

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of the
Attorney-General for New South Wales v.
Walters and others, from the Full Court of
the Supreme Court of New South Wales ;
delivered 1st April 1898.*

Present :

THE LORD CHANCELLOR.

LORD HERSHELL.

LORD MACNAGHTEN.

LORD MORRIS.

SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The Crown in this case seeks to recover certain lands in the Parish of Cumbertine in the County of Camden which were the subject of two conditional purchases—an original conditional purchase of 400 acres on the 21st of June 1883 and an additional conditional purchase of $44\frac{1}{2}$ acres on the 28th of February 1884. The contention of the Crown is that the lands became liable to forfeiture and have been duly forfeited for non-compliance with the statutory conditions in regard to improvements. The original selector or conditional purchaser was one Moore. In 1888 he transferred his purchases to one Walters apparently by way of mortgage. In December 1890 he conveyed the equity of redemption to the Respondent Black. Moore and Walters have both been disposed of. The Respondent Black who is in possession of the land resists the claim of the Crown on the ground that the proceedings on the part of the Crown

were unauthorized and irregular and that the alleged forfeiture was therefore invalid. In the Courts below some question was raised or suggested as to the position of the Respondent Black. But for the purposes of this case it may be assumed that he duly became entitled to Moore's conditional purchases subject to the statutory conditions attached thereto.

The conditional purchases having been made before the 1st of January 1885 when the Crown Lands Act of 1884 came into force the conditions with regard to improvements applicable to the case under the combined operation of the Crown Lands (Alienation) Act of 1861 and the amending Acts of 1875 and 1880 were that the lands should be improved to the value of 6s. per acre within three years and of 10s. per acre within five years after the purchase but the Act of 1875 Section 17 provided that the period of three years might be held to commence from the date of the survey of the lands conditionally purchased.

Section 18 of the Act of 1861 declared that on default of a compliance with the requirements of that section which included a condition as to improvements to some extent varied by subsequent enactments the land conditionally purchased should "revert to Her Majesty" an expression which in the Act of 1880 and in subsequent Acts is treated as equivalent to the expression "become liable to forfeiture." The Act of 1861 provided no machinery for determining or investigating any question between a conditional purchaser and the Minister in charge of Crown Lands. By the Act of 1861 as amended by the Act of 1875 the requirements of Section 18 of the former Act were to be held to have been complied with on a statutory declaration being made as therein prescribed and "on the Minister being satisfied" and thereupon

on payment of the balance of the purchase money the grant in fee was to issue.

By the Act of 1875 Section 25 the Governor in Council was empowered to appoint a Commissioner to whom should in case of dispute or question and might in every case be referred by the Minister the claim of a conditional purchaser to a grant and complaints by any person that a conditional purchaser had not fulfilled or was not fulfilling the condition as to improvements. The Commissioner was to hear evidence in open Court and report to the Minister. The Act however did not contain any provision making the Commissioner's report final as between the parties or in any way binding upon the Minister. Both before and after the Act of 1875 it was held that the action of the Minister in declaring a forfeiture for non-compliance with statutory conditions might be questioned at law and that if it were so questioned it was incumbent on the Minister to prove that the forfeiture was justified.

The Act of 1884 repealed the previous Acts but it contained a provision (Section 2B) to the effect that notwithstanding such repeal all rights accrued and obligations incurred and imposed under or by virtue of any of the repealed enactments should subject to any express provisions of that Act in relation thereto remain unaffected by such repeal.

The Act then proceeded to re-enact the repealed code of land legislation with various modifications and amendments. In place of the provisions relating to the appointment of a Commissioner under the Act of 1875 it contained a group of sections (Sections 11-20) providing for the establishment of local Land Boards and defining their duties mode of procedure and powers. Section 13 provided that in addition to the matters thereafter "required or permitted" to be made the subject of adjudication

“inquiry or report by Local Land Boards” it should be the duty of every Land Board to hear examine and report to the Minister upon (among other things) :—

“(II.) Any complaint or question as to the
“ non-fulfilment of any condition of residence or
“ improvement by a conditional purchaser under
“ any of the said repealed Acts.”

