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one under the *Transfer of Land Act*. The presence of a seal by both parties in a given case may or may not be material, according to the tenor of the document. A lease may, notwithstanding a seal, appear clearly to be under the Act, and the seal may therefore be superfluous. Or there may be additional stipulations of a personal nature beyond the provisions of the Act, and as to which a common law covenant may be necessary or desirable, the seal being reasonably attributable to their presence.

But in the present case there is strong reason for considering the presence of the seal as showing the lease to be one not under the Act, and this is why we consider sec. 3 of so much importance. This lease is for five years, and therefore by sec. 3 of the *Landlord and Tenant Act* (the *Statute of Frauds*) it is required to be in writing. Superadded to this is sec. 163 of the *Real Property Act* 1890 (following 8 & 9 Vict. c. 106, sec. 3), which declares that "a lease required by law to be in writing of any land" shall be "void at law unless made by deed." Now, the question presents itself, why was this lease made in the form of an indenture, notwithstanding the specific declaration in sec. 92 of the *Transfer of Land Act*, that every instrument shall be deemed of the same efficacy as if under seal?

It will be observed that the demise is of furniture as well as of land, and that an undivided rent is stipulated for both land and furniture. Standing by itself, that would not be a determining circumstance, because, as said by the learned Chief Justice, a furnished house must be premises that can be leased, and the principle that in such a case the rent issues out of the land only would apply (*Newman* v. *Anderton* (1); *Farewell* v. *Dickenson* (2); and *Brown* v. *Peto* (3)). But taken in conjunction with the fact of its seal it has this effect. If the rent is to be regarded as attributable to the land alone, the only apparent reason for sealing is to overcome the provisions of sec. 163 of the *Real Property Act*, and this would, by reason of sec. 92, be unnecessary if the lease were under the *Transfer of Land Act*.

On the other hand, if, to escape this result, the seal is, by a wider meaning given to the word "rent," to be attributed to the

(1) 2 B. & P. N.R., 224.
(2) 6 B. & C., 251.
(3) (1900) 1 Q.B., 346, at p. 354; affirmed (1900) 2 Q.B., 653.

covenant to pay the rent so far as it concerns the furniture, it leaves the amount of rent for the land itself undefined; and this would be a substantial departure from the required form.

All these circumstances taken together leave no doubt that the appellant has failed to show that the document relied on is one made under the *Transfer of Land Act*, and substantially in the form prescribed. Consequently the judgment of *à Beckett* J. should be affirmed.

Isaacs J. Gavan Duffy J.

Appeal dismissed with costs.

Solicitors, for the appellant, *Maddock, Jamieson & Lonie.*

Solicitor, for the respondent, *Guinness*, Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

WILLIAMS . . . . . APPELLANT;
DEFENDANT,

AND

THE PERPETUAL TRUSTEE COMPANY LIMITED . . . . . } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Nov.* 27, 28; *Dec.* 1, 2, 11.

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

Land—Private land compulsorily taken under statutory power for railway—Proviso for reverter on non-user—What amounts to non-user—Conveyance of land for purposes of Act—Effect on proviso for reverter—Victorian Coal-mining Company's Act 1884 (*N.S.W.*) (48 *Vic.*) *secs.* 1, 3, 22.

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By the preamble to the *Victorian Coal-mining Company's Act of* 1884 it was recited that S. "his heirs and assigns trading as the Victorian Coal-mining Company," afterwards designated by the Act "the Company," was desirous of constructing a railway from certain coal mines which he was about to open to the sea-coast through certain private lands. By sec. 1 authority was given to the Company to construct such railway between specified termini by a defined line through the lands of certain named persons to the sea-coast, and to take and use so much of such lands as the Company might require for the purpose of the railway not exceeding 66 feet in width, "Provided that the said railway shall be constructed and brought into use within the term of three years from the passing of this Act and that in default thereof or if after its completion the said railway shall cease to be used for three years continuously all the said lands and all the said Company's interest and estate therein shall revert without any conveyance to the original owners thereof their heirs and assigns." By sec. 3 it was provided that so much of the lands as should be taken and used by the Company under the provisions of the Act should by virtue of the Act and without the necessity of any conveyance be vested in the Company. By sec. 22 it was provided that in the event of no agreement being arrived at as to the compensation to be paid by the Company to the several owners of the land taken and used, the amount of such compensation should be settled by arbitration.

The railway having been constructed, a portion of it, namely 340 chains out of a total length of 633 chains, was taken up and dismantled, and was never afterwards used as a railway.

Held, that the railway had ceased to be used for three years continuously within the meaning of the proviso to sec. 1 of the Act.

S. by indenture assigned and transferred all his estate, right, title and interest in the land taken for the railway, and all his rights under the Act, "subject to the provisions of" the Act, to two persons, who by indenture assigned and transferred to the S. C. Co. their estate, right, title and interest in and to the Act and in and to the lands taken for the railway, together with all rights, &c., conferred by the Act "subject nevertheless to the provisions of" the Act. J., the owner of certain land through which the railway ran, having died, an indenture was executed between his trustees and the S. C. Co. which recited the authority for railway construction given by the Act "subject to the terms conditions and restrictions" therein particularly mentioned; the transfers by S. to the two persons, and by them to the S. C. Co.; that certain lands belonging to J. "were duly taken set out and appropriated for railway purposes in connection with the carrying on of the business of the S. C. Co., but no conveyance thereof" had "been made to the Company"; that under the provisions of the Act those lands were then vested in the S. C. Co.; that the parties to the indenture had agreed to arbitrate as to the amount to be paid by the S. C. Co. as purchase money and compensation; and that the arbitrators had awarded £700 in that behalf. The indenture then witnessed that in consideration of £700 the trustees granted, bargained, sold, aliened and released to the S. C. Co., its successors

and assigns, the land taken for the railway pursuant to the Act and a certain other piece of land, "and all the estate right title and interest of the trustees in and to the same premises and any part thereof to have and to hold the said lands and hereditaments unto and to the use of the Company its successors and assigns for ever according to the true intent and meaning of the hereinbefore recited Act."

Held, that the trustees were not debarred by the indenture from taking advantage of the proviso for reverter contained in sec. 1 of the Act.

Decision of the Supreme Court of New South Wales (*Street* J.): *Perpetual Trustee Co.* v. *Williams*, 13 S.R. (N.S.W.), 209, affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was instituted by the Perpetual Trustee Co. Ltd. against James Leslie Williams, a nominal defendant on behalf of the Government of New South Wales, in which the statement of claim was as follows:—

"1. The plaintiff Company is a company duly incorporated under the Companies Acts for the time being in force in the above-mentioned State and under the Perpetual Trustee Company (Limited) Act, and is capable of bringing and defending actions in its corporate name.

