[HIGH COURT OF AUSTRALIA.]

CHARLES MACKINNON . . . . APPELLANT;
DEFENDANT,

AND

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1909.

SYDNEY, *Nov.* 24, 25.

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

Crown lands—Improvement Leases Cancellation Act 1906 (*N.S.W.*), (*No.* 42), *secs.* 2, 3, 4*—*Crown Lands Act* 1895 (*N.S.W.*), (*No.* 18), *secs.* 24, 25—*Cancellation*

*Secs. 2, 3 and 4 of the *Improvement Leases Cancellation Act* 1906, No. 42, are as follows:—

"2. If within four months of the commencement of this Act the Honorable Mr. Justice Owen certifies that any improvement lease, then current and in force, which was the subject of inquiry by the Royal Commission on the administration of the Lands Department was granted or purported to be granted under circumstances evidencing improper acts or serious irregularity, and that such lease should be dealt with under this Act, such certificate shall be notified in the *Gazette*, and thereupon such lease shall become cancelled and forfeited.

"3. On such cancellation and forfeiture, the former lessee of the land comprised in such lease shall become the holder of a preferential occupation licence thereof, and such land shall thereupon become reserved from sale and leases generally until such reservation is revoked in whole or in part by notification by the Governor in the *Gazette*.

"The said former lessee may within sixty days after such cancellation make application for an improvement lease or improvement leases or for a lease under section eighteen of the *Crown Lands Amendment Act* 1903, of the said land or any part thereof.

"4. (1) For the purpose of dealing with land comprised in leases so forfeited, the Governor shall appoint a board of three persons, one of whom shall be a Judge of the Supreme Court, who shall preside at meetings of the board.

(2) Such board shall inquire and finally determine—

(*a*) whether any and what part of such land may be leased under an improvement lease or under section eighteen of the *Crown Lands Amendment Act* 1903;

(*b*) the term, not exceeding twenty-eight years, the rent, and the conditions of any such lease;

(*c*) whether, having regard to the circumstances surrounding the granting of the cancelled lease and the equities of the case,

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of improvement lease—Power of Crown to determine preferential occupation licence by grant of settlement lease.

The appellant was the holder of an improvement lease, which was cancelled under the *Improvement Leases Cancellation Act* 1906. By sec. 3 of this Act the appellant thereupon became the holder of a preferential occupation licence in respect of the land comprised in the improvement lease.

Held, that this land was subject to the provisions of the Crown Lands Acts, and that the preferential licence of the defendant was determined by the grant by the Governor of a settlement lease of the land under sec. 25 of the *Crown Lands Act* 1895.

Minister for Lands v. *The Bank of New South Wales*, 9 C.L.R., 322; considered and applied.

Decision of *A. H. Simpson* C.J. in Eq. (*Attorney-General* v. *Mackinnon*, 26 W.N. (N.S.W.), 138), affirmed.

APPEAL by the defendant from the decision of *A. H. Simpson* C.J. in Eq., upon the hearing of an information brought by the Attorney-General under the following circumstances.

In 1906 the appellant was the registered holder of two improvement leases in the central division which had been granted to him by the Crown under the *Crown Lands Act* 1895. These leases were the subject of an inquiry by the Royal Commission on the administration of the Lands Department held in 1905 and 1906, and on 27th February 1907 these leases were cancelled under the provisions of the *Improvement Leases Cancellation Act* 1906. On or about 17th April 1907 the appellant applied under sec. 4 of the last mentioned Act for improvement leases of the land formerly comprised in the cancelled leases. This application was disallowed by the Board appointed under the Act.

By notification in the *Government Gazette* of 11th December 1907, by the Governor, in pursuance of sec. 3 of the said Act, the

the former lessee should have a preferential right to any such improvement lease, or whether such lease should be by auction or tender;

(*d*) whether, and to what extent, the former lessee should be entitled to tenant right as defined in section fifty-one of the *Crown Lands Act* 1895, in any improvements effected during the currency of the cancelled improvement lease;

(*e*) the amount of the preferential licence for such land.

(3.) The Governor may fill any vacancy in the board caused by the death or resignation of any member.

reserves from sale and lease generally of the land comprised in the cancelled leases were duly revoked.

In the same *Gazette* the Governor notified that in pursuance of sec. 10 of the *Crown Lands Act* 1895, the Crown lands comprised within certain areas mentioned (which included the lands in question in this suit), should not be available for the purposes of any application until a further notification had been published in the *Gazette*. On 24th June 1908 a notification was published in the *Gazette* revoking the notification of 11th December 1907, and on the same day the land comprised in the cancelled leases was set apart as four farms available for original settlement lease.

