[PRIVY COUNCIL.]

THE COMMONWEALTH . . . . . APPELLANT;
DEFENDANT,

AND

THE STATE OF NEW SOUTH WALES AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE HIGH COURT.

PRIVY COUNCIL.* 1929. Jan. 29.

Crown Lands (N.S.W.)—Dedication—Revocation of dedication—Garden Island—Dedication to purposes of naval depot—Whether dedication perpetual—User and occupation by Imperial Navy—Agreement between Imperial Government and Government of State—Imperial Order in Council—Effect of recitals—Commonwealth holding in right of Imperial Government—Right of New South Wales to possession—Order in Council—Subsequent legislation—Inconsistency—New South Wales Constitution Act 1855 (18 & 19 *Vict. c.* 54), *sec.* 2—*Crown Lands Alienation Act* 1861 (*N.S.W.*) (25 *Vict. No.* 1), *secs.* 3, 5—*Colonial Fortifications Act* 1877 (40 & 41 *Vict. c.* 23), *sec.* 1—*Crown Lands Consolidation Act* 1913 (*N.S.W.*) (*No.* 7 *of* 1913), *sec.* 25—*Imperial Order in Council of 26th October* 1899.

Garden Island, in Port Jackson, was, at the time the *New South Wales Constitution Act* 1855 was enacted, part of the waste lands of the Crown, the entire management and control of which was by sec. 2 of that Act vested in the Legislature of New South Wales. Pursuant to sec. 5 of the *Crown Lands Alienation Act* 1861 (N.S.W.) the Island was, as to one part in 1865 and as to the other part in 1866, dedicated for the purposes of a naval depot. The Island had for some years before 1865 been continuously and exclusively used by the Imperial Government as a naval depot for the Royal Navy, and thereafter continued to be so used until 1913, since when the Island was used by the Commonwealth for the purposes of the Australian Navy. By an

* Present—Lord Buckmaster, Viscount Sumner, Lord Blanesburgh, Lord Warrington of Clyffe and Lord Atkin.

PRIVY COUNCIL. 1929. THE COMMONWEALTH v. NEW SOUTH WALES.

Imperial Order in Council of 26th October 1899, made pursuant to the *Colonial Fortifications Act* 1877, it was recited that an agreement had been made between the Imperial Government and the Government of New South Wales that certain improvements should be made to Garden Island and a suitable residence for the representative of the Navy on the Australian Station should be provided, and that, as soon as those works were carried out and the sites of a receiving depot and the said residence were conveyed, granted or dedicated in perpetuity for the use of Her Majesty's Navy "in the same way as Garden Island had been," the Imperial Government would surrender certain Ordnance Reserve and other lands. The Order in Council then set out that in consideration of the premises Her Majesty ordered that the Ordnance Reserve and other lands be and the same were vested in the Government of New South Wales. On 12th October 1923 the Minister administering the *Crown Lands Consolidation Act* 1913 (N.S.W.) purported, pursuant to sec. 25 of that Act, to revoke the dedication of Garden Island.

Held, (1) that, notwithstanding the Imperial Order in Council of 26th October 1899 and the matters recited therein, the Minister might lawfully revoke the dedications of Garden Island; (2) that the dedications were effectively revoked on 12th October 1923, and (3) that the State of New South Wales was entitled as against the Commonwealth to a declaration that Garden Island is, by virtue of the revocation dated 12th October 1923, vested in His Majesty, His Heirs and Successors, and has become Crown lands within the meaning of the *Crown Lands Consolidation Act* 1913 and liable to be dealt with in accordance with the provisions of that Act.

Acting within its Constitution, the legislature of a self-governing Colony or State is supreme, and no act of the Executive Government can fetter in any legal sense the future exercise by it of its powers or give to any person a title other than such as could be conferred under existing legislation.

Decision of the High Court: *The State of New South Wales* v. *The Commonwealth*, (1926) 38 C.L.R. 74 (with a variation in the form of the declaration), affirmed.

