Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the West Australian Land Company, Limited, v. *John Forrest, Commissioner of Crown Lands, from the Supreme Court of Western Australia; delivered* 10*th March* 1894.

Present:

LORD WATSON.
LORD ASHBOURNE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD BOWEN.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The decision of this appeal depends upon the meaning to be attributed to the word "land," as it occurs in certain articles of a contract which was concluded, on the 25th October 1884, between the Governor of Western Australia and one Anthony Hordern, therein styled "the Contractor," who has assigned all his rights and liabilities under it to the Appellant Company. The contract, and its assignment to the Company, were confirmed by an Act of the Legislative Council of the Colony, which received the Royal Assent on the 19th April 1888. In order to appreciate the merits of the present controversy, it is necessary to refer, in some detail, to the terms of the contract, and also to the regulations which at its date were applicable to Colonial lands belonging to the Crown.

The purposes of the contract were, in the first place, to establish railway communication between

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Albany, a seaport town situated upon King George's Sound, and Beverley, an inland town, upwards of 200 miles to the north, from which the Government was in course of constructing a line of railway to Freemantle, on the western coast; and, in the second place, to increase the European population of the colony.

The contractor undertook to construct the railway, to provide suitable plant, and to work it for traffic; and the undertaking, when duly completed, was to become his absolute property. The land required for the construction of the line, so far as belonging to the Government, was to be given free of charge; and, in so far as it was private property, the contractor was empowered to acquire it compulsorily, upon payment of compensation to the owner. For the purposes of the contract, the line was divided into sections which were to be completed successively.

On the other hand, the Government, by article 49, became bound "to grant in fee simple to the contractor, by Crown grants in the form prescribed by the Land Regulations of the colony, a subsidy in land, for and in respect of each section or deviated section as herein-before defined, at the rate of 12,000 acres for every mile of the railway which shall be duly completed and open for traffic, in accordance with the provisions of these presents, and a proportionate quantity for and in respect of such length of line less than twenty miles which shall be over from the end of the last of such sections to the actual completion of the line."

Article 50 provides that the lands so to be granted to the contractor as a subsidy shall be selected by him within twelve months from the opening of each section subject to conditions which it prescribes. The conditions which are of importance in the present case are: (1) that the quantity of land to be granted in

respect of each section shall be selected within a reserved area bounded on two sides by lines drawn on each side of and parallel to the railway at a distance not exceeding 40 miles therefrom, and on the north and south by lines produced east and west through the termini of the sections which have been duly completed and opened for traffic, but not in advance thereof; (2) that each quantity shall be selected in blocks of not less than 12,000 acres, and that such blocks, except when bounded by the lands taken by the railway, shall have their boundaries at right angles to the meridian; (3) that half the frontage to the railway along each section shall be reserved to the Government; and that the blocks so reserved shall have a frontage of not less than five miles in the direction of the meridian and a depth of not less than fifteen miles. The same Article prescribes that the Contractor shall, at his own expense, make all such "surveys, plans, and diagrams" as the Surveyor-General of the Colony may "consider necessary . . . for "ascertaining and defining the boundaries of "the land to be granted, and for all other "purposes required by the provisions of this "agreement." These surveys are to be kept by the Surveyor as official records; and the Surveyor is to be satisfied that all necessary reservations for roads and other public purposes have been sufficiently provided for.

Upon the completion of each section the Contractor (Article 52) is entitled to deeds of grant of a moiety of the land selected by him; and (Article 53) on the completion of the undertaking to grants of the remaining moiety. He has also, by Article 57, "the privilege of "declaring town sites and villages within the "areas aforesaid upon the lands selected by him "as aforesaid."

By Article 51 it is stipulated that, when

the contractor takes land within a town site from a private owner, for the purpose of constructing the line, he shall be entitled to select lands at the rate of one acre for every 10s. of the compensation paid by him. The selection is to be confined to the area from which he has a right to select lands as a subsidy for the line, and in blocks of not less than 5000 acres, unless a smaller quantity of land will cover the compensation, in which case the land must be taken in one block.

