[HIGH COURT OF AUSTRALIA.]

THE STATE OF NEW SOUTH WALES AND ANOTHER . . . . . PLAINTIFFS;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

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SYDNEY, *April* 12-15; *Aug* 18.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Crown Lands (*N.S.W.*)—*Dedication*—*Revocation of dedication*—*Garden Island*—*Dedication to purposes of naval depot*—*Whether dedication perpetual*—*User and occupation by Imperial Navy*—*Agreement between Imperial Government and Government of State*—*Imperial Order in Council*—*Effect of recitals*—*Commonwealth holding in right of Imperial Government*—*Right of New South Wales to possession*—*New South Wales Constitution Act* 1855 (18 & 19 *Vict. c.* 54), *sec.* 2—*Crown Lands Alienation Act* 1861 (*N.S.W.*) (25 *Vict. No.* 1), *secs.* 3, 5—*Colonial Fortifications Act* 1877 (40 & 41 *Vict. c.* 23), *sec.* 1—*Crown Lands Consolidation Act* (*N.S.W.*) (*No.* 7 *of* 1913), *sec.* 25—*Imperial Order in Council of 26th October* 1899.

Practice—*High Court*—*Original jurisdiction*—*Hearing of action*—*Direction that whole case be argued before Full Court*—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *sec.* 18.

Garden Island, in Port Jackson, was, at the time the *New South Wales Constitution Act* 1855 was enacted, part of the waste lands of the Crown, the entire management and control of which was by sec. 2 of that Act vested in the Legislature of New South Wales. Pursuant to sec. 5 of the *Crown Lands Alienation Act of* 1861 (N.S.W.) the Island was, as to one part in 1865 and as to the other part in 1866, dedicated for the purposes of a naval depot. The Island had for some years before 1865 been continuously and exclusively used by the Imperial Government as a naval depot for the Royal Navy, and thereafter continued to be so used until 1913, since when the Island was used by the Commonwealth for the purposes of the Australian Navy. By an Imperial Order in Council of 26th October 1899, made pursuant to the *Colonial Fortifications Act* 1877, it was recited that an agreement had been made between the Imperial Government and the Government of New South Wales that

certain improvements should be made to Garden Island and a suitable residence for the representative of the Navy on the Australian Station should be provided, and that, as soon as those works were carried out and the sites of a receiving depot and the said residence were conveyed, granted or dedicated in perpetuity for the use of Her Majesty's Navy "in the same way as Garden Island had been," the Imperial Government would surrender certain Ordnance Reserve and other lands. The Order in Council then set out that in consideration of the premises Her Majesty ordered that the Ordnance Reserve and other lands be and the same were vested in the Government of New South Wales. On 12th October 1923 the Minister administering the *Crown Lands Consolidation Act* 1913 (N.S.W.) purported, pursuant to sec. 25 of that Act, to revoke the dedication of Garden Island.

Held, by *Knox* C.J., *Higgins*, *Gavan Duffy*, *Rich* and *Starke* JJ. (*Isaacs* J. dissenting), that, notwithstanding the Order in Council of 26th October 1899 and the matters recited therein, the Minister might lawfully revoke the dedications of Garden Island.

Held, also, by *Knox* C.J., *Gavan Duffy*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the dedications were effectively revoked on 12th October 1923.

Held, therefore, by *Knox* C.J., *Gavan Duffy*, *Rich* and *Starke* JJ. (*Isaacs* and *Higgins* JJ. dissenting), that the State of New South Wales was entitled as against the Commonwealth, which claimed in right of the Imperial Government, to possession of Garden Island.

Under sec. 18 of the *Judiciary Act* 1903-1920 a Justice of the High Court may direct that the whole of a case which comes before him for hearing be argued before the Full Court.

REFERENCE by *Starke* J.

An action was brought in the High Court by the State of New South Wales and the Attorney-General for that State against the Commonwealth in which the statement of claim as amended was substantially as follows :—

1. On and prior to 10th January 1865 Garden Island which is situated in the Harbour of Port Jackson in the State of New South Wales and which then had an area of 12 acres 2 roods was vested in Her Majesty Queen Victoria in right of her Sovereignty of the said State (then Colony) and was Crown land within the meaning of the New South Wales *Crown Lands Alienation Act of* 1861 (25 Vict. No. 1).

2. Under the provisions of the said Act the Governor of the said Colony with the advice of the Executive Council thereof by notice published in the New South Wales Government *Gazette* on

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10th January 1865 dedicated portion of the said Island having an area of 4 acres 1 rood 25 perches for the purposes of a naval depot.

3. Under the provisions of the said Act the said Governor with the advice aforesaid by notice published in the said *Gazette* on 5th June 1866 dedicated a further portion of the said Island having an area of 6 acres 3 roods 21 perches for the purposes of a naval depot. It was intended that the said dedication should include the whole of the remaining portion of the said Garden Island but owing to an error in calculating the area of the said Island there remained 1 acre 34 perches outside the said dedications.

4. The said remaining 1 acre 34 perches of the said Island has not in terms been the subject of any dedication or alienation and unless taken to have been included in the dedication of 5th June 1866 has always remained Crown land but has always been treated as if included in the said dedication of 5th June 1866. Subsequently to the said 5th June 1866 the area of the said Island was increased by the addition thereto by reclamation of 6 acres 1 rood 27 perches but the said additions were never the subject of any dedication or alienation and have always remained Crown land.

5. On 12th October 1923 the Minister administering the New South Wales *Crown Lands Consolidation Act* 1913 duly revoked the said dedications under the powers conferred upon him by sec. 25 of the last-mentioned Act whereupon the whole of Garden Island became and has ever since continued to be Crown lands under the same Act.

6. The defendant Commonwealth has for a long time been in possession of the said Island, and has refused and still refuses to give the plaintiffs or either of them possession of the said Island or any portion thereof.

The plaintiffs claimed (*inter alia*): (1) possession of Garden Island; (2) alternatively a declaration that the plaintiffs are or one of them is entitled to possession of the said Island; (3) mesne profits in respect of the said Island from 12th October 1923.

The defence as amended was as follows :—

1. The defendant denies that on 10th January 1865 Garden Island had only an area of 12 acres 2 roods.

2. On 25th August 1864 the Governor of the Colony of New South Wales in the manner prescribed by sec. 5 of the *Crown Lands Alienation Act of* 1861 of the said Colony by notice published in due form in the Government *Gazette* of the said Colony on 10th January 1865 duly dedicated portion of Garden Island to a public purpose namely the purpose of a naval depot the said dedication being for the purpose of the continuous and exclusive use of it the portion dedicated by the Government of the United Kingdom of Great Britain and Ireland (hereinafter called the Imperial Government) as a naval depot for the sole purposes of the naval defence of the said Colony and the Empire or of such use of it by any body or persons chosen by the Imperial Government to use it for such purposes.

3. On 28th November 1865 the Governor of the said Colony duly in the manner prescribed by the said sec. 5 by notice published in due form in the Government *Gazette* of the said Colony on 5th June 1866 dedicated portion of Garden Island being the remaining portion thereof not dedicated as hereinbefore mentioned to a public purpose namely the purpose of a naval depot the said dedication being for the purpose of the continuous and exclusive use of it the portion dedicated by the Imperial Government as a naval depot for the sole purposes of the naval defence of the said Colony and Empire or of such use of it by any body or persons chosen by the Imperial Government to use it for such purposes.

4. The defendant says that the whole of Garden Island was dedicated by the said dedications but that if contrary to its contention any portion of Garden Island as existing in June 1866 was not comprised within the said dedications the said portion was at or about the time of the dedications aforesaid duly dedicated to the same purposes as those to which the portions so dedicated as aforesaid were dedicated.

5. No grant has ever been made of any portion of Garden Island.

6. The said dedications were dedications in perpetuity.

7. The Imperial Government and the Government of the said Colony duly agreed that all the said dedications should be treated by them as dedications in perpetuity and should never be revoked and that the lands so dedicated as aforesaid might be possessed and

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used by the Imperial Government for the purpose of a naval depot for the sole purposes of the naval defence of the said Colony and Empire or might be possessed and used for the said purposes by any body or persons chosen by the Imperial Government to use them for the said purposes.

8. The defendant denies that any portion of Garden Island has always remained Crown land and the defendant denies that the addition to Garden Island mentioned in par. 4 of the statement of claim never was the subject of any dedication or alienation and has always remained Crown land.

9. Prior to the making of the reclamation mentioned in par. 4 of the statement of claim the Imperial Government and the said Colonial Government duly agreed that the Colonial Government should make the said reclamation for the Imperial Government and duly agreed that the land so to be reclaimed should when so reclaimed be treated for all purposes as part of Garden Island and as part of the lands so dedicated as aforesaid and that the land so reclaimed might be possessed and used by the Imperial Government for the purpose of a naval depot for the sole purposes of the naval defence of the said Colony and Empire or might be possessed and used for the said purposes by any body or persons chosen by the Imperial Government to use it for the said purposes The said reclamation was accordingly made possessed and used pursuant to the said agreement.

10. The Imperial Government has chosen the defendant to possess and use the whole of Garden Island including the said reclaimed land for the purpose of a naval depot for the sole purposes of the naval defence of the said Colony and Empire and the defendant is using the same by reason of such choice for the said purposes and not otherwise and is necessarily and with the consent and by the authority of the Imperial Government in possession of the same for the purpose of such use and not otherwise and does not claim otherwise any right to the possession of Garden Island.

11. The defendant denies that on 12th October 1923 or at any time the Minister administering the New South Wales *Crown Lands Consolidation Act* 1913 duly or at all revoked any of the dedications herein mentioned under the powers conferred upon him by that

Act or under any power and denies that any part of Garden Island ever became Crown lands under the said Act as alleged in the statement of claim and says that by reason of the facts herein stated the Minister had not and has not power to revoke any of the dedications herein mentioned.

12. The defendant submits that His Majesty in right of his Sovereignty of the United Kingdom of Great Britain and Ireland or some party properly joined on his behalf is a necessary party to these proceedings.

By their reply the plaintiffs joined issue.

The action came on for hearing before *Starke* J., who, after evidence had been taken, made an order that the cause be argued before the Full Court on the evidence taken on the hearing before him.

The parties admitted (*inter alia*) that they were willing and agreed to treat the whole of Garden Island as it existed on 5th June 1866, and the reclamations mentioned in the statement of claim as if they were included in the dedications mentioned in pars. 2 and 3 of the statement of claim.

The other material facts are sufficiently stated in the judgments hereunder.

Piddington K.C. and *Browne* K.C. (with them *McKell*), for the plaintiffs. Garden Island was part of the waste lands of the Crown, the entire management and control of which was vested in the Legislature of New South Wales by sec. 2 of the *New South Wales Constitution Act* 1855. It has remained in that position ever since and has never been divested from the King in right of New South Wales. The dedications in 1865 and 1866, pursuant to sec. 5 of the *Crown Lands Alienation Act of* 1861 (N.S.W.), for the purposes of a naval depot were for the purpose of the defence of New South Wales; and it was the duty of the Legislature to see that the purposes of the dedication were carried out. The Legislature might at any time have revoked the dedication, and the revocation in 1923, under sec. 25 of the

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Crown Lands Consolidation Act 1913 (N.S.W.), was effective and entitled the State to possession of the Island. Neither the Order in Council of 26th October 1899, which was made under the power conferred by sec. 1 of the *Colonial Fortifications Act* 1877, nor the agreement therein recited, affected the power of the Legislature of New South Wales to deal as it chose with Garden Island, and in particular to revoke the dedications of it. The Order in Council shows that the Imperial Government was content to accept the existing dedications of Garden Island. There was nothing in the nature of a bargain as to Garden Island. There was no more than an arrangement between the Imperial Government and the Government of New South Wales that so long as the Imperial Government chose to use Garden Island as a naval depot for the Royal Navy it might do so. When in July 1913 the naval defence of Australia was taken over by the Commonwealth and Garden Island ceased to be used by the Royal Navy, the Government of New South Wales might honourably, as it always might legally, have put an end to the dedications of Garden Island and resume possession of it. In the same way, if the Legislature of New South Wales had before Federation taken over the naval defence of New South Wales, it might properly have resumed possession of Garden Island under the terms of the dedications.

