Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Our Sovereign Lady the Queen v. *Hughes and another, from the Supreme Court of South Australia; delivered the 1st day of February,* 1866.

Present:

LORD CHELMSFORD.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

THIS is an Appeal against a rule of the Supreme Court of the Province of South Australia, making absolute a rule of the same Court obtained by the Respondents for quashing a writ of *scire facias*, issued for the purpose of revoking certain leases of Crown lands granted by the Governor of the Province to the Respondents.

The question raised by the rule and to be decided upon the Appeal, is whether the Supreme Court of South Australia had jurisdiction to proceed by writ of *scire facias* to annul grants or leases of Crown lands within the Province.

The writ of *scire facias* to repeal or revoke grants or charters of the Crown is a prerogative judicial writ which, according to all the authorities, must be founded upon a record. These Crown grants and Charters under the great seal are always sealed in the Petty Bag Office, which is on the common law side of the Court of Chancery, and become records there. Whether grants would be records by the mere act of sealing without enrolment in the Court, it is unnecessary to consider, because in point of fact such grants are invariably enrolled. They are then at all events brought within the definition of a record given in Com. Dig. Record A,

upon the authority of Co. Litt. 260A, viz., "A Memorial of an Act or proceeding of a Court of Record proceeding according to the course of the common law, entered on parchment for the preservation of it." All charters or grants of the Crown may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons, and the appropriate process for the purpose is by writ of *scire facias*. And if the grant or charter is to the prejudice of any person, he is entitled as of right to the protection of this prerogative remedy. For, as was said by C. J. Jervis in the case of the Eastern Archipelago Company *v.* the Queen (2 E and B., 94), "To every Crown grant there is annexed by the common law an implied condition that it may be repealed by *scire facias* by the Crown, or by a subject grieved using the prerogative of the Crown upon the fiat of the Attorney-General."

This being the long-settled and well-known rule of proceeding with respect to Crown grants in this country, the question to be determined is whether grants and leases of Crown lands in South Australia are of such an analogous character and description as to be necessarily subject to the same remedial process of *scire facias* for their repeal.

The first thing to be considered is the constitution of the Supreme Court in the Province. This was settled by a Colonial Act No. 31, 1855–56, intituled "An Act to consolidate the several Ordinances relating to the establishment of the Supreme Court of the Province of South Australia." By the 7th section of this Act, the Court is constituted a Court of Record, and is to have cognizance of all pleas, civil, criminal, and mixed, and jurisdiction in all cases whatsoever, as fully and amply in the Province and its dependencies as Her Majesty's Courts of King's Bench, Common Pleas, and Exchequer at Westminster, or either of them, lawfully have or hath in England." And by the 8th section, it is enacted "that the Supreme Court shall be a Court of Equity in this province and its dependencies, and shall have power and authority to administer justice, and to exercise and perform all such acts, matters, and things necessary for the due execution of such equitable jurisdiction as the Lord

High Chancellor of Great Britain can or lawfully may within the realm of England; and all such acts, matters, and things as lawfully can or may be done by the said Lord High Chancellor within the realm of England in the exercise of the jurisdiction to him belonging." The 16th section gives the Judges of the Supreme Court power to make and practise (probably a misprint for "frame") general rules and orders "touching and concerning the time and practice of holding the Courts, the forms and manners of proceeding, and the practice and pleading upon all indictments, informations, actions, suits and other matters to be brought therein." Whether, under the powers conferred by this section, it would have been competent to the Judges to have made a rule for "the form and manner of proceeding" in suits to revoke grants of Crown lands, and to have ordered that the remedy by *scire facias* should be applicable to such cases, it is unnecessary to consider. They have not done so. They have promulgated a rule as to the teste of writs of *scire facias*, but as that process is applicable to other objects besides the grants of Crown lands (such as recognizances and judgments), the right to use it in order to annul the leases in question must depend upon whether the grants are of the peculiar nature and character to render them a proper foundation for this particular remedy.