By article 45, the contractor became bound, within seven years from the date of the contract, to introduce into the colony, at the rate of not more than 1000, and not less than 700 in each year, 5000 adults of European extraction. For each of these immigrants the Government, by articles 46 and 47, agreed to pay the contractor £10, or in his option to grant to him in fee fifty acres of land, to be selected by him, in blocks of not less than 10,000 acres, "out of the residue of the lands within the areas hereinafter defined in clause 50 remaining after selection of lands to be granted to the contractor as a subsidy for railway construction, maintenance and equipment."

It was also agreed, by article 55, that the Government should not, during the time limited for the construction and opening of the railway, make any grants or sales of land within the reserved area from which the contractor's subsidy and other lands to which he was entitled under the contract were to be selected.

The Land Regulationsof Western Australia, proclaimed in October, 1882, were in force at the date of the contract. They apply to all "Crown lands," which are defined, in clause 2, as "the waste lands of the Crown within the colony," whilst "Crown grant" is defined as "a deed of grant issued in name of Her Majesty,

" conveying to the grantee some portion of Crown " lands in fee simple." Clause 3 confers upon the Governor for the time being full authority to dispose of the Crown lands in the manner and upon the conditions prescribed by the regulations. By Clause 38, these lands are, for administrative purposes, divided into " town," " suburban " and " rural," the latter class including mineral and pastoral lands ; and the Governor is empowered, from time to time to classify any Crown lands, and to vary the classification as he may deem advisable. There is a group of clauses (39 *et seq.*) which deal with the alienation of Crown lands in fee simple. It is unnecessary to refer to their provisions, beyond noticing that, whilst rural lands are open for private sale in fee simple, at prices not less than the minimum fixed by the regulations, town and suburban lands must, in the first instance, be exposed to public auction, when, if not sold, they may be " open for pur- " chase by selection by any person at the upset " price."

Clause 29 confers very wide powers upon the Governor, either to reserve to Her Majesty, or to dispose of in any other manner as for the public interest may seem best, such lands as may be required for the public objects therein specified. It is not necessary to recapitulate these objects, one of which is " resting places " and commonage for horses, cattle and sheep."

Before the date of the contract, the Governor had, in terms of the regulations, duly proclaimed certain areas within the reserved area, as defined by Article 50 of the contract, to be town sites and commonages. He had placed one of these town sites under the jurisdiction of the Municipal Council of Albany ; and had also placed the commonages so declared under the control of Boards of Management. The present controversy arose from the Government having refused to

allow the appellant company to include any portion of these town sites or commonages in the lands selected by them under the contract, and having, after the date of the contract, sold and made grants in fee simple of lands within such town sites.

In order to obtain a settlement of these differences the company presented a petition of right to Sir Malcolm Fraser, at that time administrator of the government of the colony, who, with the advice of his executive council, referred it to the Supreme Court for trial, and appointed the respondent in this appeal to be the nominal defendant on behalf of the Government. The parties then adjusted a special case, in which these two questions were submitted for the opinion of the Court:—

"(1.) Did or does the company's right of selection in respect of the said subsidy, and in respect of compensation paid by the company under clause 51 of the contract, or in respect of either of the same, extend over all rural Crown lands, including commonages as aforesaid, within the reserved area?

(2.) Did or does the company's right of selection, as aforesaid, extend over all Crown lands within town sites within the reserved area?"

The parties also agreed upon the terms of the judgment to be pronounced by the Court in the alternative events of one or other or both of these queries being affirmed, or of both being answered in the negative.

The case was heard before the Acting Chief Justice of the Supreme Court, sitting as a primary judge, who found upon both questions for the respondent, and directed judgment to be entered for him with costs. On appeal his decision was affirmed by a full bench, consisting of the Acting Chief Justice and his Honour,

E. A. Storey the Puisne Judge. In this appeal, the Company have not sought to impeach the finding of the Courts below upon the first question submitted, which proceeded upon the ground that areas of rural land, formally proclaimed as commonages, are thereby dedicated to the uses of the public, and, so long as such dedication is in force, are not, although the fee simple may remain with the Crown, lands which can be disposed of to a purchaser under the regulations.