Brissenden K.C. and *Flannery* K.C. (with them *Weston*), for the defendant. Garden Island was not part of the waste lands of the Crown at the time the *Crown Lands Alienation Act of* 1861 was passed, and was not Crown land within the meaning of that Act, because in 1856 the Government of New South Wales had promised or agreed that the Island should be set apart for the Royal Navy. That setting apart or dedication had been made under the power conferred by sec. 3 of 5 & 6 Vict. c. 36. The dedications of 1865 and 1866 were a formal ratification of the earlier agreement and setting apart. The acts which were done prior to 1865 with relation to Garden Island constituted a gift or handing over to the Imperial Government for a particular purpose, namely, a permanent depot for the Royal Navy. If those acts prior to 1865 had no legal effect, they must nevertheless be taken into account in considering what was the

effect of the dedications of 1865 and 1866. They show that the dedication was for the purposes of a naval depot for the Royal Navy. The provisions of sec. 25 of the *Crown Lands Consolidation Act* 1913 do not bind the Crown, and do not enable the Minister to revoke a dedication to the Crown in right of the Empire (*Perry* v. *Eames* (1); *Mersey Docks and Harbour Board Trustees* v. *Cameron* (2); *Gorton Local Board* v. *Prison Commissioners* (decided in 1887) (3)). The revocation of 12th October 1923 was not validly made, for the Minister could not, on the facts, possibly have formed an opinion that the purposes for which the dedications had been made had wholly failed and that it was expedient to resume the land. The Court is entitled to go behind the opinion of the Minister (*R.* v. *Electricity Commissioners*; *Ex parte London Electricity Joint Committee* (4); *R.* v. *Port of London Authority* (5)). The Minister either acted on a misconstruction of the Act or took into consideration matters which were outside the failure of the purposes. The Crown in right of the Empire is a necessary party to this action, for the Court cannot do justice in its absence. The whole of the transactions in relation to Garden Island are transactions which are not cognizable in a Court of law. They are in the nature of political arrangements and not of binding contracts. The Order in Council of 26th October 1899 under the authority of the *Colonial Fortifications Act* operated to give legal effect to the agreement which had been entered into between the Imperial Government and the Government of New South Wales, that Garden Island should be held by the Imperial Government in perpetuity. The "terms and conditions" upon which by the Order in Council the Ordnance Reserve and other lands were transferred to the Government of New South Wales included the condition that Garden Island should continue to be held in perpetuity. If that is so, the revocation of the dedications in 1923 is repugnant to the Order in Council of 26th October 1899 and is invalidated by the *Colonial Laws Validity Act* 1865. The recital in the Order in Council of the fact that the Crown is possessed of a grant in perpetuity and that the possession of that grant in perpetuity is made part of the consideration for the granting of the

(1) (1891) 1 Ch. 658.
(2) (1864) 11 H.L.C. 443, at p. 464.
(3) (1904) 2 K.B. 165 (n.).
(4) (1924) 1 K.B. 171.
(5) (1919) 1 K.B. 176.

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Ordnance Reserves was sufficient to establish a legal relationship which could not be interfered with by State legislation.

Piddington K.C., in reply.

Cur. adv. vult.

Aug. 18.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY, RICH AND STARKE JJ. In this case the plaintiffs sue the defendant for the possession of Garden Island or, in the alternative, for a declaration that they are entitled to such possession. The case was set down for trial before *Starke* J., who, having heard the evidence led by the plaintiffs and the defendant respectively, directed that the whole case should be argued before the Full Court; and it now comes before us on that direction. In our opinion sec. 18 of the *Judiciary Act* authorizes this course to be taken ; but, as it has been more than once suggested that the power contained in that section to direct that any case or question should be argued before a Full Court applies only to arguments on points of law, it is well to note that the Court is now asked under that power to determine, and is determining, mixed questions of law and fact.

The plaintiffs in their statement of claim allege that Garden Island was Crown land within the meaning of the New South Wales *Crown Lands Alienation Act of* 1861 (25 Vict. No. 1), that portions of it were dedicated for the purposes of a naval depot under the provisions of that Act, and that " on the 12th day of October 1923 the Minister administering the New South Wales *Crown Lands Consolidation Act* 1913 duly revoked the said dedications under the powers conferred on him by the 25th section of the last-mentioned Act, whereupon the whole of Garden Island became and has ever since continued to be Crown lands under the same Act."

The defendant, in its statement of defence, alleges that the said dedications were dedications in perpetuity, and were for the purpose of the continuous and exclusive use by the Government of the United Kingdom of Great Britain and Ireland of the dedicated portions as a naval depot for the sole purposes of the naval defence of the Colony of New South Wales and the Empire, or of such use of it as a naval

depot by a body or person chosen by the Imperial Government to use it for such purposes. It then alleges that the Imperial Government has chosen the defendant to possess and use the whole of Garden Island for the purposes of a naval depot and that the defendant is so using it. The defendant further alleges an agreement between the Imperial Government and the Government of New South Wales under which the dedications should be treated by those Governments as dedications in perpetuity and should never be revoked, and that the land so dedicated might be possessed and used by the said Government or its nominee, and that the defendant is such a nominee and so possessed of and occupying the land in question under the terms of the said agreement.

Garden Island, we may say, is situated in the Harbour of Port Jackson, and has formed part of the territory of New South Wales since its foundation. It has been more or less completely used as a naval depot since the year 1858. The Island formed part of the lands of the Crown in New South Wales, and was unalienated at the time of the passing of the *Constitution Act* for New South Wales in 1855 (18 & 19 Vict. c. 54). It was part of the waste lands of the Crown, the entire management and control whereof was vested in the Legislature of New South Wales by force of sec. 2 of that Act. This grant of legislative power to New South Wales gives it an authority in respect of the waste lands of the Crown in New South Wales "as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow" (*Hodge* v. *The Queen* (1)). The constitutional validity of the *Crown Lands Alienation Act of* 1861 and of the *Crown Lands Consolidation Act* 1913 is indisputable. The power to dedicate Crown lands for the purpose of defence and any other public purpose was taken by the Act of 1861, and the power to revoke such dedications was first taken by the *Crown Lands Act of* 1884 (48 Vict. No. 18), sec. 105, and both powers were re-enacted in the Consolidation Act of 1913, secs. 24 and 25.

It will not, therefore, avail the Commonwealth to establish some arrangement between the Imperial Government and the Government of New South Wales as to the use of Garden Island in contradiction

(1) (1883) 9 App. Cas. 117, at p. 132.

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of an express statutory provision in New South Wales vesting Garden Island in the Crown and declaring that it shall become Crown lands for the purpose of the *Crown Lands Act* of New South Wales, unless sanction is given to the arrangement by some Imperial law. The Commonwealth has failed to substantiate any material part of the statement of defence, whilst the State of New South Wales has proved the allegations on which it relies. The documents submitted for our consideration show that Garden Island was dedicated in June 1866 for the purposes of a naval depot pursuant to the *Crown Lands Alienation Act of* 1861. That dedication restricted the use of the land, but it did not confer or purport to confer any legal or equitable right upon the Imperial Government or upon any other authority. The Island remained Crown land, reserved for the purposes of a naval depot, but subject always to the legislative powers of the State of New South Wales under its Constitution. The responsible Ministers of the Crown in New South Wales permitted the use of the Island as a naval depot for the ships of the Royal Navy, but no right or title to permanent possession was conferred upon any Imperial authority which such authority could itself enjoy or transmit to the defendant.

It is necessary, however, to examine an arrangement between the Imperial Government and the Government of New South Wales embodied in an Order in Council dated 26th October 1899. This Order in Council recited an agreement between the two Governments to make certain improvements on and in connection with Garden Island and to provide a suitable residence for the representative of the Navy on the Australian Station; and it further recited that as soon as these works were carried out to the satisfaction of the naval authority and the sites of a receiving depot and the said residence were conveyed, granted or dedicated in perpetuity for the use of Her Majesty's Navy "in the same way as Garden Island had been the Imperial Government would surrender all the lands known as the Ordnance Reserve and all other lands or buildings" in New South Wales "to which it might have any claim or title." Following this recital, the Order in Council set out that Her Majesty, in consideration of the premises, ordered that the Ordnance Reserve and other lands be and the same were vested in the Government of New South Wales

to the extent that the Government for the time being of New South Wales should take and hold the said lands upon such trusts and for such purposes and deal with the same in such manner as the Governor, with the advice of the Executive Council of New South Wales, should by Order in Council direct, appoint and determine. The Order in Council was made pursuant to the provisions of the *Colonial Fortifications Act* 1877 (40 & 41 Vict. c. 23); and it was said that the Order in Council gave some greater right in respect of Garden Island to the Imperial Government than did the dedication of 1866. In other words, some sanction is claimed under an Imperial law for the dedication in perpetuity of Garden Island.

The Order in Council assumes, as was the fact, that Garden Island had been the subject of some dedication, and recites an arrangement for dedication in perpetuity of other lands for the use of Her Majesty's Navy in the same way as Garden Island had been dedicated. The Order in Council did not dedicate Garden Island or any other lands to the use of Her Majesty's Navy. It recognized an existing dedication of Garden Island and left the dedication of the other lands to the authority for that purpose, namely, to the Government of New South Wales pursuant to its own constitutional powers and authorities.

The *Colonial Fortifications Act* 1877 in no wise interferes with or purports to interfere with the constitutional powers of the State of New South Wales in respect of the Crown lands confided to its management and control. The " terms and conditions " referred to in sec. 1 of the Act clearly relate, we think, to terms and conditions in respect of the fortifications, &c., transferred to and vested in a colonial authority, and by no means authorize a dedication by Order in Council of lands of the Crown within the jurisdiction and authority of colonial Governments.

If, as we have seen, there is no Imperial legislation on which the defendant can rely to establish its defence, no rights conferred by the dedication or by any agreement made in respect of or in consequence of the dedication could maintain their validity in face of the revocation of 12th October 1923: if any existed, they were destroyed by that revocation. The provisions of sec. 25 of the New South Wales *Crown Lands Consolidation Act* 1913, in our

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opinion, enable the Minister completely to undo the effect of such dedications and agreements.

In these circumstances the plaintiffs are entitled to the judgment which they seek; but a declaration of right will be sufficient for present purposes, reserving liberty to apply.

Isaacs J.

ISAACS J. This is a very exceptional case. Although it is an action by a State against the Commonwealth, no question of Federal constitutional law arises. The State of New South Wales sues the Commonwealth to recover possession of Garden Island, and alternatively for a declaration of right to possession, and also for damages in the form of mesne profits from October 1923. The Commonwealth does not set up or rely on any inherent right of its own to retain possession; but merely relies on the permission to occupy for defence purposes which it received from the Imperial Government when in 1913, by arrangement with that Government, it assumed the protection of Australia by the Royal Australian Navy as a unit of the Royal Navy of the Empire.

The issue here is, both in form and in substance, as to whether the State has the immediate right, legal and equitable, as against the Imperial Government to possession of Garden Island. I say "legal and equitable" because it is very necessary to remember that this Court—like the Court of Gibraltar, dealt with in *Larios* v. *Bonany y Gurety* (1)—has no historic legislative separation of legal and equitable jurisdictions. On the contrary, Parliament has expressly, by secs. 31 and 32 of the *Judiciary Act*, required the Court to have regard to equity, "so that as far as possible all matters of controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided." Parliament has done what it can to make this Court a tribunal of justice, not one of formalism. It rests with the Court to make the law effective. If, therefore, it appears either that the State has not the legal right to enter into possession or that, having the strict legal right, it would in the view of a Court of equity be unconscientious to make an

(1) (1873) L.R. 5 P.C. 346.

order for possession or a declaration of right to possession as against the Imperial Government, the suit must fail. More particularly so, I would add, as to the declaration of right, which is a discretionary remedy.

A few words are necessary as to the absence of the Imperial Government from the suit. When notified of the position, it stated that it did not wish to be added as a party or to intervene in the litigation; adding that it understood the use of the properties for naval purposes was not at issue, but only the question of payment. I greatly regret, for reasons to be presently stated, the absence of the Imperial Government as a party. The real issue appears to have been misunderstood. In one sense, an irrelevant sense, it is, or rather might be, a question of money only. There are some passages in the correspondence in evidence which treat Garden Island, or require it to be treated, as a "transferred property" under sec. 85 of the Constitution, placing the right to possession in the Commonwealth, and leaving undetermined merely the question of compensation. Those passages may have led to the misconception, though there are others tending to correct them. But, however that may be, Garden Island is admittedly not a property within sec. 85 at all. If the Commonwealth could acquire it at all, it would be under a new and distinct process—just as it acquires any State or private property it needs—resulting in an original right of proprietorship to which the Imperial Government would be an utter stranger. That right, then arising for the first time and out of independent circumstances, would in no way solve any issue before us; for there is not, as far as I know, any legal warrant for reducing the State's claim in this action to a question of money. I entertain serious doubt also whether the Commonwealth could in any case lawfully so acquire the property we are concerned with, if, as it appears to me, the Island is dedicated in perpetuity to the use of the Imperial Government for the naval purposes of the Empire.

Notwithstanding the ability of the arguments we have heard on both sides, I should have been glad to hear the direct views of the Imperial Government on the problems before us. Besides questions of a local character and questions of ordinary law, they involve the general unwritten Constitution of the Empire in relation to the

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separate written Constitutions of the Dominions, and the effect upon those written Constitutions, and the laws made under them, of the *Colonial Fortifications Act* 1877. As to the ultimate conclusion upon the claim, I am unable to entertain any doubt whatever. I am deeply conscious of the weight of the contrary views, but I should be wanting in candour if I suggested hesitation. By no recognized standard of right am I able to consider the State entitled to set aside, for ever, the right of the Imperial Government to occupy Garden Island as a naval depot, and to treat the Commonwealth now, or even the Imperial Government at any future time, as an unauthorized intruder. Nor, if it were a question of money, has the State, in my opinion, any just claim, legal or moral, to be paid for Garden Island. The evidence shows that Garden Island has been paid for already with lands worth many times its value.

The present claim, I cannot help thinking, has been made under misapprehension of the effect of some of the earlier transactions of the Home and Colonial Governments, and of the relation of those transactions to the later bargains. That misapprehension is not very difficult to fall into without a very close and careful examination and co-ordination of somewhat complicated negotiations spread over many years. It is, I believe, worth removing, for many reasons, even at the cost of some elaboration.