"2. By a private Act of the Parliament of New South Wales entitled the *Victorian Coal-mining Company's Act of* 1884, which was assented to on the 29th day of August 1884, one Thomas Saywell, trading as The Victorian Coal-mining Company, was authorized to construct a railway from certain lands belonging to the Company, situate near Mount Kembla, in the said State, to the sea-coasts at Red Point, also in the said State, through certain private lands belonging to various persons, including the trustees of one William Warren Jenkins.

"3. By the first section of the said Act the said Company was authorized to take and use so much of the said private lands as the said Company might require for the purposes of the said railway, and it was also thereby provided that the said railway should be constructed and brought into use within the term of three years from the passing of the said Act, and that in default thereof, or if after its completion, the said railway should cease to be used for three years continuously, all the lands so taken and all the said Company's interest and estate therein shall

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revert without any conveyance to the original owners thereof, their heirs and assigns.

"4. By the third section of the said Act it was provided that so much of the said lands as should be taken or used by the said Company should, without the necessity of any conveyance, be vested in the said Company.

"5. By the twenty-second section of the said Act it was provided that in the event of the parties not agreeing upon the amount of compensation to be paid by the promoters such amount should be settled by arbitration in the manner therein set out. The plaintiff Company craves leave to refer to the whole of the said Act as if set out herein.

"6. Prior to and at the respective dates of his will and death hereinafter mentioned the said William Warren Jenkins was seised or possessed of or otherwise well entitled for an estate in fee simple in possession to (*inter alia*) certain lands situate at Unanderra, near Wollongong, in the said State.

"7. The said William Warren Jenkins duly made his will dated 28th October 1883, whereby he (*inter alia*) appointed his two eldest sons William and Robert, and one Deighton Taylor (in the said will wrongly called William Taylor), trustees and executors thereof, and devised all his real estate not specifically devised (including the lands mentioned in paragraph 6 hereof) to his said trustees upon the trusts thereby declared.

"8. The said William Warren Jenkins died on 6th May 1884, without having revoked or altered his said will, probate whereof was on 5th June 1884 duly granted by this Honourable Court to William James Robert Jenkins, Robert Thomas Jenkins, and Deighton Taylor, the executors in the said will named.

"9. In pursuance of the provisions of the said private Act the said Victorian Coal-mining Company proceeded to take the lands required for the said railway and to construct the said railway.

"10. The said railway passed through the said lands mentioned in paragraph 6 hereof, and the said Company, under the powers contained in the said Act, took a portion thereof for the purposes of the said railway and such portion (which is more particularly described in the first Schedule annexed hereto) thereupon vested in the said Company in accordance with the 3rd section of the said Act.

"11. The said railway was not completed within the three years specified in the said Act, and the time for making the same was thereupon extended by another private Act of the said Parliament.

"12. The said railway was completed within the said extended time and the whole of the said railway as completed was used for some time.

"13. . . . .

"14. Subsequently the said Company began to use a piece of land belonging to the said estate, which was not included in the said Act" (referred to in this report as the green land).

"15. As the compensation to be paid for taking the said lands was not duly agreed upon, the matter was referred to arbitration, and a sum of £700 was awarded as compensation to the said estate for the said lands taken under the said Act, and for the said land taken without authority, as mentioned in paragraph 14 hereof.

"16. Subsequently, by indenture registered 20th April 1891, No. 111, Book 461, made 16th April 1891, between the said William James Robert Jenkins, Robert Thomas Jenkins, and Deighton Taylor of the one part, and the Southern Coal Co. of New South Wales Limited, who were the assignees of the said Victorian Coal-mining Co. of the other part, after reciting the will and death of the said William Warren Jenkins, and the taking of the said lands from the said estate and the award of £700 as compensation therefor, the said William James Robert Jenkins, Robert Thomas Jenkins, and Deighton Taylor (thereinafter called the trustees) conveyed the said lands taken from the said estate under the said Act, and also the said lands taken without authority, to the said Southern Coal Co. of New South Wales Limited, its executors and assigns to have and to hold the said lands unto and to the use of the Company, its executors and assigns for ever according to the true intent and meaning of the said private Act. The plaintiff Company craves leave to refer to the said will of William Warren Jenkins and to the said indenture respectively as if the same were set out herein verbatim. The plaintiff Company submits that if upon its true construction the said indenture operated as an absolute conveyance of the

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lands therein comprised to the Southern Coal Co. of New South Wales freed from any condition of reverter as provided by the said Acts, the same amounted to a breach of trust on the part of the said trustees, and was beyond their powers, and the plaintiff Company says and it is the fact that the said Company and all their successors in title, including the Government of New South Wales, had at all material times notice of such breach of trust, and were and are debarred in the equitable jurisdiction of this Honourable Court from claiming any interest in the lands described in the first Schedule hereto under or by virtue of the said conveyance.

"17. Subsequently the said railway ceased to be used for three years continuously, inasmuch as portion thereof, about 340 chains 2 roods in length, was disused in or about the year 1890, and has not since that date been and is not now in use, and such portion was about the same time taken up and dismantled. . . .

"18. By indenture dated 4th December 1903, the said Southern Coal Co. of New South Wales Ltd., and one Edward Nassan Marens (the receiver of the said Company) conveyed or purported to convey to the Hon. Edward William O'Sullivan, Minister for Public Works of the said State on behalf of His Majesty King Edward VII., the lands upon which the said railway was constructed including the lands taken from the said estate, and the Government of New South Wales has since the date of the said indenture been and still is in possession of the lands comprised in the said indenture, and the said Government claims to be entitled to the said lands and to the possession thereof. The said Government has made large profits from the user and letting of the said land.

"19. The plaintiff Company was on 3rd October 1906 duly appointed sole trustee of the will of the said William Warren Jenkins, and the real and personal estate of the said testator, including the right to re-enter the land described in the said Schedule hereto, thereupon became and still is vested in the plaintiff Company.

"20. The plaintiff Company has made application to the said Government to acknowledge the rights of the plaintiff Company in respect of the said lands taken from the said estate under the

provisions of the said private Act, but the said Government has refused and neglected and still refuses and neglects to recognize any rights in the plaintiff Company to the said lands or to any part thereof.

"21. By a petition relating to the subject matter of this suit, dated 4th July last, preferred to His Excellency the Governor of the said State the plaintiff Company prayed that His Excellency might appoint a nominal defendant in the matter of such petition, and His Excellency, with the advice of the Executive Council, by notification in the *Government Gazette* dated 23rd July 1912, duly appointed James Leslie Williams such nominal defendant as aforesaid in conformity with the provisions of the *Claims against the Government and Crown Suits Act* 1897.

