[HIGH COURT OF AUSTRALIA.]

STEWART . . . . . APPELLANT
PLAINTIFF,

AND

WILLIAMS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 12, 13, 14, 15; *August* 16.

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

Crown Lands—Improvement lease—Condition not authorized by Statute—Withdrawal of whole or part of land from lease—Reduction of rent—Ultra vires—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, 27, 44.

The *Crown Lands Act of* 1884 (N.S.W.), by sec. 5, provides that Crown lands shall not be leased except under and subject to the provisions of that Act, and, by sec. 6, that the Governor may grant leases of Crown lands, but only for some estate, interest or purpose authorized by that Act.

The *Crown Lands Act of* 1895 (N.S.W.), by sec. 26, provides that the Governor may grant leases (called "improvement leases") of Crown lands which are not suitable for settlement until improved, and can only be rendered suitable by the expenditure of large sums in the improvement thereof, and that the granting of such leases shall be subject to certain provisions including the following:—"(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"; "(IV.) The lease may contain such covenants and provisions as to the Governor may seem expedient according to the circumstances of each case, and all such covenants and provisions shall be notified in the *Gazette* . . . . before the lease is offered for sale or tenders called for. The lease shall contain covenants and provisions for the improvement of the land leased and for the expenditure of money thereon, for the payment of rent, and for the

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determination of the lease upon any breach by the lessee of the covenants and provisions thereof"; "(v.) Upon the expiration of the term of the lease by effluxion of time the lessee shall have tenant-right . . . . in improvements."

By sec. 27 of that Act it is provided that the holder of an improvement lease may, at any time during the last year of the term of the lease, apply for a certain portion of the land comprised in the lease as a homestead selection.

By sec. 44 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" (the Act of 1884 and certain other Acts) "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 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. . . . . 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."

A lease of Crown land, which purported to be an improvement lease, was in 1902 issued to the plaintiff. The lease was expressed to be for "about 20 years from the date of execution to terminate 27th July 1923," but contained a provision that the Governor might at any time and from time to time after the expiration of 10 years withdraw the whole or any part of the land for purposes of settlement without compensation except for the lessee's interest in improvements on the land so withdrawn, and also that upon such withdrawal of any land a reduction of the rent proportionate to the area withdrawn should be made. In 1913 the Governor by proclamation withdrew the whole of the land. The plaintiff having brought a suit asking for a declaration that the power of withdrawal contained in the lease was *ultra vires* and contrary to the provisions of the Crown Lands Acts,

Held, by *Barton*, *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. dissenting), that the plaintiff was not entitled to treat the lease as being free from the provisions as to withdrawal, and, therefore, was not entitled to the declaration asked :

By *Barton* J., on the ground that the lease was wholly void ;

By *Isaacs* J., on the ground that the lease was either wholly valid or, by virtue of sec. 44 of the *Crown Lands Act of* 1895, voidable at the option of the Crown only ;

By *Gavan Duffy* and *Rich* JJ., on the ground that the plaintiff was bound to take the lease as it stood or not at all.

The plaintiff also claimed a declaration that the Governor could only exercise the power of withdrawal upon giving reasonable notice to the plaintiff of his intention, and in any event not so as to take effect before the termination of any period in respect of which rent had been paid.

Held, that the plaintiff was not entitled to a declaration in the first alternative, and, by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. dissenting), that he was not entitled to a declaration in the second alternative.

Decision of the Supreme Court (*Harvey* J.): *Stewart* v. *Williams*, 13 S.R. (N.S.W.), 555, affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit in equity was brought in the Supreme Court by Charles Gideon Stewart 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. On 20th November 1902 an improvement lease under the Crown Lands Acts was granted to Charles Gideon Stewart, the plaintiff, of an area of about 4,400 acres in the Parishes of Leura and Wooloombye, County of Waradgery.

"2. By the said lease the term thereof was expressed to be for about 20 years from the date of the execution thereof and to terminate on 27th July 1923, subject to the provisions, conditions and covenants thereinafter declared and contained. . . .

"3. The plaintiff entered into possession of the said lands under the said lease.

"4. One of the clauses in the said lease was as follows:—'The Governor may by notice in the *Government Gazette* at any time and from time to time withdraw any land required or deemed to be required for mining purposes or for any public purpose, including travelling stock or camping, and may also at any time and from time to time after the expiration of ten (10) years from commencement of the lease withdraw the whole or any part or parts of the land for purposes of settlement without in any case compensation except for the lessee's interest in improvements on the land so withdrawn.'

"5. On 19th November 1912 the plaintiff paid to the Colonial Treasurer the rent for the said improvement lease for the year ending 19th November 1913.

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"6. On 16th April 1913 a proclamation appeared in the *Government Gazette* in the following terms:—" (The proclamation was then set out. By its terms it purported to withdraw from the lease an area of about 4,400 acres.) "The lands referred to in the said proclamation embraced the whole of the lands comprised in the plaintiff's said improvement lease.

"7. The plaintiff had not prior to the said proclamation any notice or knowledge of any intention to withdraw any of the lands embraced within his said improvement lease.

"8. The plaintiff believed that on payment of the rent for the said improvement lease for the year ending 19th November 1913 he would have the use of the said lands embraced in the said lease at least until such last mentioned date, and relying on such belief he depastured the said leased lands with stock and breeding sheep and will suffer serious loss and damage if he is deprived of the use of the said leased lands before 19th November 1913.

"9. The defendant James Leslie Williams has been duly appointed a nominal defendant on behalf of the Government of the State of New South Wales in respect of the plaintiff's claim herein.

"10. The plaintiff submits that the Governor had no power to insert in his said grant of the improvement lease to the plaintiff the clause referred to in paragraph 4 and that the said clause was contrary to the provisions of the Crown Lands Acts and therefore null and void, and the plaintiff further submits that even if such clause were properly and validly inserted in the plaintiff's said lease the power of withdrawal thereby conferred could not be exercised without reasonable notice to the plaintiff or so as to take effect before the termination of any period in respect of which rent had been paid by the plaintiff and accepted by the Crown.

"The plaintiff therefore prays:

"(1) That it may be declared that the power of withdrawal contained in the said lease as set out in par. 4 was *ultra vires* of the Governor and contrary to the provisions of the Crown Lands Acts, or in the alternative

"(2) That the Governor could only exercise the power of withdrawal set out in par. 4 upon giving the plaintiff reasonable

notice of his intention to exercise the said power and in any event not so as to take effect before the termination of any period in respect of which rent had been paid by the plaintiff and accepted by the Crown.

"(3) That the defendant may be restrained by the order of this honourable Court from interfering with the plaintiff in his possession or quiet enjoyment of the lands comprised within the said improvement lease as granted.

"(4) That the defendant may be ordered to pay the costs of this suit.

"(5) That for the purposes aforesaid all proper orders may be made and inquiries had and directions given.

"(6) That the plaintiff may have such further or other relief as the nature of the case may require."

The defendant demurred to the whole of the statement of claim on the grounds :—"(1) That upon the facts set forth in the said statement of claim the plaintiff has disclosed no equity to the relief prayed. (2) That the insertion in the improvement lease of the clause containing the power of withdrawal as set out in the statement of claim was not *ultra vires* of the Governor, and was not contrary to the Crown Lands Acts. (3) That the said power of withdrawal could be exercised without reasonable or any notice to the plaintiff, and could take effect before the termination of a period in respect of which rent has been paid by the plaintiff and accepted by the Crown."

