Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of John Maclean and the Bank of New Zealand v. *James MacAndrew and Others, from the Court of Appeal of New Zealand; delivered 9th May*, 1874.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.
SIR SAMUEL MARTIN.

THIS was a suit by the Plaintiffs, to whom a lease had been granted by the Government of certain lands for pastoral purposes, against the Superintendent of the Province of Otago, the Chief Commissioner of the Waste Land Board, and certain Members of the Executive Council of the Province, to declare the invalidity of certain Proclamations of the Superintendent, by the first of which their lease had been cancelled, and by the second and third of which portions of the land comprised in it had been selected for agricultural leases and for sale. The Plaintiffs obtained an *ex parte* injunction restraining the Defendants from putting the Proclamations in force. The Defendants moved in the Supreme Court to dissolve that injunction. This motion was dismissed by Mr. Justice Chapman with costs. Thereupon the Defendants appealed to the Court of Appeal of New Zealand, which reversed the judgment of Mr. Justice Chapman and dissolved the injunction. The present Appeal is from the last Judgment.

The facts necessary for the determination of the case are as follows:—

On the 29th January, 1867, Mr. Dick, the then

Superintendent of the Province, constituted and appointed by Proclamation a certain district to be a gold-field, under the powers conferred by the Gold Fields Act, 1866. At this date the Plaintiffs held a license to occupy waste land for depasturing purposes within the district so proclaimed, and, on the 5th July, 1867, they elected to surrender their license, and received a lease in lieu thereof under sect. 69 of the Otago Waste Lands Act, which makes it compulsory on the "Board" to grant such lease, subject to a proviso enabling the Superintendent to refuse to grant leases for pastural purposes of any waste lands which he may deem it inexpedient to lease. The Otago Waste Lands Act, 1866, came into operation at the same time as the Gold Fields Act.

On the 28th December, 1870, Mr. MacAndrew, the then Superintendent, issued a Proclamation, under sect. 16 of the Gold Fields Act, whereby he cancelled the Plaintiffs' lease to the extent of 17,360 acres. On the same day he issued a second Proclamation, under sect. 33 of the Act, selecting a portion of the 17,360 acres for the granting of agricultural leases; and a third Proclamation, giving notice that other portions of them would be sold.

The main questions argued before their Lordships, though it would appear that they were abandoned or, at all events, not insisted upon before the Appellate Court, were these:—

1st. That Mr. Dick's Proclamation was invalid, because no gold field or gold mine had been discovered when it was made; and further that, in order to support the Proclamation of the 28th December, 1870, it was necessary to prove not only a previous Proclamation of a gold field, but a previous discovery of gold upon the land included in the cancelled lease. Mr. Dick's Proclamation is not directly impeached by the pleadings; and upon the subject of the actual discovery of gold, it is to be observed that the Plaintiffs filed no affidavit on the motion for an injunction, except an affidavit verifying in general terms the allegations in their declaration, which averred that, "no gold field or gold mine has ever been discovered nor proclaimed upon the said pastoral run." On the other hand, the Defendant filed affidavits stating that there had been gold workings, and gold had been obtained,

on the land described in the Proclamation of Mr. McAndrew both before and after its date.

Upon this evidence their Lordships think it must be taken that gold had been discovered before the Proclamation of the 28th December, 1870.

The next question was whether sect. 16 enabled the Superintendent to cancel the Plaintiff's lease, it being contended that that section gave power only to cancel licenses, or leases existing at the time of the passing of the Act, and that, although the Plaintiff had a license when the Act passed, it had ceased to exist when it was exchanged for a lease, and that the lease was granted after the passing of the Act.

The material words of the section are :—

"Where any gold mine or gold field shall have been discovered and proclaimed upon any Crown lands which, at the date of the passing of the Act shall have been held for depasturing purposes, it shall be lawful for the Governor, at his discretion, to cancel the license or lease under which such lands shall have been held in occupation as regards the whole or any part of the lands so held under such license or lease."

It is to be observed that the words "shall have been" where they first occur, are not used with perfect accuracy, inasmuch as they apply to licenses and leases subsisting at the time of the passing of the Act, and not to licenses and leases then expired to which only in strictness the expression "shall have been" would be applicable; for "shall have been" therefore "shall be' should be read; and "shall be" should similarly be read for "shall have been" where it next occurs.

It is clear that the description of the lands to which the power of cancellation refers is lands held under a lease or license at the time of the passing of the Act. This description applies to the lands in question which at that time were held under a license. It seems very unlikely that when the Legislature gave an election to the holder of such lands to exchange his license for a lease it intended to enable him thereby to defeat the power of cancellation, and thus to put himself in a better position than he would have been if he had held a lease at the time of the passing of the Act. If the power of cancellation had been intended to apply only to the actual document, whether license or lease held at

the time of the passing of the Act, that intention would probably have been expressed by the word "such" lease or license. In the absence of this word, their Lordships think that the power may be fairly held applicable where a license under which lands have been held at the time of the passing of the Act, has within six months been exchanged, under the Gold Fields Act, for a lease, and that the expression "the lease," where it occurs a second time in the clause, may be read as the lease (substituted for the previous license) held at the time when the power of cancellation attaches. Both the Gold Fields Act and the Waste Lands Act came into operation at the same date, and it is difficult to read the two statutes together without coming to the conclusion that the Legislature, whilst it proposed under the Waste Lands Act to enlarge and improve the tenure of the holder of Crown lands for depasturing purposes, also intended to do so subject to a reservation of the power of cancellation which regard for the mining interests of the Colony rendered necessary. This intention would be defeated by holding that the Legislature had given power to cancel licenses, and had not given power to cancel a lease given in substitution for them. Therefore, although the clause is not free from ambiguity, their Lordships are unable to say that the Court of Appeal were wrong in construing it as they have done. An argument based on the word "when," with which section 16 of the Gold Field Act commences, which, in their Lordship's opinion, the Court of Appeal very properly disposed of, was not pressed before their Lordships' Board.

Entertaining this view it becomes unnecessary to consider the other proclamations, because, if the lease were duly cancelled the Plaintiff would have no *locus standi* to complain of what may have been subsequently done with the land.

For these reasons their Lordships will humbly advise Her Majesty that the Judgment appealed against be affirmed and the Appeal dismissed with costs.

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