

*Privy Council Appeal No. 14 of 1960*

**The Director of Public Works and another** - - - - *Appellants*

v.

**Ho Po Sang and others** - - - - - *Respondents*

**from the Supreme Court of Hong Kong**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 15TH MAY, 1961

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*Present at the Hearing*

LORD DENNING

LORD MORRIS OF BORTH-Y-GEST

MR. L. M. D. DE SILVA

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

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This is an appeal from the judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) (Blair-Kerr and Mills-Owens, J.J.) of the 31st December, 1959, by which they allowed an appeal by the plaintiffs in the action from a judgment of the Supreme Court of Hong Kong (Original Jurisdiction) (Gregg, J.) of the 13th July, 1959, by which the claims of the plaintiffs in the action were dismissed. There were two groups of plaintiffs. The first plaintiffs are the tenants of property known as Nos. 230, 232, 234 and 236, Temple Street, Kowloon, in the Colony of Hong Kong. The second plaintiffs are the sub-tenants of those premises. In this judgment they may respectively be referred to as the tenants and the sub-tenants. The action was brought against two defendants. The first, who may be referred to as the Director, is the Director of Public Works of the Colony of Hong Kong. The second defendant, Kwong Siu Kau, may be referred to as the lessee. He had held a Crown lease in respect of the above-mentioned premises. The tenants were his tenants. His Crown lease expired on the 24th December, 1951. He had however applied on the 9th April, 1950, for a renewal of his lease. Negotiations took place between him and the Director as to the particulars and conditions for the grant of a new Crown lease. These were agreed and were reduced to writing. A memorandum of agreement was signed by the Director and by the lessee on the 7th June, 1955. The lessee had continued to pay rent down to that date: he had paid at the rate prescribed by the terms of his expired Crown lease.

Stating the matter very generally the new terms provided that the lessee was to develop the site by erecting buildings on it within a certain time. The buildings were to involve a certain minimum expenditure. The lessee was then to have a new lease or leases on terms which, effectively, would give him a period of seventy-five years from the 24th December, 1951. A premium was to be payable and the rent was to be higher than before. It has been assumed for the purposes of the litigation that the erection of the buildings contemplated by the new agreement would necessitate the demolition of the then existing buildings and that such buildings were premises which were subject to the Landlord and Tenant Ordinance (chapter 255). Before the lessee could proceed to demolish the existing buildings he would need to have vacant possession. There were provisions in the Ordinance under which in certain circumstances the Director could give a re-building certificate. If such a certificate were given to a lessee he was enabled, on taking certain steps, to call upon those in occupation to quit. The parts of the Ordinance containing those provisions were repealed as from the 9th April, 1957. Before that date steps had been taken with a view to obtaining a re-building

certificate and one of the questions raised in the appeal is whether despite the repeal the provisions of the Interpretation Ordinance enabled the procedure to be followed through to a conclusion so as to result in the giving of a valid re-building certificate after the 9th April, 1957.

The Landlord and Tenant Ordinance cap. 255 was amended by Ordinance No. 22 of 1953 by the addition, inter alia, of sections 3 A-E. There was a further amendment by Ordinance No. 11 of 1954. Section 3A so far as material reads as follows:—

“ 3A (1) Whenever any person becomes liable to the Crown under a building covenant compliance wherewith involves the demolition of premises subject to this Ordinance of which premises such person is in law or equity the lessee of the Crown, vacant possession of such premises shall, subject to the provisions of this section and of sections 3B, 3C, 3D and 3E, be recoverable by such Lessee upon the expiration of two months from the giving of a certificate by the Director of Public Works (in this Ordinance referred to as a re-building certificate) that in the opinion of the Director of Public Works it is reasonable that such building covenant should be complied with and that such person should be given vacant possession of the premises.

“ (2) After due consideration of an application for a re-building certificate, the Director of Public Works shall deliver written notice to the applicant of his intention either to give or not to give such certificate.

“ (3) No re-building certificate shall be given until the applicant has proved to the satisfaction of the Director of Public Works that he has complied with section 3B, nor until after the time for any appeal provided for by that section has expired nor, in the event of any such appeal being made, until it has been determined.

“ (4) This section shall apply notwithstanding any agreement or condition that the Crown lease will not be granted until the building covenant which would bring subsection (1) into operation has been fulfilled.”

