Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of George Henry Davenport v. *the Queen, from the Supreme Court of Queensland; delivered* 10*th December* 1877.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS was an action of ejectment in the Supreme Court of Queensland, brought by Her Majesty to recover an allotment, part of the Crown lands of the colony, which had been leased for eight years to one Meyer, on the ground that the lease was forfeited. The allotment consisted of 320 acres, numbered 196 in the Darling Downs district, and formed part of what is called "agricultural reserves."

The principal questions for consideration are, first, whether the lease was forfeited, and, secondly, if so, whether the forfeiture could be, and was, waived by the Crown.

Several statutes have been passed by the Colonial Legislature regulating the sale and letting of the waste lands of the Crown. The principal enactments relating to the questions raised in this Appeal are the following:—

"The Agricutural Reserves Act of 1863" (27 Vict. No. 23), after empowering the Governor in Council to set apart lands for agricultural purposes, to be denominated agricultural reserves, and to offer them for sale in portions of not more than 320 acres, at a fixed price of 20 shillings an acre, enacts as follows:

C 47. 100.—12/77. Wt. 12062.

Section 4. "Any person desiring to purchase "land in an agricultural reserve, after the "same has been proclaimed open for sale, "may apply to the land agent for the "district in which the reserve is situated, "and shall point out the particular portion "of land, and shall at the same time pay to "the land agent the sum of 20 shillings "for every acre, together with the amount "of deed fee, and he shall, subject to the "provisions herein-after contained, be "deemed to be the purchaser of said land, "and entitled to a grant in fee simple."

Section 7. "If within 12 months from the "date of selection, the selector of land in an "agricultural reserve shall make a declara- "tion in the form contained in the schedule "to this Act, that he has actually resided "on the lands held by him in the said "reserve, for a period of not less than six "months, and that he has cultivated not "less than one sixth of the land so selected, "and shall have fenced in the said selection "with a substantial fence of not less than "two rails, then a deed of grant shall be "issued to such selector: Provided that the "Governor or other officer appointed in "that behalf may require any reasonable "evidence in support of the truth of such "declaration."

Section 8. "If any person selecting lands in "an agricultural reserve shall fail to occupy "and improve the same, as required by "section 7 of this Act, then the right and "interest of such selector to the land "selected shall cease and determine, and the "amount of the purchase money, less by "one fourth part, shall be refunded to him "by the issue of a land order, entitling the "holder to the remission of such three

" fourths of the same in the purchase of " other Crown lands."

The scheme of this Act, which provided only for the sale of agricultural reserves, was that the selector should pay at the time of selection the full purchase money of 20 shillings per acre, and should then, subject to the performance of certain conditions, be deemed to be the purchaser, and entitled to a grant in fee. No present term or estate was conferred upon the selector, but only an inchoate right to a grant, liable to be defeated on failure to perform the conditions, the selector in that case being entitled to have " the amount of his purchase money, less by one fourth," refunded to him in the manner described.

Three years later, the Leasing Act of 1866 (30 Vict. No. 12), was passed, under which the lease in question was granted. This Act made provision for leasing lands which had been put up for sale by auction and not sold. One year's rent was to be paid in advance by applicants for leases.

It contained the following further enactments:—

Section 5. " The person declared lessee shall " receive from the land agent a lease in such " form as the Governor in Council shall " appoint, and shall sign a duplicate lease, " which shall be forwarded by the land " agent to the office of the Surveyor General."

Section 6. " Every such lease shall be made " subject to the following conditions:—

" (1.) The term thereof shall be for eight " years inclusive, commencing from the " first payment of rent.

" (2.) The yearly rent shall be at the rate " of two shillings and sixpence per acre when " the upset price of the land or the sum for " which it is open to purchase by selection " is twenty shillings per acre; but if the

" upset price of such land or the price at " which such land is open to purchase by " selection be higher than twenty shillings " per acre, then the rent shall be increased " in proportion.

