

## ATTORNEY-GENERAL v. WILLIAMS.

1913.

*Land set apart for a Government House prior to responsible government—Diversion from such purpose—Concurrence of Imperial Government—Claims against the Government and Crown Suits Act, No. 27 of 1912—Information by Attorney-General—Public interest—Injunction—Practice.*

Feb. 24, 25,  
26;  
March 20.

The C.J.,  
C.J. in Eq.  
Street, J.

The land on which the buildings known as Government House stand, originally formed part of a much larger area set apart by Governor Phillip soon after the foundation of the colony "for the use of the Crown and as common lands for the inhabitants of Sydney," that area being itself restricted to a smaller area by a later proclamation of Governor Bligh, in 1809, setting apart a portion of the larger area for purposes of public recreation. The smaller area so set apart by Governor Bligh comprised within it the land now known as Government House and grounds. By a proclamation issued by Governor Darling, in 1829, certain lands, including the land in question, were specified and described as "certain parcels of land in the town of Sydney which have been heretofore reserved for public purposes." As the result of communications between successive Governors and Secretaries of State for the Colonies, a portion of about 47 acres, including the land now in question, and several acres more, was selected as a site for a new residence for the Governor. The proposal for the erection of the new residence on that site was sanctioned by the Secretary of State for the Colonies, on the recommendation of Governor Bourke, in 1832, after report by the Surveyor-General of the Colony, and approval by the Legislative Council. *Held*, that the proprietary right in the lands so set apart before the Constitution Statute for the purpose of a Governor's residence did not pass from the Imperial Government to the Government of N.S.W. *Held*, also, that this land could not be disappropriated from the purpose of a Governor's residence, and applied to a purely local purpose by the Governor acting upon the sole advice of his local Ministers, much less, by the action of Ministers themselves, without his concurrence. And that by whatever means such a change in the proprietary right might become effected, there would need to be some evidence of the concurrence of His Majesty's Imperial Government. *Held*, also, that the Claims against the Government and Crown Suits Act, No. 27 of 1912, enables a proceeding to be brought on behalf of the public in the name of the Attorney-General against a nominal defendant sued on behalf of the Government. *Held*, also, that the public had such an interest in the preservation of the land and buildings in question, for the purpose of a Governor's residence, as to enable the suit to be brought. *Held*, also, that an injunction can be granted in a proceeding under the Claims against the Government and Crown Suits Act. *Evans v. O'Connor* (12 N.S.W.R. 81), not follow d.

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## MOTION FOR DECREE.

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This was a motion for decree heard before three Judges under s. 6 of the Equity Act.

The facts sufficiently appear from the judgments.

*Knox*, K.C., *F. J. Bethune*, and *D. Wilson*, for informants. (1) The land in question, with other land, was definitely dedicated before 1845, for the purpose of the residence of His Majesty's representative. On the report of the Legislative Council, the Home Government consented to 25,000*l.* being appropriated towards erecting building and improvements. And there were further appropriations from time to time. This was an appropriation to a specific public purpose. (2) The land is now vested in His Majesty, *jure coronae*, and never passed under the jurisdiction of the State. (3) The previous taking away of portions are immaterial.

5 and 6 Vict. c. 36 (Waste Lands Act) s. 23, "Waste Lands" defined—excludes lands set apart for some public use. Constitution Act, 18 & 19 Vict., c. 54, s. 2. The Legislature of New South Wales would not have power to deal with these lands because they did not form part of waste lands, therefore *a fortiori* the Government could not. *Attorney-General v. Eagar* (3 S.C.R. 234, 266, 270, 283). That case shows that waste lands in the Constitution Act mean the same thing as waste lands in 5 & 6 Vict. The Legislature did not acquire the power to deal with land which had been dedicated to some public purpose before 1842. Prior to 5 & 6 Vict., the Crown had the sole power of disposal, and by that Act the Crown could only act in a prescribed way. The Legislature did not acquire the power of dealing with these lands. Parliament has not dealt with them, nor has the Executive dealt with them. The claim here is that the Ministers have assumed to deal with them. The lands in question were sufficiently dedicated: *Turner v. Walsh* (6 A.C. 636, 639, 641). The rule of dedication by the Crown in the case of a road is the same as in the case of a subject. *Attorney-General of British Columbia v. Attorney-General of Canada* ([1906] A.C. 552, 553, 554). That case shows that it is quite consistent with the setting up of local parliamentary government that the Imperial Government should retain property in the jurisdiction. The British North America Act, 30 Vict. c. 3, ss. 108, 117. This residence

is analagous to land set apart for military or naval purposes. Crown Lands Acts: Act of 1861 (25 Vict. No. 1) s. 1—Crown Lands defined; Act of 1884, ss. 4, 105—Revocation of dedication. Claims against the Government Act extends to claiming relief against the acts of a Minister even if those acts are not authorised or ratified by the Executive: *Municipality of Numba v. Lackey* (1 N.S.W.R. 299); *Strahorn v. Williams* (25 W.N. 49); *The Commonwealth v. Miller* (10 C.L.R. 742, 745, 748, 749); *Evans v. O'Connor* (12 N.S.W.R. 81). Not necessary to show damage to the public: *Attorney-General v. Shewsbury Bridge Company* (21 Ch. D. 752, 756).

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*Blacket*, K.C., and *J. A. Browne*, for the defendant. (1) The King retained the right to divert the land to any purpose he thought fit. This is not the case of a trust. (2) So long as a Minister retains office his official act is the act of the King. He must here be taken to have acted as a Minister, and, as if the Executive had ratified his authority. Land held for military purposes stood on a different footing. I concede that land held for military purposes could not have been diverted to other purposes by the Legislature. Parramatta Park Act, 20 Vict. No. 35 (Oliver, p. 1658). Since the landing of Governor Phillip in New South Wales, lands in New South Wales could only be granted by the Crown as represented by the Governor of New South Wales.

The stables were planned and built by Governor Macquarie without reference to the Imperial authorities, who censured him for it.

The burden of proof lies on the informants to show that some law or right is being invaded. Here, no dedication is shown—paragraph 2 of the information speaks of a utilization. I admit that there is no minute showing that the Governor in Council has authorised or approved of the acts complained of in the information. There has been no dedication of this land to the purpose claimed. As to the powers of the Governor: (1) In the case of the land taken for the Sydney Hospital there was utilization without dedication; (2) as to the portion taken for the Botanic Gardens, there was dedication to the public by permitted user. This is not a case of leaving the Governor without a residence. If any wrong is done, it was done ten years ago, when the Governor's residence was removed to Cranbrook. Any rights of the Crown must be considered

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as waived by assent to the change. The State is under no obligation to provide a residence for the Governor-General. The suit does not lie under the Claims against the Government Act: *The Colliery Employees' Federation v. Brown* (3 C.L.R. 255, 266, 268). The relators have no *locus standi*—they are not persons “interested”: Old Act 20 Vict. No. 15, Preamble s. 1. If the relators and those whom they represent have no interest, the suit would not be maintained as a complaint lodged on behalf of His Majesty himself.

