RICH J. In my opinion the conclusion arrived at by *Ferguson* J. was correct. I consider that the defendants were not entitled to set up the defence that the subject land was not in fact benefited. Within the area committed to them the finding of the trustees as to the fact of benefit is final, subject to an appeal to the Police Magistrate as to the amount of the rate.

The appeal should be allowed.

Appeal allowed. Order appealed from reversed. Appeal from District Court allowed. Judgment for plaintiffs in the District Court. Parties to bear their own costs in all Courts.

Solicitors, for the appellants, *T. A. Hill*, West Maitland, by *Weaver & Allworth*.

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

B. L.

[HIGH COURT OF AUSTRALIA.]

ROACH . . . . . APPELLANT;
DEFENDANT,

AND

BICKLE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Crown Lands—Lease from Crown—Irrigation farm—Sub-lease, validity of—Consent of Commissioner for Water Conservation and Irrigation—Action for trespass—Defence—Crown Lands Consolidation Act 1913 (*N.S. W.*) (*No.* 7 *of* 1913), *secs.* 226, 273, 274—*Crown Lands and Irrigation (Amendment) Act* 1914 (*N.S. W.*) (*No.* 10 *of* 1914), *sec.* 2.

H. C. OF A. 1915.

ROACH v. BICKLE.

Sec. 226 of the *Crown Lands Consolidation Act* 1913 provides in relation to (*inter alia*) leases from the Crown of irrigation farms that "(*b*) No lease or licence—other than a special lease—shall confer any right . . . to sub-let such land for other than grazing purposes." Sec. 273 (2), as amended by sec. 2 of the *Crown Lands and Irrigation* (*Amendment*) *Act* 1914, provides that "A lease of a holding within an irrigation area shall not be capable of being transferred except by way of mortgage until five years of the condition of residence have been performed unless the Commissioner" (for Water Conservation and Irrigation) "is satisfied that the lessee is compelled by sickness of himself or family or other adverse circumstances to leave the holding." Sec. 274 provides that "(2) Application for permission to transfer or otherwise deal with any such holding as aforesaid shall be made in the prescribed form—in the case of a homestead farm or Crown-lease—to the Minister, and in the case of a holding within an irrigation area, to the Commissioner, and such transfer or other dealing shall not be effected, or if effected shall not be valid, unless the consent thereto of the Minister or of the Commissioner, as the case may require, has been obtained. . . . (4) The provisions of this section shall not cease to apply after the issue of a perpetual lease grant, if any, and it shall be immaterial for the purposes of such provisions whether a transfer or other dealing or a devolution takes place before or after the passing of this Act; and no transfer or other dealing or conveyance or assignment in contravention of such provisions shall be valid for any purposes whatsoever."

The plaintiff, who was the lessee from the Crown of an irrigation farm, by an instrument in writing purported to sub-let it to the defendant for seven months for grazing purposes, the right being exclusive. By the instrument it was provided that the defendant should have the exclusive right to cultivate the land and remove the crop before the expiration of the term; that "this lease is subject to the written approval of the Commissioner for Water Conservation and Irrigation thereto and the lessor will use her best endeavours to procure the same"; and that, if the lessee were unable to use the farm by reason of some direction or order of the Commissioner, the agreement should become null and void.

Held, that having regard to the nature of the lease from the Crown, in the absence of the consent of the Commissioner there was no valid sub-lease.

The defendant paid part of the rent and was put into possession of the farm, and thereafter, notwithstanding that the plaintiff demanded possession of the farm, the defendant refused it and removed a crop which had been sown by the plaintiff. The consent of the Commissioner to the sub-lease was not obtained and was not asked for by the plaintiff. In an action by the plaintiff for trespass to the farm and for conversion of the crop,

Held, that the sub-lease to the defendant was not an answer to the plaintiff's claim.

Decision of the Supreme Court of New South Wales: *Bickle* v. *Roach*, 15 S.R. (N.S.W.), 295, affirmed.

H. C. OF A. 1915.

ROACH v. BICKLE.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Jane Bickle against James Roach to recover damages on three counts—those which are material being the first, for trespass to land, and the third, for conversion of goods, namely, oats. The pleas were—first, not guilty; the second, that the trespass was committed with the plaintiff's leave; the third, that the plaintiff leased the land to the defendant and that the oats were a crop upon it; and the fourth, that the land and goods were not the plaintiff's. The action was tried before *Cullen* C.J. and a jury, who returned a verdict for the plaintiff for £5 on the first count, and £165 on the third. The defendant then moved for a nonsuit, a new trial, a verdict for the defendant, or a reduction of the damages, but the Full Court dismissed the motion with costs: *Bickle* v. *Roach* (1).

