

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of James Dunbar Smith v. Her Majesty the Queen, from the Supreme Court of Queensland ; delivered March 12, 1878.

Present :

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

AN action of ejectment was brought by the Crown against the tenant in possession under a statute of the Colony of Queensland, entitled "The Crown Remedies Act, 1874," to recover possession of a plot of land containing 871 acres. The Defendant (the Appellant) appeared by leave of a Judge to defend the action, claiming the land under a lease from Her Majesty for a term of 10 years from January, 1871. On behalf of the Crown it was contended that the lease had been forfeited. The Jury found a verdict for the Crown.

An application was made to the Supreme Court for a rule nisi to set aside the verdict and enter a non-suit or verdict for the Defendant, or for a new trial, on the ground of the improper admission and rejection of evidence, and misdirection.

This rule was refused by the Supreme Court, and from the order refusing the rule the present appeal is preferred.

It appeared that the Defendant, who was the selector under "The Crown Lands Alienation Act, 1868," of a lot numbered 128, in the Darling Downs district, made an additional selection of land adjoining

thereto numbered 198—the plot of land now in dispute—by application in the proper form on the 28th April, 1871, and obtained from the Crown a lease under the provisions of that Act for a term of 10 years from the 1st July, 1871, at the rent mentioned in the 2nd Schedule to the Act. On the 12th August, 1873, he obtained a certificate from the then Commissioner of the District of compliance with the requirements of section 51, sub-sections 6 and 7 (applying to pastoral and agricultural lands respectively), such as to entitle him to a grant in fee simple on payment of the balance of the 10 years' rent. This balance has not been paid.

On the 2nd December, 1874, the then Acting Commissioner (Mr. Coxen) made a report to the Secretary for Public Lands in the following terms :

“I have the honour to report that it has been proved to my satisfaction that the lessee of the selection, as per margin,* has abandoned the same and failed in regard to the performance of the conditions of residence during a period of six months.”

And on the 8th December following the Governor issued a proclamation declaring the lease to be absolutely forfeited and vacated.

This report and proclamation purported to have been made under the Crown Lands Alienation Act, section 51, sub-section 5.

The question in the cause is whether the Proclamation was warranted by the Statute.

Section 51 provides that after land has been selected, surveyed, and approved by the Minister of Lands, “the Governor” shall issue to the selector a lease of the land subject to the conditions and provisions hereinafter contained.

After provisions relating to the term of the lease (10 years)—the rent, forfeiture for non-payment, and power to defeat that forfeiture, to the erection of boundary marks and other matters—there follows sub-section 5, which is in these terms :

“The lessee of any agricultural or pastoral land, his agent or bailiff, shall reside on such selection continuously and *bonâ fide* during the term of his lease, provided that if at any time during the currency of a lease it shall be proved to the satisfaction of the Commissioner that the lessee has abandoned his selection and failed in regard to the performance of the conditions of residence during a period of six months, it shall be lawful for the Governor to declare the lease absolutely forfeited and vacated.”

* Reg. No. 198. District. Dalby. Lessee, J. D. Smith.

Sub-section 6 is in these terms :

“(6.) If within three years from the date of selection by lease of any pastoral land the lessee shall prove by two credible witnesses, to the satisfaction of the Commissioner, that he has resided in person or by bailiff on the said land for a period of two years, and that a sum at the rate of not less than 10s. per acre for first-class pastoral land and 5s. per acre for second-class pastoral land has been expended in substantial improvements on the said land, or that he has fenced in the whole of the said land with a good and substantial fence, then the Commissioner shall issue a certificate that the conditions aforesaid have been duly performed, and the said lessee shall be entitled to a deed of grant in fee simple on the payment of the balance of the ten years' rent.”

Sub-section 7 applies to leases of agricultural land, and is in nearly the same terms. Then follows sub-section 8 :

“(8.) No lease shall be transferred or assigned until the original selector has obtained a certificate from the Commissioner that he has duly performed the conditions entitling him to a deed of grant in fee simple on the due payment of the ten years' rent. But after the issue of such certificate the lessee may transfer his lease by application to the Minister for Lands, in the form contained in the Schedule 'G' to this Act, and the payment of a fee of 10s. for the registration of every such transfer.”

Sub-section 9 contains some further provisions relative to the acquiring a grant not material to the present purpose.