Then followed provisions regulating procedure. Every Local Land Board was to hear and determine all complaints and other matters brought before it and was to conduct all inquiries sitting as in open Court with power to take evidence on oath and to compel attendance of witnesses, the procedure being the same as the procedure before a Court of Petty Sessions. The decision of the Board was to be given in open Court and immediately after adjudication or decision upon any case the Chairman of the Board was to forward all papers connected with the case together with any report required thereon to the Minister. Sections 18 and 19 provided for an appeal to the Minister. But these two sections were repealed by the Act of 1889 which established a Land Court for the hearing of appeals and for other purposes. Section 20 of the Act of 1884 on which the question in this case mainly depends is in the following terms :—

“ 20. Any question of lapse voidance or forfeiture whether arising under this Act or any of the said repealed Acts may be by the Minister referred to the Local Land Board and the decision thereon of the said Board after due investigation in open Court shall unless appealed from in the prescribed manner be final.”

Section 136 provided that every forfeiture of land conditionally purchased whether under that Act or any of the said repealed Acts should be deemed to operate as a forfeiture of all additional

conditional purchases held in virtue of such first mentioned lands and that whenever any land should be forfeited under that Act such land should become Crown land and might be dealt with as such but no forfeiture of any purchase under that Act or any Act thereby repealed was to take effect until the expiration of thirty clear days after notification of such forfeiture in the Gazette.

In 1887 the Minister for Lands directed that the period of three years within which improvements to the value of six shillings per acre were to be made on the lands comprised in Moore's conditional purchases should be held to commence from the date of the survey which had been finally approved on the 26th of February 1885.

On the 18th of June 1888 at the instance of the Minister the local Land Board held an inquiry, and having taken evidence found that improvements to the value of six shillings an acre had been placed upon the land within three years from the date of the acceptance of the survey by the Surveyor General. It is common ground that this inquiry was held under Section 20 of the Act of 1884 and that the decision upon it became final under that section.

On the 4th of August 1891 the period of five years allowed for completion of the improvements having expired since the former proceedings the Minister further referred to the local Land Board in addition to certain questions which are not now material the question whether the condition of improvements to the value of ten shillings per acre had been fulfilled or not. Notice to appear on the investigation before the Land Board was duly served upon the Respondent Black. He appeared by a solicitor and objected to the proceedings.

The inquiry by the Land Board took place on the 28th of October 1891 and four subsequent

days. On the 14th of December 1891 the local Land Board gave their decision as follows:—
 “ Having taken evidence and inquired into the
 “ said matter ‘ we find that 400 acres contained
 “ ‘ in C. P. 83. 11 ’ (the original conditional pur-
 “ chase) ‘ never was improved to the value of
 “ ‘ 200*l*. and that 44½ acres contained in C. P.
 “ ‘ 84. 7 ’ (the additional conditional purchase)
 “ ‘ never was improved ’ ” and they reported to
 the Minister accordingly.

Walters appealed against the finding of the local Land Board. The Respondent Black was served with notice of the appeal but did not appear. On the 10th of June 1892 the Land Court dismissed the appeal.

On the 10th of August 1892 the then Minister for Lands approved of the forfeiture of Moore’s conditional purchases. Notice of forfeiture appeared in the Government Gazette of the 21st of September 1892.

On the 8th of August 1894 the Attorney-General filed an information in equity in the Supreme Court against the Respondents Walters and Black and the Respondent Coffill a caretaker in possession on behalf of Black praying that the title of the Crown to the land in question might be established and that Black and Coffill might be ordered to deliver up possession.

Walters appeared and submitted to such decree as the Court should think fit to make. Coffill disclaimed. The Respondent Black filed a statement of defence claiming to be entitled to the land as purchaser for value. He denied that the local Land Board duly investigated the questions referred to it as alleged in the information.

On the 13th of December 1895 the Chief Judge in Equity made a decree in accordance with the prayer of the information.

