In the Privy Council.

No. 47 of 1914.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

HIS MAJESTY'S ATTORNEY GENERAL of and for the STATE OF NEW SOUTH WALES on the relation of Arthur Alfred Clement Cocks, of 59, York Street, Sydney, in the State of New South Wales, Merchant and Lord Mayor Elect; Sir William McMillan, K.C.M.G., of 79, York Street aforesaid, Merchant; and Thomas Henley, of Drummoyne, in the said State, Member of the Legislative Assembly of New South Wales ... (Informant) APPELLANT

AND

JAMES LESLIE WILLIAMS ... (Nominal Defendant) RESPONDENT.

Case of the Appellant

(HIS MAJESTY'S ATTORNEY GENERAL OF AND FOR THE STATE OF NEW SOUTH WALES).

1. This is an Appeal brought by special leave of His Majesty in Council from a Decree dated the 19th of June, 1913, of the High Court of Australia, which reversed a Decree of the Supreme Court of New South Wales in favour of the Appellant dated the 20th March, 1913. The subject matter of the suit was the house and premises known as Government House in Sydney in the State of New South Wales.

2. The land in question, on which stand the buildings known as Government House, originally formed part of a larger area set apart by Governor Record, pp. 40 & 50

Phillip (the first Governor of New South Wales) in or before 1792, soon after the foundation of that Colony " for the use of the Crown and as common " lands for the inhabitants of Sydney." By a proclamation issued by Governor Darling in 1829 certain lands, including that now in question, were described as " certain parcels of land in the town of Sydney which have been " heretofore reserved for public purposes." In the early days of the Colony two residences were provided for the Governor; one at Sydney, on another part of the said land so set apart, and the other at Parramatta. In course of time necessity arose for providing a more suitable residence than either. As the result of communications between successive Governors of the Colony and Secretaries of State for the Colonies, a portion of about 47 acres, including the land in question and several acres more, was selected as a site for the new residence. The proposal for the erection of the new residence on that site was sanctioned by the Secretary of State for the Colonies. The erection of a new residence had been recommended by Governor Bourke in 1832 after a report made by the Surveyor-General of the Colony, which was sent to England to the said Secretary of State. Plans for the new house were prepared in England and sent out to the Colony where they were carefully considered by a Committee of the Legislative Council, under the presidency of the Chief Justice, by which Committee the actual site of the House was finally determined and was approved by the Home Government in or about 1837. The Legislative Council approved the proposal and voted £10,000 towards the erection of the new building. On a portion of the site so selected stables had already been erected on a handsome scale during the administration of Governor Macquarie, and these have been in use in connection with the present residence ever since its completion. The cost of the new residence (exclusive of the said stables) was £25,000, of which £15,000 over and above the £10,000 voted by the said Legislative Council was derived from the sale of part of the land constituting the larger area above referred to, over which money the Legislature of New South Wales had no power of appropriation. The building was completed in the year 1845 and was thenceforward continuously occupied by the Governors of New South Wales till the year 1900. In that year the Commonwealth of Australia was constituted, and for the purpose of providing a residence for the Governor-General an arrangement was made between the Commonwealth Government and the Government of New South Wales, whereby the residence now in question was leased to the Commonwealth. This arrangement was continued till the year 1912, when it was terminated by the State Government. Since 1900 the Governors of New South Wales have occupied another residence known as Cranbrook at Sydney, provided at the expense of the State. Of the lands originally enclosed within the fences of Government House and used in connection with it some five acres were in the year 1900 separated from the rest and fenced in with the Botanical Gardens adjoining. In 1884 an acre and a half was used for the National Art Gallery. In 1879 another area enclosed by an outer fence and used for grazing purposes in connection with the residence, had been set out as a

public park. With these exceptions the House and lands remained as in 1845.

