

THE AUSTRALIAN COMMONWEALTH CARBIDE CO. LTD. v. *Full Court.*  
THE KING.

*Crown Lands—Supplication alleging fraud—Damage—Agreement for sale of Crown Lands by the Government of Tasmania—Validity of agreement—Demurrer—“The Crown Lands Act, 1911” (2 Geo. V., No. 64).* NICHOLLS,  
C.J.  
CRISP &  
CLARK, JJ.

By a supplication filed under “The Crown Redress Act, 1891,” the suppliant alleged that by virtue of certain agreements the suppliant became assignee of an agreement made between one Hensman of the one part and His Majesty’s Government of Tasmania of the other part whereby His Majesty’s Government of Tasmania agreed to sell and the said Hensman agreed to buy certain Carbide Works owned by His Majesty’s Government of Tasmania situated at Electrona in Tasmania “together with all the land, plant, machinery and stock, and lime—stone quarries, plant, and land situate at Ida Bay in Tasmania and used “in connection with the said Carbide Works and the benefit of all rights, “concessions, and agreements incidental to the business of His Majesty’s “Government of Tasmania carried on at the said Carbide Works.” It was further alleged that the Premier and the Chief Government Chemist of Tasmania acting for and on behalf of His Majesty’s Government of Tasmania made certain fraudulent representations; “and that the suppliant “was induced to and did in fact enter into and complete the said agreement “for sale and purchase by and on the faith of the said representations”; and that the said Carbide Works were worth less than the purchase price. Upon a demurrer by the suppliant to the Crown’s plea that the cause of action did not accrue within six months before this suit,

1930  
November 11.  
1931.  
May 26.  
August 11.

*Held* (by NICHOLLS, C.J., CRISP & CLARK, JJ.)—That the Court should look at the whole record and decide against the party first in fault; that as alleged in the supplication the contract for the sale of the Carbide Works was an essential part of the suppliant’s cause of action; that the effect of Secs. 9 (1), 17, and 20 of “The Crown Lands Act, 1911,” by which it is provided “The “lands of the Crown shall be disposed of in the mode prescribed and not “otherwise,” and “The Minister of Lands and Works for the time being shall “be Commissioner of Crown Lands, and as such shall have the disposal of all “Crown Land subject to the provisions of this Act,” and “All contracts for the “sale of Crown Lands . . . under this Act shall be made by and with the “Commissioner,” was to deny any power of disposal of Crown Lands to the Executive, and therefore, any agreement made by the Crown (either as owner of the land or as the Executive) for the sale of Crown Lands was in point of law simply nil; that part of the subject-matter of the sale as alleged in the supplication was land owned by the Crown, which was, therefore, vested in the Crown, and therefore, Crown Land; that the sale alleged was a sale by the Executive Government of Tasmania which in point of law was no sale; and therefore that the supplication was insufficient in that essential particular.

Under the provisions of “The Crown Redress Act, 1891,” the suppliant filed a supplication against His Majesty the King, which in substance alleged as follows:—

(1) That by virtue of an agreement dated January 28, 1927, and made between one Coombe and one Hensman and of an agreement dated February 2, 1927, and made between the said Coombe, the

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said Hensman, and the suppliant, the suppliant became assignee of an agreement dated January 27, 1927, and made between the said Hensman and His Majesty's "Government of Tasmania" whereby His Majesty's Government of Tasmania agreed to sell and the said Hensman agreed to buy certain Carbide Works "owned by" His Majesty's "Government of Tasmania" situated at Electrona in Tasmania, "together with all the land plant machinery and stock and "the limestone quarries plant and land situate at Ida Bay in Tas-  
"mania and used in connection with the said Carbide Works and the "benefit of all rights concessions and agreements incidental to the "business of 'His Majesty's Government of Tasmania' carried on at "the said Carbide Works."

(2) That in order to induce the said Hensman and the suppliant to enter into the said agreements one Joseph Aloysius Lyons, then His Majesty's Premier of Tasmania, and one William Daniel Reid, Chief Government Chemist of Tasmania, "who at all material times acted "for and on behalf of 'His Majesty's Government of Tasmania,'" made or caused or permitted to be made certain false and fraudulent representations in the supplication set forth.

(3) That the suppliant was induced to and did in fact enter into and complete the said agreement for sale and purchase by and on the faith of the said representations.

(4) That by reason of the matters aforesaid "the Carbide Works "were worth far less than the purchase money £104,000," and that the suppliant has suffered damage by reason of the premises.

The damage alleged by the supplication is therein particularised as follows:—

|   |          |   |   |
|---|----------|---|---|
| " Purchase money paid to Tasmanian Government   |          |   |   |
| " as aforesaid . . . . .                        | £104,000 | 0 | 0 |
| " Less actual value of property sold . . . . .  | 10,000   | 0 | 0 |
|   |          |   |   |
| " Difference . . . . .                          | £94,000  | 0 | 0 |
| " Add amount paid for preliminary and formation |          |   |   |
| " expenses . . . . .                            | 30,136   | 8 | 7 |
|   |          |   |   |
|   | £124,136 | 8 | 7 |
| " Add interest at 6% on purchase money . . . ." |          |   |   |

The Crown pleaded the general issue, and for a second plea, that the alleged cause of action did not accrue within six months before suit. To the latter plea, by leave, the suppliant replied and demurred together. The demurrer came on for argument before the Full Court on November 11, 1930, when the sufficiency of the Crown's plea was argued and decision was reserved. On May 26, 1931, at the request of the Court, the question whether the agreement for sale alleged in the supplication was not void by reason of the provisions of "The "Crown Lands Act, 1911," was argued.

*P. L. Griffiths*, S.-G. (with him *R. N. K. Beedham*), for the Crown: Control of waste lands was exercised by Commission issued to the Governor until 1842. By "The Waste Lands Act" (5 & 6 Vic., C. 36) it was provided that waste lands shall be disposed of by regulations and not otherwise. By 8 & 9 Vic., C. 95, the operation of the last mentioned Act was suspended so long as Tasmania received convicts. 9 & 10 Vic., C. 104, did not apply to Tasmania (Sec. 13). By Sec. 14 of "The Tasmanian Constitution Act" (13 & 14 Vic., C. 59), it was provided that nothing therein shall interfere in any manner with the sale of lands belonging to the Crown. By Sec. 5 of 18 & 19 Vic., C. 56, the colonial legislature was given power to legislate with regard to waste lands. Counsel also referred to 21 Vic., No. 33 (Tas.), 54 Vic., No. 8 (Tas.), 56 & 57 Vict., C. 54 ("The Statute Law Revision Act, 1892," amending 13 & 14 Vict., C. 59, by deleting the excepting proviso), and 2 Geo. V., No. 64 (Tas.). There is nothing in the last Act to enable the Executive to institute and complete the disposal of Crown Lands. 15 Geo. V., No. 32, Sec. 4, contains the widest extension of the Commissioner of Crown Lands' powers. (Counsel referred to *O'Keefe v. Williams* 7 N.S.W. S.R. 304, at p. 316, and 5 C.L.R. 217; *In re Woods' Estate* 31 Ch. D. 607, at p. 661; *Graham v. Public Works Commissioners* (1901) 2 K.B. 781; *Rayner v. The King* (1930) N.Z.L.R. 441; *Auckland Harbour Board v. The King* (1924) A.C. 318; *A.-G. v. Great Southern and Western Railway Coy. of Ireland* (1925) A.C. 754; *Commercial Cable Co. v. Government of Newfoundland* (1916) 2 A.C. 610; *Mackay v. A.-G. for British Columbia* (1922) 1 A.C. 457; *Forsyth's Opinions*, p. 81; *Cameron v. Kyte* 3 Knapp 332; *Lukey v. Sydney Harbour Trust Commissioners* (1902) N.S.W. S.R. (Equity) 152; *The Commonwealth & The Central Wool Committee v. The Colonial Combining, Spinning, and Weaving Co. Ltd.* (1922) 31 C.L.R. 421.

*H. I. Cohen*, K.C. (with him *R. C. Wright*), for the suppliant: The sale is immaterial to this cause of action, and can be disregarded. (*Wilkinson v. Downton* (1897) 2 Q.B. 57; *Dott v. Brickwell* 23 T.L.R. 61.) Land owned by the Crown is not necessarily Crown Land (*Ex. p. Collins* 14 N.S.W. S.R. 31). This land was vested by foreclosure in the Minister for Lands and Works, and being so vested in the Minister the land was not vested in the Crown within the meaning of "The Crown Lands Act, 1911." The land in question might have been withdrawn from the provisions of the Act by proclamation under Sec. 9 (2). The definition of Crown Lands means lands which have never been alienated.

*P. L. Griffiths*, S.-G., in reply.

C.A.V.

NICHOLLS, C.J.: This is a demurrer. We therefore have to deal with the question of sufficiency in law of each of the pleadings, taking as true the facts alleged in each. The supplication alleges that the

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suppliant is a company and that it bought from one Hensman the benefit of an agreement which he had acquired with "Your Majesty's Government in Tasmania," that, by this agreement, the suppliant became bound to buy, and did pay the purchase price for, "certain Carbide Works owned by your Majesty's Government of Tasmania together with land, plant, machinery and stock and limestone quarries plant and land at Ida Bay" and all "rights, concessions and agreements" incidental to the business of "Your Majesty's Government" carried on at the said Carbide Works, that the suppliant was induced to enter into the said agreement by false representations made by the (then) Premier of Tasmania and one Reid who represented the Government in making the sale.

The damage alleged consists of the purchase price (104,000*l.*), the preliminary and formation expenses of the Company and interest on the purchase price and the said expenses, subject to certain deductions.

The pleas are: Firstly, the general issue and, secondly, the statute of limitations (63 Vic., No. 36).

In the replication the suppliant joins issue and at the same time it demurs to the second plea.

The issue raised by the first plea includes a denial of the sale and of the damage, and, of course, of all other essentials of the suppliant's cause of action.

