

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeal of Osborne and others v. Morgan, Hall, and D'Arcy, from the Supreme Court of Queensland; delivered 4th February 1888.*

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Present :

LORD WATSON.

LORD FITZGERALD.

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

[*Delivered by Lord Watson.*]

This is an action instituted by the Appellants before the Supreme Court of Queensland, for the purpose of obtaining a judicial declaration that two gold mining leases of areas within the Crocodile Creek gold field, granted by the Governor of the Colony on behalf of Her Majesty to the Respondents Morgan and Hall, are "invalid and void." That is the leading conclusion in the Appellants' statement of claim; and upon it the controversy between the parties turns. There are other conclusions for giving the Appellants possession of certain portions of the leasehold areas in question; but these are consequential merely, and depend upon the affirmance of the Appellants' right to have the leases declared null.

The Appellants, who are twenty in number, allege no title to insist in the action, beyond the fact that each of them is the holder of a docu-

ment, known as a "miner's right," issued to him by the warden of the Crocodile Creek gold field, pursuant to the provisions of "The Gold Fields Act, 1874," and Regulations made in terms thereof by the Governor and Council. The leases which they challenge profess to have been granted in conformity with the provisions of the same statute.

The general policy of the Act, which was passed by the Legislature of Queensland, and received the Royal assent upon the 21st July 1874, is to encourage gold mining within the colony, by giving a certain fixity of tenure to all persons who are willing, either by virtue of a "miner's right" or under a lease from the Crown, to occupy Crown land for that purpose, and to work efficiently and continuously. The Governor is accordingly empowered (Section 21) to proclaim any portion of Crown land to be a gold field; and, when that has been done, Section 23 enacts that the proclaimed field "may be mined in, used, and occupied, according to the provisions of this Act and the Regulations." The duty of framing regulations is (Section 97) committed to the Governor and his Council, subject to this condition, that they are not to be contrary to the Act, but such as may be necessary for giving effect to its provisions, and for the management of the gold fields generally. By Section 2 "Crown lands" are defined as meaning (except when the context otherwise requires) "all lands vested in Her Majesty which have not been dedicated to any public purpose, or which have not been granted in fee, or lawfully contracted to be so granted, or which are not under lease for purposes other than pastoral purposes." It is important to observe that this negative definition is not limited to the state of occupation existing at the

time when a gold field is proclaimed; so that lands let on lease by the Crown for mining purposes in pursuance of its provisions cease, whilst they are so demised, to be "Crown lands" within the meaning of the Act.

"Miners' rights" are documents in the nature of a license, which are issued by the warden of a gold field, under the authority of the Governor (Section 6), to any person applying for the same, and may be kept in force for ten years, by his making an annual payment of the same amount during that period. The document, of itself, creates no interest in any part of the gold field, either legal or equitable; but the effect given to it by the statute and Regulations is, that, when the holder has, in virtue of it, lawfully occupied, and duly worked in quest of gold, a certain area of Crown land within the limits of the gold field (called a "claim"), he thereby acquires a right to remain in undisturbed occupation of the claim, and an absolute proprietary right to all the gold which it contains, these rights being indefeasible, unless forfeited by his contravention of the Act or of the statutory Regulations. Section 2, which defines the expression "claim" for the purposes of the Act, contains the proviso, "that no land comprised in any lease granted for mining purposes shall be deemed to be a claim."

The rights of lessees are regulated by Sections 10 to 16 inclusive. It is thereby made lawful for the Governor to grant to any person a lease of Crown lands for mining purposes, not exceeding twenty-five acres, for any term not exceeding twenty-one years, at the yearly rental of one pound per acre; but it is expressly provided that such lease shall in no case include Crown land occupied, for mining purposes, by the holder of a miner's right, unless with his consent. Section 12 requires that every lease

shall contain a stipulation that, if the lessee fail to fulfil its conditions, or to use the land *bond fide* for the purpose for which it is demised, the lease shall be voidable at the will of the Governor. Section 16 enacts that a lease may be surrendered any time, with the consent of the Governor in Council, if its conditions have been fulfilled by the lessee, so far as the time which has elapsed will permit.