The leases were granted by the Governor under the powers conferred upon him by a Colonial Act, 21 Vic. No. 5, intituled "An Act for regulating the sale and other disposal of waste lands belonging to the Crown in South Australia." By the first section of this Act, "All the waste lands of the Crown within the province are to be disposed of in the manner and according to the regulations therein provided, and not otherwise." The absolute sale of these lands is provided for by the 5th section in these terms, "Under and subject to the various provisions and regulations hereinafter contained, the Governor is hereby authorized and required, in the name and on the behalf of Her Majesty, to convey and alienate in fee simple, or for any less estate or interest, to the purchaser or purchasers thereof, any waste lands of the Crown in the said province, which conveyances and alienations shall be made in such forms as shall from time to time be

deemed expedient by the Governor with the consent of the Executive Council, and shall be sealed with the public seal of the same province."

There can be no doubt that under the words, "in fee simple or for any less estate or interest," in this section, the Governor might have granted leases of the Crown lands "in the name and on the behalf of Her Majesty." But the leases in question were made by the Governor himself under the authority of the 13th section of the Act, which enacts "that it shall be lawful for the Governor to demise for the purposes of mining for any metal or mineral, excepting gold, to any person applying for the same, any portion of the waste lands of the Crown within the said province not exceeding eighty acres, for any period not exceeding fourteen years, at an annual rent of 10s. per acre, &c.; subject to such regulations for the granting of such leases, and for the working and resumption of the same, as may from time to time be made by the Governor with the advice and consent of the Executive Council." The leases described in this section are not required to be under the Provincial Seal; and although the leases in question were so sealed, the authority would probably have been as strictly pursued if they had been executed under the private seal of the Governor.

It may be assumed for the purposes of the present case that these leases are void, being of quantities of lands exceeding eighty acres; and the Appellant insists that the remedy by *scire facias* is not only the proper but the only remedy for setting them aside.

It was contended, in the first place, that these leases were virtually records. That the Governor was entrusted with all the ministerial duties of putting the Provincial Seal (the Queen's Seal of the province) to grants of Crown lands. That the Supreme Court besides being a Court of Record is also a Court of Equity, and can perform "all such acts, matters, and things as lawfully can or may be done by the Lord High Chancellor within the realm of England in the exercise of the jurisdiction to him belonging."

The meaning of this argument seems to be that all the machinery existed in the province for placing grants of Crown lands on the same footing with those in this country, both in their original creation

and for constituting them a record. But it was not pretended that any enrolment of them had taken place, and it therefore became necessary for the Appellant to insist that the leases were in themselves records. With this view it was asserted that every grant under the Great Seal is *ipso facto* a record, and that the seal of the province, which was entrusted to the Governor by the Queen's commission for the purpose of making grants in Her Majesty's name, is equivalent to the Great Seal. Assuming this to be the case, it would advance the argument a very short way, unless it could be established that the mere affixing the seal to an instrument by the Governor at once made it a record. But a record (to recur to the definition of it given in Comyn's "Digest") must be "a Memorial of an Act or proceeding of a Court of Record," and when it is asserted that when the seal of the province is affixed to a lease by the Governor it becomes a record, it may not unreasonably be asked, a record of what Court? It must be borne in mind that the Governor in granting these leases was not exercising any delegated authority from the Crown, but a mere statutory power conferred upon him to demise in his own name.

But it was contended that, if these leases were not records, and, consequently, not in every respect assimilated to Royal grants, yet that form must yield to substance; and when grants of Crown lands were introduced into South Australia, they were necessarily accompanied with all their incidents, one of which is the right of a subject who receives prejudice from them to invoke the aid of the writ of *scire facias* for their repeal. And that if persons injured by these grants were debarred from this mode of proceeding, they would be remediless. To this it was correctly answered that the question of the power of a Court to proceed in a particular course of administering justice was one of substance and not merely of form. And that, however convenient or necessary a mode of proceeding for the redress of certain wrongs might be, that consideration alone would not confer jurisdiction on the Court to sanction its introduction.

