[HIGH COURT OF AUSTRALIA.]

WILLMOTT . . . . . APPELLANT;

AND

KAUFLINE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, Aug. 9, 13.

Griffith C.J., O'Connor and Isaacs JJ.

Crown Lands Act (*N.S.W.*) 1884 (48 *Vict. No.* 18), *sec.* 17—*Crown Lands Act* 1889 (53 *Vict. No.* 21), *sec.* 8, *sub-sec.* (vi.)—*Crown Lands Amendment Act* 1905 (*No.* 42 *of* 1905), *secs.* 6 (2), 7—*Appeal from decision of Land Board—Security for costs of appeal—Deposit of money order not payable to bearer—Objection to jurisdiction of Appellate Court—Question of law—Appeal by special case.*

Crown Lands Amendment Act 1908 (*N.S.W.*) (*No.* 30 *of* 1908), *sec.* 42, *Schedule—Right of appeal from Land Board—Effect of subsequent legislation.*

Under the Crown Lands Acts questions arising between rival applicants for Crown lands are determined by the Land Board of the district. By sec. 17 of the *Crown Lands Act* 1884, as amended by later Acts, either party to any such proceeding may appeal to the Land Appeal Court within a specified time on giving notice and depositing with the Chairman of the Board from whose decision the appeal is to be brought the sum of £5 as security for costs of the appeal. By sec. 8, sub-sec. vi. of the *Crown Lands Act* 1889 the Land Appeal Court in any case before it shall, if required by either party, and may of its own motion state a case upon any question of law arising and submit it for decision to the Supreme Court.

Held, that a question arising before the Land Appeal Court as to its jurisdiction to entertain a particular appeal was a question of law within the meaning of the last-mentioned sub-section, and therefore might be submitted by special case to the Supreme Court. Objections to the jurisdiction of the Land Appeal Court to entertain an appeal may be taken by way of appeal to the Supreme Court, whether they can or not be taken by prohibition.

Barker v. *Palmer*, 8 Q.B.D., 9, and *Ah Yick* v. *Lehmert*, 2 C.L.R 593, applied.

A party intending to appeal from a decision of a local Land Board sent to the Chairman a postal money order for £5, payable to the order of the Registrar of the Land Appeal Court in Sydney, from which the office of the Board was more than 100 miles distant, and the order was not endorsed by the payee or cashed within the time limited for appealing.

Held, that the lodging of the money order was not a payment of a deposit of £5 within the meaning of sec. 17 of the *Crown Lands Act* 1884, and that a strict compliance with the requirements of that section could not be waived by the Chairman's acceptance of the order as equivalent to cash.

Sec. 6, sub-sec. (2) of the *Crown Lands Amendment Act* 1905 directs the Land Board in the case of simultaneous conflicting applications for land under that Act to give preference to the applicant whose land adjoins or is nearest to that applied for, unless in the Board's opinion that applicant is substantially less in need of additional land than a competing applicant.

Held, that the right of appeal from a local Land Board was not taken away with regard to questions arising under sub-sec. (2) of sec. 6 by sec. 7 of the Act, which prohibited an appeal from decisions under sec. 6 on certain questions, and (*per O'Connor* J.) that the *Crown Lands Act* 1908, which declared that there should be no appeal from any decision under sec. 6 of the Act of 1905, did not operate retrospectively to take away any right of appeal which had already accrued.

Decision of the Supreme Court, as to the validity of the deposit: *In re Willmott*, 25 N.S.W. W.N., 179, reversed.

APPEAL from a decision of the Supreme Court of New South Wales on a special case stated by the Land Appeal Court.

