[HIGH COURT OF AUSTRALIA.]

JOHN McGILL DE BRITT . . . . APPELLANT;

AND

THOMAS FRANCIS JAMES CARR . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 28; *August* 2.

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

Crown Lands Act 1895 (*N.S.W.*), (58 *Vict. No.* 18), *sec.* 41 — *Crown Lands Amendment Act* 1905 (*N.S.W.*) (*No.* 42), *sec.* 5—*Application for conditional purchase by alien—Failure to become naturalized within five years—Absolute forfeiture—Right of waiver of forfeiture by Crown—Application for additional conditional purchase—Right of rival applicant to impeach validity of title of holder of conditional purchase.*

Sec. 41 of the *Crown Lands Act* 1895 provides that an alien shall not be entitled to apply for a conditional purchase "unless he has resided in New South Wales for one year, and at the time of making such application he lodge a declaration of his intention to become naturalized within five years," and that if he fails to become naturalized within this period he shall absolutely forfeit the land, the subject of his application, together with all improvements thereon.

By sec. 5 of the *Crown Lands Amendment Act* 1905 the holder of a conditional purchase may apply for additional land.

The appellant, an alien, who had resided in New South Wales for one year, in 1896 applied for a conditional purchase, and lodged a declaration of his intention to become naturalized within five years. Upon an inquiry before the Land Board in 1901, as to whether the appellant had complied with the statutory conditions of his purchase, it appeared that he had not been naturalized within the five years. The Board recommended that the forfeiture incurred should be waived. In 1902 the appellant became naturalized, and in the same year the Minister approved of the waiver of the forfeiture as recommended by the Board. In 1906 a certificate of conformity was granted by the Board to the appellant. In 1909 the appellant applied, as the holder

of a conditional purchase, for additional land under sec. 5 of the *Crown Lands Amendment Act* 1905. The respondent, a rival applicant for this additional land, took objection before the Land Board that the appellant was not the holder of a conditional purchase :

Held, that it is a condition precedent to the creation of a valid contract between an alien and the Crown, under sec. 41 of the *Crown Lands Act* 1895, that the alien should become naturalized within five years from the date of his application, that the non-performance by the alien of this statutory obligation could not be waived by the Crown, and that the appellant was therefore not entitled to apply for the additional land as the holder of a conditional purchase :

Held, also, that the respondent as a rival claimant with the appellant for the additional land, was entitled for this purpose to object to the validity of the appellant's original title.

Decision of the Supreme Court : *Carr* v. *de Britt*, 11 S.R. (N.S.W.), 101, varied, and affirmed as varied.

APPEAL from the decision of the Supreme Court allowing an appeal upon a case stated by the Land Appeal Court.

On 26th March 1896 the appellant de Britt, being then an alien, who had resided in New South Wales for more than one year, applied for an original conditional purchase, and lodged a declaration of his intention to become naturalized within five years from the time of such declaration, in accordance with sec. 41 of the *Crown Lands Act* 1895. This section provides that "a person who is not a natural-born or naturalized subject of Her Majesty shall not be qualified to apply for any holding of the class referred to in the last preceding section," (which includes an original conditional purchase), "unless he has resided in New South Wales for one year, and at the time of making such application he lodge a declaration of his intention to become naturalized within five years from the time of making such declaration. And if such person fails to become so naturalized within the period aforesaid, he shall absolutely forfeit all land the subject of his application, together with all the improvements thereon."

On 30th June 1896 de Britt's application was confirmed by the Land Board.

In August 1901 the Land Board held an inquiry as to whether de Britt had complied with the conditions of his

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conditional purchase, and in giving evidence on that inquiry de Britt said: "I am not a naturalized British subject yet. I understood it was not necessary for me to become naturalized until just before the residence term on the conditional purchase expired," and on 10th May 1902 he said in evidence on the same inquiry, "I have applied for letters of naturalization but they have not issued to me, and I now ask that the incurred forfeiture be waived."

This inquiry concluded on 10th May 1902, and the Board recommended that the forfeiture incurred be waived.

On 9th May 1902 de Britt became a naturalized British subject.

On 26th June 1902 the Minister for Lands signed a minute by which he approved of the waiver of the forfeiture under sec. 41 as recommended by the Board.

