[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . APPELLANT;

AND

THE REGISTRAR OF TITLES FOR VICTORIA RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 4, 5, 21.

Griffith C.J., Gavan Duffy and Rich JJ.

Land—Acquisition by Commonwealth—Easement—Right to light and air in respect of future buildings—Registration—Lands Acquisition Act 1906 (*No.* 13 *of* 1906), *secs.* 5, 20—*Transfer of Land Act* 1915 (*Vict.*) (*No.* 2740), *secs.* 68, 73.

The *Lands Acquisition Act* 1906 by sec. 20 provides as to a notification published in the *Gazette* declaring land to have been acquired by the Commonwealth that "If a copy of the notification in the *Gazette*, certified under the hand of the Attorney-General, is lodged with the Registrar-General or Registrar of Titles or other proper officer of the State or part of the Commonwealth in which the land is situated, he shall register it in the register and in the manner as nearly as may be in which dealings with land are registered, and shall deal with and give effect to the notification as if it were a grant or conveyance or memorandum or instrument of transfer of the land to the Commonwealth duly executed under the laws in force in that State or part of the Commonwealth."

Sec. 68 of the *Transfer of Land Act* 1915 (Vict.) provides that "Whenever any certificate of title . . . hereafter to be registered or issued . . . contains any statement to the effect that the person named in the certificate is entitled to any easement therein specified, such statement shall be received in all Courts of law and equity as conclusive evidence that he is so entitled." Sec. 73 provides that "the Registrar shall specify upon any future certificate of" any "land and the duplicate thereof as an encumbrance affecting the same any subsisting easement over or upon or affecting the same which appears to have been created by any deed or writing."

Pursuant to the *Lands Acquisition Act* 1906 the Commonwealth acquired a block of land in Victoria, together with full and free right to the uninterrupted

access and enjoyment of light and air to the doors and windows of the building or buildings erected or to be erected on the block of land first mentioned over a strip of land adjoining it.

Held, by *Griffith* C.J. and *Gavan Duffy* and *Rich* JJ., that the right over the adjoining strip of land so acquired was an easement at common law and as such might under secs. 68 and 73 of the *Transfer of Land Act* 1915 (Vict.) properly be specified upon the certificates of the dominant and servient tenements; and, therefore, that the Registrar of Titles was bound under sec. 20 of the *Lands Acquisition Act* 1906 to set out on the certificate of title of the block of land acquired the right to light and air acquired by the Commonwealth over the adjoining strip of land.

Per Griffith C.J.: Even if the right to light and air acquired by the Commonwealth was not an easement at common law, the Registrar of Titles, being bound under sec. 20 of the *Lands Acquisition Act* 1906 to register the notice of acquisition and give effect to it as if it were a transfer, was bound to set out the right acquired upon the certificates of title.

Decision of the Supreme Court of Victoria (*Cussen* J.): *R.* v. *Registrar of Titles; Ex parte The Commonwealth*, (1917) V.L.R., 576; 39 A.L.T., 59, reversed on a different ground.

APPEAL from the Supreme Court of Victoria.

By a notice dated 21st May 1915 published in the Commonwealth *Gazette* the Commonwealth notified that it had acquired under the *Lands Acquisition Act* 1906 a parcel of land at St. Kilda in Victoria, a full description of which was set out, "together with full and free right to and for the Commonwealth of Australia and to and for the registered proprietor or proprietors for the time being of the land firstly above described, or any part thereof, and its, his and their tenants, servants, agents, workmen, and visitors to the uninterrupted access and enjoyment of light and air to the doors and windows of the building or buildings erected or to be erected on the land firstly above described over and across all that strip of land 10 feet wide adjoining the eastern boundary of the said land firstly above described."

A copy of the notice was lodged with the Registrar-General of Victoria for registration pursuant to sec. 20 of the *Lands Acquisition Act*. A certificate of title was on 25th October issued in the name of the Commonwealth in which the right to light and air appeared in the following terms: "Together also with the right to the uninterrupted access and enjoyment of light and air over and

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across the " adjoining strip of land " to the doors and windows of any building or buildings standing on the " block of land acquired. The Commonwealth then requested the Registrar of Titles to amend the certificate in accordance with the notification of acquisition. This the Registrar of Titles refused to do. He also refused a request to state a case for the opinion of the Supreme Court under sec. 238 of the *Transfer of Land Act* 1915, giving, by direction of the Commissioner of Titles, the following reason :—" As respects the registration of easements, the only authority which the Registrar has is to register existing easements. He has no authority to register a right to a future easement. The right to light and air through windows of any possible future building is not an existing easement but a right to a future easement. The established practice of the Office of Titles is to refuse to register such rights. I am satisfied that the practice is correct, and must decline to state a case. As at present advised, the power to take land would authorize the taking of easements in the future but not, I think, the present taking of future easements."

The Commonwealth then obtained an order *nisi* for a mandamus to compel the Registrar of Titles to issue a certificate of title showing thereon " the easements, rights, powers and privileges " acquired by the Commonwealth by the notice of acquisition.