"The plaintiff Company therefore claims :—

"1. That it may be declared that the plaintiff Company is entitled to re-enter the said lands described in the first Schedule hereto, and to recover possession thereof from the Government of New South Wales.

"1A That an account may be taken of the rents and profits received by the said Government from the said lands since entering into possession thereof as hereinbefore set out.

"2. That all necessary and proper orders and declarations may be made and directions given.

"3. That the defendant may be ordered to pay the costs of this suit.

"4. That the plaintiff Company may have such further or other relief as the nature of the case may require."

By the defence it was contended (par. 3) that the facts alleged in the statement of claim disclosed no right in the plaintiffs to the relief claimed, and (par. 4) that the plaintiffs were estopped by the indenture referred to in par. 16 of the statement of claim from obtaining the relief sought.

The plaintiffs thereupon moved for a decree on admissions, or in the alternative that the questions of law raised in pars. 3 and 4 of the defence might be set down for argument. On the hearing of the motion by *Street* J. the points of law so raised were by consent argued.

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The indenture referred to in par. 16 of the statement of claim and dated 16th April 1891 was, so far as is material, as follows:—

"This indenture made 16th April 1891 between William James Robert Jenkins of North Sydney in the Colony of New South Wales Esquire Robert Thomas Jenkins of Wollongong in the said Colony Esquire and Deighton Taylor of Wollongong in the said Colony Esquire of the one part and The Southern Coal Company of New South Wales Limited hereinafter called the Company of the other part Whereas William Warren Jenkins being at the date of his will hereinafter recited and at the time of his decease seised of the land and hereditaments hereinafter described and intended to be hereby released for an estate of inheritance in fee-simple in possession duly made his will dated 28th October 1883 of which he appointed the said William James Robert Jenkins and Robert Thomas Jenkins (therein referred to as testator's sons William and Robert) and the said Deighton Taylor (therein called William Taylor) trustees and executors And the testator after making certain specific devises therein mentioned and not affecting the land hereby released thereby devised and bequeathed all his real and personal estate not therein specifically devised and bequeathed to the said trustees upon the trusts thereby declared concerning the same And the testator thereby empowered his trustees to sell the whole or any portion of his estate not thereby specifically devised either as a whole or in allotments by public auction or private contract or tender with or without special conditions And whereas the testator died on 6th May 1884 without having revoked or altered his said will And whereas probate of the said will was on 5th June 1884 granted by the Supreme Court of New South Wales in its ecclesiastical jurisdiction to the said William James Robert Jenkins Robert Thomas Jenkins and Deighton Taylor the executors named in the said will And whereas under and pursuant to the provisions of an Act of the legislature of the Colony of New South Wales . . . intituled the *Victorian Coal-mining Company's Act of* 1884 the Victorian Coal-mining Company Limited was authorized to construct a railway through certain lands belonging to the several persons in the now recited Act specifically mentioned subject to the terms conditions and

restrictions in the now recited Act particularly mentioned And whereas by indenture dated 5th May 1888 registered as No. 866 Book 388 made between Thomas Saywell of Sydney in the Colony of New South Wales trading as the Victorian Coal-mining Company of the one part and James Thomas Atchison and Adelbert Theophilus Schleicher both of Sydney aforesaid of the other part all the estate right title and interest of the said Thomas Saywell in and to all and singular the lands and hereditaments set forth and comprised in the Schedule to the hereinbefore recited Act together with all the rights powers benefits advantages claims and demands of the said Thomas Saywell under and by virtue of the hereinbefore recited Act were assigned and transferred unto the said James Thomas Atchison and Adelbert Theophilus Schleicher their heirs executors administrators and assigns absolutely subject to the provisions of the hereinbefore recited Act And whereas by an indenture dated 7th May 1888 and registered as No. 978 Book 388 made between the said James Thomas Atchison and Adelbert Theophilus Schleicher of the one part and the said Southern Coal Company of the other part all and singular the estate right title and interest of the said James Thomas Atchison and Adelbert Theophilus Schleicher of in and to the said hereinbefore recited Act and of in and to all and singular the lands mentioned and comprised in the Schedule to such Act together with all rights powers benefits privileges and advantages conferred by the said Act were assigned and transferred unto the said Company and its assigns absolutely subject nevertheless to the provisions of the hereinbefore recited Act And whereas under and pursuant to the provisions of the hereinbefore recited Act the lands and hereditaments hereinafter mentioned were duly taken set out and appropriated for railway purposes in connection with the carrying on of the business of the said Southern Coal Company but no conveyance thereof has been made to the said Company And whereas under the provisions of the hereinbefore recited Act the said lands and hereditaments are now vested in the said Company And whereas it was agreed between the parties hereto that the amount to be paid by the Company for the purchase of the said lands and for compensation should be submitted to arbitration and at such

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arbitration the arbitrators by consent of all parties awarded that a sum of £700 should be paid by the said Company to the said William James Robert Jenkins Robert Thomas Jenkins and Deighton Taylor for the purchase of the said lands and for compensation for the damage which has been or may be occasioned by reason of the construction of the said railway works or by reason of the severance of the lands the property of the trustees from the other lands the property of the estate of the said William Warren Jenkins deceased Now this indenture witnesseth that in consideration of the sum of £700 paid to the said William James Robert Jenkins Robert Thomas Jenkins and Deighton Taylor hereinafter called the trustees by the Company at or before the execution of these presents the receipt whereof is hereby acknowledged the said trustees do and each of them doth hereby grant bargain sell alien and release unto the Company its successors and assigns All that piece or parcel of land situated within the Berkeley Estate in the Parish of Wollongong County of Camden and Colony of New South Wales" (the lands were then described by metes and bounds) "being the lands authorized to be taken by the Southern Coal Company of New South Wales under their Act of Parliament, 48 Vict., known as the *Victorian Coal-mining Company's Act of* 1884 And also all that piece or parcel of land" (describing it. This is the land referred to in this report as the green land.) "Together with all ways rights members and appurtenances thereto belonging And all the estate right title and interest of the trustees in and to the same premises or any part thereof To have and to hold the said lands and hereditaments unto and to the use of the Company its successors and assigns for ever according to the true intent and meaning of the hereinbefore recited Act And each of them the said trustees as to his own acts and deeds only doth hereby for himself his heirs executors and administrators covenant with the Company its successors and assigns that the covenanting parties respectively have not at any time done or knowingly suffered or been party or privy to any act deed or thing whereby they are prevented from granting and releasing the said hereditaments and premises in manner aforesaid or whereby the same

or any part thereof are is or may be in anywise encumbered . . . . . ."

The other material facts are stated in the judgments hereunder.

