

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Minister of Mines v. Harney and Others, from the Supreme Court of Western Australia; delivered 23rd March 1901.

Present at the Hearing:

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR FORD NORTH.

[*Delivered by Lord Davey.*]

The real and only question on this Appeal is from what date the cancellation by the Government of Western Australia of two gold mining leases formerly held by the Respondent Ramsden took effect. The solution of this question involves the consideration of certain sections of the Goldfields Act of 1886 and two clauses of the Regulations of 1892 made under the provisions of that Act.

In September 1895 the Respondent Ramsden was the lessee from the Crown of two areas of land in the East Coolgardie Goldfield. These leases were granted under the power for that purpose contained in Section 10 of the Act of 1886. This section was repealed by Section 3 of the Goldfields Act of 1895 by which its provisions were re-enacted with some variations. By Section 12 of the Act of 1886 every mining lease issued under that Act or the Regulations was to contain a condition that if the lessee his

executors &c. should fail at any time during the term to fulfil the conditions or terms therein contained or to use the land *bond fide* for the purpose for which it should be demised the lease should for any such failure be avoidable at the will of the Governor. By Section 29 the Governor was empowered to appoint an officer called a Warden and by Section 31 to establish on any goldfield one or more courts to be presided over and holden by a Warden which should be a court of record and have jurisdiction to hear and determine all actions suits claims demands disputes and questions which might arise in relation to mining. By Section 79 the Governor in Council was empowered to make regulations for the purpose of giving effect to the Act and for the management of goldfields generally.

The Goldfields Act of 1886 was repealed by an Act of 1895 which came into force on 1st January 1896 but the Regulations made under the Act of 1886 remained in force until the 1st May 1896 when they were superseded by Regulations made under the powers of the later Act.

Clauses 69 and 70 of the Regulations of 1892 are as follows:—

“(69.) Any miner giving notice to the Warden of a Goldfield
 “that a lease or ground held under application for lease is
 “not being worked in accordance with these Regulations and
 “applying for the forfeiture thereof shall in the event of such
 “lease or application being forfeited have a preferent right
 “for seven clear working days after such forfeiture to take
 “possession of the ground so forfeited or any portion thereof
 “as a claim or to apply for the same as a lease.

“(70.) Each application for forfeiture of a lease shall be
 “heard by the Warden in open Court and the evidence taken
 “at the hearing together with his report recommending the
 “approval of the forfeiture or otherwise (which report shall
 “be read in open Court to the parties concerned) shall be
 “forwarded to the Minister for the decision of the Governor
 “in Council immediately after the hearing of the case.”

On the 18th September 1895 one William Austin applied under the regulations to the

Warden for the forfeiture of Ramsden's leases on the ground of non-compliance with the labour conditions contained in them. The application was heard in the Warden's Court at Kalgoorlie on the 16th October 1895 with the result that the Warden recommended the forfeiture of both leases. On the 26th November 1895 the Governor in Council approved the forfeiture as recommended by the Warden and on the following 14th January 1896 notice of the Governor's decision was sent to the Warden.

This notice seems to have lain unheeded in the Warden's office and no notice of the Governor's decision was at that time given to either Ramsden or Austin. Austin however appears to have learnt that the decision had been given by search in the Mines Department at Perth on the 28th January 1896. He thereupon on the 1st February 1896 pegged out the two pieces of land and by application dated and registered the 7th February 1896 he applied for leases of them to himself. It should be mentioned that by the 44th Section of the Act of 1895 which was then in force the applicant who shall have first taken possession of and marked out the land has priority of title.

At length on the 21st February 1896 the Mining Registrar at Kalgoorlie forwarded written notice of the Governor's decision of the 26th November 1895 by registered letter to both Ramsden and Austin, but owing to the envelope being misdirected Austin did not receive the notice until the 20th March 1896.

On the 2nd March 1896 Ramsden pegged out the same two pieces of land and on the 9th March he and the other two Respondents applied for leases having on the 3rd March lodged an objection to Austin's application.