Claims against the Government Act, No. 27 of 1912, s. 3. There is no claim or demand in the present suit within the contemplation of the Act. There is no detriment to the public, because the place is no longer needed as a residence for the State Governor. Sect. 9 of the Act gives no right to an injunction. The relief is limited to the four heads mentioned: *Davidson v. Walker* (1 S.R. 196, 199, 205, 207, 211). The case of the stables is a matter of discretion with the Government. *Enever v. The King* (3 C.L.R. 969, 987, 989). What is complained of is a matter of ministerial responsibility, for which the Minister is only responsible to the King and to Parliament: Dicey's Law of the Constitution, 5th ed., p. 7, 8; Keith on Responsible Government in the Colonies, Vol. 1, p. 170, 171; Lowell's Government of England, p. 26; *Clough v. Leahy* (2 C.L.R. 139, 157); *Raleigh v. Goschen* ([1898] 1 Ch. D. 73); *Bradlaugh v. Gossett* (12 Q.B.D. 271, 275, 284).

The duties of Ministers are to do everything lawful necessary for the good of the country; they are responsible to the King, Parliament, to the electors, but not to the Courts, unless the act of the Minister inflicts an actionable wrong on an individual. If the act affects the whole community the Courts have no jurisdiction: Todd's Parliamentary Government in England, 2nd ed., p. 2; *Ellis v. Earl Grey* (6 Sim. 214); *Priddy v. Rose* (3 Mer. 86, 102). Whether injunction would lie: *Evans v. O'Connor* (12 N.S.W.L.R. 81). Injunction would not lie because Parliament may subsequently ratify act.

*J. A. Browne.* The Court must assume that the acts complained of are acts of the Governor—acting on the advice of his responsible Ministers. The claims against the Government Act does not enable the Imperial Government to take proceedings. If the wrong alleged is a wrong to the King alone, the Act does not apply. Robinson's Civil Proceedings by and

against the Crown, p. 487; *Attorney-General v. The Ironmongers' Company* (2 Beav. 313). As to the relationship between the Governor and his Ministers: Parliamentary Debates, House of Lords, 1910, Vol. 6, p. 408. Every breach of a legal right does not entitle the Attorney-General to an injunction: *Attorney-General v. Municipal Council of Mosman* (11 S.R. 133, 141).

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*Knox*, in reply. (1) Is the action complained of unlawful. (2) If so, is the Attorney-General entitled to maintain the present suit? (1) (a) The land in question was undoubtedly set apart or reserved for the use of His Majesty's representative in New South Wales. The purpose for which the land was set apart is analagous to naval and military purposes rather than land to be used for everyday purposes of Government. This is clear from the nature of the functions of the Governor. The Governor's Instructions show that the Governor is directly responsible to the King, through the Secretary of State for the Colonies, in regard to certain matters, and as regards those matters he is an Imperial Officer outside the Government of New South Wales: Governor's Instructions of 1900, 6, 8, 9, 11. The Governor is an Imperial Officer subject to instruction from the King through the Secretary of State for the Colonies. Keith's Responsible Government in the Dominions, Vol. 1, 172, 173, 283, 286, 298. The Crown provides the Governor with a residence. Can the Colonial Government take away that residence? If so, they could tell him to reside at Broken Hill. The important point is can a Minister do that behind the back of the Governor and behind the back of the King. It is inconceivable that the Governor in Council should interfere with the appropriation of this land except in obedience to special instructions. It is inconsistent with the imperial functions of the Governor, that he should depend on the Colonial Government for a foothold in the country. (2) If there is a matter of public concern in which some authority, private or public, is exceeding the bounds of their powers, it is the Attorney-General's right to intervene on behalf of the public and ask the Court to restrain that excess: *London County Council v. The Attorney-General* ([1902] A.C. 165, 168), where an excess of power was claimed by a particular public body; *Attorney-General v. Cockermouth Local Board* (18 Eq. 172 176). Except on the question of costs there is no difference

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 ATTORNEY- contend that a suit under the Claims against the Government  
 GENERAL Act would lie merely to protect the interests of the King him-  
 v. self: *The Queen v. The United Kingdom Electric Telegraph*  
 WILLIAMS. *Company, Limited* (31 L.J.M.C. 166). This is a suit to pre-  
 serve the property of the nation from improper dealings:  
*Attorney-General v. Shewsbury Bridge Company* (21 Ch. D.  
 752, 755). We complain of an unlawful diversion of the land  
 from its use as a Government House. As to *Davidson v.*  
*Walker* (1 S.R. 196), see *Evans v. Finn* (4 S.R. 297); Sect. 11  
 of Claims against the Government Act (No. 27 of 1912), shows  
 a recognition of property impressed with an imperial trust.

*Cur. adv. vult.*

On March 20th.

THE CHIEF JUSTICE. The land in question in this suit, on  
 which stand the buildings known as Government House, origin-  
 ally formed part of a larger area set apart by Governor Phillip  
 soon after the foundation of the colony of N.S.W. "for the use  
 of the Crown and as common lands for the inhabitants of  
 Sydney." By a proclamation issued by Governor Darling in  
 1829, certain lands, including that now in question, were de-  
 scribed as "certain parcels of land in the town of Sydney  
 which have been heretofore reserved for public purposes." In  
 the early days of the colony, two residences were provided for  
 the Governor; one at Sydney on another part of the land so  
 set apart, and the other at Parramatta. In course of time  
 the necessity arose for providing a more suitable residence than  
 either. As the result of communications between successive  
 Governors and Secretaries of State for the Colonies, a portion  
 of about 47 acres, including the land now in question and  
 several acres more, were selected as a site for the new residence.  
 The proposal for the erection of the new residence on that site  
 was sanctioned by the Secretary of State for the Colonies on  
 the recommendation of Governor Bourke, made in 1832 after  
 report by the Surveyor-General of the colony, and approved by  
 the Legislative Council, which also voted 10,000*l.* towards the  
 erection of the new building. On a portion of the site so  
 selected stables had already been erected during the adminis-  
 tration of Governor Macquarie, and these have been in use in  
 connection with the present residence ever since its comple-  
 tion. The cost of the new residence was 25,000*l.*, of which