Street J. held that the railway mentioned in the *Victorian Coal-mining Company's Act of* 1884 had ceased to be used for three years continuously within the meaning of sec. 1 of that Act, and that the plaintiffs were not debarred from taking advantage of the provision for reverter contained in sec. 1 by reason of the indenture of 16th April 1891, and he made a decree accordingly : *Perpetual Trustee Co.* v. *Williams* (1).

From that decision the defendant now, by leave, appealed to the High Court.

The nature of the arguments sufficiently appears in the judgments hereunder.

Loxton K.C. (with him *S. A. Thompson*), for the appellant, referred to *Great Western Railway Co.* v. *May* (2); *Central Ontario Railway* v. *Trusts and Guarantee Co.* (3); *London and South Western Railway Co.* v. *Gomm* (4); *Fearne's Contingent Remainders*, 7th ed., p. 381; *Williams on Real Property*, 9th ed., p. 142.

[ISAACS J. referred to *Cohen* v. *Wilkinson* (5); *Graham* v. *Birkenhead, Lancashire and Cheshire Junction Railway Co.* (6); *Gardner* v. *London, Chatham and Dover Railway Co.* (7).

[RICH J. referred to *Prideaux's Precedents of Conveyancing*, 10th ed., vol. I., pp. 339-341.]

Langer Owen K.C. (with him *Maughan*), for the respondents, referred to *Blakemore* v. *Glamorganshire Canal Navigation* (8); *Davis & Sons Ltd.* v. *Taff Vale Railway Co.* (9); *Craies on Statutes*, 2nd ed., p. 492; *In re Da Costa*; *Clarke* v. *Church of England Collegiate School of St. Peter* (10).

Cur. adv. vult.

(1) 13 S.R. (N.S.W.), 209.
(2) L.R. 7 H.L., 283, at p. 285.
(3) (1905) A.C., 576, at p. 581.
(4) 20 Ch. D., 562.
(5) 1 Mac. & G., 481.
(6) 12 Beav., 460; 2 Mac. & G., 146.
(7) L.R. 2 Ch., 201.
(8) 1 My. & K., 154, at p. 162.
(9) (1895) A C., 542, at p. 559.
(10) (1912) 1 Ch., 337.

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Dec. 11.

The following judgments were read:—

BARTON A.C.J. The declarations appealed from were made on motion for decree, and they determined certain points of law raised by way of defence to a statement of claim in which the plaintiff Trustee Company, now respondent, claimed to be entitled to re-enter certain lands at Illawarra, and to recover possession thereof from the Government of New South Wales, represented by the appellant as nominal defendant. The respondent Company is the sole trustee of the will of William Warren Jenkins, deceased, of whose estate the lands in question formed part. They were taken under the provisions of a private Act, 48 Vict., by "Thomas Saywell . . . his heirs and assigns trading as the Victorian Coal-mining Company" for the purpose of a railway authorized by that Act to be constructed between certain coal lands of theirs and the coast at Port Kembla. The rights conferred by the Statute and the lands taken for its purposes have passed into the hands of the Government of New South Wales subject to the provisions of the Act mentioned and of another private Act, 51 Vict., extending for three years from the 27th April 1888 the time within which the railway was to be constructed; and repeating the provision for reverter in respect of the extended concession.

The authority to make the railway was contained in the first section of the Act of 48 Vict. It gave power to make and construct a railway from "lands belonging to the Company" through lands belonging to various proprietors named, of whom Jenkins was one, "to the waters of the Pacific Ocean," and to take and use so much of this land as might be required for the purpose of the railway for a width not exceeding 66 feet. There is a proviso to this section which I set out in full, namely, "Provided that the said railway shall be constructed and brought into use within the term of three years from the passing of this Act and that in default thereof or if after its completion the said railway shall cease to be used for three years continuously all the said lands and all the said Company's interest and estate therein shall revert without any conveyance to the original owners thereof their heirs and assigns." By sec. 3 so much of the lands as should be taken or used by the Company for the purpose of the

railway was to be vested in the Company without the necessity of any conveyance; but by sec. 21 it was provided that the Company should not be entitled to any mines of coal, ironstone, slate, or other minerals under any land vested in them by virtue of the Act except so much as might be necessary to be dug or carried away in the work of construction.

The first question for determination was whether the railway mentioned by Parliament had ceased to be used for three years continuously within the meaning of the proviso to sec. 1 of the Act of 1884.

Sec. 5 authorized the owners or occupiers of lands traversed by the railway to lay down upon their own lands branches communicating with the railway "for the purpose of bringing carriages to or from or upon the said railway," and sec. 4 provided that the railway should be at all times open to the public on payment of certain specified tolls. By sec. 6 the Company were authorized, but not required, to carry passengers and live stock upon the railways. There was a provision by sec. 22 for arbitration in the case of failure on the part of the land owners and the promoters to agree as to the compensation payable for lands taken, or for damage.

The other provisions of the Act were such as are customary in private legislation of its kind. The main railway authorized by the Act, that is the line from the Victorian Company's coal mine to Port Kembla, was constructed within the extended time allowed by the Act of 51 Vict. From the Victorian Company's coal mine for more than half its length—to be exact, for 340 chains out of a total length of 633 chains—the railway became disused in about 1890, and has so remained. In point of fact that portion of the line was taken up and dismantled. As this suit was instituted last year, it is evident that the disuse of the land has extended far beyond the period mentioned in the proviso to the first section of the Act of 1884. Since the taking up of the 340 chains the Company's railway has been used only along the remainder of its course. It was said by counsel for the appellant, but not stated upon the pleadings, that the use of the portion of the railway not dismantled was in conjunction with a branch line from mines other than that of the promoters. Their

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mine appears to have been found unprofitable. *Street* J. was of opinion that the purpose for which the promoters gained the statutory concession was the construction of a line of railway from the Company's mine to the sea-coast, so that they might ship the products of that mine. In his view that was the railway referred to in the proviso, which was to be constructed and used within three years from the passing of the Act. It had ceased for more than three years to be used for the purposes of the concession, and was no longer in substance and in fact a railway for the purpose of shipping the products of the Company's mine. It was urged both before *Street* J. and before us that the words "the said railway" in sec. 1 refer to the whole length of line, so that as long as any substantial part of it continued to be used "the railway" had not ceased to be used within the meaning of the proviso, and that no reverter to the original owners had taken place. I entirely agree with the conclusion of *Street* J. upon this part of the case. For the purpose which was the declared reason of the grant of power the railway had ceased to be used for the period the expiration of which brought the proviso into operation. In the case of *Davis & Sons Ltd.* v. *Taff Vale Railway Co.* (1), Lord *Macnaghten* said:—"Ever since it has become the practice for promoters of undertakings of a public nature to apply to Parliament for exceptional powers and privileges, the Acts of Parliament by which those powers and privileges are granted have been regarded as parliamentary contracts, as bargains between the promoters on the one hand and Parliament on the other—Parliament acting on behalf of the public as well as on behalf of the persons specially affected." When we look at the preamble of the Act, we find that the rights and powers granted in the enactment subject to the obligations upon the Company are given for the securing of certain benefits to the public. The railway contemplated is "a railway from the said coal mines, namely, the mines at which the line originally began, "to the sea-coast," and the recitals of the reasons for the concession, which may equally be inferred from the enacting clauses, are that "the said coal mines are likely to prove beneficial to the Colony and the public are concerned in promoting such an

