5, 1915

In the Privy Council.

No. 47 of 1914.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA (APPELLATE JURISDICTION).

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., Merchant, of 79 York Street, aforesaid, and THOMAS HENLEY, of Drummoyne, a Member of the Legislative Assembly of New South Wales (Informant) - - - - - - - - - - *Appellant*

AND

JAMES LESLIE WILLIAMS (Defendant) - - - - *Respondent.*

Case for the Respondent.

RECORD.

1. This is an appeal by special leave from a Decree, dated the 19th June 1913, of the High Court of Australia (Appellate Jurisdiction), whereby a Decree, dated the 20th March 1913, of the Supreme Court of New South Wales was discharged and the suit hereinafter mentioned was dismissed with costs. p. 159. p. 56.

2. The questions to be decided upon this appeal are—(1) whether the Government of the State of New South Wales is entitled to divert "Government House," Sydney, and the grounds belonging thereto from the purpose of a residence for His Majesty's representative in New South Wales, and if nay, (2) whether the Attorney-General of New South Wales is entitled to any and what relief as against the said Government. The said Government has throughout contended that it has full power to put the

said Government House and grounds to any use which is not expressly or impliedly forbidden by any law of New South Wales, and it claims to exercise such power.

3. The suit in which the said Decrees were made was instituted by information filed the 9th January 1913 in the Supreme Court of New South Wales (in Equity) by the Attorney General of New South Wales on the relation of three citizens of Sydney against the Respondent (hereinafter for convenience called "the Defendant") as nominal Defendant under the "Claims against the Government and Crown Suits Act 1912." By the prayer of the information the Informant asked for (1) a declaration
p. 3. that the said Government House and grounds "are 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 has power to interfere with or alter the said purpose to which "the said house and grounds are dedicated"; (3) an injunction restraining the Defendant 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 or other relief.

p. 1. A print of the Information will be found in the Record.

4. On the 3rd February 1913 the Informant gave notice of motion for an interlocutory injunction in the terms of paragraph 3 of the information; and on the 24th, 25th and 26th February 1913 the motion (which was by consent turned into a motion for decree) was heard before three judges of the Supreme Court, viz., the Chief Justice (Sir William P. Cullen), A. H. Simpson J. (Chief Judge in Equity) and Street J. (Judge in Equity).

pp. 5-34 & 57-159. A print of the notice of motion and of the evidence which was before the Court will be found in the Record.

5. On the 20th March 1913 the Supreme Court pronounced its Decree whereby the Court declared that the said Government House and
p. 57. grounds "are vested in His Majesty the King, 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 is necessary to divert the same from such purpose." And the Court ordered that "the Defendant as nominal Defendant for and on "behalf of the Government of New South Wales and the officers and "servants of the said Government be restrained by the order and injunction "of this Court from any unauthorised interference with that purpose," and that the Defendant should pay the costs of the said suit.

p. 56. A print of the said Decree will be found in the Record.

6. The Defendant appealed against the said Decree to the High Court of Australia; and on the 5th, 6th, 7th, 8th and 9th May 1913 the

appeal was heard before the said High Court consisting (in the absence of the Chief Justice) of Barton, Isaacs, Higgins, Duffy, Powers and Rich J.J. On the 19th June 1913 the Court allowed the appeal and made the Decree referred to in paragraph 1 hereof from which the Informant is now appealing to His Majesty in Council.

A print of the said Decree of the 19th June 1913 will be found in the Record. p. 159.

7. Before stating the facts of the case it is desirable to summarise what is conceived to have been, prior to the date when the New South Wales Constitution Act 1855 came into force, the legal position in regard to Crown lands in the Colony of New South Wales.

8. Upon the acquisition by the Crown of an oversea Colony the lands in the Colony vest in and become the property of the Crown. Until granted or appropriated under a title from the Crown such lands are and remain "Waste Lands of the Crown," which expression has for upwards of at least 130 years denoted (except in particular statutes containing a special definition) colonial lands not so granted or appropriated. Reference is made on this point to the passages in Isaacs J.'s Reasons at pp. 178 and 179 of the Record.

9. Accordingly until the Constitution Act of 1855 came into force the waste lands of the Crown in New South Wales (as above defined) were administered under the direction of the Home Government subject to the provisions of certain Acts of the Imperial Parliament which have long since been repealed. These last-mentioned Acts included an Act 5 & 6 Vict. cap. 36 and an Act 9 & 10 Vict. cap. 104, each of which contained a special definition of the expression "Waste Lands of the Crown," such special definitions being as follows: By Section 23 of 5 & 6 Vict. c. 36 it was enacted that "by the words 'Waste Lands of the Crown,' as used in the "present Act, are intended and described any lands situate therein, and "which now are or shall hereafter be vested in Her Majesty, Her Heirs "and Successors, and which have 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 have not been "dedicated and set apart for some public use." And by Section 9 of 9 & 10 Vict. cap. 104 it was enacted that "the words 'Waste Lands of "the Crown,' as employed in this Act, are intended to describe any lands "in the said Colonies" (which included New South Wales) "whether "within or without the limits allotted to Settlers for Location; and which "now are or hereafter shall be vested in Her Majesty, Her Heirs and "Successors, and which have not been already 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 have not been dedicated or "set apart for some public use."