15,000*l.*, over and above the 10,000*l.* voted by the Legislative Council, was derived from the sale of part of the land constituting the larger area already referred to, over which moneys the Legislature of N.S.W. had no power of appropriation. The building was completed in the year 1845, and was thenceforward continuously occupied by the Governors of N.S.W. till the year 1900. In that year the Commonwealth of Australia was constituted, and for the purpose of providing a residence for the Governor-General, an arrangement was made between the Commonwealth Government and the Government of N.S.W., whereby the residence now in question was leased to the Commonwealth. This arrangement was continued till the year 1912, when, under a power reserved in the lease, it was terminated by the State Government. Since 1900, the Governors of N.S.W. have occupied another residence at Sydney provided at the expense of the State. Of the lands originally enclosed within the fences of Government House and used in connection with it, some five acres were, in the year 1900, separated from the rest and fenced in with the Botanical Gardens adjoining. Previously, in 1879, another area, enclosed by an outer fence and used for grazing purposes in connection with the residence, had been set out as a public park. The substance of the complaint laid in the present information is that Government House and grounds, since the termination of the occupancy of the Governor-General, have been diverted without lawful authority from the purpose of a residence for the Sovereign's representative in N.S.W., with a view to their application to some other purpose. The evidence in support of this charge is the statement of the intention of Ministers to devote the property to other State purposes, as appears in certain correspondence between them and Commonwealth Ministers on the subject of the termination of the arrangement already mentioned; the throwing open of the grounds to public access as a place of public resort in the month of December, 1912; the making of certain alterations in the grounds facilitating access between them and other public places adjoining them as shown by the report of the Curator of the Botanic Gardens; and the preparation of plans and the taking of other steps towards the conversion of the stables into a building to serve as a Conservatorium of Music. In the affidavit of the nominal defendant he states that he is advised and believes that no

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**1913.** determination has been come to by the Government as to how Government House or the grounds attached thereto, with a certain exception, is to be used, and that with that exception no determination has been come to that the House and grounds shall not be used as and in connection with a residence for the Sovereign's representative. The exception is that it has been decided to utilise the buildings known as the stables for the purpose of a Conservatorium of Music. It is needless to say that this Court cannot inquire into the propriety of any decision arrived at by Ministers respecting any question of public policy. It is only when policy finds expression in action, and some one aggrieved complains that the particular acts done are contrary to law that the jurisdiction of the Court arises. Thus, a policy of railway construction involves interference with private property and public roads, and unless that interference has been effected in the way marked out by statute, the question becomes one of law to be dealt with by the Courts. The complaint here is that the lawful steps have not been taken to legalise certain physical acts done and proposed to be done upon these lands. Assuming for the moment that this suit is one in which that question of law can be raised, the question of fact arises whether the physical acts done on the land, coupled with the announcements of the intentions of Ministers, sufficiently show that without the intervention of the Court (assuming it to have the power) there is reason to believe that the House and grounds will be diverted from their use as a Governor's residence and applied to some purpose incompatible with that use. On the question of fact I think no other conclusion is open.

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Another question of fact somewhat disputed was, whether such a course of action had received, or must be regarded as having received, the approval of the Governor. Assuming also the relevancy of this question, I again think no other conclusion is open on the evidence—taken together with an admission by counsel for the nominal defendant on the hearing of this motion, that there is no executive minute (the usual official record) showing that the proposed action had been submitted to the Governor—than that the question of the diversion of the residence to other purposes was never so submitted. The explanation of this probably is that Ministers have regarded the question as one within their own administrative competence



without reference to the Governor, as would appear from the terms of the correspondence with the Commonwealth Government already referred to from the 23rd of May, 1912, onward. An argument was addressed to us that as Ministers were retained in office it must be assumed that all their executive acts had received the sanction of the Governor. Such an argument entirely misconceives the relation between a Governor and his Ministers, and would charge the Governor with a responsibility unknown to our system of Government. So far as the change made in 1900 was concerned, whereby the Governor-General was placed in residence, there appears to have been some general correspondence between the State and the Imperial authorities on the subject of the Governor-General's place of residence, and the subsequent arrangement made between State and Commonwealth under which the Governor-General went into residence must have been well known to the Imperial authorities. So far as regards the two portions of land detached from the grounds as previously stated, it does not appear whether this was approved by the Governor or communicated to the Imperial Government or not, and I do not think that, on either supposition, the bare fact would assist in deciding the present controversy.

Before touching on the somewhat difficult questions of procedure arising in this case I shall state some conclusions of law which I think arise upon these facts. In the first place, I am clearly of opinion that the lands now in question have at all times been vested in the Crown as Imperial property, and that they have never become vested in the Crown as represented by the Government of N.S.W. Such a distinction is one recognised by the Claims against the Government and Crown Suits Act itself, which provides in s. 2 that in the case of damages and costs adjudged against the nominal defendant or costs awarded against the Crown and not paid within 60 days after demand, execution may be levied "upon any property vested in the Government, but not upon any property vested in the Government on behalf of the Imperial Government, or to which the Imperial Government has any claim or is in anywise entitled." The same distinction has also been recognised clearly in a number of decisions of which that given in the case of the *Attorney-General of British Columbia v. The Attorney-General of Canada* ([1906]

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**1913.** A.C. 552), was an instance. In that case a declaration was claimed by the Attorney-General of the province of British Columbia that the title to certain lands within the province, set apart for defence purposes before the federation of Canada under the British North America Act, was vested in the Crown on behalf of the province by virtue of a certain section of the Act. The Attorney-General of the Dominion contended that the title was in the Crown on behalf of the Dominion by virtue of a different section of the Act. But he relied, in the alternative, on the effect of an Imperial Despatch issued subsequently. The Judicial Committee of the Privy Council held that the Act had not given title to either of the contesting Governments, but that the land remained Imperial property till the effect of the subsequent despatch had carried it to the Government of the Dominion. In other cases it has been pointed out that the Legislature of a British possession may have wide powers of legislation in relation to particular lands of the Crown within its territorial limits without possessing any proprietary rights in those lands, or any power to dispose of their revenues or to sell them and appropriate their proceeds. *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* ([1898] A.C. 700); *Ontario Mining Company v. Sybold* ([1903] A.C. at p. 79); *St. Catherine's Milling and Lumber Co. v. The Queen* (14 A.C. 46).