The primary case for the State may be put in a small compass in the following way:—In 1865 Garden Island was Crown land at the uncontrolled disposal of the State Government in manner provided by the *Crown Lands Alienation Act of* 1861. Pursuant to that Act, it was in 1865 and 1866 dedicated to the use of the Imperial Government for the purpose of a naval depot. In 1923, under the authority of sec. 25 of the *Crown Lands Consolidation Act* 1913, the dedication was revoked, whereby the Island again became Crown lands, unaffected by the dedication; and consequently the State Government had, and now has, the right of possession as against all the world.

The Commonwealth's answer is also compressible. It may be reduced to two main propositions:—(a) Garden Island is not "Crown lands" within the meaning of the *Crown Lands Act*, the attempted revocation in 1923 being invalid, since it was repugnant

to the Imperial Order in Council of 26th October 1899, put in evidence by the plaintiff. (b) Alternatively, assuming Garden Island to be now in strict law " Crown lands " within the meaning of the *Crown Lands Act*, the State agreed with the Imperial Government for valuable consideration, which it has accepted and retained, that it would dedicate in perpetuity, or otherwise transfer, to the Imperial Government, Garden Island, or the receiving depot thereon, or the reclamations, and that agreement still subsists and, at least while the consideration is retained, disentitles the plaintiff to the active interposition of the Court.

These broad issues require close investigation as to three questions : (1) The construction and legal effect of the Order in Council of 1899, and the contractual relations of the two Governments ; (2) the meaning and connotation of the original dedications of 1865 and 1866, and (3) whether those dedications were originally intended to be " in perpetuity."

One special feature necessarily absent from ordinary cases of this kind should be at once adverted to, in order to clear the ground. I refer to the state of the *title* to Garden Island. In the plaintiffs' argument considerable stress was placed on the fact that there had never been any grant to the Imperial Government. That view rests on a serious misapprehension of the title.

Before the Constitution of 1855 the title was in the King. The King owned all Colonial lands in right of his Colony, but that only means ownership because it is a Colony under the Crown. I have very fully dealt with the position in the Government House Case (*Williams* v. *Attorney-General* (*N.S.W.*) (1)). I stated (2) that the express statutory control of the sale and other disposal of the waste lands of the Crown " was transferred to the Colony not as a matter of *title*—as has been tacitly assumed—but as a matter of *governmental function*. It was given, not to the King in his executive capacity, but to the *Legislature*, which doubly evinces that it was not as a matter of title or property." In other words, *the Constitution of* 1855 *left the title exactly where it was*. If a grant is necessary, its absence would be fatal to the plaintiffs' case. But it is not necessary.

(1) (1913) 16 C.L.R. 404, at pp. 440-460—particularly, for present purposes, pp. 442, 450, 456.

(2) (1913) 16 C.L.R., at p. 456.

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In truth, there is no competition between the parties as to the title of the land in the ordinary sense of legal tenure, created and evinced by a grant. The King is on both sides. The legal title is admittedly that of the King as Sovereign. It is not that of any special part of the Dominions of the Crown, for the King is indivisible. But from the nature of the Constitution of the Empire, the King's title to the land is held by him for the benefit, and as controllable by the legislation, of such portion of His Majesty's Dominions as the governing relevant law of the Empire prescribes.

In *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1) Lord *Watson*, with reference to very strong terms in the *British North America Act* 1867, said: "It must always be kept in view that, wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a Province, these expressions merely import that the right to its beneficial use, or its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its Legislature, *the land itself being vested in the Crown.*" This statement was supplemented by Lord *Davey* in *Ontario Mining Co.* v. *Seybold* (2), in these words: "The right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or Province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the Province." I should observe that the requisite nature of the instruments must depend on the relevant legislation. Lord *Haldane*, for the Judicial Committee, reaffirmed the doctrine of the two cases mentioned in *Attorney-General for Canada* v. *Attorney-General for Quebec* (3).

The importance of these considerations is that it cannot properly be said, as in effect it was said, for the State in argument: "New South Wales in 1855 began with the legal title to Garden Island to the exclusion of the Imperial Government, and the dedication in 1865-1866 did not affect the basic title, because for that a grant was necessary." The fact of the title being in the King is a neutral circumstance. What is important is to find for what governmental

(1) (1888) 14 App. Cas. 46, at p. 56. (2) (1903) A.C. 73, at p. 79.
(3) (1921) 1 A.C. 413, at p. 419.

purposes, and by what royal agents, this land of the King, in view of the proved facts, ought now by law to be applied and used. According to the answer to that inquiry, the right to possession follows. The Constitution of 1855 committed the management, control and disposition of waste Crown lands (and I assume, without so deciding, that Garden Island was included) to the King acting by his Legislature and Executive of New South Wales. That local statutory power, which left untouched the Crown title of the land, connoted as an essential incident the initial right of the Colony to the possession of, and to all benefits arising from, Garden Island, pending some authorized disposition inconsistent therewith. (I ignore for the moment what will afterwards appear, relative to the agreed exchange *de facto* of Fort Macquarie for Garden Island.) When in 1865-1866 Garden Island was "dedicated for a naval depot" —a process unknown for such a purpose to the common law (see per Lord *Sumner* in the *Government House Case* (1) and per *Wills* J. in *Ex parte Lewis* (2))—there was then a statutory disposition inherently inconsistent with the initially implied right of possession to, and of benefits from, Garden Island in the Executive of New South Wales.

Sec. 3 of the Act of 1861 (*Crown Lands Alienation Act*) provided: "Any Crown lands may lawfully be" (*a*) "granted in fee simple or" (*b*) "dedicated to any public purpose." I have for clearness separated the words of the section in order to exhibit the more plainly the alternative methods of exercising the Colony's constitutional power of dealing with Crown lands. Sec. 5 enacted that upon the notice mentioned therein being gazetted "such lands shall become and be reserved or dedicated accordingly." That impressed upon dedicated lands a statutory status limiting their use and benefit, and consequently their possession, in conformity to the purpose to which they were dedicated. It is true that the section continues, "and may at any time thereafter be granted for such purposes in fee simple"—that is additional. Even without a grant in fee simple, the statute itself as stated gives legal effect to the executive act of dedication. But further, seeing that in the case of Garden Island

(1) (1915) A.C. 573, at p. 579; 19 C.L.R. 343, at p. 346.
(2) (1888) 21 Q.B.D. 191, at p. 197.

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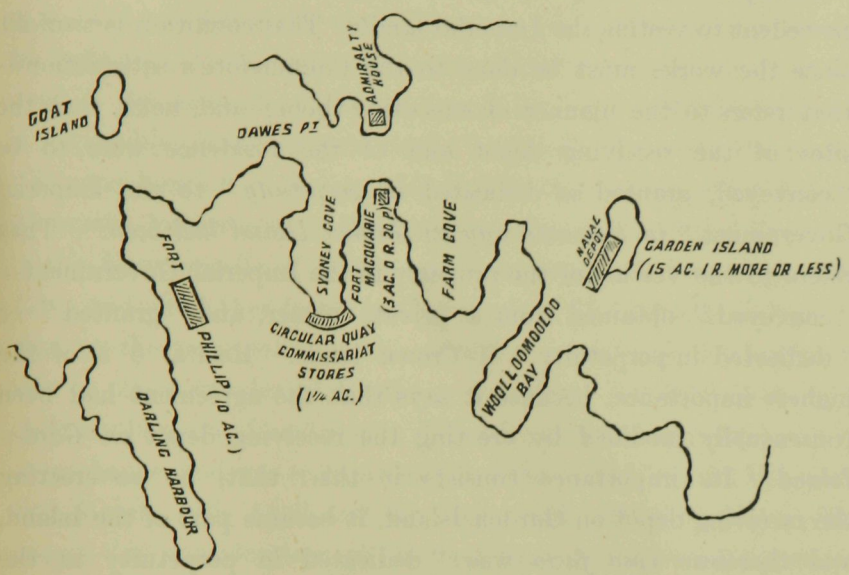
the title was already in the Crown, it would, in my opinion, have been entirely outside the contemplation of the section for the Governor, acting for the King, to grant in fee simple to His Majesty the King of England in his Imperial right for the defence of his Empire what he already held in fee in his regal capacity and was statutorily dedicated to Imperial defence by authority of the Colonial Legislature. Grants in fee simple were intended to be issued to subjects; and I think the concluding words in sec. 6 confirm this view. The dedication was all that was necessary and appropriate, and even possible. In my opinion the question of a grant was not overlooked. It was not that the State omitted to give, and that the Imperial Government omitted to ask for, a grant, but that it was regarded as unsuitable and unnecessary, even if possible under the State statute.

The position, then, is this:—The dedication as a statutory disposition, inconsistent with the Colony's right of user and possession, left the King free to use the land, legally his own, for the purposes of the dedication. The main question for the Court, then, as I view the controversy, is: Was the dedication, competently under the authority of Imperial law and consistently with relevant legal and equitable considerations, terminated either absolutely or in relation to the Imperial Government?

(1) *Order in Council of 26th October* 1899.—A good deal of argument was devoted to the legal effect of this Order in Council, which the plaintiff State itself put in evidence in its own case at the hearing, the Order being one of the facts admitted in writing. The first, and to my mind the only really necessary, question for the determination of this cause is whether the Order in Council produced by the plaintiffs does not, in the circumstances, at once destroy the plaintiffs' case. In my opinion it does. It was made under the authority of the *Colonial Fortifications Act* 1877. In an earlier form it was prepared, wholly or partly, and was amended in Sydney (see Chamberlain's Despatch, 29th April 1898). Certainly additional terms were assented to by Mr. Reid (as he was then) on 30th November and communicated to the Home Government; and there the Order was made, as ultimately agreed to.

The accompanying sketch will facilitate understanding the document, and also, to some extent, the correspondence, which will be dealt with later :—



Dealing first with its *construction*, what does the Order say ?

There are nine recitals. Recitals 1 and 2 refer to the lands to be vested, namely, the Ordnance Lands held by grant and three others held by other title, namely, Commissariat Stores, Fort Phillip and Fort Macquarie. Recital 3 refers to land to be retained for the naval depot, namely, Garden Island. It is there described as "duly dedicated . . . for the purposes of a naval depot." That is to be read with par. 4 of the agreement, recited later. It then appears that the Order affirms by recital that Garden Island has been "*dedicated in perpetuity.*" This is a *basic affirmation* on which the Order in Council is founded. Without that basis it is clear from the terms that there would have been no Order in Council. The words "dedicated in perpetuity" make the affirmation not merely relate to the past but also extend to the indefinite *future.* Recital 4 refers to negotiations as to Sydney being the Head Naval Depot for the Australian Station, and it sets out the Stuart agreement of 1883 (omitting the statement as to the great value of the Imperial lands). It is important on the question of construction to note what the works to be done were, and where they were to be placed. They include : (a) reclamations, wharves and buildings *on Garden*

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Island; (b) naval residences on mainland; (c) new receiving depot on mainland, which was to be in *communication with Garden Island naval depot.* The 4th paragraph of the agreement creates a condition precedent to vesting the Imperial lands. That condition is twofold, since the works must be done to the Commodore's satisfaction—that refers to the manner of executing them; and, next, that the sites of the receiving depot and of the residence were to be "conveyed, granted or dedicated *in perpetuity*" to the Imperial Government "*in the same way as Garden Island had been.*" That refers to the vesting of the property in the Imperial Government—"conveyed," obtained from a private owner, and "granted" or "dedicated in perpetuity" if Crown lands. Recital 5 is of the highest importance, because it says that the agreement had been consensually modified by erecting the receiving depot *on Garden Island.* Its importance consists in this: that, by so erecting the receiving depot on Garden Island, it became part of the Island, and therefore *ipso facto* was "dedicated in perpetuity in the same way as Garden Island." No other or further grant or dedication of the receiving depot was necessary or possible, for, as already pointed out, the legal title to Garden Island had always been and remained in the Crown. In other words, the mere erection there of the receiving depot was in law a complete fulfilment of the condition precedent as to the site of the receiving depot. It is always to be remembered that the necessary depot was the really essential part of the stipulated consideration for the Imperial lands (see the letter of Admiral Fairfax, 22nd February 1889). Recital 5 is, therefore, in effect, a statement of the fulfilment of the condition precedent as to the depot. The same may be said as to the accessorial reclamation. The fulfilment of the rest of the condition precedent needed express statement, and that is found in recital 6. Plaintiffs' admission, No. 13, shows that the recital is true as to Admiralty House; so both parties regarded it. Recitals 7, 8 and 9 are as to the formalities of the Order in Council.

Then comes the operative clause, which states, as the basis of the transfer about to be made, that it is to be "*in consideration of the premises.*" That is a well-known compendious method of referring to the facts and circumstances previously narrated, and of indicating

that what follows is founded on the understanding that those facts and circumstances, if already executed, are to stand unaltered, and, if executory, are to be executed. In *Sheppard's Touchstone*, 7th ed., vol. I., p. 74, it is said that the word " premises " is " often used in reference to facts and transactions which are recited in a former part of the deed." An example of this is found in *Lay* v. *Mottram* (1). It is impossible, either grammatically or legally, to sever the phrase " in consideration of the premises " from the vesting which follows. (Compare, for instance, if further comparison is necessary, Form 150 in the *Encyclopædia of Forms and Precedents*, vol. XII., at pp. 620, 621 ; and also other forms in that work.) The " premises " are as vital to the transaction as the price to an ordinary transaction of sale or the surrender of Blackacre in return for Whiteacre in an ordinary bargain of exchange. This transaction was fundamentally an exchange, and was so regarded (see letters of 1879, 12th February, 18th March, 19th April and 8th May ; and 1880, 20th May). The phrase " in consideration of the premises," when extended, means, in consideration of the Colony of New South Wales having performed as *a condition precedent* what it was bound to perform according to the relevant recitals, in order to obtain the vesting of the lands about to be vested, and in consideration of the truth of the recitals (including the recital of the dedication in perpetuity of Garden Island).

