Privy Council Appeal No. 105 *of* 1926.

George Richards Laffer - - - - - - - *Appellant*

v.

Francis Arnold Gillen - - - - - - - *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH JULY, 1927.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT SUMNER.
LORD SHAW.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

By the Crown Lands Act, 1915, of South Australia it was provided (Section 9, xiii) that the Commissioner of Crown Lands might authorise any person to take possession of lands, messuages, or tenements belonging to the Crown whereon any person is in unauthorised possession or occupation and to forcibly eject every person therefrom.

Early in May, 1923, the appellant, as Commissioner, purporting to act under the aforesaid statutory power, authorised certain constables to take possession of the lands now in question and to forcibly eject the respondent therefrom; they took possession of such lands accordingly, and ejected the respondent therefrom.

Shortly afterwards the respondent, as plaintiff, instituted the present action against the appellant, as defendant, claiming damages for the entry and ejectment, alleging that it was wrongful.

The appellant pleaded the above-mentioned statute, alleging that the respondent was in unlawful possession or occupation of the lands in question.

The question, then, is whether the respondent at the time of his ejectment therefrom was in unlawful possession or occupation of the lands.

The action was tried on the question of liability only by Poole, J., who by his judgment dated the 17th April, 1924, decided in favour of the respondent.

On appeal to the Full Court this judgment was reversed by Murray, C.J., and Angus Parsons, J., and Napier, J., who by their judgment dated the 12th August, 1924, allowed the appellant's appeal and ordered the respondent to pay the costs of the action.

The respondent appealed to the High Court of Australia, who, on the 17th December, 1925, by a majority (Higgins, J., dissenting), allowed the appeal with costs and restored the judgment of Poole, J.

The present appeal is brought by special leave of His Majesty in Council, the appellant undertaking to pay the respondent's costs of the appeal as between solicitor and client in any event.

There has thus been a very considerable difference of opinion in the Courts of the State and Commonwealth and even those judges who came to a conclusion favourable to one side or the other were by no means unanimous in their reasons for their decisions.

At the conclusion of the War the Government of South Australia was faced with the problem of dealing with numbers of discharged soldiers, and determined, amongst other things, to make provision for the settlement of such men on unoccupied Crown lands and for advances out of public funds to men so settled, and for this purpose obtained the passing of the Discharged Soldiers' Settlement Act, 1917, and subsequent amending Acts. The administration of these Acts was entrusted to the Minister of Repatriation, a corporation sole created by the Act of 1917.

The appellant at all material times held the two offices of Commissioner of Crown Lands and Minister of Repatriation.

It is obvious that for the success of such a scheme two main objects were in view—the proper cultivation and development of the land and the advantage of the men settled thereon. Superintendents and inspectors were appointed whose duty it was to inform themselves of the conduct and prospects of the settlers and to report thereon to the Minister.

The respondent, a discharged soldier, who had had some training on a Government training farm, by a letter dated the 9th February, 1918, applied for a grant of the lands in question, and on the 25th February, 1918, he was informed by letter of the Minister that his application was granted and of the conditions on which the land would be held. Except that the letter stated that for the first twelve months his occupancy of the land would be strictly probationary, it is unnecessary to set out its terms, inasmuch as they were embodied in the formal agreement to be presently mentioned.

The respondent appears to have been let into possession of the lands on the 1st March, 1918. On the 25th April, 1920, he

made a formal application for the grant to him of an agreement over the land.

The agreement is dated the 1st March, 1919, the day on which the probationary period expired, but it was not actually sealed by the Minister or signed by the respondent until the 26th February, 1921. It was treated before this Board as common ground that for purposes of construction and effect the date of the agreement is the 1st March, 1919.

The agreement purports to be made between the Minister of Repatriation of and for the State of South Australia contracting for and on behalf of His Majesty the King (thereinafter called the vendor) of the one part and the respondent (thereinafter with his executors, administrators and assigns called the purchaser) of the other part. It may be observed in passing that it is clear from the contract that in every passage material to the case "the vendor" means the Minister and not His Majesty himself.

The agreement was to be for a term of 65 years, and thereby the vendor agreed to sell and the purchaser to purchase the land as therein described for £2,106, subject to a reservation of minerals.

