

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Harold Edward Colless v. The Minister for Lands, from the Supreme Court of the Colony of New South Wales ; delivered 26th November 1898.*

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Present :

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR HENRY STRONG.

[*Delivered by Lord Watson.*]

The Appellant, Mr. Colless, on the 7th March 1895, made an application for an original conditional purchase of 640 acres of Crown land in the central division of the Colony of New South Wales, which was duly confirmed by the Local Land Board on the 27th May 1895. The land thus conditionally purchased was adjacent to the pastoral holding of "Come-by-Chance" and "Jim along Josey" within the same division of the Colony, which holding, in pursuance of the provisions of Part IV. of the Crown Lands Act, 1884, was divided into two parts, and the area contained in one of these parts was notified as the leasehold area of the pastoral holding.

The tenant of the pastoral holding did not make any application for the renewal or extension of his tenure, which expired on the 10th July 1895; but he obtained from the Crown a preferential occupation license, in virtue of which he continued to occupy the land

after the termination of his lease. After the lease expired, the lands which had been included in it were measured and sub-divided into farms to be let under settlement lease, one of these farms comprising an area of 2,413 acres.

On the 18th December 1895, a notification by the Governor with the advice of his Executive Council was published in the Gazette, to the effect that the lands comprised within certain farms therein specified, including the leasehold area of "Come-by-Chance" and "Jim along Josey" holding, "are hereby set apart for settlement leases." It was also notified that, under the provision of Sections 24 and 25 of the Crown Lands Act 1895, these farms would be available for settlement lease on and after the 30th January 1896. On the 25th January 1896, another notification by the Governor and his Council relating to the same lands was published in the Gazette, to the effect that, in pursuance of Section 5 of the Crown Lands Act 1895, these lands "are now resumed areas, and have ceased to be leasehold areas within the meaning of the Crown Lands Acts."

On the 23rd January 1896, the Appellant presented an application for a conditional lease of 1,920 acres, in virtue of his aforesaid original conditional purchase. The lands so applied for formed part of the 2,413 acres already mentioned, which had been included in the pastoral lease, and had been possessed since its expiry under a preferential occupation license.

On the 31st January 1896, Joseph Manasseh Gordon made application for a settlement lease of the said farm or area of 2,413 acres.

The Crown lands agent, in order to determine the priority of the applications made by the Appellant and by Joseph Manasseh Gordon, resorted to a ballot, the result of which was that Gordon's application came out first.

The Local Land Board on the 21st May 1896, confirmed Gordon's application for a settlement lease, and disallowed the Appellant's application upon the ground that, at the time when it was presented, the land which he applied for was not available for a conditional lease. On appeal against that decision, the Land Court differed in opinion from the Local Land Board, and stated a case, in terms of Section 8 (vi.) of the Crown Lands Act, 1889, in which the following questions were submitted for the decision of the Supreme Court:—

- (1.) Whether the land applied for by Harold Edward Colless as a conditional lease on the 23rd day of January 1896 was available for the purposes of that application when made?
- (2.) Whether the said application lodged under the circumstances hereinbefore set forth was a valid application, and constituted a continuing offer capable of subsequent acceptance?
- (3.) Whether, if question 2 is answered in the affirmative, the said application was entitled to priority over the application of Joseph Manasseh Gordon?

The case was heard, on the 30th June 1897, before the Appeal Court, consisting of Darley, C.J., with Manning and Simpson, J.J. The learned Judges, whose reasons were delivered by Manning, J., unanimously answered the first and second questions in the negative, which rendered it unnecessary to make any reply to the third; and they therefore allowed the appeal, with costs, and directed that the decision of the Local Land Board should be restored.