But it was further argued on the part of the Respondents that, even if *scire facias* does not lie

in this case, the Appellant will not be without remedy, as the leases may be impeached either by a writ of intrusion, or an information in Chancery. It was denied by the Appellant that these remedies existed; but it was said that, even if they did, they were inefficacious, as a subject has not a right to them *ex debito justitiæ*, as he has to a writ of *scire facias*. But assuming this to be correct, it would furnish no ground for the unauthorized introduction of a remedy to meet a particular occasion.

There can be no doubt, however, that the other modes of proceeding pointed out by the Respondents are applicable to the grant of the leases in question. The writ of intrusion lies in every case in which a trespss is committed on the lands of the Crown, or a person enters on the same without title. And the information in Chancery may be used to assert the Crown's right to property, as it was in the case of the Attorney-General *v.* Chambers (4 De G. McN. and Gord., 206), upon a question of the right of the Crown to the shore between high and low water-mark.

In the present case a statutory power is given to the Governor to be exercised over the Crown lands. This power must be strictly pursued. The leases which he is authorized to make are limited to the extent of eighty acres. This quantity is said to be exceeded in the leases in question; if so, they are altogether void, and the lessees are intruders upon the lands. The remedies which have just been adverted to are therefore strictly applicable to the Respondents' unauthorized possession of the lands of the Crown.

In the argument for the Appellant, the case of the Queen *v.* Clarke (7 Moore, 77), was relied upon. That was a proceeding in *scire facias* to annul a grant of Crown lands in New Zealand, where the Judicial Committee upon appeal recommended that judgment should be entered for the Crown. This, it was insisted, is an express decision that *scire facias* will lie although there is no record. In the Judgment of the learned Chief Justice of the Supreme Court the case is treated as a conclusive authority in favour of the promoters of the *scire facias*. But it appears to their Lordships that it cannot properly be regarded as a determination of the question.

From the beginning to the end of that case there was nothing to raise any doubt as to the propriety of the proceeding by *scire facias*. No objection was taken to it in the Colony. Not the slightest suggestion was offered upon the subject in the course of the argument upon the Appeal. The hearing before the Judicial Committee was *ex parte*, the Respondent not having appeared, and the attention of their Lordships was not in any way called to the irregularity of the proceeding in the validity of which they are supposed by their silence to have acquiesced. Even if the point occurred to their own minds, they might very fairly have inferred from the absence of all objection in the Supreme Court of New Zealand that the proceeding by *scire facias* to annul grants of Crown lands was proper in that Colony, either from the grants being made records of the Court or from the Judges having power to make rules as to the form and manner of proceeding, and having authorized the process of *scire facias* in the case of Crown grants.

The presumption arising from the clause in the Act, 1859, No. 18, authorizing the Governor to grant letters of registration for inventions, which expressly makes them liable to be repealed by writ of *scire facias*, is unfavourable to the Appellant's argument. It may not unreasonably be supposed that the Legislature never contemplated that grants or leases of waste lands would be made improvidently by the Governor, and would require to be recalled. But grants of monopolies to exercise inventions were likely to be occasionally prejudicial to private interests, and therefore it was thought expedient to give the subject the protection of this prerogative remedy.

If from the experience of the present case it should be thought desirable that the writ of *scire facias* should be made available for the repeal of Crown grants, the Judges appear to have the power, under the Provincial Act "for consolidating the several Ordinances relating to the establishment of the Supreme Court," to promulgate a rule that the form and manner of proceeding in these cases may be by *scire facias*. Or if there be any doubt of the sufficiency of such a rule, the remedy may, as in the case of letters of registration for inventions,

be given by the Legislature. All difficulty for the future will thus be removed.

Their Lordships being of opinion that the rule granted by the Supreme Court for quashing the writ of *scire facias* was rightly made absolute, will recommend to Her Majesty that the Appeal aganst it be dismissed with costs.