(1) (1895) A.C., 542, at p. 559.

increase in the facilities for the supply of coal for local consumption steam navigation and export as would result from the construction of the said proposed railway." The facilities were to be increased, then, by a railway from the promoter's mine to the coast for the supply of coal. It is perfectly clear that when the railway ceased for the period prescribed in the Act to be used for its manifest purposes, the Company had failed to carry out its statutory undertaking. The line ceased to be in substance the railway authorized, and the land reverted to the owners from whom it had been taken, unless they had done something to divest themselves of the right of re-entry secured to them.

Whether the owners of the Jenkins estate have so divested themselves, is the subject of the second question, which the learned Judge has stated in this form: Are the plaintiffs, as the successors in title of the original owners of some of the land through which the railway ran, debarred from taking advantage of the provision for reverter contained in sec. 1, by reason of the conveyance executed by their predecessors on 16th April 1891?

Saywell, trading as the Victorian Coal-mining Co., assigned and transferred to J. F. Atchison and A. T. Schleicher, by indenture of 5th May 1888, all his estate, right, title and interest in and to the railway lands, and all his rights under the private Act, "subject to the provisions of the hereinbefore recited Act." Atchison and Schleicher, by indenture of 7th May 1888, assigned and transferred to the Southern Coal Co. their estate, right, title and interest "of in and to the said hereinbefore recited Act," and of and to the railway lands, together with all rights, &c., conferred by the Act, "subject nevertheless to the provisions of the hereinbefore recited Act." By indenture of 4th December 1903 the Southern Coal Co. and its receiver conveyed to the Honourable E. W. O'Sullivan, Minister for Public Works, on behalf of the State Government, the railway lands and certain other lands presently to be further mentioned, which belonged to the Jenkins estate and had been purchased from that estate by the Southern Coal Co.

So far there was nothing to debar the respondents as trustees of the Jenkins estate from receiving the benefit of the statutory provision for reverter on the forfeiture incurred by disuse of the

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railway. But it is contended that a conveyance to the Southern Coal Co. executed on 16th April 1891 by the respondents' predecessors in the trust has that effect.

The right of Saywell, or any successor in title of his, to transfer the rights granted to the promoters by the private Act is not in contest upon this appeal.

The deed of 16th April 1891 recited that William Warren Jenkins, when seised of the lands the subject of the conveyance, *inter alia* devised to the conveying trustees all his estate not specifically devised, on certain trusts with power of sale; and that the testator died in May 1884. It then recited the authority for railway construction given by the Act of 1884, "subject to the terms conditions and restrictions in the now recited Act particularly mentioned"; the transfers by Saywell to Atchison and Schleicher and by them to the Southern Coal Co. in the terms already stated, subject, that is, to the provisions of the private Act; that lands thereinafter mentioned "were duly taken set out and appropriated for railway purposes in connection with the carrying on of the business of the said Southern Coal Co., but no conveyance thereof" had "been made to the said Company"; that under the provisions of the private Act these lands were now vested in the Company; that the parties thereto had agreed to arbitrate as to the amount to be paid by the Company as purchase money and compensation; and that the arbitrators had awarded £700 in that behalf. For this consideration the trustees granted, bargained, sold, aliened and released to the Company its successors and assigns (*a*) the railway lands, (*b*) a small piece of land marked in green on the plan accompanying the statement of claim; and all the estate right title and interest of the trustees in and to the same premises or any part thereof; habendum "unto and to the use of the Company its successors and assigns for ever according to the true intent and meaning of the hereinbefore recited Act."

The lands mentioned in this conveyance were those subsequently conveyed by the Southern Coal Co., with other lands, to the Minister for Public Works, as already mentioned. Mr. *Loxton* for the appellant contended that the trustees of the estate by this deed released their right to re-enter upon the railway

lands as upon reverter. He urged that the operative words of the testatum were appropriate for such a purpose, and that the concluding words of the habendum, namely, "according to the true intent and meaning of the hereinbefore recited Act," were equivalent merely to the words "for the purposes of the said railway." It may be conceded that the operative words are large enough to include the statutory right of re-entry. They are in frequent use for ordinary conveyances. But the question is one of intention, to be gathered from the scope of the indenture; not merely from its operative words, but from the whole deed, including the terms of the Act, which is embodied in the deed by reference; and, as *Street* J. said, the Act must be read into the deed. So reading it, I think that the intention of the conveyance was to do no more than to confirm contractually the title which the Act gave to the holders of the statutory concession, which was a title subject to defeat upon non-performance of the statutory conditions; and this view is strengthened by the concluding words of the habendum, which are by no means to be restricted in the manner contended for by the appellant.

If there were no Act, so that the matter rested solely on the conveyance, it might well be urged that such words as are contained in the proviso to sec. 1, if they or their equivalent were appended to a conveyance of the fee by the owner, created a condition subsequent at common law, and were void for infringement of the rule against perpetuities (See *In re Trustees of Hollis' Hospital and Hague's Contract* (1), followed in *In re Da Costa*; *Clarke* v. *Church of England Collegiate School of St. Peter* (2)). But as the deed must be read in conjunction with the Statute, the fee which passed under it was a fee subject to a statutory right of re-entry, which right it was no part of the intention of the parties to extinguish. The position of the railway lands is different from that of the other lands conveyed. The latter were not subject to the proviso, and the right of re-entry had not attached to them, for they were not included in the terms of the Act. But as to the lands which the Act had vested in the Company I cannot come to the conclusion that the

(2) (1899) 2 Ch., 540. (3) (1912) 1 Ch., 337.

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intention was to free them from the statutory rights of the Jenkins estate.

Indeed, the indenture is probably an instance of the process which commonly follows, in this State, a compulsory taking of lands under an Act of Parliament vesting them in the statutory purchaser; a conveyance resorted to merely for further assurance of the title conferred by the Statute, but without any attempt to do more.

It is possibly worthy of note that there is a slight difference in the terms employed in the proviso to sec. 1 as to the reverter, and those employed in sec. 3 as to the vesting of lands taken. In the former case the lands are to revert "without any conveyance" to the original owners their heirs and assigns; in the latter case the lands taken are to vest in the Company "without the necessity of any conveyance."