The second question, with which alone this Board has to deal, relates exclusively to lots of land belonging to the Crown, within areas previously proclaimed by the Governor to be town sites, which, at the date of the contract, had not been sold by the Government, and were neither subject to any right of pre-emption, nor dedicated to the uses of the public. It appears to their Lordships that these lots, which the Government could have exposed to public sale, and, after unsuccessful exposure, could have sold by private bargain to the first person who was willing to pay the upset price, stand in a very different position from Crown lands declared to be commonages, in which members of the public had, and would continue to have a vested interest, until revocation by the Governor.

The articles of the contract which confer the right to select subsidy and compensation blocks from the reserved area, and from time to time to call for grants thereof in fee simple, impose no limitation upon the lands which the Company are at liberty to select, beyond what is implied in the expression "Crown Grants in "the form prescribed by the Land Regulations "of the Colony"—a limitation which is accentuated by the obligation laid upon the Government to abstain from making any grants or sales of land within the reserved area during

the currency of the contract. The plain effect of these provisions is, to confine the obligations of the Government, and the corresponding rights of the company, to lands belonging to the Crown, which the Government was then in a position to convey in fee simple, or, in other words, to Crown lands, whether "town," "rural," or "suburban," which were not affected by any contract of sale or pre-emptive right, and were not devoted to public uses.

Both Courts below have practically held that all Crown lands within town sites are outside the scope of the contract. Their Lordships have been unable to find anything to justify that conclusion, either in the contract itself, or in the Land Regulations "Town" lands, which the Government is in a position to sell by auction, are, just as much as "rural" lands, which it can sell by private bargain, "waste lands of the Crown," within the meaning of the regulations. The main if not the only reason for separately classifying town and rural Crown lands is to be found in the fact that different methods are prescribed for their disposal to settlers in the colony. In both cases, the Governor has the same absolute power of alienating the lands from the Crown and vesting them in a subject. The acting Chief Justice seems to have attributed a much wider effect to the proclamation of a "town site." He says, in his second judgment: "In a colony like that of Western Australia, it (i.e., a Crown site) means land taken up, used, or dedicated to a public purpose, that purpose being the building of a town." If Crown lands within a town site were really dedicated to a public purpose, they would undoubtedly be beyond the scope of the contract; but the lands in question are not "dedicated" in any other sense than this, that they are destined to be sold by

by auction, and to be acquired by individuals and used by them, not for public but for private purposes ; and that does not constitute dedication to a public purpose, either according to the legal or the conventional meaning of the words.

The learned Judges attached considerable weight to the obligation to make surveys incumbent on the Company, as indicating that it was not intended that they should be entitled to select from the reserved area any land which had been previously surveyed by the Government. But the obligation is not absolute : The Company are only bound to make such surveys "as the said Surveyor-General may "consider necessary." Their Lordships do not think that any inference can be safely derived from an obligation expressed in these terms, for the purpose of imposing a limitation upon articles of the contract which are in themselves abundantly clear.

The Puisne Judge lays much stress upon the fact that town lands are "surveyed and worked "out into small blocks of from half an acre to "three acres more or less, and that the boundaries "of such blocks do not always run in the "direction of land at right angles to the "meridian." He then goes on to argue that, "Had it been intended that the contractor "should be empowered to select such small "blocks as from half an acre to three or four "acres, there would be no sense in the provision "which requires him to select in such large "blocks as 12,000 acres." Their Lordships cannot find that any pretension to a right to select blocks of land from half an acre to three or four acres in extent has ever been put forward by the Appellant Company. The only question raised by the special case is, whether the contract gives them the right to include town lands at the disposal of the Government, in the large blocks

reverse the judgments appealed from, and to affirm the second question submitted by the special case; and, in accordance with the arrangement made by the parties themselves in that event, to direct that a verdict be entered for the Appellant Company for forty shillings damages, with costs on the higher scale in both Courts below, and also that there shall be an inquiry before the Master of the Court as to what lands within the reserved area have been sold by the Government, contrary to the terms of the contract, since the date of the contract, and what purchase moneys or other moneys have been received by the Government therefor; and that judgment with costs shall be entered for whatever amount shall be certified by the Master on such inquiry. The Respondent must pay the Appellant Company their costs of this appeal.

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