Solicitor, for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the respondent, *Bakewell, Stow & Piper*, Adelaide, by *Norton, Smith & Co.*

B. L.

H. C. OF A. 1915.

THE KING v. SNOW.

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE REGISTRAR OF TITLES FOR VICTORIA.

EX PARTE THE COMMONWEALTH.

H. C. OF A. 1915.

SYDNEY, *March* 9, 10.

MELBOURNE, *June* 3, 4; *Sept.* 16.

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

Land—Acquisition by the Commonwealth—"Sell and convey," meaning of—Lease by municipality to Commonwealth—Power of municipality to grant lease—Lease for 500 years at peppercorn rent—Refusal by Registrar of Titles to register—Local Government Act 1903 (*Vict.*) (*No.* 1893), *secs.* 238,* 239*—*Lands Acquisition Act* 1906 (*No.* 13 *of* 1906), *secs.* 5, 8, 9—*Defences and Discipline Act* 1890 (*Vict.*) (*No.* 1083), *sec.* 12—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (XXXI.), 69, 70.

High Court—Jurisdiction—Mandamus to Registrar of Titles of Victoria—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 75 (III.).

A municipality in Victoria purported to lease certain land, of which it was the registered proprietor, to the Commonwealth for a term of 500 years at a rental of one peppercorn yearly if demanded. The lease contained a covenant by the Commonwealth to pay all water and sewerage rates in

* Sec. 238 of the *Local Government Act* 1903 (Vict.) provides that "Every municipality shall have and be deemed to have had power to let on lease to His Majesty or the Board of Land and Works for any term and subject to any exceptions reservations covenants or conditions any land building or tenement vested in such municipality."

Sec. 239 provides that "Every municipality may grant convey or transfer in fee simple or for any less estate, and either with or without a money or other valuable consideration, unto His Majesty or to the Board of Land and Works or to the Minister of Public Instruction any land building or tenement; and every such grant conveyance or transfer heretofore made shall be good and valid in law and equity."

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

respect of the land and not to use it for any purposes but purposes in connection with naval and military defence. The Registrar of Titles for Victoria having refused to register the lease,

Held, by *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Isaacs* J. dissenting), that the lease was not authorized by the *Local Government Act* 1903 (Vict.) or by the *Lands Acquisition Act* 1906, and, therefore, that the Registrar of Titles properly refused to register it.

By *Griffith* C.J. and *Isaacs* J.—The High Court has, under sec. 75 (III.) of the Constitution, jurisdiction to issue a mandamus to the Registrar of Titles of Victoria to register an instrument to which the Commonwealth is a party and which he has improperly refused to register.

MANDAMUS.

By an instrument under seal dated 1st April 1914 the Mayor, Councillors and Burgesses of the Town of Coburg, in Victoria, purported to lease to the Commonwealth a certain piece of land within the municipality, of which the Corporation were the registered proprietors, for the term of 500 years at the yearly rental of one peppercorn if demanded, subject to the covenants and powers implied under the *Transfer of Land Act* 1890 (Vict.), unless negatived or modified, and also subject to the following conditions:—(1) Covenants by the lessee (*a*) to pay upon demand the rent reserved and to pay all water and sewerage rates payable in respect of the premises if any should be legally chargeable, (*b*) not to assign, underlet or part with the possession of the premises or to use them for any purpose other than purposes in connection with the naval and military defence of the Commonwealth; (2) a covenant by the lessors for quiet enjoyment; and (3) mutual covenants (*a*) that the covenants and powers implied under sec. 100 (2) and 101 of the *Transfer of Land Act* should be negatived, and (*b*) that if the lessee should fail to pay the rent reserved within one month after demand, or if the lessee should fail to observe or perform any of the covenants to be observed or performed on his part, or if the lessee should use the premises for any purpose other than for purposes in connection with the naval and military defence of the Commonwealth the lessors might re-enter, and the tenancy should thereupon determine.

The lease having been lodged in the Office of Titles of Victoria

for registration, the Registrar requested to be informed whence the municipality derived authority to make the lease, and was informed that the authority relied upon was contained in secs. 5 and 8 of the *Lands Acquisition Act* 1906. The Registrar, who was of opinion that those sections did not confer authority upon the municipality to make the lease, refused to register it. The Commonwealth then obtained in the High Court an order *nisi* for a mandamus directing the Registrar to register the lease.

The matter was argued in Sydney on 9th and 10th March before *Griffith* C.J. and *Isaacs*, *Gavan Duffy* and *Rich* JJ., and was directed to be re-argued before a Full Bench.

H. I. Cohen, for the Commonwealth, moved the order absolute.

Mann, for the Registrar of Titles, showed cause. The municipality has no power under the law of Victoria to make a gift of land or of a leasehold estate in land owned by it, and no such power is conferred upon it by the *Lands Acquisition Act* 1906. Before the passing of that Act a municipality could only divest itself of its interest in land in accordance with the provisions of secs. 234-239 of the *Local Government Act* 1903, which give no power at all to grant a lease for 500 years. The power in sec. 239 to grant land to His Majesty only applies to the Crown as representing Victoria, and does not authorize a grant to the Commonwealth. Sec. 8 of the *Lands Acquisition Act* is a machinery section for the purpose of carrying into effect the power given to the Commonwealth by sec. 51 (XXXI.) of the Constitution to acquire land on just terms. The power to "sell and convey" given by sec. 8 is one power; so that there cannot be a conveyance without a sale. If "convey" in that section means "convey, transfer or lease," then the power in sec. 8 with respect to leasing is a power to "sell and lease." The transaction authorized by sec. 8, whether it includes a lease or not, must be for valuable consideration. There are no onerous covenants in this lease which would be equivalent to valuable consideration. If the covenant as to rates refers to rates which are in payment for services rendered, it is not onerous, and no rates could be demanded from the Commonwealth which were

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

not for services rendered. It is not disputed that the Court has jurisdiction in this case to issue a mandamus to the Registrar of Titles. The jurisdiction is given by sec. 75 (III.) of the Constitution. The Commonwealth in these proceedings is in the same position as a private litigant seeking to enforce a right given to him by a Victorian Statute. The fact that the mandamus is to a State official does not render it an interference with a State instrumentality. But the Registrar properly refused to register the instrument, for there is either a want of power to grant the lease or a breach of duty apparent on the face of the instrument. The Registrar is not merely a ministerial officer but has to exercise powers of adjudication: *Manning* v. *Commissioner of Titles* (1). It is not, however, the duty of the Registrar to take any objection to the validity of the *Lands Acquisition Act*, and none is taken.

Cohen, in reply. Mandamus is the proper remedy in this case: *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (2).

[RICH J. referred to *Ex parte Clark* (3); *In re Nance*; *Ex parte Ashmead* (4); *Guthrie* v. *Fisk* (5).]