" (3.) The rent for the second and each " succeeding year shall be paid in cash in " advance to the Treasury at Brisbane on or " before the first day of January, and in " default of such payment in advance the " lease shall be forfeited, and the land and " all the improvements thereon shall revert " to the Crown."

This sub-section then provides that the lessee may defeat the forfeiture by paying the rent and a certain amount by way of penalty within 90 days.

" (4.) So soon as the lessee shall have " made the eighth payment of rent as afore- " said, he shall be entitled to a deed of " grant in fee simple, subject, however, to " the payment of the fees chargeable on the " issue of deeds of grant.

" (5.) If at any time during the term of " such lease the lessee shall pay in cash or " land orders into the Treasury at Brisbane " the rent for the unexpired portion of such " term, he shall be forthwith entitled to a " deed of grant in fee simple, subject, how- " ever, to the payment of the fees chargeable " on the issue of deeds of grant."

The following section brought unselected allotments of the agricultural reserves within the operation of this Act:

Section 12. " All lands in agricultural reserves " which shall have been or may hereafter be " proclaimed as open for selection, and have " remained so open and unselected for one " calendar month, shall be open to lease by " the first applicant under the terms and

" conditions specified in the seventh clause of
" this Act: Provided only that if taken up
" on lease they shall be subject to the same
" condition and restriction as to cultivation
" and quantity as if they were selected by
" purchase."

By section 17 so much of the seventh clause of the Agricultural Reserves Act of 1863 as required residence on and fencing of selections was repealed.

This was the state of legislation when Meyer became the applicant for a lease of the allotment in question; but before his lease was granted, an Act to consolidate and amend the laws relating to the alienation of Crown lands was passed, viz., "The Crown Lands Alienation Act of 1868." (31 Vict. No. 46.) It contains the following enactment:

" Any selector who, before the passing of this
" Act, shall have selected land in any agricul-
" tural reserve under the 4th and 5th sections
" of the Agricultural Reserves Act of 1863,
" or Leasing Act of 1866, and who shall have
" proved by two credible witnesses to the
" satisfaction of the commissioner that he, his
" heirs, assigns, or lessees is, or at the time of
" selection was, a resident within the district
" over which such commissioner may have
" jurisdiction, is hereby empowered at his
" option to substitute improvements in lieu
" of cultivation, the fencing of the said land to
" be deemed and taken to be part of the said
" improvements, provided that such improve-
" ments shall in the aggregate be equal to the
" sum of five shillings per acre, on the total
" number of acres so selected by him as aforesaid.
" And upon the said selector proving by two
" credible witnesses to the satisfaction of the
" commissioner of the district that he has
" performed the conditions aforesaid, then the

" said commissioner shall issue a certificate " accordingly, and the said selector shall there- " upon be entitled to a deed of grant in fee " simple, subject, however, to the payment of " the fees chargeable in the issue of the said " deed of grant and balance of rent due."

The terms and conditions of the leases to be issued under this Act are prescribed by section 51.

The lease is from Her Majesty, and is dated on the 1st May 1868. After reciting that Meyer, in pursuance of the Agricultural Reserves Act of 1863, and Leasing Act of 1866, had applied to be declared lessee of the allotment, and paid 40*l.* as the first year's rent in advance, Her Majesty in consideration of the rent so paid in advance, and of the covenants by the lessee, demised the land to Meyer for the term of eight years, from the 23rd September 1867, "being the " day upon which the first payment of rent " was made, and thenceforth fully to be com- " plete and ended with all the rights of purchase " and other rights, powers, and privileges, and " subject to the terms, conditions, exceptions, " reservations, provisoes, penalties, and forfeitures " in the said Acts contained."