On 16th November 1906 a certificate was granted by the Board that all conditions applicable to the conditional purchase except payment of balance of instalments had been complied with.

On 7th October 1909 de Britt applied, as the holder of the conditional purchase above referred to, under sec. 5 of the *Crown Lands Amendment Act* 1905, for an additional conditional purchase of certain land. A simultaneous application for the same land was made by Carr. The Land Board inquired into the conflicting applications, and allowed de Britt's application.

In March 1910 Carr again applied for the said land as an additional conditional purchase and conditional lease. In June 1910 Carr forwarded a notice to the Chairman of the Land Board that he desired to prosecute a complaint upon the ground that de Britt had allowed more than five years to elapse from the date of his application for his original conditional purchase before he became naturalized, and that he had consequently forfeited his original conditional purchase, and therefore could not apply for an additional conditional purchase under sec. 5 of the Act of 1905.

The Land Board held that Carr had a *locus standi* to oppose the confirmation of de Britt's application for an additional conditional purchase, but dismissed the complaint, and confirmed de Britt's application.

On appeal the Land Appeal Court held that there had been no

forfeiture of de Britt's original conditional purchase under sec. 41 of the *Crown Lands Act* 1895, because no such forfeiture had been notified in the *Gazette* in accordance with sec. 136 of the *Crown Lands Act* 1884, and that de Britt was therefore entitled to apply for an additional conditional purchase.

The questions submitted for the decision of the Supreme Court were :—

1. Was the absolute forfeiture provided for in sec. 41 of the *Crown Lands Act* of 1895 subject to notification in the *Government Gazette* before such forfeiture took effect ?

2. Had the Minister a discretion or power to waive the absolute forfeiture provided for in the said section ?

3. Was the recommendation of the Land Board of 10th May 1902 as to waiver of forfeiture within the power of the Land Board ?

The Supreme Court answered the first two questions in the negative, and allowed the appeal: *Carr* v. *de Britt* (1).

From this decision de Britt now appealed.

Canaway K.C. and *Coghlan*, for the appellant. The questions for determination are, first, whether de Britt was the holder of a conditional purchase when he applied for the land in dispute as an additional holding under sec. 5 of the *Crown Lands Amendment Act* 1905, and secondly, assuming that by appropriate proceedings the Crown could recover possession of the conditional purchase, whether Carr can in these proceedings impeach the validity of de Britt's title to it. If de Britt is the holder of a conditional purchase he is entitled to apply for the additional land. In order to succeed Carr must be in a position to prove the invalidity of de Britt's original title.

As to the first point, an alien who has resided in New South Wales for a year, and declares his intention to become naturalized within five years, is entitled to apply for a conditional purchase under sec. 41 of the Act of 1895, and when his application has been confirmed he becomes a conditional purchaser just as if he were a British subject, except that his title is liable to be forfeited by the Crown if he does not become naturalized within

(1) 11 S.R. (N.S.W.), 101.

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five years. The fact of prior residence and the lodging of the declaration make the alien qualified to become an applicant, and upon the confirmation of his application he enters into a valid contract with the Crown, which is subject to the fulfilment of the conditions subsequent, in accordance with the Crown Lands Acts. Apart from the disqualifications imposed by the Crown Lands Acts, an alien in New South Wales had the full capacity of a British subject, to acquire and dispose of real and personal property, except that he could not become the owner of a British ship: 1898 No. 21, sec. 4. Sec. 41 was not intended to deal with the competency or the status of aliens generally, because in 1895 it only referred to four classes of holdings. There were other forms of direct purchase from the Crown, as for instance, under sec. 27 of the Act of 1895, which deals with pastoral, homestead, and settlement leases. These other forms of leases might lead to the acquisition by an alien of the fee. Sec. 41 is an enactment dealing with the more popular forms of tenure under the Crown Lands Acts, and provides that an alien shall not apply for land under these forms of tenure unless he gives a certain undertaking. It says he is not competent to apply, not that he is incompetent to hold. It imposes a modified form of disqualification, and provides a condition subsequent. The section does not provide that the alien must become naturalized within five years as a condition precedent to his right to enter into contractual relations with the Crown. Sec. 44 of the Act of 1895 provides in the widest terms for the validation of purchases or leases where there has been a breach or non-observance of the provisions of the Acts. Sec. 1 of the Act of 1895 provides that that Act is to be read with and form part of the unrepealed portion of the earlier Acts, and sec. 136 of the Act of 1884 provides that no forfeiture shall take effect until thirty days after notification in the *Gazette*. The word forfeiture, as used in the Crown Lands Acts, implies the exercise by the Crown of an option, or discretion, and the communication by the Crown of its intention to exercise its powers of forfeiture: *Minister of Mines* v. *Harney* (1). Sec. 6 of the Act of 1891, 55 Vict. No. 1, provides that in any case in which a purchase, lease, or licence, has become liable to for-