The material portions of the lease were as follow :—" Whereas an improvement lease of the Crown lands hereinafter described has in conformity with the provisions of the *Crown Lands Act of* 1895 been submitted for lease by tender and Charles Gideon Stewart of Wooloondool, Hay, in the State of New South Wales, has offered the highest annual rental for the said lease that is to say the sum of £64 3s. 4d. Now know ye that in pursuance of the provisions of the said Act we do hereby grant unto the said Charles Gideon Stewart who with his executors administrators and assigns is hereinafter referred to as the lessee an improvement lease of all that piece or parcel of Crown lands containing approximately 4,400 acres . . . . Together with all rights easements and appurtenances to the same belonging

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excepting and reserving unto us our heirs and successors all minerals . . . . To hold the said lands unto the lessee his executors administrators and assigns for the term of about twenty years from the date of the execution of these presents to terminate 27th July 1923 subject to the provisions conditions and covenants hereinafter declared and contained yielding and paying therefor during the said term the yearly rent of £64 3s. 4d. of which payment for the first year of the term has already been made and for the second and every succeeding year of the term payment shall be made in advance to the Treasurer for our said State before the day in each year corresponding to the date of the execution of these presents. Provided always that these presents shall not operate so as to exempt the lands hereby demised from any condition incident power or provision created or enacted by any law or statute now or hereafter to be passed so far as the same may be applicable to Crown lands under improvement lease and it is hereby declared that all conditions and provisions contained in the Crown Lands Acts or any other law or Statute now or hereafter to be passed so far as the same may be applicable to Crown lands under improvement lease are embodied and incorporated with these presents as conditions and provisions of the improvement lease hereby expressed to be granted and in particular that the lessee shall and will duly pay in advance the rent hereby reserved at the date hereinbefore appointed for the payment thereof without deduction or abatement on any account whatsoever. . . . . The Governor may by notice in the *Government Gazette*, at any time and from time to time, withdraw any land required, or deemed to be required, for mining purposes or for any public purpose, including travelling stock or camping, and may also at any time, and from time to time, after the expiration of ten (10) years from commencement of the lease, withdraw the whole or any part or parts of the land for purposes of settlement without in any case compensation, except for the lessee's interest in improvements on the land so withdrawn. Such compensation in respect of the improvements effected in terms of this lease shall be ascertained by multiplying a sum representing the fair value of the improvements by a fraction, of which the numerator shall be the unexpired term of

the lease, and the denominator the original term of the lease; and, in case of other improvements effected by the lessee, in terms of a special consent, given by the Minister for Lands or Chairman of the Local Land Board, the compensation shall be the fair value of such improvements. Provided that in all cases the fair value referred to shall be based on the cost of making improvements at the date of withdrawal, and that no improvements which have ceased to be of any practical value to the land or to an incoming settler shall be considered. The compensation shall be appraised by the Local Land Board, or by the Land Appeal Court on appeal or reference. The lessee shall be deemed to have a right of appeal, and the Minister shall be deemed to have a right of reference of the Board's appraisement to the Land Appeal Court; and for this purpose the appraisement shall be deemed to be an appraisement under the provisions of sec. 6 of the *Crown Lands Act of* 1889. Upon the withdrawal of any land as aforesaid, a reduction of the annual rent shall be made proportionate to the area withdrawn. Upon expiration of the lease by effluxion of time, the lessee shall have tenant-right as defined in the *Crown Lands Act of* 1895, in such improvements as may be effected with the consent of the Chairman of the Local Land Board or the Minister for Lands; but shall not have tenant-right or ownership in tanks, drains, fencing, or other improvements effected in terms of this lease. The lessee shall not sublet without having first obtained the Minister's consent in writing. . . . In the event of any of the conditions, provisions or covenants not being complied with in the manner specified, the lease will be liable to forfeiture, and the conditions, provisions, covenants and reservations announced in the *Government Gazette* No. 529 of 3rd September 1902, are embodied herein and incorporated herewith. . . . . Provided also that it shall be lawful for us our heirs and successors on giving not less than three months' previous notice in writing to resume any part of the said land which may be required for a road railway canal or the like public purpose without compensation subject to payment of the value at date of resumption of any improvements existing at that date on the land resumed and such value shall if the Minister

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shall deem it necessary be determined by appraisement but shall not exceed the actual cost of the improvements."

The demurrer was heard by *Harvey* J., and was allowed: *Stewart* v. *Williams* (1).

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

Knox K.C. and *Pike*, for the appellant.

Wise K.C., *Langer Owen* K.C. and *Hanbury Davies*, for the respondent.

During argument reference was made to the *Crown Lands Act of* 1884, secs. 5, 6, 78, 85, 108; *Crown Lands Act of* 1889, secs. 35, 37, 38; *Crown Lands Act of* 1895, secs. 26, 27, 44, 51; *Crown Lands Act Amendment Act* 1903, sec. 18; *Crown Lands (Amendment) Act* 1908, secs. 14, 38; *Western Lands Act* 1901, sec. 17; *In re Lynch* (2); *Bull* v. *Attorney-General for New South Wales* (3); *Goodright* v. *Richardson* (4); *Price* v. *Green* (5); *Baines* v. *Geary* (6); *Goodwin* v. *Phillips* (7); *Bridges* v. *Potts* (8); *Soames* v. *Nicholson* (9); *King* v. *Eversfield* (10); *Landale* v. *Menzies* (11); *Goldsmid* v. *Great Eastern Railway Co.* (12); *Griffiths* v. *Earl of Dudley* (13); *Wilson* v. *McIntosh* (14); *Cooper* v. *Stuart* (15); *McCulloch* v. *Abbott* (16); *Foa on Landlord and Tenant*, 5th ed., p. 120; *Gledstanes* v. *Earl of Sandwich* (17); *Attorney-General* v. *Teece* (18); *Kerrison* v. *Cole* (19); *Campbell* v. *Leach* (20); *Alexander* v. *Alexander* (21); *Mouys* v. *Leake* (22).

Cur. adv. vult.

(1) 13 S.R. (N.S.W.), 555.
(2) 13 S.R. (N.S.W.), 552.
(3) 17 C.L.R., 370.
(4) 3 T.R., 462.
(5) 16 M. & W., 346.
(6) 35 Ch. D., 154.
(7) 7 C.L.R., 1.
(8) 17 C.B.N.S., 314, at p. 348.
(9) (1902) 1 K.B., 157.
(10) (1897) 2 Q.B., 475.
(11) 9 C.L.R., 89.
(12) 25 Ch. D., 511.
(13) 9 Q.B.D., 357.
(14) (1894) A.C., 129.
(15) 14 App. Cas., 286.
(16) 6 N.S.W.L.R., 212.
(17) 4 Man. & G., 995, at p. 1028.
(18) 4 S.R. (N.S.W.), 347.
(19) 8 East, 231.
(20) Amb., 740.
(21) 2 Ves., 640.
(22) 8 T.R., 411.

The following judgments were read :—

GRIFFITH C.J. The appellant is the holder of a lease from the Crown, dated 20th November 1902, and purporting on its face to be an improvement lease issued under the provisions of sec. 26 of the *Crown Lands Act of* 1895, by which the land comprised in it, containing 4,400 acres, purports to be demised for the term of "about 20 years" from the date of execution "to terminate 27th July 1923 subject to the provisions conditions and covenants hereinafter declared and contained."