The reddendum is: "yielding and paying " to us, our heirs and successors, yearly, and " every year in advance during the continuance " of the said lease, the rent or sum named in " the second schedule." (This schedule provides for the first payment on the 23rd September 1867, and for subsequent payments on the 1st January in the years from 1869 to 1875 inclusive.) The lease contains covenants by the lessee for payment of the rent, and also to cultivate at least one sixth part of the land within one year from the commencement of the term of the lease, and to observe, perform, and keep the clauses, conditions, and provisoes applicable to the lands demised in the Acts contained.

It appears that two transfers of the lease have been made, viz., one from Meyer to Mr. Davenport (the Appellant), and the other from him to Mr. D'Abedyll, and that both were registered by the Surveyor General, the first on the 14th June 1869, and the last on the 28th June 1870. The Appellant was in possession as tenant to Mr. D'Abedyll, when the ejectment was brought.

The forfeiture insisted upon by the Crown is the failure of Meyer to cultivate or improve the allotment within a year from the 23rd September 1867, the date of his application to be declared lessee. In point of fact this failure happened, but the Appellant contends, on grounds to be presently adverted to, that a forfeiture was not thereby incurred, or if it was, that it has been waived. He relies moreover on a certificate granted by the Commissioner of Crown Lands.

The principal facts are undisputed. The rent payable on the 1st January 1869 was duly paid into the colonial treasury, but there being no evidence that the Crown was then made aware of the non-improvement, nothing turns upon this payment. However, on the 1st February in that year the Surveyor of the Darling Down district, who had been directed by the Surveyor General to examine the allotments which had been leased, made a report in which he stated that no cultivation or improvement had been made, among others, in the allotment in question. A copy of this report was sent in the month of June following by the Surveyor General to Mr. Taylor, the minister for lands of the colony. Mr. Taylor, who was examined at the trial, deposed that having made himself acquainted with the report he laid it before his colleagues in the ministry, and that the result of their deliberations was a determination not to proceed for the forfeiture of the allotments, but to allow the future rents to be paid. Mr. Taylor says he

thereupon told the Surveyor General to take no action on this report, adding, "we could not afford it."

Accordingly, Mr. D'Abedyll paid the subsequent yearly rents in advance as they became due, viz., on the 1st January in the years 1870, 1871, and 1872; and on the 31st May 1873 he paid in advance the whole of the remaining rent accruing under the lease. He paid at the same time the fees chargeable on the issue of deeds of grant.

It is not denied that the minister for lands was made acquainted with these payments, nor that they were paid "as rent;" and it cannot be doubted that the minister knew they were so paid.

Two receipts given by the local land agent were produced, in which the payments are described as "rents."

On the 23rd December 1869 a notice headed "Payment of Rents under the Leasing Act, 1866," was published in the gazette. After giving notice to lessees living at a distance from Brisbane that the local land agents had been instructed to receive "the rents," it contains the following note:

"The accompanying schedule contains all selec-
" tions made under 'The Leasing Act of 1866,'
" excepting those which have been forfeited for
" non-payment of rent. Rents which may be
" received upon such of these selections as may
" have been forfeited by operation of law, will be
" deemed to have been received conditionally, and
" without prejudice to the right of the Govern-
" ment to deal with the same according to the
" provisions contained in the Act in that behalf."

The schedule contained the name of the Appellant, (who was then the assignee of the lease,) the allotment No. 196, and the amount due was described as "third years rent, 40*l*."

Similar notices were published in the gazette on the 18th November 1870 and the 31st October 1871.

After the rent for the whole term of eight years had been fully paid, and before the term of the lease had expired, and without an offer to refund any part of the money, this ejectment was commenced.

The writ bears date the 16th September 1874, and alleges the title of the Crown to have accrued on the 3rd May 1869, treating the lessee and his transferees as trespassers from that date.

Upon the trial of the action, in which the above facts were admitted or proved, the Judge directed the verdict to be entered for the Crown; one question only, which will be hereafter adverted to, having been left to the jury. The principal points were reserved for the consideration of the Court, which, by the judgment under appeal, sustained the verdict.