The appellant and respondent were competing applicants for holdings of certain Crown lands in the Cooma district. Their applications came before the local Land Board at Cooma, and the Board on 11th May 1908 decided in favour of the appellant. The respondent forwarded a notice of appeal addressed to the Chairman of the Land Board at the office at Goulburn together with a postal money order for £5, payable to the order of the Registrar of the Land Appeal Court, Sydney. Goulburn is about 100 miles from Sydney. This was received by the Chairman on 9th June 1908. The ground of appeal was that the successful applicant, Willmott, was substantially and financially less in need of land than Kaufline the respondent. At the hearing of the appeal the present appellant took the preliminary objections (1) that the prescribed deposit had not been made, and (2) that no appeal lay on the ground taken. The Land Court overruled the objections,

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and at the request of the present appellant stated a case for the decision by the Supreme Court of the questions whether the lodging of the money order with the Chairman was a deposit of £5 within the meaning of sec. 17 of the *Crown Lands Act* 1884, and whether, in view of the provisions of sec. 7 of the *Crown Lands Amendment Act* 1905, any appeal lay from the Land Board on the ground taken by the respondent in his notice of appeal. The Supreme Court held that there had been a proper deposit, but refused to answer the question as to the competency of the appeal on the ground that it was a question of jurisdiction, which could only be raised by application for mandamus or prohibition: *In re Willmott* (1).

From that decision the present appeal was brought.

Pike, for the appellant. There must be a strict compliance with the conditions as to security. They are for the benefit of the respondent, and can only be waived by him: *Re Wilmott* (2); *The Queen* v. *Justices of Anglesey* (*No.* 2) (3); *Francis* v. *Dowdeswell* (4); *Park Gate Iron Co. Ltd.* v. *Coates* (5); *Blenkiron* v. *Statter* (6). The Chairman has no discretion in the matter, and cannot waive a strict compliance with the condition by accepting something else as equivalent to cash. If the conditions are for the public benefit they cannot be waived at all. There was no waiver by the respondent even if he had power to waive.

[ISAACS J. referred to *Enders* v. *Rouse* (7); *Wilson* v. *MacIntosh* (8).]

Although this was a question going to the jurisdiction, and there might be a prohibition if the Land Appeal Court entertained the appeal, yet it is a question of law, proper to be submitted by way of special case to the Supreme Court: Crown Lands Acts, 48 Vict. No. 18, sec. 17; 53 Vict. No. 21, sec. 8, subsec. VI.; *Barker* v. *Palmer* (9); *Backhouse* v. *Moderana* (10).

[GRIFFITH C.J. referred to *Rhondda Valley Breweries Co.* v. *Pontypridd Union Assessment Committee* (11).

(1) 25 N.S.W. W.N., 179.
(2) 12 N.S.W. L.R., 304.
(3) (1892) 2 Q.B., 29.
(4) L.R. 9 C.P., 423.
(5) L.R. 5 C.P., 634.
(6) 31 L.T.N.S., 413.
(7) 11 V.L.R., 827.
(8) (1894) A.C., 129.
(9) 8 Q.B.D., 9.
(10) 1 C.L.R., 675.
(11) (1909) 1 K.B., 652.

ISAACS J. referred to *The Queen* v. *Allan* (1).]

The conditions were not complied with. It was not enough to pay something which was equivalent to cash. If the order had been actually converted into money in time it might have been sufficient, but here the Chairman had not the £5 at his command within the prescribed time, and nothing done afterwards could cure the defect. [He referred to *Noseworthy* v. *Overseers of Buckland-in-the-Moor* (2)]. As to the other point, there was no appeal from the Land Board's decision on the ground taken. It was a matter within sec. 7, sub-sec. (3), of the Act of 1905. The *Crown Lands Act* of 1908, by the Schedule, provides that there shall be no appeal at all from decisions under sec. 6 of the Act of 1905. This was a question of law as much as the other question, and the Supreme Court should have answered it. [He referred to *Re Sherry* (3); *Stevens* v. *Barnett* (4).]

No appearance for the respondent.

Cur. adv. vult.

Aug. 13.