3. Immediately after the determination of the said arrangement with the Commonwealth Ministers and Members of the Government of New South Wales stated their intention of using Government House and grounds for purposes other than that of a residence for His Majesty's Representative in New South Wales, and on the 14th December, 1912, the Premier of New South Wales caused the grounds to be publicly thrown open and declared them open to the public. The said Ministers caused the removal of boundary and other fences between the grounds of Government House and the adjoining public places, the making of paths, the cutting down of trees and the setting up of notice boards, and did other acts towards converting the grounds into a place of public resort. They also prepared plans and took other steps for the conversion of the stables of Government House into a building, to serve as a Conservatorium of Music, and placed the sum of £4,000 in the Public Estimates of the year for the purpose of such Conservatorium.

4. The Appellant humbly submits that Government House and grounds were, at the time of the acts of the said Ministers, vested in His Majesty, dedicated to the public purpose of a residence for the Sovereign's Representative, and that neither the Government of New South Wales nor the Governor in Council had power to interfere with or alter the said purpose to which the said House and Grounds were dedicated. The following is a brief summary of their legal history.

5. It is admitted on all hands that originally the said lands were vested in His Majesty's predecessors and that they were administered entirely by the Imperial Authorities until the New South Wales Constitution Act, 1855 (18 and 19 Vict. Cap. 54) came into force. Prior to that date the lands were administered under Orders in Council but there were in force two Imperial Acts relating to the sale and leasing of waste lands belonging to the Crown in the Australian Colonies, namely, 5 and 6 Vict. Cap. 36, and 9 and 10 Vict. Cap. 104 (hereinafter sometimes referred to as the Australian Waste Lands Acts, 1842 and 1846). Record, p. 43

6. By the said Act of 1842 it was enacted that within the Australian Colonies the waste lands of the Crown should be disposed of as therein prescribed and not otherwise, and the Act forbade alienation except by sale as therein mentioned and enabled lands to be reserved by Her Majesty for certain public uses as therein mentioned and by Section 23 thereof it was enacted that by the words " waste lands of the Crown " as used in that Act were intended and described any lands situate in the Colony and which then were or should thereafter be vested in Her Majesty her heirs and successors and which had not been already granted or lawfully contracted to be granted to

any person or persons in fee simple or for an estate of freehold or for a term of years and which had not been dedicated and set apart for some public use.

7. By the said Act of 1846 it was enacted that leases and licences to occupy waste lands of the Crown in the said Colonies might be granted, and in Section 9 it was enacted that the words " waste lands of the Crown as " employed in that Act were intended to describe any lands in the said " Colonies whether within or without the limits allotted to settlers for location " and which then were, or thereafter should be, vested in Her Majesty, " her heirs and successors and which had not already been granted or lawfully " contracted to be granted by Her Majesty, her heirs and successors to any " other person or persons in fee simple and which had not been dedicated or " set apart for some public use."

8. The New South Wales Constitution Act of 1855 empowered Her Majesty to assent to a Bill which had been passed by the Legislature of New South Wales in the previous year and which was set out in a schedule to the said Imperial Act.

SECTION 1 of the Scheduled Bill conferred upon the local legislature power to make laws for the peace, welfare and good government of the said Colony in all cases whatsoever.

SECTION 43 enacted that subject to the provisions therein contained, it should be lawful for the said local legislature to make laws for regulating the sale, letting, disposal and occupation of the waste lands of the Crown within the said Colony.

SECTION 58 referred (*inter alia*) to the said Act of 1842 as an Act for regulating the sale of " waste land belonging to the Crown " in the Australian Colonies, and to the said Act of 1846 as an Act to amend the Act for regulating the sale of " Waste land belonging to the Crown " in the Australian Colonies, and provided that the said Constitution should have no force or effect until so much of those Acts and certain other Imperial Acts had been repealed, and the entire management and control of the waste land belonging to the Crown in the said Colonies, and the proceeds thereof should be vested in the Legislature of the said Colony.