This Court has jurisdiction to issue mandamus to the Registrar under its original jurisdiction conferred by sec. 75 (III.) of the Constitution. A conveyance is a necessary instrumentality for the acquisition of land, and as such must be allowed to be registered: *The Commonwealth* v. *State of New South Wales* (6). Sec. 239 of the *Local Government Act* 1903 gives power to a municipality to lease to His Majesty. The words "His Majesty" must be interpreted most beneficially to the Crown, and there is no reason why they should not include His Majesty in right of the Commonwealth. This lease is substantially a lease to His Majesty. There was power in the municipality under the *Defences and Discipline Act* 1890 to make this lease to the King for defence purposes, and under sec. 70 of the Constitution the same power continues to exist. The power conferred by sec. 51 (XXXI.) to acquire on just terms is severable, and the only power

(1) 15 App. Cas., 195.
(2) 14 C.L.R., 286.
(3) 17 V.L.R., 82; 12 A.L.T., 163.
(4) (1893) 1 Q.B., 590.
(5) 3 B. & C., 178.
(6) 3 C.L.R., 807.

with which this case is concerned is the power to acquire. This lease is authorized by sec. 8 of the *Lands Acquisition Act*. That section gives two separate powers, one to sell and another to convey, and, by virtue of sec. 5, the power to convey includes a power to lease. The lease is not without consideration.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. By an instrument dated 1st April 1914, under the seal of the Corporation of the Mayor, Councillors and Burgesses of the Town of Coburg, the Corporation purported to demise to the Commonwealth a parcel of land containing 2 acres 2 roods and 3 perches, of which they were the registered proprietors in fee simple, for the term of 500 years at a peppercorn rent, subject to a covenant by the lessees to pay all water and sewerage rates legally payable in respect of the land, and a covenant (also made a condition) not to assign or underlet or part with possession of the land, or to use it for any purpose other than purposes in connection with the naval and military defence of the Commonwealth. The instrument was presented to the Registrar of Titles for registration under the *Transfer of Land Act*, but that officer refused to register it on the ground that the Corporation had no power to grant it.

The lease was apparently made to the Commonwealth, instead of to His Majesty, in view of a provision of the *Lands Acquisition Act* No. 13 of 1906 (sec. 57), by which the Commonwealth is declared to be a corporation for the purposes of the Act with power to acquire and hold land. In substance, the demise is to the political entity called the Commonwealth, of which the Sovereign is the head.

That Act makes provision for the acquisition of land either by agreement with the owner or by compulsory taking, and, as usual in Statutes of that character, special powers are conferred in certain cases upon persons who are not absolute owners. No question is raised as to the validity of the Act.

In my opinion no statutory authority is necessary to enable the Commonwealth to acquire from an owner of land *sui juris* any

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Griffith C.J.

interest in that land by way of purchase or otherwise. The *Lands Acquisition Act* deals with the case where the Commonwealth desires to acquire an interest in land and there is not, except by virtue of the Act, any person who can dispose of that interest by contract or conveyance.

I will deal with the present case under both aspects, and first with the latter on the assumption that the Coburg Corporation had no power to grant the lease except under the Act.

Sec. 8 of the Act enacts that "any person seised, possessed, or entitled to any land, particularly any (*a*) corporation, (*b*)" (then follows a list of enumerated persons) "may (by force of this Act and notwithstanding anything to the contrary in any law, deed of settlement, memorandum, or articles of association, deed, or instrument) sell and convey the land to the Commonwealth, and may enter into any agreement for that purpose." The complementary provision authorizing the Commonwealth to acquire land is contained in sec. 14, which provides that "The Governor-General may approve of the acquisition by the Commonwealth of any land by agreement with the owner." By sec. 5 the term "land" includes any estate or interest in land. It follows that any of the persons mentioned in sec. 8 is empowered to "sell and convey" to the Commonwealth, and the Commonwealth is entitled to acquire, an interest in land less than freehold. If there were any room for doubt on this point it is removed by the second paragraph of sec. 14, which authorizes the Minister, when the interest proposed to be acquired is a lease for a term not exceeding three years at a rental not exceeding £50 per annum, to approve of the acquisition of the lease by the Commonwealth by agreement with the owner without requiring the approval of the Governor-General. It is, I think, impossible to read these provisions as meaning that the Commonwealth cannot acquire a lease except by assignment. A difficulty might have been raised by the use of the words "sell and convey" in sec. 8 without the word "demise" or "lease," but that difficulty is removed by sec. 5, which defines the word "convey" as meaning "convey, transfer, or lease." Sec. 8 is, therefore, so far as regards the acquisition of leasehold interests in land by the Commonwealth, to be read "may sell and lease," which, having regard

to the purpose of the Act and the context, must mean "may enter into an agreement to grant a lease and grant a lease in pursuance of the agreement." It is suggested that it is inaccurate to use the word "sell" to denote an agreement made for any other than a pecuniary consideration. Perhaps so, but the meaning is plain enough. Moreover, a lease for 500 years (or, indeed, for any less term) is a qualified sale.

The case falls, therefore, exactly within the terms of the Act.

On this being pointed out to the Registrar of Titles, he took the further objection that sec. 8 of the Act merely converted the persons mentioned in it into trustees with powers of sale, and that the proposed lease was not a *bonâ fide* exercise of such a power. As to this objection, it is to be remembered that sec. 8 is an enabling provision, which empowers the persons enumerated to give a legal title to the Commonwealth irrespective of any fetters that might otherwise exist as between themselves and other persons.

While the Registrar of Titles may be justified in refusing to register an instrument which is on its face a breach of trust, or is forbidden by positive law, it is not, in my opinion, competent for him to examine the propriety of the bargain or the sufficiency of the consideration for an instrument presented for registration unless he has independent reasons for suspecting fraud, in which case he would, I think, be justified in holding his hand. In the present case it is impossible, in my opinion, having regard to the lessee's covenants, to affirm that the lease was given without consideration. The adequacy of the consideration or propriety of the bargain is no concern of his or ours.

I am also led to the same conclusion, on consideration of the other aspect of the case, by a different and independent road.

Sec. 234 of the Victorian *Local Government Act* 1890 enacted and declared that every municipality should have and be deemed to have had power to let on lease to Her Majesty or the Board of Land and Works (a body incorporated under the law of Victoria for the purpose of holding and administering land on behalf of the Government) for any term and subject to any exceptions, reservations, covenants or conditions any land vested in the municipality.

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Griffith C.J.

By sec. 235 of the same Act municipalities were empowered to grant, convey or transfer any land in fee or for any less estate, either with or without a money or other valuable consideration, to Her Majesty or the Board of Land and Works or the Minister for Public Instruction.

By the *Defences and Discipline Act* of the same year a Council of Defence was created, which was empowered (sec. 12) to purchase, take and hold any lands or buildings for (*inter alia*) parade grounds and orderly rooms. I have no doubt that an agreement made under the power conferred by secs. 234 and 235 of the *Local Government Act* to transfer land to Her Majesty for such purposes could have been lawfully carried out by a transfer to the Council of Defence *eo nomine*. That would, indeed, have been the proper mode of giving effect to it.