(1) (1901) A.C., 347.

feiture by reason of the non-fulfilment of any condition annexed by law, if innocently caused, the Minister may waive the forfeiture. The terms of this section are wide enough to cover the case of the non-performance of a condition precedent. The Acts provide a uniform scheme of administration as regards forfeitures, and distinguish between lapse, voidance, and forfeiture: *O'Keefe* v. *Malone* (1).

The word "forfeiture" being used in the Crown Lands Acts with a well-recognized meaning as distinct from "lapse," the addition of the word "absolutely" does not preclude the Crown from exercising its right of waiver which exists in other cases of forfeiture.

The section should be read as meaning "shall absolutely forfeit at the discretion of the Crown." These words were construed as conferring a discretionary power in *Moore* v. *Rawlins* (2). So in *Bank of Australasia* v. *Harris* (3), it was held that the words "absolutely void" in sec. 8 of the *Insolvent Act*, 5 Vict. No. 17, did not mean void in all respects and against all persons, but void as against creditors. The construction contended for by the respondent would enable an alien to take advantage of his own wrong. If he found that he had entered into an onerous contract he could avoid his obligations by failing to become naturalized. The use of the word "absolutely" was not an implied repeal of sec. 136 of the Act of 1884.

If the intention of the legislature was as contended for by the respondent, the appropriate words to express that intention would be "absolutely void": *Davenport* v. *The Queen* (4).

[GRIFFITH C.J. referred to *President and Governors of Magdalen Hospital* v. *Knotts* (5).]

Assuming that the appellant's original title could be impeached at suit of the Crown, the respondent is not claiming the conditional purchase, and he cannot litigate the question by way of complaint under sec. 14 (5) of the Act of 1884: *Osborne* v. *Morgan* (6). Sec. 44 of the Act of 1895 embodies the principle of that decision. Under sec. 5 of the Act of 1905 it is sufficient that a

(1) (1903) A.C., 365, at p. 377.
(2) 6 C.B.N.S., 289; 28 L.J.C.P., 247.
(3) 2 Legge (N.S.W.), 1337; 15 Moo. P.C.C., 97, at p. 116.
(4) 3 App. Cas., 115.
(5) 4 App. Cas., 324.
(6) 13 App. Cas., 227.

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person should be a *de facto* holder whose title is recognized by the Crown.

Piddington and *Coffey*, for the respondent. *Osborne* v. *Morgan* (1) has no application to this case, because the respondent is not seeking to disturb the appellant's possession of the conditional purchase *de facto*, but is merely attacking the appellant's derivative right to be a competitor as against him for the additional lands. *Davenport* v. *The Queen* (2) is also distinguishable because the scope and purpose of sec. 41 is to deal with the alien's capacity to contract, and not with the conditions of the contract when made. The effect of the appellant's contention is that all conditions precedent to the right to acquire land from the Crown can be waived by the Crown. The absolute forfeiture under sec. 41 is not optional or permissive. All the other sections dealing with forfeiture provide for the forfeiture of the money deposited by the applicant. Here no such provision was necessary as, if the alien does not become naturalized within the five years, there is no contract. The use of the word "absolutely" precludes the application of the sections dealing with notification, and waiver of forfeiture. Sec. 9 of the Act of 1875 is the only other instance in which the words "absolutely forfeited" occur in the whole series of the Crown Lands Acts, though forfeiture is dealt with in a great number of sections: see secs. 26, 38, 39, 96 and 135 of the Act of 1884: secs. 16, 25 (*g*), 29, 43 of the Act of 1895: sec. 12 (1) of the Act of 1902 and sec. 21 of the Act of 1905. With the exception of sec. 26 of the Act of 1884, when the words used are "shall forfeit", in every other section the power of forfeiture is expressly made optional or permissive. Sec. 6 of the Act of 1891, and sec. 44 of the Act of 1895, deal with the forfeiture or avoidance of a purchase or lease, thus pre-supposing the existence of a valid contract. Sec. 41 carefully avoids the recognition of the existence of any purchase or lease in the alien during the five years.