One A. W. Cleaver was the successful applicant for one of these farms, and his application was confirmed by the local Land Board on 28th July 1908, and a certificate of such confirmation was duly issued to him on 1st August 1908.

On 12th August 1908 the appellant wrote and sent to A. W. Cleaver a letter claiming that he was, as preferential occupation licensee, entitled to undisturbed possession of the lands in question, and threatening, if Cleaver interfered with such possession, to proceed against him as a trespasser.

By information the Attorney-General prayed for declarations against the appellant: (1) that the Crown was entitled to grant and issue settlement leases of the land comprised in the cancelled leases; (2) that upon the issue of any such settlement lease the occupation licence of the appellant in respect of the land so leased forthwith ceased, and determined; (3) that upon the issue of any such lease the Crown and its lessee or lessees were entitled to possession of the land so leased against the appellant, and for consequential relief.

A. H. Simpson, C.J. in Eq., made the declaration as asked (1). The defendant now appealed.

Shand K.C., *Canaway*, and *Bavin*, for the appellant. The *Improvement Leases Cancellation Act* 1906 specifies two kinds of leases which the Governor may grant, and the power to grant leases of two kinds must be taken to negative the existence of

(1) 26 W.N. (N.S.W.), 138.

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power to grant a lease of any other kind: see *Blackburn* v. *Flavelle* (1), where the principle applied by the Privy Council is precisely in point. The title to the Act shows that the legislature intended that a special Board was to be the proper authority to deal with the lands; and this inference from the title is confirmed by the first words of sec. 4. Although the Act provides that the improvement lease is to be cancelled, and the last holder of the lease is to become the holder of a preferential occupation licence, there are no words to be found in the Act such as in, *e.g.*, sec. 136 of the *Crown Lands Act* of 1889, and at the end of sec. 43 of the *Crown Lands Act* 1889, which would in terms enable the Governor to deal with the lands at his discretion. Hence it is to be inferred that the legislature has advisedly withheld from the Governor powers appropriate to ordinary cases; and for good reason, for if the Governor had power to deal with the lands at his discretion, it is obvious that the mischiefs which the Act was passed to cure might creep in again and flourish as before. The *Reserves Declaratory Act* 1907 shows that it was immaterial that the former lessees had not been heard. To the irregularities for which the lease was cancelled, they need not have been in any degree parties. The special Board (subject to certain exceptions) could only recommend a lease if, at the date of the inquiry, the land continued to be of the description for which an improvement lease could have been granted under sec. 26 of the *Crown Lands Act* 1895. It, therefore, might well happen under the Act that a lessee, whose conduct had been spotless, lost his former lease and at the same time was prevented from obtaining a new lease from the Board for the very reason that his own expenditure had made the land of a different description from what it was originally. That the Act may have worked out to such results of hardship helps the view that the legislature intended to keep the lands under its own special supervision, and where new leases had been refused by the Board, to leave the lands under preferential occupation licence until fresh legislation could be passed with full knowledge of all the circumstances. The enactment as to tenant right is in fact so framed as to make further legislation a necessity before the

(1) 6 App. Cas., 628.

former lessee would have a right which could be properly enforced.

The question now to be decided by the Court could not have arisen in the former case: *Minister for Lands* v. *The Bank of New South Wales* (1); for that case proceeded on an assumption common to both parties, and accepted by the Court, that the Governor had the power, which the appellant contends he has not. Where a question is not raised before the Court, the Court is not less free in future as to that question than if it had given a decision *ex parte*. A final Court of appeal is free to reconsider former decisions given *ex parte*. *Tooth* v. *Power* (2).

Cullen K.C., *Hanbury Davies*, and *Bethune*, for the respondent, were not called upon.

GRIFFITH C.J. In my opinion this case is practically concluded by the decision reported in *Minister for Lands* v. *The Bank of New South Wales* (1) decided in August last, while this appeal was pending. The question raised is as to the rights of a person who becomes the holder of a preferential occupation licence under the *Improvement Leases Cancellation Act* 1906 (No. 42). In the case to which I have referred the particular question was whether the holder of a preferential occupation licence was entitled to the ordinary privileges of occupation licensees conferred by the Crown Lands Acts relating to such land. The Court held that he was. It then became necessary to inquire whether the particular privilege set up in that case really existed, and the Court held that it did. The Court held, in effect, that in construing the Act of 1906 all the other Acts relating to Crown lands were to be read with it, and that when a preferential occupation licence was granted under the Act of 1906 the holder was entitled to the same advantages, and subject to the same conditions, as the holders of other occupation licences.