By the effect of sec. 69 of the Constitution the departments of naval and military defence in the States were transferred on the proclaimed date to the Commonwealth.

Sec. 70 of the Constitution provides that "In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires."

All the powers and functions of the Council of Defence, including the power to make an agreement with a municipal corporation for the acquisition of land for defence purposes, therefore, became vested on the proclaimed date in the Defence Department of the Commonwealth, and such an agreement might have been carried into effect by a transfer of the land into the name of any person lawfully designated by the Commonwealth Government for that purpose.

The result is that by the conjoint operation of the *Local Government Act* and the Constitution the term "Her Majesty," as used in the *Local Government Act*, had come to mean, so far as regards the administration of the laws in force in Victoria

relating to defence, the Sovereign in his capacity as head of the Commonwealth.

By the *Local Government Act* of 1903, which consolidated the laws relating to local government, the Act of 1890 was repealed, and its provisions, with those of later Acts amending it, were re-enacted, secs. 234 and 235 being re-enacted, in identical terms, as secs. 238 and 239. In my judgment, the provisions thus re-enacted must be construed as having the same meaning and effect as the repealed sections had at the time of repeal. The lease was, therefore, expressly authorized by the State law as well as by Commonwealth law. From either point of view the Commonwealth is entitled to have the lease registered. In this respect its rights are precisely the same as those of any other transferee of land who is entitled to call for registration.

It has been decided by this Court that the appropriate remedy for enforcing this right is by application for a mandamus (*Perpetual Executors &c. Co.* v. *Hosken* (1)), that is to say, by a litigious proceeding at the suit of the transferee. The question of the proper forum in which to assert the right is an entirely independent one. It has been suggested that the only competent forum is the Supreme Court of the State. Sec. 75 of the Constitution, however, provides that in all matters (*i.e.*, all litigious proceedings) in which the Commonwealth is a party the High Court shall have original jurisdiction.

The only condition of the Commonwealth's right to sue in the High Court is that it shall be a party to the proceeding. This express provision cannot be cut down by any implied prohibition of interference with a State functionary. But in truth there is no interference. The Registrar of Titles is called upon by a competent party to do an act which he is required to do by the law of Victoria. An enforcement of the laws of a State at the suit of a private suitor cannot in any intelligible sense be called an interference with the executive functions of the State.

This Court, therefore, has jurisdiction to entertain the present application, which, for reasons already given, should in my judgment be granted.

(1) 14 C.L.R., 286.

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

ISAACS J.

ISAACS J. This is an application by the Commonwealth of Australia to compel the Registrar of Titles of Victoria to register a transfer to it of land by the municipality of Coburg.

The first thing to be determined is that of the jurisdiction of this Court to entertain the present application, as to which a question was raised during the argument. This is an extremely important question, and having been raised, though I cannot feel any doubt upon it, it deserves close attention. The answer depends upon the meaning of a very few words.

In sec. 75 of the Constitution it is provided, *inter alia*, that "In all matters in which the Commonwealth is a party, the High Court shall have original jurisdiction." The word "matters" is of wide import, but is confined to disputes susceptible of determination by legal standards. I can only repeat as to this what I said in the *Boundary Case* (1): that the word "matters" includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations, and constitutes the measure of their respective rights and duties.

Assuming the proceeding is concerned with such a "matter," the only necessary fact to establish the jurisdiction of the Court under sub-sec. III. of sec. 75 is that the Commonwealth is a party. To introduce qualifications or additions is to amend the Constitution, and that is not a judicial function.

It was suggested that there is an implied exception of State "instrumentalities" as defendants. If that is so, it excludes the States themselves—for the agent cannot stand higher than the principal—and the exclusion extends to every sort of legal process.

But that is contradicted by the Constitution itself, in sub-sec. IV. of sec. 75, and in sec. 78. Under the latter section Parliament has enacted in the *Judiciary Act*, sec. 57, as to suits by the State against the Commonwealth, and sec. 58 as to suits by the Commonwealth against a State. Other sections deal with process.

If this power did not exist, then the Commonwealth, for the protection and assertion of its rights, would be driven to enter the State Courts. Further, in so doing, it could invoke State

(1) 12 C.L.R., 667, at p. 715.

jurisdiction only, because the jurisdiction that can be conferred by the Commonwealth Parliament upon State Courts is only federal jurisdiction, and is limited by sec. 77 to the "matters" mentioned in secs. 75 and 76. The absurdity of this position is well shown by the reasoning in the case of *United States* v. *Texas* (1), re-affirmed in *United States* v. *Michigan* (2).

The duty alleged in the present case arises only under the State *Transfer of Land Act*, and therefore, in respect of the present matter, the State Courts' federal jurisdiction depends equally with that of the High Court on sub-sec. III. of sec. 75. I am unable to cut down the comprehensive words of that sub-section and drive the Commonwealth, not only to State Courts, but also to State judicial jurisdiction. If that were so, a State could by its own legislation provide that no suit of the present nature should be entertained by a State Court, and the Commonwealth would be without any means of redress whatever. The mere statement of such a result—which necessarily flows if the suggestion is correct—appears to me to carry its own refutation.

In America the Supreme Court has held, with regard to State officers, that while a State cannot be sued in America without its consent, and while a Court cannot substitute its own discretion for that of executive officers, yet that when a plain official duty requiring no exercise of discretion is to be performed and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it: *Board of Liquidation* v. *McComb* (3), a case originating in federal jurisdiction. This has been quoted with approval in *Ex parte Young* (4) in 1907.

The last mentioned case points out (5) that the power to give the remedy exists where the act commanded is an act which does not affect the State in its sovereign or governmental

(1) 143 U.S., 621, at pp. 643-645.
(2) 190 U.S., 379, at p. 396.
(3) 92 U.S., 531, at p. 541.
(4) 209 U.S., 123, at p. 158.
(5) 209 U.S., 123, at p. 154.

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Isaacs J.

capacity. Now, that leads to the inquiry as to the nature of the claim made here, and the nature of the duty sought to be enforced.

The claim by the Commonwealth is not made in any governmental capacity, but in its proprietary capacity, just as any private individual would claim in a similar case. The distinction between the two is clear and broad. See *Ontario Mining Co.* v. *Seybold* (1). Then, as to the Registrar, it is plain that it is to the individual he owes the duty to register a transfer in an appropriate case. If his duty under the Act to register were to the Crown only, without some words of extension, it would in that case primarily mean the Crown in right of Victoria, and a mandamus at the instance of a proprietor, or, indeed, of the Crown in any other right than that of Victoria, would not lie.

The Commonwealth is, then, for the present purpose regarded simply as a proprietor who desires to have the fact of ownership recorded according to law, which, in this instance, is the State law. An applicant may be not merely a private individual, but the State of New South Wales or the Dominion of Canada or of New Zealand, claiming to have the title registered; but in each case the Registrar's duty is the same.