The lands in question in the present suit were appropriated to the special purpose of a Governor's residence at a time when the Crown lands within the colony were being administered by the Imperial Government itself. It was not until the enactment of the Constitution of 1855 by the Statute 18 & 19 Vict. c. 54 that the management and control of the waste lands belonging to the Crown in N.S.W. and the appropriation of moneys derived from them passed to the Legislature of N.S.W. There had then been a Legislature in N.S.W. for about 30 years, originally created under the Statute 4 Geo. 4 c. 96, but it was not till the Constitution of 1855 that the power was conferred "to make laws for the peace welfare and good government of the Colony in all cases whatsoever." The lands we are now concerned with, clearly did not come within the term "waste lands," and, on the authority of the *Attorney-General of British*

*Columbia v. The Attorney-General of Canada*, the conferring of a general power of legislation did not affect the proprietary right in them, unless the purpose to which they had been appropriated was a purpose in which the Government of N.S.W. and not the Imperial Government was charged with the responsibility of administration.

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Now, I think it is clear that the purpose to which these lands had been appropriated was one necessary for the maintenance of Government in Imperial affairs as well as in affairs over which the authority of the Crown was exercisable by the local Government. Both before and after the establishment of the Constitution in 1855, the office of Governor remained an Imperial Office. Though the responsibility for advising him in all matters of administration affecting the colony was cast upon the local Ministers, he himself remained responsible to the Crown for the due discharge of his own duties, some of which were of Imperial rather than of local concern, and in regard to some of which he was bound to exercise an independent judgment. This has always been recognised even by those who have asserted the powers of the local executives in the widest terms. Having regard to the relation of the Governor to the Crown, both as executive head of the Empire and as executive head of N.S.W., I think that the proprietary right in lands set apart before the Constitution statute for the purpose of a Governor's residence, did not, any more than in the case of lands set apart for military or naval purposes, pass from the Imperial Government to the Government of N.S.W. The true position of the N.S.W. executive in regard to them seems to have been that of custodian only. In the next place, I am of opinion that though the land might have been disappropriated from the purpose of a Governor's residence and applied to a purely local purpose by executive act without legislation, as appears to have been done in the case of the earlier residence, this could not be done by the Governor acting upon the sole advice of his local Ministers, much less by the action of Ministers themselves without his concurrence. By whatever means such a change in the proprietary right might become effected, there would need to be some evidence of the concurrence of His Majesty's Imperial Government. The approval of the Governor, had that been obtained, might have been taken as evidence of such concurrence, because it would lead to the

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presumption that the Imperial Government had been made acquainted with the proposal and had expressly or impliedly given their consent to it.

On the evidence as it stands, I come to the conclusion that the appropriation of the property to the purpose of a Governor's residence has never been altered in law; that, until that has been effected, any act done to the property by any officer or servant of the Government contrary to that purpose would be without warrant in law; and that, assuming some appropriate procedure to exist, the Government could be held responsible in law for such acts.

This leads to the further questions (1) whether the Claims against the Government and Crown Suits Act, No. 27 of 1912, enables a proceeding to be brought in the name of the Attorney-General against a nominal defendant sued on behalf of the Government, and, if so, whether orders of the kind now asked could be made in such proceedings, and (2) whether in the present case there is any right in the members of the public for the infringement of which such relief could be claimed. On the first of these questions, it is objected, firstly, that such a proceeding is, according to its legal effect, a suit by the King, whereas the Act was only intended to give rights of action to subjects; and, secondly, that it is a suit against the King and, therefore, would amount to a proceeding by the same litigant against himself. I agree with the contention that the Act does not extend to the authorisation of proceedings on behalf of the Crown itself, its plain intention being to afford the subject a remedy by action which he did not formerly possess, whereas infringements of the rights of the Crown itself were always sufficiently remediable by other forms of procedure. I think this sufficiently appears from the nature and history of the legislation on the subject which is fully set out in the judgment of the Privy Council in the case of *Farnell v. Bowman* (12 A.C. 643). But when the Attorney-General sues on the relation of an informant who complains that some right of the public has been infringed, he undertakes the burden of proving not that the King has, but that some aggregate of his subjects have, a grievance remediable by some order of the Court. In that sense, I think it would be an undue limitation of the utility of the Act to hold that though an individual may sue under it to remedy his own grievances, another grievance affecting

all individuals alike, though no one more than the rest, lies outside its provisions. The second branch of the contention, though it has some bearing on the nature of the remedy, if any, to be obtained in the proceeding, cannot, in my opinion, be maintained in view of the frequency of litigation in recent years between different branches of the King's government. I refer to such cases as those between Province and Province and between Province and Dominion in the case of Canada, and the parallel line of proceedings in the case of Australia. This case is not strictly analagous to those, because here, though the complaint rests on a suggested conflict between two governmental authorities, the party alleged to be wronged, *i.e.*, the public of N.S.W., is not a governmental authority. But, unless some other difficulty stands in the way, the fact that the King as *parens patriae*, should be in litigation with the King as represented by the Government of N.S.W., is no more anomalous than the fact that one of his governments in Canada or Australia can be in litigation with another. The apparent confusion arises from the application of language correctly enough descriptive of proceedings in the English Courts, where only one Government exercises authority, and no power to sue that Government exists, but misleading when applied without caution to a British federation where the Imperial, the Federal, and the Provincial Governments are each entitled to exercise certain functions, and the two latter have been made amenable by legislation to legal proceedings.

The question whether an injunction can be granted in a proceeding under the Claims Against Government and Crown Suits Act arose in the case of *Evans v. O'Connor* (12 N.S.W. 81), and was there decided in the negative. It was pointed out by Sir *Frederick Darley*, C.J., that neither the nominal defendant, personally, nor individual Ministers, could be properly named in such an injunction; the nominal defendant, because the Act exonerated him from liability in person and property, and Ministers, because they were not parties to the action. *Windeyer*, J., pointed out that it had already been held that neither a discovery order nor a garnishee order could be maintained against the Government. It was afterwards held by the Supreme Court in *Morrissey v. Young* (17 N.S.W. Eq. 157), that an order for discovery might be made; and in the case of *The Commonwealth v. Miller* (10 C.L.R. 742) it was held by the High Court that discovery could be ordered

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**1913.** against the defendant Commonwealth in a suit under the  
**ATTORNEY-GENERAL** Crown Remedies and Liability Act of 1890. In the case of  
**v.** *Strahorn v. Williams* (25 W.N. 49) an injunction was granted  
**WILLIAMS.** by the Chief Judge in Equity in a suit under the Act. In  
**The C.J.** regard to the difficulties formerly felt, it is to be remembered  
that the real party affected by any order made, whether for the  
payment of money, or specific performance (remedies specially  
mentioned in the Act), or any other, is the Government of  
N.S.W. itself, not Ministers individually or collectively, but  
the executive Government in which the Governor is as essen-  
tial a component as Ministers themselves. The exemption of  
the nominal defendant from individual liability, and the ab-  
sence from the record of the real litigant, would be as immaterial  
in the case of an injunction as in any other case. The sug-  
gested difficulty of the enforcement of orders would apply  
to discovery or specific performance as much as to injunction.  
Sect. 9 of the Act provides that: "In any action or suit under  
this Act all necessary judgments, decrees, and orders may  
be given and made, including every species of relief, whether  
by way of—(a) specific performance; or (b) restitution of  
rights; or (c) recovery of lands or chattels; or (d) payment  
of money or damages."