APPEAL from the High Court to the Privy Council.

This was an appeal by the Commonwealth from the decision of the High Court: *The State of New South Wales* v. *The Commonwealth* (1).

Lord WARRINGTON OF CLYFFE delivered the judgment of their Lordships, which was as follows:—

This is an appeal by special leave from a judgment of the High Court of Australia, dated 18th August 1926, whereby it was declared that the State of New South Wales is entitled to possession of Garden

(1) (1926) 38 C.L.R. 74.

Island, in the Harbour of Port Jackson in the same State, having an area of 18 acres 3 roods 17 perches or thereabouts. The real question in the suit and on this appeal is whether, in the events which have happened, Garden Island falls within the definition of "Crown lands" contained in the *Crown Lands Consolidation Act* 1913, namely, "Lands vested in His Majesty and not permanently dedicated to any public purpose or granted or lawfully contracted to be granted in fee simple under the *Crown Lands Acts*." Stated in a more concrete form, it is whether dedications extending over the whole Island made in the years 1865 and 1866 have been effectually revoked by action of the Minister purporting to have been carried out pursuant to the provisions of the above-mentioned Act of 1913. The judgment appealed from is that of the majority of the Court, namely, the Chief Justice and *Gavan Duffy*, *Rich* and *Starke* JJ. *Isaacs* J. and *Higgins* J. dissented, the former, for reasons expressed in an elaborate judgment, having come to the conclusion that the existing dedication was, in the events which had happened, permanent and irrevocable, and the latter on the ground that the alleged revocation thereof did not comply with the provisions of the Act and was therefore ineffectual.

Before stating the particular facts giving rise to this appeal, it may be convenient to state shortly the course of legislation affecting the question to be decided. Garden Island was in 1855 part of the waste lands belonging to the Crown in the Colony of New South Wales. On 16th July 1855 the royal assent was given to an Act (18 & 19 Vict. c. 54) by which Her Majesty in Council was authorized to assent to a Bill of the Legislative Council of the Colony of New South Wales for conferring a Constitution on such Colony. The said Act contained a provision that the entire management and control of the waste lands belonging to the Crown in the said Colony should be vested in the Legislature of the Colony, and a similar provision was also contained in the Bill above mentioned. The assent of Her Majesty in Council was in due course given to the Bill and the Constitution of New South Wales as a self-governing Colony was thus established. By an Act of the Parliament of New South Wales passed on 18th October 1861 the expression "Crown lands" was defined to mean "All lands vested in Her Majesty

PRIVY COUNCIL. 1929. THE COMMONWEALTH v. NEW SOUTH WALES.

which have not been dedicated to any public purpose or which have not been granted or lawfully contracted to be granted in fee simple." The Act contained the following material provisions:—Sec. 3. "Any Crown lands may lawfully be granted in fee simple or dedicated to any public purpose under and subject to the provisions of this Act but not otherwise And the Governor with the advice of the Executive Council is hereby authorized in the name and on behalf of Her Majesty so to grant or dedicate any Crown lands." Sec. 5. "The Governor with the advice aforesaid may by notice in the *Gazette* reserve or dedicate in such manner as may seem best for the public interest any Crown lands for . . . any purpose of defence . . . or for any other public purpose And upon any such notice being published in the *Gazette* such lands shall become and be reserved or dedicated accordingly . . . Provided that an abstract of any intended reservation or dedication shall be laid before both Houses of Parliament one calendar month before such reservation or dedication is made." Prior to this Act the Legislature had not—unless possibly in particular cases of which the Board has no information—delegated to the Governor or any other public authority the power conferred upon them by the Constitution of controlling and managing the Crown lands, and even now by the concluding proviso of sec. 5 of the Act they reserve to themselves the right of being consulted before an intended reservation or dedication is made. By an Act intituled the *Colonial Fortifications Act* 1877 (an Act of the Imperial Parliament) Her Majesty was authorized by Order in Council to vest any fortifications, works, buildings or land in any Colony held in trust for the defence of that Colony in the Governor of that Colony for such estate and interest and upon such terms and conditions and subject to such reservations, exceptions and restrictions as should be specified in the Order, and the Governor for the time being should by virtue of the Act and the Order take and hold (subject to the provisions of the Order) the premises transferred to and vested in him accordingly. By an Act of the Colonial Legislature passed in the year 1884 power was conferred upon the Minister of Lands to revoke any dedication of Crown lands made before or after the passing of the Act, but as it is agreed that substantially the mode in which such revocation