In none of these cases, any more than in the case of a private individual, is there any interference with what has often been called State instrumentalities—a term which I have come to recognize as a bewildering and misleading expression. *Blackburn* J., in *The Queen* v. *Lords Commissioners of the Treasury* (2), draws the distinction between an obligation cast upon an official as the servant of the Sovereign, and a duty cast upon him towards third persons which is the subject of mandamus or of action (*Fulton* v. *Norton* (3)). If it were the former, no Court—not the State Court nor the Commonwealth Court—could command the performance of the duty (*In re Nathan* (4)).

As the duty is one by an individual, holding a certain office, towards any person as transferor or transferee, the failure to perform that duty is a "matter" within the meaning of sec. 75 of the Constitution, and this Court has jurisdiction.

(1) (1903) A.C., 78, at p. 82.
(2) L.R. 7 Q.B., 387, at pp. 398, 399.
(3) (1908) A.C., 451.
(4) 12 Q.B.D., 461.

Passing, then, to the controversy itself, the substantial question is whether the municipality of Coburg has the capacity to grant the lease to the Commonwealth.

The view that it has not, will be found to result in denying all statutory authority to the Commonwealth under the Act to take an original lease from any landowner, although it might admittedly purchase a lease already granted, and pay an extra premium of unlimited amount for it by way of profit to the middleman. That is said to be the true intention of Parliament; but, if so, it is one which I confess I am unable to perceive. I think it plain that original leases are contemplated if the Commonwealth considers an original lease is the most advantageous interest for the public; and I am of opinion the Corporation of Coburg has the capacity to grant one.

I am not able to adopt the view that sec. 238 of the Victorian *Local Government Act* 1903 confers power to let on lease to the Commonwealth. I accept the Commonwealth in its corporate capacity as equivalent to His Majesty, for, in accordance with the theory of our law, His Majesty represents every portion of his dominions. But "His Majesty" in sec. 238 of the Victorian Act means, in the absence of contrary intention, His Majesty in right of Victoria; it means "His Majesty" in the same sense as "The King's Most Excellent Majesty" in the enacting declaration of the Act, and the expression "His Majesty" in other sections of the Statute, as in sec. 235. The context strengthens this, because the Board of Land and Works means the Victorian Board of Land and Works. No special purposes are indicated in sec. 238 as the object of the lease, but the inference is that the Crown, if it takes the lease, does so for purposes that are confined to Victoria.

The capacity of the Corporation to grant the lease must depend on whether sec. 8 of the Commonwealth *Lands Acquisition Act* includes a power to lease.

It is essential to observe at the outset that the validity of this Act is assumed. The respondent expressly disavowed any intention to challenge it; and, what is still more important, he admitted what I think is clearly right, that it was no part of his duty, when asked to register or transfer, to question the

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Isaacs J.

validity of the Act. Consequently, as all we have to determine is whether he has left his duty undischarged, we should dismiss from our minds all doubts as to the legality of the enactment itself. But this important consequence follows from that assumption. The Constitution permits acquisition of land only on just terms; and so we must for the present purpose assume that just terms—that is, terms that are just to all whose interests are permitted to be acquired—are provided for, and that whether the acquisition is voluntary or compulsory, and whether the estate or interest acquired is freehold or leasehold. The inhabitants of Coburg therefore, however long the lease, must be taken to suffer no injustice.

The difficulty in the present case arises from the expression in secs. 8 and 9 "may sell and convey." Does it give power to "convey" only after a sale, or does it give power to "convey" independently of sale? If there were no interpretation clause there could be no doubt that the two were inseparable, and there could be no doubt that "convey" would not include "lease." But the same Act, by sec. 5, enacts that unless the contrary intention appears "convey" *means* "convey, transfer, or lease." "Lease" there cannot be assumed to mean "release"—for a mistake is not to be presumed: *Pemsel's Case* (1). The words "may sell and convey" mean therefore in their expanded form "may sell and may convey, transfer or lease." That is giving precise effect to the interpretation section. What is there against it? First, it is said the word "and" is opposed to it. But the word "and" is, in the expanded form, unchanged, and so is not against it.

Next, it is said the word "lease" is expressly used in sec. 6. But that is because "sale" is used, and "convey" is not used. Later in that section we find "granting conveying or leasing"; that is—*reddendo singula singulis*—"granting" and "conveying" with "sale," and "leasing" with "lease." Then it is said that sec. 10 refers only to "purchase money or compensation." But it is clear to me that the presence of that phrase does not determine that leasing is impossible. The section uses the phrase "sold *or* conveyed," which means that one or other of the powers included

(1) (1891) A.C., 531, at p. 549.

in sec. 8 has been exercised, and not necessarily both. No distinction between persons who can sell without conveying, or convey without selling, apart from the Act, can eradicate the fact that this section applies whether the land itself is sold *or* conveyed but not necessarily both "sold" *and* "conveyed" to the Commonwealth. Next, "compensation," which is applicable to compulsory process, may in some instances be confined to compensation for some interest in the land, and is payable on "conveyance" (sec. 42), which may (sec. 45) be a conveyance of an "interest" only in the land.

In my opinion, sec. 10 operates and is intended to operate only where there is a lump sum, either by way of purchase money or compensation, which, if paid over to some person not authorized by the actual owners to sell, might not reach the persons really interested. The section provides for it being dealt with so that those persons shall be sure to get the benefit of it according to the measure of their respective and possibly successive interests. In the case of a lease, where there is no present lump sum payable down, but merely a rent which accrues from period to period, there is no necessity for such a provision; the person entitled to the property at any given moment is there to receive the rent then payable. Any reference to rent therefore in sec. 10 would be incongruous, and its omission is no argument to show that leasing is not contemplated.

I turn now to the considerations which support the inclusion of leasing in sec. 8.

"Land," by the *Acts Interpretation Act* 1901, sec. 22, includes messuages, tenements and hereditaments of any tenure or description, and whatever the estate or interest therein, unless the contrary intention appears.

It would require a very strong reason for cutting down the three special meanings of "owner," "convey" and "land" where the Commonwealth Parliament was empowering the Commonwealth Government to take, on just terms, lands for public purposes. What reason can be assigned so long as just terms are obtained by the private owners? Leases are admittedly within the contemplation of the Parliament as being needed for Commonwealth purposes (secs. 5, 6, 14, 58, &c.)

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Isaacs J.

Part II. of the Act headed "Acquisition of Land," and particularly secs. 13, 14 and 15, seem to me really decisive of the question, because to my mind its provisions are as plain as the proverbial pikestaff. Sub-sec. XXXI. of sec. 51 of the Constitution enables the Parliament to make laws for the acquisition of property on just terms from any State or person. Part II. of the Act is the exercise of that power, and unless it enables the Commonwealth to acquire a lease direct from the freeholder, or a sub-lease from a lessee, the Executive has no power to do so. The first division of that Part is headed "Modes of Acquisition"; and the modes described by sec. 13 are two, namely, (*a*) by agreement with the owner; and (*b*) by compulsory process.