Injunction, though not expressly mentioned, may not only  
become a "necessary order" for the purpose of effectuating  
a "just claim or demand," but may in some cases be essential  
to the efficacy of such a remedy as specific performance or  
restitution of rights. The abstention from acts, which is  
involved in injunction, offers at least as little difficulty as the  
doing of acts involved in specific performance; and as a  
Government can only act through its servants and agents,  
and an order for injunction commonly includes these, the sug-  
gested difficulty seems to me unreal.

There remains the question whether any right of the public  
of such a kind as could be made the subject of litigation has  
been shown to have been transgressed. In one sense it is  
true that all property held by the King for any purpose of  
Government is property held by him in trust for that purpose.  
An instance of the application of that term by the Legislature  
is found in the Imperial Act 40 & 41 Vic. c. 23, which deals  
with "fortifications, works, buildings, or land in any Colony  
held in trust for the defence of that Colony." So here, it  
would not be an incorrect use of language to describe the land

in question as land held in trust for the maintenance of Government in N.S.W. But, as we have seen, it is property which can be diverted from that trust by the act of the trustee himself. In so far, then, as the case bears any analogy to that of trusts in general, it would resemble land held to certain uses which could be altered by revocation and fresh appointment without the consent of those entitled for the time being to the benefit of those uses. Supposing a public charity to be the object of such a provision, the precarious nature of the interest of the public would not necessarily be an obstacle to the maintenance of a suit by the Attorney-General to prevent any interference with the lands or other assets of the charity by unauthorised persons. In the same way the rights of the public could be protected in cases where land has been dedicated as a public road or park, even though a power may have been reserved under some Act of Parliament to close the park or road. Until that power is exercised or the Act is repealed the public right subsists and can be protected by suit. In the case of a residence provided for the King's representative, the public are only benefited in the same sort of way as they are in the case of offices or residences provided for the carrying on of the ordinary executive government of the State or Commonwealth, any difference being only one of degree. In each case the right to have these means and instrumentalities of government provided is usually a purely political or constitutional right not enforceable by litigation. But when such lands and buildings have once been provided, I conceive that the public would have an interest in seeing that they are not diverted from that purpose without lawful authority. In ordinary cases that lawful authority would be the executive Government either of State or Commonwealth, as the case may be. But supposing land to be appropriated to a specific purpose by an Act of the Legislature of the State, such, for instance, as a State Forestry, there could be no lawful disappropriation from that purpose without a repeal of the Act, unless the Act itself had made provision for the purpose. In such a case, it seems to me that the Court would have jurisdiction to entertain a suit to prevent the destruction of the trees or any other act done for the purpose of diverting the land from its special purpose while the Act remained unaltered, on the ground that the public had an interest in safeguarding the provision so made for its benefit.

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I am of opinion, therefore, that the public has such an interest in the preservation of the land and buildings now in question for the purpose of a Governor's residence, as to enable this suit to be brought, and that the first declaration asked for should be made, viz.: "that the house and grounds are vested in His Majesty the King, dedicated to the public purpose of a residence for the Sovereign's representative in N.S.W.," with an additional declaration that the action or concurrence of His Majesty's Imperial Government is a necessary condition precedent to their diversion from that purpose. I am also of opinion that the interests involved are of sufficient importance to justify the granting of an injunction restraining the commission of the acts complained of. Should the lands hereafter become lawfully disappropriated from their present purpose, a new situation would arise to which such an injunction would no longer apply: *Jefferies v. Day* (L.R. 1 Q.B. 374).

A. H. SIMPSON, C.J. in Eq. This is a suit by the Attorney-General of New South Wales on the relation of three named persons asking: (1) For a declaration that Government House and grounds, which are shown on plan Exhibit H, are vested in His Majesty the King, dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales. (2) For a declaration that neither the Government of New South Wales nor the Governor in Council has power to interfere with or alter the said public purpose to which the said house and grounds are dedicated. (3) For an injunction restraining the defendant as nominal defendant for and on behalf of the Government of New South Wales, the Ministers, officers and servants of the Crown from using or causing or allowing to be used the said house and grounds for any purpose other than the public purpose of a residence for the Sovereign's representative in New South Wales. (4) For costs.

No defence has been filed, but by consent the motion for an interlocutory injunction has been turned into motion for decree. The allegations in the information cannot therefore be taken as admitted. It is clear on the evidence that the Government intended to use the stables of Government House as a Conservatorium for Music and have already taken steps to carry out this purpose. The stables are, in law, part of the house, and if the Government can use the stables for this purpose, it follows the Government can use the house and grounds for any public purpose.



Two questions are raised:—1. Is the act complained of unauthorised by the proper authority, *i.e.*, is it unlawful. 2. If yes, can the Attorney-General maintain this suit.

1. It is not disputed that the land in question, Government House grounds shown in Exhibit H, is the property of His Majesty which he might appropriate for any purpose not forbidden by law. It was originally part of a much larger piece of land shown in Exhibit A, but the evidence shows that large parts of this land have been, with the consent of His Majesty, either sold or appropriated to other purposes. The proceeds of sale, some 15,000*l.*, were used with the approval of His Majesty in erecting Government House and laying out the grounds. The evidence also shows that the whole of the land comprised in Exhibit A was appropriated by His Majesty for public purposes for the benefit of the inhabitants of New South Wales. I refer particularly to the affidavit of the defendant himself and the documents annexed to his affidavit or referred to therein. The evidence also shows the Government House grounds have been appropriated by the King as a residence for the Governor of New South Wales, and that they were for many years used for this purpose. If the use of them as such residence is no longer desirable, the King could appropriate them to any other public purpose, but, until His Majesty the King has taken some step to so apply them, the Government House grounds must be taken to be appropriated to the purpose of a residence for the Governor of New South Wales.