The lease contains a stipulation in the following words :— "The Governor may by notice in the *Government Gazette*, at any time and from time to time, withdraw any land required, or deemed to be required, for mining purposes or for any public purpose, including travelling stock or camping, and may also at any time, and from time to time, after the expiration of ten (10) years from commencement of the lease, withdraw the whole or any part or parts of the land for purposes of settlement without in any case compensation, except for the lessee's interest in improvements on the land so withdrawn. Such compensation in respect of the improvements effected in the terms of this lease shall be ascertained by multiplying a sum representing the fair value of the improvements by a fraction, of which the numerator shall be the unexpired term of the lease, and the denominator the original term of the lease; and, in case of other improvements effected by the lessee, in terms of a special consent, given by the Minister for Lands or Chairman of the Local Land Board, the compensation shall be the fair value of such improvements."

Rent was payable, and was paid, annually in advance on 20th November in each year up to 1912. On 16th April 1913 a Proclamation was published in the *Government Gazette* purporting to withdraw the whole 4,400 acres from the lease for the purposes of settlement. The appellant thereupon brought this suit, praying a declaration that the power of withdrawal contained in the lease was *ultra vires* of the Governor and contrary to the provisions of the Crown Lands Acts, and in the alternative a declaration that the power of withdrawal could not be exercised so as to take effect during a period in respect of which rent had been paid and accepted by the Crown.

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The appellant's main contention is that the power of withdrawal inserted in the lease is unauthorized by law and inoperative. This contention is founded upon various provisions of the Crown Lands Acts, and in particular upon secs. 5 and 6 of the *Crown Lands Act of* 1884, which contains the law generally applicable to dealings with Crown lands in New South Wales.

Sec. 5 of that Act provides that "Crown lands shall not be sold leased dedicated reserved or dealt with except under and subject to the provisions of this Act."

Sec. 6 provides 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." All the later Acts contain a provision that they shall be read with and as part of the Principal Act of 1884.

No more explicit language could be used to confine the power of the Executive Government within the limits prescribed by the legislature, or to prohibit the creation at their own will of what have been called "fancy tenures."

The importance of these fundamental provisions has always been recognized, and many instances have occurred in which attempts by the Executive Government to depart from the strict provisions of the law have been held ineffectual.

The *Crown Lands Act of* 1895 created several new forms of tenure, and among them what was called an "Improvement Lease." Sec. 26 provided that the Governor might grant leases of Crown lands which by reason of inferior quality or natural conditions were not suitable for settlement until improved and could "only be rendered suitable by the expenditure of large sums in the improvement thereof." It prescribed that the granting of the leases should be subject to the following provisions:— (1) The term of the lease was not to exceed 28 years, and was to commence from the date of execution of the lease; (2) the area was not to exceed 20,480 acres; (3) the amount bid at a sale by public auction or offered by an accepted tender was to be "the yearly rent of the lease"; (4) the lease might contain such "covenants and provisions" as to the Governor might seem expedient "according to the circumstances of each case," which

covenants and provisions were to be notified in the *Gazette*, *i.e.*, in the *Gazette* by which the auction was notified or tenders were invited. The paragraph went on to say that "the lease shall contain covenants and provisions for the improvement of the land leased and for the expenditure of money thereon, for the payment of rent, and for the determination of the lease upon any breach by the lessee of the covenants and provisions thereof. The section also provided that upon the expiration of the lease by effluxion of time the lessee should have "tenant-right" in improvements. That term is defined by sec. 51 of the Act, and may be shortly stated as a right of the outgoing tenant to receive from any persons who purchase or take a lease of the land the value which his improvements will have to an incoming tenant or purchaser.

Sec. 27 of the same Act of 1895 provides that the lessee of an improvement lease whose dwelling is erected upon Crown lands may at any time "during the last year of the term of the lease" apply for the portion of the leasehold which contains the dwelling-house, not exceeding 640 acres, as a homestead selection.

The appellant contends that the tenure authorized by sec. 26 is a tenure for a term certain, and not for a term defeasible at the will of the Crown. In support of this contention he relies (1) upon the words "the term of the lease shall not exceed 28 years," which he says import a term certain; (2) upon the grant of tenant-right in improvements upon the expiration of the lease by effluxion of time, which is a right appurtenant to all leases granted under the section, and inconsistent with a lease which might without default of the lessee be determined otherwise than by effluxion of time; (3) upon the express grant of a right to apply for a homestead selection during the last year of the term of the lease, which would be defeated if the lease were defeasible at the will of the Crown; and (4) upon a fixed rent being imposed for the whole term of the lease, which is inconsistent with part of the land being withdrawn from it during its currency.

He also points out that the words used to describe what the lease must contain and what it may contain are identical. It must contain covenants and provisions for the improvement of

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the land and the expenditure of money, for the payment of rent and for the determination of the lease upon any breach by the lessee of its covenants and provisions. In this limb of the paragraph the words "covenants and provisions" manifestly refer to obligations to be observed by the lessee. And it is asked why the same words in the preceding limb of the same paragraph should be construed as manifesting a power of defeasance in whole or part to be exercised by the Governor.

These arguments appear to me to have much cogency.

In answer to them it is contended for the Crown that the words "such covenants and provisions as to the Governor may seem expedient in each case" are sufficient to authorize a condition that the lease shall be defeasible at will, either as to the whole or any part of the land. The appellant replies that these words do not, even *primâ facie*, authorize a radical change in the nature of the tenure, and that a comparison with other enactments *in pari materiâ* will show that, even if they are capable of bearing such a meaning, they were not used by the legislature in that sense. I will refer to these other enactments in detail.

Sec. 37 of the *Crown Lands Act of* 1889 authorized leases to be granted for a term not exceeding 20 years of certain lands of inferior character, subject to the following provisions *inter alia*: —(I.) "Such leases shall be subject to such conditions as may be specified in the *Gazette* notice offering the land on lease"; (VIII.) "If the Minister shall be satisfied . . . that the holder of any such lease has failed or is failing to fulfil any condition of his lease" the lease may be forfeited by notification in the *Gazette*. Here the power to impose "conditions" appears to be unfettered, but they are conditions to be fulfilled by the lessee, and the term used is "conditions" and not "covenants and provisions" as in sec. 26 of the Act of 1895.

The appellant further contends that the whole course of legislation shows that the withdrawal or resumption of land from grant or lease has always been a matter kept by the legislature within its own control and dealt with by special enactment, having due regard in all cases to the rights of the grantees or lessees whose possession is interfered with.

Sec. 78, sub-sec. VII., of the Principal Act authorized withdrawal of land by the Governor from pastoral lease for certain limited purposes, and conferred a right to compensation in respect of the land withdrawn and the improvements thereon. Sec. 108 of the same Act authorized the Governor (now the Minister) to withdraw from lease or licence any land required as sites for towns and villages or for any public purpose; but this term did not include purposes of settlement.

By sec. 35 of the Act of 1889 a new form of tenure, called "Scrub Leases," was created, resembling in many respects those created by sec. 37 of that Act and afterwards by sec. 26 of the Act of 1895. It provided, *inter alia*, that the land held under such a lease should, subject to the provisions for withdrawal contained in sec. 78, sub-sec. VII., of the Principal Act, which were to be held to apply to scrub leases, be unavailable for purchase or lease during the whole currency thereof. Sec. 38 of the same Act authorized the Minister to cancel any annual lease at any time by giving not less than 3 months' notice in the *Gazette* or otherwise of his intention so to do, but the notice was required to terminate at the end of the current year.