The Respondent Black appealed to the Full Court. On the 3rd of July 1896 the Full

Court (Darley C. J. and Cohen J. Manning J. dissenting) reversed the decree as against Black and dismissed the information. The Chief Justice held that the power of the Minister to declare a forfeiture had been since the repeal of Section 18 of the Act of 1884 by the Act of 1889 "completely swept away." He thought that the finding of the local Land Board of the 14th of December 1891 was a finding upon a reference under Section 13 and not under Section 20 of the Act of 1884 and that being under Section 13 it bound no one. His view was that the Minister if he pleased might have disregarded it altogether but that if he still thought that the case was one that justified a forfeiture the only course open to him was to refer the question of forfeiture to the Land Board "which tribunal may" he said "in their judicial discretion refuse to decide in favour of a forfeiture notwithstanding that they had already reported according to the fact that the condition of improvements had not been complied with."

Their Lordships are unable to accept the conclusions of the Full Court. They agree in the opinion of the Chief Judge in Equity and in the very able and careful judgment of Manning J. They think that the reference which resulted in the findings of the 14th of December 1891 must be taken to have been made under the provisions of Section 20 of the Act of 1884. They are unable to agree with the Chief Justice in thinking that the power of the Minister to declare a forfeiture has been swept away nor can they agree in his view that a judicial discretion to refuse to decide in favour of a forfeiture has been committed to the Land Board.

The reference to the local Land Board was certainly not made in that precise and careful

way in which one would expect an important Government Department to conduct its business. But there can be no doubt as to the meaning of the reference. The local Land Board had adjudicated under Section 20 on the question whether the required improvements had been made within the period of three years. Their decision on that point was final. The period of five years had expired and the time had come for completing the investigation. The papers were sent back in a somewhat slovenly fashion but with an intimation to the Land Board of the issues on which their opinion was desired. The matter on which the Minister required their report fell properly under Section 20. An inquiry without the element of finality would have been idle and might have been a great hardship on the conditional purchaser. The Land Board conducted the investigation in a regular and formal manner and they reported to the Minister the decision at which they arrived. The Act of 1884 does not prescribe any particular form of reference under Section 20. There seems to be no reason why a decision upon a reference framed in the words of Sub-section II. of Section 13 though not containing anything pointing directly and in terms to Section 20 should not be final under the provisions of that section if the question is really a question of forfeiture, that is, an issue of fact which if determined against the conditional purchaser would render the purchase "liable to forfeiture."

Questions of "lapse" "voidance" and "forfeiture" which may be referred to the Land Board under Section 20 are in their Lordships' opinion questions of fact to be determined by the Board after a trial held in manner prescribed by Section 14. "Voidance" to give an example would include a case where the legislature has declared that in a certain event the purchase

“shall become void” as for instance under Section 7 of the Act of 1875 in the case of a false statement as to the age of the Applicant for a conditional purchase. “Lapse” applies to cases where the conditional purchase has been abandoned as mentioned in Section 17 of the Act of 1875. In both these cases the determination of the Land Board as Manning J. observes must be simply a determination on a question of fact. Why should it be otherwise in the case of forfeiture? The local Land Board have simply to determine whether the statutory requirements have been complied with or not. If those requirements are found to have been complied with the power of the Minister to declare a forfeiture for non-compliance is at an end. If the finding is the other way the discretionary power of declaring a forfeiture with all responsibility rests with the Minister. It must be so as Manning J. points out in cases of forfeiture of conditional purchases under the Act of 1884. For Section 39 of the Act of 1884 which applies to conditional purchases under that Act declares that if the local Land Board shall report to the Minister that after due inquiry held by such Board the conditions prescribed have not been duly fulfilled “it shall be lawful” for such Minister to declare the conditional purchase to be forfeited. The discretion by that section is given to the Minister and to no one else. In the absence of any distinct provision making a difference between conditional purchases under the Act of 1884 and those under the earlier Acts it is difficult to suppose that the legislature could have intended that in the one case the discretion should rest with the Land Board and in the other with the Minister.

Their Lordships are of opinion that the judgment under appeal should be reversed and

the Appeal to the Full Court dismissed with costs and the judgment of the Chief Judge in Equity restored and they will humbly advise Her Majesty accordingly.

As the difficulty in this case is mainly due to the carelessness of the Land Department their Lordships think that the Appellants should bear their own costs of this Appeal.