was to be carried out and the conditions subject to which the power was to be exercised were identical with those contained in the Consolidation Act, it is not thought necessary to repeat them here. On 9th July 1900 the *Commonwealth of Australia Constitution Act* became law, and the Colony of New South Wales thenceforth became the State of New South Wales. The *Crown Lands Consolidation Act* 1913 contains the following material provisions:—Sec. 3. "All proclamations and notifications heretofore made, whether made under the Code of 1861-80 or the Code of 1884-1912" as to (amongst other things) "(*c*) the dedication of lands . . . shall . . . be deemed to have been made under the analogous provisions of this Act, and may be . . . revoked as if actually so made." Sec. 5. "In this Act, unless the context necessarily requires a different meaning, the expression . . . 'Crown lands' means lands vested in His Majesty and not permanently dedicated to any public purpose or granted or lawfully contracted to be granted in fee simple under the *Crown Lands Acts*." Sec. 25. "In any case in which the Minister shall be of opinion that the purposes for which any reservation or dedication of Crown lands made before or after the passing of this Act have failed wholly or in part . . . or that it is expedient in the public interest to resume the land which is the subject of such reservation or dedication . . . or that the trusts annexed to any land reserved or dedicated under the *Crown Lands Acts* have failed or cannot reasonably be carried out—then and in every such case a notice under the hand of the Minister shall be published in the *Gazette*, which notice shall set forth the mode in which it is proposed to deal with the reservation dedication or land in question (hereinafter termed 'proposals'), a copy of which notice shall be laid before both Houses of Parliament" within the time therein provided, with a provision enabling Parliament to declare by resolution that it does not assent to the proposals. "If no such resolution be passed, then after the expiration of thirty clear days after the date when the notice was laid before Parliament, it shall be lawful for the Minister to direct the proposals so notified to be carried out, and the same shall be carried out accordingly, and for that purpose the Minister may revoke by notification in the *Gazette* any such reservation or dedication. . . . Upon the revocation under the

PRIVY COUNCIL. 1929. THE COMMONWEALTH v. NEW SOUTH WALES.

provisions of this section of any dedication, or grant and dedication, the lands shall forthwith be vested in His Majesty, His Heirs and Successors, and shall become Crown lands within the meaning of this Act." The Code of 1861 to 1880 includes the above-mentioned Act of 1861, and the Code of 1884 to 1912 includes the above-mentioned Act of 1884.

The story resulting in the present litigation begins in the year 1856. In that year certain land on the mainland called Fort Macquarie was and had for some time previously been in the occupation of the Navy. This land was not part of the "Ordnance lands" granted by the Crown to certain officers of the Ordnance in fee simple to be held for purposes of Colonial Defence, but had merely been reserved by the Crown for military or naval purposes. It being thought desirable that Fort Macquarie, being on the mainland, should be vacated by the Navy and revert to the Ordnance, and that Garden Island should be substituted for it and thenceforth be used as a naval depot, certain correspondence between the Colonial Secretary and representatives of the Navy and of the Admiralty took place, and in the result an arrangement to this effect was carried out; a naval depot was established on the Island, and Fort Macquarie was given back to the military authorities. It will be observed that in this matter the Legislature of New South Wales took no part in the arrangement; this was carried out by executive officers on either side, and there was no formal dedication of the Island to naval purposes. From the legal point of view the obligations on either side were purely honorary. This state of things not being considered satisfactory, steps were taken, after the passing of the Act of 1861 hereinbefore mentioned, to obtain a formal dedication of Garden Island for the purpose of a naval depot. This was carried into effect under sec. 5 of the Act by two notices in the *Gazette* dated respectively 10th January 1865 and 5th June 1866 duly laid before Parliament as required by the Act. It is agreed that, though the total acreage mentioned in these notices is less than the actual acreage of the Island, the dedication was intended to cover, and did in fact cover, the whole Island. In a letter dated 28th June 1866, from the Governor to Commodore Sir W. Wiseman, representing the naval authorities, the dedication is referred to as