Now, "owner" is defined by the interpretation section to include "any person who under this Act is enabled to sell or convey the land to the Commonwealth." That can have no meaning except as a reference to secs. 8 and 9. Consequently, "owner" in sec. 13 must, as I conceive, include all persons who have the capacity to sell or "convey," as that word is interpreted by the Act, and whether by reason of the Act, or independently of it.

This Part is plainly the counterpart of the earlier provisions. The first Part added to the capacity of persons to dispose of land to the Commonwealth, and the second confers the power on the Executive to take it from all persons having such capacity, the subject matter "land" being coextensive in both Parts. For this purpose the two modes of acquisition are dealt with separately. Sec. 14 refers to "acquisition by agreement."

Sub-sec. 1 of sec. 14 empowers the Governor-General—that is, the whole Executive Council (*Acts Interpretation Act*, sec. 17(*f*)) —to approve of "the acquisition by the Commonwealth" of any land by "agreement with the owner." "Owner" is defined in sec. 5, and, expanded by the special meaning of "convey" and "land" in the same clause, means "any person who is enabled to sell, convey, transfer or lease land or any interest in land to the Commonwealth." That refers, of course, directly to secs. 8 and 9. Then what is meant by "land" in sub-sec. 1 of sec. 14? Does it include a lease? The interpretation section defines "land," as I say, as including any interest in land, legal or equitable. Sub-sec. 2 emphasizes

that by enacting that the "Minister," (*Acts Interpretation Act*, sec. 17 (*i*)), as opposed to the whole Executive Council, may, where the interest proposed to be acquired is a lease for a term not exceeding three years at a rental not exceeding £50 per annum, approve of the acquisition by the Commonwealth of the *lease* of the land by agreement with the owner. I should have thought it is perfectly plain that "owner" in sub-sec. 1 is intended to have the fullest meaning, and to signify not simply the owner of the lease, but to include the interpretative signification, and so, of course, the fullest ordinary meaning, so as to include the ownership of the fee simple. Otherwise the Commonwealth is not authorized by the Act, and no person is authorized on its behalf, to acquire, either by agreement under sec. 14 or compulsorily under sec. 15, any land from this corporation, or any of the persons mentioned in sec. 8, even though those persons themselves were endowed with capacity to sell and convey or lease.

There is no reason whatever suggested for giving a more restricted meaning to the same word "owner" in sub-sec. 2. The object of sub-sec. 2 is obvious. Under sub-sec. 1, where land is purchased outright, and therefore a lump sum is given, either from the owner as ordinarily understood or from the owner empowered by the Act to sell, the matter must be approved by the whole Executive. So also if there is a lease taken at a rental, unless provision is made elsewhere. An exception from this is made in sub-sec. 2, where nothing more than £50 a year for three years is involved. If a larger annual rent by £1 or a longer term by a year is involved, the whole Executive must approve. It follows that if a lease were purchased for a lump sum it would fall under sub-sec. 1, and unless leases for more than three years or for a rent higher than £50 a year are wholly unprovided for by agreement, they must fall under sub-sec. 1. The opposite view would leave the Minister free to buy for £1,000 a lease of special value which a lessee held for three years at a ground rent of not more than £50. But if the rent were £51 the Minister could not even purchase for £1. And not only so: it is said that though a lease for three years at £50 may be purchased for £1,000 besides paying the rent, there is no power to accept a simple lease at the rent alone. This is so unbusiness-

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Isaacs J.

like and improbable that I cannot accept it. It is plain to my mind the intention of Parliament is that "land" includes every estate and interest in land, and that leases may be acquired as such by agreement from the "owner" of the land, whether he owns the fee or any lesser estate or interest, and that "owner" in that connection is used in the fullest statutory sense. In sec. 15 "owner" is again used, for compulsion cases, in the same extended sense. Consequently, although the language of the Act is condensed where it might be more explicit, yet on the whole it works out clearly enough; and while, on the one hand the Commonwealth possesses all necessary powers for the public welfare, on the other—assuming, as I say, the Act is valid—the owner, whoever he may be, gets the just price or compensation or rental for his interest in the land. On these grounds I agree with the Chief Justice that the transfer should have been registered, and the order *nisi* for mandamus should be made absolute.

HIGGINS J. The question is, should this Court order the Registrar of Titles to register a lease of about $2\frac{1}{2}$ acres executed by the municipality of Coburg in favour of the Commonwealth. The lease is for a term of 500 years, and the rental is one peppercorn yearly, "if demanded."

Counsel for the Registrar does not contend that the *Lands Acquisition Act* is unconstitutional, or that there is no jurisdiction for this Court to make such an order in these proceedings.

It is not pretended that this corporation of Coburg can alienate or demise this land, or divert it from the purposes of the town, unless it is authorized to do so (*a*) under the Victorian *Local Government Act* 1903, or (*b*) under the Australian *Lands Acquisition Act* 1906. A corporation such as this has not the ordinary rights of a fee simple proprietor (*Mulliner* v. *Midland Railway Co.* (1); *Great Western Railway Co.* v. *Talbot* (2); *Same* v. *Solihull Rural District Council* (3)).

(*a*) As for the *Local Government Act* 1903, except in the cases referred to in secs. 238 and 239, the municipality has no power to

(1) 11 Ch. D., 611, at p. 619. (2) (1902) 2 Ch., 759.
(3) 86 L.T., 852.

demise this land for more—at the outside—than forty years; and the consent of the Governor in Council must be obtained for any demise that exceeds seven years.

But sec. 238 gives the municipality power to lease land to His Majesty or to the Board of Land and Works, and sec. 239 gives power to convey or transfer in fee simple or for any less estate to His Majesty or to the Board of Land and Works or to the Minister of Public Instruction. In these cases, as the Governor of Victoria, acting for His Majesty, is a party to the lease or conveyance, there is no need to stipulate for the Governor's consent. "His Majesty" in this State Act (the sections are found in the former Local Government Statute of 1874) obviously means His Majesty in his Victorian capacity—the Government of Victoria. Clearly, there is no power in the Victorian *Local Government Act* to give a lease for 500 years to the Commonwealth. There is nothing on the face of this lease now presented for registration to show any consent of the Governor of Victoria; it is not pretended that such consent has been obtained; and, even if it were obtained, the consent would not authorize a lease for 500 years so far as the *Local Government Act* is concerned.

Sec. 70 of the Constitution has been referred to. This section transfers to the Governor-General any power and functions which at the establishment of the Commonwealth were vested in the State Governors in respect of matters which pass under the Constitution to the Executive Government of the Commonwealth. Whatever may be the precise limits of this section, it is clear that it does not increase or affect the powers or functions of the municipality.