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

The material facts are stated in the judgments hereunder.

Mack (with him *Nicholas*), for the appellant. The proper construction of sec. 274 (2) of the *Crown Lands Consolidation Act* 1913 is that a transfer or other dealing made without the consent of the Commissioner is voidable only and not void: *Davenport* v. *The Queen* (2). If the sub-lease was voidable only, then the plaintiff is estopped from setting up the condition that the sub-lease was subject to the consent of the Commissioner, because it was her duty to obtain that consent and she has not done so. The words "otherwise deal with" and "other dealing" in sec. 274 refer only to a dealing in the nature of a transfer, and not to a sub-lease. Sec. 236 shows the kind of dealing which is to be illegal as being contrary to the policy of the Act. [Counsel also referred to secs. 142, 272, 273.]

Armstrong (with him *Perry*), for the respondent. A sub-lease of this kind is expressly prohibited by the provisions contained in the Proclamation published pursuant to sec. 137.

Cur. adv. vult.

(1) 15 S.R. (N.S.W.), 295.

(2) 3 App. Cas., 115, at p. 128.

H. C. OF A. 1915.

ROACH v. BICKLE.

Dec. 14.

The following judgments were read :—

ISAACS and GAVAN DUFFY JJ. This is a common law action by Jane Bickle against James Roach for damages. There were three counts in the declaration : the first, for trespass to land ; the second, for false representation, and the third, for conversion of goods, namely, oats.

In the events that have happened the second count may be ignored.

The pleas were : first, not guilty ; the second, that the trespass was committed with the plaintiff's leave ; the third, that plaintiff had leased the land to defendant, and the oats were a crop on it ; and the fourth, that the land and goods were not the plaintiff's.

The facts are that the plaintiff was the lessee from the Crown of an irrigation farm, and had resided there about two and a half years prior to 1st October 1914. For some time prior to that date the plaintiff, by her agent, had negotiated with the defendant for the sub-lease to him of her farm. No application was made to the Commissioner for his consent to the sub-lease, but the parties saw an official named Broatch, who was the manager of the irrigation area, and who stated verbally that Mrs. Bickle's farm was then recommended to forfeiture, and liable to forfeiture, and he had no objection to the parties doing as they pleased with it.

After this, on 1st October, the parties executed a written instrument purporting to be a sub-lease by Bickle to Roach for seven months for grazing purposes, the right being exclusive. But it is material to state that it went beyond grazing purposes.

By clause 4 it is provided as follows :—"The lessee shall also have exclusive right of cultivating the land here demised and planting any crop (except paspalum or couch grass) therein removing same at any time before the expiration of the said term." Then, by clause 13, it is provided that "This lease is subject to the written approval of the Commissioner for Water Conservation and Irrigation thereto and the lessor will use her best endeavours to procure same." Clause 14 provides that the lessor will not surrender her lease, and that if that lease becomes forfeited, or if the lessee is unable to use the farm by reason of some direction or order of the Commissioner, the agreement is to

become null and void, and a proportionate part of the rent only to be paid.

Notwithstanding that the Commissioner's consent was not obtained either verbally or in writing, and was not asked for, the defendant paid the plaintiff £61 and the plaintiff put the defendant into possession. Before doing so, a crop of oats had been already sown by the plaintiff; it ripened while defendant was there, and was the crop he reaped and took away, and for conversion of which he was sued. Before he reaped it, and before the expiration of the period mentioned in the sub-lease, the plaintiff claimed possession of the land, which was refused.

The plaintiff claims only for the period after the refusal. This determines the plea of leave.

The learned Chief Justice of New South Wales, who tried the action, ruled in accordance with the plaintiff's contention that the lease was void by reason of sec. 274 of the *Crown Lands Consolidation Act* 1913, No. 7 of that year, and the jury awarded £5 damages under the first count, and £165 under the third. As to the damages his Honor ruled that, although as a lease it was void, the bargain was binding as to one stipulation, namely, that the plaintiff would use her best endeavours to obtain the Commissioner's consent, and so make the lease valid. And, further, his Honor held that the stipulation referred to was supported by consideration, of which the immediate payment of £61 was part. Therefore, said the learned Chief Justice in effect, the plaintiff was to some extent fettered as to her right to the crop, and the value of it to her was to be diminished by the weight of the fetter, the jury being told "that in that case the defendant, of course, could not say 'I ought only to be called upon to pay what it was worth fettered by the contract, and I ought also to get my money back.' The valuation of the property fettered by a contract of this kind would, of course, make it impossible for the defendant ever afterwards to say 'I ought to get that money back because I got no consideration for it.'" The basis of that direction, which was all in favour of the plaintiff, was that the defendant still had the enforceable promise of the plaintiff, and had, therefore, valuable consideration for his payment of £61, as

H. C. OF A. 1915.

ROACH v. BICKLE.