It is desirable to set out the provisions for payment of purchase money and interest. They are as follows :—

> "3. The purchaser shall pay the said purchase money and interest thereon by instalments as follows :—
>
> "(i) No instalments shall be payable for the first year of the term of this agreement.
>
> "(ii) During the succeeding four years of the term of this agreement the purchaser shall pay interest on the said purchase money at the following rates :
>
> "For the second year at the rate of £2 10*s*. per cent., for the third year at the rate of £3 10*s*. per cent., for the fourth and fifth years at the rate of £5 per cent. per annum.
>
> "Such interest shall be payable by equal half-yearly instalments of £26 6*s*. 6*d*. during the second year, of £36 17*s*. 1*d*. during the third year, and of £52 13*s*. during the fourth and fifth years of the said term, such instalments to be paid on the 31st and 28th days of the months of August and February respectively in each year.
>
> "(iii) During the remainder of the term of this agreement the purchaser shall pay the said purchase money and interest on the balance thereof for the time being unpaid at the rate of £5 per cent. per annum ; by half-yearly instalments of £55 10*s*. 11*d*., such instalments to be paid on the days of the months lastly hereinbefore mentioned in each and every year until the whole of the said purchase money and interest shall have been paid."

Then follow certain conditions as to residence, the proper cultivation and improvement of the land, and other matters not material to be set forth in detail.

Clause 22 is as follows :—

> "If at any time within the period of ten years from the date of this agreement the vendor is satisfied on such evidence as he deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land with advantage to himself or that the purchaser has neglected to work the land satisfactorily or has been guilty of

serious misconduct during his occupation thereof, the vendor by notice in writing given to the purchaser may determine this agreement upon and subject to such terms and conditions as the vendor thinks fit [and] upon the expiration of three months from the giving of such notice, this agreement and the right of the purchaser to complete the purchase and to possession of the said land shall cease and determine and be void anything in this agreement to the contrary notwithstanding."

[The insertion of "and" though not in record, seems neces sary.]

After a provision in clause 23 for return in the event of surrender or forfeiture of instalments of purchase money already paid and forcerta in allowances for improvements, clause 24, so far as it is material, is as follows :—

"And it is hereby declared that if any of the instalments hereby reserved shall be unpaid and in arrear for more than six months after the day whereon the same is hereby made payable the purchaser having had at least three months' previous notice in writing demanding its payment this agreement may be cancelled by the vendor . . . and the vendor may thereupon insert a notice in the Government Gazette declaring this agreement to be forfeited and such notice appearing in the Government Gazette shall in all Courts and elsewhere and under all circumstances be taken to be conclusive evidence that this agreement has been legally cancelled and forfeited."

The respondent never paid any of the instalments of interest payable under clause 3 (ii) of the agreement, and on the 21st December, 1921, there remained due the following, viz. :—
The payment due on the 31st August, 1920, £26 6*s*. 6*d*. ; that due on the 28th February, 1921, £26 6*s*. 6*d*., and that due on the 31st August, 1921, £36 17*s*. 1*d*. It will be observed that of these payments the first two only were then six months in arrear.

On the 21st December, 1921, the Assistant Secretary for Lands wrote and sent to the respondent the following letter :—

"I am directed by the Hon. Commissioner for Crown Lands to advise you that it is intended to cancel Soldiers' Acquired Agreement No. 30 and to re-offer the land unless all arrears are paid within two months from this date.

"In the event of forfeiture taking place as indicated, you will be liable for payment of amounts due up to the date of actual cancellation."

Payment due	31/8/20	£26 6*s*. 6*d*.	and
„	28/2/21	£26 6*s*. 6*d*.	interest
„	31/8/21	£36 17*s*. 1*d*.	thereon.

Agreement No. 30 is the agreement in question.

After some correspondence the Secretary for Lands on the 15th November, 1922, wrote to the respondent a letter in which he informed him that the agreement had been cancelled and the land was then Crown Land and would be dealt with at an early date.

In the Government Gazette of the 7th December, 1922, there was published the following notice dated the 6th December, 1922 :—

"Notice is hereby given that the lease and agreements mentioned and described at the foot hereof have been cancelled by the Commissioner of Crown Lands in terms of section 63 of the Crown Lands Act of 1915 and are hereby declared forfeited."

"(Signed) GEO. R. LAFFER,
"Commissioner of Crown Lands and Immigration."

There then follows a reference to the agreement in question and the words " non-payment of arrears."

Finally, to complete this part of the story, on the 22nd December, 1922, the appellant, as Commissioner of Crown Lands, signed a notice addressed to the Registrar-General and expressed to be given in pursuance of Section 94 of the Real Property Act, 1886, that the Crown lease therein mentioned, being the agreement in question, had been lawfully and wholly determined.

This notice was sent to the Registrar-General on the 9th January, 1923, and on the 17th January, 1923, a memorial thereof, as provided by Section 94 above mentioned, was duly entered in the Register of Crown Leases as provided by Section 94 above mentioned, by being endorsed on the copy of the agreement filed in such Register as provided by Section 93 of the same statute. Section 94 is in the following terms :—

> " The Registrar-General on receipt of notice from the Commissioner of Crown Lands that any Crown lease has been lawfully forfeited or determined in whole or in part, shall make an entry to that effect in the Register of Crown Leases, and such forfeiture or determination shall thereupon have effect."