The Order in Council, judging by the surrounding circumstances and, in the first place, merely by its own narration of them, was made and intended, as I read it, as a *final and authoritative settlement, record and definition for the future of the reciprocal relations and rights of the two Governments with respect to all the lands and works referred to in the Order.* In doing so, it was intended to complete, close and supersede all prior negotiations and agreements. The more it is examined, and especially if it is contrasted with all the Orders in Council which have hitherto been made under the *Colonial Fortifications Act* 1877, the more, in my opinion, is it clear from doubt that the specific terms in which it is couched were designed to place the reciprocal rights and obligations of the parties in relation to the two sets of properties on a definite and finally

(1) (1865) 19 C.B. (N.S.) 479, and see pp. 481, 488.

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binding footing. The other Orders in Council are: Mauritius (1879), Tasmania (1880), Queensland (1881), Western Australia (1881), Cape of Good Hope (1882), Canada (1882), New Zealand (1909) and Canada (Nova Scotia) (1920).

I come, as already stated, to that conclusion in construing it apart from any light thrown upon its structure by any extraneous history of the events which led up to it, beginning with the period anterior to the Constitution of 1855 and ending with the vesting in 1899. It formed a new and complete charter of rights for both parties to their respective lands, a treaty of *uti possidetis*. I find no ambiguity in the document calling for the assistance of the evidence to elucidate it. But, in the circumstances, I am bound to go further. At least the Order in Council cannot be said to be unambiguously in support of the plaintiffs' case. The best that could possibly be said for the plaintiffs is that there is some ambiguity but on the whole the interpretation is in its favour. If unambiguous, and if, contrary to my opinion, the document leaves the rights of the parties, outside the mere vesting of the Imperial lands, to be governed by their personal relations, then the rest of the evidence is decisive in favour of the Commonwealth. It is throughout a question of construction of written documents, and therefore one of law (*Di Sora* v. *Phillipps* (1), *Williams Brothers* v. *Ed. T. Agius Ltd.* (2) and *George D. Emery Co.* v. *Wells* (3)). For the moment, as the evidence can more conveniently be considered separately, I shall assume my construction of the Order to be correct, and on that basis will discuss its legal effect.

The legal effect of the Order in Council as framed depends, in the first place, upon some general principles of law applicable to such a case, and in the next place on the force of the *Colonial Laws Validity Act* 1865.

The Order, as already stated, was made under the authority of the Act of 1877, which enabled the Sovereign in Council to vest in the Colony, the Ordnance and three other lands: (1) for such estate and interest, (2) upon such terms and conditions and (3) subject to such reservations, exceptions and restrictions as are

(1) (1863) 10 H.L.C. 624, at p. 638. (2) (1914) A.C. 510, at p. 527.
(3) (1906) A.C. 515.

specified in the Order. *The Order, therefore, has statutory force.* The operative words of the Act are: "It shall be lawful for Her Majesty, on the representation of one of Her Majesty's Principal Secretaries of State and of the Commissioners of Her Majesty's Treasury, that it is expedient so to do, by Order in Council to vest any fortifications" &c. "held in trust for the defence of that Colony." Then follow provisions already outlined. It must be observed *in limine* that the power is *discretionary*, that it is in relation both to Imperial defence and to inter-Imperial relations, and that it is *conditional* on the joint representation of the Colonial Office and the Treasury that it is "*expedient so to do*"—that is to say, it is expedient to vest the lands as the Order in Council is framed. The conclusions of law to be so far drawn from the terms of the statute are these: The Act contemplates that the Sovereign in exercising this discretionary power may, as the owner of the land and as the Sovereign charged with the defence of the Empire, including its financial necessities, take all matters into consideration in determining whether any vesting order shall be made at all, or whether, if made, it shall be made unconditionally or upon terms and conditions which accommodate both Imperial exigencies and local advantages.

Even considered as the owner of the land, and still more as the guardian of the Empire, the Sovereign, unless clearly and distinctly precluded by the statute, may without any express provision to that effect, stipulate for "terms and conditions" in the nature of consideration for exercising the power at all. For instance, it would be an unduly limited construction to place upon the Act that a substituted site for a naval base, making an arrangement beneficial to both grantor and grantee, could not be validly made a binding term or condition by way of consideration. It would assume that, if that substitution were thought by the Imperial advisers of the Crown a necessary condition of expediency, the vesting could never be made at all, or never made so as to be a final settlement of terms; and so either the Colonial benefit of receiving land, or the Imperial means of defence, would be sacrificed or imperilled.

But, in my opinion, the right of the Crown to stipulate a condition when making a grant or concession at common law—a principle which, as will be seen, holds good when so acting under a statutory

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power where the contrary is not declared—exists under the Act of 1877. So here, unless there be found words excluding that right, it is, to my mind, a clear principle of law that, when the Act uses the merely permissive words "it shall be lawful to vest," there is therein a necessary implication that "terms and conditions" by way of consideration *for the vesting* may, if not unlawful, be required, no matter what internal limitations may or may not be attached to the vesting itself, as terms *of* the vesting. There is nothing whatever in the Act to exclude that implication, and it would require something very clear and distinct to have that effect.

But there is a further consideration of a vital nature. As already observed, the statute requires as a basic condition precedent to any valid Order in Council vesting lands, whatever be its terms, that there shall be the joint representation of two Departments of State that it is "expedient so to do." It is manifest that the Order in Council follows, as in established constitutional practice it must follow, the representation, and therefore that the representation declared that the vesting was *expedient only on the conditions precedent and concurrent, and upon the considerations set forth in the Order in Council.* Either that was valid because in contemplation of the statute, or it was not. If not, the Order in Council has no validity, because contrary to the statute; if the representation was in conformity with the Act, it follows that the "terms and conditions" upon which alone the vesting, whatever its mutual terms might be, was expedient, are an essential part of the Order in Council, and are as binding by force of the statute as the vesting itself. I am not prepared to hold by necessary inference that the Order in Council is invalid *in toto.*

Therefore, whether the words "terms and conditions" expressly found in the Act, as already mentioned, have a restricted connotation or have the large or unrestricted connotation that in my opinion they have, my ultimate opinion is the same. By that I mean that, whether the expression "terms and conditions" in the statute touch the vesting of the lands only as to the "lands" when vested or touch it also as to the very operation of the vesting as a statutory administrative act, that is, including both its happening and its consequences, the Crown's power to stipulate for consideration is the same; and, summarized, for this reason—that either that power

is included in the statutory expression " terms and conditions " or it remains inherent and untouched in the actual power to vest, independently of what I term the internal attributes of the vesting as originally formed.

Consequently, though in accordance with my view of the statute I proceed to treat the statutory phrase " terms and conditions " as large enough to embrace the consideration, I wish to make it quite clear that, if my view be wrong, my observations on the phrase are to be taken as equally applicable to the " terms and conditions " inherent by force of the common law implication in the discretionary and unqualified power of the vesting. If the statutory phrase does not include that power, it leaves that power untouched and fully operative in accordance with the authorities cited below, and the result is the same. It is the same because in either case the Order in Council is made under and operates by force of the statute which authorizes it. Dealing with the express words in the statute itself, nothing here turns on the words " estate and interest " or " reservations, exceptions, and restrictions." But much turns on the phrase " terms and conditions." These are words of the very widest import. They include provisions in the nature of conditions in the strict sense, either precedent, concurrent or subsequent. They also include stipulations in the nature of covenants entirely independent of the lands vested, that is, personal obligations (see, for instance, *Batchelor* v. *Murphy* (1)). Even the word " conditions " is wide enough for that in a contract. " It is equivalent to terms," says *Fry on Specific Performance*, 6th ed., par. 1184. The presence of the word " terms " in the Act and the Order in Council places the more extensive meaning beyond question. The " terms and conditions " would authorize a stipulation, as in this case, that other lands be provided for defence, or that a yearly sum should be paid out of the general revenue, or any other " term or condition " that the Sovereign may choose to impose. Clearly, " terms and conditions " are outside the first and third classes of provisions. There is every reason not to narrow the words, but to give them the fullest force which in the ordinary natural meaning they bear. In connection with Crown grants and charters at common law, the

(1) (1926) A.C. 63.

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expression " terms and conditions " is always used in the broadest sense, and includes the consideration for which the grant or charter is made (see, for instance, per *Vaughan* B. in *R.* v. *Westwood* (1)). And this, it will be seen, is the definitely accepted law.

Two conditions in the present Order in Council illustrate the wide sense in which the term is employed. One is the condition in the 6th recital that the Colonial Government shall maintain the new naval residence. That is quite unconnected with the lands vested by the Imperial Government in the Colony. It is in the nature of a personal undertaking—in other words, a covenant. Another is the condition in the 8th recital that Imperial troops sent should be provided for free of charge. I cannot regard that as a resolutive condition. The vested lands might be sold to private citizens, and by them passed on to a sub-purchaser with a clear title. The condition broken—if it were broken—would not, in my opinion, destroy the effect of the vesting. The condition is an independent contractual undertaking. There is a similar provision in the Canada (1882) Order and in the Cape of Good Hope (1882) Order.

What is the effect of the recital of these conditions ? Indeed, it must be asked—What is the effect of all the recitals, especially including that as to Garden Island being " dedicated " to the Imperial Government, and being " dedicated in perpetuity ? " As a matter of ordinary understanding, the words " in perpetuity " connote that the dedication then in existence was and is to continue for ever, and they *guarantee the future* as well as the present; that is, in view of the context, the dedication is not to be terminated so long as the land is possibly needed as a naval depot in the interests of the whole Empire. And of that possibility, in my opinion, the Imperial Government itself, charged with the security of the Empire, is the sole judge. It would be ridiculous for this or any other Court to determine otherwise, even if such an issue were raised—which is not the case.

Now, it is true that the Order in Council containing those words is a document of grant by the Sovereign and is not signed by the grantee. If it were executed also by the grantee, I apprehend there could be no question that New South Wales would have been bound

(1) (1830) 4 Bligh (N.S.) 213, at p. 240.

by the recitals referred to, and would be taken to have agreed, as part consideration for the lands it was receiving, that Garden Island thenceforth should be regarded as, and should always be dedicated "in perpetuity" as, a naval depot. So much would be necessary in order to give to the transaction such efficacy as both parties "must have intended that at all events it should have" (*Bowen* L.J. in *The Moorcock* (1), and per Lord *Buckmaster* in *L. French & Co.* v. *Leeston Shipping Co.* (2)). To hold otherwise seems to me to permit the State to derogate from its grant by way of consideration of the benefit received.

If that be contested on the ground that the State did not expressly "grant" or "covenant" or the like, it is only necessary to remind ourselves that the law to-day, in the absence of some statutory requirement or some technical rule of law, does not rest the mutual obligations of parties arising out of their dealings with one another on the language of formalism. Any words which on a fair construction (see per *Rigby* L.J. in *Re Cadogan and Hans Place Estate Ltd.*; *Ex parte Willis* (3)) show that an obligation is thrown on a party are enough. The moral duty of keeping faith is always, unless intractably excluded, a legitimate element in interpreting the actual words of the parties. The words "covenant," "agree," "promise," "undertake," "warrant," and the like, may not be found, but the actual words adopted, however informal, inartificial or imperfect in themselves, may suffice. These, when read by the light of the surrounding circumstances and when a reasonable conclusion is arrived at, as in *Blackmore* v. *North Australian Co.* (4), may be seen to be pregnant with an obligation to regard the actual words as if the more formal and more distinct expressions were employed. That, it appears to me, would have been the irresistible result if the instrument were one executed by both parties, because otherwise fair dealing would have been impossible and the relevant recitals would have been devoid of any real effect and illusory. The State would, in the case supposed of execution by both parties, have bound itself not to disturb the agreed status of Garden Island, including the new receiving station and the reclamations, so as very materially

(1) (1889) 14 P.D. 64, at p. 68.
(2) (1922) 1 A.C. 451, at p. 454.
(3) (1895) 73 L.T. 387, at p. 390.
(4) (1873) L.R. 5 P.C. 24, at p. 45.

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to alter the consideration and, indeed, the whole basis of the arrangement (see *Stirling* v. *Maitland* (1), and per Lord *Watson* in *Sailing Ship Blairmore Co.* v. *Macredie* (2)). In *Vatsavaya Venkata Jagapati* v. *Poosapati Venkatapati* (3) Lord *Atkinson*, for the Judicial Committee, says: " In their Lordships' view it is *reasonably certain* that parties to this agreement intended that this is what it should mean, and that therefore a *term must be implied* to exist in it, to the effect that " &c.

No one could have any reasonable doubt, reading the terms of the Order in Council and remembering the events of the period when it was made, that the Imperial Government intended that the dedication of Garden Island as a naval depot was and should continue to be " in perpetuity " and for the defence of Australia as a whole. By the events of the period I mean particularly that not only by 26th October 1899 had the Federal Constitution of Australia been framed but it had in the previous month been finally accepted by the popular vote of all the colonies except Western Australia. And the acceptance of the Order in Council by New South Wales in the following January establishes the like intention on the part of New South Wales. Any other view would be quite irrational.