Section 3B reads:—

“ 3B (1) Where, pursuant to the provisions of subsection (2) of section 3A, the Director of Public Works gives notice of his intention to grant a re-building certificate, the applicant may, within three weeks after receipt of such notice, serve in manner specified in section 32 notice in the prescribed form upon each tenant in occupation of the premises to which his application relates of the intention of the Director of Public Works to give a re-building certificate.

“ (2) Any such tenant may, within three weeks after service upon him of such notice, appeal by way of petition to the Governor in Council against the proposal of the Director of Public Works to give a re-building certificate, and any tenant so appealing shall, within the said period, serve upon the applicant a copy of his petition.

“ (3) Any applicant for a re-building certificate who is served with a copy of a petition pursuant to the provisions of subsection (2) may, within fourteen days after such service, present a cross-petition to the Governor in Council, and in such event shall serve a copy of such cross-petition upon the tenant who has so appealed.”

Section 3C dealt with the situation where the Director gave notice of his intention not to give a re-building certificate and laid down procedure which, in that event, mutatis mutandis, corresponded with the procedure prescribed by section 3B.

Section 3D reads as follows:—

“ 3D (2) No person lodging a petition or cross-petition as aforesaid shall be entitled to appear before the Governor in Council but every petition and cross-petition lodged in due time shall be taken into

consideration by the Governor in Council who may direct that a re-building certificate be given or be not given as he may think fit in his absolute discretion.

“(3) The decision of the Governor in Council shall be final.”

Section 3E reads:—

“3E (1) Within one month after the giving of a re-building certificate by the Director of Public Works, it shall be lawful for the lessee, notwithstanding any contractual tenancy, to serve in manner specified in section 32 a notice in the prescribed form calling upon all persons in occupation of the premises peaceably to quit the same on or before the expiration of the prescribed period of two months from the giving of the said certificate: Provided that where a new contractual tenancy exists in respect of which the period of notice to be given exceeds one month the prescribed period of two months shall be extended if necessary to enable notice in the prescribed form to operate as a notice to quit under the contractual tenancy, which such notice shall in such case be deemed to be.

(2) Upon the expiration of the prescribed period the person who is in law or in equity the lessee of the Crown shall be entitled to vacant possession of the premises to which the re-building certificate relates in like manner and with the like remedies as if an order for possession thereof had been made under section 18, and the provisions of section 24 shall apply upon production of the re-building certificate and of a statutory declaration that the provisions of subsection (1) have been complied with, in like manner as they apply upon production of a copy of an order of a tribunal under section 24.”

In the Definition section of the Ordinance it is provided that:—“lease” or “tenancy agreement” includes every agreement for the letting of any premises whether oral or in writing. One part of the definition of “tenant” is that it includes a sub-tenant.

Further mention must now be made of the terms of the agreement made between the Director and the lessee in 1955. The document of the 7th June, 1955, recorded the “Particulars and conditions for the grant of a new Crown lease of Kowloon Inland Lot No.” The particulars were as follows:—

*“First Schedule*

PARTICULARS OF THE NEW LOT

Registered No.	Situation	Boundaries	Area in sq. ft.	Annual Rental	Premium
Kowloon Inland Lot No. 6516	Temple Street, Kowloon	As per plan signed by the Lessee Area coloured red	2,950	From 25.12.51 \$270.00	\$70,800.00

*Second Schedule*

PARTICULARS OF THE OLD LOT TO BE SURRENDERED

Kowloon Inland LOT No. 63 Sec. A.R.P.”

There followed certain general and special conditions. The first three general conditions were as follows:—

“(1) A Surrender to the Crown of the old lot together with all rights of way and other rights and easements (if any) used and enjoyed therewith shall be executed by the Lessee at his own expense and without payment or compensation such Surrender to be made when required by and in a form to be approved by the Land Officer.

“(2) The Lessee shall pay into the Government of Hong Kong the sum of \$70,800·00 as premium for the grant of the new Crown Lease by instalments (incorporating interest at 5 per cent. per annum) in accordance with Special Condition (b) hereinafter contained.

“(3) Crown Rent for the new Lot commencing from the date of this agreement shall be as specified in the First Schedule and shall be payable by equal half-yearly payments on the 24th day of June and the 25th day of December the first half year’s rent or a due proportion thereof being payable on the next half-yearly date following the date hereof.”

Provided that the conditions were complied with to the satisfaction of the Director and the Land Officer the lessee was to be entitled to a lease of the new Lot for a term of 150 years from the 25th December, 1876, and it was provided (see condition 4 (b)) that in the event of more than one building being erected on the Lot the lessee would be required to take up a separate lease for the site of each separate building.