On the 11th January, 1923, the appellant, having been informed by the respondent's solicitors that in their opinion the notice of cancellation was not in order, consulted the Crown Solicitor, and was advised that it would be unsafe to rely on the document of the 21st December, 1921, either as a notice in writing demanding payment within clause 24 of the agreement or as a notice in writing within the meaning of clause 22. He thereupon sent the respondent the following notice :—

> " The Minister of Repatriation of and for the State of South Australia for and on behalf of H.M. King George the Vth, hereby gives you notice that he is satisfied upon evidence which he deems sufficient that you have neglected to work satisfactorily the land which by agreement for sale and purchase, No. 30, Register Book, vol. 645, fo. 10, you have agreed to purchase, namely, block 372, in the Hundred of Wongyarra, and block 340 in the Hundred of Gregory, and the said Minister accordingly hereby determines the said agreement, and gives you notice that upon the expiration of three months from the giving of this notice, the said agreement and your right to complete the purchase and to possession of the said land will cease and determine and be void.
>
> " Dated the 24th day of January, 1923.
>
> " (Signed) GEO. R. LAFFER,
> " Minister of Repatriation.
>
> " To Francis Arnold Gillen."

This notice was duly posted, addressed in accordance with the provisions in that behalf of the agreement, and was registered at the Post Office. The respondent refused to take it in, and it was ultimately returned through the Dead Letter Office.

After the three months had expired the appellant, as already mentioned, caused possession to be taken of the land, and ejected the respondent therefrom.

On these facts the appellant makes the following submissions :—

1. That the letter of the 21st December, 1921, was a sufficient three months' previous notice in writing demanding payment of the arrears and that as default was made in such payment he was, as vendor, justified in cancelling the agreement, which was accordingly lawfully forfeited or determined.

2. That whether it was so or not such forfeiture or determination had effect under Section 94 of the Act of 1886 upon the entry above mentioned being made in the Register of Crown Leases pursuant to the notice of the 22nd December, 1922.

3. That whether the agreement had already determined or not it was so determined at the expiration of three months from the date of the notice of the 24th January, 1923.

4. That if he establishes any one of these submissions the respondent was on the 1st May, 1923, in unauthorised possession of the land in question and his ejectment therefrom was justified by Section 9 (xiii) of the Crown Lands Act, 1915.

As the appellant's final proceedings were based upon the provisions of clause 22 of the agreement and the notice of the 24th January, 1923, their Lordships propose to deal with this point first.

The contention of the respondent on this point is that before deciding to terminate the agreement it was incumbent upon the appellant to institute some judicial or quasi-judicial enquiry, or at the least to communicate to the respondent the information he had received and his intention to act thereon and give him an opportunity of stating his case in answer thereto.

The question is entirely one of construction, and in common with all such questions can only be properly answered after a consideration of all the surrounding circumstances, the position of the parties to the agreement, its subject matter, and the apparent purpose and object thereof, and in particular of the provisions to be construed.

In the present case the transaction to which the agreement related was effected under the provisions of Acts of Parliament specially passed for the purpose of providing for discharged soldiers and in particular by settling them on unoccupied lands for the twofold purpose of developing such lands and at the same time affording to the soldier settlers the opportunity of making good in life.

The administration of the Acts was entrusted to a special Minister called the Minister of Repatriation, who was, of course, responsible to Parliament for his conduct in the matter.

The clause in question was inserted in the agreement in pursuance of an imperative regulation made under the Acts in question and having the force of an Act of Parliament (*see* Record, p. 169, Regulation 13 (*h*)).

It is obvious that the authorities contemplated that amongst the more or less experimental cases there would be a certain

number of failures, and it seems not unreasonable to conclude that they intended to put into the hands of the responsible Minister means whereby such cases might be readily dealt with, and, if necessary, a fresh start made.

Turning to the words of the clause, it is provided that the power in question may be exercised by the vendor, viz., the Minister acting on behalf of His Majesty the King. The only conditions are that it must be exercised within the first ten years, and that the vendor is satisfied on such evidence as he deems sufficient that one or the other of the specified grounds exists. There is nothing in the words used to suggest as essential to the satisfaction of the vendor any particular form of enquiry, judicial or otherwise. It may fairly be assumed that those who required the clause to be inserted in every agreement of the kind were well aware that the vendor would be assisted by officers whose duty it would be to ascertain and report to him the conduct and prospects of the soldier settler, and that he would thereby be furnished with evidence which he might well deem sufficient to enable him to form a judgment. Merely to inform the person affected of what was in contemplation would be useless unless he was also given some particulars of the information on which the vendor proposed to act and to give such information, if it consisted, as it probably would, of reports from the Minister's officers, would render their position impossible, and the knowledge that such might be the result would tend to defeat the object with which they were appointed, viz., the obtaining of honest and true reports. Their Lordships agree with Higgins, J., in thinking "that nothing is further from the intendment of this clause than a judicial or quasi-judicial enquiry." They also agree with the following passage in his judgment :—