The said Constitution Act of 1855 by Section 1 empowered Her then Majesty in Council to assent to the said Scheduled Bill, and by Section 2 enacted that certain Acts mentioned in the Schedule to that Act should be repealed, and the entire management and control of the " waste lands " belonging to the Crown in the said Colony and also the appropriation of the gross proceeds of the sale of any such lands, and of all other proceeds and revenues of the same should be vested in the Legislature of the said Colony, subject to certain provisions for preserving existing contracts and rights.

9. Neither the New South Wales Constitution Act, 1855, nor the Scheduled Bill contained any express definition of the term "waste lands." The Australian Waste Lands Acts, 1842 and 1846, were repealed by the Act 18 and 19 Vict., cap. 56.

10. The Appellant submits that having regard to the facts hereinbefore stated, the said Government House and Grounds were not waste lands within the meaning of the said Constitution Act of 1855.

11. On the 24th December, 1912, the Appellant commenced these proceedings by information in the Supreme Court of New South Wales in Equity on the relation of the above-named relators who are citizens of and resident in the said State, alleging that the Government of the said State of New South Wales were unlawfully diverting or intending to divert the said House and land from the purpose of a Governor's residence, and to apply them to other purposes, and he claimed (1) a declaration that they were vested in His Majesty dedicated to the public purpose of a residence for the Sovereign's representative in New South Wales; (2) a declaration that neither the Government of New South Wales nor the Governor in Council had power to interfere with or alter the said purpose to which the said House and grounds were dedicated; (3) an injunction to restrain the Respondent as nominal Defendant for and on behalf of the Government of New South Wales, the Ministers, Officers and Servants of the Crown, from using or causing or allowing to be used the said House and Grounds for any purpose other than the public purpose of a residence for the Sovereign's representative in New South Wales; (4) costs; and (5) further relief. Record, p. 3

12. The Respondent was made nominal Defendant to the proceedings under the "Claims against Government and Crown Suits Act, 1912," being the New South Wales Act, No. 27 of 1912.

13. On the 3rd February, 1913, the Appellant gave notice of motion for an interlocutory injunction in the terms above mentioned, and evidence was filed in support of the motion on behalf of the Appellant, and evidence in opposition was filed by the Respondent. The motion was heard before three Judges of the said Supreme Court, viz.: The Chief Justice (Sir William P. Cullen), Mr. Justice A. H. Simpson (Chief Judge in Equity), and Mr. Justice Street, Judge in Equity. By consent the motion was turned into a motion for a decree. There was in consequence no pleading on the part of the Respondent. The effect of the evidence was as the Appellant submits to prove clearly the facts hereinbefore stated. The affidavits and exhibits are set out in the Record. It was admitted by the Defendant's Counsel at the hearing, that there was no minute showing that the Governor in Council had authorised or approved of the Acts complained of in the information. The motion was heard on the 24th, 25th and 26th of February, 1913, when Judgment was Record, p. 5 Record, pp. 40, 47 & 49 Record, pp. 4-9 & 13 Record, p. 52

reserved. On the 20th March Judgment was delivered, when the Judges unanimously decided in favour of the Appellant ; and by their decree declared that the said House and Grounds were vested in His Majesty dedicated to the public purpose of a residence for His Majesty's Representative in New South Wales ; and that the action or concurrence of His Majesty's Imperial Government was necessary to divert the same from such purpose ; and granted an injunction restraining the Respondent as nominal Defendant for and on behalf of the Government of New South Wales and the officers and servants of the said Government from any unauthorized interference with that purpose, and ordered the Respondent to pay the costs.