In examining the record, the first question which, to my mind, arises is whether, taking the facts in the supplication as the suppliant has chosen to put them, they reveal any contract entered into by the suppliant with the Government of Tasmania, by which the Government could bind the suppliant to take the land subject matter of the agreement, and pay the price thereof. By special legislation, the Minister of Lands for the time being had had power to enter into agreement with the Company, which formerly owned the Carbide Works, and had had power to take a mortgage from that Company to secure payment of certain loans made by the State to that Company. It is not alleged that the Minister foreclosed on the land; though, taking our facts as we must from the supplication, there can be no harm in assuming that, either the Minister foreclosed, or the Crown purchased the Company's equity of redemption. At all events the present action is based upon the assumption that the land and all on it was the property of the Crown, and that it could be sold by the agreement entered into between the said Hensman and "Your Majesty's Government of Tasmania." The supplication does not allege misrepresentation, wilful or otherwise, as to the power of "Your Majesty's Government" to execute the said agreement and thereby sell the land.

If the land, when it reverted to the Crown, whether by foreclosure or in some other way, became Crown Land, awkward technical questions arise. There is no general power in the executive Government

to sell Crown Lands. The provisions of "The Crown Lands Act" are very much to the contrary. By Section 3 "'Crown Lands' or 'Lands 'of the Crown' means lands which are or may be vested in the Crown "and which are not granted in fee simple; and includes all lands "which are or may be held for mining, pastoral or other purposes "under any lease, licence or other right from the Crown."

By Section 17, the Minister of Lands and Works for the time being is the Commissioner of Crown Lands, and, as such, "has the disposal" of all Crown Land subject to the provisions of the Act.

By Section 20, all contracts for the sale of Crown lands and all leases of such lands under this Act shall be made by and with the Commissioner and all licences shall be issued by the Commissioner who shall be described in such cases as "The Commissioner of Crown "Lands."

By Section 9, the lands of the Crown shall be disposed of in the mode prescribed and not otherwise.

The supplication does not allege by whom the agreement to sell to Hensman was executed, and certainly does not allege that it was entered into or executed by the Commissioner of Crown Lands.

That being so, and the supplication being based upon damages caused by the suppliant's being led by fraud into the agreement, I find it difficult to connect the damage alleged with the wrong alleged. When the land, the property of the former Company, revested in the Crown, it either became Crown land or revested in the Minister for Lands. But to hold the latter would be to extend the operation of the special Acts to matters not contemplated in them, and I can only conclude that the land after the foreclosure (or other cause of the revesting) became Crown Land disposable under "The Crown Lands "Act." That being so, I do not see how the contract described in the supplication can have been legally the cause of the suppliant's suffering the damage alleged in the supplication.

The personalty included in the agreement obviously is not bought by the Suppliant Company, unless it has bought the land.

I have had the advantage of reading the Judgment of MR. JUSTICE CLARK, and he has set forth in detail the steps by which he arrives, and I arrive, at the conclusion that the supplication, as it stands, is bad in law. I need say no more, therefore, than that, unless it can be shown that the supplication can be amended so as to make it good in law, judgment upon the whole record must be for the King.

CRISP, J.: I concur.

CLARK, J.: In this case the suppliant has filed a supplication under "The Crown Redress Act, 1891," claiming 141,599/ 8s 4d as damages for the damage alleged to have been suffered by the suppliant in consequence of having been induced by the fraudulent misrepresentations of two officers of the Government of Tasmania who are alleged

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to have acted for and on behalf of the "Government of Tasmania" for the purchase by the suppliant of certain property described in the supplication, the damage alleged being (*inter alia*) the difference between the purchase money and the value of the property.

Sections 4, 5, and 6 of "The Crown Redress Act, 1891," provide as follows:—

"4. Any person having or deeming himself to have any just claim against Her Majesty in respect of any contract entered into on behalf of Her Majesty by or under the authority of the Government of Tasmania, or in respect of any act or omission, neglect or default of any officer, agent, or servant of the Government of Tasmania which would be the ground of an Action at Law or a Suit in Equity between subject and subject may file in any Court of competent jurisdiction of Tasmania a supplication setting forth the particulars of such Claim and the Court in which such supplication is filed is hereby empowered to hear and determine such Claim in manner hereinafter provided.

"5. If the Claim is such as would have been the ground of an Action at Law if it had arisen between subject and subject, the particulars thereof shall be set forth in the supplication as nearly as may be in the same manner as in a Declaration or a Plaint; and if the Claim is such as would have been the ground of a Suit in Equity if it had arisen between subject and subject, the particulars thereof shall be set forth in the supplication as nearly as may be in the same manner as in a Bill of Complaint.

"6. (1) If the matter stated in the supplication would be the ground of an Action at Law if it had arisen between subject and subject, the proceedings in the Suit shall be conducted in the same manner, and subject as nearly as may be to the same rules of practice, as an Action at Law; and the Attorney-General shall, on behalf of Her Majesty, plead or demur to the supplication or file a defence thereto within the same time after delivery to him of a copy thereof as any subject would be bound to plead or demur to a Declaration or to file a defence.

"(2) If the complaint stated in the supplication would be the ground of a Suit in Equity if it had arisen between subject and subject, the proceedings in the Suit shall be conducted in the same manner, and subject as nearly as may be to the same rules of practice, as a Suit in Equity; and the Attorney-General shall, on behalf of Her Majesty, answer, plead, or demur to the supplication or file a defence within the same time after delivery to him of a copy thereof as any subject would be bound to plead, answer, or demur to a Bill of Complaint.

"(3) Nothing herein contained shall limit or abridge any Prerogative of Her Majesty in relation to pleading or other matter of procedure in any such Suit."

The expressions "a plaint" and "a defence" in Sections 5 and 6 refer to the pleadings under "The Local Courts Act, 1896," the jurisdiction conferred by which is limited to claims not exceeding 300*l*. *Full Court.*

The supplication, therefore, is to be treated as though it were a declaration in an action at Common Law and as subject to the Common Law Rules of pleading. *NICHOLLS, C.J. CRISP & CLARK, JJ. 1931.*

The Attorney-General pleaded to the supplication the general issue, and for a second plea that the alleged cause of action did not accrue within six months before suit. *THE AUSTRALIAN COMMONWEALTH CARBIDE CO. LTD. v. THE KING.*

The second plea was founded on the statute 63 Vict., No. 36.

The suppliant joined issue on both pleas and also demurred to the second plea.

The demurrer was argued during the last term of last year.

During the course of the argument, the Court raised the question whether in view of the provisions of "The Crown Lands Act, 1911," the agreement of sale and purchase alleged in the supplication was a contract or not, and if not, whether the non-existence of the alleged contract did not render the supplication bad in substance, and not merely defective in form.

"Upon the argument of a demurrer (except in the case of demurrer to a plea in abatement) the Court will look over the whole record, and consider as well the previous pleadings as the particular pleading demurred to, and give judgment for the party who on the whole appears to be entitled to it." (*Bullen and Leake*—3rd ed., p. 820.)

"Upon the argument of the demurrer the Court looks to the whole record and decides against the party first in fault." (The Report of the Commissioners on the Courts of Common Law Parliamentary Papers 1831, X, 25, See also *Stephen—Principles of Pleading* (7th ed.), p. 141), and in so doing the Court can adjudicate upon a point which suggests itself to the Court though not raised by the parties. (*Arbouin v. Anderson* 1 Q.B. 498, at p. 502.)

In this case it was incumbent on the Court to raise the question it did, if—as was the case—the Crown did not, because the question is whether the Legislature has not denied to the Crown as such any authority to make such a contract as that alleged in the supplication.

Neither of the parties argued the question on the original argument, but subsequently the Court requested the parties to do so, and the question was then argued.

The substance of the allegations contained in the supplication is as follows:—

(1) That by virtue of an agreement dated January 28, 1927, and made between one Coombe and one Hensman, and of an agreement dated February 2, 1927, and made between the said Coombe the said Hensman and the suppliant, the suppliant became assignee of an

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agreement dated January 27, 1927, and made between the said Hensman and His Majesty's "Government of Tasmania," whereby His Majesty's Government of Tasmania agreed to sell and the said Hensman agreed to buy certain Carbide Works "owned by" His Majesty's "Government of Tasmania" situated at Electrona in Tasmania, "together with all the land plant machinery and stock and the lime-stone quarries plant and land situate at Ida Bay in Tasmania, and "used in connection with the said Carbide Works, and the benefit of "all rights concessions and agreements incidental to the business "of 'His Majesty's Government of Tasmania' carried on at the said "Carbide Works."

(2) That in order to induce the said Hensman and the suppliant to enter into the said agreements, one Joseph Aloysius Lyons, then His Majesty's Premier of Tasmania, and one William Daniel Reid, Chief Government Chemist of Tasmania, "who at all material times "acted for and on behalf of 'His Majesty's Government of Tasmania'," made or caused or permitted to be made certain false and fraudulent representations in the supplication set forth.

(3) That the suppliant was induced to and did in fact enter into and complete the said agreement for sale and purchase by and on the faith of the said representations.

(4) That by reason of the matters aforesaid "the Carbide Works "were worth far less than the purchase money £104,000," and that the suppliant has suffered damage by reason of the premises.

The damage alleged by the supplication is therein particularised as follows:—

|                                                |          |     |
|------------------------------------------------|----------|-----|
| "Purchase money paid to Tasmanian Government   |          |     |
| "as aforesaid . . . . .                        | £104,000 | 0 0 |
| "Less actual value of property sold . . . . .  | 10,000   | 0 0 |
| <hr/>                                          |          |     |
| "Difference . . . . .                          | £94,000  | 0 0 |
| "Add amount paid for preliminary and formation |          |     |
| "expenses . . . . .                            | 30,136   | 8 7 |
| <hr/>                                          |          |     |
|                                                | £124,136 | 8 7 |
| "Add interest at 6% on purchase money."        |          |     |

As damage is essential to the cause of action which is alleged—deceit—a consideration of the sufficiency of the pleading in point of law involves the question whether the allegation of damage is sufficient in point of law.

This question is involved in a matter to be discussed later, but it will be convenient to at once deal with one item of the alleged damage, that is to say, the item described in the particulars as "amount paid for preliminary and formation expenses," which no doubt means the expenses incurred preliminary to and in the formation of the suppliant Company.



The damage primarily recoverable by a purchaser of property who is induced to purchase it by the false and fraudulent representations of the vendor, and who sues in deceit, is the difference between the price paid by the purchaser for the property and the fair value of the property at the time he purchased it. (See *Peek v. Derry* 37 Ch. D. 541, at 591; *Twycross v. Grant* 2 C.P.D. 469; *Arnison v. Smith* 41 Ch. D. 348, at p. 363; *Hogan v. Daniel and Healey Ir.* R. 11 C.L. 119, at p. 122; and *Holmes v. Jones* 4 C.L.R. 1692.)

