

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Colonial Secretary of Natal (representing the Colonial Government) v. Carl Behrens, in his capacity as General Manager of the Natal Land and Colonization Company, Limited, from the Supreme Court of Natal; delivered 28th May 1889.

Present:

LORD WATSON.

LORD BRAMWELL.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

This is an *ex parte* appeal at the instance of the Colonial Secretary of Natal, as representing the Government of the Colony.

It appears that, in making grants of Crown lands in Natal, the usual but not the invariable practice has been to reserve to the Crown, in the public interest, the right of constructing and maintaining main roads upon the lands alienated. By the Law 19 of 1875, the Civil Engineer of the Colony is empowered to enter upon and take possession of so much "of any of the Crown lands of this Colony," not exceeding one hundred feet in width, as may be required for main roads; and, for that purpose, the official in question is invested with all the legal rights of the Government with respect to the taking of lands, and raising and carrying away materials for making and repairing main

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roads, "whether such rights have been created
 "or reserved by express stipulation of condition
 "in any grant of land, or exist in any way or
 "manner whatsoever." It is also enacted that
 no land or materials upon which any building has
 been erected shall be taken or raised and carried
 away without compensation to the proprietor.
 In the case where land has been granted without
 reservation, and also in the case where, there
 being a reservation, the land has been improved
 by cultivation, irrigation, or otherwise, the Civil
 Engineer is authorized to treat with owners
 "who may think proper to require compensation,"
 for the purchase or hire of the land or materials
 required; and in the event of failure to agree,
 provision is made for assessing the amount
 payable by arbitration.

The Law No. 1 of 1881, which incorporates the
 provisions of the Colonial "Lands Clauses Con-
 solidation Law, 1872," authorized the Lieutenant
 Governor and his successors (who are constituted
 a corporation for the purposes of the Act) to
 make a line of railway from Pietermaritzburg to
 Ladysmith. It is declared (Section 10) that the
 railways thereby authorized shall, "in respect of
 "all Crown lands heretofore granted by the
 "Government in quit-rent, or freehold, or lease-
 "hold tenure, and in or over which the railways,
 "or any part thereof, shall be made, be deemed
 "to be roads, made or to be made, for the public
 "good by order of Government, and accordingly
 "the proprietors of such lands shall not, except
 "in the cases provided in their several title
 "deeds, or deeds of grants for compensation, be
 "entitled to any compensation for the land
 "taken for the purposes of the railways." Pro-
 vision is made for ascertaining the amount of
 compensation due in the excepted cases.

For the purpose of constructing the line
 authorized by the Law of 1881, the Colonial

authorities took and entered into possession of five parcels of freehold land belonging to the Natal Land and Colonization Company, Limited, two of these parcels being portions of the Company's estate in the county of Pietermaritzburg, and the other three, parts of their farm of Fountain Hall, in the county of Weenan. All the land so taken was unimproved. The two parcels situate in Pietermaritzburg, about 1 acre 3 roods in extent, are of less width than one hundred feet. Of the three situate in county Weenan, one parcel of 49 acres is within that limit; the others, together about 2 acres 4 roods, are beyond it. There is no reservation in the Land and Colonization Company's title to their lands in Pietermaritzburg; but their farm of Fountain Hall is held subject to the reserved right of Government to resume any part of it for the public use and benefit, without paying compensation to the proprietor. The Company have made no claim for compensation; and *prima facie* there do not appear to be grounds for such a claim, unless it be in respect of those portions taken from the farm of Fountain Hall which are outside the hundred feet limit.

The Colonial authorities called upon the Company to execute a formal transfer of these five parcels of land to the Appellant, as representing the Colonial Government of Natal. Upon the refusal of the Company to comply with their request, a summons was issued from the Supreme Court of Natal, at the instance of the Appellant, against Carl Behrens, in his capacity as general manager and representative of the Company, praying for an order upon him to execute the transfer. Under the summons a declaration was filed by the Appellant, setting forth the facts which, so far as material, have already been noticed, and also stating that the "Plaintiff is and always has been ready and

“willing to pay all costs and fees of survey and transfer.” The Defendant filed exceptions to the declaration, and, after hearing argument upon these, the Chief Justice and Mr. Justice Cadiz gave judgment in his favour, absolving him from the instance, with costs.

