[HIGH COURT OF AUSTRALIA.]

THE WATSON'S BAY AND SOUTH SHORE FERRY COMPANY LIMITED . . . APPELLANT;
PLAINTIFF,

AND

WHITFELD . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 4, 11.

Isaacs, Gavan Duffy and Rich JJ.

Crown Lands—Intended revocation of dedication of park lands—Power of Minister for Lands—Contract to sell when dedication revoked—Auction sale with conditions deterring competition—Ultra vires—Crown Lands Consolidation Act 1913 (*N.S.W.*) (*No.* 7 *of* 1913), *secs.* 25, 63.

Sec. 25 of the *Crown Lands Consolidation Act* 1913 (N.S.W.) empowers the Minister for Lands in certain circumstances to publish in the *Gazette* a notice of his intention of revoking the dedication of Crown lands, and, subject to Parliament not having dissented, to carry his intention into effect after a specified time. Sec. 63 provides that Crown lands may be sold by public auction at such times and places as the Minister shall direct.

In respect to certain land which had been resumed by the Crown in 1912 and dedicated as a public park, the appellant was entitled to compensation. In 1916 the appellant being willing to forgo its claim for compensation provided the land was vested in it, the Minister for Lands gave notice under sec. 25 of the above-named Act to revoke the dedication of the land, and purported to enter into an agreement with the appellant that when the dedication of the land should be revoked it should be offered for sale by public auction and that the amount of the purchase money should be accepted by the appellant in full satisfaction of its claim for compensation.

Held, that the agreement was illegal and invalid on each of the following grounds: (1) because the Act does not authorize the making by the Minister

of an agreement attempting to fetter in advance the discretion and the public duty of the Minister and his successors, after the revocation of the dedication, as to retaining or disposing of the land; (2) because sec. 63 does not authorize the Minister to make an agreement to sell by auction in circumstances likely to deter competition; and (3) because the sum to which the appellant was legally entitled as compensation was to be based upon the value of the land in 1912, and not (as in effect provided by the agreement) upon its increased value in 1916 or later.

Decision of the Supreme Court of New South Wales (*Harvey* J.): *Watson's Bay and South Shore Ferry Co. Ltd.* v. *Whitfeld*, 19 S.R. (N.S.W.), 98, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 14th August 1918 the Watson's Bay and South Shore Ferry Co. Ltd. instituted a suit against George Whitfeld, as nominal defendant on behalf of the Crown, asking for a declaration that an agreement dated 21st November 1916 between the Watson's Bay and South Shore Ferry Co. Ltd. (therein called "the old Company") and the liquidator of the old Company of the first part, the plaintiff Company (therein called "the Company") of the second part, the trustees of the will of the late W. C. Wentworth of the third part, and the Minister for Lands for and on behalf of the Government of New South Wales (who, with his successors in office, was therein called "the Minister") of the fourth part, should be specifically performed. The material provisions of the agreement are as follows:—It was recited that the plaintiff Company was entitled to compensation from the Crown for the resumption of a piece of land comprising 1 rood 9 perches, on the shore of the Harbour, which with other lands had been resumed and dedicated as a public park under the name of Nielsen Park, and for consequential damage; that the Company informed the Minister that it would forgo its claim for compensation upon the land mentioned being vested in the Company, subject to the Minister arranging a road to the land through Nielsen Park, and to the Company obtaining from the Sydney Harbour Trust Commissioners a certain lease of a wharf; that a promise of this lease had been obtained from the Commissioners; that the Minister had, in the Government *Gazette* of 18th August 1916, given notice under sec. 25 of the *Crown Lands Consolidation Act* 1913 (N.S.W.) to revoke the dedication of 1 rood 17½ perches of the Park, and to re-dedicate it as a road, and a similar notice to revoke the dedication