Lands held by the King appropriated for naval or military purposes, seem to me to stand on an analogous footing, and in the Imperial Act of 1877, 40 & 41 Vict. c. 23, such lands are referred to in the preamble as held in trust for the defence of the colony whether actually vested in the Crown or in other persons. Whether it is more accurate to say that the King has appropriated the land for the residence of the Governor of New South Wales, or that he holds it in trust for such purpose, seems to me immaterial. In neither case can the appropriation or trust be interfered with except with the consent of His Majesty. A Minister of the Crown simply as Minister has no power to give such consent, nor, in my opinion, does it make any difference that some or all of his colleagues agree with his action. Whether some action by the Governor in Council would bind the Crown is another matter, for on the evidence it is clear that there was no such action. Both sides

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asked us to express an opinion on this point, but to do so would be to express an opinion on a hypothetical case which would be extra-judicial and not binding on anyone. I think it is safer to refrain from giving any opinion on this point. If this is so, the direction by the Minister to use the stables for a Conservatorium of Music, or any purpose other than a residence for the Governor of New South Wales, was unauthorised and in that sense unlawful.

The second question then arises, whether the Attorney-General can complain of the wrong. If I am right in the view that the whole of the land in Exhibit A was appropriated by the King for public purposes for the benefit of the inhabitants of New South Wales, the Attorney-General as the only person who can represent the public is the proper person to sue. It is "a matter which concerns the public," to quote the language of Lord Halsbury, L.C., in *London County Council v. The Attorney-General* ([1902] A.C. 165, 168) and it is immaterial when the suit is once instituted whether it is instituted by the Attorney-General *ex officio* or at the relation of a private individual. "Except for the purposes of costs there is no difference between an *ex officio* information and an information at the relation of a private individual. In both cases the Sovereign, as *parens patriae*, sues by the Attorney-General" per Sir G. Jessel, M.R., in *Attorney-General v. Cockermouth Local Board* (18 Eq. 172, 176).

It was contended by the defendant that the Attorney-General in this case was suing to protect what I may call the private rights of the King. I do not think this is so. I think he is suing to protect public rights, and it seems to me a question of words whether you say the Crown as *parens patriae* is suing by its Attorney-General to protect public rights, or the Attorney-General is suing to do the same thing. The Attorney-General can sue to complain, that lands held for charitable purposes are being improperly administered: *A.G. v. Vivian* (1 Russ. 226); that public bodies are exceeding their powers: *London County Council v. The Attorney-General* ([1902] A.C. 165), or using them wrongfully: *A.G. v. Birmingham, etc., Board* ([1910] 1 Ch. 48).

For these reasons I think the informant is entitled to a declaration that the Government House and grounds are appropriated for the residence of the Governor of New South Wales until His Majesty has otherwise determined, and that no

Minister has power to interfere with this purpose; and to an injunction restraining the Government from so doing until the pleasure of His Majesty can be ascertained.

The defendant must pay the costs.

STREET, J. This is a suit by the Attorney-General, acting on the relation of certain individual members of the community, against a nominal defendant appointed to represent the Government under the Claims Against the Government and Crown Suits Act 1912. He informs the Court (to use the words of the information) that the members of the Government of N.S.W., after having met in Cabinet, have determined and announced publicly that the said house and grounds shall no longer be used as a residence for the Sovereign's representative in New South Wales, but shall be devoted to some other purpose, and he says that he fears that unless restrained by the order and injunction of this Court the Government of New South Wales will carry this determination into effect so as to permanently exclude the Sovereign's representative in New South Wales therefrom, contrary to the public purpose to which the said house and grounds were dedicated. He asks that it may be declared that the property is vested in the King dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales, and for consequential relief.

The matter comes before us on motion for decree. In an affidavit filed by the nominal defendant, he states that he is advised and believes that the Government has decided to turn the building previously used as stables into a Conservatorium of Music, but that, with this exception, he is advised and believes that no determination has been come to as to how the house and grounds are to be used, and no determination has been come to that they shall not be used as and in connection with a residence for the Sovereign's representative. It appears, however, that in addition to the intention to utilise the stables as a Conservatorium of Music, the fences separating the grounds from the Botanical Gardens and the Garden Palace grounds have been removed; gates, paths, and outlets have been provided and made to facilitate public access to the grounds; notice boards, informing the public of the by-laws of the Botanical Gardens and Domain, have been erected; and in addition the Premier, on 14 December last, attended at the grounds and, in the presence of a considerable number of

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people, declared that the grounds were open to the public. It is difficult to understand why the state of indecision and indetermination said to exist should be dissembled under so considerable a display of inconsistent activity, and I do not think it can be doubted that the evidence before us is sufficient to justify the allegations of the Attorney-General in the information as to the intention of the members of the Ministry. The serious question which we have to consider is whether the facts disclosed amount to such an interference or threatened interference with the public rights as to entitle the Attorney-General, as the protector of the rights of the public, to ask for the Court's interference. The argument covered a wide range, but I think that the position was correctly put by Mr. Knox in his reply, to the effect that the two questions which emerge for consideration are (1) is the action complained of unauthorised by law; and (2) if it is, is the Attorney-General entitled to maintain the present suit.

From the evidence before us it appears that as early as 1792 Governor Phillip issued a Government order declaring that all land lying between the waters of the harbour, or the river as it was then called, and a boundary line extending from the head of Darling Harbour on the west to the head of Woolloomooloo Bay on the east, was reserved for the Crown and for the use of the town of Sydney, and that no ground within it was ever to be granted or let on lease. Within the area so reserved a smaller area extending roughly from the head of Circular Quay to Woolloomooloo Bay was set apart as ground necessary for the use of Government House. Notwithstanding Governor Phillip's prohibition against leasing, a general order was issued by Governor King in 1801 authorising leases for short terms of years, and in 1807, not only had a considerable number of leases been granted of portions of the reserved area, some of them being within the smaller area to which I have referred, but in addition a number of unauthorised houses had been built adjacent to Government House and within the smaller area. In that year Governor Bligh issued a proclamation calling upon the occupants of houses built without authority on land "particularly marked out as making part of the domain of the Governor's residence," to quit possession by a specified date as the grounds were wanted for Government purposes. It does not appear when the smaller area set apart as necessary for the use of Government House first