But additional damage directly consequential on the fraud may also be recovered if it is properly claimed by the plaintiff's pleading (*Mullett v. Manson* L.R. I. C.P. 559).

The damages claimed by the supplication are not only the difference between the price paid for the Carbide Works, and the (alleged) fair value of them, but also the sums expended preliminary to and in the formation of the Company.

But there are no facts alleged in the supplication to warrant the claim to recover the latter damage.

It is a little difficult to see how the expense incurred in forming the suppliant Company, that is to say, an expense incurred before the existence of the Company, could be damage consequent on fraudulent misrepresentations made to the Company, but if it could be, it was necessary that the supplication should allege such facts as would show that it was. (Cf. the allegations of damage in the declarations in *Mummery v. Paul* 1 C.B. 316 and *Mullett v. Manson* (supra).)

In *Ratcliffe v. Evans* (1892) 2 Q.B. 524, at p. 531, BOWEN, L.J. (as he then was), speaking of damages in an action on the case in which damage is the gist of the action, referred to the case of *Iveson v. Moore* 1 Ld. Raym. 486, and said:—"As was there said—in that language of 'old pleaders, which has seen its day, but which connoted more 'accuracy of legal thought than is produced by modern Statements 'of Claim—'damages in the *per quod* where the *per quod* is the gist 'of the action should be shown certainly and specially,'" and in a later part of his judgment he stated what was necessary to be pleaded as follows:—"In all actions on the case, where the damage actually 'done is the gist of the action, the character of the acts themselves 'which produce the damage and the circumstances under which those 'acts are done must regulate the degree of certainty and particularity 'with which the damage done ought to be stated and proved. As 'much certainty and particularity must be insisted on both in plead- 'ing and proof of damage as is reasonable, having regard to the 'circumstances and to the nature of the acts themselves by which the 'damage was done."

The supplication alleges nothing which shows the circumstances under which the preliminary and formation expenses were incurred in consequence of the alleged fraudulent misrepresentations, and if it

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were possible for those expenses to be a consequence of the fraud alleged, some statement as to the circumstances which made them such could have been made.

They are only mentioned as an item in the particulars.

There is nothing in the body of the supplication to give even a hint as to the ground on which they are claimed.

For these reasons I think that the claim to recover the preliminary and formation expenses must be disregarded, and I shall therefore proceed to consider the case on that footing.

As I have stated, the question for determination is whether in view of the provisions of "The Crown Lands Act, 1911," the agreement of sale and purchase alleged in the supplication was a contract or not, and if not, whether the non-existence of the alleged contract does not render the supplication bad in substance.

This question involves a number of subsidiary questions, involving the construction of the supplication and "The Crown Lands Act, 1911," but *Mr. Cohen* (of Counsel for the suppliant) contended that the allegations in the supplication of the contract of sale and purchase and its completion were quite immaterial and could be disregarded, and that therefore no question arose as to whether or not such a contract ever existed. Accordingly the first question to be considered is that raised by this contention.

The contention involves the proposition that the allegations of the contract of sale and purchase and its completion, that is to say, the allegation of a sale, forms no part of the cause of action alleged.

Under the Common Law system of pleading, the issues—in law and in fact—to be tried must be raised by the parties, that is to say, by their pleadings, and the action is decided on the issues of law or fact so raised. The parties raise the issues of law just as much as they raise the issues of fact (*Stephen—Principles of Pleading*, 7th ed., pp. 76, 102, and 122-124), and thus the rule supposed to be common to all systems of pleading, that a plaintiff must recover *secundum allegata et probata* must necessarily be enforced in an action conducted under the Common Law system—as it was by the English Courts of Common Law right down to the end of their day (see *Gautret v. Egerton* (WILLES, J.) (1866) *L.R.* 2 *C.P.*, 371, at p. 374) and as it still is in this Court. Moreover as that system does not permit a departure in pleading—a departure being a ground of general demurrer—a plaintiff can only recover *secundum allegata* of his declaration. He can, of course, apply for leave to amend, but the very purpose of an amendment is to put him in a position to recover *secundum allegata et probata*.

In this case, no application for leave to amend was made.

It is true that mere surplusage, that is to say, immaterial averments which might be struck out without affecting the substance of

the pleading need not be proved, e.g., where a party declares in tort, as for deceit on a broken warranty, and proves the warranty and its breach, but fails to prove the scienter, he can recover, for he might have declared in tort (or assumpsit) on the broken warranty alone (see *Williamson v. Allison* 2 East 446, *Brown v. Edginton* 2 Man. & G. 279). And if the substance of the essential allegations is proved, a mere variance between the particulars of them and the evidence adduced may be amended.

But if a party frames his declaration in such a way as to make a particular allegation an essential part of his cause of action, but cannot prove it, he will not be permitted to succeed because he might have framed a cause of action in which the particular allegation need not have appeared as part of the cause of action.

Therefore, if it appears on the face of a declaration that, although the facts (including conclusions of law stated as facts) alleged as the cause of action would constitute a cause of action if all those facts were such as could in point of law be established, but that one or more of those facts cannot be so established, and that therefore the plaintiff cannot recover *secundum allegata*, his pleading is in point of law insufficient.

And even although it does not appear that what is alleged as the cause of action cannot in point of law be established, still if it appears that the pleading only alleges what may or may not be a good cause of action, it will be insufficient in point of law, for "upon all sound principles of pleading it is necessary to allege what must and not what 'may be a cause of action' (LORD ALVERSTONE in *West Rand Central Gold Mining Coy. v. Rex* (1905) 2 K.B. 391, at p. 399).

Accordingly, to answer the questions under consideration, that is to say, the question whether the supplication alleges a cause of action on which the suppliant can recover, it is necessary to determine, whether on the supplication as it is framed the allegations that the suppliant was induced by fraudulent misrepresentations to enter into and complete an agreement of sale and purchase and that the damage it thereby sustained was the difference between the price it paid and the value of the property it purchased, are parts of the cause of action which is alleged.

The question—to repeat it—is not whether on what appears in the supplication a good cause of action might have been alleged, but whether what the supplication alleges as the cause of action on which the suppliant claims to recover is in point of law a good cause of action.

The cause of action alleged is not merely that the suppliant was induced to pay the Government of Tasmania a sum of money by the fraudulent misrepresentations of its agents.

If that had been all that was alleged, no such question as that under consideration could have arisen.

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The cause of action which is alleged, is that the suppliant has suffered damage, by reason of the fact that it was induced to enter into and complete a contract to purchase property by representations affecting the value of the property, and that such representations were false and were made fraudulently, and that, in consequence of having entered into that contract, the suppliant sustained damage in that the price which it paid for the property under that contract was more than the property was in fact worth. The draftsman has woven alleged sale into the cause of action.

That is the manner in which the suppliant has chosen to state its cause of action, and it must abide by it, unless and until the supplication is amended.

The alleged sale is an essential ingredient in a cause of action so stated, and the sale and the alleged damage are inseparable.

The damage which is alleged is the difference between the price paid for property under a contract of sale and the fair value of the property obtained under the contract plus interest—a damage which can only be arrived at on the footing that there was a contract and that the suppliant had affirmed it. It is true that the contract of sale is alleged to have been induced by fraud, but nevertheless, as the supplication is framed, the damage alleged is that which was sustained by reason of entering into and completing the contract of sale.

This is not to say that if the suppliant could not allege a contract it could not allege a cause of action, but only that the damage which it has alleged as a necessary part of its cause of action is damage arising out of a contract. A cause of action could have been alleged of which the alleged contract formed no part, indeed, the very absence of a contract—if such were the fact—could have been availed of in stating a cause of action, but that is not a sufficient reason why a Common Law declaration, which alleges a cause of action in such a manner that a contract is part of it, should be construed as though the contract were not a part of it.

The case might be otherwise in the case of pleadings under the rules of Court made under "The Judicature Act," for we have the authority of LORD PARKER OF WADDINGTON (*Banbury v. Bank of Montreal* 1918 A.C. 626, at p. 710) for saying that pleadings under the present English system impose less restraint on the parties than did the pleadings under the Common Law system—that is to say, our present system. "The present practice," said the learned Lord, "appears to me to have most of the vices of the old procedure in Chancery. There are pleadings it is true, but the pleadings are for all practical purposes disregarded. The plaintiff is allowed to prove what he likes and set up any case he can. The Judge has no longer to deal with a case formulated on the pleadings, but to make up his mind whether on the facts proved there is any and what case at all."

Possibly it was this or a similar system which the learned Counsel had in mind when he submitted his contention.

But this Court has in this case to apply the Common Law system of pleading in which the case is "formulated on the pleadings."

That the alleged contract is—on the supplication as it is framed—a part of the cause of action alleged will be clear, if we ascertain what issues would be raised on the supplication if the general issue were pleaded to it—as it has been.

The general issue would deny the representations—that they were false—that they were fraudulent—the sale, that is to say, the contract of sale and its completion—that the misrepresentations induced the contract and the damage, and each denial would tender, that is to say, would well tender, an issue as to the fact denied and as an issue well tendered must be accepted, an issue would be raised as to each of the facts denied.

And to say that the general issue would on such a declaration deny the sale and tender an issue on it, is only another way of saying that the allegation of the sale is an essential part of the cause of action alleged, for after the promulgation of the rules of Hilary Term 1834 the general issue operated only as a denial of the most essential or characteristic allegation in the declaration, according to the particular cause of action alleged (*Bullen and Leake*, 3rd ed., p. 460), and the latter rules of Trinity Term 1853 were in this respect substantially the same as those of Hilary Term 1834, and our pleading Rules are practically a transcript of the Rules of Trinity Term 1853.

In *Mummery v. Paul* (*supra*) (TINDALL, C.J., MAULE, CRESWELL, and ERLE, JJ. (1845)), the plaintiff by his declaration alleged (I state it shortly), that the plaintiff bargained with the defendant to buy of him his interest in a certain lease and certain fixtures, &c., and the goodwill of a certain business for 7,000*l*, and that the defendant by then falsely, fraudulently, and deceitfully pretending and representing to the plaintiff that the amounts received for commission in the course of the business and the net profits of the trade were of a certain amount then sold to the plaintiff the said lease, &c., and the goodwill of the said business at and for a certain sum, and then it went on to allege that the representation was false and thereby the said lease, &c., were of no use or value to the plaintiff, and the plaintiff sustained an expense of 200*l* in carrying on the said business and endeavouring to dispose of the same and had been prevented from earning a livelihood, &c.