The order *nisi* was heard by *Cussen* J., who discharged it : *R.* v. *Registrar of Titles*; *Ex parte The Commonwealth* (1).

From that decision the Commonwealth now appealed to the High Court.

Mann, for the appellant. The word " land " under sec. 5 of the *Lands Acquisition Act* 1906 includes " any easement, right, power, or privilege over, in, or in connection with land " ; so that what the Commonwealth has acquired in this case over the adjoining land is more than a common law easement.

[GRIFFITH C.J. Is not the right acquired an easement at common law ? See *Ecclesiastical Commissioners for England* v. *Kino* (2); *Browne* v. *Flower* (3).

(1) (1917) V.L.R., 576 ; 39 A.L.T., 59.
(2) 14 Ch. D., 213.
(3) (1911) 1 Ch., 219.

[RICH J. referred to *Dalton* v. *Angus* (1); *Dyce* v. *Hay* (2); *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (3).]

The case below was argued on the assumption that a right to light was not an easement unless it was in respect of existing apertures. Under the *Lands Acquisition Act* the Commonwealth has power to take such a right as was acquired in this case absolutely against all persons and for all time. In that respect the acquisition differs from a grant by the owner of adjoining land. If what is taken is within the definition of "land," the Registrar is bound to register it under sec. 20. By acquiring the right as against all persons and for all time the right becomes an interest in land. The Registrar is to register the notification, and he must deal with it as nearly as may be as if it were a grant. He must therefore modify the provisions of the *Transfer of Land Act* accordingly.

J. R. Macfarlan (with him *Latham*), for the respondent. There is nothing in any of the cases to show that there may be a grant at large of a right to light or air, or that such a right would be an easement. See *Halsbury's Laws of England*, vol. XI., p. 327; *Aldin* v. *Latimer Clark, Muirhead & Co.* (4). Although by Statute an easement of this kind might be created as an interest in land, the Commonwealth Parliament has not purported to do so in this case. The effect of sec. 20 of the *Lands Acquisition Act* is that although the law of Victoria requires that instruments dealing with land must, for the purpose of registration, be in certain forms, the mere fact that a notice of acquisition of land is not in the form of a grant or conveyance or instrument of transfer is not to prevent the Registrar from dealing with it as if it were a grant or conveyance or instrument of transfer. If the right acquired here were in a grant it could not confer a right to the future access of light in respect of houses that might be built, as an interest in land distinct from a right against a particular individual. The Registrar is not to register anything but interests in land.

(1) 6 App. Cas., 740, at p. 823.
(2) 1 Macq., 305.
(3) (1915) A.C., 599, at p. 617.
(4) (1894) 2 Ch., 437, at p. 446.

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[GAVAN DUFFY J. referred to *Mayor of New Windsor* v. *Stovell* (1).]

Mann, in reply.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. The Commonwealth, by a notification in the Government *Gazette* published under the *Lands Acquisition Act* 1906, acquired a parcel of land (parcel A) and also a right of way over an adjoining strip of land (parcel B), together with rights of drainage over parcel B and also a right expressed in the words: " together with full and free right to and for the Commonwealth of Australia and to and for the registered proprietor or proprietors for the time being of the land firstly above described, or any part thereof, and its, his and their tenants, servants, agents, workmen, and visitors to the uninterrupted access and enjoyment of light and air to the doors and windows of the building or buildings erected or to be erected on the land firstly above described over and across all that strip of land 10 feet wide adjoining the eastern boundary of the said land firstly above described, which strip is shown cross hachured on plan hereunder." The Registrar of Titles refuses to register this right on the ground that it is not an existing easement. Whatever it is, it is a right in respect of land, and it has been acquired by the Commonwealth under its power to acquire " land," which term includes " any estate or interest in land (legal or equitable), and any easement, right, power, or privilege over, in, or in connection with land " (sec. 5). It is also clear that the complete and exclusive dominion which the proprietor of parcel B had in that parcel has been diminished to the extent of the right which had been so acquired and added to the property of the Commonwealth.

The present application relates to the registration of the right in respect of the title to parcel A, which, if it is registrable at all, is required by sec. 68 of the *Transfer of Land Act*. No application to register in respect of the title to parcel B, which registration is

(1) 27 Ch. D., 665, at p. 672.

obviously more important to persons desiring to deal with that parcel, and which is provided for by sec. 73, is made. I think that in such cases the Registrar of Titles should, as far as he can, endeavour to ensure registration in respect of the servient as well as the dominant tenement. This, however, appears to be not imperative.