On my construction of the recitals, the consideration stipulated for was given; and the recitals are true. If the consideration recited be not true, the maxim as stated in *Barwick's Case* (4) might conceivably become important (see also *Chitty on Prerogative*, p. 398). But, since it was not executed by the grantee, the position taken up on behalf of the State is virtually that the Order must be taken to be the language of the Imperial Government exclusively, and consequently not to *operate* further than to vest the Imperial lands in the Colony; the recitals being regarded only as a monologue of personal reasons for royal action. That view, of course, gives it no operation whatever in relation to any other lands. This, however, is a fatal error, and altogether opposed to one of the most rudimentary principles of law applicable in the circumstances.

The unquestioned facts are that the Colony at once adopted the

(1) (1864) 5 B. & S. 840, at p. 842.
(2) (1898) A.C. 593, at p. 607, last three lines.
(3) (1924) L.R. 52 Ind. App. 1, at p. 21.
(4) (1597) 5 Rep. 93b, at f. 94a.

grant and has ever since retained and still enjoys the full benefit of it. New South Wales by the Order in Council received and holds lands which in the opinion of Sir Alexander Stuart, recorded in his proposals of 1883, were "of great value," and which are asserted, without contradiction, to have been worth in 1898 about £2,000,000, that is, appraising them at their selling value, just as Garden Island is appraised, whereas Garden Island and Admiralty House were together in 1910 valued by the State at something less than £450,000. The Imperial Government, it is true, had leased some of these lands to the State at a nominal rental. But that generosity does not detract from the intrinsic value of the lands, had the Home Government taken up a commercial attitude. Now, according to well established law, settled for centuries, a grantee from the Crown in circumstances such as those of the present case is bound by the statements, affirmations and conditions in favour of the grantor which are contained in the grant. Therefore, whatever statements, affirmations and conditions are found in the vesting order in favour of the Imperial Government must be taken as true and as binding on New South Wales as if executed on behalf of the State. If, as already shown, the recitals, expressly or by implication, imply its action or inaction, then *at the moment of acceptance*—I leave aside for the instant any possible alteration of the law, or any possible executive cancellation *ex post facto* of obligations under existing law —the State claiming the benefit of the Order in Council was bound accordingly to act, if competent constitutionally so to act, or to observe forbearance. There is no difference in this respect between a State and an individual. If a term or condition is imposed and accepted, then, if within the legal capacity of the grantee, the grantee is bound to act or forbear accordingly, and if incompetent by law, the grant conditioned on the performance or forbearance fails.

But acceptance is an election to be bound by the terms and conditions, and no one is allowed at once to approbate and reprobate. *Platt*, in is work on *Covenants*, at p. 18, speaks of "the acceptance of a deed being considered equivalent to an actual execution by the lessee." In the case of a Crown grant the position has always been unquestionable that the grantee consents to all things therein, all words of promise, condition or other consideration being as

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spoken by the grantee when he accepts the grant (see *Platt*, at pp. 9-10, and the cases he cites; see also *Cruise's Digest*, vol. IV., p. 368). This principle, which after all is only common justice, represented by the maxim *Qui sentit commodum sentire debet et onus*, was applied to a Crown grant in a well-known case nearly a hundred years ago (*Mayor of Lyme Regis* v. *Henley* (1)). There a royal grant of a pierquay or cob was made to the corporation, the grant stating that the King was " willing " that the corporation should repair. An injury occurring to an individual by reason of non-repair, he sued the corporation. The Court of Common Pleas and the Court of King's Bench held the corporation liable, and an appeal was taken to the House of Lords. A question was proposed to the Judges as to the corporation's liability, and *Park* J. delivered their opinion, which, on the main question, was unanimous. At p. 350 is found a passage in that opinion which is much in point here, namely, " Now these words are undoubtedly an expression of the King's will that the corporation should repair ; but they are not the less a condition on that account ; on the contrary, they show *the consideration* for the grant, the motive inducing the King to make the grant, and consequently *the terms and conditions* on which the grant was to be accepted." It is perfectly plain that the Judges of England thought—and the House of Lords confirmed their opinion—that " terms and conditions " in that connection are equivalent to the " consideration " in the full legal sense, that is, as including not only all that the grantor receives, but also all that the grantee is required to perform or observe. This judicial interpretation of the expression " terms and conditions," if one were needed, it may be parenthetically observed, necessarily applies to the *Colonial Fortifications Act* 1877. The point of difficulty in the minds of the learned Judges apparently was whether the King's mere " willingness " was sufficient to constitute a consideration in law, there being no antecedent agreement and no express promise by the corporation in the grant. *Park* J. continued as follows : " What effect such words might have in a grant from one subject to another it is not necessary to determine ; such a grant between subjects is a matter of contract and bargain, strictly so speaking ; but a grant from the King to a subject is a matter

(1) (1834) 2 Cl. & Fin. 331.

of favour, and the language used will be found to vary accordingly." Then the case of *Brett* v. *Cumberland* (1) is cited, and is the fundamental case on the subject, and is referred to by *Platt*. The opinion then proceeds: "So in the charter in question, the words are in show the words of the King only, but the corporation having acceptcd the charter and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture." So far as concerns the recital as to the original dedication of Garden Island, the case is directly in point. It also goes without saying that where there is a strict bargain, as in the present case with respect to the new works and the new transfers or dedications, the same result ensues, *a multo fortiori*. Had there been a bargain in that case, evidently there would have been no argument on the point. The law as declared covers the whole of Garden Island. The opinion delivered by *Park* J. was in exact accordance with a passage in the judgment of Lord *Tenterden* C.J. in the King's Bench (*Mayor &c. of Lyme Regis* v. *Henley* (2)), stating that acceptance of the benefits is assent to being bound by the King's will "as a condition or obligation." Observe, it was a condition or obligation in the sense that it carried *personal liability* for breach causing injury to individuals, that is, something other than a mere "condition" in the abstract legal sense (see the third ground of the writ of error (3) and Mr. *Erle's* argument (4)).

The latest and, for us, the most authoritative illustration is found in *Ontario and Minnesota Power Co.* v. *The King* (5). No new law was there enunciated: it was merely the enforcement in modern circumstances of the ancient and deeply-rooted doctrine of the common law already mentioned. If that case be at all distinguishable from the present, it is because the present is the clearer case. In the Canadian case the recital binding the grantee was admittedly inaccurate in fact; here it is true. The judgment of *Riddell* J. in the Ontario Court, there approved by the Privy Council, shows (*Smith* v. *Ontario and Minnesota Power Co.* (6)) how far a Court is

(1) (1617) Cro. Jac. 521.
(2) (1832) 3 B. & Ad. 77, at p. 92.
(3) (1839) 1 Bing. N.C. 222, at p. 231.
(4) (1834) 2 Cl. & Fin., at p. 345.
(5) (1925) A.C. 196, at pp. 205, 206.
(6) (1918) 44 Ont. L.R. 43, at p. 49, last seven lines.

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prepared to go in order to prevent the injustice of enforcing the grant of a benefit and at the same time permitting a grantee to escape the obligation of paying the stipulated price.

In essence, then, the Order in Council once accepted is both an agreement and a conveyance. It is to me a most astonishing interpretation of the Order in Council for which the plaintiff State contends :—It is that the vesting of the Imperial lands in the State is binding and perpetual, as firmly as if it were unconditional or entirely independent of the expressed consideration of correlative transfer of property. On the other hand, it is that the dedication of Garden Island declared to be " in perpetuity " means not in perpetuity, but at the will of the State ; that the very kernel of the consideration, namely, the transfer of the site of the receiving depot, which was to be " in perpetuity," is also only during the pleasure of the State ; and that, although the transfer of the naval depot was definitely made a condition precedent to the grant of the Imperial lands, that provision is perfectly consistent with its *ex parte* revocation, and with the perpetual exclusion of the Imperial Government, and also with the recovery of damages from its permitted occupant of the naval depot, the Commonwealth, for the purpose of defending Australia.

Mr. Wearne, Minister of Lands in 1923, says in his evidence that after the Commonwealth took over occupation the New South Wales " agreement with the Imperial authorities no longer existed." One is tempted to inquire, if that be so, " why keep the consideration ? " There is no answer set up in this case that in fact the purposes of the naval depot had ended. *No such issue has been raised.* All that is relied on is *the opinion of the Minister* that those purposes had failed. That opinion appears to have been held by the Minister, who apparently accepted whatever he was told ; but it does not prove the central fact, even if that central fact were averred. Were I called upon to determine that issue of fact on the evidence as it stands, the suggestion of the State would fail. Some reasons, sufficient but not exhaustive, will be later stated in another connection. But, in the circumstances, there is nothing but a claim on the part of the State that it has, by virtue of the arbitrary provisions of

sec. 25 of the *Crown Lands Consolidation Act* 1913, destroyed the right of the Imperial Government to occupy the naval depot.

I am unable to understand the line of reasoning which attempts to make that compatible with the Order in Council, or other than a mere arbitrary executive act, resting on nothing else than the legislative will of the grantee of benefits given on condition that no such arbitrary action should be taken. And the effective legal answer to the contention of the State that the vesting of the Imperial lands was not conditional on the retention by the Imperial Government of Garden Island naval depot, is the rule of construction laid down by the Privy Council and applicable to the Order in Council, namely, "a higher rule; higher because it has a moral element, that the construction shall not be such as to work a wrong" (*Rodger* v. *Comptoir d'Escompte de Paris* (1)).

Mr. *Piddington* was candour itself in asserting the State view that after the Order in Council, and even prior to 1900, the State as a matter of law could have expelled the Imperial Government but not as a matter of honour. But if not as a matter of honour, it was because the Order in Council had created relations which I have shown to be legally binding, and which *at the moment of acceptance* created obligations of action and forbearance on the State. Of course, what learned counsel meant by legal right of expulsion was this: that there existed in 1899 the *Crown Lands Act of* 1884, under which all dedications could legally be revoked, even if it meant breaking agreements whereby the State received benefits; but that honour forbade the State from making use of that power at the time.

The important thing to bear in mind is that if an obligation rested on the State at the moment of acceptance, to forbear from depriving the Imperial Government of the naval depot, as, for instance, by revoking the dedication of Garden Island, the obligation arose from the operation of the Order in Council, *that Order carrying with it the statutory force of the Imperial Act.*

That brings us to the second point, as to the legal effect of the Imperial Order in Council in relation to the State legislation. Were the reciprocal rights or obligations which it created or declared subject to the right and power of the Colony to accept and retain the rights granted in its favour, and yet immediately, or at any

(1) (1869) L.R. 2 P.C. 393, at p. 406.

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time thereafter, to annul at its will its own obligations? I am distinctly of the opinion that that question must be answered in the negative, since the Order in Council has statutory force. The *Colonial Laws Validity Act* 1865 (28 & 29 Vict. c. 63), sec. 2, applies; and so not only the prior Act of 1884 but also the 25th section of the *Crown Lands Consolidation Act* 1913, under which the *de facto* revocation took place, must be read subject to the Imperial Order in Council. I have very fully expressed my views on this branch of the law in *Union Steamship Co. of New Zealand* v. *Commonwealth* (1); and to that statement I refer for my reasons.

It goes without saying that if sec. 25 can be used to revoke the dedication, carrying with it the agreed reclamations, another Act may be passed with equal authority to take back Admiralty House. In either case the annulment would, in my view, be manifestly repugnant to the Order in Council, both as regards its letter and its spirit (see also as to this, the Forty-four Hours Week Case—*Clyde Engineering Co.* v. *Cowburn* (2)).

The test may be very simply stated. Assuming that the recitals as to the status of Garden Island, and especially the receiving depot, bound the State to maintain that status, by force of what authority did the obligation arise? Only one answer is possible: The Order in Council, that is, the Imperial legislation. If that status is altered, by force of what authority is it altered? Again only one answer is possible: The State Act. This is plain collision, and at once brings the case within sec. 2 of the *Colonial Laws Validity Act*.

At this point I desire very emphatically to express my dissent from two propositions advanced on behalf of the State, though in my view they become immaterial. One was that every contract with a State is implicitly subject to its known constitutional power to legislate, and therefore at will to annul or alter its obligations. The other was that every such contract is impliedly subject to any known executive power under any existing law to cancel its grants. The first I dismiss simply with the observation that, so far as the implied intention of the parties governs the matter, no Court would hesitate in the interests of honest conduct to reject the suggested implication. It would justify the annulment of

(1) (1925) 36 C.L.R. 130.

(2) (1926) 37 C.L.R. 466.

every State obligation, from the cancellation of all Crown grants to the refusal to recognize public debts. Subject to express limitations, whether in the Constitution itself or elsewhere, as in the *Colonial Laws Validity Act*, no doubt the legal power to act in that arbitrary manner is known. But, if exercised, it is not because it is inherent in the contract, but because it exists in spite of the contract and its implications. As to the second, I reject it for the same reason if it is suggested that the power may justifiably be exercised arbitrarily, or except upon an occasion and on grounds which may reasonably be taken to have been in the contemplation of the parties.