Record, pp. 40-56

14. The reasons of the said Judges who were unanimous are set out in the Record. The grounds upon which they proceeded were briefly these. It was not disputed that the lands in question were vested in His Majesty, and the Court held that they had been appropriated and set apart for the special purpose of a Governor's residence at a time when the Crown lands within the Colony were being administered by the Imperial Government itself, and that none of the subsequent legislation had placed the said lands under the control of either the Legislature or the Executive Government of the Colony, and that they remained appropriated to the purpose aforesaid until His Majesty, acting through his Imperial Government, should be pleased to divert them to some other purpose, and there was no evidence of any such event having occurred. They further held that the Appellant, complaining of the infringement of a right of the public, was entitled to sue the Respondent as nominal Defendant under the provisions of the said claims against the Government and Crown Suits Act, 1912, and that an injunction might be granted against the said Respondent in a proper case ; and that the public had such an interest in the preservation of the said lands and buildings for the purpose of a Governor's residence as to enable the suit to be maintained.

Record, p.160

15. On the 2nd April, 1913, the Respondent appealed to the High Court of Australia against the said Decree.

16. The Appeal was heard before the High Court of Australia (in the absence of the Chief Justice) before Barton, Isaacs, Higgins, Duffy, Rich and Powers, J.J., on the 5th, 6th, 7th, 8th and 9th of May, 1913, when Judgment was reserved. On the 13th June, 1913, Judgment was delivered allowing the Appeal and discharging the said Decree of the Supreme Court and dismissing the Appellant's said suit with costs in both Courts. All the said Judges concurred, but separate Judgments were delivered by Barton, J., Isaacs, J., and Higgins, J. A joint Judgment was given by Duffy and Rich, J.J., while no formal Judgment was delivered by Powers, J., he merely concurring in the Judgment of the Court. The reasons of the Judges are set out in the Record. Briefly summarized, the effect of the Judgments was as hereafter stated.

Record, p.160

Record, pp. 161-197

17. Barton J. was in favour of the Appellant as regards the objection that in this suit the Crown represented by the Attorney General was proceeding against the Crown represented by the nominal Defendant, so that in effect His Majesty was suing himself. He held that the Attorney General was suing as representative of His Majesty as *parens patriæ* claiming redress for an alleged grievance of some of his subjects; which the nominal Defendant opposed as representative of the Executive Government; and that such a suit could be maintained, and there was nothing in the claims against the Government Act to prevent it. As regards the objection that the relators had no interest, he held that did not prevent the Appellant from proceeding. He held however that there was a fatal defect in the suit, because the Appellant was claiming that the House and grounds in question were vested in His Majesty in right of the Crown of the United Kingdom, and that the said Crown was not a party to the suit; that the Appellant represented only the rights of the Crown as *parens patriæ* in New South Wales, and could not usurp either the ownership or the trust of the Crown in respect of an Imperial right. He did not however proceed upon that ground alone, and said that the merits disclosed other grounds for dismissing the suit, and as it was reasonable to suppose that the case might be carried beyond that Court he stated his views thereon. His point was that the said House and lands were subject to the control of the State Government and not of the Imperial Government. The question he said depended on the construction of the Acts of Parliament hereinbefore referred to, and he discussed them at length. He held that the expression "waste lands" as used in the said Constitution Act was not to be construed according to the definition clauses contained in the Australian Waste Land Acts, 1842 and 1846 or either of them; and that the said Constitution Act of 1855 contained no definition of the words "waste lands" and he said that those words meant such of the lands of which the Crown became absolute owner on taking possession of the Colony as the Crown had not made the subject of any proprietary right on the part of any citizen, and he held that as the said Government House and lands had not been made the subject of any such proprietary right they were "waste lands" within the meaning of the Constitution Act of 1855 and thereby fell under the control of the local legislature. The learned Judge further held that if he was wrong in that view the said House and lands still fell under control of the local Legislature by virtue of the enactment in Section 1 of the said Scheduled Act of 1855 enabling the local Legislature to make laws for the peace, welfare and good government of the Colony in all cases whatever, notwithstanding that Section 43 of the said Scheduled Act expressly empowered the said Legislature to make laws for regulating the sale, letting, disposal and occupation of the said waste lands of the Crown; thus in effect as the Appellant humbly submits, treating Section 43 as surplusage.