General condition 4 (c) was in the following terms:—

“4 (c) Pending the issue of such new Lease the tenancy of the new Lot shall be deemed to be upon and subject to and such new Crown Lease when issued shall be subject to, and contain, all Exceptions, Reservations, Covenants, Clauses and Conditions as are contained in the existing lease or agreement for tenancy under which the same is held as varied modified or extended by the General and Special Conditions herein contained, and a covenant to provide for the payment by instalments of the balance of the premium then remaining unpaid.”

The exact boundaries of the new Lot were to be determined by the Director before the issue of the Crown lease.

The first part of general condition 6 (a) was as follows:—

“6 (a) The Lessee of the Lot shall develop the same by the erection thereon of the building(s) specified in Special Condition (c) with such materials as may be approved by the Director of Public Works, and in all other respects in accordance with the requirements of the Special Conditions and the provisions of all Ordinances, Byelaws and Regulations relating to buildings or sanitation as shall or may at any time be in force in the Colony, such buildings to be completed before the expiration of 24 calendar months from the date hereof and shall expend thereon a sum of not less than \$200,000·00 (such sum to exclude moneys spent on site formation, foundations, access roads, and other ancillary works) : . . .”

It was further provided (by general condition 6 (b)) that the fulfilment by the lessee of his obligations under the general and special conditions was to be deemed to be a condition precedent to the grant or continuance of the tenancy. General condition 9 gave the Crown a right to retain any premium that the lessee might have paid and to re-enter and take possession of the new Lot without payment or compensation to the lessee in respect of the value of the land or any buildings on it if the lessee neglected or failed to comply with any of the general or special conditions.

Special condition (a) was in the following terms:—

“(a) The lessee, his executors, administrators and permitted assigns shall not assign, underlet or part with the possession of or otherwise dispose of the new lot or any part thereof or any interest therein or enter into any agreement so to do unless and until he has in all respects observed and complied with the General and Special Conditions to the satisfaction of the Director of Public Works and the Land Officer and shall not mortgage or charge the new lot except by way of a Building Mortgage in connection with the development thereof. The form of Building Mortgage shall be approved by the Land Officer and every assignment, mortgage, charge, sub-letting or other alienation of the new lot or any part thereof shall be registered at the Land Office.”

The memorandum of agreement was signed by the lessee and by the Director and was in the following terms:—

“ MEMORANDUM OF AGREEMENT

Between KWONG SIU KAU ( ) of No. 44 Bonham Strand ground floor Hong Kong Merchant (the Lessee) of the one part and the Director of Public Works for and on behalf of the Governor of the other part

*Whereby It Is Agreed* that the Lessee shall Surrender the Lot and premises set out in the Second Schedule of the foregoing particulars and shall be entitled to a Lease of the new Lot described in the First Schedule subject to and on the terms and conditions hereinbefore contained.

C/R No. 5206

Dated this 7th day of June, 1955.”

More than a year after the signing of the memorandum of agreement the lessee made application (on the 11th June, 1956) to the Director for a re-building certificate. He made such application in reliance upon the provisions of paragraph 3A of the Ordinance. In order that the lessee should be entitled to rely upon those provisions the position would have to be (1) that the lessee was liable to the Crown under a building covenant (2) that compliance with the covenant involved the demolition of premises subject to the Ordinance and (3) that the lessee was in law or equity the lessee of the Crown in respect of the premises.

It may here be said that the tenants and sub-tenants asserted in the action that there was no “ covenant ” to build and furthermore they said, as will be more particularly mentioned later, that the memorandum of agreement was void and of no effect in that it was not made by the Governor under the Public Seal of the Colony.

The application of the 11th June, 1956, having been made by the lessee the Director took it into consideration and on the 20th July, 1956, he delivered written notice to the lessee of his intention to give a re-building certificate (see paragraph 3A (2) of the Ordinance).

The lessee then complied with the requirement indicated in paragraph 3B (1) and served notices of the Director's intention. The tenants and sub-tenants then appealed by way of petition to the Governor in Council. There followed a cross-petition by the lessee to the Governor in Council. (See paragraph 3B (2) and (3).) The requirements as to time were in each case satisfied.

