Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Blackburn v. *Flavelle from the Supreme Court of New South Wales; delivered, May 20th, 1881.*

Present:

Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Richard Couch.
Sir John Mellor.

THIS case is a very important one, inasmuch as it appears from the statement of Mr. Justice Faucett that the titles of a great many persons may be affected by it. The learned Judges of the Supreme Court gave a very careful consideration to the case, and their Lordships have heard very able and elaborate arguments on both sides with regard to the construction to be put upon the Alienation Act of 1861. The question relates to a portion of the waste lands of the Crown in New South Wales, which, on the 30th of May 1875, were conditionally purchased by Henry Woods under the 13th section of the Act, and were subsequently, on the 10th of October 1878, declared to be forfeited. Mr. Devlin had on the 8th of August 1878, previously to the declaration of forfeiture, made an application for a conditional purchase of the lands. On the 13th March 1879, some considerable period after notice in the Gazette that the land had been forfeited, the Plaintiff, who is the Appellant, selected the land and applied to purchase it conditionally. The land agent refused to allow him to do so, upon the ground that Mr. Devlin had already made an

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application for the purchase of it. Upon the question being referred by the Plaintiff to the Minister for Lands, he, by letter of the 5th of April 1879, directed the land agent to accept the Plaintiff's application as if made on the day on which it was originally tendered. This was accordingly done, and the deposit paid on the 15th of April 1879. Mr. Devlin remained in possession. The Plaintiff brought an action of trespass against him, and the question then arose whether lands taken under a conditional sale, and afterwards forfeited by the Crown, were open to a conditional purchase under section 13 of the Act, or whether by virtue of the 18th section they must not be sold, if at all, by public auction. That is the real question in the case. The Plaintiff had to make out his title; and if he failed, it was unnecessary to decide whether Mr. Devlin obtained a title by the conditional purchase on the 8th of August 1878.

It had been decided as far back as 1879, in the case of *Drinkwater* v. *Arthur*, 10, New South Wales Supreme Court Reports, 193, that under such circumstances the lands were not open to conditional sale under the 13th section. But, considering the importance of the case, the learned Judges thought it right to confer together, and to reconsider the decision in *Drinkwater* v. *Arthur*. Having done so, they unanimously came to the conclusion that that decision was correct, and that the lands were not open to a conditional sale.

Their Lordships have come to the conclusion that the decision of the Supreme Court was a correct one. The 13th section of the Act appears to make it compulsory upon the Government to sell conditionally, upon an application being made, any lands which do not fall within the exceptions mentioned in the earlier part of that section. The Act provides "That any person

" may, upon any land office day, tender to the land " agent for the district a written application for " the conditional purchase of any such lands, not " less than 40 acres nor more than 320 acres, at " the price of 20*s.* per acre, and may pay to " such land agent a deposit of 25 per centum of " the purchase money thereof. And if no other " like application and deposit for the same land " be tendered at the same time, such person " shall be declared the conditional purchaser " thereof at the price aforesaid." Then there is a provision with regard to several applications being made at the same time. In this case no question arises under that.

The conditions upon which the land is sold are not specified in section 13, but by section 18 it is enacted:—"At the expiration of three " years from the date of conditional purchase of " any such land as aforesaid, or within three " months thereafter, the balance of the purchase " money shall be tendered at the office of the " Colonial Treasurer, together with a declaration " by the conditional purchaser or his alienee, or " some other person in the opinion of the " minister competent in that behalf under the " Act ninth Victoria number nine to the effect " that improvements, as herein-before defined, " have been made upon such land, specifying the " nature, extent, and value of such improve- " ments, and that such land has been from the " date of occupation the *bonâ fide* residence " either continuously of the original purchaser " or of some alienee or successive alienees of his " whole estate and interest therein, and that no " such alienation has been made by any holder " thereof until after the *bonâ fide* residence " thereon of such holder for one whole year at " the least." Upon his making that declaration, and upon payment of the balance of the purchase money, he is entitled to have a conveyance in fee

simple; but there is a clause at the end of section 18 that, "on default of a compliance with the requirements of this section,"—that is, in default of his having made the necessary improvements, and having resided according to the terms of the section,—"the land shall revert to "Her Majesty, and be liable to be sold at "auction, and the deposit shall be forfeited."