Record, pp. 161-172
Record, p.161
Record, p.161
Record, p.162
Record, pp. 170-171
Record, p.171

18. Isaacs J. thought that the real foundation of the Appellant's claim was that the House and lands in question were vested in His Majesty in His

Record, pp. 172-193

Record, p. 173

Record, p. 176

Record, p. 178

Record, p. 179

Record, p. 182

Record, p. 191

Record, p. 187

Imperial right, and if so, the learned Judge could see no justification for the King " in his local character " proceeding to vindicate that right. He said that the passivity of the true owner, where a wrong was being done to him, gave no warrant to a stranger to that right to interfere ; and that the Appellant had no right of complaint even assuming that the Respondent's interference with the property in question was unlawful as against the Imperial Authorities. He thought that the absence of the Imperial Government was fatal to the case ; and it was futile to inquire into the substantive right of the Government of New South Wales to do the acts complained of. But as his opinion as to the Appellant's competency might be wrong and for other obvious reasons it was desirable to express his opinion on the main issue. He was of opinion that the words " waste lands " of the Crown apart from legislative definition meant " lands not appropriated under any title from the Crown " and that the words " set apart " merely denoted a segregation in fact, and did not necessarily involve the creation of a right in another. He considered that the evidence did not show that the lands in question had been set apart for an Imperial as distinct from a local public purpose he regarding the Governor as holding a Colonial rather than an Imperial Office. In his opinion " waste lands " as used in the New South Wales Constitution Act, 1855, was not limited by the definition contained in the said Australian Waste Land Acts of 1842 and 1846 ; and that Section 1 of the Constitution Act enabled the local Legislature to make laws concerning and therefore to deal with and dispose of all lands within the State.

Record, pp. 193-196

Record, p. 194

Record, p. 195

19. Higgins J. was of opinion that the words in the Australian Waste Lands Acts, 1842 and 1846, " dedicated and set apart for some public use," referred only to a case where the Crown had bound itself in some way to keep the land for some public use, and that the effect of the transactions which had taken place was not to give the land to the public, but to retain it for the use of the Royal servants, namely, the Governors. He thought, therefore, that the land was waste land belonging to the Crown within the meaning of the Constitution Act, 1855, and, under the Constitution Act, became subject to the power of the local legislature. No Act of that legislature in the nature of a dedication or altering the rights of the King in respect of this land had been produced ; and it was not clear where the power over it really rested, pending such legislation. The power might be in the Governor-in-Council, though there was nothing to show that it was so. But the information did not raise any issue as to the rights of the King in the absence of dedication. It was based solely on the allegation of a permanent dedication of the land to the public purpose of a residence for the New South Wales Governors ; and that had not been proved ; and as there was no such dedication, the case must fail. He also thought that the Appellant could not fitly represent His Majesty in asserting his right as against the Government of New South Wales.

Record, pp. 196-197

20. Gavan Duffy and Rich J.J. were of opinion that the evidence did not disclose any right in the public of New South Wales. The reservation

and use of the land as a residence and domain for the Governor of New South Wales was not intended to confer on the public of New South Wales any right as against the Sovereign, but to retain the land for the purpose of His Majesty's Government in the Colony, and created no right which could be enforced in any Court of law by any individual or individuals, or by the public of New South Wales. The Sovereign still retained complete and undivided ownership and dominion, and he alone could complain of any interference with the land or with the method of dealing with it, and that was enough to dispose of the case ; but if it were necessary they would have been disposed to agree with Isaacs J. that the Imperial Government was no longer concerned with the land, and that the Government of New South Wales was within its legal rights in all that it had done or threatened to do.