(*b*) The *Lands Acquisition Act* provides (sec. 8) that a corporation (*inter alios*) seised of land may (by force of the Act and notwithstanding anything to the contrary in any law) "*sell and convey* the land to the Commonwealth, and may enter into any agreement for that purpose." These words "sell and convey" are the ordinary technical words used for the transaction of transferring land for purchase money. Personal property may be transferred by sale; but real property cannot be transferred by sale alone—there must be a conveyance. Looking at random at p. 3 of *Dart's Vendors and Purchasers*, 5th ed., I find the

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Higgins J.

words "sell and convey" used three times, and in the sense which I have stated. What does a sale import? According to *Benjamin on Sales*, pp. 2 and 3, one element of a valid sale is that the absolute or general property must pass from the seller to the buyer; and another essential element is "a price in money paid or promised." "If any other consideration than money be given, it is not a sale." These words relate to personal property, but they apply equally to land. If a trustee has power to "sell" *simpliciter*, he must sell outright for purchase money—he cannot convey the land even in consideration of a rent-charge: *Read* v. *Shaw* (1). Moreover, in this very Act, sec. 10 shows that in every case there must be purchase money (if the land be acquired by agreement), or compensation (if the land be acquired compulsorily). "Where *any* land is sold or conveyed to the Commonwealth" (by a corporation, or other party not entitled to sell or, &c., except by the Act) "*the* purchase money or compensation may be applied" as follows: "the purchase money" or compensation may be paid to a trustee or be paid to a Registrar of the Court or other officer, and may be paid out by order of the Court in discharging encumbrances, purchasing other land or Government securities, &c. But in the case of this lease, there is no sale of the fee simple, and there is not a penny of purchase money.

I cannot find, from beginning to end of this Act, any power given to a corporation (or person under disability) to grant a lease of land to the Commonwealth. I say "grant" a lease; I do not refer to a sale and conveyance of any lease which the corporation holds. There is a provision in the Act (sec. 6) enabling the State Government to make either a sale or a lease of Crown land to the Commonwealth; and it would have been easy to insert in the Act a similar provision enabling corporations &c. to lease as well as to sell. But there is no such provision; and *expressio unius exclusio alterius*. It has to be remembered that that Act is not novel either in character or in expression. It follows to a great extent the language as well as the method of the British *Land Clauses Act* 8 & 9 Vict. c. 18, and also of the repealed Commonwealth Act No. 13 of 1901. Now,

(1) Sugd. Powers, 8th ed., 864.

neither of these Acts enabled a corporation to grant a lease; and if a public undertaking (under the British Act) or the Commonwealth (under the Australian Act) wanted land for its purposes, even temporarily, it had to acquire the fee simple, and to substitute purchase money for the fee simple (*Legg* v. *Belfast &c. Railway Co.* (1)). If it acquired the fee simple, it could purchase the interest of any lessee under any existing lease. Even if the promoters of the undertaking (under the British Act) needed nothing but an easement, they could not compel the grant of an easement—they had to take the land *in solido* (*Pinchin* v. *London &c. Railway Co.* (2); *Great Western Railway Co.* v. *Swindon &c. Railway Co.* (3)). No one denies the power of the Commonwealth Parliament to make a new departure; it is assumed that the "acquisition of property" in sec. 51 (XXXI.) might include a power to acquire a lease. But if Parliament meant a new departure of this unprecedented nature it would surely have given the power to compel a lease, and the power to corporations, &c., to grant a lease, in express terms; and it would have made careful provision for the terms of the lease so as to secure for future inhabitants "just terms" in compliance with sec. 51 (XXXI.) of the Constitution. We are apt to forget the fact that, if the Act did give power to a corporation to grant a lease by agreement, it follows that a corporation could be compelled to grant a lease, accepting "compensation" if it will not accept the Commonwealth's offer; and yet the whole machinery for compulsory taking, in this Act, is adapted to the taking of the land *in solido* (paying purchase money as compensation for existing leases), not to the compelling the grant of a lease. Under the word "land" is included any estate or interest which exists in land (sec. 5). In this case the ratepayers of Coburg are deprived of the use of this land for 500 years, and all they are to get in its place, even if the land increase a thousandfold in site value, is an annual peppercorn, if demanded.

The validity of the Act, indeed, if it has the meaning contended for by the Commonwealth, seems to be doubtful; for under sec. 51 (XXXI.) of the Constitution the Act passed must

(1) 1 Ir. C.L., 124 n.
(2) 5 D.M. & G., 851, at pp. 861-862.
(3) 9 App. Cas., 787.

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Higgins J.

contain provision for "just terms" in the case of a lease. But the validity of the Act is not disputed; we have had no argument on the subject, and it is not safe to make a pronouncement against the validity of the Act.

A difficulty certainly arises from the interpretation section, 5, which says that in this Act "*unless the contrary intention appears* 'convey' means convey, transfer, or lease." But, having regard to the joint form of the power to "sell and convey," with its obvious technical meaning (the words used are not "may sell or may convey"), and the provisions of sec. 10 involving purchase money *in every case*, as well as to the whole machinery provided by the Act, and to the history of the legislation on which the Act is founded, the contrary intention does, in my opinion, appear. The same joint form of expression is found in sec. 9: "*The power to sell and convey land* may be exercised by" &c. I might add to these reasons that such a phrase as "sell and lease" (if the meaning prescribed by the interpretation section were applicable) is without any recognized meaning. "Sell" cannot mean "make an agreement," for the very next line provides for an agreement (to "sell and convey"). It is just possible that the phrase might cover the rare case of offering a lease for tender at a certain rent, and of granting it to him who tenders the highest premium; but there was no premium in this case. There is no money that can be applied in purchasing other land, &c., or to the other purposes of sec. 10. One cannot conceive of the annual peppercorn being applied (as prescribed by sec. 10) in the payment of encumbrances, or in the purchase of other land for the benefit of the future inhabitants of the town. Why should we do violence to these ordinary technical words "sell and convey" (which always mean sell, and convey to complete the sale), when we can avoid all violence to the language of the Act by simply using the latitude which the Act expressly allows us, by holding that in sec. 8 the contrary intention does appear, and that "convey" does not here mean "lease"?