Canaway K.C., in reply, referred to *In re Levy's Trusts* (3); *Blackburn* v. *Flavella* (4).

(1) 13 App. Cas., 227.
(2) 3 App. Cas., 115.
(3) 30 Ch. D., 119.
(4) 1 N.S.W. L.R., 58; 6 App. Cas., 628.

GRIFFITH C.J. We have had an opportunity of considering this matter since the adjournment, and as the case seems to be tolerably free from difficulty we do not think it necessary to reserve our decision.

The appellant and the respondent were rival applicants for certain portions of Crown lands. The appellant claimed to be entitled to take up the land as an additional conditional purchase in right of a conditional purchase of which he claimed to be the lawful holder. The respondent denies that the appellant is the lawful holder of the conditional purchase and contends that the appellant's title to the conditional purchase failing, any derivative title to acquire the additional land by virtue of it fails also. It is common ground that unless the appellant has a good title to the original conditional purchase his application to take up the additional land must fail, and that the respondent in that case has a better right to that land.

Sec. 41 of the *Crown Lands Act* of 1895 provides that "a person who is not a natural-born or naturalized subject of Her Majesty shall not be qualified to apply for any holding of the class referred to in the last preceding section" (which includes a conditional purchase) "unless he has resided in New South Wales for one year, and at the time of making such application he lodge a declaration of his intention to become naturalized within five years from the time of making such declaration. And if such person fails to become so naturalized within the period aforesaid, he shall absolutely forfeit all land the subject of his application, together with all the improvements thereon."

The material facts with regard to the appellant's title to the original conditional purchase are that he was not a natural-born or naturalized subject at the time when he made his application for it, but had resided in New South Wales for one year. At the time of making his application he lodged a declaration of his intention to become naturalized within five years. He did not, however, become naturalized within the five years. The consequence was, according to the *primâ facie* meaning of the latter words of the section, that the appellant absolutely forfeited the land the subject of his application, together with all the improve-

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ments thereon. That is the apparent meaning of the words, and the Supreme Court have held that it is the true one.

But it is contended that, although this is the apparent meaning of the section, the words "shall absolutely forfeit" mean "shall be liable to forfeit at the option of the Crown," and in support of that contention several other sections of the Crown Lands Acts have been referred to.

It is settled law in the interpretation of the Crown Land Acts that the power of forfeiting a lease is generally a power that may be waived by the Crown. But it does not follow that the legislature cannot provide otherwise. The question is what did they mean in this instance? Moreover, this rule has only been laid down as to cases of failure by Crown tenants or purchasers to observe the conditions of their contract, as in any other case between landlord and tenant. It has never been held that the performance of a condition, which is essential to the creation of a valid contract, can be waived. The suggestion in this case is that the Crown can waive what the legislature has said is a condition precedent to the existence of a valid contract. By the law of New South Wales the Crown is only authorized to dispose of Crown lands in accordance with the provisions of the Crown Lands Acts. In my opinion sec. 41 imposed upon the appellant an obligation to become naturalized within five years, and his compliance with this statutory requirement was a condition precedent to the creation of a contract that he should acquire the land by purchase from the Crown. During the five years his title to the land was inchoate or provisional, and his right to become a purchaser was conditional upon his becoming naturalized within that period. The fact that during the five years the appellant was in possession of the land cannot effect the construction of the Statute. That is sufficient to dispose of the case.

I will, however, refer to some other arguments that were addressed to us. Sec. 136 of the Act of 1884 provides that whenever any land is forfeited under the Act such land shall become Crown land, and may be dealt with as such, but that no forfeiture of any purchase or lease shall take effect until the expiration of thirty clear days after notification of such forfeiture

in the *Gazette*. That section obviously assumes the existence of a valid purchase or lease.

