to be voidable by reason of any breach or non-observance of statutory provisions which may be specified in such notification, and the same shall become valid so far as regards the ground of objection so specified.

"Nothing in this section contained shall affect" (*inter alia*)—"(*b*) Any application for a conditional purchase or lease made before the 13th day of September 1894 in reliance on the fact that the questioned purchase or lease was void. (*d*) Any remedy by writ of *scire facias* where a grant has been or shall have been issued for any such purpose as aforesaid.

"The provisions of this section shall apply in like manner to purchases or leases purporting to be made or granted after the commencement of this Act; but the Governor shall not, in any such case, declare that the purchase or lease shall cease to be voidable, unless notice of the intention to make such declaration shall have lain before both Houses of Parliament for not less than 90 days, without being objected to by specific resolution"

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

respectively, and in pursuance of this order, and in the same month, there was indorsed on each of the original leases what purported to be an improvement lease for the term of 16 years from the termination of the particular original lease. What was done in June 1904 was without any recommendation of the Local Land Board.

Held, that the leases granted in June 1904 were void, and not merely voidable, and that the Crown was entitled to possession of the land.

Quære, whether sec. 44 of the Act of 1895 has any application to a breach or non-observance of the provisions of that Act.

In June 1906 the Secretary for Lands, by letter, informed the defendants that it had been ascertained that the leases of June 1904 were "voidable for breach or non-observance of the provisions of the Crown Lands Acts," and that steps would be taken to have them "declared void in due course," and he ignored the defendants' request for an explanation of the meaning of the letter. In October 1910, just before the terms of the original leases expired, the Crown received rent for the year 1911, purporting to have been paid under the leases of June 1904. In May 1911 the Secretary for Lands, by letter, informed the defendants that the leases of June 1904 were absolutely void, and demanded possession of the land. In an information in equity by the Attorney-General claiming possession of the land,

Held, by *Barton* A.C.J., *Gavan Duffy* and *Rich* JJ., that, if the defendants were entitled to be re-imbursed for expenditure by them on the faith that the leases of June 1904 were valid (which *Barton* A.C.J. doubted), they were only so entitled in respect of the expenditure between the termination of the original leases and the receipt by the defendants of the letter of May 1911, and that there was no evidence of such expenditure.

Decision of the Supreme Court of New South Wales (*A. H. Simpson* C.J. in Eq.): *Attorney-General* v. *Bull*, 13 S.R. (N.S.W.), 23, varied.

APPEAL from the Supreme Court of New South Wales.

By an information in equity the Attorney-General for New South Wales sought as against the seven sons of Charles Bull, deceased, (1) a declaration that certain indorsements on three improvement leases purporting to grant improvement leases of certain lands to the defendants were void and of no effect, (2) a declaration that the Crown was entitled to possession of such lands, and (3) that the defendants should be ordered to deliver up possession of such lands to the Crown.

The suit came on for hearing before *A. H. Simpson* C.J. in Eq., who made a decree whereby it was declared that the indorsements referred to were voidable and that the Crown was

entitled to possession of the land, and it was ordered that five of the defendants, by whom the rights of the other two had been acquired, should deliver up possession of the land to the Crown within six months, and it was further ordered that it be referred to the Master in Equity to inquire to what extent the value of the lands had been increased by any expenditure by the defendants on the lands between December 1898 and 11th May 1911, beyond the amounts required to be expended under the conditions of the improvement leases: *Attorney-General* v. *Bull* (1).

From this decision the five defendants now appealed to the High Court.

The other material facts and the nature of the arguments appear in the judgments hereunder.

Canaway K.C. and *Pike*, for the appellants, referred to *Nott* v. *Minister for Lands* (2); *Blackburn* v. *Flavelle* (3); *Barraclough* v. *Brown* (4); *Minister for Lands* v. *Wilson* (5); *Osborne* v. *Morgan* (6); *Attorney-General* v. *Kerr* (7).

Langer Owen K.C. and *Hanbury Davies*, for the respondent, referred to *The Queen* v. *Hughes* (8); *De Britt* v. *Carr* (9); *Story's Equity Jurisprudence* (1st English ed.), par. 1237.

[RICH J. referred to *Dicker* v. *Angerstein* (10); *Life Interest and Reversionary Securities Corporation* v. *Hand-in-Hand Fire and Life Insurance Society* (11).]

Canaway K.C., in reply, referred to *In re Barker* (12); *Salmon* v. *Duncombe* (13); *Tracey* v. *Pretty & Sons* (14).

[RICH J. referred to *Halsbury's Laws of England*, vol. XIII., p. 71.]

Cur. adv. vult.

(1) 13 S.R. (N.S.W.), 23.
(2) 17 N.S.W.L.R., 255.
(3) 6 App. Cas., 628.
(4) (1897) A.C., 615.
(5) (1901) A.C., 315, at pp. 323, 326.
(6) 13 App. Cas., 227, at pp. 227, 34.
(7) 2 Beav., 420; 3 Beav., 425.
(8) L.R. 1 P.C., 81.
(9) 13 C.L.R., 114.
(10) 3 Ch. D., 600.
(11) (1898) 2 Ch., 230.
(12) 17 Ch. D., 241, at p. 243.
(13) 11 App. Cas., 627, at p. 634.
(14) (1901) 1 K.B., 444, at p. 451.

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Dec. 1.

