Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ricketson v. *Barbour, from the Supreme Court of New South Wales; delivered 4th March* 1893.

Present:

THE LORD CHANCELLOR.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD HANNEN.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by The Lord Chancellor.*]

This is an appeal from a judgment of the Supreme Court of New South Wales, confirming the decision of the Land Court of that Colony upon a case stated by it.

On the 20th February 1890 the Respondent, Robert Barbour, made two applications, one for a conditional purchase, the other for a conditional lease of certain lands which formed part of the reserve made under the Crown Lands Alienation Act of 1861. The Special Case which bears date the 21st October 1890, states that :— " Some 10 or 12 years ago one, Henry Ricketson " (the Appellant), a grazier, on whose holding " the reserve was situate, made applications to " purchase the lands in question, by virtue of " improvements." The Case contains further this statement :—" For the purposes of this Case " it is assumed that the said Henry Ricketson " was entitled to make such applications, and

74942. 100.—3/93. A

" that the same were duly made." In the judgment of the Supreme Court it is stated that either prior to the date of the reservation, or at any rate before the 1st July 1876, Ricketson, who was the holder of the lease of the run on which the reserve was situated, had fully improved the land. Whether this was an inference from the statement in the Special Case which their Lordships have quoted, or was an admission made in the course of the argument, is immaterial; it must be taken to be the fact. On the 14th December 1889 notice of the revocation of the reserve was published in the " Government " Gazette." Thirty days from this notice expired in the month of January 1890, sixty days on the 13th February 1890. On the 4th February 1890 the Governor in Council approved of the Appellant's applications to purchase, and this approval was notified in the Gazette of the 25th February following.

On the 20th February the Respondent made the applications already referred to. It was held by the Land Court, and this decision was affirmed by the Supreme Court, that on the day of the Respondent's application the lands in question were Crown lands, open to conditional purchase or conditional lease, and that the Respondent was therefore in a position to insist that his application should be granted.

The determination of the question which has arisen depends upon the construction of various provisions in Acts which have been passed by the Legislature of New South Wales relating to Crown Lands. It will be necessary to consider somewhat minutely the terms of these provisions.

By the third Section of the Crown Lands Alienation Act, 1861, it is provided as follows :—

" 3. Any Crown lands may lawfully be granted " in fee simple or dedicated to any public purpose

" under and subject to the provisions of this " Act, but not otherwise. And the Governor, " with the advice of the Executive Council is " hereby authorized in the name and on the " behalf of Her Majesty so to grant or dedicate " any Crown Lands."

Under Section 4 the Governor, with the advice of the Executive Council, might, by notice in the Gazette, declare what lands should be reserved from sale until surveyed for the preservation of water supply or other public purposes. Land to which this description applies is afterwards referred to as land temporarily reserved from sale.

By Section 6 it is provided that " after any " land shall have been temporarily reserved from " sale the same shall not be sold or otherwise " disposed of until such reservation shall be " revoked by the Governor with the advice " aforesaid, and the notice of such revocation " published in the Gazette."

By Section 8 the Governor was empowered, with the advice of his Council, upon application by the holder of any lease or promise of lease of Crown Lands containing improvements made previously to the expiration of such lease, to sell and grant such lands to the owner of such improvements without competition in fee simple, at a price to be fixed by appraisement.

By Section 13, lands not containing improvements were to be open for conditional sale in the manner provided by the section, which entitled an applicant for conditional purchase upon the prescribed terms if there were no other applicant to be declared the conditional purchaser.

The Crown Lands Act of 1875 repealed amongst other provisions Section 8 of the Act of 1861. By Section 2, however, the provisions of the repealed Section, so far as they are material to the present case, were re-enacted.

It was contended by the learned Counsel for the Appellant that upon the true construction of the Act of 1861, as amended by the Act of 1875, it was competent for the Governor, with the advice of his Council, to sell improved land by appraisement to the holder, notwithstanding that it had been temporarily reserved from sale, and that such reservation had not been revoked. Although the argument is not without plausibility owing to the language to be found in certain parts of the Acts, their Lordships concur with the Court below in thinking that it is not well founded.

Under these earlier Acts the only land open for conditional sale by competition was unimproved land. The Lands Act of 1880 made a change in this respect. Section 12 provided that whenever the temporary reservation of any lands should be revoked by the Governor, the land upon which any improvements of not less than 20*s*. per acre in value were made might, notwithstanding their existence, be conditionally purchased. That section, however, contained this important proviso: "Provided that nothing "in this Clause shall prevent the Governor from "selling by appraisement any improved reserved "land the improvements upon which were made "before the reservation thereof, or before the "first day of July 1876."