After the year 1895 the same course of legislation continued. By an Act passed in 1903 (3 Edw. VII. No. 15) by which outgoing pastoral lessees and some other outgoing Crown tenants were allowed to apply for a lease of part of the area, the applications were (sec. 18) to be referred to the Land Board, upon whose report the application might be granted for a term not exceeding 28 years "subject to the conditions of withdrawal for settlement named in such reference" or such other conditions as the Governor might determine.

The *Crown Lands (Amendment) Act* 1908, which deals with a large number of subjects, provides *inter alia* (secs. 14-16) for the resumption (veiled under the name of "surrender") of land comprised in improvement leases and situated within 15 miles of a then existing railway. But the surrender is subject to approval by both Houses of Parliament, and the lessee is entitled to compensation on a basis specifically laid down, which includes the consideration of "any right of the Minister to withdraw the whole or any part of the land from the lease and the compensa-

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tion payable in respect thereof and for improvements on the land." By the same Act the power of withdrawal conferred by sec. 108 of the Principal Act on the Governor was transferred to the Minister, so that the right intended would seem to be that power of withdrawal only.

Reference was also made to an Act which is *in pari materiâ*, though it is not one of the Acts to be read with the Principal Act of 1884, namely, the *Western Lands Act of* 1901, which dealt with pastoral lands in the Western Division of the State. Under that Act (sec. 17) new conditions might be imposed upon the lessee, but the conditions on which land could be withdrawn from a lease granted under it were expressly defined.

Sec. 61 of the Act of 1895 empowers the Governor for the purposes of the Act to exercise the power of making regulations conferred on him by sec. 53 of the Act of 1889, which declares that regulations so made shall be good and valid in law.

The regulations so made prescribed the form to be used for improvement leases (Form 88), which contains a reservation of "such powers of resuming the land thereby demised or any part thereof as are hereinafter provided," and a provision that it shall be lawful to resume on three months' notice any part of the land which may be required for a road, railway, canal, or the like public purposes, without compensation except for improvements. The express reservation seems inconsistent with the addition of other reservations of a like nature. Moreover, "the yearly rent of the lease" being definitely fixed for the whole term, it is highly improbable that it was intended that a large portion of the land might be withdrawn from it, leaving the lessee still liable for the whole rent.

In addition to these arguments there are others which seem to me entitled to considerable weight. Where the terms of a Statute are ambiguous regard may properly be had to its object. In the present case the object of the enactment under consideration is to grant leases of land which is not suitable for settlement on terms which will require and encourage the lessee to expend "large sums of money" in its improvement so as to "render it suitable." The lessee will naturally have to wait for some time before he can obtain any return for his initial outlay, and will

expect an opportunity of enjoying the fruits of it. Under these circumstances fixity of tenure would seem to be a necessary, or at least a highly probable, condition of the lease.

Again, it was the plain intention of the legislature that the alienation of Crown lands should be conducted upon fixed and definite rules, so as to avoid the possibility of favouritism in administration. If a lease is offered to public tender on onerous conditions (such as liability to defeasance in whole or part at the will of the lessor), the rent obtained for it will probably be less than if the tenure is fixed, or is defeasible only on certain and definite conditions. It might, therefore, easily happen that a lease offered on such conditions would be obtained by a favoured tenderer, who could or thought he could afford to offer a higher rent than others in the belief that he would be able to exert sufficient influence to prevent the exercise of the power of defeasance adversely to him. Such stories are, unfortunately, not unheard of in the history of land administration in Australia.

On consideration of all these matters I have come to the conclusion that the term "covenants and provisions" used in sec. 26 of the Act of 1895 was not used in a sense which would include a condition for defeasance of the lease at the will of the Governor as to the whole or part of the land. In my judgment the only lease which the Governor is empowered to grant under that section is a lease of a definite area for a term certain, and he is not entitled to attach to the lease conditions making it defeasible at will in whole or in part, with or without apportionment of rent on partial eviction.

It follows that the Crown is not entitled to found any claim upon the Proclamation of 16th April 1913.

But the serious question remains whether the appellant is entitled to insist upon the lease as a lease for a term certain. Any case that he might have for rectification by omission of the unauthorized stipulation could not be based upon contract, for he must be taken to have known of the provisions intended to be inserted in the lease when he made his tender. Various analogies were suggested in the course of argument, none of which are complete. One is that of a void condition annexed to a grant,

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of which the case of *Ware* v. *Cann* (1) affords a good illustration. In that case a testator devised land "to A.B. and his heirs, but if A.B. offers to mortgage or suffer a fine or recovery upon the whole or any part thereof then to go to C D. and his heirs." The Court of King's Bench held that A.B. took an estate in fee with an executory devise over to take effect upon conditions which were void in law, and that he could make a good title to the land to a purchaser in fee from himself.

If I am right in thinking the condition in the lease in question is unauthorized by the Act, and if the principle of that case is applicable, the appellant's lease is a lease until 27th July 1923, subject to an executory condition which is void in law.

Another and, perhaps, closer analogy is that of the execution of a power accompanied by an unauthorized reservation of a power of revocation.

The authority conferred on the Governor to deal with Crown lands is in the nature of a special and limited power, and the provision for withdrawal now in question is analogous to a power of revocation reserved in an instrument executing a power. In the case of *Liddy* v. *Kennedy* (2) a similar provision was so treated. If I am right in the conclusion I have stated, the Governor had no authority to make such a reservation. In this respect, therefore, the authority implied in the case of powers created by instruments made by private persons is excluded. I cannot doubt that an attempt to reserve a power of revocation which is forbidden, or not expressly or impliedly authorized, by the instrument creating the power would be ineffectual, and it was so held by *North* J. in *Burnaby* v. *Baillie* (3).

A third analogy is that of a valid execution of a power of appointment in favour of a permitted object, followed by an unauthorized attempt to tie up or settle the property appointed. In such a case it is held that, the attempt having failed, the absolute interest already appointed remains unaffected: *Carver* v. *Bowles* (4), *Kampf* v. *Jones* (5); *Harvey* v. *Stracey* (6); *McDonald* v. *McDonald* (7).

(1) 10 B. & C., 433.
(2) L.R. 5 H.L., 134.
(3) 42 Ch. D., 282.
(4) 2 Russ. & M., 301.
(5) 2 Keen, 756.
(6) 1 Drew., 73, at p. 139.
(7) L.R. 2 H.L., Sc., 482.

The principle, as stated by *Wood* V.C. in *Woolridge* v. *Woolridge* (1), is that in such a case, where there is an appointment in favour of a proper object and that appointment is followed by attempts to modify the interest appointed in a manner which the law will not allow, the Court reads the instrument as if all the passages in which such attempts are made were swept out of it for all intents and purposes—even so far as they might otherwise be relied upon as raising a case of election.

I am, therefore, of opinion that on the construction of the lease as it stands, assuming it to be not altogether void, and if there were no more in the case, the plaintiff would be entitled to the first declaration which he asks.