The following judgments were read:—

BARTON A.C.J. The Attorney-General is seeking by information in equity to recover for the Crown from the defendants possession of three blocks of land. These were first leased to the father of the seven defendants on 13th, 29th and 19th December 1898. The original leases to the father were for 12 years from the above mentioned dates, and were unimpeached exercises of the power to make improvement leases, first granted by sec. 26 of the *Crown Lands Act of* 1895. The original lessee transferred to the defendants in 1901, and the present appellants are five of the defendants, who added to their original interests those of the other two defendants by purchase. On the recommendation of the Minister for Lands the Governor in Council in June 1904 ordered that "the terms of the said improvement leases be extended for a period of 16 years from 13th December 1910, 29th December 1910 and 19th December 1910, respectively, to 12th December 1926, 28th December 1926 and 18th December 1926, respectively, subject to the conditions, covenants, provisions, restrictions and reservations contained in the original leases," with a proviso for increase of rent should the circumstances so warrant.

In pursuance of this order there was indorsed on each of the original leases, and executed by the Governor, a document by which the Crown purported to grant to the defendants "an improvement lease of the Crown lands described in the within written lease" for "the term of 16 years," specifying in each case the last day of the existing term as the date of commencement of the new one. All this was done without any recommendation of the Local Land Board under sec. 26 of the Act of 1895. If these instruments are regarded as extensions, as the Order in Council for their issue contemplated that they should be, the further term was granted wholly without statutory authority, since the Crown Lands Acts do not provide for extensions of improvement leases. Sub-sec. VI. of sec. 26, just mentioned, does not refer to improvement leases, but to two totally distinct classes of holding. See secs. 35 and 37 of the Act of 1889 (53 Vict. No. 21). If they are regarded as original improvement leases, they are not merely unauthorized by sec. 26, and

indeed prohibited, as I think will appear, but are expressly made for a term forbidden by that section, in that it purports to commence from a future date. In respect, therefore, of the possession which they have retained since December 1910 the defendants are only supported by documents which could not lawfully be granted as extensions, and which, though they call themselves improvement leases, were made in the absence of a prior recommendation essential to their validity as such, and also violated the condition that the term should commence from the date of the execution of the lease: Sec. 26, and sub-sec. 1. As, therefore, these further leases or extensions, whichever it may be right to call them, depend for their validity upon conformity with statutory conditions with which they have not been made to conform, they seem to me to be altogether void, unless they derive a limited protection from the provisions of sec. 44 of the same Act. So far, indeed, as sec. 26 is concerned, they are in the same position as were the leases that were the subject of the case of *The Queen* v. *Hughes* (1) in relation to the *Waste Lands Act* of South Australia. Of these leases Lord *Chelmsford*, in delivering the judgment of the Judicial Committee, said (2):—"In the present case a statutory power is given to the Governor to be exercised over the Crown lands. This power must be strictly pursued. The leases which he is authorized to make are limited to the extent of eighty acres. This quantity is said to be exceeded in the leases in question; if so, they are altogether void, and the lessees are intruders upon the lands. The remedies which have just been adverted to are, therefore, strictly applicable to the respondents' unauthorized possession of the lands of the Crown."

The remedies to which his Lordship alluded were the writ of intrusion and the information in Chancery.

But the defendants urge that notwithstanding these defects the extensions, if I may call them so, are only voidable; and they rely upon sec. 44 of the Act of 1895. Upon the construction of that section the learned Chief Judge in Equity has upheld this contention, and has treated the Crown as coming to the Court to obtain the voidance of the extensions and consequent ejectment

(1) L.R. 1 P.C., 81.

(2) L.R. 1 P.C., 81, at p. 92.

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Barton A.C.J.

of the defendants; and he has treated the defendants' claim of compensation from that point of view.

Sec. 44 in its first paragraph provides as follows:—"Any purchase or lease of Crown lands purporting to have been heretofore made or granted under the provisions of the repealed Acts or the Principal Act, shall not be held to be void by reason of any breach or non-observance of the provisions of the said Acts, but every such breach or non-observance as aforesaid (if of a nature to affect the validity of the purchase or lease) shall render the same voidable only at the instance of the Crown."

The second paragraph authorizes the Minister to refer to the Local Land Board cases in which the purchase or lease appears to be voidable at the instance of the Crown. The Board is to investigate the matter and find whether or not the purchase or lease is voidable. If it finds in the affirmative, the Governor may declare the purchase or lease to be void by *Gazette* notice, and it thereupon becomes void.

By the third paragraph, if the Crown elects to sustain the purchase or lease the Governor may declare by *Gazette* notice that it shall cease to be voidable by reason of any breach or non-observance of statutory provisions specified in the notice, and the purchase or lease becomes valid *quoad hoc*. As this validation extends only so far, it is at least probable that the Minister may refer the case to the Land Board under the second paragraph, after the declaration by notice, in respect of any breach or non-observance not specified in the notice. But, if so, the notice, coming first, effects a validation apart from any reference to the Board in respect of any breach or non-observance specified.

The fifth paragraph is as follows:—"The provisions of this section shall apply in like manner to purchases or leases purporting to be made or granted after the commencement of this Act; but the Governor shall not, in any such case, declare that the purchase or lease shall cease to be voidable, unless notice of the intention to make such declaration shall have lain before both Houses of Parliament for not less than 90 days, without being objected to by specific resolution."

But for this paragraph the holder of an improvement lease could not have claimed any benefit of sec. 44, since that class of

holding was created by the Statute of which the section is part.

It is urged for the defendants that, no matter what provision of the land laws may be violated in the making of any purchase, or the grant of any lease, neither the one nor the other can be absolutely void since the passing of this section. It is true that the words of the first paragraph are susceptible of that interpretation, but the argument advances a very large claim, and requires close examination. If it is correct, the protection of the section extends not only to breaches or omissions of statutory duty in the exercise of a clearly granted liberty to purchase or a clearly granted authority to lease, but it extends to purchases made or leases granted without any statutory warrant whatever. It would follow that a notice under the fifth paragraph, after escaping objection by specific resolution, could be followed by a declaration under the third paragraph, and any sort of disposal of the Crown lands, however flagrantly in violation of the Statute, would become lawful and operative.