If for present purposes it is assumed that the agreement of the 7th June, 1955, was not void and if it is assumed that the lessee brought himself within the wording of paragraph 3A (1)—the position then was that a decision as to the granting of a re-building certificate rested within the absolute discretion of the Governor. When the two years period from the 7th June, 1955, was nearing its termination the Government on the 20th March, 1957, granted to the lessee (subject to some variation of other terms) an extension of time to the 28th June, 1958, within which to fulfil his obligations to build.

By the 9th April, 1957, no decision had been taken by the Governor in Council in regard to the petitions and the cross-petition presented to him. Then by the Landlord and Tenant (Amendment) Ordinance 1957 (No. 14 of 1957), which was to be deemed to have had effect as from the 9th April, 1957, sections 3A, 3B, 3C, 3D and 3E of the Landlord and Tenant Ordinance above referred to were repealed. There was no express provision which enabled consideration to be given to any pending petitions or cross-petitions or which permitted the subsequent giving of any re-building certificate.

In view of this repeal on the 9th April, 1957, the issue was raised in the action as to whether the provisions of the Interpretation Ordinance became applicable which read:—

- “ 10. The repeal of any enactment shall not—
- (b) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or
  - (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;
  - (e) affect any investigation, legal proceeding or remedy in respect of any such right.”

It will be observed that the provisions cited correspond with provisions contained in section 38 of the Interpretation Act, 1889.

The subsequent events were that on some date before the 12th October, 1957 (but after the repeal of sections 3A to E) the Governor directed that a re-building certificate be given. On the 12th October the Director gave the lessee a re-building certificate under section 3A (1) by which he certified that in his opinion it was reasonable that the building covenant relating to 230–236, Temple Street, should be complied with and that the lessee (who was referred to as “ the Crown lessee of this lot ”) should be given vacant possession. Thereupon the lessee, claiming to be entitled to follow the procedure which had been set out in section 3E (1), served notice to quit in prescribed form calling upon all persons in occupation of the premises to quit within two months and after the expiration of that time he claimed to be entitled to vacant possession of the premises.

The tenants and sub-tenants thereupon commenced proceedings (on the 10th December, 1957) against the Director and the lessee. They presented three main contentions viz. (1) that after the repeal of sections 3A to E the Director had no legal authority to issue a re-building certificate (2) that the purported agreement of the 7th June, 1955, was null and void in that it was contrary to clause 13 of the Letters Patent of the Colony of Hong Kong in that it was a disposition of land not under the hand of the Governor and that consequently section 3A never applied or came into operation so as to authorise the Director to issue a re-building certificate (3) that in the alternative even if the re-building certificate was validly issued—the sub-tenants were protected from eviction under the provisions of the Landlord and Tenant Ordinance and (under section 23) became direct tenants of the lessee. The plaintiffs asked for relief in the form of declarations and injunctions appropriate to their contentions.

Article XIII of the Letters Patent dated the 14th February, 1917, constituting the office of Governor and Commander-in-Chief of the Colony was in the following terms:—

- “ XIII. The Governor, in Our name and on Our behalf, may make and execute, under the public seal of the Colony, grants and dispositions of any lands which may be lawfully granted or disposed of by Us. Provided that every such grant or disposition be made in conformity either with some law in force in the Colony or with some Instructions addressed to the Governor under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, or with some regulation in force in the Colony. Nothing in this article shall be construed as preventing the enactment of laws by the Legislature of the Colony regarding the making and execution of such grants and dispositions.”

By the Hong Kong Letters Patent 1960 a new Article XIII was substituted for the Article as just quoted but in this litigation it is the Article as it formerly stood that applies.

The learned Judge (Gregg, J.) in the Supreme Court held that the agreement of the 7th June, 1955, was not technically an express “ grant or

disposition" of land as was contemplated by Article XIII but was rather in the nature of a binding preliminary agreement for a lease of Crown land which gave no right of assignment and which did not need to be signed by the Governor himself under the Public Seal of the Colony. He held that the re-building condition in condition 6 of the agreement was a "covenant" for the purposes of section 3A of the principal Ordinance. Though there had been a repeal of sections 3A to E he considered that the lessee's position was preserved by section 10 of the Interpretation Ordinance firstly because the application for a re-building certificate constituted something "duly done" under the repealed sections and secondly because it amounted to an acquired right within section 10 (c) to have his claim determined and that in the result the re-building certificate was validly given. Lastly the learned Judge held that an order for "possession" under section 18 as referred to in paragraph 3E (2) of the Ordinance could only mean, having regard to the wording of sections 3E and 3A, an order for vacant possession which meant an order ejecting all tenants including sub-tenants. Holding therefore that the lessee was entitled to vacant possession of the premises he dismissed the action with costs.