On the other hand, it is said that this argument proves too much, since, as the lease is on its face a lease defeasible at will after 10 years, if the Governor had no authority to grant such a lease, it is absolutely void, and no claim can be founded upon it. I should find some difficulty in dealing with this point but for sec. 44 of the Act of 1895, which declares that any purchase or lease of Crown lands purporting to be made or granted under the repealed Acts or the Principal Act or after the commencement of the Act itself shall not be held to be void by reason of any breach or non-observance of any of the provisions of the Act, but that such a breach or non-observance, if of a nature to affect the validity of the purchase or lease, shall render it voidable only at the instance of the Crown. The section proceeds:—"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."

The words of sec. 44 are comprehensive, and in terms apply to all improvement leases "purporting" to have been issued under the Act. If, however, the only ground for avoiding the lease were that, the provision for withdrawal being void, the Crown had been deceived in its grant because the lease would not have

(1) John., 63.

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been issued except upon the supposition that that provision was valid, sec. 44 would not affect the matter, for the lease would, without it, be voidable only. It follows, in my opinion, that that section only applies to cases in which there has been such a breach or non-observance of statutory provisions as would make the lease, apart from the section, wholly void.

If, however, the lease now in question would but for sec. 44 have been void *ab initio*, I think that the words of the section are sufficient to include the case, and to make the lease, if it purports to have been issued under the Act, voidable only. The question then arises as to the effect of the provision which I have just quoted at length. In my opinion it means that the lease, if affirmed, is to be regarded as if the breach or non-observance of statutory provisions, whether relating to matters intrinsic or extrinsic to the instrument itself, had not occurred,—in other words, that the breach or non-observance is to be altogether disregarded.

When the breach or non-observance is in respect of matters antecedent and extrinsic to the instrument, whether in the nature of commission or omission, the defective authority may be ratified retrospectively in the manner prescribed by the section. When the breach or non-observance is in respect of matter intrinsic to the lease, I think that a distinction must be drawn between the omission of what should have been inserted and the insertion of what is explicitly or implicitly forbidden to be inserted. In the first case the lease may be ratified. But if it contains a provision the insertion of which is explicitly or implicitly forbidden the case seems to me to be different, and I do not think, having regard to secs. 5 and 6 of the Act of 1884, that ratification can render such a provision valid. In that case the question is, I think, whether the disregard of it, that is, its omission, would in effect be making a new lease substantially different in character. If it would, I think that the lease would not on its face "purport" to be made under the Act, and sec. 44 would not help it. But if the rest of the instrument, the invalid provision being omitted, would not be substantially different in character, and would be a lease within the Governor's authority,

I think that that section would save it. In other words, the test is whether the void provision is severable or not.

The insertion of void provisions in a lease is not an unusual occurrence, as, for instance, the insertion of a covenant by the lessee to pay land tax, such covenant being forbidden by a taxing Act. It has never been suggested that in such a case the validity of the lease is affected, or that the insertion of the forbidden covenant is such an illegality as to infect the whole of the consideration given by the lessee, and so make the whole contract void.

Upon the whole I think that the general principles of law applicable to void conditions annexed to a grant or appointment, and to attempts to exercise a non-existent power, should govern the case, and that, to use the words of *Wood* V.C., the lease should be read as if the provision in question were swept out of it. I think therefore that, if sec. 44 is applicable to the case, the void condition is severable.

In either view, therefore, the lease is not void, and can only be avoided, if at all, by proper proceedings for that purpose.

It may be that the lease is voidable on *scire facias* or information by the Attorney-General, but it will be time enough to consider that question when it is properly raised in a suit by that officer.

As to the alternative declaration asked for, I am of opinion that if the power of defeasance is valid it is an implied term of the lease that notwithstanding a Proclamation of withdrawal the lessee shall not be disturbed during a current year of his tenancy for which rent has been paid and accepted. Without elaborating my reasons for this conclusion I content myself by saying that I think the implication arises from the nature and purpose of the lease, coupled with the ordinary rule that a tenant at will is entitled to a reasonable time to remove his fixtures, and the estoppel which is ordinarily created by the acceptance of rent. I think that this point is distinctly raised on the statement of claim, or at any rate sufficiently raised for the purpose of demurrer.

BARTON J. I agree with the learned Chief Justice in the view that the power of withdrawal given to the Governor in the appellant's lease is not such a "covenant" or "provision"

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as is authorized in sec. 26 (IV.) of the *Crown Lands Act of* 1895; also that the only lease which the Governor is empowered to grant under that section is a lease of a definite area for a term certain. His Honor has discussed these questions exhaustively, and I think it unnecessary to supplement the reasons he has given. The provision impeached makes the lease, as his Honor has put it, defeasible by the lessor (the Crown) at any time after 10 years from its commencement, in whole or in part. It also provides for apportionment of rent on partial eviction.

One cannot but desire to sustain the lease, if possible, by discarding the power to destroy its effect in part. But, to my regret, I am constrained to differ from the opinion that the lease can be treated as if the unauthorized provision had not been inserted. I do not think that provision can be severed, so as to admit of the lease being so treated. It seems to me that the lease is either void altogether or is at best rendered voidable by virtue of sec. 44 of the same Act.

It has been argued on behalf of the Crown that the whole matter rests in contract; that there is nothing in the nature of an improvement lease, as a tenure created by the Act, which takes away the common law right of an intending lessee to consent to be bound by such a stipulation as is here impeached, and that the provision may be regarded as a mere term in a contract regulating the length of the notice upon which the lease may be terminated. I do not agree with that argument, which seems to mean that a stipulation which violates the Statute can be maintained as valid because it is the subject of an agreement in the lease. But I mention it to recall my mind to the fact that the provision is a term in the appellant's contract, and one that affects the contract as a whole. All that the Crown granted was the lease as it stands, with the unauthorized provision embedded in it. It is impossible to say that its inclusion has not influenced the contract to the advantage of the lessee in other respects. We must look at the matter from the contractual point of view before considering the effect of the Statute. This term was known to the appellant before he accepted the lease, which he was at liberty to decline if the term remained a part of it. It cannot be said that the Crown would have granted the lease on any other

conditions, or that it would have assented to a term of even so long as 10 years, or to the grant of such an area, if the plaintiff had insisted on the elimination of the power of withdrawal. Without that power, how can it be said on the one hand that the Crown would have granted the lease at all, or on the other hand that it would not have received a higher rent for the lease? It is clear from sec. 26 that the terms and conditions are fixed and notified before the lease is put up for auction or tender. I cannot escape from the conclusion that the lease was offered and purchased as a whole, and that the plaintiff cannot have its advantages without the inclusion of this onerous provision. Without it *non constat* that he would not have had to pay much more, and no one knows how much. There could not now be any adjustment of the rent, and it would be inequitable that the appellant should have all the benefits of the lease without the onus of this provision. As the appellant bought the lease as a whole, I think it must stand or fall as a whole.

Now, taken as a whole, the lease is so infected by the offending provision that it cannot be said to be valid altogether. Having regard to secs. 5 and 6 of the Principal Act of 1884, which, as I pointed out in *Bull* v. *Attorney-General for New South Wales* (1), are very clear and emphatic provisions against any dealings with the public lands by the Crown except in pursuance of authority granted by Statute, it is to my mind clear that the whole lease is either void or voidable. Apart from the provisions of sec. 44 of the *Crown Lands Act of* 1895 I have no doubt it would have been altogether void. Is it then merely voidable at the instance of the Crown by reason of that section? We must recur to *Bull* v. *Attorney-General for New South Wales* (1) for the solution of that question. Under that decision the section does not operate so as to give validity, or enable validity to be given, to a lease which in form and substance is not authorized by the legislature. Such a transaction is forbidden by secs. 5 and 6 of the Act of 1884. In that case I said (2):—"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 . . . . by sales or leases in their inception wholly unwarranted by the Acts,

(1) 17 C.L.R., 370.