10. By the New South Wales Constitution Act 1855 (18 and 19 Vict. cap. 54) after reciting that a Bill intituled "An Act to confer a Con-

" stitution on New South Wales and to grant a Civil List to Her Majesty " had been passed by the Legislative Council of the Colony of New South Wales but had been reserved by the Governor of the said Colony for the signification of Her late Majesty's pleasure thereon and reciting that it was expedient that Her late Majesty should be authorised to assent to the said reserved Bill as amended by the omission of certain provisions thereof in the now stating recital more particularly mentioned and reciting that a copy of the said Bill as so amended as aforesaid was set forth in the Schedule (1) to the now stating Act it was enacted (Section 1) that it should be lawful for Her late Majesty in Council to assent to the said reserved Bill as amended as aforesaid and contained in the said Schedule (1).

And (Section 2) that from the day of the proclamation of the Act in the said Colony (the said reserved Bill having been previously assented to by Her Majesty in Council as aforesaid) so much and such parts of the several Acts of Parliament mentioned in the Schedule (2) to the now stating Act as severally related to the said Colony of New South Wales, and were repugnant to the said reserved Bill amended as aforesaid should be repealed and that " 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 sales of any such lands and of all other proceeds and " revenues of the same, from whatever source, arising within the said " Colony, including all royalties, mines and minerals, shall be vested in the " Legislature of the said Colony . . .

" Provided, that nothing herein contained shall affect or be construed " to affect any contract or to prevent the fulfilment of any promise or " engagement made by or on behalf of Her Majesty with respect to any " lands situate in the said Colony, in cases where such contracts, promises " or engagements shall have been lawfully made before the time at which " this Act shall take effect within the said Colony, nor to disturb or in any " way interfere with or prejudice any vested or other rights which have " accrued or belong to the licensed occupants or lessees of any Crown Lands " within or without the settled Districts under and by virtue of the provisions " of any of the Acts of Parliament so repealed as aforesaid or of any Order " or Orders of Her Majesty in Council issued in pursuance thereof."

By the Scheduled Bill it was provided (Section 1) that there should be a Parliament for the Colony of New South Wales as therein mentioned and that within such Colony Her Majesty should have power by and with the advice and consent of the said Parliament " to make laws for the " peace, welfare and good government of the said Colony in all cases " whatsoever."

And (Section 43) that " subject to the provisions herein contained " it shall be lawful for the Legislature of this Colony to make laws for " regulating the sale letting disposal and occupation of the waste lands of " the Crown within the said Colony."

And (Section 58) that the foregoing provisions should have no force and

effect until so much or such parts of certain Acts of the Imperial Parliament therein mentioned including the said Acts 5 & 6 Vict. c. 36 and 9 & 10 Vict. c. 104, " as severally relate to the Colony of New South Wales and as " are repugnant to this Act," should have been repealed ; and that " the " entire management and control of the Waste Lands belonging to the " Crown in the said Colony of New South Wales, and also the appropriation " of the gross proceeds of the sales of any such lands and of all other " proceeds and revenues of the same, from whatever source arising within " the said Colony including all royalties mines and minerals shall be vested " in the Legislature of the said Colony: Provided thatno thing herein " contained shall affect or be construed to affect any contract or to prevent " the fulfilment of any promise or engagement made by or on behalf of " Her Majesty with respect to any lands situate within the said Colony, in " cases where such contracts promises or engagements shall have been " lawfully made before the time at which this Act shall take effect within " this Colony nor to disturb or in any way interfere with or prejudice " any vested or other rights which have accrued or belong to the licensed " occupants or lessees of any Crown Lands within or without the settled " Districts," under and by virtue of the said Act 9 & 10 Vict. c. 104, " or " of any Order or Orders of Her Majesty in Council issued in pursuance " thereof."

11. The said Acts 5 & 6 Vict. cap. 36 and 9 & 10 Vict. cap. 104 were not among the Acts included in Schedule (2) to the Constitution Act, but by a later Act passed in the same session (18 & 19 Vict. c. 56) the same were repealed (Sections 1 and 2) as from the date of the proclamation in New South Wales of the Constitution Act, subject nevertheless (Section 4) to the provisions of the Constitution Act for the preservation and enabling the fulfilment of contracts, promises and engagements made by or on behalf of Her Majesty with respect to lands situate in the Colony.