The tenants and sub-tenants successfully appealed against this decision. The judgments in the Appellate Division were delivered on the 31st December, 1959.

Blair-Kerr, J., held that no particular right was conferred by section 3A (1) of the Ordinance and that the existence of a building covenant gave a lessee no more than a privilege to apply under the procedure set out and that the fact that there had been an application for a re-building certificate did not give the applicant a "right" to the continuance of the procedure after a repeal and that he had no "right acquired" or "accrued".

Mills-Owens, J., held that at the date of the repeal of the relevant sections of the Ordinance the lessee had no vested right but had a mere hope or expectation of obtaining a re-building certificate and that the fact that the Director had given notice of his intention to issue a re-building certificate did not improve the lessee's position. The learned Judge considered that when sections 3A to E were repealed the position of a landlord of protected premises became as it was before those sections were enacted in 1953: if he wished to re-build he could in general only secure vacant possession upon obtaining an order which would invariably be conditional upon the payment of compensation to the tenants.

Both learned Judges were of the opinion (agreeing with Gregg, J.) that if the re-building certificate had been validly issued the resulting steps taken by the lessee would have enabled him to secure vacant possession against the sub-tenants as well as against the tenants.

In regard to the questions as to whether the agreement of the 7th June, 1955, was or was not a "disposition of land" and as to whether it was competent for the Director to enter into the agreement on behalf of the Governor Mills-Owens, J., held (with the concurrence of Blair-Kerr, J.) that the agreement was a purported "disposition" within Article XIII which it was not competent for the Director to enter into on behalf of the Governor in the absence of enabling legislation. He further held that the receipt of instalments of the premium and rent paid by the lessee was insufficient to amount to a ratification by the Governor of the agreement if it was originally void.

Before their Lordships' Board the appellants submitted two main contentions. In the first place they submitted that the agreement of the 7th June, 1955, was valid and effective as between the parties to it at least to the extent to which there was thereby imposed upon the lessee an obligation to re-develop. They submitted that the agreement was merely an agreement for a lease and was not a "disposition of land" within the meaning of Article XIII and would not become a disposition until the lessee had established his right to specific performance. **If however, because** of the provisions of Article XIII, the agreement was not originally binding upon the Crown, they submitted that by the acceptance and collection of rent and

of the other monies due under the provisions of the agreement the agreement had been ratified by the Crown. Alternatively they submitted that even if the agreement was void as a disposition of land the obligation to re-develop was valid and attached to the yearly tenancy of the premises which by possession and the payment of rent was established in favour of the lessee.

In the second place they submitted that the lessee had an accrued right to possession under the Ordinance prior to the repeal of sections 3A to E and that in consequence of the provisions of the Interpretation Ordinance that right survived the repeal. There was they submitted an accrued right in the lessee in certain events which in fact happened to have vacant possession of the whole of the premises: and there was an accrued right in the lessee to have his application for a re-building certificate determined in accordance with the provisions of sections 3A to 3E.

It becomes necessary to consider whether on the 9th April, 1957, the lessee possessed some "right" under the Ordinance which by reason of the provisions of the Interpretation Ordinance remained unaffected by the repeals which had effect as from that date. This can be considered on the assumption (for the purposes of dealing with this point) that the lessee could bring himself within the provisions of 3A (1) i.e., if it is assumed (a) that the lessee became liable to the Crown under a building covenant (b) that compliance with the covenant involved the demolition of premises (c) that such premises were subject to the Ordinance and (d) that in respect of such premises the lessee was in law or in equity the lessee of the Crown.

It was submitted on behalf of the lessee that after the Director had given notice (see section 3A (2)) of his intention to give a re-building certificate some kind of a right (even though one that might be defeated) to such a certificate was then acquired by the lessee. Their Lordships cannot accept this view. After the Director gave notice of his intention to issue a certificate there could have been no giving of it until certain conditions were satisfied. The lessee was under obligation to give notices as required by 3B (1). Had there been no appeals by tenants and sub-tenants and had the time for appeals expired the Director would then have been in a position to give a certificate. Had those been the circumstances then, inasmuch as the Director had indicated what his intention was, doubtless he would in fact have given his certificate. But the Ordinance did not impose an obligation upon the Director to give a certificate in accordance with his declared intention: it merely provided that he could not follow up his declared intention unless and until certain conditions were satisfied. Though in the events that happened this point does not call for decision it would not seem that in any circumstances any right to a certificate could arise at least until, after notices given, the time for appeals by tenants and sub-tenants went by without there being any appeal. In a case however where (as in the present case) the giving of notices under section 3B (1) resulted in appeals by way of petition to the Governor, followed by a cross-petition to the Governor presented by the applicant, then any decision as to the giving of a re-building certificate no longer rested with the Director. In the present case the position on the 9th April, 1957, was that the lessee did not and could not know whether he would or would not be given a re-building certificate. Had there been no repeal, the petitions and cross-petition would in due course have been taken into consideration by the Governor in Council. Thereafter there would have been an exercise of discretion.