The defendant pleaded the general issue.

At the trial the plaintiff failed to prove the sale and a verdict was given for the defendant. On a motion for a new trial on the ground that the trial Judge was in error in submitting to the consideration of the jury matter that was admitted on the record, and that the verdict

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was against the evidence, a rule was refused on the second ground, but granted on the first. On the return of the rule, Counsel for the defendant submitted that the plaintiff should have been non-suited as he had failed to prove the alleged sale.

The Court held that the general issue denied that the plaintiff made the representation—that it was false—that he knew it to be so, and that the sale was made by reason of it, and as the plaintiff had failed to prove the sale he could not succeed.

In the course of the argument CRESWELL, J., said: "If there was no sale it is of no consequence how many falsehoods the defendant told about the matter" (at p. 322).

Judgments were delivered by all the members of the Court.

TINDALL, C.J., said: "This is like the old action for deceit on a sale where under not guilty both the warranty and the sale were put in issue the two being inseparable" (at p. 325).

MAULE, J., said: "When the defendant says he is not guilty, he denies that he has done that which the plaintiff has alleged against him. Now the only thing the plaintiff alleges is that the defendant by means of a fraudulent representation sold him a certain lease fixtures and goodwill. Unless there was fraud the plaintiff has no ground of action; it was essential also for the plaintiff to prove the sale as alleged."

CRESWELL, J. (at p. 327), said: "The plea of not guilty clearly puts in issue the sale by means of the fraudulent representation; the plaintiff was bound to prove both a sale and a misrepresentation."

ERLE, J. (at p. 327), said: "The cause of action was a sale by means of a false and fraudulent representation. The plaintiff complains that he was induced by that false representation to make the purchase. It was, therefore, essential to show that there was a sale and also that there was a misrepresentation.

"It clearly was not enough to prove a misrepresentation only."

And this decision is cited as correctly stating the law in the 3rd (1868) edition of *Bullen and Leake—Precedents of Pleadings*.

And it is to be observed that, in that case the plaintiff claimed to recover the whole of the moneys paid by him to the vendor. In this case the damage claimed is such as can only be arrived at on the footing that there was a contract.

On the other hand, in a case where the sale was stated merely by way of inducement, and not as part of the cause of action, it was held that the plea of the general issue did not put the sale in issue (*Spenser v. Dawson* 1 M. & Rob. 552).

The learned Counsel for the suppliant cited the case of *Dott v. Brickwell* (23 T.L.R. 61) in support of his contention, but it is no authority for it. In the first place the pleadings in the case were pleadings under the system established by the rules of Court under the Judicature Act, but even if the pleadings had been under the Common Law system the decision would have been the same.

By his Statement of Claim the plaintiff alleged that the defendant had obtained a loan from him by false and fraudulent representations.

The loan was void under "The Money Lenders Act, 1900," but it was held that the plaintiff could nevertheless recover.

The loan involved a contract, but the Statement of Claim did not allege the contract as part of the cause of action.

And the plaintiff sued to recover the whole amount of the loan—the net difference between the price paid for the property alleged to have been purchased, and the real value of that property.

In a Common Law declaration the loan would have appeared as mere inducement, that is to say, as matter "introduced merely to explain the "essential statements of the declaration and" not itself "involving any "essential allegation" (*Bullen & Leake*, 3rd ed., p. 8), and that was the way in which it was regarded in *Dott v. Brickwell* (*supra*).

In the pleading we have to pass upon—and pass upon in accordance with the rules of the Common Law system of pleading—the allegations of the contract and its completion are alleged as part of the cause of action.

For these reasons I am of opinion that the contention of the learned Counsel for the suppliant that the allegations in question are immaterial, cannot be sustained.

If this be the case then, if it appears on the face of the supplication that those allegations cannot in point of law be established, or if the supplication leaves it open whether in point of law they can or cannot be established, the supplication is insufficient in point of law.

Then are the allegations of the contract of sale and its completion and consequential damage allegations which can be sustained in point of law?

The question necessitates an examination of "The Crown Lands Act, 1911."

I propose in the first place to consider the Act as a whole, and thus to ascertain its general purport and main features.

The Act is intituled "An Act to regulate the sale and disposal "of the lands of the Crown in the State of Tasmania."

By Section 3 "Crown Land" and "lands of the Crown" are defined to mean "lands in this State which are or may become vested in the "Crown and which are not granted or lawfully contracted to be "granted in fee simple and includes all lands which are or may be

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*Full Court.* "held for mining pastoral or other purposes under any lease license  
 ——— "or other right from the Crown." And by the same section "lands"  
 NICHOLLS, C.J. and "land" are defined to mean "Crown lands or Crown land."