Sec. 6 of the Act of 1891 provides that in any case in which a purchase, lease or licence has or shall become liable to forfeiture by reason of the non-fulfilment of any condition annexed by law to such purchase, lease or licence, but in which the Minister shall be satisfied that such non-fulfilment has been caused by accident, error, mistake, inadvertence, or other innocent course, and that such forfeiture ought therefore to be waived, it shall be lawful for the Minister to declare that such forfeiture is waived either absolutely, or upon such conditions as he may see fit to declare, and the forfeiture shall thereupon be waived accordingly. That section, on its face, refers to a case where there is an existing lease or licence. It does not apply to a case where the question is whether there has ever been a valid contract for a purchase or lease.

Reliance was also placed upon sec. 44 of the Act of 1895, which provides that a purchase or lease purporting to have been theretofore made or granted under the provisions of the repealed Acts or the Principal Act shall not be held to be void by reason of any breach or non-observance of the provisions of those Acts, but every such breach or non-observance as aforesaid, if of a nature to affect the validity of the purchase or lease, shall render the same voidable only at the instance of the Crown.

That section only relates to past transactions and has no application to the present case. The concluding paragraph of the section, however, says that the provisions of the section shall apply in like manner to purchases or leases purporting to be made or granted after the commencement of the Act, but that the Governor shall not, in any such case, declare that the purchase or lease shall cease to be voidable unless notice of the intention to make such declaration shall have lain before both Houses of Parliament for not less than ninety days, without being objected to by specific resolution. It is said that the latter part of the section qualifies the words "a purchase or lease shall not be held to be void" in the earlier part, so as to make the whole section applicable to future contracts. But it is unnecessary to express any opinion on this point.

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The terms of sec. 44 at first sight appear to be very strong, but it must be remembered that they occur in immediate conjunction with secs. 41 and 43. In sec. 41 the legislature has said that in certain cases the land shall be absolutely forfeited. Sec. 43 provides for the forfeiture of a holding for want of good faith. Then sec. 44 permits the validation of a purchase or lease where a mistake has previously been made.

It has been pointed out by Mr. *Piddington* that sec. 41 is the only instance in the existing Crown Lands Acts when the words "absolutely forfeit" are used. In the *Crown Lands Act* 1875 it was provided by sec. 9 that, if any person became the conditional purchaser of any land in violation of the provisions of that section, his right, title and interest and the land itself with all improvements should, on notification in the *Gazette*, be absolutely forfeited.

There was no doubt what that meant. It meant that the title ceased, and the land revested in the Crown.

Sec. 41 is the only other instance of the use of this expression in the Crown Land Acts. It is an entirely erroneous principle of construction to say that when the legislature goes out of its way to use a different and distinct expression it does not mean to express a different intention. The question of forfeiture is dealt with continually throughout the Crown Land Acts. The expressions used vary. In sec. 26 of the Act of 1884 the words used are "shall forfeit." That was a forfeiture for making a false declaration. Secs. 38, 39, 96 and 135 give a power of forfeiture to the Crown.

Sec. 16 of the Act of 1895 provides for forfeiture of the right to a homestead selection by notification in the *Gazette*, and that thereupon the applicant's right to continue in occupation shall wholly cease and determine. Sec. 29 of the same Act gives the Minister a power of forfeiture for non-performance of the conditions of residence by the holder of a conditional purchase. Power of forfeiture is also given in the later Acts of 1902 and 1905. But sec. 41, as I have said, is the only instance of the use of the term "absolutely forfeit."

I think it is impossible, having regard to the context and the whole course of legislation, to say that "absolutely forfeit" means

"shall be liable to forfeiture at the option of the Governor." Upon the applicant's failure to become naturalized within the five years I think his title to the land came to an end, and that he was not entitled to apply for the additional land by a derivative title depending upon that title.

A question was raised as to the respondent's *locus standi* to take this objection. But although he probably could not be heard to object to the appellant's right to possession of the original selection, I do not think that he is debarred from taking this objection when the appellant sets himself up as a competitor with him for the purpose of acquiring additional land from the Crown. His object is not merely to interfere with the possession of the land which the appellant has *de facto* acquired, but to defend himself against the competition of a rival claimant whose right as against him to take up the additional land he disputes.