It was contended on behalf of the Appellants that there had been no failure to cultivate or improve the land at the time the ejectment was brought, because it was said the twelve months from the date of selection prescribed by the seventh section of the Agricultural Reserves Act, 1863, in the case of sales, was inapplicable to leases, and that lessees had the whole term of eight years to fulfil the condition. It was said that the reason for requiring the cultivation within a year in the case of sales was, that no estate being granted, nor any interest created beyond the right to have a grant in fee on the performance of the condition, it was essential that a definite time should be fixed for that performance; the scheme being, that in the event of non-fulfilment within that time, the inchoate purchase should be at an end, and the selector entitled to a return of three fourths of the price he had paid. This reason, it was said, did not apply to the case of leases creating a legal interest for a definite term, with a right to a grant in fee on payment of the rent for the entire term; and,

therefore, that the proviso in the 12th section of the Leasing Act, 1866, that lands in agricultural reserves, if taken up on lease, should be subject to the same condition as to cultivation as if they were selected by purchase, should be construed to apply to the obligation to cultivate only, and not to the limit of time. It was also pointed out that this limit in the first Act was only fixed by reference to the time within which a declaration was to be made by the selector in order to obtain a grant, and that a declaration was not necessary in the case of leases.

It was further contended that the 68th section of the Alienation Act of 1868 (which came into operation on the 1st March of that year, during the currency of the first year of the lease in question), allowing selectors who held leases like the present to substitute improvements of the value of five shillings per acre in lieu of cultivation, gave the whole term of their leases for so improving their lands.

If the above construction of the statutes be correct, this action, brought during the currency of the term, would, no doubt, have been prematurely commenced.

It was further insisted on behalf of the Appellant that the proviso in the 12th section of the Leasing Act, 1866, did not make lessees subject to the forfeiture created by the 8th section of the Agricultural Reserves Act, 1863, but only to the obligation imposed by the 7th. It was urged that these sections were separable; that the condition for cesser of the interest, which was necessary to define and determine the position of a selector at the end of a year in the case of a purchase, was not necessary in the case of a lease creating a definite term, and it was pointed out that the condition for cesser was coupled with an equitable provision for the return (in the shape of land orders) of three fourths of the purchase

money, a provision inapplicable to the case of a lessee. It was said that a condition of forfeiture should be imposed in clear terms, and that the vague reference in the Leasing Act of 1866 to "the condition as to cultivation" in the Sale Act of 1863 did not subject lessees to the forfeiture prescribed in section 8 of that Act, and would be satisfied by holding them liable to the obligation to cultivate imposed by the 7th section.

The difficulties of construction, which these arguments undoubtedly present, arise from the inconvenient practice of legislating by means of vague and indistinct reference to the enactments of a former statute, a practice which in this case has been followed, without due regard being had to the distinctions existing between the position of purchasers and that of lessees. Their Lordships, however, do not think it necessary to determine the questions raised by the arguments just referred to, for, assuming that these arguments ought not to prevail, their opinion is in the Appellant's favour on the further question arising in the Appeal.

In answer to the defence that if a forfeiture had accrued it had been waived by the receipt of rent, it was contended on the part of the Crown that the effect of the proviso in the 8th section of the Act of 1863 was to make the lease absolutely void, and not voidable only. The Supreme Court took this view, and further decided that the Legislature having imposed this condition, the Crown could not dispense with it.

It is unnecessary to decide whether, in the event of a selector by purchase failing to perform the condition, a valid grant could be made to him. Such a selector has no estate vested in him, nor any right to a grant until he has fulfilled the condition precedent as to cultivation. The distinction between the case of such a selector and that of a lessee to whom a lease has been

granted, liable though it be to forfeiture, is obvious. The latter has a present estate for a definite term, an estate not created by the statute, but by a demise from the Crown. By the 5th section of the Leasing Act the form of lease is left to the discretion of the Governor in Council, and a duplicate of the lease is to be signed by the lessee. This provision shows that a lease by way of contract was contemplated, though based on the provisions of the statute.