There is, at first sight, some argument to be drawn in favour of a power for the Corporation to grant a lease from sec. 14 (2). It certainly does not allow a lease for 500 years, but it allows the Minister "where the interest proposed to be acquired is a

lease for a term not exceeding three years at a rental not exceeding £50 per annum" to "approve of *the acquisition by the Commonwealth of the lease* of the land by agreement with the owner." It is said that this means that the Minister may procure the *grant* of a lease for three years, and that this implies that corporations may grant to the Commonwealth leases for a term of 500 years. The expression "acquisition by the Commonwealth of the lease" is more suited to the purchase of an existing lease; and the agreement in such a case would have to be made with the owner of the lease, not with the owner of the fee. The words are consistent with this meaning, and this meaning would be consistent with the British Act (sec. 74). It is always convenient to have a power, when land is taken, to buy out the interest of an existing lessee for a short term, instead of leaving him to a claim for compensation (see secs. 30, 32, &c.). Under sec. 14 the Governor-General may sanction the acquisition of land from the owner by agreement; and under sec. 15 he may direct the acquisition of land from the owner by compulsion; but the "owner" must mean the owner of that which is to be acquired, whether a fee simple or an existing lease. "Land" includes an existing lease of land; and the lessee is an "owner" of land, as having an estate or interest in land (sec. 5). It is to be noticed that under sec. 9 a tenant for life has no power to sell and convey the interest of the remainderman; he can only sell and convey his own interest. The scheme of the Act is that the owner of an interest sells merely his own interest—he cannot affect the interest of others; although, for the purpose of the Act, guardians of infants, committees of lunatics, trustees, executors, &c., are necessarily treated as if they were the owners of the interests for those for whom they act. So in secs. 14 and 15 it is with the lessee that an agreement must be made for the purchase of a lease; and it is from the lessee that the lease must be acquired in case of compulsion. But even taking the other interpretation of sec. 14, is it legitimate to infer from this provision for petty leases a power for the council of a corporation to divert corporation lands from the use of the ratepayers for 500 years? Is this a necessary inference? I regard it as a

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Higgins J.

strained conjecture. If we are to base our judgment on conjecture, I should think another conjecture to be more reasonable —that in sec. 5, in the interpretation of "convey," the word "lease" has been used as an oversight for "release." It is to be noted that in the very next section of the Act—sec. 6—the words "conveying or leasing" are used where, according to the words of sec. 5 as printed, the word "conveying" would have been sufficient; and in sec. 48 "convey" and "conveyance" are used where "lease" cannot be meant, but a release must be meant (release by a mortgagee). Wherever in the Act elsewhere the word "convey" or "conveyance" is used, it is used in such a context that it cannot mean "lease." "Release" is the word used in the British Act on which this Act is based ("sell and convey or release"), and in the repealed Commonwealth Act No. 13 of 1901 ("'convey' means convey transfer or release"). But there is no need to rely on this conjecture. I base my opinion on the assumption that "sell" means sell, and that "convey" means convey transfer or lease, unless the contrary intention appears.

The position of the Registrar then is, that the document presented for registration does not show on its face a valid disposition of the land. I take it that the Registrar's duty is confined to seeing that the instrument is in accord with the prescribed practice, and that it is signed by a registered proprietor competent to effect a transaction of the sort disclosed by the instrument. He is not concerned to inquire into the circumstances, or even to verify the facts stated. In this case, the Registrar sees what purports to be a lease for 500 years from a municipal corporation; and there is nothing on the face of the instrument to take it out of the general rule forbidding such leases on the part of the Corporation.

I am therefore of opinion that the Registrar, acting under the guidance of the Commissioner, was right in refusing to register the document; and that, if there is jurisdiction in this Court to issue a mandamus to him, no mandamus should be issued. I do not like to pronounce either for or against the jurisdiction, as the question has not been argued.

GAVAN DUFFY and RICH JJ. This is an application to make absolute a rule *nisi* for a mandamus to compel the Registrar of Titles to register a lease granted by the Mayor, Councillors and Burgesses of the Town of Coburg to the Commonwealth of Australia. The term of the lease is for 500 years, and the rent reserved is one peppercorn yearly. The question to be decided is whether this lease is within the competency of the municipality, and this question, in our opinion, depends on the meaning of the words "sell and convey" in sec. 8 of the *Lands Acquisition Act* 1906. That section provides that any corporation may (by force of this Act) and notwithstanding anything to the contrary in any law, &c., "sell and convey" to the Commonwealth any land of which it is seised or possessed, or to which it is entitled. Does sec. 8 confer two independent powers, one to sell and the other to convey, or is the power single? We think that the Legislature, both in the case of this section and of sec. 7 of the *Lands Clauses Consolidation Act* of 1845, from which it is adapted, must be taken to have had in contemplation the ordinary executory contract for the sale of land, which requires the execution of the further instrument for its completion. "Sell" refers to the discretionary act, which, in the case of land, is almost invariably evidenced by a preliminary written agreement. "Convey" refers to the formal act by which effect is given to the prior exercise of a discretionary act. The section deals with three classes of persons: those competent without the assistance of the Statute, to sell but not to convey; those competent to convey but not to sell; and those incompetent either to sell or convey. It enables members of each of these classes to "sell and convey" and to enter into "any agreement for that purpose," not for the purpose of selling only, or of conveying only, but for the purpose of "selling and conveying." It is for this reason that sec. 10 (1) speaks of land "sold or conveyed" to the Commonwealth by any person who was not entitled to sell or convey the land to the Commonwealth except under the Act, and that the "owner" who is entitled to payment in respect of the land taken is made by sec. 5 to include "any person who under this Act is entitled to sell *or* convey the land to the Commonwealth." Sec. 5 provides that unless the contrary intention appears, the word "convey"

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Gavan Duffy J. Rich J.

means "convey, transfer, or lease," and it is said that this provision enables sec. 8 to be applied to leases to the Commonwealth because "sell and convey" may be read as sell and lease. On the other hand, it is said that the words sell and lease are insensible as describing steps in one transaction. In the definition section of the repealed *Property for Public Purposes Acquisition Act* 1901, sec. 2, the word used is "release," not "lease," and it is suggested that the word "lease" in the existing Act was used by mistake instead of release. It is said, too, that sec. 10 of the *Lands Acquisition Act* 1906, dealing with the application of proceeds of sale and conveyance, contains dispositions which are apt if read as restricted to purchase-money, but inapt if applied to current rent. From all this it is argued that the word "convey" in the phrase "sell and convey" does not mean lease because the contrary intention appears in the Act itself. We do not desire to express any dissent from this proposition, but, if we assume that sec. 8 does confer a power to sell and lease, the applicant must still show that there has been a sale and lease, and we are unable to find that anything has been done here to satisfy the word "sell" so as to bring the case within sec. 8.

POWERS J. In this case the question is whether this Court should, at the instance of the Commonwealth, order the Registrar of Titles for the State of Victoria to register a lease executed by the municipality of Coburg in favour of the Commonwealth for the term of 500 years at the rental of one peppercorn a year.

I have read the judgment of my brother *Higgins*, and I agree with him (1) that the corporation in question cannot, apart from the powers given by sec. 8 of the *Lands Acquisition Act* 1906 (No. 13 of 1906), sell land to the Commonwealth; (2) that the corporation cannot, under State law, lease the land to the Commonwealth for longer than seven years without the consent of the Governor of Victoria, or with such consent for a term exceeding forty years; (3) that sec. 70 of the Constitution does not increase or affect the powers or functions of the Coburg municipality—an instrumentality of the State of Victoria; (4) that there is not anything in the Act to authorize corporations or other persons under disability, to grant leases to the Commonwealth which

they are not otherwise authorized by law to grant; (5) that sec. 8 of the *Lands Acquisition Act* enables a corporation, under the special conditions set out in secs. 8, 9 and 10, to sell and convey lands which it could not otherwise convey, but does not authorize such a corporation to grant a lease which it could not otherwise lawfully grant; (6) that it is the Registrar's duty generally to register documents correctly executed by a registered proprietor, without inquiring into the consideration, yet it is his duty to refuse to register a document if it is clear that it purports to effect a transaction which the registered proprietor is not by law justified in effecting.