The appellant urged that the Company and the Government were respectively purchasers for value without notice. On the part of the respondents it was answered that their title deeds affected them with notice. I do not think that the controversy on this point is relevant to present purposes. If, as I hold, the right of re-entry was not affected by the deed, it arose irrespective of any question of notice.

I am of opinion, then, that the plaintiffs, as the successors in title of the original owners of some of the land through which the railway ran, are not debarred by the conveyance of 16th April 1891 from taking advantage of the proviso for reverter.

In my view, therefore, the first question demands an affirmative, and the second a negative answer, and the appeal must be dismissed with costs.

ISAACS J. Two questions present themselves for decision.

1.—Whether the event has arisen which the Statute contemplates as working a reverter. That depends entirely on the proper construction to be given to the words:—"If after its completion the said railway shall cease to be used for three years continuously."

The way in which the Act is intituled, the description of the railway in the preamble, and its object there described, leave no

doubt that "the railway" is the whole railway from terminus to terminus.

Sec. 1, in which the quoted words occur, describes the line as "a railway from lands belonging to the Company through" private lands described, which include Jenkins's land, "to the waters of the Pacific Ocean." It empowers the promoters "to take and use so much of the said lands as the said Company may require for the purpose of such railway." Provided that "the said railway shall be constructed and brought into use" in three years, and in default thereof or of cesser as already described "all the said lands and all the said Company's interest and estate therein shall revert," &c.

It is the same railway that is spoken of throughout—the one project, for the one main public purpose, which is predominant, nothwithstanding additional rights of convenience and general utility are superadded by various sections. But the animating purpose without which the legislature, judging by their words, would not have conferred the powers of compulsory taking at the option of the promoters, a clear interference with private rights, is that described in the preamble. The dismantling of so considerable a portion of the line about 1890, together with its continuous abandonment for three years and ever since, demonstrates to my mind, that in substance the line as existing since about 1890 is substantially a different line, for different purposes, and cannot be said to be identical with "the said railway" spoken of in sec. 1 of the Act of 1884. The principle of the cases of *Cohen* v. *Wilkinson* (1), *Graham* v. *Birkenhead, Lancashire and Cheshire Junction Railway Co.* (2), *Bagshaw* v. *Eastern Union Railway Co.* (3), is applicable.

Any attempt to apply the provisions of sec. 5 in relation to the lands adjoining the dismantled portion, would be impossible. But these are statutory rights; and the rights of the owners of the lands traversed by the railway are part of the consideration—if that word may be used—or, more strictly speaking, are portion of the conditions stipulated for by Parliament.

Mr. *Loxton* urged that as the provision for reverter was in the

(1) 12 Beav., 125; 1 Mac. & G., 481. (2) 2 Mac. & G., 146.
(3) 2 Mac. & G., 389.

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nature of a forfeiture, it should be construed strictly against the respondents.

To this there are two answers. There are some judicial expressions which, unless closely examined, appear to treat enactments of this kind as contracts. Where parties come to an arrangement in relation to a project, and embody it in a proposed Act, and then obtain the sanction of the legislature to that arrangement, together with all necessary provisions, there is no doubt a strong analogy to a contract; and in many respects the construction of the Statute will be influenced by its nature and origin, and the mutual obligations of the parties will be determined upon a contractual basis. But it must always be remembered that the Act is not a contract, owing its efficacy to the consent of the parties, but is a law in the true sense, and whatever is therein provided is the declared will of the legislature. If it declares or implies that what it sanctions is to be taken as an agreement, then it must be so taken and construed—as, for instance, in *Rowbotham* v. *Wilson* (1), as to which see *Butterley Co. Ltd.* v. *New Hucknall Colliery Co. Ltd.* (2); but if it proceeds, from whatever moving cause, to declare, as the considered will of the legislature, what shall be lawful and the conditions of that lawfulness, it is not as an agreement but as a Statute that its terms must be construed and applied. In this latter connection I refer to the words of *Jervis* C.J. in *York and North Midland Railway Co.* v. *The Queen* (3); of Lord *Watson* in *Davis & Sons Ltd.* v. *Taff Vale Railway Co.* (4), and of *Farwell* J. in *Corbett* v. *South Eastern and Chatham Railway Companies' Managing Committee* (5). The powers granted by Parliament to the promoters included powers to take compulsorily private land, and the public purposes and conditions upon which alone that interference with private rights was permitted must be strictly observed and followed. *Lee* v. *Milner* (6); *Stourbridge Canal Co.* v. *Wheeley* (7); *Parker* v. *Great Western Railway Co.* (8), and *Lamb* v. *North London Railway Co.* (9) are among many authorities on this point. That is the first answer.

(1) 8 H.L.C., 348.
(2) (1910) A.C., 381, at p. 387.
(3) 1 E. & B., 858, at pp. 864-868.
(4) (1895) A.C., 542, at p. 552.
(5) (1905) 2 Ch., 280, at p. 287.
(6) 2 Y. & C. (Ex.), 611, at p. 618.
(7) 2 B. & Ad., 792.
(8) 3 Rail. & Can. Cas., 563, at p. 599.
(9) L.R. 4 Ch., 522.

The second is that the right of reverter on the happening of the stipulated event is not a forfeiture, but a conditional limitation. This was the actual decision in *Miller* v. *Waterford Harbour Commissioners* (1), *Palles* C.B. delivering the judgment of the Court. The case arose under sec. 127 of the *Lands Clauses Consolidation Act* 1845, an enactment which will be presently again referred to.

The ground of that decision is so much in point that I quote a few words of the learned Chief Baron. They are (2):—"That provision applies to the lands which were acquired by the defendants here, under the powers of their special Act—lands which are *primâ facie* held in fee, and . . . they absolutely vest upon the happening of the event mentioned in the section, vest in and become the property of the adjoining owners. It seems to me," says the learned Judge, "as plain as possible that that provision is not in the nature of a forfeiture, but is a conditional limitation."

This is supported by *Macfie* v. *Callander and Oban Railway* (3), under sec. 120 of the Scottish *Lands Clauses Consolidation Act* similar to sec. 127 of the English Act. The House adopted the judgment of Lord President *Robertson* who said (4):—"The law, as I understand it, is that at the end of ten years . . . the lands either vested or did not vest in the adjoining proprietor. If at that date the lands were not required by the company, they vested in the pursuer; if they were required, then they did not vest in him, and his interest in them for ever came to an end." And see *London and Greenwich Railway Co.* v. *Goodchild* (5).

So it is plain, the right of reverter is an existing interest which may or may not take effect, and not an entirely new right created by forfeiture of that interest by another person.

In my opinion, therefore, the respondents make good their first point.

2.—The second question is: Have the trustees of Jenkins's estate abandoned their right of reverter?