"permanent," but it is to be observed that there is nothing in either of the notices to distinguish the dedication thereby effected from any other dedication of Crown lands. There was at this time no statutory power under which an executive authority could revoke a dedication, but the Legislature, acting within the limits of the Constitution, was supreme and could either directly revoke a dedication of Crown lands or delegate to an executive authority the power to do so. This it did first by the Act of 1884 and afterwards by the *Crown Lands Consolidation Act* of 1913. The Governor's letter cannot be regarded as anything more than an expression of his own view on the matter, and certainly cannot in any way impair the authority and powers of the Legislature.

We have now arrived at a very important part of the story, and events happened which form the real ground for the dissenting judgment of *Isaacs* J., and they require, therefore, very careful consideration. It will be remembered that under the *Colonial Fortifications Act* of 1877 hereinbefore mentioned Her Majesty in Council had power by order to vest fortifications and lands held in trust for the defence of the Colony in the Governor thereof. In the year 1878 negotiations were started between the Imperial Government and the Government of New South Wales for the transfer under the Act of certain Ordnance Reserves in the Colony. These negotiations occupied several years, but eventually an agreement between the two Governments was arrived at to the effect that on the completion at the expense of the Colony of certain buildings and works partly on the mainland and partly on Garden Island an Order in Council should be made under the Act for the vesting in the Governor of the Ordnance lands and the buildings and so forth thereon. The said buildings and works were carried out by and at the expense of the Colony and were completed in the year 1899. The sum expended by the Colony exceeded £300,000. The Order in Council was dated 26th October 1899. It recited that the lands described in the First Schedule had been granted to officers of the Ordnance for the use and service of that Department and that the lands described in the Second Schedule, including Fort Macquarie, had been reserved for military or naval purposes, but had never been granted for Ordnance purposes. It then recited that under

PRIVY COUNCIL. 1929. THE COMMONWEALTH v. NEW SOUTH WALES.

the Act of 1861 hereinbefore mentioned Garden Island, described in the Third Schedule, had been dedicated for the purposes of a naval depot by the said two notices of 10th January 1865 and 5th June 1866. The Order mentioned the agreement for the erection and carrying out by the Colonial Government of the buildings and works above mentioned, and stated that one of the terms of the agreement was as follows: "(4) That as soon as these works were carried out to the satisfaction of the Commodore and the sites of the receiving depot and of the said residence should be conveyed granted or dedicated in perpetuity for the use of Her Majesty's Navy in the same way as Garden Island had been the Imperial Government would surrender all the lands known as the Ordnance Reserves and all other lands or buildings in the Colony to which it might have any claim or title." And after stating, in effect, that the obligations of the Colonial Government under the agreement had been fulfilled and referring to the Act of 1877, Her Majesty by and with the advice of the Privy Council and in pursuance of the said Act was pleased to order that the lands described in the First and Second Schedules with the buildings and works thereon should, subject to a condition not material to the present question, be vested in the then Governor of New South Wales to the intent that the Governor for the time being should by virtue of the Act of 1877 and that Order, take and hold the said lands and the buildings and works thereon upon the trusts and purposes thereinafter declared, being in effect such trusts and purposes as the Governor with the advice of the Executive Council should by Order in Council direct. With reference to this Order, it is only necessary to observe that it in no way purports to affect Garden Island or the powers under the Constitution of the Legislature of the Colony over the Island or other Crown lands, and, in fact, the power by the Act of 1877 conferred upon Her Majesty in Council was strictly confined to the lands and so forth mentioned therein, which did not include Garden Island or any Crown lands properly so called. It should be remembered also that at the date of the Order the Act of 1884, conferring on executive authority the power of revoking dedications, was in operation. Moreover, the Order in Council was a unilateral instrument, being in effect a conveyance for an executed consideration of the lands specified therein, and

does not purport to contain and would not from its nature properly contain any obligation on the part of the Colony other than the condition above referred to, which is a condition affecting only the lands conveyed.