The Governor would have directed either that a certificate be given or be not given and the decision of the Governor in Council would have been final. In these circumstances their Lordships conclude that it could not properly be said that on the 9th April the lessee had an accrued right to be given a re-building certificate. It follows that he had no accrued right to vacant possession of the premises. It was said that there were accrued rights to a certificate, and consequently to possession, subject only to the risk that these rights might be defeated and it was said that in the events that happened the rights were not defeated. In their Lordships' view such an approach is not warranted by the facts. On the 9th April the lessee had no *right*. He had no more than a *hope* that the Governor in Council would give a favourable decision. So the first submission fails.

The further and perhaps more attractive submission which was presented on behalf of the lessee was that on the 9th April he had an accrued right to have the matter taken into consideration by the Governor in Council and that such right was (by reason of the Interpretation Ordinance) unaffected by the repeal, and that consequently the Governor in Council necessarily acted after the 9th April and that in the result a re-building certificate of full validity was issued, which led to entitlement to vacant possession of the premises. These submissions raise an interesting question. At the time of the repeal all the procedure under section 3A and 3B had been followed and it can properly be said that the stage had been reached when the lessee could expect and was entitled to have the petitions and cross-petition considered in due course by the Governor in Council and to have a decision reached. Could such expectation or entitlement be regarded as a right or a privilege, either acquired or accrued, within the meaning and intendment of the Interpretation Ordinance? Or was such expectation or entitlement something that necessarily came to an end at the time of the repeal? There might have been some express provision in the 1957 repealing Ordinance by which it could have been ordained that petitions and cross-petitions awaiting consideration should receive such consideration in spite of the repeal, and that subsequently an effective re-building certificate could be given. The argument for the lessee is that the provisions of the Interpretation Ordinance made any such express enactment unnecessary. The argument for the tenants and sub-tenants is that the repeal of sections 3A to E put an end to certain special methods of obtaining vacant possession without paying compensation in cases where lessees of the Crown had obligations under building covenants. The tenants and sub-tenants did not concede that, assuming that a valid re-building certificate had been given immediately before the 9th April, the steps under section 3E could thereafter have been taken so as to result in a right to vacant possession: they recognised however that very different considerations might in such circumstances apply. The question so raised does not arise for decision.

Was the lessee therefore possessed on the 9th April of a "right" (or privilege) within the meaning of the Interpretation Ordinance? In their Lordships' view the entitlement of the lessee in the period prior to the 9th April to have the petitions and cross-petition considered was not such a "right". On the 9th April the lessee was quite unable to know whether or not he would be given a re-building certificate, and until the petitions and cross-petition were taken into consideration by the Governor in Council no-one could know. The question was open and unresolved. The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a re-building certificate even though he may have had grounds for optimism as to his prospects.

It is to be observed that under paragraph 10 (e) a repeal is not to affect any investigation legal proceeding or remedy "in respect of any such right". The right referred to is the right mentioned in 10 (c) i.e. a right acquired or accrued under a repealed enactment. This part of the provisions in paragraph (e) of section 10 does not and cannot operate unless there is a right as contemplated in paragraph (c). It may be therefore that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon a repeal the former is preserved by the Interpretation Act. The latter is not. Their Lordships agree with the observation of Blair-Kerr, J., that:—

"It is one thing to invoke a law for the adjudication of rights which have already accrued prior to the repeal of that law; it is quite another matter to say that, irrespective of whether any rights exist at the date of the repeal, if any procedural step is taken prior to the repeal, then, even after the repeal the applicant is entitled to have that procedure continued in order to determine whether he shall be given a right which he did not have when the procedure was set in motion."