At the same time I hold that, if it is necessary for the Commonwealth to acquire a lease or any other interest in lands vested in a corporation, or in any person under disability, beyond the term of the lease or the interest which the corporation or person under disability can lawfully grant, the Commonwealth can compulsorily acquire such lease or interest under other sections of the Act on just terms. The Commonwealth can purchase lands or lease lands or acquire by agreement any interest in lands from persons not under disability (sec. 14). The Commonwealth can acquire by compulsory acquisition lands or leases of lands or any interest in lands from persons willing to sell, or unwilling to sell, and from persons under disability; and, on such compulsory acquisition, the lands are free from all trusts, interests, charges, &c. (secs. 15 and 16).

As to the words "His Majesty" in sec. 239 of the State *Local Government Act* of 1903, I agree that they obviously mean "His Majesty" in his Victorian capacity—the Government of Victoria. I find that contention strengthened by the fact that the words "His Majesty" in other parts of the same Act must mean "His Majesty" in his Victorian capacity. The first use of the same words in the Act after sec. 239 is in sec. 249. The Court has held in *Sydney Municipal Council* v. *The Commonwealth* (1) that sec. 110 of the Sydney Corporation Consolidating Act of 1902 (a section dealing with municipal taxation of lands as sec. 249 in the Victorian Act does) should be construed as not intended to apply

(1) 1 C.L.R., 208.

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Powers J.

to land the property of the Commonwealth. That was held in that case, although the lands in question had been State Crown lands, and had been vested in the Commonwealth by virtue of sec. 85 (I.) of the Constitution upon the transfer of the departments to the Commonwealth. The learned Chief Justice of this Court in his judgment in the case referred to said (1):—"The term 'the Crown' as used in the *Sydney Corporation Act* must be taken to mean the Crown in its capacity as representing the State of New South Wales."

As to the meaning of the words "sell and convey" in sec. 8 of the Commonwealth *Lands Acquisition Act*—reading secs. 8, 9, 10 and 11 of the Act together, as I feel bound to do—I hold that the word "convey" does not include lease in secs. 8, 10 and 11 when read together, because the contrary intention appears. To hold any other view, one must credit the Commonwealth Parliament with intending to allow a tenant for life to give a lease, as in this case for 500 years at a peppercorn rent, of land in which he has only a life interest, and thereby deprive the person entitled to the estate after the life estate terminates of any benefit in the property or in its value. Any trustee could in the same way deprive his *cestui que trusts* of any benefit in the trust property or in its value.

Reading the words "sell and convey" in their ordinary meaning, the person under disability can sell the fee simple, and convey it to the Commonwealth, but the purchase money or compensation would, under sec. 10, have to be paid to a trustee on terms approved by the Attorney-General, or to a Registrar or other officer of the High Court or of the Supreme Court, to be applied in accordance with any order of the Court made under sec. 11.

In this way the intention expressed by the Act could be carried out, namely: the Commonwealth could acquire the land it requires for public purposes; the Commonwealth could obtain a legal title to it, and all the persons interested in the property sold would, although deprived of their land, receive the purchase money or compensation paid for it.

I cannot interpret the Act to mean that life tenants, trustees,

(1) 1 C.L.R., 208, at p. 231.

or any of the other persons under disability mentioned in sec. 9 could deprive the other parties interested both of the land and the value of it by granting leases for 500 years at a peppercorn rent. In the only other section of the Act in which I can find that the word "convey" has been used (sec. 48 (5)) the word cannot, I think, mean "convey, transfer, *or lease*." *Conveyance* and *lease* are specially referred to in secs. 20 and 58 and in other sections of the Act. Throughout the Act the words "sale and lease," "conveyance and lease," "conveying and leasing" are used as if the interpretation clause had been forgotten. Whenever the word "convey," "conveyance" or "conveying" is used it is used in its ordinary sense, and the word "lease" or "leasing" is used whenever lease or leasing is meant. The words "purchase money" or "compensation" in sec. 10 or sec. 11 cannot apply to rent received for a lease, but if the word "convey" in sec. 8 includes lease the words should apply. The words in the sections mentioned are only applicable, in my opinion, to sales in the ordinary sense. "Sell" is the important word and convey follows as the means universally used to carry into effect a sale.

I therefore agree that the word "convey" in sec. 8 does not include the word "lease" because the contrary intention appears; that the Coburg Council was not legally justified in granting the lease in question; that the Registrar of Titles was justified in refusing to register the document.

A constitutional question was mentioned by members of the Court during the hearing of the case, namely, whether this Court could, at the instance of the Commonwealth, legally order a State officer to do any act in the course of his duties as a State Government instrumentality. The State Government, by its counsel, asked this Court to make such order as it thought fit, and said the order would be complied with. Under the circumstances, and as the majority of the Court hold that no order should be made on the merits, it is not necessary to consider the constitutional question.

I agree that the application should therefore be refused.

Order nisi discharged.

H. C. OF A. 1915.

THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Solicitor, for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor, for the Registrar of Titles, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

PLUMB . . . . . APPELLANT;
COMPLAINANT,

AND

TRITTON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1915.

BRISBANE, *July* 26; *Aug.* 2.

Isaacs, Gavan Duffy and Powers JJ.

Health—Adulterated food—Sale—Exposing for sale—Offence—Proof—Requirements of Statute—Samples—Analysis—Health Acts 1900-1911 (*Qd.*) (64 *Vict. No.* 9 —2 *Geo. V. No.* 26), *secs.* 91, 102, 103, 104, 111, 111D.

Sec. 91 of the Health Act (Consolidated), which provides that "No person shall sell any food or drug or article which is adulterated," &c., is a general section constituting an offence which is *primâ facie* provable in the ordinary way, and there is nothing in the Health Acts requiring such offence to be proved in any other way than by the ordinary methods and rules of evidence as known to the common law or enacted by way of general application in the Evidence Acts.

Sec. 103 empowers an officer under the Act to demand and take or obtain samples of any food or drug or article for the purposes of the Act from any person selling the same; under sec. 104 an officer so taking or obtaining such sample is to divide it into three parts, and offer one part to the person from whom he took or obtained the sample, and deliver another part to an analyst, and retain the third part; and sec. 111D enacts that on the hearing of a complaint, "the Court shall on the request of either party to any proceedings for an offence against this Part" (which includes sec. 91), "and may, if it thinks fit, without such request, order the Commissioner to procure that the