CRISP & The two expressions "Crown lands" and "lands of the Crown"  
 CLARK, JJ. therefore mean one and the same thing. They include as well lands  
 1931. which were vested in the Crown at the time of the passing of the Act,  
 ~~~~~ as lands which might thereafter become so vested, and which in either  
 THE case "are not granted or lawfully contracted to be granted in fee  
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WEALTH There is nothing in the Act which requires the term "land" to be  
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 CO. LTD. tion of "substantial improvements" and Sections 30, 78, 84-87, and  
 v. 165 and Section 12 of "The Interpretation Act, 1906".)  
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Section 9 (1) provides that "The lands of the Crown shall be dis-  
 posed of in the mode prescribed and not otherwise."

By Section 14 of "The Interpretation Act, 1906," "prescribed" is  
 defined to mean "prescribed by the Act or by Regulations under  
 the Act."

Section 9 (2) (of "The Crown Lands Act, 1911") provides that  
 "The Governor may at any time by proclamation withhold or with-  
 draw any land from the operation of this Act or any part; and may  
 in manner aforesaid revoke such proclamation as to the whole or  
 any part of the land included therein and thereupon the land the  
 subject of such further proclamation shall be subject to the opera-  
 tion of this Act at any time to be named in such proclamation not  
 being less than thirty days from the date thereof."

Section 11 provides that "The Governor may by proclamation ex-  
 cept from sale and lease, and reserve to His Majesty any Crown  
 land" for the various public purposes therein specified and any  
 other public purpose that he may think fit, whether similar to any of  
 those specifically mentioned or not. And it provides that the  
 Governor may thereafter, for the purpose of giving effect to any such  
 proclamation as aforesaid, vest for such term as he thinks fit any land  
 so excepted and reserved for any of the said purposes, in any person.

Section 12 provides (*inter alia*) that "In every instrument by  
 which any such land is vested for any of the purposes mentioned in  
 the last preceding section, such purpose shall be expressly stated,  
 and such instrument shall contain a condition providing that the  
 land shall be appropriated only to such purpose, and such other  
 conditions, reservations, exceptions, and limitations as the Governor  
 sees fit to impose, and subject as hereinafter mentioned, shall also  
 contain a condition for the absolute forfeiture of the said land to  
 His Majesty upon breach or non-observance of any such condition,  
 reservation, exception, and limitation; and upon such forfeiture



"the land so forfeited shall be disposable under this Act as Crown land."

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Section 13 authorises the Governor by proclamation to except from sale and lease and reserve any Crown land to His Majesty for the preservation and growth of timber and from time to time to alter or revoke any such proclamation.

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Section 14 authorises the Governor by notice in the "Gazette" to except from sale and lease and reserve as a school allotment any Crown land not exceeding 5 acres in extent.

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Section 15 prohibits the Governor from excepting from sale and reserving to His Majesty or from disposing of, except by sale under the Act, any Crown land as sites of places for public worship or for any other religious purpose, but lands which were reserved for such sales before September 17, 1868, are excepted from the operation of the section.

Section 17. "The Minister of Lands and Works for the time being shall be the Commissioner of Crown Lands, and as such shall have the disposal of all Crown land subject to the provisions of this Act."

Section 20. "All contracts for the sale of Crown lands and all leases of such lands under this Act shall be made by and with the Commissioner, and all licences shall be issued by the Commissioner, who shall be described in such cases by the name of 'The Commissioner of Crown Lands,' without otherwise naming him; and every such contract, lease, or licence shall be valid and effectual notwithstanding any change in the person who is the Commissioner, and may be enforced by and against the Commissioner for the time being."

Section 21. "(1) All actions, suits, or other proceedings at law or in equity in respect of any contract, lease, licence, or other agreement whatsoever entered into by or with the Commissioner under this or any previous Act shall be commenced and prosecuted by or against 'The Commissioner of Crown Lands' as the plaintiff or defendant therein, as the case may be, without otherwise naming him; and the Commissioner shall recover, or be liable to, as the case may be, the damages and costs of any such action, suit, or other proceeding. (2) No such action, suit, or other proceeding by or against the Commissioner shall abate or be affected by reason of the death, resignation, removal or new appointment of the Commissioner, but the same may be continued as if no such change had taken place."

Part III. of the Act which comprises Sections 23 to 35 (both inclusive) deals with the selection and purchase of Crown land.

Section 23 directs that the Surveyor-General (now Secretary for Lands) shall classify rural land as first, second, and third class, and shall fix the value of the same.

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Clause III. and IV. of the same section provide that

“III. Rural land shall be deemed to be

“(a) First class land if its value is so fixed at or above One pound  
“per acre.

“(b) Second class land if its value is so fixed at less than One  
“pound per acre and not less than ten shillings per acre.

“(c) Third class land if its value is so fixed at less than ten  
“shillings per acre and not less than five shillings per acre.

“IV. The value so fixed shall be the price of the land Provided  
“that no Crown land within the area and during the currency of a  
“pastoral lease shall be sold at a price less than ten shillings per  
“acre.”

The expression “rural lands” is defined by Section 3 to mean “all  
“lands other than town lands” and by the same section the expression  
“Town Lands” is defined to mean and comprise “all lands situate within  
“any city and all lands within a distance of five miles from the near-  
“est point of any part of the boundaries of any city and all lands  
“situate within the boundaries of any town or which now or here-  
“after may be set apart, surveyed, or laid out in lots as the site of a  
“town.”

Section 24 (1) (as amended by Section 4 of 15 Geo. V., No. 32)  
provides that any person of the age of 18 years or upwards may, sub-  
ject to the provisions of the Act, select and purchase under the Act,  
at a price to be fixed by the Secretary for Lands and upon the terms  
thereby prescribed, one lot of first class land not exceeding two  
hundred acres nor less than fifteen acres, one lot of second class  
land not exceeding three hundred acres nor less than thirty acres, and  
one lot of third class land not exceeding six hundred acres nor less  
than sixty acres.

Section 27 provides that any person of the age of 18 years or up-  
wards who is not the holder on credit of any land purchased under  
the Act or any previous Act may select and purchase, at a price and  
upon the terms thereby prescribed, one lot of first class agricultural  
land not exceeding fifty acres nor less than fifteen acres.

Section 28 imposes the condition that a purchaser of land under  
Section 27 shall within 4 years after receiving a certificate from the  
Commissioner of Crown Lands that the land is available for purchase  
personally occupy the land. Section 29 requires the purchaser (under  
Section 27) to occupy the land purchased for 5 years and during such  
period to effect substantial improvements to the value of £1 per acre  
and provides that if he does not do so the land shall be liable to for-  
feiture.

Part IV., which comprises Sections 36 to 41 (both inclusive), deals  
with the survey of the land purchased on credit.

Part V., which comprises Sections 42 to 55 (both inclusive), deals with the sale of land both by auction and by private contract. *Full Court.*

Section 42 provides that Crown lands may be sold by public auction in the manner and subject to the conditions prescribed by the Act, and that all rural lands to be offered for sale by auction shall after survey and before sale be classified as first, second, or third class lands. *NICHOLLS, C.J. CRISP & CLARK, JJ. 1931.*

Section 43 provides that the lowest upset price of rural lands offered for sale by auction shall be one pound per acre for first class land, 10s per acre for second class land, and 5s per acre for third class land. *THE AUSTRALIAN COMMONWEALTH CARBIDE CO. LTD.*

Section 45 provides that notice of sales by auction shall be published in the "Gazette."

Section 46 provides that the Commissioner of Crown Lands is to prepare an estimate of the upset prices, and is to submit the same to the Governor, who may vary or approve of the same, and that the prices so varied or approved shall be the upset sale prices. *v. THE KING.*

Sections 53, 54, and 55 are as follows:—

"53. Where the Governor agrees with the Governor-General of the Commonwealth for the sale, grant, or lease of any Crown land to the Commonwealth, any instrument or assurance executed by the Governor for conveying, granting, or leasing the land to the Commonwealth accordingly shall by force of this Act be valid and effectual to vest the land in the Commonwealth, according to the tenor thereof.

"54. Where any second-class Crown land, being less than thirty acres in area, and not contiguous or adjacent to any other Crown land, is so situated as to make it desirable in the opinion of the Commissioner that the same should be sold, he may cause the same to be sold—

"I. Upon the terms set forth in Schedule (3): or

"II. By public auction.

"55. (1) Within Twenty-one days after every sale by auction of town lands, not within Five miles of any city, and within a like period after every sale by auction of rural lands, and afterwards quarterly or oftener if he thinks fit, and until the same lands are again offered for sale by auction, the Commissioner may cause a list of all such lands as were offered for sale by auction and not sold, with the upset prices at which they were offered for sale, to be gazetted, and shall prefix a notice that any person may purchase any of the said lots at such upset prices by private contract; and the Commissioner may, after the expiration of Fourteen days from the date of the first publication of such notice, sell any of such lots at the upset prices mentioned in the notice by private contract to any person who applies to purchase the same; but if more than one application is made prior to the expiration of such period of

*Full Court.* "fourteen days to purchase the same lot, such lot shall not be sold  
 — "by private contract, but shall be again submitted by public auction  
 NICHOLLS, "as soon as may be after such applications are made.  
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 CRISP & " (2) This section shall apply to any Crown lands which before  
 CLARK, JJ. "the commencement of this Act have been offered for sale by auction  
 1931. "and not sold."

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Part VI., which comprises Sections 56 to 60 (both inclusive), deals with Mining Areas.

Section 56 (2) provides that Crown land situate within any mining area shall be sold or disposed of under and be subject to the provisions of Part VI. of the Act.

Section 57 provides that any person of the age of 18 years or upwards may select and purchase, subject to the provisions of the Act, one lot of first class land within any mining area not exceeding 100 acres at a price to be fixed by the Secretary for Lands, but adds the proviso that when any such Crown land within any mining area is within a distance of one mile from the nearest point in the boundary of any town such land may be selected and purchased in lots of not less than ten nor more than twenty acres.

Section 58 provides (*inter alia*) that Crown lands within any mining area not purchased under Section 57 may be sold by the Commissioner of Crown Lands by public auction, and if offered for sale by public auction, then by private contract in the manner provided by Part V.

Part VII., which comprises Sections 61 to 69 (both inclusive), deals with the sale of land in Mining Towns.

Section 61 provides (*inter alia*) that any Crown land forming part of any town situate in or near a mining area may be sold by the Commissioner in the manner provided by Part V. notwithstanding that such land has been withdrawn by proclamation from the operation of the Act.

Part VIII., which comprises Sections 70 to 75 (both inclusive), deals with areas for special settlement.

Section 70 provides that, if the Secretary for Lands reports to the Commissioner that there exists an area of rural land not being less than 1,000 acres in extent which in his opinion is first class land suitable for agriculture, horticulture, or dairy farming purposes, the Commissioner may withdraw such area and such further area of inferior land adjoining or contiguous to such area as he may think desirable for the purposes aforesaid from selection under the Act. Section 71 authorises the Commissioner to expend money on subdividing such land and making roads, &c., into it and clearing and fencing it and sowing it with grass seed and building houses, &c., on it.

Section 73 provides that after the withdrawn area has been subdivided into suitable blocks, and such blocks surveyed and classified as provided by the Act, and the said roads constructed wholly or in part, the Commissioner may submit the blocks so surveyed for sale by auction in the manner provided by Part V., but adds as a proviso that any of the blocks may without having been submitted for sale by auction be declared by the Commissioner to be open or be reserved by him for *bona fide* immigrants to the extent of one block in every six, for purchase by private contract at such price as the Commissioner thinks fit upon the terms prescribed by the Act.

Part IX., which comprises Sections 76 to 107 (both inclusive), deals with the conditions of purchase.

Section 105 (1) is as follows:—

“105. (1) Under and subject to the provisions contained in this Act or the regulations, the Governor is hereby authorised, in the name and on behalf of His Majesty, to convey and alienate in fee simple, or for any less estate or interest, any Crown lands.

“Such conveyance or alienations shall be made by deed of grant under the hand of the Governor and the public seal of the State, and shall be in such form as may be prescribed, and being so made shall be valid and effectual to vest in possession in the grantee any such lands as aforesaid for any such estate or interest as by any such deed of grant is granted to him.

“No such deed of grant shall be issued to any such purchaser until the whole of the purchase-money for any such lands has been fully paid and the conditions imposed by this Act fulfilled.”

Part X., which comprises Sections 108 to 130 (both inclusive), deals with leases.

Part XI., which comprises Sections 131 to 145 (both inclusive), deals with Licences, that is to say, timber licences, temporary licences, Occupation, Residence, and Business licences.

Part XII., which comprises Sections 146 to 150 (both inclusive), imposes penalties for the unlawful possession of Crown land and provides a summary remedy for obtaining possession of Crown lands unlawfully occupied.

Part XIII., which comprises Sections 151 to 159 (both inclusive), deals with the Construction of Roads and other Public Works.

Part XIV. (Section 160) authorises the Governor to make regulations for the purposes therein mentioned. Such purposes include the following:—

“(v.) For prescribing the forms of all applications, licences, leases, mortgages, contracts, and other documents contemplated by this Act or found necessary to give effect to its provisions.”

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 — " 'prescribed' issued in this Act or in respect to any purpose for  
 NICHOLLS, " which regulations are contemplated by this Act."

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 CRISP & Part XV., which comprises Sections 161 to 177, is headed "Mis-  
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Section 165 is as follows:—

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" In case any grant, contract, lease, licence, or other agreement  
 " whatsoever under this or any previous Act becomes void or is  
 " determined, or in case any land granted or disposed of in any man-  
 " ner under this or any previous Act reverts or becomes forfeited  
 " to the Crown, the land comprised in any such grant, contract, lease,  
 " licence, or agreement, so forfeited, shall immediately be disposable  
 " under this Act as Crown land; and the Commissioner or any person  