21. The Appellant humbly submits that the judgments of the Judges of the High Court are erroneous in many important respects ; and in particular the Appellant would refer to the following points :—

(1) The Appellant was His Majesty's duly appointed Attorney-General in the State of New South Wales, and the land in question is situate in that State. He humbly submits that it was his duty and right to sue in the Courts of the said State on behalf of His Majesty to prevent and redress all wrongs done affecting His Majesty's lands situate in the said State, whether such lands are subject to the control of the local legislature or not ; and that the Judges of the High Court were in error in holding that His Majesty was not a party to or properly represented in the proceedings.

(2) The Appellant submits that the said Judges put a wrong construction on the said Constitution Act of 1855. According to usual and legal principles of construction, the expression " waste " land " as used in that Act ought to receive the same meaning as in the Australian Waste Land Acts, 1842 and 1846, which were referred to in and dealt with by that Act ; and further if this submission is wrong, and the expression " waste land " is to be construed independently of the Acts of 1842 and 1846, and without the aid of any definition clause, they cannot according to any natural or ordinary sense of the word include the house, ground and stables, which, at the passing of the Constitution Act had already been erected and laid out at the cost of over £25,000, and had for several years been and then were in the actual occupation of the Governor of the Colony as his regular residence.

(3) The Appellant submits that if his preceding submission is erroneous, and the said House and land became by virtue of the Constitution Act, 1855, subject to the power of the New South Wales Legislature, still that power was never exercised as regards the said

House and land, though in the case of the Parramatta Domain, an Act of the said Legislature, viz., the Parramatta Domain Act, 1857, 20 Vict., No. 35, was passed. The Appellant submits that in the absence of such legislation, the pre-existing rights still remain. Higgins J. was the only Judge who adverted to or apparently noticed this fact ; and the reasons which he gave for regarding it as immaterial are, as the Appellant submits, based on a too narrow construction of the information ; and the suit ought not to have been dismissed on such a ground, without at any rate the offer to the Appellant of an opportunity of amending his information in this respect.

(4) The Appellant submits that the Judges were also wrong in holding that the public of New South Wales had no interest in the suit. It is submitted that every citizen of the State has an interest in the question ; and moreover, public money was being applied to and expended on an unlawful user of the said house and stables and land.

Record, p. 198 22. On the 22nd of November, 1913, the Appellant obtained special leave to appeal to His Majesty in Council against the said Decree of the High Court upon the usual terms which have been duly complied with.

23. The Appellant humbly submits that the said Decree of the High Court is wrong and ought to be reversed, and the relief asked by the information granted to the Appellant for the following amongst other

REASONS.

1. **Because** the said House and land were before and at the passing of the Constitution Act, 1855, vested in Her Majesty, dedicated and set apart for the public purpose of a residence of the Sovereign's Representative in New South Wales ; and no statute has since been passed nor act done by virtue of which the same can lawfully be diverted from that purpose or devoted to other purposes.

2. **Because** the said House and land were not " waste lands " within the meaning of the said Constitution Act ; and the same were not subject to the powers of the New South Wales Legislature.

3. **Because**, if the said premises were subject to the powers of the said Legislature, that Legislature had passed no act affecting the said premises or the user thereof.

4. **Because** the Government of New South Wales were without lawful authority, diverting and threatening and intending to divert the said premises from the said purpose, and devote them to other purposes.

5. **Because** there was no evidence that either the Governor of New South Wales in Council, or the Imperial Government sanctioned the said unlawful diversion.

6. **Because** the Appellant was the proper person to take legal proceedings to prevent such unlawful diversion.

10 7. **Because** such proceedings were properly brought against the Respondent as nominal Defendant under the said claims against Government and Crown Suits Act.

8. **Because** the relators as citizens of New South Wales had an interest in the subject matter of the suit.

9 **Because** the Decree of the said Supreme Court was right and ought to be restored.

P. OGDEN LAWRENCE,
ALFRED ADAMS.

In the Privy Council.

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BETWEEN

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AND

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Case of the Appellant.

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