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of the parcel of land which the Company wished to get back. The agreement then concluded :—" And whereas subsequently to such revocation it is the intention of the Minister to have the said land (being the said area of 1 rood 9 perches) offered for sale by public auction subject to the provisions of the *Crown Lands Consolidation Act* 1913 and the regulations thereunder Now these presents witness that it is hereby covenanted and agreed between the parties hereto respectively as follows :—(i.) The Minister will as soon as conveniently may be after the completion of such revocation of the dedication of the areas of land referred to in the above recited proposals (*a*) direct that the said land (being the said area of 1 rood 9 perches) be submitted at public auction subject to the provisions of the *Crown Lands Consolidation Act* 1913 and the regulations thereunder (*b*) direct the dedication of the land described in the second schedule as a public road (ii.) The amount at which the said land shall be sold at such auction shall subject to the dedication of such public road as aforesaid and subject to such lease as aforesaid being completed be accepted by the Company in full satisfaction of all claims in respect of the resumption of the said land as aforesaid and on payment thereof by the Minister to the Company the Company and the old Company and the liquidator thereof will execute a release in the form to be prepared by the Crown Solicitor (iii.) It is specially agreed and declared that this agreement is entered into by the parties on the express condition that if Parliament should not assent to the proposals of the Minister as above mentioned or should the Minister from any cause whatsoever be unable to carry out this agreement then these presents shall be void and of no effect and shall not prejudice the rights of the parties hereto in relation to the said resumption from the old Company or any matter connected therewith Provided also that the Company shall not in any case be entitled to any compensation for any expenses incurred or loss if any occasioned or sustained through this agreement having been entered into."

At the hearing before *Harvey* J. the defendant demurred *ore tenus* to the statement of claim. The demurrer was upheld, and the suit dismissed : *Watson's Bay and South Shore Ferry Co. Ltd.* v. *Whitfeld* (1). The grounds of the decision of *Harvey* J. and other

(1) 19 S.R. (N.S.W.), 98.

material facts are stated in the judgment of the Court hereunder.

The plaintiff Company now appealed to the High Court on the following grounds :—(1) That the defendant's demurrer *ore tenus* should have been overruled : and (without prejudice to the generality of the foregoing ground) (2) that his Honor was in error in holding that the Minister for Lands could not by a contract for value tie the hands of himself and his successors in office as to how or when a sale should take place of a portion of a dedicated park if and when that dedication should be revoked ; (3) that his Honor was in error in holding that the agreement dated 21st November 1916 and made between the appellant and others and the said Minister was not within the power given to the said Minister by sec. 63 of the *Crown Lands Consolidation Act* 1913 or that such agreement was a fraud on the said power ; (4) that his Honor should have held that the said agreement was valid and binding upon the Crown.

Maughan K.C. (with him *Teece*), for the appellant. Where the donee of a power enters into a binding contract to exercise it when the time for exercise arrives, the contract is *primâ facie* good (*Dowell* v. *Dew* (1) ; *Shannon* v. *Bradstreet* (2) ; *Gas Light and Coke Co.* v. *Towse* (3)).

[RICH J. referred to *Sugden on Powers*, 8th ed., p. 788.]

Counsel referred to *Farwell on Powers*, 3rd ed., p. 397.

[RICH J. Does *Farwell* express any disagreement with *Sugden* ?]

No. There is no difference where the donee of the power is a Minister of the Crown. There is no reason in principle why the Minister exercising a statutory power should not bind himself to exercise it, or to exercise it in a particular way, at a future time.

[GAVAN DUFFY J. Does anything turn on the words of the Statute ?]

No. The Minister must show that at the time when the power is to be exercised its exercise as agreed would be improper. It is not inconsistent with sec. 25 of the *Crown Lands Consolidation Act* 1913 for the Minister to say that he will deal with the land in a certain way.

[ISAACS J. referred to sec. 6 of that Act and to secs. 95 and 96 of the *Public Works Act* 1900.]

(1) 1 Y. & C.C.C., 345 ; 12 L.J. Ch., 158 ; 7 Jur., 117.
(2) 1 Sch. & Lef., 52.
(3) 35 Ch. D., 519.

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Under sec. 94 of the *Public Works Act* the Minister can agree to give compensation. The amount of the compensation is in the Minister's discretion.

[RICH J. referred to *Oceanic Steam Navigation Co.* v. *Sutherberry* (1).]