The Act of 1895 is to be read with and to form part of the *Crown Lands Act of* 1884 and certain other specified Crown Lands Acts down to and including that of 1891, and this body of Statutes is referred to in the Act of 1895 as the Principal Act.

Sec. 5 of the *Crown Lands Act of* 1884 prohibits the sale, lease, dedication, or reservation of Crown lands, or any dealing with them except under and subject to the provisions of the Act, &c. Sec. 6 empowers the Governor on behalf of Her Majesty to "grant dedicate reserve lease or make any other disposition of Crown Lands but only for some estate interest or purpose authorized by this Act and subject in every case to its provisions."

These are very clear and emphatic prohibitions against any dealing with the public lands by the Crown except in pursuance of authority granted by Statute. This is not the case of an attempt by a third party under cover of a mere licence carrying no legal or equitable interest in the soil, to interfere by suit with the possession of a tenant under "an *ex facie* regular lease," impeachable only upon extrinsic grounds, and voidable at the will of the Crown: *Osborne* v. *Morgan* (1). It is the Crown itself as lessor

(1) 13 App. Cas., 227, at p. 234.

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Barton A.C.J.

that seeks to terminate a possession which, unless sec. 44 extends to the great length claimed for it, is an intrusion under a document both prohibited by law and void on its face.

It is well to remember that sec. 44 is not in form an enabling section. That is, it does not give authority for the creation of any class of tenure not elsewhere authorized. It merely provides that where the purchase or lease is made or granted in breach or non-observance of the provisions of the previous Acts, and the fault goes to the validity of the transaction, the purchase or lease is not void, but voidable at the instance of the Crown. I do not think the section should be so construed as to enable a Minister to set at nought such safeguards as secs. 5 and 6, above quoted, by sales or leases in their inception wholly unwarranted by the Acts, which dispositions he may use the third paragraph of sec. 44 to validate. Such a construction would be wholly at variance with the scope and tenor of the rest of this body of legislation. It seems more reasonable to construe the section as providing a means of avoiding unnecessary hardship where the transaction is one in its inception warranted by the Statutes but becomes invalid through failure to follow some obligatory term of the law in the course of or incidental to the alienation or lease. I think the attempt to create a tenure wholly without statutory warrant must still be void, while any incidental error in the course of completing an authorized disposition, although the error is "of a nature to affect the validity of the transaction" would be within the section so as to render the transaction merely voidable.

To hold the extensions or improvement leases now in question to be merely voidable would be, in my view, to take a step towards enabling this validating section to be used as a cover for the creation or attempted creation of titles not only not warranted by the Acts, but intended to be prohibited by secs. 5 and 6 of the Act of 1884. I am therefore of opinion that the true construction of sec. 44 does not render the grant of an extension of an improvement lease, or a grant of an improvement lease to commence at a future date—to mention no other defect, since these are fatal—anything better than a nullity. A question was raised whether, under the terms of paragraph 4 of sec. 44, improvement leases whose validity was affected by breach of

Statute could be treated as merely voidable, since such leases are not granted "under the provisions of the repealed Acts or the Principal Act." And it was urged that a breach or non-observance of the Act of 1895, which creates this tenure, cannot be called a breach or non-observance of the provisions of the repealed Acts or Principal Act. In the view I take of the case it is not necessary to decide this point; but the argument in its favour has much force. If it were upheld these extensions or leases must equally be held to be void.

The instruments not being merely voidable, have the appellants any claim to compensation? If the extensions were only voidable until set aside by the Court, the Crown, in the words of the Judicial Committee in *Osborne* v. *Morgan* (1), "could not obtain judgment, except on the footing of making, so far as practicable, *restitutio in integrum*"; and would probably be held liable to reimburse the appellants for useful and necessary outlays. But if the view already expressed is correct, the Crown is here seeking to dispossess the defendants because the instruments under which they hold are nullities. The original improvement leases, however, are perfectly good, and they carry with them obligations up to the end of 1910, which are set forth at length in the leases, and which involve expenditure in the extirpation of pests and the improvement of the land. The defendants can have no claim by reason of the discharge of these obligations up to the termination of the original leases. But the defendants say that they expended some £1,656 between the beginning of 1907 and the hearing of this suit, in August 1912, in outlays which they would not have made if they had supposed that the leases were invalid. Now there is no case of mistake in fact. It is true that both the Crown and the defendants were under a mistake in law. But it was not like the case of a mistake in the meaning of a settlement or other document regulating private rights as between beneficiaries. It was a mistake as to the meaning of a public general Statute, an idea that this Statute empowered the Crown to do something validly which, when done, was wholly inoperative; a notion which a very slight study of the Acts on either part would have served

(1) 13 App. Cas., 227, at p. 234.

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Barton A.C.J.

to dissipate. I have some doubt whether a reimbursement of any outlays can be successfully claimed under such circumstances. But it is important before deciding this to ascertain whether there were any outlays which could be made the subject of an order for reimbursement. If there were not, the question does not arise.

In June 1906, before the expenditure of any part of the £1,656 in question, the Under-Secretary informed the defendants by letter that it had been ascertained that the "extensions" of their improvement leases, purporting to have been granted on 11th June 1904, were "voidable for breach or non-observance of the provisions of the Crown Lands Acts," and that "steps will be taken to have them declared void in due course"; and the defendants were requested to forward to the Department the forms of leases in order that the indorsements of the extensions might be cancelled. The defendants wrote asking what was meant by the terms "purporting" and "non-observance of the provisions of the Crown Lands Acts." The Department took no notice of this inquiry beyond merely acknowledging its receipt. The letter of June 1906 seems to show that the then intention of the Department was to resort to the methods provided by sec. 44.