(2) 17 C.L.R., 370, at p. 378.

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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. . . . I think the attempt to create a tenure wholly without statutory warrant must still be void, . . ."

I do not think that what has occurred in this case is merely an "incidental error in the course of completing an authorized disposition." What has been done appears to me, taking the whole lease together, to amount to an attempt to create an unauthorized tenure, and that is a transaction so definitely prohibited by secs. 5 and 6 above mentioned, that it cannot be supposed that sec. 44 of the Act of 1895 provided a cure for it.

If the lease were merely voidable the appellant would be in no better position upon this statement of claim. It would be voidable only at the instance of the Crown, which has taken no step to avoid it. Until avoidance it would be good as a whole, and therefore the provision impeached would continue to warrant the action which the appellant challenges, and his suit would fail.

I am therefore of opinion that *Harvey* J. was right in allowing the demurrer, and that the appeal must be dismissed.

ISAACS J. Several questions of law of great public importance affecting, as we were told, the titles to over a million acres of land have been raised in this appeal, and they will be considered in order.

(1) *Original legality of the withdrawal clause, and the provision for reduction of rent.*—By sec. 26 of the Act of 1895 the legislature conferred on the Crown a new specific authority to dispose of certain Crown lands. To the extent of that new authority, but no further, the power is an exception to the general prohibition in sec. 5 of the Act of 1884, which by sec. 1 of the Act of 1895 is taken to be one with the later Act.

Having regard to the description of the land in sec. 26, a power of withdrawal for public purposes is certainly a very convenient and desirable power to insert. In the known circumstances of this country, opportunities for settlement may considerably influence its welfare. Before 28 years elapse from the date of a lease, circumstances may so change as to make the land necessary

for settlement. Unless there is power to provide for contingencies of population requirements, such land might either have to be withheld altogether from interim use, or let only for very short terms, or might be found to be locked up when needed, and the locking up of available land is a very serious question for an Australian State. Even land held in fee simple can be taken for public purposes on just terms, and there is no reason to suppose the legislature meant an improvement lease which is only a lease for the interim use of the land to be an immovable legal fixture. On the contrary, the description of the land in the opening words of sec. 26 point in the contrary direction. The land is such as is "not suitable for settlement until improved" and "can only be rendered suitable by the expenditure of large sums in the improvement thereof." So that settlement is the main object, improvement is the *sine quâ non*, and the expenditure of money is the means.

As long as both parties are fully aware of the conditions of the contract and freely fix their own terms accordingly, there can be no complaint of unfairness, and this consideration, as will be seen when I deal with the question of equitable relief, has an important bearing on the result. Fairness includes a fair rent for the use of the land as long as it is in fact used, and the return of all expenditure on improvements handed over.

In my opinion, sub-sec. IV. of sec. 26 confers on the Governor a discretion to insert, in the advertised particulars notifying the public of the willingness of the Government to lease the land, any provision not inconsistent with the definite requirements of the section.

Some requirements are definite and unalterable. The term of the lease cannot exceed 28 years; the area cannot exceed 20,480 acres, that is 32 square miles; and the rent, which is the only term of the lease the Crown is not authorized to fix beforehand—except by way of reserve, that is, a *minimum*—must be the best the Crown can get by auction or tender. There is no room for negotiation; the public are told the irreducible terms of the proposed lease; the public are to make their offer of rent, which if accepted must be accepted as it stands.

In my opinion a provision to reduce the rent on the happening

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of any specified event is inconsistent with the third sub-section of sec. 26, because the yearly rent at the reduced rate is not auction or tender rent, and the Crown is not permitted to suggest or promise the rent. And see sec. 6 of the Act of 1889.

But in my opinion it is not inconsistent with the rest of the section to insert the well known clause (see *Platt on Leases*, vol. II., p. 461, and *Woodfall*, 17th ed., p. 407) either for terminating the whole lease, thereby restoring the original status of all the land, or for simply terminating the lease as to any part of the land, restoring thereby the original status of that part of the land. This was done under the English Act of 10 Geo. IV. c. 50: See *Coombes* v. *Dutton* (1). The rent offered at auction might either be fixed in view of the possibility or else the offer might be at so much per acre, which would adjust itself.

It is, however, as I think, inconsistent with the provisions of the section to add a proviso undertaking in the event of a partial withdrawal to reduce the rent for the residue. That falls within what I have said about the necessity of adhering to auction or tender rent.

The presence of such a clause does no harm to the State in respect of the amount of rent tendered for the whole lease, because that will certainly not be diminished by reason of the promise to reduce it in the given event; and, as the reddendum fixed the rent properly for the whole lease, the proviso is only a subsidiary clause applying to the case of a partial withdrawal, and so I think if the lessee chose to forgo the proviso it could be treated as separable and harmless.

If this were a case of partial withdrawal I should, in view of the provision for reduced bulk-sum, see difficulty on the one hand, on ordinary principles of contract, in allowing the Crown to enforce the higher rent unless the lessee were willing to waive the provision for reduction, and on the other hand in allowing the lessee to insist on the lower rent, because the lease would be left to operate for the residue, and according to its terms at a reduced rent invalidly fixed.

But as this is a case of complete withdrawal entirely terminating the lease, no such difficulty arises. There is then no

(1) 5 M. & W., 469.

inconsistency, and no illegally reduced rent on the one hand, or higher rent inequitably insisted upon on the other. Some of the decided cases which I have examined since the argument throw considerable light on the withdrawal clause.

In *Doe d. Gardner* v. *Kennard* (1), for instance, a lease was granted, habendum for 15 years from the date of the lease at a rent named. Proviso that if the lessor would "at any time or from time to time during the continuance thereof, be minded and desirous of having any part of the said piece or parcel of land . . . delivered up to him," and should give three months' notice, the lessee covenanted to yield and surrender up. Compensation was provided in respect of moneys laid out in "improving" the land given up, and thenceforth the rent reserved was to be reduced at the rate mentioned, and the reduced rent was to be treated as if it were the original rents. The lessor's assignee gave notice as to the whole and entered. The Court held that the proviso gave a valid "power" to take possession, and disregarded a contention that it was repugnant.

That case was approved and acted on in *Liddy* v. *Kennedy* (2). There a seven years' lease was granted, and a covenant permitting the lessor to give notice of intention to resume any portion of the land for building purposes. Lord *Chelmsford* (3) said:—"What is the character of the clause in question? Is it a condition, is it a covenant, is it an agreement, or is it (which appears to be more clearly a description of it) a power which is agreed upon between the parties that the lessor shall possess, of determining the interest of the tenant, and resuming possession on giving a certain notice?" Lord *Westbury* (4) said it was "a proviso which is entirely collateral to the demise"; and a "special power given by this particular reservation, which is contained in what I have called a collateral clause." Lord *Colonsay* (5) calls it "a power to resume."

The Crown can, for instance, limit a lease to 10 years, if it is satisfied that the land will probably be needed and fit for settlement in that time. But, if doubtful, I can see nothing to prevent

(1) 12 Q.B., 244.
(2) L.R. 5 H.L., 134.
(3) L.R. 5 H.L., 134, at p. 149.
(4) L.R. 5 H.L., 134, at p. 152.
(5) L.R. 5 H.L., 134, at pp. 155, 156.