 " authorised by him, may, with the consent of the Governor, enter  
 " upon any such land without suit."

The Act has been amended by Acts passed in the years 1917, 1918, 1920, 1924, and 1925.

The amendments are very extensive, but the only one (other than those which are incorporated in the above citations from the Act), which would appear to be relevant to the present inquiry, is Section 9 of 15 Geo. V., No. 38, which is as follows:—

" (9)—(1) The Commissioner may, with the consent of the  
 " Governor, lease to any person, on such terms and conditions, and for  
 " such period not exceeding Seven years, as the Governor sees fit—

" I. Any Crown land situate in any town; or

" II. Any building or part of a building on such land—which is  
 " not for the time being required for any public purpose."

" (2) Sections 121 to 130 inclusive of the Principal Act shall not  
 " apply to any lease granted under this Section."

The purpose of the statute is declared in its title to be the regulation of "the sale and disposal of the lands of the Crown in this State." The manner in which it effects that purpose can, I think, be correctly generalised as follows:—

Except in special cases, such as those provided for by Sections 11 and 53, it denies to the Crown the right or power to dispose of (that expression being understood to exclude the formal "grant" on a sale) any Crown land subject to the provisions of the Act, and it creates (or rather continues, for the office had been created by an earlier "Crown Lands Act") the office of "Commissioner of Crown Lands," and commits to that officer "as such" exclusively (except as aforesaid and subject in some cases to the consent of the Governor, e.g., Sections 46, 108, 111, 117-120 of the Act of 1911 and Section 9 of 15 Geo. V., No. 38) the authority to dispose of any land subject to the provisions of the Act, and it prescribes the kinds of transaction by

which the land may be disposed of and the kind or class of land to which each kind of disposal shall be applicable and the conditions on which each kind of disposal may be made.

The title to the land remains vested in the Crown, that is to say, in His Majesty (*cf. New South Wales v. The Commonwealth*, 38 C.L.R. 74, at p. 89), and any grant of it is made by the Governor as His Majesty's representative, but otherwise, (except in the special cases referred to), the exclusive power to dispose of it is vested in the Commissioner.

There is no provision in the Act which states in so many words that the Crown, that is to say, the Crown as the Executive Government of the State (*Williams v. Attorney-General for New South Wales* 16 C.L.R. 404, at p. 437), shall not have the power to sell Crown lands, or that a contract with the Crown for the sale of Crown lands shall be illegal or void.

But the effect of the enactments that Crown lands shall be disposed of in the mode prescribed and "not otherwise," and that the Commissioner of Crown lands "as such" shall have the disposal of Crown lands, and that all contracts for the sale of Crown lands shall be made with him, necessarily denies any power in that behalf to the Crown as the Executive. The power of disposal is conferred on the Commissioner.

A part of the mode of disposal prescribed is disposal by the Commissioner, and it is expressly provided that contracts of sale shall be made with him. And inasmuch as the Act denies to the Crown (either as owner of the land or as the Executive) any power to contract to sell Crown lands, it necessarily follows that any agreement made by the Crown for the sale of Crown lands is in point of law simply nil.

The Commissioner of Crown Lands is such by virtue of the fact that he is Minister of Lands and Works, and as such Minister he is a servant of the Crown; but so far as the powers and authorities incidental to the office of Commissioner are concerned he is not the servant of the Crown. He is a public officer whose office and authorities are respectively created and conferred by the Legislature.

Contracts for the sale of Crown lands made by the Commissioner in conformity with the provisions of the Act, bind the Crown as owner of the land, and in that sense it may be said that the Commissioner represents or is a statutory agent of the Crown, but the authority which the Commissioner exercises when he enters into such a contract is an exclusive authority which is not conferred, cannot be withdrawn, and (except so far as the consent of the Crown is required to the exercise of certain powers and so far as the Crown can make regulations as to sales) the exercise of which cannot be controlled by the Crown, either as owner of the land, or as the Executive.

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That the Act (except in the special cases above referred to) denies to the Crown any power to dispose of land subject to the Act even in cases in which the Commissioner has no authority to do so, is I think clear on the face of the Act itself, but if it is ambiguous in the sense that it is fairly and equally open to be construed as denying or not denying to the Crown the power in question, I think that other legislation relating to Crown lands removes the ambiguity.

We know that for years before the Act of 1911, and every year since the passing of that Act, it has been the practice of the Legislature to specially authorise the sale or other disposal of Crown lands in cases where the sale or other disposal could not be effected under the Act of 1911.

Such cases occur annually, and they are provided for in the annual "Crown Lands Purchasers Reinstatement Act."

These Acts are not confined to cases of the reinstatement of purchasers, but as will appear from a perusal of the Acts they include cases of original sales, exchanges, &c., that is to say, both cases in which the land disposed of, although disposed of by way of sale or lease (modes of disposal authorised by the earlier Crown Lands Acts as well as by the Act of 1911) was for some reason not so disposable under the Act for the time being in force, and also cases in which the mode of disposal (e.g., exchange) was not authorised by the Act.

These Acts are in *pari materia* with "The Crown Lands Act, 1911," and it is, therefore, at least permissible to have regard to them in construing that Act if it is ambiguous.

As to the Acts passed prior to the year 1911 it is sufficient to go back to the year 1890, that is to say, the year in which "The Crown Lands Act, 1890," was passed.

Neither that Act nor the Act of 1903, which replaced it, contained any provision which excluded the powers of the Crown to a greater extent than does the Act of 1911, and "The Crown Lands Purchasers Reinstatement Acts" passed between the years 1890 and 1911 show that the Legislature interpreted the Acts of 1890 and 1903 as denying to the Crown the power in question. (See, e.g., 62 Vict., No. 39, Sections 6, 7, and 8; 2 Ed. VII., No. 47, Sections 7, 12, 13; 3 Ed. VII., No. 42, Sections 4, 5, 10, 11, 16; 5 Ed. VII., No. 25, Sections 5, 7, 8, 10, 11, 13, and 15; 8 Ed. VII., No. 42, Sections 6, 7, 8, 9, 10, and 16; 1 Geo. V., No. 71, Sections 5, 10, 11, 12, and 13.)

And "The Crown Lands Purchasers Reinstatement Acts" passed in the same year as, and since, "The Crown Land Act, 1911," show that the Legislature has interpreted that Act in the same way. (See, e.g., 2 Geo. V., No. 58, Section 4; 5 Geo. V., No. 36, Sections 4, 5, and 6; 6 Geo. V., No. 47, Sections 4, 5, 6, 7, and 8; 16 Geo. V., No. 47,



Sections 4, 5, 6, 7, 8, and 9; 17 Geo. V., No. 61, Sections 5, 6, and 7; 18 Geo. V., No. 75, Sections 6, 7, and 8; 19 Geo. V., No. 29, Sections 5, 6, and 7; and 20 Geo. V., No. 93, Sections 5 and 6.)

Moreover, "The Crown Lands Purchasers Reinstatement Acts" passed in and since the year 1924 expressly provide that they shall be (deemed to be) incorporated with the Act of 1911, and they are therefore not only in *pari materia* with, but must be construed as a very part of that Act, and many of the lands the sale of which is sanctioned by those Acts are declared to be "Crown land" and are thus declared to be "Crown lands" within the meaning of the Act of 1911 (see definitions of "Crown Lands" and "land").

Even if the Legislature had not passed any of the Acts later in date than 1911, it would be reasonable to impute to it that when enacting the Act of 1911 it intended that Act to be construed as it itself had construed the similar Acts of 1890 and 1903, but the subsequent Acts clearly indicate that that is what it did intend, for those Acts recognise and give effect to that construction.

Of course, if it were clear that "The Crown Lands Act, 1911," does not deny to the Crown the power in question, the fact that the Legislature had proceeded upon an erroneous construction both of that Act and earlier Acts would not alter that Act. (*Cape Brandy Syndicate v. Inland Revenue Commissioners* (1921) 2 K.B. 403, at p. 414, and *Ormond Investment Company v. Betts* (1928) A.C. 143.)

But as I have stated, I think that the Act of 1911, even when read without regard to "The Crown Lands Purchasers Reinstatement Acts" does deny to the Crown the power in question, and I have only discussed those Acts on the assumption that the Act of 1911 is ambiguous.

Such being, as I think, the effect of the Act, the next step in disposing of the question under consideration is to construe the supplication with reference to the provisions of the Act.

This raises two questions. The first is whether the agreement of sale and purchase alleged in the supplication is alleged to be an agreement for the sale of "Crown Lands" within the meaning of that expression as used in "The Crown Lands Act, 1911," and the second whether, if the first question is answered in the affirmative, the land referred to in the supplication was land which could have been sold under "The Crown Lands Act, 1911."

To answer the first question, it is necessary to consider two subsidiary questions, namely (a) whether the subject-matter of the alleged agreement is alleged to be land vested in the Crown, and (b) if so, whether it is alleged to be land vested in the Crown within the meaning of "The Crown Lands Act, 1911." The first of these subsidiary questions depends on the construction of the supplication, and the second on the construction of the statute.

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I think it is on the first of these questions that the strongest case in support of the supplication might have been made.

The agreement alleged in the supplication is therein described as an agreement "whereby Your Majesty's Government of Tasmania agreed to sell and the said Harold William Hensman agreed to buy certain Carbide Works owned by Your Majesty's Government of Tasmania situated at Electrona in Tasmania together with all the land plant machinery and stock and the limestone quarries plant and land situated at Ida Bay in Tasmania and used in connection with the said Carbide Works and the benefit of all rights concessions and agreements incidental to the business of Your Majesty's said Government carried on at the said Carbide Works."

On a literal construction of the words the only subject-matter of the alleged agreement which is alleged to have been owned by the Government of Tasmania is the Carbide Works.

It is true that the supplication alleges that the Government of Tasmania agreed to sell the whole subject-matter, but that does not necessarily imply an allegation that the Government of Tasmania owned the whole subject-matter.

A subject can contract to sell a particular parcel of land, to which he has no title at the date of the contract, and if he can cause such title as he contracted to be given to the purchaser, to be conveyed to him, he may implement his contract without ever acquiring a title to the property agreed to be sold.

The position of the Crown is somewhat different, for it could not, without the authority of Parliament, contract to acquire a title to property, if the acquisition of it involved the expenditure of public funds. But such authority may have been given in a form which does not enable us to say whether it has been given in respect of the lands referred to in the supplication, and in any case it is not impossible that the Government of Tasmania may have been able to acquire a title to the land, or to cause a title to it to be conveyed to the suppliant, without the expenditure of public funds.

So that, if the supplication is construed literally, it does not necessarily allege that the subject-matter of the contract was land vested in the Government of Tasmania, unless "Carbide Works" must necessarily be such a structure as is part of the land beneath it, within the meaning of the maxim *quidquid plantatur solo, solo cedit*, and we can take judicial notice of that fact.

The term "works" has no technical legal meaning.

When used to describe something connected with the conduct of some industrial enterprise, it is frequently and perhaps generally applied to a structure of the kind referred to, but it is also applied to things which are chattels. The meaning to be given to it when it is used in a written instrument depends—in the absence of any express

definition—on the context in which it is used. (*Cf. Duke of Beaufort v. Bates* 3 *De G.F. & J.* 381, and *Earl of Mansfield v. Blackburne* 6 *Bing. N.C.* 426.)

There may be cases of particular kinds of works which it is known as a matter of common knowledge must be attached to the soil, and in such cases a Court might take judicial notice of the fact.

But I do not think that we can say that of Carbide Works.

But is this literal construction the proper one?

The words "together with all the land plant machinery and stock" must almost necessarily be read as describing items of property which are located in or about the Carbide Works, for not only do the words "together with" import association, but if the words in question are not so read they are left without anything to identify them except the circumstance that they are "used in connection with the Carbide Works"—I read those words as applying not only to the land, &c., at Ida Bay, but also to the "land plant machinery and stock"—and would include some of the items (i.e., land and plant) mentioned in the later part of the description. The words "land plant machinery and stock" cannot be read as being qualified by the later words "situated at Ida Bay," because the words which immediately follow them exclude that construction.

The conjunction immediately before and after the word "stock" and the repetition of the words "land" and "plant," make the passage commencing "and the limestone quarries" a description of a locally separate item.

I, therefore, read the supplication as if the words describing the part of the subject-matter immediately under consideration were arranged as follows:—"Certain Carbide Works together with all the land plant machinery and stock used in connection with said Carbide Works owned by Your Majesty's Government of Tasmania situated at Electra in Tasmania."

If this is the true construction of the passage under consideration, the supplication does allege that part of the subject-matter of the contract was land owned by the Government of Tasmania.

And further, when the passage in question is so read it is difficult to see what the "works" could be if they were not buildings or structures of some kind, for the words "plant machinery and stock" would appear to exhaust those parts of the subject-matter which could be described as "works" if the works consisted of chattels. According to *The Oxford English Dictionary* "plant" means "The fixtures implements machinery and apparatus used in carrying on any industrial process."

Webster gives the commercial meaning of the word as "the whole machinery and apparatus employed in carrying on a trade or mechanical business; also sometimes including real estate and what-

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Full Court. "ever represents the investment of capital in the means of carrying  
 — "on a business, but not including material worked up or finished  
 NICHOLLS, "products; as the plant of a foundry mill or a railroad."  
 C.J.  
 CRISP & No doubt the terms "works," "land," "plant," and "machinery," as  
 CLARK, JJ. used in the supplication, are not intended to be mutually exclusive,  
 1931. but "it is a good rule," said the Judicial Committee (in *Ditcher v.*  
 ~~~~~ *Denison* 11 *Moore P.C.* 324, at p. 337), "that one who reads a legal  
 THE "document, whether public or private, should not be prompt to  
 AUSTRALIAN "ascribe—should not without necessity or some sound reason, impute  
 COMMON- "—to its language tautology or superfluity and should be rather at  
 WEALTH "the outset inclined to suppose every word intended to have some  
 CARBIDE "effect or be of some use," and as the words "together with" require  
 Co. LTD. the words "land plant machinery and stock" to be read as meaning  
 v. something additional to or other than the "works," on the whole I  
 THE KING. think that the fair and true construction of the part of the descrip-  
 — tion under consideration is that the works are the buildings and  
 other structures in which the machinery is erected and the manu-  
 facturing processes conducted.