Section 55 of the Act is in these terms :

“55. It shall be lawful for any selector of any piece of land or his legal alienee to make additional selection of lands adjoining to his first selection or to each other, but not otherwise, and not exceeding in the aggregate, including such first selection, 640 acres of agricultural land, 2,560 acres of first-class pastoral land, and 7,680 acres of second-class pastoral land, and subject to all the conditions applicable to such first selection except residence: Provided that in the measurement of such aggregate the proportion of frontage to depth shall not exceed the proportion required by the provisions of this Act in the case of an original selection: Provided also that nothing herein contained shall prevent the sale of the adjoining lands to any other person before such additional selection shall have been applied for.”

It has been contended on behalf of the Appellant:

1st. That he is under no obligation to reside on his selection: because, having taken it as an additional selection under section 55, residence on it has by that section been dispensed with; and further, because, even if that be not so, the certificate he has

obtained under section 51, dispenses with residence after the date of it.

2nd. That if residence is not required sub-section 5 of section 51 does not apply, inasmuch as under that section proof both of abandonment, and of failure to reside, must be made to the Commissioner as a condition precedent to the power of the Government to declare a forfeiture.

3rd. That no proper hearing took place before the Commissioner which would enable the Crown to assert that there had been proof to the satisfaction of the Commissioner, such as is required by the Statute, of either abandonment or non-residence.

It has been contended on the part of the Crown that the words of section 55 enabling a selector to make an additional selection, subject to all the conditions applicable to his first selection, "except residence," must be read with some qualification to this effect: "Provided that he or his transferee shall continue to reside on his first selection," and that the Commissioner has in effect found that the Defendant did not continue to reside on his first selection.

But their Lordships think it would be a departure from all sound rules of construction to import into the clause, which is in itself plain, such a qualification unless it is to be collected by necessary implication from some other expressions in the Act, and none such have been brought to their notice. It is not improbable that the intention of the Legislature may have been that contended for by the Crown, but if so it has not been expressed. If, on the other hand, the intention was to confer upon an original selector the advantage of exemption from residence on his additional selection, perfectly apt language has been used to express it.

Their Lordships hold that section 55 exempts selectors of additional selections from residence upon them. It therefore becomes unnecessary to decide whether or not the Appellant is right in contending that the mere obtaining a certificate under section 54, sub-section 7, exempts the holder from further residence on his selection. They think it, however, well to say that the inclination of their opinion is against the Appellant on this question. The selector entitled to a grant is not bound to pay the balance of rent, or apply for the grant,

and may transfer his lease, or hold it till the expiration of 10 years: until the grant has been obtained, or the 10 years have expired, the "currency of the lease" appears to continue, and sub-section 5 to apply.

It has been contended, however, on the part of the Crown, that the words in sub-section 5, "has abandoned his selection and failed in regard to the performance of his conditions of residence during a period of six months," are to be read distributively; that the failure to reside must be taken to apply only to cases where residence is necessary; and that where residence is unnecessary it is enough for the purpose of forfeiture to prove abandonment, and that abandonment was in this case proved.

It becomes necessary, with reference to this contention, to examine the evidence in the cause together with other sections of the Statute. The evidence of the Crown, as far as is material to the questions their Lordships have to consider, is that of Mr. Coxen, who says that in October, 1874, he made an investigation as to the performance of the conditions of his lease by the Defendant, and that after beginning it he sent the following notice to the Defendant:—

"Public Lands Office.

"Sir,

"2nd November, 1874.

"I have the honour to acquaint you that evidence has been brought before me to the effect that you have not carried out the conditions of residence, either personally or by your agent or bailiff on the selection, as per margin,* and I have to request that you will show cause at the next Land Court to be held at Dalby on 11th November, why I shall not report the abandonment of the said selection, in pursuance of Sub-Section 5 of Section 51 of 'Crown Lands Alienation Act of 1868.'"

that on the application of the Defendant's solicitor he granted an adjournment to the 26th November; that he was then sitting in the Land Court (that is his expression), and that the Defendant's solicitor (Mr. Hart) appeared; that Mr. Hart produced no witnesses, but tendered a statutory declaration by the Defendant that he had resided on the land continuously and *bonâ fide* from the date of his selection; that he had not abandoned it, and had performed all the conditions and provisions of the Act. He proceeds:—

* Reg. No. 198. District, Dalby. County, Aubigny. Parish, West Prairie. Portion, 198. Area.