A consideration of the authorities confirms their Lordships in the view which has been expressed. A case much relied upon on behalf of the lessee was *Heston and Isleworth Urban District Council v. Grout* [1897] 2 Ch. 306. In that case notices had been given to frontagers in a private street requiring them to sewer and make up. That was in October, 1891. The notices had been given under the authority of section 150 of the Public Health Act, 1875, which empowered the local authority in the event of the notices not meeting with compliance to execute the works themselves (if they thought fit) and to recover the expense from the frontagers according to the frontage of their premises. Default was made by the owners in complying with the notice and the local authority resolved to do the work by means of a loan. In 1892 they applied to the Local Government Board for power to raise a loan in order to execute the improvements. Sanction to the raising of a loan was delayed and in June, 1894—nearly three years after the giving of the notices—the local authority resolved to adopt the Private Street Works Act, 1892, which by section 25 provided that from its adoption in any district section 150 of the Public Health Act, 1875, should not apply to that district. The 1892 Act was adopted as from August 1st, 1894. The loan was sanctioned in November, 1894, and the work was subsequently done by contractors who contracted with the local authority. The expense was apportioned and the local authority took out an originating summons to obtain a declaration that a particular apportioned sum was due from a frontager. The claim succeeded before North, J., and his decision was affirmed in the Court of Appeal. In his judgment Lindley, L.J., referred to the Interpretation Act and continued:—

“ But that Act appears to me to apply; for I cannot help thinking that when s. 150, by force of s. 25 of the Act of 1892, ceases to apply to this district as from August 1, 1894, that is a repeal of s. 150 as from that day so far as regards this district. That, I think, lets in the provision contained in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, which says: ‘ (2) Where this Act, or any Act passed after the commencement of this Act, repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . (b) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed.’ That to my mind preserves that notice and the effect of it. Then s. 38 goes on to say: ‘ or (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed.’ If there would otherwise be any doubt about the question, it appears to me that those enactments are amply sufficient to remove such doubt. I cannot come to the conclusion which Mr. Macmorran and Mr. Ribton have urged upon us, that the true construction of the Act of 1892 is to render the previous notice and everything done under it absolutely futile for future purposes. Of course, after the Act of 1892 comes into force in this district, no fresh notice under s. 150 can be given, and no notice can be given involving the consequences mentioned in that section; but it appears to me that the Act of 1892 does not at all affect the validity of a notice given before it came into operation in a district.”

In that case the position on the 1st August, 1894, was that the frontagers, being in default, were under a liability and the local authority had a right. The liability of the frontagers was none the less a liability even though no claim in money could be presented against them unless and until the local authority executed the works. So also the local authority possessed rights on the 1st August, 1894. They possessed rights against the frontagers even though they could present no money claims unless and until they executed the necessary works.

The position in the present case is different. The validity of “ anything duly done ” before the 9th April, 1957, was not affected by the repeal. Accordingly the procedural steps which had been taken as a preliminary to obtaining a decision of the Governor were not invalidated: they were however rendered abortive, for the repeal ended the hope or possibility of being given a re-building certificate. The lessee enjoyed no right which was kept alive.

He did not have any right even of a contingent nature. He was not in the position of the local authority in the case just cited for they possessed an existing right (corresponding with an existing liability in the frontagers)—even though the enforcement of the right depended upon their taking certain steps.

Reliance was also placed upon a passage occurring in the judgment of the Board in *Abbott v. The Minister of Lands* [1895] A.C. 425. The Lord Chancellor (at page 431) said:—

“It may be, as Windeyer, J., observes, that the power to take advantage of an enactment may without impropriety be termed a ‘right’. But the question is whether it is a ‘right accrued’ within the meaning of the enactment which has to be construed.

“Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words ‘obligations incurred or imposed.’ They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a ‘right accrued’ within the meaning of the enactment.”

Reliance was placed on behalf of the lessee in the present case upon the words “without any act done by an individual towards availing himself of that right” and it was argued that in the present case steps had been taken by the lessee which could be regarded as acts done towards availing himself of a right to have a re-building certificate. In *Abbott v. The Minister of Lands* the point now being discussed in the present case did not arise and their Lordships cannot ascribe to the words quoted above the wide significance suggested on behalf of the lessee. In the present case the lessee had taken procedural steps in the hope of being able to obtain a re-building certificate but at the date of the repeal he had no accrued right.

The case of *Reynolds v. Attorney-General for Nova Scotia* [1896] A.C. 240 does not assist the lessee. In that case the appellants had a licence under a section of a statute and after a repeal of the section applied under it for a renewal of their licence. It was held that the power to renew had gone and that, even if the repealing provision could be so construed as not to interfere with accrued rights, the appellants had under the repealed section a privilege to get an extension but no accrued right.