came to be spoken of as the Government domain, but in 1812 Governor Macquarie issued a proclamation stating that the whole of the Government domain extending from Sydney Cove to Woolloomooloo Bay had been completely enclosed by stone walls and palings except such parts as were under lease, and giving notice that stock found trespassing would be impounded and that the public were prohibited from removing stone or loam or cutting down timber. Apparently the public were allowed access to the Government domain so enclosed, inasmuch as in 1816 Governor Macquarie found it necessary to issue a proclamation calling attention to the injury which had been done by the breaking down of the wall and various other acts of destruction, and prohibiting persons from trespassing, but at the same time pointing out that the order was not meant "to extend to the prohibiting the respectable class of inhabitants from resorting to the Government domain as heretofore for innocent recreation during the daytime." In 1829 the lands known as the Government domain were included in a list of lands reserved for public purposes, which Governor Darling caused to be published in the Government Gazette. Previously to this, portion of the area known as the Government domain had been appropriated for the purposes of a hospital, another portion had been appropriated for the establishment of botanical gardens, while stables for the use of the Governor had been built upon a further portion. As time progressed it became desirable that a new residence should be erected for the Governor, and a portion of the Government domain, consisting of about 47 acres, and including the ground on which the stable buildings stood and still stand, was selected as a site for a residence and grounds. To raise the necessary funds for building portions of the Government domain in the vicinity of Circular Quay were sold, and with the proceeds of sale, supplemented by a sum of money voted for the purpose by the Legislative Council, the present Government House was built. It became ready for occupation in about the year 1845, and ever since then it has been continually used as a residence, first for the Governor of N.S.W. and afterwards for the Governor-General of the Commonwealth, until 1st December last, when the arrangement under which it was occupied by the Governor-General came to an end. The grounds surrounding it and used in connection with it as garden and pleasure grounds have been slightly curtailed in area by the diversion on, I

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think, two occasions, to other public purposes of small portions, but with this exception they were the same on 1st December last as in 1845.

The allegation in the information that the ground became permanently dedicated to the public purpose of a residence for the Sovereign's representative in N.S.W. is too widely stated. The Crown has never divested itself of the land, and it is manifest that power resides somewhere to permit of its diversion to some other public purpose. Where that power resides must depend upon the question whether the purpose of a Governor's residence for which the land has been appropriated is to be regarded as an Imperial purpose or a local purpose, but the position taken up by Mr. Knox was that, on this part of the case, all that it is necessary for the Attorney-General to establish is, that, wherever the power may reside, no authority has been conferred upon those who have claimed to exercise it. In my opinion the evidence is sufficient to establish this. The allegation in the information is that the members of the Government, (meaning of course Ministers of the Crown) after meeting in Cabinet, determined that the land should be devoted to some other public purpose, and the evidence shows that effect has been given to this determination by ministerial action. The Constitutional functions of the Cabinet are, however, to advise, not to act. It is a consultative and deliberative body, not an executive body. It determines what policy ought to be pursued and advises as to action to be taken or orders to be given, but beyond this it has no power of determination. If action is to be taken or orders are to be given in accordance with its advice, this must be done by the Governor in Council. The primary function of each Minister is, in like manner, that of an adviser merely, and a Minister has no executive power except in so far as it is conferred upon him by the Legislature or delegated by the Governor in Council. It is abundantly plain to my mind that no power belonged to the Ministers of the Crown, either individually or collectively, to take action on their own responsibility for the purpose of diverting the land from the purpose for which it was being used, and that their action in this respect was illegal, in the sense that it was an unauthorised interference with the purposes to which the land had been appropriated by the properly

constituted authorities. Mr. Blacket admitted that there is no executive minute showing that the Governor in Council has authorised or approved of the acts complained of, but both he and Mr. Browne urged that inasmuch as the Governor had not dismissed his Ministers he must be taken to have assented to what was done, and that the acts must therefore be looked upon as acts of the Governor in Council. The proposition is a startling one, and I cannot assent to it. The Governor takes no part in the deliberations of the Cabinet, and if he had given executive authority to its determinations this would have been evidenced by some executive minute or other record. The inference which I draw from the absence of any such minute is that what has been done was done without the authority of the Governor in Council.

Mr. Knox, as I have already said, was not inclined to take any further burden on his shoulders than the necessities of his case demanded, and he contented himself with arguing that the ministerial interference proved was unauthorised, and therefore unlawful. We might perhaps content ourselves with taking up the same attitude, but I do not think that we should do so, and I am prepared to go further. In my opinion, the specific purpose for which the land in question was set apart—that of a residence for the Governor—is an Imperial purpose and not a matter of purely local concern, and I think, therefore, that the land cannot properly be diverted from that purpose to some other without the consent of the Imperial Government. As I have already pointed out, the land has never been divested from the Crown, and having been set apart for a specific public purpose prior to the conferring of a Constitution on N.S.W., it was not waste land of the Crown within the meaning of s. 2 of the Imperial Act 18 & 19 Vict. c. 54, or s. 43 of the Constitution Act, 17 Vict. No. 41, and therefore the power of dealing with it did not pass to the Legislature under the provisions of those sections which vested the control of waste lands of the Crown in the Legislature (see *A.G. v. Eagar* (3 S.C.R. 234)). Seeing, moreover, that, the purpose for which it was set apart was not a purely local purpose, such for instance, as that of a post office, a public school, or a lock-up, but was in my opinion an Imperial purpose, analogous to the case of lands set apart for naval or military purposes, I do

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not think that the Legislature acquired power to deal with it under the general powers conferred upon Parliament by the authority given by s. 1 of the Constitution Act to make laws for the peace, welfare and good government of N.S.W. The land was set apart for a specific public purpose of an Imperial and not a merely local character and, in my opinion, power to deal with it was never vested either in the local Government or the local Legislature, but remained vested in the Crown as represented by the Imperial Government. The conception of the Imperial Government and of the Governments of the various dominions and dependencies within the Empire as distinct entities capable of acquiring and asserting rights against one another is familiar enough to lawyers of the present generation, accustomed as they are to see questions between the Governments of different States and dependencies within the Empire litigated in Courts of Justice. The land cannot therefore be diverted to other uses without the assent of the Imperial Government, and the proper person to assent to any such diversion is, in my opinion, the Governor of this State, acting, not on the advice of his Ministers, but under instructions from the Imperial Government. It may very well be that if in point of fact it were found that action had been taken in the matter by the Governor in Council, it would be the duty of the Court to assume that in so acting the Governor was acting in accordance with instructions from the Imperial Government, but that is a question which we need not at present consider.

Another argument put forward by Mr. Blacket was that assuming that the land could not be diverted from its use as a residence for the Governor of New South Wales without the assent of the Imperial Government, this assent had in fact been given in the year 1900 after the establishment of the Commonwealth, when the residence of the State Governor was, with the assent of the Imperial Government, removed elsewhere in order that the Governor-General might be housed in the old residence. He urged that as the obligation to provide a residence for the Governor of N.S.W. had been satisfactorily discharged and as the Government of N.S.W. was under no obligation to provide a residence for the Governor-General it was at liberty, without consulting the Imperial Government, to



appropriate the site of the old residence to any other public purpose it might see fit. On the assumption, however, that the Imperial Government is entitled to be consulted before any diversion is effected, I do not think that the inference of waiver of this right which Mr. Blacket seeks to draw is maintainable. The papers before us show that the assent to the removal elsewhere of the State Governor's residence was not an unconditional assent, but was given merely in order that the old residence might be availed of for the use of the Governor-General.