It will be observed that the statute gives to the Governor the power of determining according to his discretion whether a lease ought or ought not to be voided, in respect of the lessee's failure to observe its conditions, or to use the land for the purposes for which it was demised to him. But Article 84 of the Regulations makes special provision with regard to the extent of working required of the lessee, during the dependence of his application for a lease, and after he has received intimation that it will be granted. Failure to comply with its provisions entails forfeiture of his right, whether the lease has been issued or not; and Article 89 farther provides that "any miner giving notice to the warden of a gold field that a leasehold, or ground held under an application for a lease, is not being worked in accordance with these Regulations, and applying for the forfeiture thereof, shall, in the event of such leasehold being forfeited, have a preferent right, for seven days after the forfeiture, to take possession of the ground so forfeited as a claim, or to apply for the same as a leasehold." It was undoubtedly within the competency of the Governor, by means of a Regulation framed with the assistance of his Council, to confer that privilege upon the holder of a miner's right, assuming that the latter had not, under the Act, a personal title to insist in the forfeiture of the leasehold.

The two leases which are assailed in the present action were granted by the Governor of the Colony, in name of Her Majesty, on the 21st February 1884, professedly in terms of "the Gold Fields Act, 1874," for the full term of twenty-one years from the 1st day of December 1883. They each contain an acknowledgement that the first year's rent had been paid in advance. They also contain a variety of conditions with regard to the mode of working the mines, keeping them in proper repair and preservation, and also a clause providing for their avoidance at the will of the Governor in terms of Section 12 of the Act.

Seeing that the Respondents have chosen to plead by way of demurrer, the facts of the case must, for the purposes of this appeal, be taken to be as stated by the Appellants. They do not dispute that, at the time when their writ was issued (which appears to have been about the end of September 1885), the Respondents were and had all along been in possession of the lands demised to them, and were recognized by the Crown as its tenants. Nor do they allege that the Respondents had been guilty of any breach of the terms of the leases, or of the conditions imposed by the Regulations. The grounds upon which they ask a declaration of the nullity of the leases are, (1st) that they were granted by the Governor within two years from the date of the proclamation of the Crocodile Creek gold field (which is said to have been the 20th September 1883) contrary to the provisions of Section 11 of the Act; and (2nd) that, in the applications for the leases certain formalities prescribed by the Regulations were not observed. Their Lordships venture to doubt whether, having regard to the terms of the leases themselves, and to the possession which has followed upon them, the alleged omission of

these formalities would afford a relevant ground for annulling the leases, even at the instance of the Crown. But they are willing to assume (without indicating any opinion upon the point) that, taken by itself, and apart from other considerations, the fact of a lease having been granted within two years from the time when the gold fields was first proclaimed is sufficient to render it voidable at the instance of any person who has, in law or equity, a right to set it aside.

It does not seem to admit of doubt that the Crown would have a good title to challenge the validity of these two leases, upon the first ground advanced by the Appellants, either by means of a writ of intrusion or by an information in Chancery. In a suit of that kind, it would be open to the lessees to plead in defence, all acts of the Crown inferring recognition of their leasehold right; and in any view, the Plaintiff could not obtain judgement, except on the footing of making, so far as practicable, *restitutio in integrum*. The Crown could not, in the event of success, retain rents paid by the tenants, if they had made outlays useful and necessary, though as yet unremunerative, for the purpose of mining gold within the areas demised to them; and would probably be held liable to reimburse them for these outlays, so far as available for future working. But the Appellants assert their right to terminate the leases, and to dispossess the lessees, not only without the aid, but against the wish of the Crown. They concede that no decree which they can obtain in this action could operate as *res judicata* between the lessees and the Crown; and it is obvious that their contention, if well founded, will be productive of very singular results. On that supposition, the lessees may have so conducted themselves that they cannot, withdraw from their contract obligations: and

the Crown may have so ratified the contract that it cannot disturb the possession of its lessees; yet any one or more persons holding a miner's right may avail themselves of an original flaw in the lease, at any time during its currency. They may delay their challenge until the lessees have, on the faith of the lease, spent large sums of money in preparing the land for mining operations, and may then intervene and appropriate the whole benefit of such expenditure, without the lessees being entitled either to repetition of the rents which they have paid, or to compensation for their beneficial outlay. That may be a necessary, but it can hardly be described as a just, consequence of the statutory privileges implied in a miner's right.