In considering the effect of this proviso, it is necessary to bear in mind that the second Section of the Act of 1875 was not repealed or in terms modified by the Act of 1880, and that the Section just quoted enacts only that reserved land "may," when the reservation is revoked, be conditionally purchased. Supposing there were no applicant for such purchase, it would be difficult to contend that notwithstanding the Act of 1880 the Governor, with the advice of his Council, could not sell improved land to the

holder by appraisement, whether his improvement were made before 1876 or not. What, then, is the meaning of the proviso that nothing in the clause should prevent the Governor from selling by appraisement improved reserved land the improvements on which were made before that date? In their Lordships' opinion it can only have been intended to enable the Governor to sell such land under the second Section of the Act of 1875, even though before the contract of sale was complete there was an application for conditional purchase. It was quite natural that, when improved land was for the first time made the subject of conditional purchase, the Legislature should enable the Governor, with the advice of his Council, if it was thought right to do so, to have regard to the claims of those whose improvements had been effected before the given date, to purchase their improved holdings. The reason for fixing the particular date does not appear, but it was not improbably due to the fact that after that date there was reason to anticipate a change of legislation as regards the sale of improved lands.

Their Lordships do not think that in expressing this opinion they are differing from the view entertained by the learned Judges in the Court below. Those learned Judges, however, thought that the application for purchase under Section 2 of the Act of 1875 must be in respect of land which might at the time of the application be sold. No reasons are given for this opinion, and their Lordships are unable to agree with it. Their Lordships cannot but entertain grave doubt whether it was open to the Court below to come to the conclusion that the applications of the Appellant were invalid, in view of the statement in the Special Case, that for the purposes thereof it was assumed that the applications for purchase were "duly made." But

apart from this, their Lordships fail to see why an application made during the reservation should be invalid.

The application has no effect until accepted, and may until then be withdrawn at pleasure. It is but an offer to purchase made to those who will thereafter have the power to sell. Why should not such an offer be as well made before the time arrives, when the power to sell can be exercised, as after? It is well recognized law that an offer to buy or sell is regarded as a continuing offer down to the time of acceptance, and that upon acceptance there is a complete contract. Supposing that trustees had only power to sell after a certain date, and that before that date an offer to purchase were made to them which was accepted after that date, their Lordships cannot doubt that upon acceptance the contract would be complete and valid. There appears to be nothing in the Statutes which govern the present case to lead to a different conclusion where the application to purchase reserved land is made before the reservation is revoked. Their Lordships think therefore that in the present case the application was valid, though made pending the reservation, and that the transaction could be validly completed by the Governor as soon as the statutory period after revocation of the reservation expired.

If then the case depended only upon the Statutes to which reference has already been made, their Lordships are of opinion that it would have to be determined in favour of the Appellant, even assuming that the effect of the Statute to which attention will presently be called was to substitute 60 for 30 days as the period which must elapse subsequent to revocation of the reservation before the sale could be lawfully effected.

On the 4th February 1890, the Governor in

Council approved the Appellant's application to purchase. If the view which their Lordships have indicated of the effect of the proviso to Section 12 of the Act of 1880 be correct, the Governor in Council had power, notwithstanding the application of the Respondent of the 20th February, to sell to the Appellant under Section 2 of the Act of 1875, in pursuance of his previous application. But besides this the Appellant was, down to the 13th February, applying to purchase, and the Governor in Council had previously approved the sale to him. Even admitting, then, that there was no power to sell until the 13th February, and that before that date the Appellant could have withdrawn his application to buy and the Governor in Council his acceptance of the offer, it is by no means clear that either could have done so after that date, and that there was not a complete contract therefore prior to the 20th February. The Land Court held that even if the approval on the 4th February was valid, that did not in itself establish a contract, as the notice approving the Appellant's application "which was the contract" was not published in the Gazette until the 25th February. The case cited in support of this view decided only that the notice in the Gazette was evidence of a contract, not that the notice was itself a contract. In their Lordships' opinion, the contract was constituted by the approval of the Governor in Council of the application to buy, and not by the notification of the approval in the Gazette.

So far, their Lordships have dealt with the question as if the Statutes already referred to had remained unrepealed. But the first Section of the Crown Lands Act 1884 (which was passed on the 17th October 1884 and did not come into force until the 1st January 1885) repealed the prior Acts, subject to certain saving provisions

contained in the second Section. The repeal was not of itself to prejudice or affect any proceeding, matter, or thing lawfully done or commenced or contracted to be done under the authority of any enactment or regulation thereby repealed, and all rights accrued and obligations incurred or imposed under or by virtue of any of the repealed enactments were (subject to any express provisions of that Act in relation thereto) to remain unaffected by such repeal.

It is contended that, the application having been made prior to the Act of 1884 coming into operation, the transaction was a matter proceeding or thing commenced to be done under the authority of the repealed Statutes, and enabled a sale to be proceeded with under those Statutes after the 1st January 1885. Whatever doubt there might have been on the point, but for the enactment in the second sub-section of Section 3, appears to their Lordships to be entirely removed by that enactment. It provides that:—

"No application to make any purchase of "Crown lands in virtue of improvements under "the said Acts effected or acquired after the "17th day of July 1884 shall unless made for "land held under a miner's right or business "license be complied with. Provided that all "such first-mentioned applications to purchase "under the said repealed Acts shall be lodged "with the proper officer before this Act comes "into operation."