(2) *The Surrounding Circumstances.*—The relevancy of the surrounding circumstances, which really mean the history of the events leading up to the Order in Council, is not to be doubted if the language of the Order in Council be not "absolutely plain and unambiguous." For this position I shall mention three authorities which are final: *Van Diemen's Land Co.* v. *Table Cape Marine Board* (1) and *Vatsavaya Venkata Jagapati* v. *Poosapati Venkatapati* (2) and the case already cited, *Ontario and Minnesota Power Co.* v. *The King* (3), where the history of the reserves was investigated in order to arrive at the true construction of the grant. Perhaps I should add a reference to *Kidner* v. *Stimpson* (4). In any case it is necessary to trace the course of events in order to determine the issues as to the agreement, so far as it exists independently of the Order in Council, and as to the meaning and connotation of the original dedications, and whether they were intended from the first to be in perpetuity, apart from the binding force of the Order in Council as to their perpetuity.

The written evidence, when collated and read so as to gather the time, sequence and relation of events, is found to establish six distinct and yet related steps in the line of governmental action, leading ultimately to the seventh, namely, the Order in Council. I shall first briefly state them and then indicate how they came about.

(1) (1906) A.C. 92, particularly at pp. 97, 98.
(2) (1924) L.R. 52 Ind. App., at p. 21.
(3) (1925) A.C. 196.
(4) (1918) 35 T.L.R. 63.

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(*a*) 1851.—Fort Macquarie was "reserved" by the Imperial Government for a naval depot, so as to be its property on the advent of the Constitution. Probably the reservation was made under instructions such as the Additional Instructions of 1789 (see *Williams* v. *Attorney-General* (*N.S.W.*) (1)). Garden Island, though used officially, remained unreserved, and therefore passed to the legal control of the Colonial Government in 1855. (*b*) 1856-1864. — The two Governments by agreement permanently exchanged, *de facto*, Fort Macquarie and Garden Island. (*c*) 1865-1866.—The *de facto* exchange was, with a variation, completed technically under later law as to Garden Island, by the formality of statutory dedication. (*d*) 1874-1882.—Negotiations eventuating in the Robertson agreement that the Imperial Government should transfer its Ordnance lands, Garden Island, Circular Quay Commissariat Stores and other lands in exchange for Dawes' Point. (*e*) 1883.—Stuart modified agreement, as embodied in agreement recited in Order in Council. (*f*) 1889.—Further modifications of agreement by placing the new receiving depot on Garden Island instead of on the mainland. (*g*) 1899.—Order in Council which *inter alia* included formalization of the *de facto* transfer to the Colony of Fort Macquarie, and a corresponding and correlative definite recital of the statutory dedication in perpetuity of Garden Island.

As to the details of these several steps :—

(*a*) The essential starting-point of the present controversy, and in a very real sense the key to its determination, is that when the relevant events begin Fort Macquarie is the property of the Home Government, and it was so regarded by the Colonial Government after the grant of the Constitution of 1855. By despatch from Earl Grey to the Governor, dated 11th November 1850, that is, when the lands were under Imperial control, instructions were given to secure Fort Macquarie and its enclosure to the Naval Department of the Imperial Government, with a view to the construction of a naval depot. The letter of the Colonial Secretary, Mr. Deas Thomson, to Captain Erskine R.N. of 16th June 1851 indicated that Earl Grey's direction was complied with. So the matter stood in 1855, when the Constitution went into force. Fort Macquarie,

(1) (1913) 16 C.L.R., at pp. 417, 441.

with its enclosure, was then in precisely the same position as was Deadman's Island in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1), and was exclusively Imperial property, notwithstanding the Constitution of 1855. It appears, however, that in 1854, during the Crimean War, the naval officer, Captain Fitzgerald, had given permission to the military commandant for the temporary occupation of the Fort by the 11th Regiment.

(*b*) 1856-1864.—In November 1856 the Navy required restoration of the Fort. In December 1856, the Colonial Secretary of New South Wales, Mr. Elyard, in view of the serious inconvenience this would have caused the military, suggested "that a part or the whole of *Garden Island* might be given over for the use of the Navy, *in lieu of Fort Macquarie.*" Captain Freemantle consented "*with the understanding that Garden Island is to be secured to the Naval Department in the same manner as the Fort now is.*" The word "secured" is significant. Obviously that meant that the Island was to be reserved for ever as the property of the Admiralty. Captain Freemantle went on to add that there should be no division of Garden Island, but that the naval authorities would be bound not to erect any buildings or works on that part of the Island that might be required for harbour defence works. That the substitution of Garden Island for Fort Macquarie emanated from the New South Wales Government is reiterated in Mr. Elyard's letter to Captain Freementle of 1st December 1856. A plan marking out the portion not likely to be required was sent. Ultimately, on 10th January 1857, Mr. Elyard, for the New South Wales Government, wrote to Captain Freemantle as the Senior Naval Officer, informing him "that the portion of the above Island" (Garden Island) "which is not likely to be required for the purpose of military defence that may hereafter be projected, will be *reserved* by the Government for the use of the Navy, on the same footing as Fort Macquarie was reserved for a like purpose." An intimation to the like effect was sent by Mr. Elyard for the Colonial Secretary to the Lands and Public Works Department, which carried out the promise made to Captain Freemantle as far as departmental administration could do so in the absence of express legislative provision. The Admiralty

(1) (1906) A.C. 552.

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approved of the substitution of Garden Island for Fort Macquarie, and the transaction closed with the letter of Mr. Elyard to the Department of Lands and Public Works, notifying the Admiralty's approval. Apparently the word " reserved " was thought to be equivalent to dedication. Permanent reservation has that meaning in the Lands Acts.

I fail to see how there can be any doubt that at this point there was an agreement starting at the instance of the Colonial Government, whereby Garden Island was " secured " to the Imperial Navy by being reserved in perpetuity for a naval depot for Imperial use—subject only to possible military defences on a defined portion. It will presently be seen how definitely the perpetuity was recognized. The transaction of " exchange " was entirely between the Colonial Government and the Imperial Government for the Navy. Fort Macquarie ceased *de facto* to be a naval depot, and was treated henceforth as if it were Colonial property by both Governments. For instance, in 1874 Commodore Goodenough tried to bargain for it with the Robertson Government. Sir John Robertson, however, " was not willing to give up Fort Macquarie without further consideration." Sir Alexander Stuart in 1883 regarded it as a paramount necessity that " we keep Fort Macquarie." So there is no doubt the exchange was regarded as between the two Governments as in substance an exchange of the respective sites mentioned.

It appears, however, that some dissatisfaction arose on the part of those who had been accustomed to visit Garden Island. Captain Loring made a proposal to meet the position, subject to Admiralty sanction, and " without in any way giving up *the right to possession of the Island.*" The Governor, in an executive minute, agreed with the suggestion, and observed the probable establishment of Sydney as the headquarters of a large naval establishment. This was in 1859, and is the emergence of that idea as a probable result, not as a condition. The New Zealand disturbance in 1860 led to the lengthened absence of Captain Loring.

It is proper to state at this point that Dr. *Brissenden* wished to contend that Garden Island had been dedicated by these events, and independently of the process under the Act of 1861. Objection was made to his doing so, as it was not pleaded and further evidence

might have been given on such an issue. I think the matter immaterial, even if pleaded, because the two Governments, though looking at the matter as practically final, decided upon basing its formal character upon statutory dedication, and the Order in Council so treats it. Dr. *Brissenden's* view was substantially correct, but it is only material as helping to interpret the subsequent formal step of dedication.

(*c*) 1865-1866.—Commodore Wiseman's request on 27th June 1864 to have Garden Island *entirely* given up for naval use, and to be informed what portion (if any) might be considered "the property of the Admiralty," led to steps being taken to place the matter on a formal footing. An executive minute of 29th June 1864 speaks of "*again marking off a portion for the permanent use of the Admiralty.*" The matter was settled in a personal interview between the Secretary of Lands and the Commodore, and the outcome was that 4 acres 1 rood 25 perches were marked off and a plan made. On 25th August 1864 an Order in Council was made that that portion which "has for several years past been used as a depot for the use of Her Majesty's ships in this port, be *formally dedicated* to that purpose in terms of the 5th clause of the *Crown Lands Alienation Act of* 1861." The dedication was duly made. On 29th April 1865 the Governor notified the Commodore of the "permanent dedication." On 1st May 1865 the Commodore acknowledged the notification of the "permanent dedication." On Colonial suggestion the balance (as was thought) of the Island was, in 1866, similarly dedicated, but with a reservation for military defence works. By letter of 28th June 1866 the Governor notified the Commodore that "the whole of Garden Island is now therefore permanently dedicated as a depot for the use of Her Majesty's ships in terms of the 5th clause of the Alienation Act, 25 Vict. No. 1." On 26th September 1866 Lord Carnarvon, Secretary of State for the Colonies, forwarded to the Governor a despatch which, having regard to some of the contentions of the plaintiff State, merits quotation in full. It says: "The Lords Commissioners of the Admiralty have informed me that they have received a communication from the Senior Naval Officer at Sydney, stating that the whole of Garden Island, Port Jackson, has been *assigned in perpetuity*

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by the Colonial Government as a naval depot for the use of Her Majesty's ships in these waters; and their Lordships have requested me to convey to you the expression of their cordial thanks for the liberality shown by the Government of New South Wales in thus promoting *the interests of Her Majesty's Service.*"

The net results of the facts of the period of dedication show that the first dedication was a formal recognition by means of the new statutory power of substantially the prior arrangement, for which the Admiralty had given *de facto* consideration, and being legally consummated by the Order in Council of 1899. The second dedication was from mixed motives, and it followed the course of the first dedication in being perpetual as both parties understood. That understanding was not lessened by the circumstance that at that time there was no legislative authority to the Executive to annul or cancel the dedications.

(*d*) 1874-1882.—The question of Commodore Goodenough in 1874, whether it would be possible "to obtain Fort Macquarie in exchange for Circular Quay Store and Garden Island," led to an agreement later. Sir John Robertson was not willing to give up Fort Macquarie, but he was willing to give up *Dawes' Point.* In 1878 Sir Hercules Robinson suggested to the Secretary of State the general surrender of all the Ordnance Reserves, except such part as the Admiralty required for naval purposes. On 20th May 1879 Lord Kimberley intimated that the transfer of the Ordnance lands would be effected "as soon as the proposed *exchange* is concluded." It will be seen that "exchange" is a condition of the transfer of the Ordnance lands. Passing over much correspondence, it is to be noted that Sir Henry Parkes in a letter to the Commodore says :— "In the final settlement we would much like to have Garden Island restored to us." On 17th January 1882 Sir John Robertson wrote a notable minute to the Governor as to the terms of exchange. They were these : New South Wales to give Dawes' Point and erect an Admiral's residence, also stores and buildings for a naval yard, on condition that the Imperial Government surrender (1) Ordnance lands, (2) the commissariat stores, (3) *Garden Island* and (4) all other lands on which the Imperial Government possessed any claim. Lord Kimberley's acceptance is found in his cablegram of

15th June 1882 and his letter of 26th June 1882. But two passages in that letter are of the utmost importance, namely:—"I have expressed my concurrence in the views of the Lords Commissioners of the Admiralty, to the effect that the transfer of the reserves should not be finally made until the *conditions* referred in the Admiralty have been fulfilled." "The preparation of the Order in Council under the *Colonial Fortifications Act* will not therefore be proceeded with until the arrangements agreed upon have been completed."

The Admiralty conditions appear in the Admiralty letter of 14th June 1882, and include the "conditions" of the "*transfer to the Imperial Government of the Naval Establishment so to be formed.*" That is what is embodied by Sir Alexander Stuart with fidelity in par. 4 of his proposed modified agreement ultimately adopted. There cannot be a doubt as to the recognition by New South Wales that Garden Island was to all intents and purposes the property of the Imperial Government.

(*e*) 1883.—Sir Alexander Stuart's Government came into office before the Robertson agreement was carried out. Stuart recognized that the question of recreation on Garden Island had changed, and he saw great disadvantages in giving up Dawes' Point. New South Wales had, by agreement, reobtained Garden Island, but he was willing to give it up in favour of having Dawes' Point. The Cabinet approved, and the Agent-General, Sir Saul Samuel, induced the Imperial Government to retain Garden Island and relinquish Dawes' Point. This led to the Stuart minute of 16th April 1883, modifying the Robertson agreement. The dominant feature of the correspondence in Exhibit 6 is the retention of Garden Island by the Admiralty. It was to be enlarged by reclamation, and in the Engineer-in-Chief's minute of 8th December 1894 occurs this significant passage: "I might here place on record the fact that, while *Garden Island and all buildings thereon will be absolutely transferred to the Imperial Government as a permanent naval depot*, Spectacle Island is only lent." That was perfectly true. Apart from the substitution of Garden Island and what that substitution imported in the way of existing proprietary rights, the conditions stipulated on the part of the Admiralty remained.

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It appears from the evidence in various other places, and it may conveniently be shown here, that it was the fixed belief of both sides that Garden Island was to be the absolute property of the Admiralty. For instance, on 22nd June 1888 the Colonial architect, when reporting to the Principal Under-Secretary, after referring to "works on Garden Island and the mainland of Woolloomooloo Bay," says: "The works when carried out to be conveyed in perpetuity for the use of Her Majesty's Navy." On 22nd March 1888 Admiral Tryon, in a letter to the Admiralty (enclosed in a despatch to Governor Lord Carrington, dated 25th June 1889), says: "The Island when the buildings are completed will become Imperial property." See also the Admiralty memorandum headed "Spectacle Island," enclosed in Lord Elgin's despatch of 6th June 1907.