(Reference was also made to *O'Keefe* v. *Williams* (2) and to *Robertson* v. *Dumaresq* (3).)

Bethune (with him *Jordan*), for the respondent. It is absurd to call this an auction sale. The public, who are the owners, get no benefit, no matter what price is realized (*Attorney-General* v. *Goldsbrough* (4)). The Minister binds himself as to a future time when he may not be in power. It would be unjust to carry out this arrangement. The Court would have to look into all the Crown's reasons in order to see whether the refusal to exercise the discretion in the way agreed was justified. It is not within the power of the Crown to dispose of lands in this way. These lands never became Crown lands.

Maughan K.C., in reply. *Attorney-General* v. *Goldsbrough* (5) has no application, or at any rate cannot govern this case.

Cur. adv. vult.

Dec. 11.

The judgment of the COURT, which was read by ISAACS J., was as follows :—

This suit was brought under the *Claims against the Government and Crown Suits Act* 1912 for specific performance of a contract under seal, entered into on 21st November 1916, between the plaintiff and the Minister for Lands for New South Wales and others, whose presence is unnecessary. There were also a claim for damages and a general claim for relief.

A demurrer *ore tenus* was raised at the trial before *Harvey* J. that the contract was *ultra vires* and unenforceable. The learned Judge

(1) 16 Ch. D., 236.
(2) 5 C.L.R., 217, at pp. 225, 230.
(3) Legge, 1291 ; 2 Moo. P.C.C. (N.S.), 66.
(4) 15 V.L.R., 638, at pp. 649, 662.
(5) 15 V.L.R., 638.

upheld the demurrer on two grounds. The first ground was that the Minister could not lawfully bind himself and his successors in office as to the time or manner of a sale under the provisions of the Crown Lands Acts in sec. 63 of the Act of 1913 (No. 7). The other ground was that in any event an agreement to sell by auction in circumstances in effect eliminating all competition is opposed to the law and invalid.

Great stress was laid in argument on the fact that the Act appoints the Minister as the person to direct the sale and fix the conditions; and it was contended that that gave him authority to determine his course of action, even by means of a contract such as that sued upon.

The suit, as we have pointed out, is one under the Act enabling suits to be brought against the Crown. It is not one against the Minister on a personal statutory obligation, as in *Fulton* v. *Norton* (1). The plaintiff cannot succeed except on the basis that the Minister in entering into the contract did so as the duly authorized agent of the Crown. His authority, for this purpose, depends on the effect of the *Crown Lands Consolidation Act* 1913. But before referring to the appropriate provisions of that Act, the facts in sequence should be mentioned.

In 1908 the trustees of the Wentworth Estate, being owners in fee simple of certain lands, including a piece of land on Sydney Harbour comprising 1 rood 9 perches, sold those lands to the then Watson's Bay Ferry Co., but the matter remained in contract. In August 1911 and, by way of correction of an error, again in March 1912 the Governor by notification in the *Gazette* declared that the parcel of land containing 1 rood 9 perches had been resumed for the public purpose of a public recreation ground. This was under sec. 36 of the *Public Works Act* 1900, No. 26. In November 1911 the then Watson's Bay Ferry Co.—being the equitable owners—delivered a notice of claim under sec. 95 of the *Public Works Act*. That notice has stood good as to the first notification and the corrected notification. The amount claimed was £7,500 in all, being £2,500 for the value of the land and £5,000 for damage caused by resumption. In July 1912 a new Company, the present appellant, was formed and

(1) (1908) A.C., 451.

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purchased the old Company's interest in all its property. So far as regards the resumed land, the old Company's interest was only a right to money, the price of the land. That Company was not the owner, legal or equitable, of the land or any interest in the land itself. By sec. 39 of the *Public Works Act* every estate and interest in the land of the persons entitled to the land had, on the notification being published, been conveyed to the Minister and "converted into a claim for compensation."