12. Her late Majesty duly gave the assent which by Section 1 of the said Constitution Act she was empowered to give, and the said Act was in due course proclaimed in the Colony of New South Wales.

13. It is submitted that the scope of the expressions " Waste Lands " belonging to the Crown in the said Colony " and " Waste Lands of the " Crown within the said Colony " as used in the said Constitution Act and the Scheduled Bill is not in any manner limited by the special definitions of " Waste Lands of the Crown " contained in the said Acts 5 & 6 Vict. c. 36 and 9 & 10 Vict. c. 104, but that such expressions are to be construed in the wider sense mentioned in paragraph 8 hereof, viz.: As meaning all lands in New South Wales not granted or appropriated under any title from the Crown. The effect of the Constitution Act was, therefore, it is submitted, to vest the power of legislating in regard to all such last-mentioned lands in the legislature of the Colony (now the State) of New South Wales and as a necessary incident to place the interim management thereof, including the right to put the same to any use which is not expressly or impliedly

forbidden by any law of New South Wales, in the hands of the Government of the Colony.

14. It has been urged on behalf of the Appellant that the land now in question ceased to be " Waste Land " upon its appropriation by the Crown as hereinafter mentioned for the purpose of a residence for the Governor. It is however submitted that even if this view is correct, there is nothing to shew any irrevocable appropriation by the Crown for such purpose. It follows therefore that the appropriation might be at any time revoked by the Crown : and it is submitted that after the said Constitution Act came into force, the power to effect such revocation on behalf of the Crown was vested in the Government of New South Wales and that the facts hereinafter stated shew a valid exercise by the said Government of such power.

15. It now becomes necessary to refer shortly to the facts of the case.

Annexure to Record.

16. In or about 1792 (or possibly a year or two earlier) Governor Phillip (the first Governor of New South Wales) marked out on a plan of Sydney, which he had caused to be prepared and which is still in existence, a considerable tract of land, which was afterwards known as " The Govern- " ment Domain." This tract of land is shewn on the plan by a line running from the head of what is now known as Darling Harbour to the head of Woolloomooloo Bay (then called Garden Cove) ; and partly above and partly below the line are the words—" The boundary line of Sydney Common " within which (as all the ground is retained for the use of the Crown and " is common land for the inhabitants of Sydney) no land can be granted." The plan bears internal evidence, and it is not disputed, that the above line and note were made by or under the direction of Governor Phillip.

17. Subsequent Governors from time to time issued notices and proclamations with regard to the said Government Domain prints of which

pp. 57 to 61.

will be found in the Record. In 1810 Governor Macquarie appropriated

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part of the Domain for the erection of a general hospital, which was in due course erected and the site of which is now occupied by the central portion of the present Parliament House, the Royal Mint and the New Sydney Hospital ; and in 1816 he appropriated a further part thereof as and for public botanical gardens. The same Governor also erected within the domain a Gothic building which was used by him and subsequent Governors for the purpose of stables.

p. 59.

18. In a despatch, dated the 25th May 1825, Governor Brisbane drew the attention of Earl Bathurst, the Secretary of State, to the necessity for the erection of a suitable residence for the Governor in Sydney, the then Government House (which stood within the confines of the Government Domain) being dilapidated and unfit for its purpose. He pointed out that one-half of Sydney Cove had been reserved by the Government, and suggested that it was desirable to sell or let on building leases the whole of the water side of the Domain as far as Fort Macquarie, the revenue from the

sale of this part of the Domain being applied towards the erection of a suitable Government House.

19. During the next few years the proposal formed the subject of various communications between the Governor for the time being and the Secretary of State; and ultimately by a despatch, dated the 25th March p. 67.
1835, from Lord Aberdeen (the Secretary of State) to Governor Bourke authority was given for the erection of a new Government House and the enclosure therewith of about 47 acres of the Government Domain. The Governor was also authorised to dispose of the land which in 1825 Governor Brisbane had suggested should be sold, and to apply the proceeds towards the building and other expenses.

20. The new Government House (hereinafter referred to as "Government House") was in due course erected and appears to have been completed some time in the year 1845. Part (about 47 acres) of the p. 14.
Government Domain was enclosed as pleasure grounds and paddocks for the house, and became known as the Inner Domain. A further part of the Government Domain—about 20 acres—including the site of the old Government House—was sold. The cost of the building and other works was approximately £25,000 of which £10,000 was voted by the Legislative Council of the Colony and the balance was derived from the sale of the 20 acres.

21. From 1845 Government House, the Gothic building mentioned in paragraph 17 hereof and (subject as hereinafter mentioned) the Inner Domain were occupied till 1901 by the Governor of New South Wales and thereafter till the end of 1912 by the Governor-General of the Commonwealth of Australia.