GRIFFITH C.J. This is a special case stated by way of appeal from the Land Appeal Court to the Supreme Court of New South Wales. Under the Crown Lands Acts, starting with the Act of 1884, 48 Vict. No. 18, the scheme was that applications for land should be submitted to the local Land Board, and in the event of there being competing applicants the Land Board should decide between them. It was provided by sec. 17 of the Act of 1884, as amended by later Acts, that: "Either party to any proceeding dispute or claim before a local Land Board . . . may appeal from the adjudication or decision of such Board to the Land Court at any time within twenty-eight days after the same has been given by giving written notice of such appeal to the Chairman of the Board and to the other party to the proceeding (if any) and depositing with such Chairman the sum of five pounds as security for the costs of the appeal." By the Act of 1889 (53 Vict. No. 21), sec. 8, sub-sec. (vi.), it was provided that:—"Whenever any question of law shall arise in a case before the Land Court, the Land Court shall, if required in writing by any of the

(1) 4 B. & S., 915.
(2) L.R. 9 C.P., 233.
(3) 26 N.S.W. W.N., 63.
(4) 17 N.S.W. W.N., 38.

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parties within the prescribed time and upon the prescribed conditions, or may of its own motion, state and submit a case for decision by the Supreme Court thereon, which decision shall be conclusive." The appellant and the respondent with others were competing applicants for a selection in the Cooma district, which is at a great distance from Sydney. The Land Board decided in favour of the present appellant. Thereupon the respondent gave notice of appeal to the Land Appeal Court, and in order that his appeal might be competent it was necessary, to comply with the provisions I have already referred to, that a deposit of £5 should be made with the Chairman of the local Land Board, whose office was at Goulbourn, about 100 miles from Sydney. The ground of appeal was that the successful applicant, the present appellant, was substantially less in need of additional land than the present respondent. That objection was taken under the provisions of the *Crown Lands Amendment Act* 1905, sec. 6, sub-sec. (2), which provides that: "In the case of simultaneous applications, preference shall be given to the applicant whose land adjoins or is nearest to the land applied for, unless, in the opinion of the Board, such applicant is substantially less in need of additional land than an applicant whose land does not adjoin or is not nearest to the land applied for." The ground of appeal was, therefore, not quite accurately stated. It should have been that the present respondent was not substantially less in need of additional land than the successful applicant. When the case came before the Land Appeal Court two objections were taken for the respondent, the present appellant; first, that the appeal was bad, as the deposit prescribed by sec. 17 of the *Crown Lands Act* 1884 had not been made; and, second, that it was not competent for the appellant to appeal against the decision of the Land Board on the ground stated.

The Land Appeal Court by a majority overruled both objections, and a case was stated for the Supreme Court, the questions submitted for the opinion of that Court being—(1) whether the lodging with the Chairman of the Land Board, Goulburn, of a money order for £5, such order being payable to the order of the Registrar of the Land Appeal Court, Sydney, was a depositing with such Chairman of the sum of £5 within the meaning of sec. 17

of the *Crown Lands Act* 1884; and (2) whether, having regard to the provisions of sec. 7 of the *Crown Lands Amendment Act* 1905, it was competent for the present respondent to appeal against the decision of the Land Board on the ground taken in his appeal. The Supreme Court held that lodging the money order was a deposit within the meaning of the Act, but declined to answer the other question upon the ground that it involved a question of jurisdiction and could not be raised by case stated, but must be taken by prohibition or mandamus. With respect to the first point, what the Act requires is that a deposit of £5 shall be made. What the appellant did was not to make a deposit of £5 in cash, but to send to the Chairman of the Land Board at Goulburn a money order, which is in point of law a bill of exchange of a particular kind, which was made payable not to the Chairman of the Land Board at Goulburn, but to another person with whom the Chairman had no official relations, and at another place. The question is whether that can be considered a deposit of money. I express no opinion as to whether the deposit of a money order payable to the Chairman of the local Land Board at Goulburn would have been a sufficient compliance with the law. But it seems to me that sending a bill of exchange payable to another person, a stranger, at another place cannot be considered a payment of a deposit of £5. I think, therefore, that that objection was good, and undoubtedly it can be taken by way of special case. The Supreme Court entertained it, and no objection was taken to their doing so. That such objections to the validity of a notice of appeal are entertained on appeal by way of special case is shown by the general practice of the Courts in England. I mentioned during the argument the case of *Rhondda Valley Breweries Co.* v. *Pontypridd Union Assessment Committee* (1), where the only point raised on a special case stated was the sufficiency of a notice of appeal. On that point, therefore, I feel myself bound to disagree with the conclusion of the learned Judges of the Supreme Court.