The amount of compensation, as provided by sec. 94 of the *Public Works Act*, was determinable either (1) by agreement or (2) by ascertainment otherwise. But whichever method was adopted, one legal standard is contemplated by the Act referred to. It is the value of the land at the very moment of resumption (*Tyson* v. *Mayor of London* (1); *In re Lucas and Chesterfield Gas and Water Board* (2); *Fraser* v. *City of Fraserville* (3), and sec. 117 of the Act itself). Considerable difference of opinion can easily exist as to the sum which properly represents that value, but the legal standard, including the factor of time which is to be applied to the operation of estimating the sum, is unalterable. The value ascertained on that basis was the sum to which the old Company was entitled, and nothing more or less.

By March 1912, at latest, the land itself was legally and equitably vested in the Minister of Lands and was "Crown lands" within the meaning of the *Crown Lands Act*. Consequently, subject to other statutory enactment, the provisions corresponding to sec. 6 of the Act of 1913 applied, namely, that "Crown lands shall not be sold leased dedicated reserved or dealt with except under and subject to the provisions of this Act." In April 1912 the land was, under other statutory enactment, namely, the *Public Parks Act* 1902, dedicated as part of a public park called "Nielsen Park." By sec. 9 (2) the estate of the Minister in the lands thereupon passed to the Park Trustees. In 1916 the money claim was from four to four and a half years old, and still undetermined. The land itself, after dedication under the *Public Parks Act*, was not technically "Crown lands," but belonged to the Park Trustees. In those circumstances

(1) L.R. 7 C.P., 18.
(2) (1909) 1 K.B., 16, at p. 29.
(3) (1917) A.C., 187, at p. 194.

the Company informed the Minister that it was willing to forgo its claim for compensation, provided (1) the land itself was vested in the Company, (2) the Minister arranged a public road to it, and (3) the Company got a wharf lease from the Sydney Harbour Trust. The wharf lease was arranged for. With a view of otherwise effectuating the object of meeting the Company's proposition, the Minister determined (1) that it was expedient to resume the land from the Nielsen Park, and (2) that it was expedient to resume another piece of land from the Park for the necessary road. On 18th August 1916 two proposals were made under sec. 25 of the *Crown Lands Act* 1913, and published in the Government *Gazette*, for the two projects of resumption, and were, as we must take it, duly placed before Parliament. As sec. 25 requires such proposals to be laid before Parliament within one month after publication in the *Gazette*, it must be taken that they were laid before Parliament on or before 18th September 1916; and, as Parliament has only one month within which it may declare that it "does not assent," that would bring the matter up to 18th October 1916. So that on 21st November 1916, the date of the agreement, it was known that Parliament had not affirmatively dissented. Nevertheless, the agreement contains the express provision that "if Parliament should not assent to the proposals of the Minister . . . or should the Minister from any cause whatsoever be unable to carry out this agreement then these presents shall be void and of no effect." We have not, on this appeal, to consider the meaning or effect of that stipulation, but the sequence of events has been pointed out. At the time of the contract sec. 25 had been exhausted so far as the "proposals" were concerned.

The result in law, so far, was that the Minister was empowered and directed to revoke the old dedication and make whatever new dedication was contained in the proposals.

The proposals did not, however, say anything about the proposed arrangement, and, inasmuch as they preceded the contract sued on, they could not say anything about that. Further, on the revocation of the dedication of the land, 1 rood 9 perches, whenever that took place, if we are to assume it took place, the land became, by virtue of sec. 25, "Crown lands" within the

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meaning of the Act. It does not appear one way or the other whether that land was "Crown lands" on 21st November 1916. That point, however, is, we think, immaterial to the result.

