*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of William Cooper* v. *The Honourable Alexander Stuart (Colonial Secretary), from the Supreme Court of New South Wales; delivered 3rd April* 1889.

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Present:

LORD WATSON.
LORD FITZGERALD.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR WILLIAM GROVE.

[*Delivered by Lord Watson.*]

His Excellency Sir Thomas Brisbane, then Governor-in-Chief of New South Wales and its Dependencies, on the 27th May 1823, made a grant to one William Hutchinson, his heirs and assigns, of 1,400 acres of land in the county of Cumberland and district of Sydney, "reserving "to His Majesty, his heirs and successors, such "timber as may be growing or to grow here- "after upon the said land which may be deemed "fit for naval purposes; also such parts of the "said land as are now or shall hereafter be re- "quired by the proper officer of His Majesty's "Government for a highway or highways; and, "further, any quantity of water, and any quantity "of land, not exceeding ten acres, in any part "of the said grant, as may be required for public "purposes; provided always, that such water or "land so required shall not interfere with, or in

" any manner injure or prevent the due working " of the water mills erected or to be erected on " the lands and watercourses hereby granted."

The Appellant is the successor in title of William Hutchinson, the original grantee.

By a proclamation, dated the 4th November 1882, duly made and published, His Excellency Lord Augustus Loftus, the Governor of the Colony, in pursuance of the reservation in the grant, and on the recital that the land (the subject of this action) was required for a public park, gave notice that he thereby resumed and took possession on behalf of the Government of the Colony of a parcel of land 10 acres in extent, being part of the 1,400 acres granted to the predecessor in title of the Appellant, to the intent that these 10 acres should revest in Her Majesty to be used as and for a public park. In terms of the proclamation the Government at once proceeded to take actual possession of the land, fenced it off, and excluded the Appellant.

On the 17th November 1884 the Appellant brought the present action, in which he prays for (1) a declaration that the reservation to the Crown to resume any quantity of land not exceeding ten acres is void; (2) an injunction to restrain the Respondent, as representing the Government, from continuing in possession of the land resumed; and (3) an account of the damage sustained by him. The whole controversy between the parties turns upon the first of these conclusions, to which the second and third are merely consequential. There are no facts in dispute, it being conceded by the Appellant, that, assuming the reserved power to be valid in law, it has been duly exercised. But he maintains that the clause of resumption is invalid on these grounds, (1) that being in substance an exception it is void for repugnancy,

and (2) that it violates the rule against perpetuities.

In support of the first of these objections the Appellant's Counsel relied upon a well known class of authorities such as "Hornby *v.* Clifton" Dyer, 264A, where the grant by husband and wife was of "the messuage or tenement in "Fleet Street, called 'the Three Conies,' with "all the chambers, cellars, and shops, &c., ex- "cepting and reserving to the husband, the "shops for his own sole use and occupation," and it was held that the exception being of all the shops, and therefore repugnant to the grant, was void. And so of a grant of 20 acres by particular names excepting one acre, the exception is repugnant (Touchstone 79). Assuming these authorities, and the very technical rule which they establish, to be applicable to a Crown grant of public property in a young Colony, it appears to their Lordships that the reservation in the grant of 1823 does not constitute an exception within the meaning of the rule.

An exception is that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant, but may be taken out of it and remain with himself. A valid exception operates immediately, and the subject of it does not pass to the grantee. Their Lordships are of opinion that the grant to Hutchinson carried to him the whole 1,400 acres, but subject to a defeasance as to 10 acres. The whole and every part of the lands granted vested, and have, from the 27th May 1823 to November 1882, been in the ownership and possession of the grantee or his representatives, subject to that provision, which the Plaintiff describes in his statement of claim as a "reservation of a right to resume any "quantity of land, not exceeding 10 acres, in

" any part of the said grant." It is obvious that such a provision does not take effect immediately, it looks to the future, and possibly to a remote future. It might never come into operation, and when put in force it takes effect in defeasance of the estate previously granted, but not as an exception.

In support of the second objection, it was maintained for the Appellant, in the first place, that the English rule against perpetuities, as now settled, applied in all its entirety to the Colony of New South Wales in the year 1823; and, in the second place, that the rule, as established in the law of England, applies to reservations made by the Crown in the interest of the public.

Both of these propositions were contested by the Respondent's Counsel. They maintained that there is no authority for extending the rule to a Crown grant in England; and pointed out that the Crown may lawfully annex a condition against alienation on a grant of fee, and other conditions which are not competent to a private person. They argued also that, although the rule had been applied to conveyances operating under the Statute of Uses, it had not been applied to common law conditions, or conditional limitations in common law grants which existed before that statute.

It does not appear to their Lordships to be necessary, for the purposes of the present case, to decide whether the Crown, in attaching such reservations to grants of land in England, would be affected by the rule against perpetuities. In order to succeed in this appeal, it is not enough for the Appellant to establish that the Crown would be within the rule here; he must also show that the rule, in so far as it affects the Crown, was operative in the Colony of New South Wales at the time when his land was

originally granted to William Hutchinson; and that, in the opinion of their Lordships, he has failed to do.