> "The power is confined to the first ten years, as years of probation; the contract is one in which the chief object of the vendor is to benefit the purchaser because the purchaser is a man who has served the country in the Great War; the facts of which the Minister is to be satisfied involve issues of such a character as might lead to endless debate; and the Minister as administrator is under a duty to other returned soldiers to see that the first holder is not blocking them without advantage to himself and under a duty to the State to see that its generosity is not wasted."

In their Lordships' opinion the cases referred to in argument have no bearing on the present case. The vendor is under this clause exercising a merely administrative function, and is entitled to form an opinion on such materials as he himself thinks sufficient.

There is no suggestion that the appellant in the present case acted otherwise than in absolute good faith.

There appears at p. 23 of the Record at line 24 a passage of the appellant's evidence in which he gives a general description of the materials before him, and this shows that he acted with great care and deliberation.

On the whole, their Lordships are of opinion that on this point the appellantis entitled to succeed.

The Board having come to this conclusion, it may be said that a decision on the other points is unnecessary. But they have been argued and various opinions thereon have been expressed in the Courts below, and their Lordships therefore think it right to state their own views upon them.

On the first point their Lordships have no hesitation in saying that the letter of the 21st December, 1921, was not a sufficient demand in writing within clause 24 of the agreement. It was, moreover, open to other attacks: it only purported to give two months for payment instead of three, one of the three sums or default in payment of which cancellation was threatened was not six months in arrear, and no distinction was made between it and the other sums, so that if the letter was, in fact, a demand, it would require payment of a sum to which the clause did not apply at all. Counsel for the appellant hardly pressed his submission on this point.

As to the effect of Section 94, this is a more difficult question, but their Lordships are of opinion that the appellant's contention is correct. The Registrar is directed to make the entry in the Register by which effect is given to the forfeiture or determination on receipt of the notice from the Commissioner that the Crown lease in question has been lawfully forfeited. In this respect the Crown lease is placed in a different position from that occupied by an ordinary lease. In this case the lessor, seeking to have registered the fact of re-entry, has to prove the fact, and that it has taken place in manner prescribed by the lease to the satisfaction of the Registrar. The Registrar is then to make an entry in the Register, and the estate of the lessee in the land is then to determine (*see* Real Property Act, 1886, Section 126).

If the viewof the appellant is not correct, then the Crown is in a less favourable position than the ordinary person. In the latter case when once he has satisfied the Registrar and the necessary entry has been made in the Register, the validity of the re-entry cannot be questioned, for the statute provides that the estate of the lessee in the land shall thereupon determine, whereas in the case of a Crown lease, if the respondent is right, the validity or otherwise of the forfeiture or determination might remain an open question until it should be decided whether it was lawful or not. It is more reasonable to suppose that in this case the duty of deciding the point was cast upon the responsible minister whose view was to be taken as final so far as the Register is concerned. The two cases would then be on the same footing, except only that in the one case the decision affecting the Register would be that of the Registrar in the other that of the Commissioner.

The Judges in the Courts below who decided against the appellant on this point do so on the ground that the forfeiture or determination which is to have effect is a lawful forfeiture or determination. Their Lordships cannot agree with this view; the forfeiture or determination is that above referred to, viz., one which the Commissioner in his notice *says* has been lawfully effected. It may be worth noticing that this is apparently the

view taken by the Registrar, for in the endorsement on the agreement he says that it " has been lawfully determined as appears by the notice from the Commissioner."

It has been suggested by the appellant that any hardship to individuals deprived of land by erroneous entries on the Register is met by the provision in the Act contained for compensation either by the person responsible for an erroneous entry (Section 203) or out of the assurance fund (Section 208). Beyond saying that there appears to be something in the suggestion, their Lordships express no opinion on the matter, as the point was not really before them.

In their Lordships' view, therefore, the appellant fails on his first point but succeeds on his second. As he also succeeds on the third point he establishes his case on the fourth.

Their Lordships are therefore of opinion that this appeal should be allowed and the order of the High Court of Australia discharged, the order of the Full Court of South Australia being thus restored. As to thecosts of this appeal the appellant, pursuant to his undertaking, must pay the costs of the respondent as between solicitor and client. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

GEORGE RICHARDS LAFFER

v.

FRANCIS ARNOLD GILLEN.

DELIVERED BY LORD WARRINGTON OF CLYFFE.

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