In the argument upon this appeal, it was not disputed, on either side of the Bar, that, if the lands in question formed part of a resumed area, on the 23rd January 1896, they were open to

the application made by the Appellant of that date for a conditional lease. By Section 4 of the principal Act of 1884, "resumed area" is defined to mean "that portion of a pastoral holding for which a pastoral lease may not be granted under this Act"; and the definition is incorporated with Section 2 of the Act of 1895. On the other hand, the Appellant's Counsel did not dispute that a conditional lease of the lands in question could not competently be granted, so long as these lands remained, as they admittedly had been until the 10th July 1895, portions of a leasehold area. Accordingly, a great portion of the Appellant's argument was directed to establishing that, at and prior to the 23rd January 1896, the lands for which he then made application had ceased to be leasehold area, and had become resumed area, within the meaning of the Acts. On the assumption that they had not, it was alternatively maintained, though not with the same vigour which characterised the rest of the argument, that the Appellant's application of the 23rd January 1896 did notwithstanding continue to be operative, and preferably affected the lands, as soon as they were declared to be resumed area, and ceased to be leasehold.

It appears to their Lordships that the provisions of the Act of 1895 are fatal to the leading contention of the Appellant. Section 5 enacts that "after the expiration of the term or extended term of a pastoral lease in the Central Division, the lands theretofore subject to such lease shall become a resumed area on notification in the Gazette to that effect, and on such notification, and not before, shall cease to be a leasehold area within the meaning of the principal Act." Counsel for the Appellant were therefore constrained to argue that the provisions of Section 5 did not apply,

and that leasehold area became resumed area within the meaning of the Acts, whenever the Crown, on the expiry of his lease, gave to the previous tenant a preferential occupation license, to enable him to continue his possession. Their Lordships are unable to find anything in the context of the Land Acts which could warrant them in sustaining such an implied exception from the provisions of Section 5, which are in themselves absolute and unqualified. They are accordingly of opinion that, under the express enactments of that clause, the lands in question continued to be leasehold area until they were declared to be resumed area by the Gazette notification of the 25th January 1896.

It may here be noticed that the Appellant founded upon two announcements which appeared in the Government Gazette of the 4th July 1895, and of the 1st October 1895 respectively, as being equivalent in effect to notifications that the lands in question had been "resumed" of these dates. Neither of these announcements is in the nature of a notification such as is required by Section 5 of the Act of 1895, which must emanate from the Governor and his Council. The first of them is a notice by the local officer that preferential occupation licenses had been granted for certain "leasehold areas in the "central division," including the lands now in question, which, so far as it goes, involves the assertion that the lands demised by these occupation licenses were leasehold area. The second of them is a simple notice by the same official, that the fees payable in respect of such licenses were of the amounts stated in a schedule appended to the notice, and must be paid to the Colonial Treasurer within a time limited. Beyond showing the fact, which is otherwise apparent and is not disputed, that a preferential license had

been granted to occupy the area in question, both intimations are immaterial. They could not have the effect of altering the purposes to which the area was at the time legally appropriated.

It is also necessary to notice the argument which was addressed to their Lordships for the Appellant, founded upon the terms of Section 11 of the Act of 1895, with respect to conditional purchases and conditional leases in classified areas. The preceding section (10) gives the Governor absolute discretion to classify Crown lands; and declares that, when such classification has been duly notified in the Gazette, the lands comprised in it shall not be available for any other application than that which it sanctions. Had these provisions been unqualified, it is obvious that the Governor and his Council might have destroyed the privilege of a person who was in a position to apply for a conditional purchase or lease, by notifying in the Gazette a new classification which excluded conditional purchase and leases. Section 11 is a saving clause, which in that case preserves the privilege, upon certain conditions, one of which is that the holder of the privilege shall make his application for conditional purchase or conditional lease not later than forty days after the date of the notification that a new classification has been made. Although the clause, to that extent, and under these conditions, saves existing rights, it creates no new right or privilege; and, in their Lordships' opinion, its provisions cannot avail any person who was not, before and at the date of the notification, in a position to apply for a conditional purchase or lease.

The result of the opinions already expressed by their Lordships is, that the Appellant, on the 23rd January 1896, had no title to apply for a conditional lease of the area in question,

which was then, and previously had been, appropriated to purposes which excluded any such application. Their Lordships do not think it necessary to discuss the plea urged by the Appellant, to the effect that, assuming his application to have been incompetently made on the 23rd January, it became operative as soon as the notification of 25th January 1896 took effect. Upon that point, they agree with the learned Judges of the Court below. They will accordingly humbly advise Her Majesty to affirm the judgment appealed from. The Appellant must pay to the Respondent his costs of this appeal.

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