In the case of that part of the subject-matter which is described as "the limestone quarries plant and land situated at Ida Bay in Tasmania," there are not the same grounds for reading the description of it as qualified by the words "owned by Your Majesty's Government of Tasmania," as exist in the case of the part described as "all the land plant machinery and stock," but nevertheless here again I think that on a fair construction of the supplication the whole description must be read together as describing one subject-matter, and seeing that it is alleged that the whole subject-matter was the subject of a contract for sale by the Government of Tasmania, I think that the supplication is to be read as alleging that the whole subject-matter of the contract was owned by that Government.

And it was obvious that this was the construction which was put on it by both of the parties.

The argument of the learned Solicitor-General assumed that the subject-matter of the alleged sale was Crown Land.

The learned Counsel for the suppliant conceded that the lands referred to were lands of the Crown, and he did not suggest that the Carbide Works were not part of the land.

His contentions were that the alleged contract and its completion were immaterial to the cause of action, whether or not the subject-matter of it was Crown land within the meaning of "The Crown Lands Act, 1911," and that even assuming that the alleged contract and its completion are alleged as part of the cause of action the lands, although lands of the Crown, were not Crown lands within the meaning of "The Crown Lands Act, 1911."

Under these circumstances, I think that we must construe the supplication as alleging that the whole subject-matter of the alleged contract was owned by the Government of this State, and that the Carbide Works were part of the land.

It is not alleged that the agreement related exclusively to land, but land was the essential part of the subject-matter of it, and, as appears from the particulars of damage, the whole of the subject-matter was to be paid for by one lump sum.

It is, therefore, impossible to sever the subject-matter and treat the alleged contract as two or more separate contracts.

I, therefore, construe the supplication as alleging a contract between His Majesty's "Government of Tasmania" and the suppliant, whereby the said Government agreed to sell to the suppliant lands "owned by "His Majesty's Government of Tasmania."

The meaning of the phrase "His Majesty's Government of Tasmania" depends on the context in which it is used.

Frequently, perhaps generally, it means the Crown in right of the State of Tasmania in its Executive capacity, that is to say, the Governor in Council (*cf. Roberts v. Ahern* 1 C.L.R. 406, *Enever v. The King* 3 C.L.R. 969, *Williams v. Attorney-General for New South Wales* (*supra*), at p. 465), but I do not think that it means that in the allegation under consideration. The Crown's ownership of what I will call public land is the ownership of the Sovereign *jure coronae simpliciter*, and not in the character of the Executive Government. It is merely a matter of title (*cf. Williams v. Attorney-General for New South Wales* (*supra*), at pp. 442, 455, and 456, and *New South Wales v. The Commonwealth* (*supra*), at pp. 89-90).

Property owned by the Crown in right of the State of Tasmania is not owned by the Governor in Council, but by the Sovereign.

So, in this context, I think the allegation is to be construed as alleging that the land was owned by the Crown in right of the State of Tasmania.

And the allegation that the land was "owned by" the Crown is, I think, an allegation that it was vested in the Crown (*cf. St. Catherine's Milling and Lumber Co. v. The Queen* 14 A.C. 46, at p. 56, and *New South Wales v. The Commonwealth* (*supra*), at p. 89).

Counsel for the suppliant contended that although the lands were lands of the Crown they were not "Crown lands" within the meaning of "The Crown Lands Act, 1911."

The grounds of this contention were (1) That the land in question might have been withdrawn from the operation of "The Crown Lands Act, 1911," by proclamation under subsection (2) of Section 9. (2) That the words "which are not granted or lawfully contracted to "be granted in fee simple" in the definition of the expression "Crown

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*Full Court.* "lands" in Section 3 of the Act confine the subject defined to land which has never been granted or contracted to be granted, and land which has been granted or contracted but has reverted, or become forfeited, to the Crown within the terms of Section 165, and that the land in question had been granted prior to the contract alleged in the supplication, and that it had not reverted or become forfeited to the Crown within the meaning of Section 165. (3) That at the date of the contract alleged in the supplication the land in question was vested in the Minister for Lands and Works, the same having been acquired by him by foreclosure under a mortgage given by the Hydro-Electric Power and Metallurgical Coy. Ltd., and being so vested in the Minister, it was not land vested in the Crown within the meaning of "The Crown Lands Act, 1911."

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I shall deal with these contentions—so far as it is necessary to do so—in the above order.

The first was that the land may have been the subject of a proclamation under Section 9 (2).

The effect of Section 9 is that *prima facie* Crown land is subject to the Act, but that it may be removed from the operation of the Act by a proclamation to that effect.

If there had been a proclamation taking this land out of the Act, we should have been bound to take judicial notice of that fact—without the fact being pleaded ("The Interpretation Act, 1906," Section 36—*Taylor on Evidence* (10th ed.), Vol. 1, pp. 4-5, *Brandao v. Barnett* 12 C. & F. 786, at p. 801, and *Stephen, op. cit.* 286 and 289), and it follows, that if no such proclamation has been issued, we must necessarily take judicial notice of that fact.

The fact is that no such proclamation was issued.

The second contention was that it appears from the statute 12 Geo. V., No. 43, intituled "The Hydro-Electric Company's Loan Act, 1921," that this land had been previously granted, and that fact excluded it from the definition of the expression "Crown lands." I have not been able to find anything either in the statute 12 Geo. V., No. 43, or any other statute or the supplication, which would warrant the Court in construing the supplication as referring to the same land as that referred to in the statute 12 Geo. V., No. 43, but I will assume that the premise alleged by the learned Counsel is true.

It was contended that the effect of Section 165 of "The Crown Lands Act, 1911," read with the definition of "Crown lands," is that land which had once been granted or contracted to be granted by the Crown in fee simple, is excluded from the Act, unless it reverts to the Crown or becomes forfeited to it, and thus comes within the operation of Section 165.

This contention requires that the meaning of the term "reverts" in Section 165 shall be confined to a reverter by operation of law

(otherwise than on the avoidance or determination of a grant). This, however, would exclude from the operation of the Act all land which came back to the Crown by surrender. But assuming that the term "reverts" is used in the sense contended for, I do not think that Section 165 is to be construed as confining the meaning of the words "may become vested" in the definition of "Crown lands" in Section 3 to such lands as revert to (in the sense above mentioned) or become forfeited to the Crown.

The expression "Crown lands" is defined as follows:—"Lands in this State which are or may become vested in the Crown and which are not granted or lawfully contracted to be granted in fee simple and includes all lands which are or may be held for mining, pastoral, or other purposes under any lease, licence, or other right from the Crown."

There can be no doubt that land which had been granted and which again became vested in the Crown—howsoever the reversion might be effected—would again become "Crown land" within the meaning of that definition—that is to say, within the words of the definition read by themselves, and without regard to Section 165.

"The Land Sales Act" (5 & 6 Vict., C. 36)—the first of the Imperial statutes dealing with the disposal of Crown lands in the Australian Colonies—provided (by Sec. 11) "that the Waste lands of the Crown in the Australian colonies shall not, save as hereinafter is excepted, be conveyed or alienated by Her Majesty or by any person or persons acting on the behalf or under the authority of Her Majesty either in fee simple or for any less estate or interest, unless such conveyance or alienation be made by way of sale, nor unless such sales be conducted in the manner and according to the regulations hereinafter prescribed."

Section III. provided that nothing in the Act should extend or be construed to extend to prevent Her Majesty or any person or persons acting on Her behalf or under Her authority from excepting from sale and either reserving to Her Majesty, or disposing of in such other manner as for the public interest might seem best, such lands as might be required for any of the purposes in the section mentioned, and that nothing in the Act should prevent Her Majesty or such person as aforesaid from fulfilling any such promise or engagement as is therein mentioned. Section 23 provided (*inter alia*) "that by the words 'Waste lands of the Crown' as used in this Act are intended and described any lands situated therein and which now are or shall hereafter be vested in Her Majesty Her Heirs and Successors and which have not been already granted or lawfully contracted to be granted to any person or persons in fee simple or for an estate of freehold or for a term of years and which have not been dedicated and set apart for some public use."