At this point it is desirable to deal with that part of the learned and elaborate judgment of *Isaacs* J. in which he discusses the Order in Council and expresses his conclusion as to its effect. This appears to be that by virtue of the recital, including the incidental mention of the dedication of Garden Island as having been made "in perpetuity," and of the fact that the Order was made "in consideration of the premises," the Order imposed upon the Colony an obligation at no time to alter the then existing dedication without the consent of the Imperial Government, and he even goes so far as to say that in his view the Order had the effect of an Imperial statute forbidding a revocation of or other interference with the dedication. With all respect, their Lordships cannot agree with this view. In the first place, it seems to ignore the difference between a self-governing Colony or State and an individual. Acting within the Constitution, the Legislature of such a Colony or State is supreme, and no act of the Executive Government could fetter in any legal sense the future exercise by it of its powers or give to any person a title other than such as could be conferred under existing legislation, including in the present case the *Crown Lands Acts*. Assuming, therefore, for the purpose of argument, that if the Order in Council had been a conveyance by one individual to another, there would have been imposed upon the grantee an obligation not to alter the existing right in Garden Island, it could not have that effect in the actual case in question. But in truth the Order, as already pointed out, did not purport to alter the then existing title to Garden Island; that was of necessity left as it was. It is quite impossible to regard the Order as having the force of an Imperial statute except so far as it effects that which the Act of 1877 authorized, namely, the vesting in the Governor of the lands described in the First and Second Schedules. On this part of the case their Lordships entirely agree with the views expressed by *Higgins* J. and by the majority of the High Court.

PRIVY COUNCIL. 1929. ~~ THE COMMONWEALTH v. NEW SOUTH WALES. ——

To resume the statement of the facts: After the establishment of the Australian Commonwealth and the decision in the year 1909 of the Government and Legislature to establish a naval unit of its own, Garden Island was vacated by the Imperial Naval Authorities and has since been occupied by those of the Commonwealth as a depot for "His Majesty's ships provided and maintained by the Commonwealth of Australia."

Differences having arisen between the Commonwealth and the State as to the terms on which Garden Island should be occupied by the former and the financial arrangements in reference thereto, and negotiations between the two Governments not having resulted in an agreement, the State on 12th October 1923 purported to revoke the dedication of Garden Island in accordance with the provisions of sec. 25 of the *Crown Lands Consolidation Act* 1913, and on 26th May 1924 commenced the present action for the purpose of having the respective rights of the State and the Commonwealth determined by the Courts.

In form the plaintiffs claimed (1) possession of Garden Island, (2) alternatively a declaration that they were entitled to possession, (3) mesne profits from 12th October 1923. In substance, however, they sought to have it determined that the Island was at the disposal of the State notwithstanding the previous dedication. The real question, therefore, is whether the revocation of 12th October 1923 was valid and effectual. *Higgins* J. gave judgment against the State on this point, and it therefore requires careful consideration. The revocation purports to be made under the *Crown Lands Consolidation Act* 1913, the relevant provisions of which are set forth above. The "proposals" were dated 10th August 1923, and were under the hand of the Minister of Lands. After reciting the two notices of dedication of 10th January 1865 and 5th June 1866 respectively, and that the Minister was of opinion that the respective purposes for which the said dedications were respectively made had failed wholly, and that the trusts respectively annexed to the lands the subject of the respective dedications had failed and could not reasonably be carried out, and that it was expedient in the public interest to resume the whole of the said lands, therefore notice was given in accordance