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the Crown from allowing the land to be leased for 20 years, reserving the power to terminate the lease if necessary at the end of 10 years. The State does not suffer, it may benefit; the individual thinks he will benefit and enters into the bargain with full knowledge, and his offer of rent is on that basis.

It is urged that sec. 27, by reason of the right it gives to apply for a homestead selection in the last year of the lease, is opposed to what I have said.

There are, as it seems to me, two answers to this.

In the first place, it is clear to me, upon a careful reading of the section, that it proves too much. The right referred to is given to the holder of (*inter alia*) "any scrub lease not being within a pastoral or homestead lease . . . whether granted before or after" the Act of 1895. Therefore, if the argument is good that the intention of Parliament was by sec. 27 indicated that every lease there referred to was non-determinable by withdrawal, it includes scrub leases granted under the Act of 1889. But by sec. 35 of that Act such leases are expressly made determinable as to any land required, that is, in whole or part, by withdrawal. And by sub-sec. VII. of sec. 78 of the Act of 1884 (incorporated by sec. 35 of the Act of 1889) "settlement" is *eo nomine* included as a purpose for which withdrawal is permissible. But as it is absurd to contend in the face of the express provisions of the Act that scrub leases before 1895 were intended to be clear from withdrawal, and as those since the Act are placed in the same position, the argument relied on is obviously untenable.

The second consideration is this: Apart from the proverbial incongruities of the Land Acts, it must not be overlooked that the right of application may in any case be defeated by forfeiture and therefore is only a defeasible right. And, more than that, it is a right against which must be set the larger right of public advantage, and if the Crown thinks that under the intentionally wide language of sub-sec. IV. of sec. 26, a clause should be inserted to protect the public interest, I think there is no reason to abridge the natural meaning of the words of the enactment; and if, having so inserted the clause, the Crown finds at a given

moment the public interest requires the exercise of the power, then the private right must yield, on the agreed compensation.

I attach no importance to the express references elsewhere to withdrawal, because special provisions accompany them.

But there is still another consideration to reckon with. Sec. 61 of the Act of 1895 gives the power to make regulations, as in sec. 145 of the Act of 1884 and sec. 53 of the Act of 1889; and by the last mentioned section the regulations when made and gazetted are to be "good and valid in law." Regulation 159 prescribed the form of the lease as in Form 88, and that form includes a power of resumption on certain notice, and for certain purposes only, namely, "road, railway, canal or the like public purposes," and the compensation is for improvements not exceeding their cost. Does this exclude the power of termination by withdrawal for settlement? I do not think it does, because there are no negative words; and the form expressly provides for the inclusion of all "conditions" inserted in the *Gazette*. If, however, the clause for withdrawal be unlawful, what is its effect? In my opinion it is a depreciatory clause, and distinctly tends to lower the rent offered for the whole lease. This is an unlawful depreciation of the rent, and would be such a distinct violation of the section, which aims at getting the best rent that competition on terms permitted by law can give, that, apart from sec. 44, the lease must be regarded as invalid.

(2) *Sec.* 44.—After some hesitation, occasioned by the decision in *Bull* v. *Attorney-General for New South Wales* (1), as to whether the present case, in the event of invalidity, falls within the healing influence of sec. 44, I have come to the conclusion that it does. I think there is a sufficient distinction between the fault of the lease in *Bull's Case* (1) and the suggested departure in the present. The invalidity, if it be an invalidity, is by reason of a new term, not a departure from an expressly stated requisite of the lease. Sec. 44 applying makes the lease voidable only, and that at the instance of the Crown alone. Otherwise the lessee would lose even the value of his improvements. But being voidable, instead of void, and voidable only at the instance of the Crown, involves the consequence that the whole lease in all its

(1) 17 C.L.R., 370.

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terms is saved, subject to being avoided in appropriate method. A voidable transaction is valid in its entirety, unless and until avoided, and then it is annulled in its entirety, and as *Farwell* J. said in *Manchester City Ship Canal Co.* v. *Manchester Racecourse Co.* (1):—"When the legislature declares an agreement valid, it is valid *in toto*, and I am not at liberty to hold it partly invalid."

(3) *Reasonable notice.*—Granting for the sake of argument the validity of the withdrawal power, the plaintiff contends that before it can be exercised there should be reasonable notice given.

A distinction might be made—as to which I decide nothing—if it were sought to treat the appellant as a trespasser *eo instanti* of the *Gazette* publication of the withdrawal. An implied reasonable opportunity for the removal might well be held to exist. But no such complaint is made in the present case. The only objection is that the power of withdrawal of the land, that is, of the termination of the lease, cannot be exercised until some reasonable notice is given. And at the bar it was plain that this was the position the Crown contested. As to this, the words used in the power, namely, "at any time," are too strong for the objection. (See *Bridges* v. *Potts* (2) and *Soames* v. *Nicholson* (3)). The considerations already adverted to would be sufficient to dispose of the plaintiff's claim; but there are others which appear to me equally fatal.

(4) *Election.*—The doctrine of approbate and reprobate, which is the Scottish name for the English doctrine of equitable election, applies only to attempted dispositions of property for the benefit of a person on conditions. He must either comply with the conditions, or make compensation, or reject the gift. Closely connected with this is the special rule as to appointments under powers whereby in some cases *ultra vires* conditions are disregarded, leaving the gift standing. (See *Woolridge* v. *Woolridge* (4) and *McDonald* v. *McDonald* (5)).

The only election applicable here is the common law rule of electing to affirm or disaffirm a contract.

Really the question of election by the plaintiff cannot arise. If

(1) (1900) 2 Ch., 352, at p. 359.
(2) 17 C.B.N.S., 314.
(3) (1902) 1 K.B., 157.
(4) John., 63, at p. 69.
(5) L.R. 2 H.L., Sc., 482.

the condition of withdrawal is originally valid, there is no question of confirmation; if it is illegal and inseparable, confirmation of the contract is impossible, for a nullity cannot be confirmed: *Harle* v. *Jarman* (1). If illegal originally, but aided by sec. 44, there is not room for confirmation by the plaintiff, because it is no longer void, and is not even voidable except by the Crown.

But lastly, if the clause is itself illegal, yet separable, there has been no confirmation of it by the plaintiff, and no Court would lend its aid to enforce it against him. Whether he on the other hand could in that case himself successfully invoke the intervention of the Court requires separate attention.

If, then, the clause is originally legal, there is a lease but no case; if saved by sec. 44, the same consequence; it illegal and inseparable and not saved by sec. 44, there is neither lease nor case; if illegal and separable, the position depends on further considerations.

If, however, the lease be considered voidable generally, the plaintiff would then have to elect whether he would avoid it entirely or affirm it entirely and abide by the withdrawal.

A man cannot be allowed as a general rule to ask a Court, and especially a Court of Equity, to enforce in his favour some stipulations in a bargain voluntarily entered into, and assist him to escape from other stipulations in the same bargain. That is certainly so where no illegality is alleged.