Isaacs J. Gavan Duffy J.

to which on that basis it could not be said the consideration had failed.

The Full Court by a majority (*Pring* and *Gordon* JJ.) held that the direction by the Chief Justice as to the lease being rendered void by sec. 274 was correct, and dismissed the defendant's application for judgment or new trial. *Sly* J. was of the contrary opinion.

During the argument the question was put to Mr. *Mack* whether there was any concluded bargain for a lease at all, in view of the 13th clause—whether it was not a mere inchoate lease, dependent for its final binding effect upon the Commissioner's consent being in fact obtained. Mr. *Mack* contended that, in view of clause 14, the lease should be considered as granted subject to defeasance, if the consent were refused. In our opinion, having regard to all the circumstances, there never was a binding agreement for a lease—that is, there never was a a sub-lease finally granted. It was subject to the performance of a condition precedent to the absolute grant of a sub-lease, giving the defendant a legal interest in the land.

We say, "having regard to the circumstances," because we are not prepared to lay down a canon of construction with reference to a provision commencing "This agreement is subject to" &c. It is always a question of construction of the document applied to surrounding circumstances. Reference to three cases as instances will suffice to indicate why this view is entertained. They are *Lehmann* v. *McArthur* (1)—a case of requiring the landlord's approval; *Winn* v. *Bull* (2), and *Bonnewell* v. *Jenkins* (3).

The nature of the head lease in this case and the law relating to it are most important circumstances in determining whether the document of 1st October 1914 is to be read as an absolute grant of a lease. As *Fry* J. said in *Bonnewell* v. *Jenkins* (4) "the true rule for construing an instrument is to consider what the writer must have conceived that the reader would understand from it." In previous cases in this Court there has been expressed the same view; and as the reader is supposed to have

(1) L.R. 3 Ch., 496.
(2) 7 Ch. D., 29.
(3) 8 Ch. D., 70.
(4) 8 Ch. D., 70, at p. 71.

the same light from surrounding circumstances as the writer, we think the provisions of the *Crown Lands Act* are a very material and, indeed, a necessary help in arriving at the meaning of the parties. In any case, having regard to the difference of opinion in the Supreme Court as to the validity between the parties of such a sub-lease, we consider it desirable to express an opinion upon it; but, even apart from that, the way in which the document we have to construe is framed, the studious care that has been obviously bestowed upon it so as to conform to the requirements of the law so far as the bargain permitted, and the central fact that the parties were contracting with reference to the provisions of the law as to irrigation farms, all lead us to feel that the only safe and proper mode of construing the instrument is to inquire first as to the nature of the head lease and the provisions of the law with respect to parting with interests in it, and then to apply our minds to the words used by the parties with reference to those commanding circumstances.

If, for instance, the law were that a sub-lease could be granted subject only to defeasance if approval were withheld, it would seriously affect our construction of the agreement, more particularly in view of the fact that the parties transferred possession in fact.

Now, the first section of importance is sec. 226, which by par. (*b*) of sub-sec. 1 declares that "No lease or licence—other than a special lease—shall confer any right . . . to sub-let such land for other than grazing purposes." Mrs. Bickle's lease is not a "special lease."

Sub-sec. 5 protects leases in particular cases, of which the present is not suggested to be one. The sub-lease, as is seen, purported to be in the first place for grazing purposes, but by clause 4 it went clearly beyond it. What would be the effect of that clause in itself in view of the statutory provision mentioned is not now to be considered.

The importance of that provision upon the construction of the document consists in this, that the appellant's assumption has been that we could start with a *primâ facie* power of alienation and look upon sec. 274 as a mere restriction upon that

H. C. OF A. 1915.

ROACH v. BICKLE.

Isaacs J. Gavan Duffy J.

power. But, in truth, we have to start with the opposite assumption, namely, that except for grazing purposes there is no power to sub-let, since it does not appear that the case comes under sub-sec. 5 except so far as sec. 274 applies to it.