It is contended that the right is not an easement because it is not enjoyed in respect of any existing building. This argument seems to me to confuse the existence of a legal right with the present physical enjoyment or exercise of it, and also to treat the easement as appurtenant not to the land but to the building. Again, it is said that the easement of light can only exist in respect of existing defined apertures. Here, again, there is a confusion—between a right and the mode of its acquisition. It has always been held that an easement, which is an incorporeal hereditament, lies in grant. An easement of light has generally been rested on prescription, that is, on long and uninterrupted enjoyment, from which, it is said, a grant should be presumed. The presumption, of course, assumes the possibility of a valid grant. But, since the enjoyment could only have been of definite apertures, no such prescription could arise except in the case of their existence. The foundation of every implied or presumed agreement or grant is that it *must* have been intended by the parties, and in the case of vacant land adjoining other vacant land no one could suppose that the owners must have intended that neither should ever interfere with the other's light. But these difficulties do not arise in the case of an express grant, which may in general be formulated in any way the parties please.

It is said that there is no reported decision in which a grant of a general easement of light has been supported, and that it must be taken that the list of possible easements is closed. Lord *St. Leonards* did not think so. As long ago as 1852 he said (*Dyce* v. *Hay* (1)): "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind."

A recent instance of a novel easement is to be found in the case of *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd* (2).

(1) 1 Macq., at p. 312.

(2) (1915) A.C., at p. 617.

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In the course of argument I referred to several possible easements novel in kind. For instance, an easement or servitude for the passage of aeroplanes through the superjacent air of the servient tenement to a landing place, for the passage of an electric current through suspended wires passing through that air, for the free passage of the flash from a heliograph station. Why not also of the sun's rays? All these would be servitudes of a right of passage over the servient tenement, not indeed on the surface of the soil, but through that which, *usque ad coelum*, is, in the eye of the law, a part of the land. In the olden days air was not thought of as a subject of property any more than as a substance capable of being liquified or solidified. In the light of modern knowledge, however, there is no difference in principle between a right to the free passage of moving air to my windmill and the free passage of running water to my watermill.

I have no difficulty, therefore, in saying that on principle such a right as is claimed is an easement at common law. And I know of no authority binding the Court to hold otherwise. This aspect of the case was not presented to *Cussen* J.

But if there were any room for doubt on the point, the doubt is, in my opinion, set at rest by the *Lands Acquisition Act*. It is not disputed that the number of existing kinds of easements may be increased by Statute. I have already pointed out that under the Act any part of the dominion of the owner of land may be taken from him separately from the soil and vested in the Commonwealth. The right now in question is a right of dominion of the same kind as those which fall within the category called easements. If no more were said, it would follow that a formal transfer of it would be effectuated by the form of conveyance appropriate to property of that kind. The Act expressly provides that the notification itself shall operate as a transfer of what is taken, and sec. 20 requires the Registrar of Titles to deal with it by registration in the manner in which dealings with land are registered, and to give effect to it as if it were an instrument of transfer of the land (which, of course, means so much of it as is taken) to the Commonwealth, duly executed under the laws of the State. That is to say, he is to treat it in the same way as he would treat a transfer, namely, by entering it upon

the title. There is no ambiguity in the language. It is to be treated as a transfer, whether under the domestic law it would be so treated or not. The law of the Commonwealth is part of the law of the State, and the Act which allows such a right in respect of land to be created and transferred to the Commonwealth, whether it does or does not add to the list of interests in land already transferable under the State law, at any rate puts this right in respect of land, when acquired by the Commonwealth and transferred by notification, on the same footing as land transferred.

For this reason, also, I am of opinion that there is no valid answer to the motion.

GAVAN DUFFY AND RICH JJ. We agree with the Chief Justice in thinking that the right which the Commonwealth has assumed to take in this case is an easement such as might be created at common law by a proprietor of land for the benefit of adjacent land, and should therefore be registered under the provisions of sec. 20 of the *Lands Acquisition Act* 1906. The owner of a parcel of land is *primâ facie* entitled to all the light and air which would naturally pass to it across his neighbour's land, but that right is subject to the neighbour's right of building on his own land as and when he chooses, although the effect of his building may be to diminish the quantity of light or air so passing or even to entirely obstruct its passage. It was conceded by counsel for both parties before *Cussen* J. and before us that an abandonment of this right could not constitute an easement at common law if it did more than assure to the dominant tenement the passage of light and air to and through defined apertures in existing buildings, and that the claim here was both too large and too uncertain to constitute such an easement. We can find no reason either in principle or authority for this view of the law. An easement is appurtenant to and for the benefit of the dominant tenement as a whole, and not to or for the benefit of any particular building. The abandonment by the owner of the servient tenement of what is really his right to build as and when he chooses on his own land, but what for convenience we may call his right to obstruct the passage of light and air across

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his land, may be either total or partial. The part abandoned here is so much of the whole as is inconsistent with a right in the owner of the dominant tenement to the uninterrupted access and enjoyment of light and air to the doors and windows of any buildings already erected or thereafter to be erected on such tenement. The exact nature of the easement is ascertained and described, the only uncertainty is as to the probable extent of its user by the owner of the dominant tenement.

In the circumstances it is unnecessary to express any opinion as to the construction of sec. 20 of the *Lands Acquisition Act* 1906.

Appeal allowed. Order appealed from discharged. Order for mandamus absolute with costs. Respondent to pay costs of appeal.

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.