In the present case the question arises in this way: The holder of an occupation licence is liable, as soon as the land has been thrown open to any other form of occupation, to lose his occupation right. It is contended that under this Act the holder of an

(1) 9 C.L.R., 322. (2) (1891) A.C., 284.

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Griffith C.J.

occupation licence has, in fact, a perpetual tenure until some new legislation is passed. That is entirely inconsistent with what the Court held in the case of the *Minister for Lands* v. *The Bank of New South Wales* (1). In my judgment, the holder of an occupation licence under this Act is liable, like the holder of a similar licence under the other Crown Lands Acts, when the land becomes open for selection, to have the land selected, and as soon as it is selected, his title ceases. That is the only point to be decided. *Simpson* J. did not address himself to the subject at length. His observations are summed up in these words:—"When the *Improvement Leases Cancellation Act* of 1906 makes the lessee under a cancelled lease holder of a preferential occupation licence it makes him holder under a tenure well known and recognized; it does not create a new tenure. In my opinion such licence was intended to be subject to the incidents mentioned in sec. 25 of the *Crown Lands Act* of 1895, and consequently the Governor has power by granting a settlement lease to put an end to the defendant's preferential occupation licence."

I entirely agree. I think that the appeal fails, and I think also that if the decision in the case of the *Minister for Lands* v. *The Bank of New South Wales* (1) had been given before this appeal was brought we should not have heard of it.

BARTON J. I am of the same opinion and have nothing to add.

O'CONNOR J. I agree. It is unnecessary to add anything to what has been already said.

ISAACS J. I am of the same opinion, but I should like to add a few words. The reason given in the case we have already decided is undoubtedly opposed to the appellant's contention. Counsel for the appellant, as I understand their argument, took up two positions. First, they asked us to review the decision given in another case like the present, where no patent error is pointed out, and in those circumstances I do not feel disposed to reconsider the reasoning which led us to the conclusion we came

(1) 9 C.L.R., 322.

to in that case. Their contention is as to the manner in which the Governor in Council may alienate the land, namely, that the power of the Governor in Council is limited to the express matters referred to in the Act itself. I do not think that there is anything in this Act which indicates that the power of the Governor in Council is limited to the modifications which are distinctly referred to in the Act itself. The appellant claims to be the holder of a preferential occupation licence of land, which he undoubtedly is, but he claims to be such a licensee with much greater rights than any other occupation licensee of other land can have, and I think the contention is destroyed when we look at the words of sec. 3, sub-sec. 1, and find that in the same breath, so to speak, in which the legislature has made him the holder of the preferential occupation licence, it has also added that "such lands shall thereupon become reserved from sale and lease generally." These words would be unnecessary if his contention were correct. Then those words are followed by a significant expression "until such reservation is revoked in whole or in part."

So far from finding in those words any indication that the ordinary power given under the Crown Lands Acts to alienate is curtailed, those words appeal to my mind as confirming that power. Then, at the end of sec. 5 are words which also appear to me to have no meaning whatever, supposing the contention of the appellant is correct. Under sec. 26 of the *Crown Lands Act* 1895, unless land is of a certain description, it can be granted by way of improvement lease. Sec. 5 of this Act modifies that by allowing it to be granted, notwithstanding that fact, on one condition, if in the opinion of the Board the land is unfit for settlement, or not likely to be required during the currency of the improvement lease. If the Governor in Council had no power to grant that land for settlement, I cannot understand why the legislature should have inserted those words. It is nothing to the point to say that the legislature contemplated some other enactment, because it would be time enough then to put in those words, but the presence of those words is sufficient reason to me that the Act conveys, by implication, power to deal with the land as Crown lands. For these reasons I think no distinction can be

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made between this case and the previous case, and that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors, for the appellant, *Macnamara & Smith.*

Solicitor, for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

C. E. W.

[HIGH COURT OF AUSTRALIA.]

GAIR AND OTHERS . . . . . APPELLANTS;

AND

BOWERS AND OTHERS . . . . RESPONDENTS.

GAIR AND OTHERS . . . . . APPELLANTS;

AND

BOWERS AND OTHERS . . . . RESPONDENTS.

FALCONAR . . . . . APPELLANT;

AND

BOWERS . . . . . RESPONDENT.

GAIR AND OTHERS . . . . . APPELLANTS;

AND

H. C. OF A. 1909. FALCONAR . . . . . RESPONDENT.

MELBOURNE. *Sept.* 1, 3, 6, 7, 8, 14.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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

Will—Execution—Evidence—Will not produced—Affidavit contradicted by oral evidence—Presumption of due execution—Statements made by testator after execution—Revocation by subsequent will.