It seems to me that this letter cannot be taken as an encouragement to the defendants to lay out money on the lands in reliance on the validity of the extension leases. It was rather a warning to them that their right to possession after December 1910 was challenged, and I cannot think that any expenditure by them from that time to the expiry of the then current leases was attributable to a justifiable reliance on an extended term, or in any sense induced by the Crown so as to render it incumbent on the Crown, for the doing of equity, to reimburse them any such outlay. I think they clearly took their chance.

But, the old leases being about to run out in December 1910, the Crown, in October of that year, received a year's rent in advance, expressly applicable, as appears from the receipt, to a tenancy under "improvement leases" of the three blocks in the occupation of the defendants.

No doubt this acceptance of rent was open to the inference, despite the letter of June 1906, that the Crown did not intend to

carry out its declared intention to avoid the extension leases. From 27th October 1910, then, was there any expenditure of which reimbursement should be ordered? After 11th May 1911 no outlay could be the subject of such a claim; for on that date the Department, by letter, claimed delivery of possession of the lands and of the leases with the indorsements thereon, to obviate proceedings for possession and a declaration of invalidity, on the ground that "the Acts do not contain any provision for the extension of an improvement lease," and that the lands were "not occupied under any valid tenure under the *Crown Lands Act*." There could be no serious contention that outlays made after the receipt of this intimation should be made good by the Crown.

The matter, then, is confined to the period between 27th October 1910 and the receipt of the letter of 4th May 1911. I cannot find any tangible evidence of any expenditure between these dates.

On the facts, then, I do not think the appellants have made out that they are entitled to anything by way of compensation.

In my opinion the decree should be varied by declaring the indorsements on the improvement leases void and not merely voidable, and the reference to the Master should be omitted. With these variations the decree should be affirmed.

ISAACS J. I entirely agree with the view of the law taken by the learned primary Judge, on every point except one, namely, as to the exclusive character of the procedure provisions contained in sec. 44. On the initial point, therefore, which in some respects may be considered the main point, agreeing as I do with the learned Chief Judge in Equity I have the misfortune to differ from my learned brethren. They hold that the attempted grants are entirely outside the purview of sec. 44.

If it were not for their opinion, I should have thought the question was not reasonably open to doubt. The last clause of the section is the relevant portion. There the words refer to "purchases or leases purporting to be made or granted after the commencement of this Act." There are no other words. The question is: Are these particular leases, in the words of the legislature,

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

ISAACS J.

"leases purporting to be granted after the commencement of this Act," that is, after the commencement of the Act of 1895? The importance of the matter to many whose titles depend on the construction to be given to these words leads me to examine the question with some particularity.

The key to the problem of this remedial enactment lies in remembering the evils which the legislature were engaged in remedying. From time to time, as will presently be shown, they collected specific cases of titles which, for various reasons, were invalid, and legalized them. But in some instances the flaw was discovered by some individual before there was any opportunity of parliamentary validation, and advantage was taken of the defect to "jump" the holding. A legal right was thus acquired by the "jumper" which had to be respected by Parliament, though injustice and hardship to the holder occurred. This evil was notorious. Sometimes the cases came before the Courts, as in *Blackburn* v. *Flavelle* (1) and *Pratt* v. *Goldsbrough, Mort & Co.* (2). But the right of the "jumper" was clearly established, and as long as any breach or non-observance of statutory provisions rendered a dealing by the Crown in respect of Crown lands void, this evil must continue. To end that condition of things, a clear, consistent, just and safe scheme, if we give the natural meaning to the words used, was devised by Parliament, and enacted in sec. 44 of the Act of 1895. It was this: In future no purchases and leases—for those were the sources of trouble—of Crown lands at any time made or granted in supposed pursuance of the Crown Lands Acts should be void; but if there had been or should be such a breach or non-observance of law as, but for the new enactment, would affect their validity, they should be voidable only at the instance of the Crown. Titles voidable apart from the section are outside it, and depend for their continued validity or their avoidance upon ordinary circumstances and methods.

But titles to Crown lands otherwise invalid are by the section protected without exception from the evil of jumping which took place irrespective of hardship.

Henceforth there were to be no void grants of Crown lands:

(1) 1 N.S.W.L.R., 58; 6 App. Cas., 628. (2) 18 N.S.W.L.R., 187.

they were all either indefeasible or voidable. And voidable grants were in two classes—one within sec. 44, and the other outside it. But while so reducing invalid titles to voidable titles, and while taking away the existing power of attack by third persons, Parliament was careful to protect even the accrued rights of third persons up to the time when apparently public notice of the intended change was given by introduction of the Bill, namely, 13th September 1894.

Sec. 44 saves adverse applications before that date made "in reliance on the fact that the questioned purchase or lease was void," and also all proceedings pending on that date. But for the future such steps were to be impossible. The word "void" is unqualified.