The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own Legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done, the law of England must (subject to well established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute. The often quoted observations of Sir William Blackstone (1 Comm., 107) appear to their Lordships to have a direct bearing upon the present case. He says:—

"It hath been held that, if an uninhabited "country be discovered and planted by English "subjects, all the English laws then in being, "which are the birthright of every English "subject, are immediately there in force "(1 Salk, 411, 666). But this must be under"stood with very many and very great re"strictions. Such colonists carry with them

"only so much of the English law as is ap-
"plicable to the condition of an infant Colony;
"such, for instance, as the general rules of in-
"heritance and protection from personal injuries.
"The artificial requirements and distinctions
"incident to the property of a great and com-
"mercial people, the laws of police and revenue
"(such especially as are enforced by penalties),
"the mode of maintenance of the established
"Church, the jurisdiction of spiritual Courts,
"and a multitude of other provisions are neither
"necessary nor convenient for them, and there-
"fore are not in force. What shall be admitted
"and what rejected, at what times and under
"what restrictions, must, in case of dispute, be
"decided in the first instance by their own pro-
"vincial judicature, subject to the decision and
"control of the King in Council; the whole of
"their constitution being also liable to be new-
"modelled and reformed by the general superin-
"tending power of the Legislature in the mother
"country."

Blackstone, in that passage, was setting right an opinion attributed to Lord Holt, that all laws in force in England must apply to an infant Colony of that kind. If the learned author had written at a later date he would probably have added that, as the population, wealth, and commerce of the Colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it; and that the power of remodelling its laws belongs also to the Colonial Legislature.

Their Lordships have not been referred to any Act or Ordinance declaring that the laws of England, or any portion of them, are applicable to New South Wales. There was no land law or tenure existing in the Colony at the time of its annexation to the Crown; and, in that condition of matters, the conclusion appears to their

Lordships to be inevitable that, as soon as colonial land became the subject of settlement and commerce, all transactions in relation to it were governed by English law, in so far as that law could be justly and conveniently applied to them. Their Lordships have had an opportunity of referring to an official copy of the Royal Commission to Sir Thomas Brisbane, under the Great Seal, dated 24th January 1821. It recites the previous Commission to Governor Macquarie of the 8th May 1809, defines the limits and boundaries of the territory, and confers on the Governor authority and jurisdiction which may be described as Royal, including full powers to make grants of lands, tenements, and hereditaments, but it gives no indication of the law which was to be in force in the Colony.

Their Lordships have recently had occasion to consider, in "Jex *v.* McKinney and others" (decided 8th February 1889), the authorities bearing upon the question of the suitability of English law to colonial circumstances. That case differed from the present in this respect, that there the law of England was introduced into the Colony by statute, and not by the silent operation of constitutional principles; but its introduction was qualified by words which excluded the application of laws prevailing here which were unsuitable in their nature to the needs of the Colony.

The rule against perpetuities, as applied to persons and gifts of a private character, though not finally settled in all its details, until a comparatively recent date, is, in its principle, an important feature of the common law of England. To that extent, it appears to be founded upon plain considerations of policy, and, in some shape or other, finds a place in most, if not in all, complete systems of jurisprudence. Their Lordships see no reason

to suppose that the rule, so limited, is not required in New South Wales by the same considerations which have led to its introduction here, or that its operation in that Colony would be less beneficial than in England. The learned Judges of the Supreme Court of the Colony, in deciding this case, proceed on the assumption that the rule applies there as between subject and subject; and their Lordships are of opinion that the assumption is well founded.

Assuming next (but for the purposes of this argument only) that the rule has, in England, been extended to the Crown, its suitability, when so applied, to the necessities of a young Colony raises a very different question. The object of the Government, in giving off public lands to settlers, is not so much to dispose of the land to pecuniary profit as to attract other colonists. It is simply impossible to foresee what land will be required for public uses before the immigrants arrive who are to constitute the public. Their prospective wants can only be provided for in two ways, either by reserving from settlement portions of land, which may prove to be useless for the purpose for which they are reserved, or by making grants of land in settlement, retaining the right to resume such parts as may be found necessary for the uses of an increased population. To adopt the first of these methods might tend to defeat the very objects which it is the duty of a Colonial Governor to promote; and a rule which rests on considerations of public policy cannot be said to be reasonably applied when its application may probably lead to that result.

Their Lordships have, accordingly, come to the conclusion that, assuming the Crown to be affected by the rule against perpetuities in England, it was nevertheless inapplicable, in

the year 1823, to Crown grants of land in the Colony of New South Wales, or to reservations or defeasances in such grants to take effect on some contingency more or less remote, and only when necessary for the public good.

The decision in the Courts below, with the result of which their Lordships entirely agree, went very much on the case of Lord *v.* Commissioners of Sydney (12 Moore 5, P. C. C., p. 493), and if the decision in that case had been directly applicable it would have been one which their Lordships would have been bound to follow. But though the decision is not directly in point, its circumstances throw some light upon the present question. It was an action for compensation under the Sydney Water Act of 1853. The compensation sought and awarded was in respect of putting in force a reservation under a grant of 1810, made by Governor Macquarie in terms identical with the grant of 1823, and the Water Act seems fully to recognize the validity of such reservations.

Their Lordships will, therefore, humbly advise Her Majesty that the judgement appealed from ought to be affirmed, and this appeal dismissed. The Appellant must pay the costs of the appeal.