With regard to the second point, which, as I have said, the Supreme Court declined to answer, it does not seem to have occurred to the Court that the first point was equally a question of

(1) (1909) 1 K.B., 652.

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jurisdiction. If the notice of appeal was bad the Land Court had no jurisdiction to hear the appeal. They thought, however, that, as the question went to jurisdiction only, it could not be raised in that way. The case of *Barker* v. *Palmer* (1) is a clear decision of the Court of Queen's Bench that such an objection can, and indeed ought, to be taken by way of appeal and not otherwise. The attention of the Court was not directed to the decision of this Court in *Ah Yick* v. *Lehmert* (2) in which this Court had occasion to point out the distinction between the case of Courts from which no appeal lies and whose errors can only be corrected by mandamus or prohibition, and Courts from which an appeal does lie. I do not like quoting from my own judgments, but I will read a passage which in my opinion correctly declares the law (3): "When there is a general appeal from an inferior Court to another Court, the Court of Appeal can entertain any matter, however arising, which shows that the decision of the Court appealed from is erroneous. The error may consist in a wrong determination of a matter properly before the Court for its decision, or it may consist in an assertion by that Court of a jurisdiction which it does not possess, or it may consist in a refusal of that Court to exercise a jurisdiction which it possesses. In all these cases the Court of Appeal can exercise its appellate jurisdiction in order to set the error right. For instance, if the Court of Appeal in England were to hear an appeal from the King's Bench Division in a case in which no appeal lay, the remedy would be by appeal to the House of Lords, and that tribunal, as it has, I think, done in some instances, would allow the appeal and reverse the decision of the Court of Appeal, on the ground that it had sought to exercise a jurisdiction which it did not possess. In the same way if the Court of Appeal declined to entertain an appeal from the King's Bench Division in a case in which it could entertain an appeal, the House of Lords, as an appellate tribunal, would set it right." The objection that the Court has no jurisdiction to entertain a matter is a question of law, and there is an appeal upon all questions of law. I think, therefore, that the Supreme Court ought to have answered

(1) 8 Q.B.D., 9.

(2) 2 C.L.R., 593.

(3) 2 C.L.R., 593, at p. 601.

the second question. How the question should have been answered is a matter no longer of any consequence, as the law has since been altered. The law as now declared is that an appeal does not lie from the Land Board upon that ground. But I think that at that time an appeal did lie. It is sufficient to say that I entirely agree with the reasons of *Cohen* J. in *Ex parte Sherry* (1).

For the reasons I have given I think that the appeal should be allowed, the first question being answered in the negative, and the second in the affirmative.