with the provisions of the 25th section of the *Crown Lands Consolidation Act* 1913 that it was proposed to revoke the said respective dedications theretofore made. By a further notice dated 12th October 1923, after reciting the notices of 10th January 1865, 5th June 1866 and 10th August 1923 and stating that a copy of such last-mentioned notice was laid before both Houses of Parliament then in session within one month after the publication in the *Gazette*, and that no resolution was passed by either House of Parliament that it did not assent to the proposals set forth in such notice and that thirty clear days had expired since such notice was laid before Parliament: therefore in pursuance of the section above mentioned the Minister directed the said proposals to be carried out and that the same should be carried out accordingly, and for that purpose he by that notification wholly revoked the said dedications. *Higgins* J. expressed the view that there could be no valid revocation under the provisions of the Act of 1913 until Parliament had had proposals laid before it for the future of the land. With all respect to the learned Judge, their Lordships cannot agree with this view. The Act provides that the notice shall set forth "the mode in which it is proposed to deal with the reservation *dedication* or land in question (hereinafter termed 'proposals')." If, therefore, as in the present case, the notice merely states that the mode in which it is proposed to deal with the dedication is by revoking it, that is a sufficient proposal. That this is the true meaning of the above-mentioned provisions of the Act is, in their Lordships' opinion, confirmed by the last paragraph of sec. 25, which provides that "upon the revocation under the provisions of the section of any dedication, or grant and dedication, the lands shall forthwith be vested in His Majesty, His Heirs and Successors, and shall become Crown lands within the meaning of this Act," namely, lands not permanently dedicated to any public purpose under the *Crown Lands Acts*. If, therefore, no "proposal" for a new dedication has been made, provision for a future dedication is found in the Act itself.

As the result, their Lordships are of opinion that in substance the appeal fails and ought to be dismissed. They think, however, that in form the declaration that the State of New South Wales is entitled to possession of Garden Island is, in view of the provisions already

PRIVY COUNCIL. 1929. THE COMMONWEALTH v. NEW SOUTH WALES.

referred to of the Act of 1913, not correct. They are of opinion that it should run as follows:—"This Court doth declare that Garden Island, in the Harbour of Port Jackson, in the State of New South Wales, having an area of 18 acres 3 roods 17 perches or thereabouts is now, by virtue of the revocation dated 12th October 1923, vested in His Majesty, His Heirs and Successors, and has become Crown lands within the meaning of the New South Wales *Crown Lands Consolidation Act* 1913, and liable to be dealt with in accordance with the provisions of that Act."

They will humbly advise His Majesty accordingly.

Cons *Scook* v *Premier Building Solutions* (2003) 28 WAR 124

[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } APPELLANT;

AND

ROBERT TAYLOR AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT (GAVAN DUFFY J.).

H. C. OF A. 1929. MELBOURNE, *May* 10, 30. Isaacs, Rich, Starke and Dixon JJ.

Estate Duty (Cth.)—Testatrix entitled to residue of unadministered estate of intestate—Disposition of interest to children shortly before death—Deed—Delivery—Absolute or conditional—Escrow—Covenants by children to pay annuity as consideration—Deed not executed by some children until after death of testatrix—Whether property effectually disposed of by deceased—Whether "gift inter vivos or settlement made within one year before her decease"—"Bona fide purchaser for valuable consideration"—Estate Duty Assessment Act 1914-1922 (*No.* 22 *of* 1914—*No.* 34 *of* 1922), *secs.* 3, 8 (3) (*b*), (4) (*a*).*

A testatrix, who was domiciled in Australia, became entitled shortly before her death to the residue of the unadministered estate of an intestate. By deed which she signed and sealed four days before her death, she purported

* Sec. 8 of the Commonwealth *Estate Duty Assessment Act* 1914-1922 provides:—"(4) Property . . . (*a*) which passed from the deceased person by any gift *inter vivos* or settlement made before or after the commencement of this Act within one year before his decease . . . shall for the purposes of this Act be deemed to be part of the estate of the person so deceased."