In the present case the demise is for a term of years, in the usual form of a lease. Besides being made subject to the terms, conditions, penalties, and forfeitures contained in the Acts, this lease includes covenants by the lessee for the payment of the rent and observance of the clauses, conditions, and provisoes in the Acts, with a distinct covenant to cultivate one sixth of the land within a year. There seems to their Lordships to be nothing in the form of this lease inconsistent with the Acts. The covenants afford the means of conveniently enforcing the obligations of the lessee.

Does then the proviso of forfeiture in section 8 of the Reserves Act, when read into such a lease as the present, make the term *ipso facto* void, or voidable only upon a breach of the condition? In a long series of decisions the courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. The same rule of construction has been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract (*see* Doe *v.* Bancks, 4 B. & A. 401, Roberts *v.* Davey, 4 B. & Ad. 664, and other cases in the notes to Dumpor's case, 1 Smith's Leading Cases).

In Roberts *v.* Davey the words were that the license "should cease, determine, and be utterly "void and of no effect to all intents and "purposes." As far, therefore, as language is concerned, it was stronger in that case than in the present.

It is however contended that this rule of construction is inapplicable when the Legislature has imposed the condition. But in many cases the language of statutes, even when public interests are affected, has been similarly modified. Thus, where the statute provided that if the purchaser at an auction refused to pay the auction duty his bidding "should be null and void to all intents and purposes," it was decided that the bidding was void only at the option of the seller, though the object of the Act was to protect the revenue. In that case Mr. Justice Coltman said: "It is so contrary to justice "that a party should avoid his own contract by "his own wrong that, unless constrained, we "should not adopt a construction favourable to "such a view." (Makins *v.* Freeman, 4 Bing. N. C. 395).

There is no doubt that the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail, but the intention to exclude it should be clearly established.

The question arises in this, as in all similar cases, whether it could have been intended that the lessee should be allowed to take advantage of his own breach of condition, or, as it is termed, of his own wrong, as an answer to a claim of the Crown for rent accruing subsequently to the first year of his tenancy. The effect of holding that the lessee himself might insist that his lease was void would of course be to allow him to escape by his own default from a bad bargain, if he had made one. It would deprive the Crown of the right to the future rents, although

circumstances might exist in which it would be more to the interest of the Crown, representing the colony, to obtain the money than to repossess the land, as indeed in the present case it was thought to be.

Again, if the lessee could treat the lease as null on his own default, he would, whilst escaping from his contract and from liability to future rent, forfeit one year's rent only, or one eighth of what in the end would be purchase money, instead of the one fourth of the purchase money, which selectors by purchase would in the like case forfeit, the latter two being entitled to a return of the other three fourths only in the shape of land orders. This difference establishes a further distinction between such selectors and lessees.

Having regard to these considerations, the intention of the Legislature to the contrary does not, in their Lordships view, so clearly appear as to exclude the usual and equitable rule of construction from applying to these leases. It may well have been meant to leave to the Crown, acting by its responsible ministers, the option which other lessors in the case of similar conditions are entitled to exercise.

If then the Crown could treat the lease as voidable, the further question to be considered is, has it elected so to treat it and waived the forfeiture?

On this part of the case their Lordships have felt no difficulty. The evidence of waiver seems to them to be clear and overwhelming. Not only was the rent for three successive years accepted in advance, but in 1873 the whole of the remaining rent accruing under the lease was paid up in full. And these rents were received by the officers of the Government, as appears by the evidence before set out, not only with full knowledge of the breach of the condition, but in consequence of the decision of the ministers of the Crown in the colony, come to after mature deliberation, that the Government of the colony

wanted the money and could not afford to insist upon the forfeiture.