This position, the burden of which, in my opinion, lies upon the Crown to establish, depends largely on the interpretation to be given to a few words in the deed of 16th April 1891. Those

(1) (1904) 2 I.R., 421.
(2) (1904) 2 I.R., 421, at p. 424.
(3) (1898) A.C., 270, at p. 278.
(4) (1898) A.C., 270, at p. 278.
(5) 3 Rail. & Can. Cas., 507.

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words are: "According to the true intent and meaning of the hereinbefore recited Act." The Crown says these words do not reserve the statutory right of reverter; the respondents contend they do, and further, if upon strict construction that is not so, they say they so plainly and manifestly work a breach of trust as to be notice thereof to all who take under the deed.

The facts appearing, so far as material, are these. In 1884 Saywell's Act was passed. In 1888 the railway was still untouched, and Parliament in April extended the time which would expire on 27th April 1891. On 5th May 1888 Saywell purported to transfer all his rights to two individuals who on 7th May 1888 professed to transfer the same to the Southern Coal Co. That company took, set out and appropriated (*inter alia*) the lands, the subject matter of this suit, and, as the deed of 16th April 1891 says, under and pursuant to the provisions of the 1884 Act "for railway purposes in connection with the carrying on of the business" of the Southern Coal Co. Then the deed proceeds: "And whereas under the provisions of the hereinbefore recited Act, the said lands and hereditaments are now vested in the said Company." It was thus declared by both parties, and this was the basis upon which the deed was made, that the Southern Coal Co. had had the right to take, and had in fact taken compulsorily, and under the provisions of the Act, the lands now in contest. This involved the Company's obligation to pay for them, for so the Act says in the preamble and sec. 22, There was no necessity for an actual conveyance, except for convenience and to reduce to precision the parcels of land taken and to be paid for and the access and appurtenances thereto.

But an arbitration—probably a method of agreement to meet the first part of sec. 22, or if not, then an arbitration under the later portion—was held, and the sum of £700 was awarded for compensation, damage and severance, and, as par. 15 of the statement of claim says, for another piece of land also; and an actual conveyance of all the lands was executed.

The Company were assumed by all parties to be entitled to an estate in fee simple in the lands taken compulsorily, and they got it, as well as a grant of the other lands. But they were not entitled to an absolute fee at all events of the statutory lands,

and it does not appear by recital or otherwise that it was even intended they should receive an absolute fee either of them or of the other. No agreement is suggested except for the ascertainment of compensation, and in some undefined way as to awarding the green land to the Company; and, putting aside the fact that the Southern Coal Co. were not the concessionaires, and also the disuse of part of the railway, there is nothing but the words of the habendum "unto and to the use of the Company its successors and assigns for ever," followed by the words already quoted, and the word "release," to sustain the suggestion that the grantors intended to obliterate their statutory right of reverter.

But the form of the words in the habendum is identical with that of the habendum in Schedules A and B of the English *Lands Clauses Consolidation Act* 1845 (8 & 9 Vict. c. 18).

The grant in those Schedules is of the premises conveyed "together with all ways, rights, and appurtenances thereto belonging, and all such estate, right, title and interest in and to the same as I am or shall become seised or possessed of, or am by the said Act empowered to convey"—words much wider than the corresponding expressions in the present deed. And it must be remembered that the English Act contained two notable sections. Sec. 127 provides for the sale of superfluous lands within the prescribed period, or, if no period is prescribed, then within ten years, and on default "all such superfluous lands remaining unsold . . . shall thereupon vest in and become the property of the owners of the lands adjoining thereto," &c. The other section is sec. 128, which gives to the owner of lands from which the lands taken were originally severed a right of pre-emption whenever the Company decide to sell superfluous lands. Now it would, as it seems to me, be quite impossible to maintain that the English Act meant by the words in the Schedule to cut out the rights given by those sections, one of which is of considerable analogy to the right of reverter here. It is sufficiently obvious—indeed, it is the only reasonable explanation available—that the words relied on were adopted because from the English Act they found their way into books of precedents which embodied them. And here I will quote some observations of Lord *Cairns* L.C. in *Great Western Railway Co.*

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v. *May* (1) where his Lordship, referring to sec. 127, uses language quite applicable to the present case. He said:—"The policy of the legislature clearly applies itself. The policy which dictated that 127th clause is obviously this: a railway company is armed with powers to take land from landowners against their will. The object to be attained is the effectuating of a great national enterprise. It is not part of that object, on the contrary, it is foreign and antagonistic to that object, to make railway companies landowners for the purpose merely of owning land. The object on the part of the legislature rather is, to secure to the landowners from whom land is taken by compulsion, a reverting, as nearly as the legislature can accomplish it, of all land which becomes useless or not wanted for the purpose of the national enterprise which has been sanctioned by Parliament."

The words "according to the true intent and meaning of the hereinbefore recited Act" indicate that the transaction was for the purpose of subserving the purposes of the Act, and mean that the grantee is to hold the estate granted for the purposes and subject to the provisions of the Act. The results, therefore, of abandonment of the project could not have been contemplated. It follows that the stress laid by Mr. *Loxton* on the word "release" is not well founded. In *London and South Western Railway Co.* v. *Blackmore* (2) Lord *Westbury* says:—"The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given." The statutory estate obtained by the Company as to the "white lands," as they are called, was alone the subject of grant, and, looking at the deed as a whole, was alone the subject of contemplation as the "premises" to pass; and therefore to extend the words of the grant to the reverter which stood outside the ambit of the transaction would offend against the rule stated by Lord *Westbury*, and against the law laid down, for instance, in *Hunt* v. *Remnant* (3).

Then it was suggested that in view of the alleged dismantling of part of the line about 1890, the deed must be read as making the grant independently of the purposes of the railway as a

(1) L.R. 7 H.L., 283, at p. 293. (2) L.R. 4 H.L., 610, at p. 623.
(3) 9 Exch., 635.

whole. But there are several reasons which, to my mind, operate against that view.

First, the presence of the words "according to the true intent and meaning of the hereinbefore recited Act," which are unqualified, and cannot be cut down by conjectural intention. Next, the actual date of dismantling is not definitely fixed—four months would destroy the argument in fact. And lastly, the dismantling of the part was not in itself a statutory cause of reverter. The Company—there being no other objection—might have restored it at any time within the three years, and saved the position. In the meantime the lands had been taken, and were to be paid for, and there could be no reasonable ground of objection as the parties then understood the position in law.

A case a good deal in point as showing the effect of using part only of the authorized powers, in relation to abandonment is *Thicknesse* v. *Lancaster Canal Co.* (1) where the powers were unlimited in point of time, as was customary at the time the Act there was passed; the legislature only afterwards, as *Gurney* B. said, entertaining the idea of restricting the time of operation of such powers. Now they are limited by sec. 123 of the *Lands Clauses Consolidation Act* 1845 to three years unless otherwise prescribed.