The construction placed upon the section by my learned brothers, again throws the scheme into confusion by restoring in addition to void titles outside "Crown lands" a class of void titles of "Crown lands" proper, much more difficult to discriminate than before, because some invalid titles are to be void while others are voidable only, and leaving two diverse classes of voidable titles, one of which shares with the void class the uncertainty of ascertainment. And this, too, without any apparent reason for cutting down the primary import of the words. I shall examine them. The first words are "any purchase or lease," which obviously means any *de facto* purchase or lease. Then come the words "of Crown lands." That is, of lands which are Crown lands within the meaning of the Acts. These comprise all lands of which the disposition to private individuals has been entrusted by Parliament to the Executive, and as to which in the prescribed way, and under the prescribed conditions, the Government may create titles. Beyond this class of lands the scheme does not go. If the prevention of jumping was its main object, it was unnecessary to go further, for no person could assert private rights to land reserved or dedicated or already parted with in fee simple. Then come the words "purporting to have been heretofore made or granted." All Crown lands in New South Wales must be dealt with as under the provisions of some Statute (secs. 5 and 6 of the Act of 1884), and therefore every Crown grant *bonâ fide* issued must, as it

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

ISAACS J.

seems to me, purport to be in pursuance of some statutory authority. "Purport" does not here mean a representation of fact appearing on the face of the document, but refers to the statutory foundation upon which the grant rightly or wrongly professes or is assumed to rest. The first portion of the section relates to purchases or leases as the law stood before the Act of 1895, and the last clause, as will be seen presently, relates to those made or granted as the law may stand afterwards.

Then it is provided that none of these transactions shall be void by reason of "any breach or non-observance of the provisions of the . . . Acts." It is not any "incidental" breach or non-observance but "*any*" breach or non-observance. Then we find the phrase "*every* such breach or non-observance"—it is not "every *incidental* breach or non-observance." No such qualification is inserted, but Parliament states its own limitation expressly in these terms: "if of a nature to affect the validity of the purchase or lease." This is express; and on the principle of *expressio unius* there is no room for any implied further limitation. If only the breach or non-observance relates to Crown lands and answers the stated character, that seems to me enough. If it does answer it, then the purchase or lease is within the section; if it does not, its effect is left to the ordinary principles and methods applicable to voidable transactions. If within the section, then it is "voidable only at the instance of the Crown." The precise effect of this expression I shall consider later.

Why, then, should not the ordinary meaning of these words be given to them?

In the first place, this is a remedial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially (*per* Lord *Loreburn* L.C. in *Bist* v. *London and South Western Railway Co.* (1)). This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow. It is so laid down in *Giovanni Dapueto* v. *James Wyllie & Co.*; *The "Pieve Superiore"* (2), and in *Gover's Case* (3). But I can see no

(1) (1907) A.C., 209, at p. 211. (2) L.R. 5 P.C., 482, at p. 492.
(3) 1 Ch. D., 182, at p. 198.

ambiguity. Looking at the documents themselves, they certainly even on their face, when read as they must be with the original leases on which they are indorsed, "purport to be leases granted after the commencement of" the Act of 1895. No doubt the attempted grants were mistaken and entirely wrong in law, and therefore the further leases were not *de jure* "granted," but that they "purport" to have been so granted seems to me to be a fact as to which there is no room for dispute. They bear all the recognized *indicia* of authority, and profess to be no mere exercise of arbitrary power, for the Act assumes that no such thing will be attempted, but each professes to be a lawfully authorized transaction. They are, to my mind, brought within the very words of the legislature.

Hardship and injustice to *bonâ fide* holders are avoided, and yet there is no danger to the public. If it appears to the Crown either upon its own initiative or when moved by a third person that there would be invalidity, or under the section that there is voidability, the Minister may have the whole facts and law investigated. He may refer the question to the Local Land Board, whence it may pass to the Land Appeal Court, and on questions of law to the Supreme Court, and so on to the final appellate tribunal.

So that besides the law, the whole of the facts are open to the fullest investigation whereby the good faith of all parties, and the moral or equitable claims of the grantee *de facto*, or his successor, and all exceptional considerations are elucidated.

If for some reason, based on fact or law, it is found that the transaction is "voidable," then the Minister has an option. If he wishes to terminate the transaction, it may be done by official notification, because that simply maintains the law as Parliament has already determined. But if he thinks it just to validate the transaction—that is, to uphold it notwithstanding the contravention—he must first get the consent of both Houses of Parliament, tacit it may be, by reason of no objecting resolution of either House, and then and only then may the Governor's notification of validity be issued. It is obvious that a process involving the most exhaustive investigation of facts and law and the consideration of these by Parliament and the Crown is tantamount to

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

ISAACS J.

legislation in the full light of circumstances. There is no reason for not preserving to the words under consideration their full primary meaning.

The absence of parliamentary consideration of transactions occurring before the Act of 1895, is explained by the fact that Parliament had on several prior occasions validated numbers of purchases and leases—namely, in 1876 (40 Vict. No. 14); in 1881 (45 Vict. No. 19); in 1888 (52 Vict. No. 13); and in 1894 (57 Vict. No. 9); there might still perhaps have been some few cases of invalidity arising under the law existing after the last-named Act, or even some undiscovered cases under the law as existing prior to the Act of 1884 under what are called by that Act, sec. 2, the repealed Acts, namely the Statutes 1861 to 1880. Some of them, therefore, might be 34 years old, and improbable of existence, and as this validating section was not in force when they arose, no person could have erred with any idea of official condonation. Parliament, consequently, did not apparently trouble about a veto as to these.

How these grants came to be issued is apparent. The contemplation of all parties as disclosed by the facts was to act within sec. 26, which governs improvement leases, and is so headed, and sub-sec. VI. of that section appears to have misled everybody at the time. It is quite true that when properly interpreted that sub-section is foreign to improvement leases, but there are several reasons why the parties might *bonâ fide* consider it permitted their extension to 28 years on any terms and conditions the Government thought fit. The general heading of the section, the words "inferior quality" and "scrub" in the opening paragraph; the provision in the same paragraph "The granting of the leases shall be subject to the provisions hereunder contained," and then sub-sec. VI being inserted as one of them, are some of those reasons.