It was sought to obviate the effect of these receipts by referring to the passage contained in the "notification of rents due," set out above. This notification appeared in the Gazette in three successive years, the last year being as far as appears 1871. After that year the publication was apparently abandoned. It is therefore very doubtful whether this notification can in any way affect the acceptance in the year 1873 of all the rent then remaining due.

But, supposing this notice is to be regarded as pointing to all future rents, their Lordships think it would not prevent the acceptance of these rents from operating as a waiver. The notification itself describes the payments as "rent," and their Lordships have no difficulty, upon the evidence before adverted to, in coming to the conclusion of fact, that the money was not only paid, but received as "rent."

A question of this kind received great consideration in the House of Lords in Croft *v.* Lumley, 6 H. L., 672. In that case the facts were much more favourable to the contention that there was no waiver than in the present. The tenant tendered and paid the rent due on the lease after the landlord had declared that he would not receive it as rent under an existing lease, but merely as compensation for the occupation of the land. The opinion of all the Judges, except Mr. Justice Crompton, was that the receipt of the money under these circumstances operated as a waiver. In the present case, the rent, as already stated, was received as rent, with, at most, a protest that it was received conditionally, and without prejudice to the right to deal with the land as forfeited. Lord Wensleydale, who was disposed to agree with Mr. Justice Crompton in his conclusion of fact in the particular case,

appeared to have no doubt that when money is in fact received as rent the waiver is complete. A very learned Judge, Mr. Justice Williams, gave his opinion in the following terms: "It " was established as early as Pennant's case—3 " Rep, 64A, that if a lessor, after notice of a " forfeiture of the lease, accepts rent which " accrues after, this is an act which amounts to " an affirmance of the lease, and a dispensation of " the forfeiture. In the present case, the facts, " I think, amount to this: that the lessor " accepted the rent, but accompanied the receipt " with a protest that he did not accept it as rent, " and did not intend to waive any forfeiture. " But I am of opinion the protest was altogether " inoperative—as he had no right at all to take " the money unless he took it as rent; he cannot, " I think, be allowed to say that he wrongfully " took it on some other account, and if he took " it as rent, the legal consequences of such an " act must follow, however much he may repu- " diate them."

Without finding it necessary to invoke this opinion to its full extent in the present case, it is enough for their Lordships to say that where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally, and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt.

The finding of the jury that there was no waiver appears from the notes of the learned Judge who tried the cause to have been founded on his direction: " that the intention of the " party receiving the rent, and not of the " party paying it, must be looked at in con- " sidering the question of waiver, and that " unless the jury were of opinion that the " rents were received after the 23rd May 1869, " unconditionally and unreservedly, they should

" find no waiver." In their Lordships' view of the law, which has just been stated, this direction is erroneous. They do not however deem it necessary to send down the case for a new trial, because the question of waiver really depends on undisputed facts, from which the proper legal inference to be drawn is, in their opinion, clear. Even if the evidence of the receipt of the money as rent had been less convincing than they have found it to be, they would have hesitated to come to the conclusion that the Ministers of the Crown took this money wrongfully, and without any colour of right, as they would have done if it had not been accepted as rent.

Upon a review of the whole case, therefore, they are of opinion that the verdict ought to be entered for the Defendant.

After coming to this decision it is unnecessary to determine the effect of the certificate of "fulfilment of conditions" given to the Appellant by the Commissioner of Crown Lands. Such a certificate, if it be in proper form, and good and sufficient upon its face, may for some purposes be conclusive. But it was contended that defects both of form and substance were disclosed upon the face of the above certificate which precluded the Appellant from relying on it. Without expressing any opinion on these objections, it is enough to say that the Appellant is entitled to succeed in the present action without the aid of this certificate.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court, discharging the rule nisi of the 11th December 1874, and, instead thereof, to direct that such rule be made absolute to set aside the verdict found for the Plaintiff, and to enter the verdict for the Defendant, with costs.

The Defendant (Appellant) will also have the costs of this Appeal.