This clearly declares by implication that an application to purchase lands by virtue of improvements under the repealed Acts can be complied with after the Act of 1884 comes into operation, and indicates that a transaction of purchase by virtue of improvements, if commenced by application prior to the Act, might

be completed afterwards. It prohibits, however, compliance with the application in the case of improvements effected or acquired after the 17th July 1884, and it provides that all applications, except perhaps in the case of miners, to purchase under the repealed Acts should be lodged with the proper officer before that Act came into operation.

It has been held in the Colony that an application to purchase land under the provisions of prior Orders in Council was something lawfully commenced to be done within the meaning of similar words contained in Section 2 of 25 Victoria (No. 1).

The learned Judges, however, were of opinion in the present case that the lodging an application to purchase land which was not then open for sale, and which might never be open for sale, was wholly nugatory, and did not fall within the protection of the third sub-section of Section 2, as being a proceeding, matter, or thing lawfully commenced.

Their Lordships are unable to concur in the view that an application to purchase reserved land made before the revocation was complete and the land had become open for sale was a nullity. They have already stated their reasons for thinking that a sale by appraisement, made on such an application, would be as valid and effectual as if the application had been made after the reservation had ceased.

No doubt an application to purchase reserved land made before the reservation is at an end is of itself of no force or effect, but this is equally true of an application made after the reservation is at an end, which is of itself no more effectual than the other. In their Lordships' opinion either of them is of equal validity as the initiation of a transaction which can only be completed if the Governor, with the advice of his Council, determines to sell by appraisement.

It is evident that the intention of the Legislature in enacting the provisions contained in the second and third Sections of the Act under consideration, though it was not to preserve any vested interests of those who had improved reserved land, for they possessed no such interests, was yet to enable the Governor with the advice of his Council to recognize by selling to them by appraisement the legitimate claim of such persons to consideration.

When the terms of the second sub-section of Section 3, and the purview of that and the preceding Section, are considered, their Lordships cannot think that it was intended by the Legislature to create such a distinction as this, that an application made before the Act came into operation might be complied with if the requisite period after the notice in the Gazette expired before that date, but could not be complied with if, though the notice revoking the reservation had been made before the Act came into operation, the statutory period requisite before sale expired after that day. The apparent intention of the Legislature is, in their Lordships' opinion, better given effect to by holding that an application made before the Act came into operation might be complied with even though the reservation were not then revoked, than by limiting the saving effect of the enactment to applications for the purchase of land which at the time of the application is capable of being immediately sold, and their Lordships do not feel any difficulty in holding the saving provision to be as applicable to the one case as to the other.

Their Lordships have hitherto assumed that it was necessary that 60 days should expire after the reservation had been revoked before the land could be sold. They are, however, not satisfied that this was the case.

It is contended that this is the effect of Section 102 of the Act of 1884. It is to be

observed, however, that the Section referred to was applicable only to Crown lands temporarily reserved from sale "under this Act," and therefore does not in terms apply to land reserved from sale under the previous Statutes.

It is argued that "The Crown Lands Titles "and Reservations Validation Act of 1886" enacted, in effect, that the provisions of Section 102 should apply to Crown lands reserved pursuant to the repealed Acts. Their Lordships do not think that this is the case. Section 8 of that Act provides as follows:—

"Where a reservation of Crown land from "sale made pursuant to any of the said repealed "Acts has been or shall be revoked by a noti- "fication published in the Gazette and before "the expiration of thirty days from the date of "publication of such revocation, a further reser- "vation of such Crown land or any part thereof "from sale has been or shall be made and notified "in the Gazette such last reservation shall not "by reason only of its having been made within "such thirty days be deemed to have been "invalid. Provided that reservations made pur- "suant to the repealed Acts shall be held to be "and to have been revocable under the 'Crown "'Lands Act of 1884.'"

The proviso is, of course, the part of the enactment relied on. But that proviso only has the effect of making the reservations under the former Acts revocable under the Act of 1884, and of validating any revocations of them which had been made under that Act. The proviso refers obviously to Section 101 of the Act of 1884, which enacted that lands reserved under the provisions of that Section should be reserved until revoked or altered in like manner. It was manifestly the intention of the Legislature to meet the contention that, inasmuch as the Act of 1884 only provided for revoking or altering reservations made under that Act, there was no power to

revoke and no provision for the revocation of reservations made under the repealed Acts, the provisions of which relating to revocation had been repealed. But the proviso does not enact that reservations made pursuant to the repealed Acts should be held to be temporarily reserved from sale under "The Crown Lands Act of "1884," and there is, therefore, nothing in the subsequent enactment to remove the difficulty that Section 102 is restricted in its operation to lands temporarily reserved from sale under that Act.

The case no doubt presents some difficulty owing to the somewhat complex course of legislation relating to Crown lands in the Colony, but for the reasons given their Lordships think that the Land Board rightly disallowed the Respondent's applications, and that the Judgments appealed from must be reversed, and that the Respondent must pay the costs of this appeal and in the Courts below, and they will humbly advise Her Majesty accordingly.