" He (Mr. Hart) did not produce anything else. He did not say anything about a certificate. I have no remembrance of anything relative to a certificate being mentioned. I intimated to Mr. Hart that that declaration was insufficient to satisfy me of non-abandonment. (That was in the Court-room.) I considered all the evidence before me, including the declaration."

And he further says that what he reported was proved to his satisfaction. On cross-examination he says :—

" Mr. Hart, I think, may have said, ' I believe, Mr. Commissioner, you are sitting as a Land Court under the Act of 1868, and I object'—he said words of the same character. I said, ' Pardon me, I am not doing so. I have called upon these gentlemen to satisfy me that they have not abandoned the land and performed the conditions of residence,' or words to that effect. I think I said, ' It is a mere act of courtesy, which I think one gentleman should show to another.' I believe Mr. Hart said, ' Do I understand you are not sitting as a Commissioners Court under the Act of 1868?' I said, ' Certainly not,' or words to that effect. Mr. Hart then asked for production of the evidence referred to in the notification to Defendant. I said, ' I did not consider it a judicial inquiry on my part in this case.' I said, ' Evidence, or a portion of it, had been forwarded, and I could not produce it.' I remember telling Mr. Hart I did not wish him to be in ignorance of the charge, which was non-residence and abandonment, and I was ready to receive any evidence he might produce to prove the contrary. I also remember saying it should have due consideration by me if he did so before my reporting. Mr. Hart said he couldn't meet evidence the nature of which he didn't know. Mr. Hart, I believe, said, ' I may remind you that you knew beforehand I should require it.' I have no doubt I said I never intended to produce it—there is nothing in the Statute to require it. It was after this he handed me the statutory declaration. I don't remember—but the impression on my mind is I should have told him if he asked the question ' I was not holding a Land Court.' Very likely I might have said, ' I could hold it in my office, as it was simply a Court of Inquiry.' I made no formal announcement in the Court, but it was fully understood by all parties."

The learned Judge rejected evidence tendered by the Defendant that the actual state of facts did not justify Mr. Coxen's report that there had been an abandonment and non-residence, and left to the Jury only these questions :—

" 1. Was it proved to the satisfaction of the Commissioner that the lessee had abandoned his selection ?

" 2. Was it proved to the satisfaction of the Commissioner that the lessee failed to reside during a period of six months ?

" 3. Did the Governor declare the lease absolutely forfeited and vacated ?"

all of which were answered by the Jury in the

affirmative, and a verdict was entered for the Crown.

Section 3 of the "Crown Lands Alienation Act of 1868" provides for the appointment of Commissioners of Crown Lands, who shall have power to exercise the provisions of the Act, and gives the Governor power to declare and define their duties by Regulations.

Section 4 is in these terms:—

"Such Commissioner shall sit at the Land Office of his district at certain stated times to be determined by the Governor in Council."

Section 5 follows:—

"All questions shall be decided by the Commissioner, who shall give his decision in open Court, subject to confirmation by the Governor in Council."

Sections 6 and 7 prescribe the manner in which applications for land shall be made to and dealt with by the Commissioners.

It has been contended on the part of the Crown that the judicial character given to the decisions of the Commissioner by section 5 applies only to such decisions as he is authorized to come to under the sections immediately following, relating to applications for land, and not to such decisions as he may come to under section 51, upon which forfeiture of these lands may be declared, his decisions on questions relating to forfeiture being purely ministerial.

The application of Section 5 is certainly not so limited in terms, nor does it appear to their Lordships to be so limited by reasonable intendment.

If an exercise of judgment is required to determine whether or not a man is entitled to lands by reason of compliance with the provisions of the Act, it is difficult to see why less judgment should be required in determining, what concerns him quite as much, whether or not he has forfeited them by non-compliance. Their Lordships are of opinion that the inquiry to be made by the Commissioners under Section 51, sub-Section 5, is in the nature of a judicial inquiry.

They do not desire to be understood as laying it down that the Commissioner, in conducting such an inquiry, is bound by technical rules relating to the admission of evidence, or by any form of pro-

cedure, provided the inquiry is conducted according to the requirements of substantial justice.