(5) *Severability.*—It is said, however, the illegality of the withdrawal clause is an exceptional circumstance, and the Court will simply excise the clause and leave the rest standing. That would, in this case, be forcing on the opposite party a bargain he never entered into. The doctrine of severing illegal promises was referred to. But there is no analogy. If a man for valuable consideration promises another two distinct and separate things, one lawful and the other unlawful, the promisee may content himself with the lawful thing, and have it, though he cannot compel compliance as to the unlawful promise. The case of *Bank of Australasia* v. *Breillat* (2) is the highest authority for that. But, on the other hand, as *Willes* J. said in *Pickering* v.

(1) (1895) 2 Ch., 419.

(2) 6 Moo. P.C.C., 152, at p. 201.

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Ilfracombe Railway (1):—"Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void." And see *Kearney* v. *Whitehaven Colliery Co.* (2).

If once it be assumed that the withdrawal clause is invalid, then it is inseparable, because it inevitably affects the rent, and vitiates the whole contract, which thus becomes void and not susceptible of affirmance (see Lord *Cairn's* judgment in *President and Governors of Magdalen Hospital* v. *Knotts* (3)), and so the plaintiff's argument of illegality destroys the very foundation on which he stands. He must, therefore, if as to him the bargain is voidable, elect either to regard the lease as good, in which case his complaint of interference with his estate fails; or to regard it as invalid, in which case he has no estate at all.

(6) *Equitable right to relief.*—The relief claimed is a declaratory judgment and an injunction.

A declaratory judgment is often a very convenient, speedy and desirable means of ascertaining or adjusting doubtful rights. A lessee's rights may in this way be protected from injury by conduct of the landlord in breach of his contract as in *Young* v. *Ashley Gardens Properties Ltd.* (4), or in violation of a Statute as in *West* v. *Gwynne* (5). But the power to make a declaratory order is discretionary, and is to be granted or refused with careful relation to the circumstances. In *Sree Narain Mitter* v. *Sreemutty Kishen Soondory Dassee* (6) the Privy Council say:—"It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for." This view has been adopted in very recent English cases.

Now, to my mind, it is unconscientious for a party in the position of the plaintiff, who is *sui juris* and has with his eyes open, after full opportunity for consideration, and without overreaching or other improper conduct of the opposite party, to ask to be relieved

(1) L.R. 3 C.P., 250.
(2) (1893) 1 Q.B., 700, particularly at p. 713.
(3) 4 App. Cas., 324.
(4) (1903) 2 Ch., 112.
(5) (1911) 2 Ch., 1.
(6) L.R. I.A., Sup. Vol. (1873), 149, at p. 162.

from an onerous term of his bargain while clinging to the benefits it gives him.

So strongly, however, does equity discountenance such a claim by a suitor, that where illegality is the ground of complaint, something more is needed (for instance, in some cases, public policy) before the active interference of the Court is attracted. Illegality as a defence is one thing; as a claim for active interposition it is another. In *Jones* v. *Merionethshire Permanent Benefit Building Society* (1) *Lindley* L.J. says:—"A plaintiff is not entitled to relief in a Court of Equity on the ground of the illegality of his own conduct. In order to obtain relief in equity . . . he must prove either pressure or undue influence. If all that he proves is an illegal agreement, he is not entitled to relief." Taking it at the best for the plaintiff that is all he alleges here. A plea is not necessary to displace the plaintiff's equity, because he has not sufficiently averred it (see *Rowe* v. *Teed* (2)). The doctrine of equity stated by *Lindley* L.J. applies with additional force where the illegality is asserted as to a part only of the agreement, the burden of which part the plaintiff seeks to escape, while retaining the benefit of the remainder. *Willes* J. in *Grimston* v. *Cunningham* (3) says:—"The Court will decline to interfere by injunction where the plaintiff fails to do that which he has promised to do as part of the contract." See also *per Giffard* L.J. in *In re Cork and Youghal Railway Co.* (4). See also *Halsbury's Laws of England*, "Injunction," vol. 17, par. 512.

The claim for the injunction consequently falls with that for the declaration, and for the same reasons.

In my opinion, therefore, the appeal fails and should be dismissed.

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

GAVAN DUFFY J. In this case the plaintiff contended that he was entitled to his lease free from the provision enabling the Governor to withdraw the whole or any part of the land leased, and there was much debate as to whether this provision was

(1) (1892) 1 Ch., 173, at p. 182.
(2) 15 Ves., 372, at p. 377.
(3) (1894) 1 Q.B., 125, at p. 130.
(4) L.R. 4 Ch., 748.

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itself unauthorized by the legislature, and, if so, whether it followed that the lease was void or voidable. We think it neither necessary nor expedient to determine any of these questions. If it is desired to establish the validity of the lease in the form in which the Executive has chosen to issue it, it should be done by an exercise of legislative power. Judicial construction is more likely to darken than to illuminate the existing obscurity, and might introduce doubt as to the meaning of other provisions of the Crown Lands Acts.

It is enough to say that the plaintiff is not entitled to take the benefit of one portion of his lease and repudiate the limitation contained in another part, or to waive a provision which is not for his benefit but for the benefit of the lessor. He must take the lease as it stands or not at all.

It is further argued that on the construction of the lease the plaintiff was entitled to reasonable notice before the land was withdrawn, and that the withdrawal could not take place during the currency of a year in respect of which rent had been paid in advance under the lease. In our opinion the words of the lease mean what they say, and entitle the Governor to withdraw the land for the purposes of settlement at any time after 10 years from the commencement of the lease.

It was then argued that the tenant should be allowed some time after the withdrawal in order to remove his stock and chattels. This point is not raised in the statement of claim, and we are informed by counsel for the defendant that it was never intended to summarily eject the plaintiff from his holding; it is therefore unnecessary to say anything more about it.

During the argument it was suggested that the provision contained in the lease for reducing the rent if portion of the land be withdrawn is itself *ultra vires* and inconsistent with the provisions of sec. 26 of the Act of 1895.

If the provision is invalid either the view of our brother *Isaacs* is correct, and it may be waived, or the lease itself is void and the plaintiff is without a title, or the lease is voidable at the instance of the Crown by virtue of the provision of sec. 44 of the Act of 1895 and is valid unless and until the Crown avoids it. In no view of the matter is the plaintiff's case assisted.

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We think that the defendant is entitled to succeed on his demurrer.

Appeal dismissed with costs.

Solicitor, for the appellant, *C. W. Alexander*, Hay, by *Pigott & Stinson.*

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

B. L.

[PRIVY COUNCIL.]

THE COMMISSIONER OF TAXES (VICTORIA) . APPELLANT;

AND

THE MELBOURNE TRUST LIMITED . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1914.

July 24.

Income Tax—Company—Profits—Company formed to realize assets of companies in liquidation—Surplus proceeds of realization—Business of company—Income Tax Act 1903 (*Vict.*) (*No.* 1819), *sec.* 9.

Three assets companies were formed in England in December 1897 to carry out schemes of arrangement of the affairs of three Victorian banking companies then in course of liquidation in England and Victoria. In each case provisional agreements had been made with the sanction of the Courts in England and Victoria. The basis of each scheme was that the whole of the assets of the banking company should be handed over to a company to be formed for the purpose of carrying it into effect. The creditors of the respective banks were to accept, in full satisfaction of their claims, shares and debenture stock in the respective assets companies. The objects of each assets company were stated in its memorandum of association to be (*inter alia*)

* Present—Earl Loreburn, Lord Dunedin, Lord Atkinson, Lord Sumner, Sir Joshua Williams, and Sir Arthur Channell.