It was contended, on behalf of the Plaintiff, that the declaration that the land shall revert to Her Majesty authorises the Crown to sell the lands so forfeited either by conditional sale or by auction, at the option of the Crown. But the section does not stop at the words "shall revert to Her Majesty." It proceeds to say that the land shall be liable to be sold at auction, and the deposit shall be forfeited. It was argued that the words "and be liable to be sold at auction" are not compulsory upon the Crown, but that it gives it an option, and section 20 of the Act was referred to. That relates to lands which are abandoned, and says that they shall "be declared forfeited by notice in the Go-"vernment Gazette, and may then be sold at "auction." Then a Statute for the general interpretation of Acts was referred to for the purpose of showing that the word "may" gives an option, and it was said that as section 20 says they may be sold, and gives an option to the Government, so the words "liable to be sold at auction" must be interpreted in the same way as "may then be sold at auction," and also gives an option to the Government.

It is true that both the expressions "liable to be sold at auction" and "may be sold at auction" give an option to the Government, but the question is, what is the option? Is it an option to sell by auction or to sell by conditional sale, or an option to sell by auction or not to sell at all? That is the mode in which Sir

William Manning very properly puts the case. He says at page 16 of the Record:—"I agree, "indeed, that the words plainly import that the "Crown has an option. But to do what? Surely "to sell by auction or to withhold from such sale "as the Crown may think fit. The alternative of "sale by way of free selection in no way enters "into the question, no trace of it being found "in either the 18th or 20th clause; and, indeed, "it is not too much to say that if that alterna- "tive were admitted, the option would not be "with the Crown, but with the selectors, for "when once the land is open to selection, a "statutory right accrues to anyone to select the "land." Their Lordships are of opinion that the view taken by Sir William Manning is the correct one, and that the option given to Government was to sell by auction or to retain it in their own hands.

A general rule of construction of Acts of Parliament is "*expressio unius est exclusio alterius*."

Two modes of sale are referred to by the Act: one a conditional sale, the other a sale by auction; and according to the maxim above referred to, the 18th section, by expressly authorising a sale by auction, excluded the right of conditional sale. That was the view taken by Mr. Justice Hargrave in the case of *Drinkwater* v. *Arthur* to which the Court below referred. Mr. Justice Faucett in his judgment in this case quotes the following passage from Mr. Justice Hargrave's judgment in *Drinkwater* v. *Arthur*:—"If there be any one rule of law "clearer than another as to the construction "of all statutes and all written instruments (as, "for example, sales under powers in deeds and "wills) it is this: that where the Legislature or "the parties to any instrument have expressly "authorised one or more particular modes of "sale or other dealing with property, such

" expressions always exclude any other mode, " except as specifically authorised." That appears to their Lordships to be a correct exposition of the law, and it is substantially carrying out a principle similar to that expressed in the maxim *expressio unius est exclusio alterius.*

The construction that the option given to the Government was to sell by auction or not to sell at all, is a very reasonable one. If under the words " shall revert to Her Majesty " the forfeited lands should be held to have become subject to all the provisions of the Act to the same extent as they were previously to the conditional sale, then, as soon as the defaulter made default and the Government elected to treat the default as a forfeiture, any person might claim to purchase the land conditionally at the rate of 20*s.* an acre, whatever might be the value of the improvements. But if the Government are bound to sell by public auction or not to sell at all, then at least a month's notice must be given of the intended sale ; so that every one may have an opportunity of purchasing, and the Government may get the real value of the land by competition. There would be no objection to the original defaulter's coming in and purchasing by auction with the competition of other persons, each bidding for the land according to his view of the value of it.

Again, if after forfeiture all the provisions of the Act apply to the forfeited land, the Government would be bound to sell it to the first applicant, and the defaulter would have a right to come in and purchase the land again conditionally on the original terms.

It should be observed that the Legislature could not have said that the Government must sell by auction without depriving the Government of the option of retaining the lands.

Their Lordships are of opinion that the

Supreme Court came to a correct conclusion in holding that the Government were not bound to sell a forfeited selection, but that if they elected to sell they could only sell by auction. Their Lordships, therefore, will humbly recommend Her Majesty to affirm the decision of the Supreme Court. The Appellants must pay the costs of this Appeal.