(*f*) 1889 Modification.—For various reasons, immaterial to narrate, delay in executing the works so far agreed upon took place. Among the circumstances causing delay was the difficulty in finding suitable foundations at Woolloomooloo. In the Engineer-in-Chief Moriarty's minute of 20th September 1887 he suggested that the stores proposed to be erected for the Admiralty would be better for the Naval Service on Garden Island, instead of Woolloomooloo, and he further suggested submitting the proposals to the Admiral. The Admiral adopted the suggestion (see Admiralty minute, 17th March 1888); but the Admiralty did not assent. The continued delay led to Admiral Fairfax, on 22nd February 1889, at last threatening to advise the Admiralty to seek store buildings in some other colony. Obviously, a receiving depot was a vital consideration. Promptly then the Public Works Committee considered the question, and resolved "that the Committee recommend that the Government enter into negotiations with the Imperial naval authorities with the view to providing the necessary accommodation at Garden Island, in lieu of the proposed site for a naval wharf and store at Woolloomooloo Bay" (11th March 1889). This was done on 17th June 1889 by Lord Carrington's letter to Admiral Fairfax. The Admiralty approved, and the final agreement between the two Governments was concluded. Nothing then remained but that the State Government

should fulfil its part of the bargain and receive in return the Imperial lands.

(*g*) 1899.—The next event was the Order in Council, with the consequences I have stated. If the relations of the Colonial Government and the Imperial Government are to be gauged outside the Order in Council, I am unable to understand how the very definite agreement of a condition precedent stated in the Admiralty minute of 14th June 1882, and incorporated in Lord Kimberley's despatch, can be ignored. In the face of that clear and distinct condition, not only not dissented from, but incorporated in Sir Alexander Stuart's 1883 proposal, there is a clear equitable right in the Imperial Government to remain in possession. The revocation of the dedication in 1923 cannot be taken as revoking the *agreement*, which remains and may still be legally performed. The agreement is relied on in pars. 7 and 9 of the amended defence, and is established both by its recital in the Order in Council and independently; and, in my opinion, the plaintiff State must fail even if that were the only ground of defence, on the principle that equity looks upon things agreed to be done, as actually performed (see *Attorney-General for Trinidad and Tobago* v. *Bourne* (1)). I would go further and say that, even if there were no specific pleadings setting up the equitable defence, the nature of the contest, the consequences involved, the completeness of the evidence and the elaborate discussion in argument of the real position of the parties on the evidence, would lead me not to confine my consideration to the mere formalities of pleading and, ignoring the equities established by unimpeachable documents, entirely foreclose for ever by an adjudication important Imperial rights purchased at a great price (*Yorkshire Insurance Co.* v. *Craine* (2) and *Sri Mahout Govind Rao* v. *Sita Ram Kesho* (3)).

(3) *The Dedications of* 1865 *and* 1866.—As already indicated, two points of conflict have arisen with regard to the original dedication, as to its meaning and connotation at the time, and as to whether it was understood to have been in perpetuity. With respect to the intended perpetuity, I add nothing to what is

(1) (1895) A.C. 83.
(2) (1922) 2 A.C. 541; 31 C.L.R. 27.
(3) (1898) L.R. 25 Ind. App. 195, at p. 207.

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already stated. As to the meaning and connotation of the dedication a very important constitutional principle is involved. I state at once my opinion that the words of dedication "the purposes of a naval depot," in the circumstances of the time, meant and connoted: "The purposes of being used as a naval depot by the King for the defence of his Empire, acting in his discretion by whatsoever functionaries he might select among those whom the common or statute law of the Empire in force within the territory of New South Wales should, according to recognized constitutional practice, empower His Majesty to employ for that purpose."

The contention for the State was that the words in question were limited in various ways: (1) To the defence of New South Wales exclusively, because there was no local constitutional power to make a larger dedication; (2) to that portion of the King's Navy directly controlled by the Imperial Government; (3) to that period of time when the State had defence powers; (4) to the time when Sydney would be the naval headquarters in Australia.

If, as the State contends, sec. 25 of the *Crown Lands Consolidation Act*, notwithstanding the Order in Council of 1899, authorizes the revocation of the dedication of Garden Island, then, so far as the Imperial Government's rights depend upon mere formal dedication, those rights disappear. But, as already observed, even if there had never been any dedication, the agreement of 1883, particularly as consummated by the Order in Council, had not been revoked and stands of full force, and entitles the Imperial Government to retain possession as much as if there had never been a revocation. There is no statutory provision contrary to that. Still, the contention stated and strongly pressed in respect to the dedication applies in large measure to the agreement. In any case, therefore, that contention must be dealt with.

It is to my mind an amazing contention that, because the Constitution of New South Wales confers local powers of legislation, limited territorially in operation, land cannot be dedicated or disposed of to be used territorially for refitting the King's Navy, so as to enable His Majesty's ships to meet an enemy outside the territorial limits of New South Wales, in order to defend Australia generally. I should have thought the very amplitude of the

legislative power granted to New South Wales, while necessarily exercised and operated within the territory, was itself a disproof of the suggested limitation. While it is true that a local law operates only within the State, the royal prerogative of defence of the whole Empire is undiminished, except so far as its exercise within New South Wales is inconsistent with the parliamentary grant of autonomy (see *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (1); *Bonanza Creek Gold Mining Co.* v. *The King* (2)). The Constitution of New South Wales was not an act of separation. It was not a thing apart from the law of the Empire. It was a step in the political evolution of the Empire, and took its place as a portion of the entire fabric of law—partly written, partly unwritten—forming what is called the Constitution of the British Empire. Other portions of that fabric consist of the written Constitutions of the other self-governing Dominions. But still a large portion is the common law, including the prerogative duty and power of the Crown to maintain the integrity and peace of the entire Imperial Dominions.

There is nothing inconsistent with the amplest grant of self-government that the State or Dominion receiving it should within its own frontiers, by means of its granted constitutional power, aid the Sovereign to defend the Empire at large. To deny this is to deny the indivisibility of the Crown, to limit self-government itself and to make for disintegration of the Empire. I cannot doubt that the "public purposes" of New South Wales include purposes of general defence concerning New South Wales as a constituent unit of the Empire. Some public interests are its own exclusively; others it shares with the rest of Australia or the rest of the Empire. There can be no reason why, apart from express prohibition, it cannot within its own territory adopt measures to protect the interests it shares with as well as those it holds apart from all the others. It is very satisfactory to know, and it is due to New South Wales itself to say, that the practical interpretation of its Constitution in this respect by many of the eminent statesmen who have guided its affairs has been in conformity with the principles I have stated. I may instance the International Conference of 1881, which decided that the duty

(1) (1920) A.C. 508.

(2) (1916) 1 A.C. 566, at p. 587.

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of maintaining the Imperial Navy should rest on the Imperial Government, which ought, at its own cost, to defend Australia by sea, and pressed for an increase of the squadron kept on the coast. Those resolutions would be sheer nonsense unless it were conceded that a local base would be available for purposes beyond the particular colony in which it was situated. Further, it is unimaginable that those who took part in the Conference did not intend that the naval depot in Sydney Harbour might be used for the purpose of defending Australia generally. The best proof of the matter is that the outcome of the Conference was the Colonial Conference agreement of 1887, followed by local legislation of the colonies, of which the New South Wales Act No. 22 of that year was the type. The British Parliament, on its side, passed an Act (51 & 52 Vict. c. 32) called the *Imperial Defence Act* 1888, the recital of which shows the recognition by all the Australian colonies and New Zealand with the Imperial Government that the floating trade in Australasian waters should and could be protected at their joint charge. The agreement was ratified by the respective Parliaments of all the contracting parties. It was in accordance with that agreement that the Fleet entered Port Jackson on 5th September 1891. The agreement lasted up to Federation, and continued, indeed, until the renewal in 1903. In 1892 an agreement was made between New South Wales, Victoria, Queensland, South Australia and Western Australia to defend Albany. In 1893 a similar agreement was arrived at with reference to Thursday Island. Since Federation the same view of local constitutional power has prevailed, as witness the renewal in 1903 of the Naval Agreement, New Zealand assenting, and also the Imperial Conferences of 1907, 1909, 1911 and 1923. All these events are of public notoriety. It cannot, therefore, be maintained that a New South Wales port was incapable under the Constitution of the Colony of utilization for the defence of Australia generally, even when territorial defence was a local constitutional power, and therefore not now capable by force of New South Wales law. I would add that for mere misuse, by allowing unauthorized persons to use land dedicated, the remedy would not be cancellation, but restraint of the misuser complained of.

As for the suggested limitation to Imperially controlled vessels,

there is not a syllable to support it, and, as an implication to exclude Australians from defending their own continent, it would be idle to waste words upon it. The evidence shows that at all events ships of the Imperial Navy coming to Australia use that depot as before. This the State seeks to prevent also. With regard to the altered powers respecting defence, there is no possible relevancy, except, perhaps, that the change makes it more necessary to maintain the naval depot for those who have the power of defending New South Wales, that is, the same people of New South Wales, no longer alone, but in combination with those of every other State.

As to Sydney being the headquarters of the naval station, there was no condition as suggested. Stuart's memorandum in 1883 is some proof of that. Sir Joseph Carruthers in 1906 disproves the suggested compact, and adds with unanswerable force: "The plea that Sydney may benefit is entirely beside the question, and introduces local or parochial considerations into a great question of Federal and Imperial concern." As I have already pointed out, the Order in Council refutes the contention. At the same time the objection is only academic. The evidence shows that Sydney is still the headquarters of the Royal Australian Navy.

In the result, then, the true meaning and connotation I have stated must be correct. It follows that since by some law of the Empire operating in New South Wales—whether it be Imperial law or Commonwealth law—the King by his appropriate agents controls His Majesty's Navy in the territory of New South Wales, the purpose of the dedication is preserved when the Royal Australian Navy (see Imperial Order in Council of 9th February 1914) by permission of the Admiralty occupies the depot, primarily to protect Australia, and capable in time of war of being formally incorporated into the strict Royal Navy.

In my opinion the right of possession of Garden Island is in the Imperial Government, and, therefore, the Commonwealth is entitled to succeed in this action, and judgment should be entered accordingly.

HIGGINS J. I am of opinion that the dedications of Garden Island were not duly revoked under the power conferred by the *Crown Lands Consolidation Act* 1913; but I concur in the opinion

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that if they were duly revoked the plaintiff State is (or will be) entitled to possession. The only difficulty that I feel in coming to this latter opinion lies in clearing away a vast mass of irrelevant details.

The action is for possession of Garden Island, the plaintiff being the Crown in right of New South Wales; and the Commonwealth, the defendant, has produced no title whatever to the Island. The Island has never been granted or conveyed to anyone. But under sec. 5 of the *Crown Lands Alienation Act of* 1861 (of New South Wales) the Island was dedicated for the purpose of a naval depot. The dedication of the Island as to one portion was made 10th January 1865, and the dedication as to the other portion was made 5th June 1866. The pleadings, and the admissions made between the parties, put the dedication beyond question in this cause. Then, by two documents, dated respectively 10th August 1923 and 12th October 1923, the Minister of Lands purported to revoke the two dedications, under the powers given to him by sec. 25 of the *Crown Lands Consolidation Act* 1913.

Now, in my opinion, "dedication" as used in the Act of 1861 gives no title to anyone. It operates to reserve the land dedicated from sale or other dealing, to reserve it for certain public purposes—here for the public purpose of a naval depot (see sec. 1, "Crown lands"; sec. 3). But even if this view is right, it does not necessarily follow that the State, under such circumstances as here appear, is entitled, as a matter of course, and without more ado, to get an order for immediate possession against the Commonwealth—whether there has been revocation or not. The question is by no means easy to answer; this action has not been so framed as to raise it; and counsel for the State claim possession on the basis of a valid revocation, and on that basis alone.

By sec. 5 the Governor in Council was empowered to reserve or dedicate "any Crown lands in such manner as may seem best for the public interest" for any of certain stated purposes, including "any purpose of defence" or "for any other public purpose." The same sec. 5 conferred power at any time thereafter to grant the land dedicated for such purposes in fee simple, but no such grant has been made—to the British Government, to the Admiralty, or

to anyone ; and under sec. 6 every conveyance or alienation of land permanently reserved, except for the purpose for which the reservation is made, is absolutely void, as well against Her Majesty as all other persons whomsoever. The land dedicated ceased on dedication to be " Crown land " available for the purposes of settlement.

For some years before 10th January 1865, the first dedication, the Island had, with the consent of the New South Wales Government, been continuously and exclusively used by the Imperial Government as a naval depot, and the whole Island was so used from 1866 until 1st July 1913. On this last date the duty of naval defence of the Commonwealth was undertaken by the Commonwealth Government, and the Island has since been used by that Government for the purposes of the Australian Navy—no doubt with the consent of the Imperial Government if such consent is material. The Commonwealth has not paid any compensation for the Island or the buildings thereon under sec. 85 of the Constitution of Australia, inasmuch as the section did not apply to this land that had been occupied by the British Navy. So far, one cannot discern any shadow of a title, on these facts, in either the British Government or in the Commonwealth Government. It seems impossible to conceive of New South Wales ever objecting to the use of the Island by the British Navy ; but, so far as the legal title is concerned, the Navy had no property in the Island. The Island was still the property of the Crown ; but under the Constitution of New South Wales (1855—18 & 19 Vict. c. 54) " the entire management and control of the waste lands belonging to the Crown in the said Colony " was " vested in the Legislature of the said Colony." By virtue of the Act of 1861 the Legislature reserved the land of the Island from sale, reserved it for a naval depot ; but, subject to this reservation, the State Legislature retained the entire management and control of the Island ; and (under sec. 1 of the Constitution) the Legislature could pass any Act that it saw fit to pass for New South Wales—could make laws for New South Wales " in all cases whatsoever."