The reference in sub-sec. VI. to the "Principal Acts" might easily have misled both sides, because, as was argued in this appeal, and debated even on the bench, there is an element of uncertainty as to the connotation of that expression by reason of sec. 1 (*c*) of the Act of 1895, directing that the latter Act "shall form part of the said Acts," that is, the Acts prior to itself and

described in sec. 2 as the "Principal Act," and in the singular only.

The substance of the transaction, then, was that there was an attempted and supposed valid extension under sec. 26 of the original lease to 28 years on a term or condition of an optional increase of rent.

Assuming *bona fides*, as both from the facts of the case and the circumstance that *mala fides* cannot be presumed against the Crown, and none is suggested as to the applicants, it appears to me an unanswerable position, that the leases not only purported to be granted after the Act of 1895, but also purported to be granted under that particular Act. They were not so obvious and flagrant a departure from what might appear to be the provisions of the Act as to evince an endeavour to make the grants independently of Statute, and in defiance of secs. 5 and 6 of the Act of 1884, and so, to be outside the scope of the word "purporting." One may fairly ask: If they do not purport to be granted under the *Crown Lands Act of* 1895, under what law do they purport to be granted, or do they purport to be departmental outlaws?

Applying somewhat analogous cases such as *Spooner* v. *Juldow* (1), *Hughes* v. *Buckland* (2), *Jones* v. *Gooday* (3) and *Cann* v. *Clipperton* (4), and other similar cases, the test I would apply is whether the attempted leases were *bonâ fide* in reliance upon Acts as the source of authority, and not absurdly contemplated as a valid exercise of the statutory provisions: *Dicker* v. *Angerstein* (5).

It is the duty of the Lands Department imposed upon it by law, to administer the Acts, and necessarily for the purpose of administration to interpret them, notwithstanding their traditional intricacy and obscurity. In those circumstances it seems only natural that the legislature meant to include in the word "purporting" any grant made by the Crown in good faith, and accepted by the subject in good faith, both sides relying, not unreasonably, or as the Privy Council say "not absurdly," on the

(1) 6 Moo. P.C.C., 257, at p. 283.
(2) 15 M. & W., 346.
(3) 9 M. & W., 736, particularly at pp. 741, 742, 743.
(4) 10 A. & E., 582.
(5) 3 Ch. D., 600.

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

ISAACS J.

phraseology of the Act as authorizing the grant. Public faith is to some extent involved.

My reading of the words of the section is confirmed by the interpretation of the word "purporting" which the legislature itself has placed upon it from time to time in Acts *in pari materiâ*. It used the word "purporting" for grants which on their face were impossible in law, and even for transactions *de facto* which went altogether outside any possible power conferred by the Crown Lands Acts and outside sec. 3 of the *Crown Lands Alienation Act of* 1861 and secs. 5 and 6 of the Act of 1884, by attempting to alienate land which was not "Crown land" within their meaning. For instance, in the Act of 1876 (40 Vict. No. 14), Marshall's case and Smellie's case were transactions which on their face were beyond the competency of the Crown to enter into. Yet they were designated by the legislature as "purporting" to be under the Acts. (See first recital to Act of 1876).

Then the whole of Schedule A of the Act of 1881 (45 Vict. No. 19) consists of grants which the legislature said "purported" to be under the *Crown Lands Alienation Act of* 1861, but which by sec. 1 of that Act were not "Crown lands" within its meaning, and required an Act to make them Crown lands (see, for instance, No. 10 of 1881—Resumption of certain Dedicated Crown Lands). Sec. 3 of the Act of 1861 even if such lands were included as Crown lands would have prohibited the transaction, and by sec. 6 they were declared to be "absolutely void as well against Her Majesty as all other persons whomsoever."

Again in the Act of 1888 (51 Vict. No. 29) validating conversion into mining conditional purchases under sec. 19 of the Act of 1861, the legislature validated all prior regulations "purporting to authorize such conversion," and also any conversion "purporting to be in pursuance thereof." Now it is quite clear that the legislature assumes there was no power to do the act under any circumstances, no power to make the regulation, and no power to make the conversions. The holders, original or successive, may be quite mistaken as to the value of their titles.

In the Act of 1894 (57 Vict. No. 9) the use of the word "purporting" indicates how the legislature still understood that word, and this brings us close up to the Act of 1895. In Miller's case

(Schedule D), a township allotment sold without competition, the Act speaks of the transaction as simply "unauthorized." There had been no grant. But Schedules E and F, which are both cases of want of power, refer to transactions completed by grant and there the Act speaks of "the sale and grant . . . which purported to have been made and issued under the provisions of" the sections of the Acts respectively mentioned. See *Life Interest and Reversionary Securities Corporation* v. *Hand-in-Hand Fire and Life Insurance Society* (1).

My learned brethren introduce, as I understand, a limitation into the section to this effect: that to come within its provisions, an attempted grant must be one which could at the time be validly made if only certain incidental requirements were observed.

But if power to do the act at all *at the given time* be the test, it applies necessarily where any essential element of that power is lacking.

As a "purchase made" connotes capacity on both sides, personal disqualification would have the effect of excluding the case from the section (sec. 22 of the Act of 1884). As a day too late is as bad as a day too early, an application for a homestead selection under sec. 27 of the Act of 1895, would also place the matter beyond the scope of sec. 44. And this, notwithstanding all these would be "breaches" or "non-observances" of the various sections quoted, and also of secs. 5 and 6 of the Act of 1884.