These requirements are well known to our law, and have been enunciated in many cases bearing some resemblance to, though not identical with, the present.

When a Statute enabled a Bishop, if it should appear to his satisfaction, either of his own knowledge, or upon proof by affidavit, that (for various causes) the ecclesiastical duties of a benefice were negligently performed, to require the Vicar to nominate a stipendiary Curate, and the Bishop made a requisition to this effect on the Vicar founded on his own knowledge, without hearing the Vicar, the Court of Common Pleas held the requisition bad. Lord Lyndhurst, in giving judgment, thus expresses himself: "Does not this (the Statute) import inquiry, and a judgment as the result of that inquiry? He is to form his judgment: it is to appear to him from affidavits laid before him; but is it possible to be said that is to appear to him, and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and his property? that he is to come to that conclusion without giving the party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defence?"

Bayley, J., in the course of his Judgment, also observes: "Is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the Judgment is to operate shall have an opportunity of being heard." (*Capel v. Child*; 2. *Crompton and Jervis*, p. 558.)

The same view of the law was expressed by Lord Campbell, who quoted the maxim, "*Qui statuit aliquid, parte inauditâ alterâ, æquum licet statuerit, æquus non fuit*," in *Regina v. the Archbishop of Canterbury* (1. *Ellis and Ellis*, p. 559).

The same doctrine, only varied in expression, has been again and again applied to the conduct of Trustees in deciding on the dismissal of Schoolmasters (see *Phillips' Charity*, 8, *Jurist*, p. 959. *The Fremington School*, 10, *Jurist.*, p. 512).

This doctrine is, indeed, carried somewhat further

in *Cooper v. the Board of Works for the Wandsworth District* (14 C. B., p. 180), wherein it was held that although the Metropolis Local Management Act empowered the District Board to alter and demolish a house, where the builder had neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation, the Board were, nevertheless, unable to execute that power without first giving the person guilty of the omission an opportunity of being heard.

Erle, C. J., in his Judgment, extends the principle somewhat beyond proceedings strictly judicial. He observes: "I fully agree that the Legislature intended to give the District Board very large powers indeed, but the qualification I speak of has been recognized to the full extent. It has been said that the principle that no man will be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding. I do not quite agree to that. The law I think has been applied to many exercises of power, which in common understanding would be not at all more judicial proceedings than would be the act of the District Board in ordering the house to be pulled down."

Assuming the contention of the Crown to be correct, that in such a case as this it would be enough that the Commissioner should be satisfied of abandonment alone, residence being put out of the question, their Lordships would be disposed to say that there does not appear to have been a finding of the Commissioner of abandonment apart from non-residence. But they decide the case upon broader grounds. It appears to them that the Defendant has not been heard in the sense in which "a hearing" has been used in the cases which have been quoted and in many others, and in the sense required by the elementary principles of natural justice. The Commissioner doubtless acted with perfect good faith, but apparently without being aware that he was performing a judicial function, or even a function of a judicial nature. He has not stated upon what evidence he formed his opinion, whether written or *visà voce*, whether direct or hearsay. He refused to furnish the Solicitor of the Defendant with any note or memorandum of that evidence, to give him any information as to who the witnesses against his client were, or even what was the general character

of their evidence. The Defendant could not answer or explain testimony of which he was kept in ignorance, and therefore was not heard in his defence in any proper sense of that term.

It is true that he was summoned to answer general charges of non-residence and abandonment, but a summons to answer charges the evidence in support of which is withheld appears to their Lordships illusory.

Their Lordships are for these reasons of opinion that the Crown failed to establish that there was such a hearing in this case as would enable the Crown to assert that it was proved to the satisfaction of the Commissioner within the meaning of the Act, that the Defendant had abandoned his selection, or had failed in regard to the performance of the conditions of residence, and that consequently the Governor had no jurisdiction to issue the Proclamation of forfeiture. It follows that so much of the rule as prays that the verdict for the Crown be set aside, and a non-suit or verdict be entered for the Defendant, should have been made absolute. It becomes unnecessary to discuss so much of the rule as relates to a new trial.

Their Lordships will therefore humbly advise Her Majesty that the order appealed against be set aside, and that in lieu thereof it be ordered that the verdict for the Crown be set aside, and that a verdict be entered for the Defendant, and that the Defendant have his costs in the Court below, and of this Appeal.