The case of *Hamilton Gell v. White* [1922] 2 K.B. 422 furnishes an example of an accrued right and the facts are in contrast with the facts in the present case. In that case the landlord of an agricultural holding gave his tenant notice to quit: he gave it because he wished to sell. The tenant then became entitled to compensation upon the terms and subject to the conditions of section 11 of the Agricultural Holdings Act, 1908. The tenant duly complied with one condition. He duly gave notice of his intention to claim compensation. Another condition was that he should make his claim within three months of quitting. But before the time for him to quit arrived section 11 was repealed. He did nevertheless make his claim within three months of quitting. It was held that his claim could proceed and that he could recover compensation under section 11. He had an accrued right which resulted from the fact of the landlord having given a notice to quit in view of a sale. The conditions imposed by section 11 were conditions not of the acquisition of the right but of its enforcement. As he had an accrued right it was preserved by the operation of the Interpretation Act and further as he had an accrued right the repeal did not affect the investigation in respect of that right. The investigation was by arbitration. Scrutton, L.J., said (at page 430):—

“In the course of that arbitration he would no doubt have to prove that that right in fact existed, that is to say that the notice to quit was given in view of a sale, and he would also have to prove the measure of his loss. But he was entitled to have that investigation, which had been begun, continue, for s. 38 expressly provides that the investigation shall not be affected by the repeal.”

The difference between that case and the present is that in that case a right existed and the investigation, which was unaffected, was an investigation in respect of it ; whereas in the present case no right existed or had accrued, and the intended investigation which had not taken place before the time of the repeal (i.e. the consideration by the Governor in Council) was an investigation in order to decide whether a right should or should not be given. It was not itself a right or privilege which was preserved by the Interpretation Ordinance.

Their Lordships have considered other decisions such as *Moakes v. Blackwell Colliery Co. Ltd.* [1925] 2 K.B. 64, *Briggs v. Thomas Dryden & Sons* [1925] 2 K.B. 667, and *Boddington v. Wisson* [1951] 1 K.B. 606 and can find no support for any view contrary to that which their Lordships have expressed.

The result is therefore that when sections 3A, 3B, 3C, 3D and 3E were repealed on 9th April, 1957, the lessee had no right to vacant possession under those sections : and he could only recover possession under the sections remaining in force which provide for compensation.

As their Lordships' conclusion on this issue is decisive of the appeal it is not necessary to express any final view in regard to the other issues. The issue in regard to Article XIII depends upon an examination of the nature and contents of the agreement of the 7th June, 1955—an agreement which is peculiar to this case. If that agreement was no more than an agreement thereafter to grant a lease their Lordships would not regard it as being a grant or disposition of land. It is one thing to make a grant or disposition of land. It is quite another thing to enter into an agreement to make thereafter a grant or disposition of land. A mere agreement thereafter to grant a lease would not, their Lordships conclude, be a grant or disposition within Article XIII. This, however, does not conclude this case because there can be no doubt that there are many provisions in the document of the 7th June, 1955, which might be said to amount to an immediate grant of a present interest in land which was of such a substantial character as to be a grant or disposition of land. Thus the document provided for a surrender of what was called the " old lot ". The lessee became entitled to occupy the " new lot ". That new lot had boundaries as designated in a plan which the lessee signed. He became obliged to pay rent at a new rate. He became obliged to pay a first instalment of \$3,900 of a total premium of \$70,800 within fourteen days of the 7th June, 1955, to pay a second instalment (of \$3,900) on the 25th December, 1955, and to pay subsequent instalments annually. He further became under obligation to build. He had a period of two years within which to build. (That period was later extended.) When he had built he would become entitled to a long lease or leases. He had security upon specified terms until he built; after he had built he was to be granted a formal lease on the terms which were in great detail set out in the written agreement. By conferring on him these large rights for this substantial period the agreement might itself be a grant or disposition of land. But their Lordships feel that it is unnecessary to come to a final conclusion on this point because for the reasons earlier given it follows that on the 12th October, 1957, there was no validity in what purported to be a re-building certificate which was given to the lessee.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.

to the Davis Council

1911

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1914

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1916

In the Privy Council

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THE DIRECTOR OF PUBLIC WORKS  
AND OTHERS

v.

HO PO SANG AND OTHERS

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