O'CONNOR J. read the following judgment:—The Supreme Court in my opinion came to an erroneous conclusion on both the matters dealt with in their judgment. The *Crown Lands Act* 1889 by sec. 7 entitles a party dissatisfied with the determination of the Land Board to appeal to the Land Appeal Court. That right has been in certain respects cut down by sec. 7 of the Act of 1905. The respondent in the exercise of his right of appeal took his case from the Land Board to the Land Appeal Court. He was met there by two objections. One was that sec. 7 of the Act of 1905 had taken away his right of appeal, the other that he had not complied with a necessary condition of exercising that right in not having deposited the sum of five pounds with the Chairman of the Land Board as security in accordance with sec. 17 of the Act of 1884. The Land Appeal Court had necessarily to investigate both these objections when the case came before it. Sec. 8, sub-sec. (VI.) of the *Crown Lands Act* 1889 enables the Land Appeal Court to obtain the decision of the Supreme Court on "any question of law which shall arise in a case before it," the question to be stated and submitted in the form of a special case. Each of these objections involved a question of law arising in the case as it was before the Land Court. It is true that both objections were to the jurisdiction, and an erroneous judgment might have given either party a right to question it by means of an application for prohibition or mandamus according to the decision. But that circumstance did not deprive either party of the right of appeal. Nor did it prevent

(1) 26 N.S.W. W.N., 63.

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the Land Court if they thought fit from obtaining for their own guidance the opinion of the Supreme Court on the points that had been raised. The interpretation put on sub-sec. (VI.) of sec. 8 by the Supreme Court would, if correct, restrict the right of appeal to matters of law not involving the jurisdiction of the Land Court to hear an appeal. There is no warrant in the sections under consideration or in any other sections of the Lands Acts for so narrowing the rights conferred on the Land Court and its suitors. *Barker* v. *Palmer* (1) strongly supports the appellant's view, and the principle laid down by the learned Chief Justice of this Court in *Ah Yick* v. *Lehmert* (2) in these words is directly applicable:—"When there is a general appeal from an inferior Court to another Court, the Court of Appeal can entertain any matter, however arising, which shows that the decision of the Court appealed from is erroneous." For these reasons in my opinion the Land Court was entitled to state the special case, and the Supreme Court was in error in declining to answer the questions submitted. As to the questions to be answered the Supreme Court did express its view that the condition as to the deposit of £5 under sec. 17 of the Act of 1884 had been complied with. With every wish to come to the same conclusions, for the objection is without merits, I have been unable to do so. The words of the section are explicit. The sum of £5 must be deposited within twenty-eight days after the decision of the Land Board has been given. The appellant here, who was respondent in the Land Court, had a right to demand substantial compliance with that condition. It is not necessary to determine in this case whether the depositing of £5 in bank notes or in postal notes, or even in the form of a Government money order made payable to the Chairman, would have amounted to a deposit of £5 as required. It may be that any of these generally accepted equivalents for cash would have been a substantial compliance with the condition. But in this case the conversion of the order for £5 into money depended entirely on the will of a person other than the Chairman. The order could not become money until the Clerk of the Appeal Court in Sydney had

(1) 8 Q.B.D., 9.

(2) 2 C.L.R., 593, at p. 601.

attached his signature to the document, and even if he were willing to attach his signature and did so at the earliest possible moment, the money represented could not have been moneys in the Chairman's hands until after the period prescribed in the section had elapsed. As to the other point it is perhaps unnecessary to express an opinion, but as the matter has been fully put before us from the appellant's point of view, I may say that, in my judgment, it is impossible to hold that sec. 7 of the Act of 1905 deprived the respondent, when before the Land Court, of his right of appeal in respect of the decision of the Land Board, which was the subject of his complaint. As far as that ground was concerned the Land Court were bound to hear the appeal. But the appellant must succeed in his first objection. The respondent having failed to comply with one of the conditions imposed by the enactment which conferred the right of appeal, the Land Appeal Court had no jurisdiction to entertain it. I agree, therefore, that the case must be remitted to the Land Court, with the answers of this Court to the questions submitted. The answer to the first question should be in the negative, and to the second in the affirmative. Notwithstanding the provisions of the *Lands Act* 1908 taking away the right of appeal in respect of determinations of the Land Board under sec. 6 of the Act of 1905, the appellant's right to have the appeal dismissed by the Land Court has not been taken away. There is nothing in the Act of 1908 to make the provision in question retrospective, and it is quite clear that the taking away of a right of appeal is not merely a matter of procedure. The decision of the Privy Council in the *Colonial Sugar Refining Co. Ltd.* v. *Irving* (1), is a direct authority on the point. For these reasons I am of opinion that the appeal must be allowed.