The Act here does not speak of intention to discontinue for three years, but of actual disuse for that period; and until that period elapsed, it cannot in the absence of clear indication be taken that the parties accepted abandonment of part as the basis of their dealing.

If such a basis were assumed it means that all the statutory rights of the trustees as owners of the property were entirely given up. Not only would this be—so far as appears—a direct breach of trust, but it would as Mr. *Owen* said include the grant of the minerals excluded by sec. 21. See *Rowbotham* v. *Wilson* (2).

In a coal-bearing district especially, this would be a substantial surrender, and ought to be supported by something stronger than the slender threads of conjecture suggested on behalf of the Crown.

(1) 4 M. & W., 472.

(2) 8 H.L.C., 348, at p. 360.

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For these reasons I am of opinion that on the second point also the respondents succeed.

There are two matters which received considerable attention during the argument, and which, though not necessary to the decision, are so important as to deserve passing observation.

One is as to the legality of the transfer of powers by Saywell, and ultimately to the Crown. Without expressly deciding, I may say that I have the greatest doubt whether Saywell's powers were assignable at all (See, among other authorities, *Gardner* v. *London, Chatham and Dover Railway Co.* (1), and *Burgoin* v. *La Compagnie du Chemin de Fer de Montréal, Ottawa, et Occidental* (2). Compare, also, *In re Peckham, Dulwich and Crystal Palace Tramways Bill* (3)). But this question while possibly affecting the legality of any assumed assignee's exercise of those powers as regards persons whose acts have not excluded complaint and therefore deserving of careful consideration by those now working the line, do not apply as between the parties here, because by the deed of 16th April 1891 the trustees have affected to transfer for valuable consideration to the Southern Co. and its assigns. They cannot, therefore, in my opinion, approbate and reprobate : they cannot hold to the advantages of the deed, and disregard the fact of recognition and assert that the line was abandoned three years after Saywell transferred.

The other question has reference to what is called the "green land," that is, the non-statutory land.

It was argued that the words "according to the true intent and meaning of the hereinbefore recited Act" could not refer to the green land, in the sense contended for by the respondents, because that land was outside the Act, and because any such attempt to annex a right of reverter so unlimited would be invalid under the rule as to perpetuities, and therefore cannot be supposed to have been made. As to the first reason, it seems to me, ascertaining the intention of the parties by the words they have used, that they intended to place both the white and green lands in the same category, namely, under the statutory conditions, and they appear to have thought that saying so would bind everybody.

(1) L.R. 2 Ch., 201.
(2) 5 App. Cas., 381, at pp. 402-403.
(3) (1909) 2 Ch., 540 ; and, on appeal, (1910) 2 Ch., 1.

But as to the assumption made by the second reason, namely, invalidity, I wish to guard myself from any supposed assent at present to such a proposition. The title to the green land is not now directly in question, and nothing we can say in this case can determine it. But there are some observations in the judgment of *Street* J., and there were some at the Bar, which lead me to say that, as at present advised, I think it is a matter for very serious consideration.

The question whether the possibility of reverter is void as a common law condition, has been and still is the subject of divided opinions. There are two cases referred to in the judgment of the learned primary Judge, the *Hollis' Hospital Case* (1) and the case of *In re Da Costa* (2), where such a proviso was held void. But in the first case, *Bryne* J. (3) expressly states that the conveyance operated under the *Statute of Uses*. Portion of the land conveyed was the legal property of Thomas Hollis, sen., and other grantors, the right of reverter being limited to the heirs of Thomas Hollis, sen., alone. The latter case was a case of will and gift over. And *Eve* J. said (4):—"It is a gift to the trustees upon trust, during the lives of successive tenants for life, to apply the income in a particular manner." The learned Judge followed the *Hollis' Hospital Case* (5).

But the deed in this case has a pure common law operation. See *per Stirling* L.J. for the whole Court of Appeal in *Savill Brothers Ltd.* v. *Bethell* (6). In view of that fact the judgment of that very learned Judge, *Palles* C.B., in *Attorney-General* v. *Cummins* (7), requires the most careful consideration. See also the reference to that judgment by *Walker* C. in *In re Tyrrell's Estate* (8). In his judgment the learned Lord Chief Baron (9) distinguishes *London and South Western Railway Co.* v. *Gomm* (10).

The assumed reverter here is to the grantors only. See also *Fearne on Contingent Remainders*, 7th ed., p. 381 (*n*). This question, therefore, I think quite open to argument.

(1) (1899) 2 Ch., 540.
(2) (1912) 1 Ch., 337.
(3) (1899) 2 Ch., 540, at p. 548.
(4) (1912) 1 Ch., 337, at p. 342.
(5) (1899) 2 Ch., 540.
(6) (1902) 2 Ch., 523, at p. 540.
(7) (1906) 1 I.R., 406*n*.
(8) (1907) 1 I.R., 292, at p. 299.
(9) (1906) 1 I.R., 406*n*, at p. 413.
(10) 20 Ch. D., 562.

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Gavan Duffy J. Rich J.

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

RICH J. Two questions which are stated in the judgment under appeal were argued in this case before *Street* J. and this Court. The first question involves the construction of the *Victorian Coal-mining Company's Act of* 1884. This Act is an enabling Act and gives the promoter certain conditional powers. Sec. 1 provides for the construction through private lands of a railway between specified termini and for vesting in the promoter the lands taken for this purpose, and further provides that "If after its completion the said railway shall cease to be used for three years continuously all the said lands and all the said Company's interest and estate therein shall revert without any conveyance to the original owners thereof their heirs and assigns."

The Act contemplates the construction and use of a practicable railway between specified termini, and we consider that the evidence in this case shows that the railway authorized by the Act has in fact ceased to be used by the original promoter or by his assigns for three years continuously within the meaning of this section. In these circumstances it is unnecessary to express any opinion as to whether the user prescribed by the Act is limited to user by and for the purposes of the Victorian Coal-mining Co. or extends to user by the Southern Coal Co. of New South Wales Ltd. claiming to be an assign of the original promoter.

The next question is whether the possibility of reverter under the Act has been extinguished by the conveyance of 16th April 1891. This depends on the proper construction of the conveyance. In construing the conveyance it is material to bear in mind that all that then remained in the conveying parties was the possibility of reverter under the Act of Parliament, and that all parties treated the land as vested in the Company by virtue of the Act, and subject to the Act. This is emphasized by several of the recitals, which appear to have been framed with the object of showing that the relations of the parties were governed by the Act. If the intention of the deed was to get away from the Act, and to extinguish a possibility of reverter which the parties virtually asserted to be in existence, one would naturally expect