

sider first whether a surrender would be desirable at all, and then, if he thought it might be desirable, to negotiate as to the terms on which the new lease should be effected—that is to say, the terms on which the new lease should be granted. When the terms were settled, the agreement for surrender and for the new lease would be one transaction, and would be carried out by the grant and acceptance of the new lease, which would operate as a surrender of the old one. The Trustee, however, clearly has the right to say that he will not enter into any negotiations for surrender at all unless he is satisfied there is reasonable prospect that the terms of the new lease will be such that the acceptance of a surrender will benefit his *cestui que trusts*. Does, then, the 7th section of the Act of 1887 make the acceptance of the surrender by the Trustee, which was previously optional, compulsory upon him. That section enacts that on the surrender of a lease under section 13 of the Act of 1884 a new lease thereunder may be granted to the former lessee, at a rental to be computed on the value of the land comprised in the lease less the value of any improvements thereon, upon terms to be decided by arbitration. It will be observed that section 7 does not repeal section 13, but refers to it as the section under which the surrender is to be made and the new lease granted. If the parties can without arbitration come to an agreement under section 13, computing the rent on the improved value of the land, there is nothing that I can see in section 7 to prevent them doing so. If, under section 13, the acceptance of the surrender is optional, then, as the surrender referred to in section 7 is a surrender under section 13, the acceptance of a surrender would still remain optional, although arbitration under section 7 might be resorted to to decide the terms of the new lease, unless the provision of the section that the rent is to be computed on the value of the land apart from the improvements is a clear indication of the intention of the Legislature that the Trustee must accept a surrender and grant a new lease. I do not think that such an indication of intention appears. Apart from the fact that the Legislature has expressly connected section 7 with section 13, and that the acceptance of a surrender under the latter section is clearly optional, the word “may” in section 7 *primâ facie* gives the Trustee a discretion.

The consequence of holding that the meaning which is *primâ facie* to be applied to that word did not apply, would be to decide that the Legislature intended to compel a trustee to sacrifice the interests of his *cestui que trusts* at the instance of a party with whom he had contracted on their behalf, and to confiscate for the benefit of a lessee that to which the lessor by the terms of the contract of the lease was entitled to. In order to deprive persons of rights to which they have become entitled by contract the clearest indication of intention on the part of the Legislature is necessary. The result, therefore, of holding the section otherwise than as giving an option to the trustee is the strongest argument that the *primâ facie* meaning of the word “may”—viz., that it gives an option, is to be adhered to. By the implied terms of the original lease, the improvements, in the absence of an agreement to the contrary, would at the expiration of the term become the property of the lessor. This, of course, was known to the lessees when they made their bargain for the lease, and the rent and other terms of the lease would be adjusted upon this basis. There is no suggestion that the parties in making the original bargain were not on equal terms. Of the two parties, the European lessees would presumably have a better knowledge of the effect of the instrument than the Native lessors. If the section is to be construed as contended for by the defendants, a lessee could compel the trustee the day before the term expired to grant him a new lease, with the rent computed on the value of the land apart from the improvements, and so deprive the Native owners of what they had originally bargained for. It may be said that any new lease under section 7 must inevitably be to the detriment of the Native owners, and therefore the Legislature must have intended to give an absolute right to the lessees to surrender and obtain a new lease, as if they had no such right the section must be inoperative, as the trustees could never be expected to consent to what was to the detriment of the Native owners, if they had any option to refuse to consent. In the absence of express words compelling the trustees to consent, I should hesitate before putting this construction upon the section, even if the necessary effect of a new lease were to injuriously affect the interests of the lessors. I do not, however, think that this would be in all cases the necessary effect of a new lease: the old lease might have several years to run; the rent computed on the value of the land, apart from the improvements, might be considerably more than the rent originally reserved. In such a case it might be a good thing for the lessors to agree to an extended term at the increased rent and to leave the improvements out of consideration. I think that it would be the duty of the trustee, before agreeing to accept a surrender and grant a new lease upon terms to be decided by arbitration under section 7, to