The right to interfere with the possession of a tenant under a formal lease, independently of the lessor, and in derogation of his rights, is not one of the natural incidents of a mere license, which carries no legal or equitable interest in the soil. An *ex facie* regular lease, followed by possession, and impeachable only upon such extrinsic grounds as are alleged in the Appellants' declaration, is, as between the parties to it, not void but voidable; and, the lessees being willing to continue in possession and to comply with its stipulations, it is the privilege of the lessor to determine whether they shall be permitted to do so or not. The lessees are not liable to ejection, except in a suit brought at his instance or with his concurrence. In the present case, the rights and privileges of the lessor are so far protected by Section 10 of "The Gold Fields Act, 1874," which provides that nothing in the Act contained "except so far as is herein expressly enacted shall be deemed to abridge or control the prerogative rights and powers of Her Majesty in respect of gold mines." It was accordingly conceded in the argument for the Appellants

that, if the Statute of 1874 has not given them the right which they assert, either expressly or by plain implication, they have no title to maintain this action.

The Appellants relied upon the terms of Section 9 as conclusive in their favour. It enacts that any person who shall be the holder of a miner's right shall, "subject to the provisions of this Act, and to the Regulations, be entitled (except as against Her Majesty) to take possession of mine and occupy Crown lands for mining purposes." Lands which are in actual occupation as a claim do not cease to be Crown lands within the definition of the Act; and it has already been pointed out that Section 9 gives the occupant an absolute and exclusive interest in his claim, so long as he complies with the statute and the regulations. The words upon which the Appellants rely cannot, therefore, be construed as giving the holder of a miner's right license to occupy any Crown land which he may choose to select, but must signify Crown lands not yet occupied as claims. That is made abundantly clear by Article 5 of the Regulations, which prescribes the method by which the holder of a miner's right may lawfully take up a claim. It provides that "a miner may take up and work any *unoccupied* Crown land as a claim by fixing firmly in the ground at each corner thereof a post four inches in diameter," &c. Again, Article 7 gives him the right, when a claim has become liable to forfeiture, to apply to the warden to give him possession of such claim, but that is a right against Crown lands which must be followed out and enforced in the manner prescribed by the regulations.

Lands let by the Crown for gold mining purposes, whether before or after the proclamation of a gold field, are not Crown lands within the meaning of the Act of 1874, and against these



Section 9 gives no right whatever to the holder of a miner's license. That is hardly disputed by the Appellants, but they contend that the provisions of Section 9 give them a title to try the validity of leases bearing to be granted by the Governor in terms of the statute, in a question with the lessees, and in the absence of the Crown, with the view of restoring the areas let to the category of Crown lands. It appears to their Lordships that the Act does not, expressly or by necessary implication, confer any such right. It is, in their opinion, sufficient to exclude the holder of a miner's right that the land is *de facto* occupied in virtue of a lease granted and recognized by the Crown. Their Lordships do not doubt that, in cases where reasonable grounds can be shown for interfering with the lessee's possession, the Crown will lend its assistance in terminating the lease, and that it will refuse its aid to any attempt to disturb his possession merely for the purpose of giving the holders of miners' rights the benefit of his outlay and operations.

The whole tenor of the regulations is opposed to the inference that miner's right holders have a title to impeach possession held under a gold mining lease. It is only in one event, that of the lease becoming liable to forfeiture through breach of the regulations, that the miner is allowed to intervene at his own hand. Section 46 of the Regulations, no doubt, provides that "any person being in unauthorized occupation of Crown lands on any proclaimed gold field may be summarily removed therefrom by order of the warden, and any person resisting or obstructing the carrying out of any such order shall be liable to a penalty not exceeding ten pounds." The sole object of that regulation is to give the warden the power of summarily ejecting occupants who can show no title of possession, or whose title has been found, in a

competent proceeding, to be insufficient or void. It has no application to the case of an occupant who has a colourable title from the Crown.

In these circumstances their Lordships have come to the same conclusion, although not for the same reasons, as the Court below. If the Statute of 1874 had given to the owner of a mining license right to challenge and set aside leases as being contrary to its provisions, without excluding the jurisdiction of the Supreme Court, their Lordships are not disposed to hold that the Appellants could have had no remedy in this suit, because the ordinary forms of action, for recovering possession of Crown land, require the plaintiff to have an interest in the land, which a miner's right is incapable of conferring.

A great deal of the Respondents' argument was directed to the point that the warden and his Court had exclusive jurisdiction to entertain, in the first instance, a claim of the nature of that preferred by the Appellants. Seeing that, in the opinion of their Lordships, the Act gives no right to sue, it is unnecessary to consider to which tribunal jurisdiction would have belonged if such a right had existed.

Their Lordships will humbly advise Her Majesty to affirm the orders appealed from of the Supreme Court of Queensland, and to dismiss these consolidated appeals. The Appellants must pay to the Respondents their costs of these consolidated appeals.

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