None of the statutes relating to the powers of the Government to resume Crown lands already granted to a subject, for road or railway purposes, make any reference to the execution of transfers by the owners whose lands are resumed, with the single exception of the Lands Clauses Consolidation Law, No. 16 of 1872. The provisions of that Act are intended to apply, not only to the Colonial Government, but to all private persons and Corporations who may obtain special statutory power to take land by compulsion for the purposes of their undertaking. Its enactments with respect to transfers are substantially the same with the analogous provisions of the English Lands Clauses Consolidation Act, 1845. Section 47 of the Colonial Statute enacts that, upon tender to the owner, or deposit, “of the purchase money or compensation agreed or awarded to be paid in respect of any lands purchased or taken by the Company,” the owner shall duly transfer such lands to the Company, or as they shall direct; and “in default thereof, or if he fail to adduce a good title to such lands to the satisfaction of the said Company, it shall be lawful for the Supreme Court, on the application of the Secretary or other proper officer of the Company, to order the Registrar of Deeds to transfer the same, and he is hereby authorized to transfer the same accordingly.” Section 48 provides that, on the owner’s refusal to accept the tender or to grant a transfer, it shall be lawful for the Company to deposit the money with the Master of the Supreme Court, subject

to the control and disposition of the Court. These statutory provisions have no application except in cases where compensation is payable; and it is made a condition precedent of the Company's right to a transfer that the compensation due shall not only have been fixed in terms of the statute, but shall either have been tendered or paid into Court. The duty of the owner to transfer is not imperative but optional; and if he refuse, the Company's sole remedy is to deposit the money, and obtain a transfer from the Registrar upon the order of the Court. The only penalty attaching to the owner's refusal is that, in the event of its being "wilful," he cannot claim from the Company the costs of an application to the Court for payment of the money deposited.

The Attorney General argued that these provisions sufficiently indicate the intention of the Colonial Legislature that a "Company," within the meaning of the Law of 1872, shall be entitled to demand a transfer from the owner of all lands taken from him under statutory compulsion, whether compensation be payable or not. That inference appears to their Lordships to be wholly unwarranted. *Expressio unius est exclusio alterius* is a maxim directly applicable to the present case. When careful provisions are made with regard to transfers in one class of transactions only, there can be no presumption that any part of these provisions was meant to extend to a totally different class of transactions. In cases where land is compulsorily acquired on condition of compensation being made, the statute imposes upon the parties the relative positions of vendor and purchaser. In cases where it is taken by compulsion, and without compensation, no contractual or quasi contractual relation is established between them;

and it is difficult to understand on what principle a proprietor who is forcibly deprived of his land without consideration can be held to incur an obligation to grant a conveyance to the persons who take it. Their Lordships cannot, in the absence of express enactment, or of any enactment which could reasonably suggest such an inference, assume it to have been the intention of the Colonial Legislature, in enacting expressly that a proprietor who has been fully compensated may grant a transfer or not, according to his own option, meant to enact, by implication, that another proprietor who has been deprived of his land without compensation must execute a transfer, and may be ordained to do so under pain of imprisonment for contempt.

Apart from statute, the Appellant has, in the opinion of their Lordships, failed to show that he is entitled to the transfer which he demands upon any considerations of law or equity. He has not shown, and has scarcely attempted to show, that the execution of such a transfer is necessary in order to complete his right to the parcels of land of which he has entered into possession. It appears to their Lordships that when the Government of a colony, or, in other words, the Crown, has lawfully resumed possession of Crown lands alienated to a subject, by virtue either of a reservation in the original grant, or of legislative authority subsequently obtained, the right of the subject is *pro tanto* extinguished, and his interest, so far as resumed, reverts to the title of the Crown.

These considerations are sufficient to dispose of this appeal, and make it unnecessary to discuss the different positions of certain of the five parcels with respect to the Defendant's possible claims for compensation. Where no compensation is due the Appellant has no right to call for a transfer,

and if compensation is due in any case, he can only obtain a transfer by following the procedure prescribed in the Law of 1872. The judgment appealed from must therefore be affirmed, and their Lordships will humbly advise Her Majesty to that effect.

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