The practical effect upon the argument is this: the appellant is forced to rely upon the words "otherwise deal with" in sub-sec. 2 of sec. 274 for power to grant such a sub-lease as the present, because we have not been able to discover, nor was learned counsel able to point to, any power to sub-let for other than grazing purposes except that contained in sec. 274.

Sub-sec. 2 of that section gives the power. But whether it is essential to the existence of the power, or whether it is a qualification of it, a sub-lease clearly comes under the words "otherwise deal with," and the required process is (1) application to the Commissioner and (2) his consent.

The sub-section says:—"Such transfer or other dealing shall not be effected, or if effected shall not be valid, unless the consent thereto . . . of the Commissioner has been obtained."

Consent, if asked for, can be given independently of the local Land Board, at the Commissioner's discretion, but he cannot refuse without first getting a recommendation, though when that is given he can do as he thinks right. But *unless* his consent is given the dealing is not to be effected, and if effected is not valid. A good deal of discussion took place as to the meaning of the word "void," and in what cases it is to be read as "voidable." But the word "void" does not occur. There is a distinct statutory prohibition against the dealing without the consent being "effected" at all—that is, being made in fact; and then there is added the further provision, really unnecessary but emphatic, that if in spite of the express prohibition it be in fact made, it shall not be "valid." There is no analogy to the cases where a party is not allowed to avoid his own bargain by his own wrong. This is a distinct statutory enactment made in the public interest, and applying directly as between the parties themselves, and while permitting a dealing between them on a certain condition being satisfied, forbids it without that condition, and stamps any attempt to avoid that condition as destitute of validity. A

clearer case of legislative annulment of a transaction could hardly be imagined.

Taking the first declaration by itself, that "such other dealing shall not be effected," and supposing that stood alone, what would the position be? The answer is not doubtful. Where a Statute prohibits a transaction either expressly or by implication, no such transaction can be validly created.

The law which forbids its existence cannot consistently recognize it as ever having any binding force. Its existence in fact may be recognized for the purpose of punishing those who disobey the law, but the parties who are both transgressors cannot assert any right under it. It is lifeless from the beginning. Since the judgment of *Parke* B. in *Cope* v. *Rowlands* (1) the principle has been considered settled, and the recent citation of that judgment by Lord *Dunedin* in *Whiteman* v. *Sadler* (2) reaffirms it with added authority.

The further provision that, if effected, no such dealing shall be valid is a statutory declaration of the rule of the common law, in presence of the prior prohibition.

The concluding words of the section, whatever the extent of the application, though in our opinion they apply to the whole section, confirm the view already expressed.

This being the true state of the law, and the parties presumably knowing this, the document ought to be construed as not attempting to violate the law, and therefore as not intended to effect a dealing forbidden. In other words the bargain was not absolute, but inchoate only, and as the necessary consent was never obtained, the transaction never emerged from the inchoate stage, and no lease in fact ever existed.

There is therefore no room for estoppel or personal conduct to alter their legal rights. In any case, where an Act of Parliament lays down a rule of public policy it is impossible for private individuals to abrogate it at will, and more particularly if the rule relates to the regulation of public property. (See *Equitable Life Assurance Society of the United States* v. *Reed* (3).) Where that rule of public policy takes the form of express declaration of

(1) 2 M. & W., 149, at p. 151. (2) (1910) A.C., 514, at pp. 526, 527.
(3) (1914) A.C., 587, at p. 595.

H. C. OF A. 1915.

ROACH v. BICKLE.

Isaacs J. Gavan Duffy J.

invalidity no Court can permit personal relations to effect a virtual repeal of the enactment.

The defendant's application to add a plea of set-off need not now be considered, as Mr. *Armstrong* voluntarily agreed to allow the sum of £61 to be deducted from the amount of damages.

The appeal will be dismissed with costs.

RICH J. There was some evidence in the case that opinions had been expressed that the consent of the Commissioner was not necessary to validate a transfer or dealing with property within the irrigation area. That there should be no doubt, so far as this transaction was concerned, the parties expressly stipulated that "this lease is subject to the written approval of the Commissioner."

The agreement was provisional. As the approval of the Commissioner was not obtained, the contract did not become operative. I was not a member of the Court which granted special leave in this case. The grounds for the application are set out in the affidavit of J. B. Broatch, filed on 23rd August 1915. Leave would not have been granted on the question of set-off. The respondents have substantially succeeded, and, having regard to the terms upon which leave was granted, I consider that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors, for the appellant, *Kershaw, Matthews & Lane.*
Solicitor, for the respondent, *Thomas Arkins.*

B. L.