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*Full Court.* In discussing that definition and statutory regulation in *Williams v. Attorney-General for New South Wales* (*supra*), MR. JUSTICE ISAACS (as he then was) said (at p. 452):—"The prohibition to sell, except under the statutory regulations and conditions, extended only to waste lands within the definition: but while these lands were set apart, they were outside the definition, and were also outside the prohibition which latter was immaterial, but what was material was that they were outside a would-be purchaser's reach."

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"If the Crown chose to make them available by bringing them within the definition, just as private lands subsequently surrendered to the Crown would be, there was nothing to cut down the Royal right to sell subject to the statute."

And the material words (for the present purpose) in the definition in "The Lands Sales Act" were "which now are or shall hereafter be vested in Her Majesty and which have not been already granted or lawfully contracted to be granted."

The words in the definition in "The Crown Lands Act, 1911," are "which are or may become vested in the Crown and which are not granted or lawfully contracted to be granted."

The definition then being unambiguous, why should its operation be limited to lands which may become vested in the Crown by reverter (assuming that expression has the limited meaning which the contention under consideration requires) or forfeiture?

"No rule of construction can require that when the words of one part of a statute convey a clear meaning it shall be necessary to introduce another part of a statute for the purpose of controlling or diminishing the efficacy of the first part" (*Warburton v. Loveland* 2 D. & C. 480, at p. 500). If the Legislature had intended to limit the operation of the Act so far as land which had once been granted or contracted to be granted to such lands as subsequently reverted or became forfeited to the Crown, the natural place for the limitation would be in the definition. If the contention of the learned Counsel is correct, then the definition must be read as if its words were as follows:—"Lands in this State which have been granted or lawfully contracted to be granted by the Crown but which revert to or become forfeited to the Crown and includes, &c."

The condition expressed by the words "are not granted" refers to the time at which the question of the application of the Act to a particular piece of land arises. The words are not "which has never been granted."

And the words "in fee simple" qualify the words "which are not granted" as well as the words "lawfully contracted to be granted." By Section 105 (1), the Governor is authorised under and subject to the provisions of the Act and the regulations to convey and alienate Crown lands in fee simple "or for any less estate or interest."



The definition of "Crown lands" is framed so as to bring within the operation of the Act every estate and interest in land which was vested in the Crown at the commencement of the Act, or which should subsequently become vested in the Crown, other than land "contracted to be granted" in fee simple.

The purpose of the words "which are not granted or lawfully contracted to be granted in fee simple" is to include in the expression defined lands granted for an estate less than the fee simple, and to exclude lands "contracted to be granted" in fee simple.

Although all land is held of the Crown, land which has been granted for an estate in fee simple and remains so granted is no longer "vested in the Crown," and no words were needed to exclude such land from the expression "Crown lands." Lands granted for an estate less than the fee simple might not have been considered to be land "vested in the Crown," and it was, therefore, either necessary or desirable to declare that it should be so considered.

But land which has not been granted but is "contracted to be granted" would still be land "vested in the Crown."

The words "which are not granted or lawfully contracted to be granted in fee simple" bring within the words "lands vested in the Crown," lands granted for an estate less than the fee simple, and exclude from them lands "contracted to be granted" in fee simple.

But the only effect of excluding lands "contracted to be granted" in fee simple is, that, except for the purpose of completing the contract, they become inalienable—so long as the contract subsists.

They are treated as disposed of, and it would, therefore, be absurd to construe the Act as leaving them alienable by the Crown dehors "The Crown Lands Act, 1911."

So that if the lands referred to in the supplication were vested in the Crown, they were not lands granted in fee simple, and to be alienable at all they must not have been lands "contracted to be granted" in fee simple."

The supplication alleges that they were owned by His Majesty's Government of Tasmania, and as stated above, I think that is an allegation that they were vested in the Crown, and the allegation of the contract of sale necessarily negatives the existence, at the time of the making of the contract alleged in the supplication, of another contract to grant the fee simple in the lands.

The third contention was that the land had become vested in the Minister for Lands and Works by foreclosure, and being so vested in him it was not land vested in the Crown within the meaning of "The Crown Lands Act, 1911."

There is nothing in the supplication from which it can be even inferred that the land became vested in the Minister for Lands and

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*Full Court.* Works, either by foreclosure or in any other way, but the learned Counsel referred to "The Hydro-Electric Company's Loan Act, 1921" (13 Geo. V., No. 43), which ratifies a loan made by the Crown to the Hydro-Electric Power and Metallurgical Company Limited, and two agreements made between the Crown and the Company. One of the agreements provides that the said loan shall be secured by a mortgage of the real estate of the Company in this State and a mortgage debenture, both of which securities were to be given to the Minister for Lands and Works.

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The agreements certainly speak of certain "Carbide Works" and "manufacturing operations at Electrona" and "Works at Electrona" and a certain "site near to North-West Bay in Tasmania (hereinafter referred to as 'Electrona')," but unless we can take judicial notice of the fact that there is only one Carbide Works at Electrona, nothing in the statute can be of any assistance to us.

I am, however, dealing with the matter on the assumption that the "Carbide Works" referred to in the Act 12 Geo. V., No. 43, are the same Carbide Works as those referred to in the supplication.

But there is nothing on the record or of which we can take judicial notice which informs us that the Minister for Lands and Works foreclosed the mortgage, or if he did so, that at the time of the alleged contract the land in question stood in his name, and on a demurrer the Court is confined to construing the pleading or pleadings in question with the assistance only of such facts as it can take judicial notice of.

In construing the pleading the Court will of course ascertain what its words imply, as well as what it expressly avers, but the Court cannot even draw inferences (*Vacher & Sons Ltd. v. London Society of Compositors* (1913) A.C. 107, at p. 125, and *Lubrano v. Gollin and Coy. Ltd.* 27 C.L.R. 118), much less read into the pleading wholly external facts.

The pleading alleges that the Carbide Works were owned by His Majesty's Government of Tasmania, but we know nothing as to the manner in which that fact was brought into existence.

But even if the Minister did foreclose, the result of his so doing may not have been what Counsel for the suppliant contended—namely, that although the land did not become "Crown Land" within the meaning of "The Crown Lands Act, 1911," it nevertheless became land owned by the Crown and disposable by the Crown in any way and on any terms that its advisers might think fit.

It may be—I express no opinion on any of the questions—that on foreclosure the land reverted in the Crown and ceased to be "granted land," this is to say, that the result was the same as if the land had been surrendered or it may be that as the mortgage was to secure money voted by Parliament for a special purpose, that is to say, a loan to the Company, the Act authorising the loan should not

be construed as conferring on the Crown the right to deal with the land on foreclosure in any way that its advisers might think fit, but that it should only be disposed of in such manner as Parliament authorised.

But for the reasons I have given, I do not think that any of these questions arise on the supplication as it stands.

They can be considered if and when the suppliant applies to amend the supplication by alleging the facts stated by its Counsel.

For these reasons I am of opinion that the lands referred to in the supplication were Crown lands within the meaning of "The Crown Lands Act, 1911."

Then was the land referred to in the supplication disposable under "The Crown Lands Act, 1911"?

The learned Solicitor-General contended that it was not, but I do not think it necessary at present to express any opinion on the question, for even if it could have been disposed of under the Act, I think the supplication shows that it was not so disposed of.

It will be time enough, therefore, to pass upon the question if and when the suppliant applies to amend the supplication by alleging a contract with the Commissioner of Crown Lands.

As I have stated, I am of opinion that the supplication alleges a sale as part of the cause of action, and that the subject-matter of that sale was Crown land within the meaning of "The Crown Lands Act, 1911," but it alleges that the contract of sale was made with His Majesty's Government of Tasmania, and that allegation, I think, negatives the alleged sale, and thus destroys the cause of action.

As used in the allegation of the contract of sale, the phrase "His Majesty's Government of Tasmania" must, I think, mean the Crown (in right of the State of Tasmania) in its Executive capacity. But the paramount purpose of "The Crown Lands Act, 1911," is to regulate the disposal of Crown lands by withdrawing the power to dispose of them from the Crown, and committing the power to the Commissioner "as such," and therefore to allege a contract with His Majesty's Government of Tasmania, that is to say, the Crown as the Executive Government of the State for the sale and purchase of Crown lands (subject to the Act) is to allege what the statute intended to prevent.

But in any case, the allegation that the contract was made with His Majesty's Government of Tasmania cannot be construed as satisfying the requirement of the statute, that contracts for the sale of Crown lands (subject to the Act) shall be made with the Commissioner of Crown Lands "as such."

But even if the allegation that the contract of sale was made with His Majesty's Government of Tasmania does not negative a contract

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with the Commissioner "as such," still there could be no contract unless it was made with the Commissioner as such, and the allegation of a contract with His Majesty's Government of Tasmania at least leaves it uncertain whether the allegation is of a contract with the Commissioner or the Executive. *Non constat* that it was not made with the Premier (who is alleged to have made the fraudulent misrepresentations) or some other Minister as representing the Governor in Council.

So that on this construction of the allegation, it is an allegation of something which in point of law may or may not be a sale, and as the sale is alleged as part of the cause of action the supplication does not allege what must be a cause but only what may be.

For these reasons I am of opinion that the supplication is insufficient in point of law.

Attorneys for the suppliant: *Simmons, Wolfhagen, Simmons, & Walch.*

Attorney for the Crown: *A. Banks-Smith.*

(Note: The suppliant appealed from this decision to the High Court of Australia. The High Court (GAVAN DUFFY, C.J., STARKE, EVATT, and McTIERNAN, JJ.), after hearing argument on March 4, 1932, proposed to the parties that there should be a repleader. Counsel agreed, and the following order was made:—"By consent, the judgment of the Court below set aside. The parties undertaking to replead and the Solicitor-General undertaking that the suppliant shall not be prejudiced by any delay in the amending of the pleading as compared with the delivery of the original supplication. Costs below and here to abide the ultimate result of the cause.")

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*Costs pursuant to Order of Court of Criminal Appeal—Taxation—Review—Summons before single Judge—Jurisdiction—The Criminal Code (14 Geo. V., No. 69), Secs. 400, 414, 418—"The Supreme Court Act, 1917" (8 Geo. V., No. 18), Sec. 3.*

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 April 13.  
 May 25.  
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A single judge has no jurisdiction to order the review of taxation of costs taxed pursuant to the order of the Court of Criminal Appeal.

In an appeal brought by John Bax from his conviction, the Criminal Court of Appeal ordered (*inter alia*) that the costs of the appellant of and incidental to the appeal should be taxed by the Registrar,