22. Between 1879 and 1910 the area of the Inner Domain was reduced to about 35 acres or rather less by the following appropriations, which were made by the Government for the time being of New South Wales of various parts thereof, viz. (1) in 1879 a few acres were appropriated for p. 28.
the establishment of the (public) Palace Gardens and the erection (which was in due course effected) of the International Exhibition Buildings; (2) in 1884 about 1½ acres were appropriated for the erection (which was in due course effected) of the present National Art Gallery; (3) in 1900 about 5 acres were thrown into the Botanical Gardens which were established by Governor Macquarie; (4) in 1910 a piece of land was appropriated as a site for a National Library.

23. After the establishment of the Commonwealth the Government of New South Wales arranged to lease Government House to the Commonwealth Government for the use of the Governor-General (who was to reside in Sydney for a portion of each year) and to provide another residence for the Governor of New South Wales. A house known as "Cranbrook" was accordingly purchased by the State Government as and for the residence of the Governor of the State and has since been used by him as such. A lease of Government House was thereupon granted to the

Commonwealth Government and the House became the official residence of the Governor-General when in Sydney.

24. In 1912 the lease of Government House to the Commonwealth Government came to an end and was not renewed though the tenancy was temporarily extended to meet the convenience of the Governor-General.

25. The State Government thereupon decided to throw the whole of the Inner Domain into the Botanical Gardens and to utilise the Gothic building (theretofore used for stables) as and for the purpose of a conservatorium of music. Accordingly the fences between the Inner Domain and the Botanical Gardens have been removed and the Inner Domain has in effect been incorporated with these gardens and opened to the public. Certain junction paths and other necessary works have been carried out or begun and the whole of the grounds have been placed under the care of the Director of the Botanical Gardens. The necessary alterations to the Gothic building, which are required for the purpose of converting it to its new use as a conservatorium of music, are in progress. Government House itself has been temporarily opened to sightseers under proper safeguards, but no final decision has been come to by the Government as to the use or purpose to which the house shall be ultimately put.

pp. 40 to 56 and 161 to 197.

26. The reasons of the learned Judges in the Courts below will be found in the Record, and the Respondent refers thereto.

27. By an Order in Council dated the 22nd November 1913 the Appellant was given special leave to appeal to His Majesty in Council from the said Decree of the High Court of Australia. A print of the said Order in Council will be found in the Record.

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28. The Respondent humbly submits that the Decree of the said High Court of Australia is right and ought to be affirmed for the following among other

REASONS.

(1) BECAUSE Government House and the grounds thereof (which expression when used in these Reasons means the grounds of Government House as existing at the end of 1912) are Waste Lands belonging to the Crown in New South Wales within the meaning of the New South Wales Constitution Act 1855, and accordingly the entire management and control thereof are vested in the Legislature of the State.

(2) BECAUSE, pending legislation by the Parliament of New South Wales, the interim management of the said house and grounds—including the right to put the same to any use which is not expressly or impliedly

forbidden by any law of New South Wales—is necessarily placed in the hands of the Government of New South Wales.

(3) BECAUSE the Government of New South Wales is not in fact putting or threatening to put the said house and grounds to any use which is expressly or impliedly forbidden by any law of New South Wales.

(4) BECAUSE the appropriation by the Crown of the land hereinbefore referred to for the purpose of a residence for the Governor was always subject to the right or power of the Crown to revoke such appropriation and after the establishment of Constitutional Government in New South Wales such right or power of revocation was exercisable by the Government of New South Wales as representing the Crown.

(5) BECAUSE the appropriation of the land for the purpose of a residence for the Governor has been validly revoked by the said Government.

(6) BECAUSE the Crown through its representatives or officers has not conferred or dealt with the said house or grounds in such a manner as to confer any rights in respect thereof upon the public or any part or section of the public.

(7) BECAUSE the suit which was instituted by the Appellant as hereinbefore mentioned was not and is not maintainable, and the injunction which was granted by the Supreme Court of New South Wales would be unenforceable.

(8) BECAUSE the Reasons of the Judges in the Supreme Court of New South Wales were wrong and the Reasons of the Judges in the High Court of Australia were right.

(9) BECAUSE the Decree appealed from is right and ought to be affirmed on all or some of the grounds stated in this Case.

R. B. FINLAY,

J. AUSTEN CARTMELL.

No. 47 of 1914.

In the Privy Council.

ON APPEAL

From the High Court of Australia (Appellate Jurisdiction).

BETWEEN

ATTORNEY GENERAL FOR THE STATE OF NEW SOUTH WALES (on relation)

Appellant

AND

JAMES LESLIE WILLIAMS

Respondent.

Case

For the RESPONDENT.

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