If the instances I have given are correct, it demonstrates that the section is reduced to a shadow and the enterprise of jumping, supposed for 18 years to be dead, receives new vitality. If, however, contrary to what I think is the necessary result of the rule formulated by my learned brothers, such cases could be brought within the section, while the present cannot, it demonstrates with equal plainness how impossible it is to work the section practically. If the Minister is confronted with an invalid grant, what is he to do? Whatever he does may be wrong. If he decides upon employing the provisions of the section as the Department in writing the letter of 25th June 1906 thought was the legal course in this case, the grantee, and his transferees to any dis-

(1) (1898) 2 Ch., 230.

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Isaacs J.

tance, may be still without a title, and the want of title may still after full parliamentary acquiescence, and the consent of the Crown, be challenged by a third party applying for the land and forcing the hand of the Crown.

On the other hand, if he sues at law, he may find after protracted litigation that the Court holds the case within the section, and more money and time were wasted.

In my view, the whole simplicity and certainty of the section are thus destroyed, the Department and the public embarrassed, and an acknowledged and notorious evil left unchecked. It surprises me that it is the Department that has raised the contention.

It is not an unimportant circumstance that for 18 years the legislature has not thought it necessary to pass any special validating Act, as they had been accustomed to do at short intervals previously. They seem to have trusted entirely to the operation of the section.

For all these considerations I am of opinion that the case falls within the section.

The conclusion arrived at by the majority of the Court makes it unnecessary to determine whether improvement leases come within the final clause. The doubt arises from the words "the provisions of this section shall apply," &c. As the case has been fully argued, I think, taking the view I do, that I ought to express my opinion. There are clear reasons for not narrowing the operation of the words quoted. The legislative scheme, as I have stated, involves the inclusion of grants under the Act of 1895.

The very late amendment by the Act of 1912 (No. 53), sec. 27, by which to sec. 44 of the Act of 1895 were added in the final paragraph the words "selections" and "selection"—meaning homestead selections which arise solely under the 1895 Act,—is decisive. As its own interpreter of the language it has used, the legislature must have treated sec. 44 as comprehending in the concluding paragraph transactions arising entirely under the Act of 1895. And the contrary contention reduces this amendment to a nullity: See *Salmon* v. *Duncombe* (1).

We have been informed that such matters have to some extent been dealt with under the section. If that practice is wrong, it

(1) 11 App. Cas., 627.

is obvious that titles now thought to be secure under 18 years administration might be insecure.

The words "the provisions of this section" refer, in my opinion, with regard to the subsequent transactions exactly what the strict literal words in the first clause refer to with respect to the prior transactions, namely, the breach and non-observance of the Acts under which they purport to be made or granted.

Then there is a further point raised by the Crown, which the majority opinion leaves it unnecessary to decide, but as to which, for reasons already stated, I proceed to state my opinion.

It is whether, assuming sec. 44 to apply, its procedure is exclusive. Here I venture to differ from the learned primary Judge. It is part of the scheme, and an essential part. One consideration is on the face of the matter. If the Crown can avoid the transaction on common law principles, it can affirm it in the same way. If, therefore, it proceeds under the section up to the point of endeavouring to obtain the acquiescence of Parliament and finds an adverse resolution, its statutory path is stopped; but what, on the argument advanced, would prevent it even then from expressly affirming the transaction? If the section is not exclusive, it is because the common law right stands clear. But the result is unthinkable.

The section creates a new specific right, to affirm or disaffirm what is otherwise an utterly invalid transaction, incapable of affirmance; and a special procedure is also created for the purpose. The doctrine of *Doe* v. *Bridges* (1) applies. There Lord *Tenterden* C.J. says:—"Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

This doctrine was affirmed and applied by the House of Lords in *Pasmore* v. *Oswaldtwistle Urban Council* (2). See also *Blackburn* v. *Flavelle* (3), where the principle is treated as similar to that expressed in the maxim *Expressio unius est exclusio alterius*.

I am therefore of opinion that the grants the subject of this

(1) 1 B. & Ad., 847, at p. 859. (2) (1898) A.C., 387, at pp. 394, 398.
(3) 6 App. Cas., 628, at p. 634.

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Isaacs J.

action are by virtue of sec. 44 not void, but appear to be voidable only at the instance of the Crown, and may or may not be found to be really voidable if the Crown should proceed in the manner required by the section.

Therefore, in my opinion, the appeal should succeed, and the suit be dismissed.

There still remains the question of compensation, on the assumption that my opinion is wrong. On this I agree with the learned Chief Judge in Equity.

The suit was brought for a declaration of invalidity, and of right to possession, and for an order to deliver possession within 60 days, and for general relief. The whole relief claimed was equitable, the foundation being the declaratory judgment. It was not an action of ejectment.

It may be that an ejectment action on the common law side would, on the view taken by my learned brothers, have succeeded, though I do not say so definitely.

But assuming it would, there still remains the question whether the Court in its equity jurisdiction can deal with a pure common law action for ejectment. In my opinion it cannot. I have stated my reasons in *Cobar Corporation Ltd.* v. *Attorney-General for New South Wales* (1), and need not here repeat them. I shall refer a little more particularly to the case of *Larios* v. *Gurety* (2) there cited. In that case it was held that the Court of Gibraltar might have moulded a misconceived suit for specific performance into a common law action for damages for breach of contract. But it was so held for the reason that it had by its charter complete jurisdiction in general terms over both law and equity—without any provision creating different sides of the Court, and requiring it to observe equity practice on one side and common law practice on the other. But here the position is that Parliament by the *Equity Act* 1901 (No. 24) creates a purely equity side to the Court (sec. 3), limits the jurisdiction of that side (sec. 4), and by sec. 8 gives it power to determine legal questions incidental to or arising in the course of a suit which is otherwise within the jurisdiction of the Equity Court as prescribed by the Statute. Sec. 10 provides for

(1) 9 C.L.R., 378, at pp. 402, 403. (2) L.R. 5 P.C., 346.

a declaration of right, and it is under this section the declaratory relief is claimed. There is no such declaration possible on the common law side, and the possession asked for is a common consequential claim in equity.