The Minister—it is recited, and we must accept that recital as a fact—formed and held on 21st November 1916 the intention to have the land, 1 rood 9 perches, put up for auction under the Act of 1913. At this point we must ask why was that intention so recited? Reading the agreement as a whole, the answer must be this:—In order to rid the Government of the compensation claim on the terms proposed by the Company, it was necessary to use the forms of the *Crown Lands Act* 1913. No other way presented itself than to put the land up to public auction. But to do that, revocation of the park dedication was essential so as to make the land "Crown lands"; and then the only practicable method of procedure was to hold an auction sale at which the Company might bid. But, as at an auction sale other people also might bid, and the price might, in the changed circumstances that four and a half years had brought about, be much higher than the value in 1912 some provision had to be made to guard against the Company being compelled to pay that higher price: it was arranged that if the Company bought, at whatever sum, it was to be a mere book-keeping entry, because that sum was to be taken as their compensation. In other words, what they nominally paid under the Land Act of 1913, was to be what they nominally received under the Works Act of 1900. But the arrangement, if carried out, left the Company the choice of stopping at a point in the bidding; and, as Mr. *Maughan* rightly argued, a point might come when it would have paid the Company to bid no more and to leave another person at his higher bid, so that the Company would not have the land but the price it fetched at auction. This argument was necessary to his case, in order to show that the auction sale was to be a real one to the highest bidder. But it also demonstrated that the agreement if carried out might, at the option of the Company, yield them, under the name of compensation for the true value of the land in 1912, a sum admittedly, in their opinion, higher than that value, and higher than, in their opinion, the value of the land in 1916 or whenever it was sold.

Was such a bargain valid? In our opinion it was invalid for the

following reasons :—First, taken as a whole it was an attempt to fetter in advance the discretion and the public duty of the Minister of Lands for the time being. The very ground of the claim is that the Minister was bound by the contract to exercise his statutory power, not as the expediency of doing so presented itself to him at the moment of exercise, but as predetermined by the contract. It was put that his discretion was exercised at the time of making and by the act of making the contract. But the answer to that is that on the true construction of the Act and, particularly in this connection, of sec. 63, that is not a mode of exercising his discretion that comes within his authority. The contract was not the completed exercise of discretion, as in the cases cited of private trustees, but it was an anticipatory fetter on the future exercise of discretion and public action. That discretion might, if unfettered, lead the Minister to retain the land as Crown land, and so change his intention, however and whenever previously formed, of selling the land by auction. That agreement is impossible to support. The principle stated by Lord (then Lord Justice) *Moulton* in *Osborne* v. *Amalgamated Society of Railway Servants* (1) as applicable to the case then in hand is equally applicable to the present. It is there said: "Every such agreement is tainted with the vice of the trustee binding himself contractually for valuable consideration that he will exercise a trust in a specified manner to be decided by considerations other than his own conscientious judgment at the time as to what is best in the interests of those for whom he is trustee." The agreement was an attempt to vest at the Company's option, and possibly after special terms had been required under sec. 63 of the Act to further the object of the agreement, a piece of land, possibly then park land and so not vested in the Minister, or else "Crown lands," in a particular private individual preferentially, there being no legal warrant for such preference. The special terms might have been so framed as to deter competition, and in any event the nature of the bargain, if known—and there was nothing to prevent the Company making it known—would in itself greatly deter possible competitors.

From every aspect the agreement was an unauthorized attempt

(1) (1909) 1 Ch., 163, at p. 187.

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to bind the Minister for the time being in the exercise of his statutory functions.

The second point of illegality is equally clear. The sum owing for compensation being the value as in 1912, it was plainly beyond the power of the Minister to agree to pay the Company whatever sum might be received by the Crown as its value after November 1916—no matter how far that sum might exceed the 1912 value. That sum was by the *Crown Lands Act* to be the property of the Crown in exchange for its land. That sum was in contemplation of law the highest sum the Crown could get as its then present value having regard to the discretionary conditions that the Minister under sec. 63 might stipulate for. To adopt *eo nomine* the value of the land in 1916, or later, as proper satisfaction of a claim for its value in 1912 in the hands of the Wentworth trustees, or the old Company, in different circumstances, and to pay that sum over in professed liquidation of the fixed compensation claim, was to adopt a patently false standard—a standard which, on the clear construction of the document and on the argument of the appellant, would have effect only where the money bid exceeded, not merely the value of the land in 1912 but even its late value—and was altogether unauthorized and illegal.

For these reasons we agree with the decision of *Harvey* J. on both the grounds upon which he allowed the demurrer.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Fisher & Macansh.*

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

N. McT.