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The acts complained of being then in my opinion unlawful, in the sense that they are unauthorised, the remaining question for consideration is whether the present proceedings are maintainable in respect of them. It is conceded that the provisions of the Act No. 27 of 1912, relating to claims against the Government, are applicable only to proceedings brought or sought to be brought by subjects of the Crown, and if the unauthorised diversion of the land were a matter which concerned the King only and in which the public had no concern, I should be disposed to think that the present suit would not be maintainable. Having regard to the fact that the specific public purpose to which the land was appropriated was that of a residence for the King's representative in N.S.W., I have felt some doubt whether an unauthorised diversion of the land from that purpose to another public purpose could be said to amount to such an interference with a public right as to justify members of the public in approaching the Court for relief through the Attorney-General as the protector of the rights of the public and as the only available mouthpiece of the public in such a case, but upon the whole I have come to the conclusion that the matter is one that concerns the public and does not merely concern the right of the Crown, and that there has been such an interference with a public right as to justify these proceedings. The evidence to which I have previously referred shows that the land forms part of a larger area, the whole of which was set apart in the year 1829 for public purposes. In my opinion this was sufficient to create a public interest and a public right in the lands so set apart. The right so created would not entitle the public to dictate in respect of the specific public purposes to which the land might from time to time be put, nor to interfere in respect of a diversion from one public purpose to another by the proper authority in that behalf,

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but in my opinion it would be sufficient to entitle the public to interfere if the land had been unlawfully diverted to private uses, and if the right and the interest created are sufficient to justify proceedings by the public in respect of an unauthorised interference of one kind, I think that they are sufficient to justify proceedings in respect of an unauthorised interference of another kind. Though the public cannot control the particular public purpose to which the lands may be put, I think that they have sufficient right and are sufficiently concerned to justify them in asking for the Court's interference in respect of an unauthorised diversion from one public purpose to another. The ministerial action in the matter is no doubt capable of ratification, and it may be that it will be ratified. We are not concerned with that. All that we are concerned with is whether the acts complained of are unauthorised, and if so, whether the public are sufficiently concerned to ask for the Court's interference, and for the reasons which I have given I think that both these questions must be answered in the affirmative.

It was urged that the Court could only regard the suit as one brought to protect some legal right of the relators and others, and that there had been no infringement of any legal right either of the relators or of any other citizen. The interest however which the public have in maintaining the proceedings is based not upon evidence of any actual injury to the public or to any member of the public—this is unnecessary—but upon an unauthorised interference with public rights in a matter in which the public have an interest recognised by the law and which affects the public generally. It is not necessary where an illegal act of a public nature is complained of to adduce evidence of actual injury to the public, and in such cases the Attorney-General is allowed to intervene “for the purpose of asserting, on behalf of the public generally, that public interest and that public right which probably no individual could be found willing effectually to assert, even if the interest were such as to allow it.” (See *A.G. v. Compton* (1 Y. & C. 417 at p. 427).) In such cases the Attorney-General sues, not as the representative of the Sovereign in respect of a violation of the rights of the Crown, but as the proper public officer to represent the public, and the circumstance that in the present case the suit is to external appearance a suit by the Crown against the Crown presents no difficulty to my mind.

In so far as an injunction is asked for it was contended that this Court has no power to grant an injunction in a proceeding of this character. The first ground upon which this contention was based was that the Legislature had stated in s. 9 of the Act, four specific kinds of relief which might be obtained, and that a litigant was not entitled to any other relief than that particularly specified in the section. I am of opinion that this contention is untenable.

The section states in plain terms that every species of relief is to be obtainable, and I do not think that the circumstance that some of the remedies available under the Act are particularly mentioned has the effect of curtailing the general provision that all kinds of relief may be obtained. The other ground relied upon was the decision of this Court in *Evans v. O'Connor* (12 N.S.W.R. 81), that an injunction cannot be granted against a nominal defendant. With great respect, I do not think that that is a sound decision, or that it is one which we should follow. The difficulties which were suggested in that case as lying in the way of enforcing obedience to an injunction are no greater than the difficulties which lie in the way of enforcing an order for specific performance, and yet the Legislature has expressly mentioned specific performance as a form of relief which is obtainable. Since *Evans v. O'Connor* was decided it has been held in *Morrissey v. Young* (15 N.S.W.R. Eq. 157) that a nominal defendant can be ordered to give discovery, and I can see no reason why an injunction should be put on a different footing from an order for discovery or for specific performance or for restitution of rights. It was said that a difficulty is created by the circumstance that the persons to be enjoined must be named in an order for an injunction and that the nominal defendant, the only party to the action, is expressly protected from individual liability either in person or property. It is, however, a matter of common knowledge that—in this branch of the Court's jurisdiction at all events—an order for an injunction is not limited in its operation and its efficacy to persons who are before the Court as parties, but in a proper case extends to others as well, and having regard to the purposes for which the Act was passed I can see no reason why an order should not be made in a proper case restraining not merely the nominal defendant but also other servants of the Crown from committing unauthorised or unlawful acts.

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For the foregoing reasons I am of opinion that the plaintiffs have made out a case entitling them to relief, and I concur in the order proposed by the Chief Justice.

*Declaration that Government House and grounds are vested in His Majesty the King dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales, and that the action or concurrence of His Majesty's Imperial Government is a necessary condition precedent to their diversion from that purpose. Injunction granted restraining the defendant as nominal defendant for and on behalf of the Government of New South Wales and the officers and servants of the Government from any unauthorised interference with that purpose. Defendant to pay the costs.*

Solicitors: Cope & Co.; The Crown Solicitor.

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30 ;

June 13.

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*Will—Probate Act, 54 Vic. No. 25—Marshalling—Order of assets—Executor's commission—Commission on corpus—Real estate—Devise—Estate of trustee—Legal or equitable—Provision for maintenance.*

The order of assets available in the hands of an executor for the payment of all duties and fees, and the debts of the testator, was not altered by the provisions of the Probate Act of 1890, so as to place residuary real estate in the same category as residuary personal estate.

The commission of an executor on corpus, so far as it is a commission on personal estate, is to be paid in the ordinary course of administration out of the assets in the ordinary order; so far as it is a commission on the corpus of real estate, it is to be thrown on the real estate *pro rata*. *Re Betts* ([1907] 2 Ch. 149), and *Patching v. Barnett* (51 L.J. (Ch.) 74), applied.

A testator devised certain property to a trustee company upon trust