ISAACS J. read the following judgment:—I agree with the judgment proposed by the learned Chief Justice.

The first question raised by the case submitted by the Land Appeal Court should, in my opinion, be answered in the negative. The learned Judges of the Supreme Court have regarded one circumstance as decisive, namely, the acceptance of the money

(1) (1905) A.C., 369.

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order by the Chairman of the Board. The Act provides as one of the requirements of appeal that the proposed appellant shall deposit with such Chairman "the sum of five pounds as security for the costs of the appeal." I do not think this necessarily requires the deposit of specie; for instance, the deposit of bank notes would I think be a substantial compliance with the section; or even a money order payable to the Chairman himself, because lodging with the Post Office £5 to the sole order of the Chairman within the proper time, and in due course forwarding him the money order which enables him to obtain it at will, is as effectual as if it were deposited to his credit in the bank, and having regard to the circumstances of the country and the distances at which applicants reside, ought, in my opinion, to be considered as equivalent within the meaning of the Act to handing the sum in actual money to the Chairman himself.

But, on the other hand, it would not be sufficient to hand to the Chairman, for instance, a promissory note of the appellant, and notwithstanding the fact that the Chairman accepted the instrument as cash, it would not be a compliance with the Statute. The Chairman has no power to waive the requirement of the Act, nor is his solvency the security aimed at by the legislature, it is the money of the appellant substantially deposited with and under the control of the Chairman. Now the Registrar of the Land Appeal Court would doubtless readily endorse it if desired, but apart from the question whether he was bound to do so, the fact exists that he had not done so within the stated time, and therefore within that prescribed period the Chairman was in possession of a document which needed still one essential thing, namely, the Registrar's signature, to place the money under his control, and so complete the deposit of security stipulated by the Act. Kaufline, therefore, did not comply with the statutory requirements, and as no waiver can be suggested—even if waiver be possible, as to which I offer no opinion—the answer must be that the lodging of the money order was not a depositing of the money within the meaning of the section.

The Supreme Court refused to answer the second question on the ground that it went to the jurisdiction. But it is nevertheless a question of law, though a fundamental question. For the

purpose of this question we must assume that all conditions of appeal were complied with, and therefore that the case was properly before the Land Appeal Court. The contest is whether Kaufline or Willmott should succeed. The notice of appeal in accordance with sec. 17 of the Act of 1884 states the grounds, and the respondent when before the Land Appeal Court urged that upon the proper construction of sec. 7 of the Act of 1905 the ground stated in the notice is declared a matter as to which there shall be no appeal. Why is this not a question of law in a case before the Land Court? If it had been only one of several grounds, the others being admittedly cognizable, the point would hardly have been contested. It seems to me that the legislature by means of the case to be submitted under sec. 8 of the Act of 1889 has provided a simple and ready means of obtaining the decision of the Supreme Court upon any point of law whatever which may arise in the course of the judicial functions of the Land Appeal Court, and it would be unduly limiting the usefulness of the Statute to exclude from it such a question as that now under consideration, and so render necessary a multiplicity of proceedings which are avoided by a broader construction of the Act. As to the proper answer to the question itself, I agree with what has fallen from my learned brothers, and although the question is now divested of any materiality for the future by reason of later legislation, and is also without importance in the present case because of the proper answer to the first question, I am of opinion that there was nothing in sec. 7 of the Act of 1905 which prevented an appeal on that ground, and that this question should be answered in the affirmative.

Appeal allowed. Order appealed from discharged with costs in the Supreme Court. Question (1) *answered in the negative and question* (2) *in the affirmative.*

Solicitors, for the appellant, *A. F. W. Rose*, Cooma, by *Backhouse & Jeanneret.*

C. A. W.