I therefore think that the appellant's application should have been rejected by the Land Board.

A difficulty arises as to the form in which the questions for determination are submitted in the special case.

I do not think it is necessary to answer Yes or No to the first question submitted. It will be sufficient to say that, so far as regards the appellant's right to make the application now in question, the absolute forfeiture provided for in sec. 41 of the *Crown Lands Act* of 1895 was not subject to notification before such forfeiture took effect.

The answer to the second question will be, No, so far as regard the appellant's right to make the application now in question.

It is not necessary to answer the third question.

I think therefore the answer to the questions given by the Supreme Court should be varied to the extent stated, and that the decision of the Supreme Court as so varied should be affirmed.

BARTON J. concurred.

O'CONNOR J. In this case the validity of the appellant's title to his original conditional purchase comes in question only in investigating whether he is a person qualified to apply for addi-

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tional land under sec. 5 of the Act of 1905. I agree that we should confine our answer upon the questions submitted to the appellant's right to apply under that section. On this point I concur in the decision of the Supreme Court, and I adopt the reasons expressed by *Pring* J. in support of that decision except those which have reference to the word "absolutely." Differing from his Honor in this respect, I think the use of that word in the context in which it stands throws considerable light on the sense in which the word "forfeiture" is used in sec. 41 of the Act of 1895. Mr. *Canaway* put his argument in two ways. His first contention was that a forfeiture does not take effect until the Government have, by notification in the *Gazette*, expressed their intention to take advantage of it. The soundness of that contention depends upon whether a forfeiture under sec. 41 of the Act of 1895, upon the failure of an alien to become naturalized within 5 years, is the kind of forfeiture dealt with in sec. 44 of the Act of 1895, and sec. 136 of the Act of 1884. In considering that question it is very important to notice what Mr. *Piddington* has pointed out, that in every case in which the word "forfeiture" is mentioned in the Crown Lands Acts (and in the whole series the word is used many times) there is only one other section in which the power of forfeiture is not conferred expressly as a permissive or optional power. Speaking generally, the scheme of the Acts is that the Crown may take advantage of a forfeiture or not as it thinks fit. If it elects to take advantage of the forfeiture it must notify its election in the *Government Gazette*. But in looking at the section under consideration the question at once arises, is that the kind of forfeiture with which it is dealing? The section cannot be properly construed without giving some effect to the change in the form of expression relating to forfeiture which occurs in its provisions. There is nothing there to suggest that the exercise of the power by the Crown is optional, that it may or may not as it pleases take advantage of the forfeiture. In the other sections to which I have alluded forfeiture does not take effect until after the *Gazette* notification intimating the Crown's intention to take advantage of it. In addition to that, in sec. 41 the forfeiture is expressed to be absolute, which clearly distinguishes it from the other forfeitures

which only take effect conditionally, that is to say, subject to the condition that the Crown has elected to take advantage of them and has notified its election to do so in the *Gazette*. For these reasons I am of opinion that sec. 136 of the Act of 1884 and sec. 44 of the Act of 1895 have no application to the forfeiture provided for in sec. 41, and that the forfeiture under that section operates immediately and automatically on breach of the condition.

It was also contended that sec. 6 of the Act of 1891 gives power to the Crown to waive the forfeiture. The answer is that that section deals with an existing contract for conditional purchase, lease, or licence in the same way as sec. 136 of the Act of 1884 and sec. 44 of the Act of 1895 deal with estates created under valid subsisting contracts and with forfeitures for non-compliance with conditions embodied in such contracts. Giving effect to the words of the section, absolute forfeiture takes effect beyond recall when the alien has failed to become naturalized within the five years as provided in the section. In my opinion therefore the Supreme Court was right, and the appeal must be dismissed.

Appeal dismissed.

Solicitor, for appellant, *L. L. Hogan*, Young, by *Collins & Mulholland.*

Solicitors, for respondent, *Coomenelen, Bertie & Co.*, Grenfell, by *L. G. B. Cadden.*

C. E. W.