On the 10th April 1896 the Warden before whom the applications came stated a special case

for the opinion of the Supreme Court on the following question of law :—

“ Whether the forfeiture referred to in
 “ Clause 69 of the Regulations takes place, or
 “ the seven days preferent right therein referred
 “ to begins to run, from date of decision of the
 “ Governor in Council declaring the lease or
 “ ground forfeited, or does the said prefernt
 “ right begin to run from the date that such
 “ decision is first communicated by the Local
 “ Registrar’s office to the applicant for for-
 “ feiture ? ”

Two other points were also raised by the case but they are not material to this Appeal.

On the 5th of May 1896, the special case came before Mr. Justice Hensman, one of the Judges of the Supreme Court, who gave his opinion that the forfeiture took place, and the preferent right began to run from the date when notice of the decision of the Governor in Council was communicated to the lessee (Ramsden).

On the same date the Respondents’ applications for leases of the 9th of March 1896 were recommended by the Cabinet, and on the 15th of May 1896 the approval of the Governor in Council of such application was gazetted pursuant to the Regulations then in force. On the 3rd of June however on the recommendation of the Minister of Mines, the Cabinet advised the Governor to approve the cancellation of the Respondents’ approved applications for leases, and on the 10th of July 1896 the Governor’s approval of such cancellation was gazetted.

On the 6th June 1896 the Warden stated another special case for the opinion of the Court of Mining Appeal on the following point.

From what date does the seven days preferent right given by Clause 69 begin to run ?

This special case was heard before the Chief Justice and Hensman and Stone J.J. The two

first named Judges held that the seven days ran from the 22nd of February on which day the notice in the ordinary course of post would have reached the lessee. Mr. Justice Stone thought that the time ran from the date on which the Governor's decision was communicated to the Warden on the grounds that it was not required of the Warden that he should give notice to either party and it was for the parties themselves by search or inquiry at the Warden's Office to ascertain the fact. But in deference to previous decisions the learned Judge waived his opinion.

On the 10th July 1896 the Government approved Austin's application and on the 24th of the same month the approval of the Governor in Council was gazetted.

Austin entered into possession and thereupon an action of trespass was commenced against him by the Respondents. It was heard before Mr. Justice Hensman who gave judgment for the Plaintiffs (the present Respondents) but his decision was reversed by the Full Court (Hensman J. dissenting). In other words the decision was that Austin's title to the leases could not be attacked in an action by the Respondents.

On the 26th July 1898 the proceedings out of which the present Appeal has arisen were commenced by the Respondents against the Appellant by Petition of Right for damages for breach of an agreement by the Government to grant the leases or alternatively for wrongful cancellation of the two approvals of the Respondents' applications. The Appellant by his defence pleaded that Austin had a preferential right to apply for leases and pursuant thereto he on the 1st February 1896 marked out and took possession of the lands and that the approval of the Governor of Ramsden's application was given by mistake and owing to the

misrepresentation of Ramsden that the lands were unoccupied Crown lands and that Ramsden's application being therefore null and void the approval thereof by the Governor was of no effect.

It was not contended by the defence or before their Lordships that assuming the regularity of Ramsden's application there was any power in the Governor to cancel his approval thereof in the circumstances or in the manner in which he had done so.

This action also came on for trial before Hensman J. who on the 14th March 1899 found all issues in favour of the Respondents and a general verdict for them, the question of damages being sent to a referee. They have since been assessed at 8,000£. This judgment was affirmed on appeal to the Full Court and on the 26th June 1899 an order was made that the Appeal be dismissed with costs. The present Appeal is from that order.

The learned Judges in the Full Court followed the decision of the Court of Mining Appeal on the special case submitted to them that the cancellation of the leases did not take effect as against Ramsden until notice of the decision of the Governor was communicated to him and that was not until the 22nd February 1896. If so it followed that Austin's application of the 7th February 1896 was premature and of no effect and Ramsden's application of the 9th March was not made until after the expiration of Austin's preferent right of application.

Their Lordships are of the same opinion. They agree that there must be an unequivocal expression of the Governor's will to avoid or cancel the leases which had been found to be voidable. They do not think that merely transmitting his decision to the Warden was

such an act. It is true there was no provision in the regulations then in force requiring the Warden to give notice to the parties. But that is immaterial. So long as this decision lay dormant in this office and no notice was given to the lessee and the land was not declared vacant by some other overt act of the Governor it was not an unequivocal or irrevocable expression of the Governor's will.

Their Lordships will therefore humbly advise His Majesty that this Appeal be dismissed. The Appellant must pay the costs of it.