In pursuance of this legislative power, the New South Wales Legislature passed the *Crown Lands Act of* 1884 ; and, by sec. 105, this Act enabled the Governor in Council to revoke any dedication under certain conditions, even if the dedication were " permanent,"

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as this dedication was. No one denies that the Legislature could give power to revoke; but the Commonwealth urges that *this* dedication could not be revoked. The power to revoke reappeared in the *Crown Lands Consolidation Act* 1913 (sec. 25), but the power was conferred on the Minister instead of the Governor. The precise words of this sec. 25 are very important in several aspects, and I think it necessary to repeat them here in full :—" In any case in which the Minister shall be of opinion that the purposes for which any reservation or dedication of Crown lands made before or after the passing of this Act have failed wholly or in part—or that there is any doubt or uncertainty as to such purposes—or that it is expedient in the public interest to resume the land which is the subject of such reservation or dedication—or to make an exchange of any portion of any such land for other land of equivalent value or nearly so to be dedicated on similar trusts or for like purposes—or that the trusts annexed to any land reserved or dedicated under the Crown Lands Acts have failed or cannot reasonably be carried out—then and in every such case a notice under the hand of the Minister shall be published in the *Gazette*, which notice shall set forth *the mode in which it is proposed to deal with the reservation dedication or land* in question (hereinafter termed ' proposals '), a copy of which notice shall be laid before both Houses of Parliament within one month after the publication thereof in the *Gazette* if Parliament be then in session, or otherwise within one month after the commencement of the next ensuing session. If Parliament shall within one month declare by resolution that it does not assent to the proposals set forth in such notice, no further action shall be taken in the matter. If no such resolution be passed, then after the expiration of thirty clear days after the date when the notice was laid before Parliament, it shall be lawful for the Minister to direct the proposals so notified to be carried out, and the same shall be carried out accordingly, and for that purpose the *Minister may revoke* by notification in the *Gazette* any such reservation or dedication, *and make any new dedication sanctioned by such proposals*; and such grants may be issued and instruments executed, as the circumstances of each case may require. The provisions of this section shall be held to extend to land which after dedication has been or shall be granted by the

Crown, and to any land which, after grant by the Crown, has been or shall be resumed purchased or otherwise acquired by the Crown, and dedicated or granted for any purpose. And the powers conferred by this section may in all cases be exercised in respect of any part of the land reserved dedicated or granted, as well as in respect of the whole thereof. *Upon the revocation* under the provisions of this section of any dedication, or grant and dedication, the lands shall forthwith be vested in His Majesty, His heirs and successors, and shall become Crown lands within the meaning of this Act."

Unless the land was Crown land, the power to dedicate does not apply. It is admitted that Garden Island up to 10th January 1865 was Crown land.

Assuming then, that nothing had occurred since 1865 and 1866 to alter the position in law as to the title to the land of this Island, admitting that the revocation was duly effected under sec. 25 of the Act of 1913, it is clear that even the British Government or the Admiralty would have to submit to the revocation—would have to treat the Island as no longer reserved for a naval depot. Yet in the voluminous correspondence and numerous documents in evidence it is shown that the Admiralty did not so regard the position; or, at all events, claimed to have a title to the Island in perpetuity.

The Commonwealth relies, in particular, on an Order of Her Majesty in Council, 26th October 1899, made as in pursuance of the Act 40 & 41 Vict. c. 23, and other powers enabling Her Majesty in this behalf; and "in consideration of the premises" the Order in Council ordered that certain Ordnance lands in New South Wales granted to British officers should be vested in the Governor of New South Wales. This does not directly bear upon Garden Island, except that the two dedications are mentioned, and an "arrangement" is alleged between the New South Wales and the Imperial Governments, made in 1883, under which the New South Wales Government was to make certain wharves, &c., in Garden Island, was to provide a suitable residence for the Admiral, to provide a convenient receiving store on the mainland for Garden Island, &c.; and that when the residence and store were "conveyed granted or *dedicated in perpetuity* for the use of Her Majesty's navy *in the same way as Garden Island had been*" the Imperial Government would

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surrender the Ordnance lands, &c. It may well have been that the Admiralty authorities thought, or wished it to be recognized, that they were entitled to the use of Garden Island for ever; but it is sufficient for my purpose to say that the Order in Council did not purport to give to the British Government anything more as to Garden Island than had already been given. This Order in Council is not a grant or conveyance of the Island; nor is a recital in an Order in Council a conveyance. As for the "arrangement" recited as stated in the Colonial Secretary's minute of 11th April 1883, it could not be operative without the sanction of the New South Wales Legislature. Indeed, if the Government of New South Wales desired to give to the Admiralty a right to the Island other than that which the Government was authorized to give by sec. 5 of the Act of 1861 and the subsequent Acts, it had no power to do so. The Crown Lands Acts, from 1861 onwards, contained a section to this effect (sec. 3 of the Act of 1861): "Any Crown lands may lawfully be granted in fee simple or dedicated to any public purpose under and subject to the provisions of this Act *but not otherwise.*" The Admiralty had the two dedications to rely on, and nothing else in law. The Legislature that could authorize a dedication in perpetuity could terminate the dedication. Even if the New South Wales Government intended, and if the Admiralty understood, that the dedication was not to be revoked, the Government could not fetter the power of the New South Wales Legislature to make any law that it chose as to New South Wales land; nor could the Government repeal the then existing Act, the *Crown Lands Act of* 1884, which gave the power to revoke. The Legislature has power even to break faith; much more has it power to refuse to carry out a promise made by the Government without authority. At this stage I feel bound, out of respect for the view expressed by my brother *Isaacs* with so much erudition, to say that I cannot regard this Order in Council as effecting any change in the title to the Island. For the present purpose it is sufficient to say (1) that the Order in Council did not even purport to affect the title; (2) that even if any new or better title was agreed to be given by the New South Wales Government than the Imperial Government had already, the New South Wales Government had no power to give

such a title except in pursuance of the *Crown Lands Act*. The title to Garden Island was to remain as it was at the date of the Order in Council. Whatever right the Imperial Government had under the dedication of Garden Island for the purpose of a naval depot, without any grant to the Imperial Government, that Government retained. Besides, the Government of New South Wales had no power to fetter the power of the Legislature of New South Wales to make any laws under the Constitution for New South Wales (18 & 19 Vict. c. 54), or, in particular, to agree that the Legislature would not exercise its power to provide for the revocation of any dedication as well as of any grant of land. If one could accept the position that the Government, in effect, covenanted that the dedication of Garden Island should never be revoked, such a covenant, in my opinion, would be invalid, nugatory.

There are other difficulties in the way of the Commonwealth succeeding in this action on the ground of equitable title in the Imperial Government and the consent of that Government to possession by the Commonwealth. It is true that this action is brought in the High Court by virtue of sec. 75 of the Constitution, and that under High Court procedure an equitable title in the Imperial Government may be a good defence on the part of the Commonwealth against a legal title held by the plaintiff. But the only title alleged is an equitable title for the use of the Royal Navy in perpetuity: and what right has the Imperial Government to sanction the possession of the Island by another navy? Moreover, the equitable title to possession for the purposes of the defence, must be such that specific performance of the agreement said to be contained in the Order in Council would be enforced as of course; and that specific performance would be enforced has not been established, and cannot be established in the absence of the party with whom the agreement (if any) was made—the Imperial Government. Much less has the Commonwealth Government established that *it* has a present right to possession of this Crown land of New South Wales.

But, in my opinion, the alleged revocation was not valid, under the powers conferred by sec. 25 of the *Crown Lands Consolidation Act* 1913. By par. 11 of its defence the Commonwealth denies

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that the Minister (the New South Wales Minister for Lands) duly or at all revoked any of the dedications; and that issue has to be faced. If sec. 25 of the Act merely gives power to the Minister to revoke a dedication to one public purpose and to devote the land to some other purpose (of which the Legislature approves or from which it does not dissent), then this revocation is invalid. If a landlord permit his tenant to pull down a shed and put up another in its place, the tenant is not thereby enabled to pull down the one without putting up the other. If A authorize B to take away any horse in A's stable on the condition that B put another horse in its place, B cannot take away the horse leaving the condition unfulfilled. If the Legislature enables the Minister to revoke any dedication provided that the land be devoted to some other purpose sanctioned by the two Houses, the Minister cannot, without such a sanction, revoke the dedication and throw the land into the ordinary mass of lands available for sale or settlement. The donee of a compound power cannot take the agreeable part of that power and leave the rest. It is, of course, clear law that there is no valid execution of a power if the conditions prescribed by the donee of the power are not satisfied by a literal and precise performance, even if they seem to be unessential and unimportant except as being required by the donor of the power (here, the Legislature of New South Wales): per Lord *Ellenborough*, *Hawkins* v. *Kemp* (1); per *Parke* B., *Rutland* v. *Wythe* (2); *Earl of Shrewsbury* v. *Scott* (3); *Cooper* v. *Martin* (4); and see *Cohen* v. *Wilkinson* (5). There seems to be no doubt that if sec. 25 did not contain more than the first paragraph (the only paragraph in the original sec. 105 of the *Crown Lands Act of* 1884), this would be a case of such a compound power. If the Minister be of opinion that any dedication of the Crown lands has failed, then a notice shall be published in the *Gazette* setting forth the *mode in which it is proposed to deal with the reservation, dedication or land in question* (hereinafter termed "proposals"); a copy of the notice is to be laid before both Houses of Parliament; if in one month Parliament by resolution declare

(1) (1803) 3 East 410, at p. 440.
(2) (1843) 10 Cl. & Fin. 419, at p. 456.
(3) (1859) 6 C.B. (N.S.) 1, at pp. 178-179, 220.
(4) (1867) L.R. 3 Ch. 47, at p. 58.
(5) (1849) 18 L.J. Ch. 378.

that it does not assent to the "*proposals*," no further action is to be taken. But if no such resolution be passed within thirty days, the Minister may direct the *proposals* to be carried out, and "*for that purpose the Minister may revoke by notification in the Gazette any such reservation or dedication, and make any new dedication sanctioned by such proposals*; and such grants may be issued and instruments executed, as the circumstances of each case may require." So Parliament has not to decide as to revocation: it has merely a power to say that it does not assent to proposals for some stated new purpose for the land. The power of the Minister to revoke applies *after* the proposals are accepted, and is not part of them. When the Minister finds that there is no expression of dissent from Parliament as to the proposals, he has power to "*revoke . . . any such reservation or dedication, and make any new dedication sanctioned by such proposals.*" The Minister's power to revoke is not, even verbally, separated from the power of the legislative Houses to sanction a new *dedication* for the purpose stated in the proposals; the words are not even "*may* revoke" and "*may* make," but "may revoke and make." Even if the scheme of the Legislature was that any land once dedicated to a public purpose should always be dedicated to some public purpose and reserved from sale, such a scheme is quite intelligible and legitimately within the legislative power.

As for the 3rd paragraph of sec. 25—a paragraph inserted by way of amendment by the *Crown Lands Act of* 1889 (along with the first part of the second paragraph)—I felt at first some doubt. The words are: "*Upon the revocation* under the provisions of this section of any dedication, or grant and dedication, the lands shall forthwith be vested in His Majesty, his heirs and successors, and *shall become Crown lands within the meaning of this Act.*" However, it is sufficient for the present purpose to say that the whole paragraph hinges on the words "upon the revocation under the provisions of this section"; and there is no revocation under those provisions until Parliament has had proposals laid before it for the future of the land. The paragraph is, therefore, not applicable to the present case. What the Minister has actually done appears from two documents—he has on 10th May 1923 notified that it is "proposed

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to *revoke* the said respective dedications heretofore made"; and on 12th October 1923, after reciting that the Legislature had not passed a resolution against that "proposal" (as he wrongly calls it), he directs the "proposals so notified" to be carried out, "and *for that purpose* I by this notification wholly revoke the said dedications." (I shall assume, in favour of the plaintiff, that a power to revoke can be exercised as to two dedications *uno flatu*.) Thus the Minister treats a proposal to revoke, *simpliciter*, as a sufficient proposal to lay before Parliament; and this, in my opinion, was a mistake.

The Minister's power to revoke, and the last paragraph of sec. 25, do not apply therefore until Parliament has had an opportunity of dealing with a scheme for the future. Until there is a valid revocation the words "upon the revocation" do not apply.

But this question as to the validity of the revocation has not been argued, or even mentioned, by counsel for the Commonwealth, although issue was joined as to due revocation; and, as I understand from my learned colleagues, they do not feel the difficulty which I feel. Under the circumstances I cannot but feel a diffidence as to my conclusions; but it is my duty to say that, in my opinion, there has been no valid revocation; and that, as it is not contended for the plaintiff State that it is entitled to a judgment for ejectment unless there has been a valid revocation, our judgment should be, on the materials before us, for the defendant.

Declare that the State of New South Wales is entitled to possession of the land in the pleadings mentioned. Liberty to apply.

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

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

B. L.