Ejectment at common law must not be joined with another action (*Common Law Procedure Act* 1899, sec. 49), and we cannot suppose an intended breach of that provision. In these circumstances the observations of Lord *Watson* in *Osborne* v. *Morgan* (1) and the case of *Lodge* v. *National Union Investment Co. Ltd.* (2) are clear authorities in support of the appellants. *Chapman* v. *Michaelson* (3), in which *Lodge's Case* (2) was distinguished, went upon the fact that the High Court of Justice is one undivided Court every part of which may under the new practice make a declaration of right. Therefore, as there was no need to resort to equitable practice to get relief, the relief could not be said to be equitable. But that is an entirely different state of the law from that prevailing in New South Wales, and the reason of the decision operates against the Crown here.

If that be right in law, the facts proved sufficiently entitle the appellants to a reference. They have spent money on the land from 1907 to the date of action in reliance on the grants not being void. The departmental letter of 25th June 1906 is no bar. It asserted, not invalidity, but voidability for "breach or non-observance of the provisions of the" Crown Lands Acts, and indicated that steps would be taken to have the lease declared void in due course. Clearly that letter had reference to sec. 44. When the appellants asked for information of the nature of the breach or non-observance, they got no reply except an acknowledgement.

No steps under the Act have ever been taken, and the matter appears to have dropped. A voidable transaction is good until avoided, and so long as the Crown chose not to correct its assertion that for some reason undisclosed the grant was only voidable at its option, and permitted the grants to stand unimpeached by the only process open by law on the assumption then made, I do not think its intimation was at the grantee's risk. What were they to do? The grants were not voidable by them; they

(1) 13 App. Cas., 227, at pp. 234-235. (2) (1907) 1 Ch., 300.
(3) (1909) 1 Ch., 238.

H. C. OF A. 1913.

BULL v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Isaacs J.

could do no more than ask for information, which was denied them; and until at least the Crown took some step on the road to election, which it could have taken in 1906, it would be most inequitable to ask the grantees to stand idle, and not use their property in a reasonable manner. There was nothing to prevent the Crown from electing to affirm the grants, and so compelling the appellants to pay rent and observe the conditions.

The Department's misleading conduct, in not stating the alleged "breach or non-observance," and its inaction lasting for six years and unexplained—that is, until 11th May 1911,—and the acceptance on 27th October 1910 of rent for 1911, leave the appellants, as I think, quite free from any disentitling effect of the letter of 1906.

Their rights to compensation ought consequently, in my opinion, to be determined apart from that letter, and upon the ordinary principle that he who seeks equity must do equity.

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

GAVAN DUFFY J. In this case the Attorney-General for New South Wales seeks a declaration that His Majesty is entitled to certain lands, and an order that the defendants deliver possession of them to His Majesty within 60 days. The defendants resist this claim on the strength of alleged improvement leases of the lands in question granted to them. Apparently it was considered that the alleged leases were justified by the provisions of sec. 26 of the *Crown Lands Act of* 1895, but they are not authorized by that section. In the first place, they were not made under a recommendation of the Local Land Board, and in the second place each of the leases purports to have been, and in fact was, executed during the existence of a prior improvement lease comprising the same lands, and purports to be made for a term commencing many years after the date of execution. Here, then, is not only the absence of a condition precedent necessary to give jurisdiction to the Governor, but the leases are such that under no circumstances would the Governor have had power to grant them. They are clearly void and of no effect if they are not protected by the provisions of sec. 44 of the *Crown Lands Act of* 1895. That section enacts that "Any purchase or lease of Crown lands purporting

to have been heretofore made or granted under the provisions of the repealed Acts or the Principal Act, shall not be held to be void by reason of any breach or non-observance of the provisions of the said Acts, but every such breach or non-observance as aforesaid (if of a nature to affect the validity of the purchase or lease) shall render the same voidable only at the instance of the Crown;" and in the concluding paragraph further enacts that "The provisions of this section shall apply in like manner to purchases or leases purporting to be made or granted after the commencement of this Act." It is said for the Crown in the first place, that sec. 44 cannot give validity to a transaction which in form and substance is not within the competency of the Governor either by Statute or at common law, and in the second place, that the section has no application to a breach or non-observance of the provisions of the *Crown Lands Act of* 1895. We agree with the first of these contentions, and it is therefore unnecessary to say anything as to the second. In our opinion sec. 44 does not empower the Governor to grant a lease which in form and substance is not authorized by the legislature, and which is therefore forbidden by sec. 6 of the *Crown Lands Act of* 1884. It merely enables him to sustain a lease which without the section would be invalid because some provision of the legislature incidental to the transaction has been overlooked or ignored. In our opinion His Majesty is entitled to the possession which is asked for.

The next question that arises on the pleadings is whether the defendants are entitled to any restitution or compensation in respect of moneys expended by them in reliance on the validity of the alleged leases. For the defendants it is said that the Crown having come for the assistance of a Court of Equity should itself do equity; for the Crown it is urged that it has the legal title to the lands and that it is entitled to possession without any conditions. When the Governor signed the documents relied on as leases all parties were apparently under the misapprehension that they were valid either as extensions of existing leases or as new improvement leases. On 25th June 1906, before the defendants had spent any of the money of which they seek repayment, a letter was written to them from the Department of Lands informing them that the extension of their leases was