Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of O'Keefe v. *Malone, from the Supreme Court of New South Wales; delivered the* 13*th May* 1903.

Present at the Hearing:
LORD MACNAGHTEN.
LORD DAVEY.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The action in which this Appeal has arisen was brought by the Appellant to recover damages for trespass by the Respondent on the Appellant's land. The defence was in substance that the land on which the alleged trespass was committed was the land of the Respondent and not that of the Appellant. The question, therefore, is which party has the better title? There are no facts in dispute, and the determination of the question turns on the construction and effect of certain sections of the legislation of the Colony of New South Wales respecting Crown lands, and the validity and effect of certain acts of the Minister for Lands.

By the Crown Lands Act, 1884 (48 Vict., No. 18), the Colony was divided for the purpose of the Act into three divisions, called the Eastern, Central, and Western Divisions. The land in question was formerly part of a pastoral holding called Barham in the Central Division. Under the provisions of the Act this holding was some time since divided into two areas, called respectively the resumed and the leasehold areas, and the

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then holder became entitled to and obtained a lease from the Crown of the leasehold area and an "occupation license" of the resumed area at an annual license fee. On the expiration of the term granted by the lease of the leasehold area the holder acquired what is called a "preferential occupation license" of the land comprised in the lease. The rights of a holder of a preferential occupation license, however, do not differ in any respect material to the present controversy from those of a holder of an ordinary occupation license. In June 1899 the Appellant acquired the rights conferred by these two licenses over all the lands comprised therein.

An occupation license entitles the licensee to occupy the land comprised therein for grazing purposes. In its legal incidents it appears to their Lordships to resemble more nearly a lease for a year than a mere license to use the land, and many sections of the Acts were quoted to their Lordships in which the rights of lessees and licensees are put on the same footing. The second and fourth Sub-sections of Section 81 of the Act of 1884 are as follows:—

"(II.) Licenses shall be in force from the first "day of January to the thirty-first day of "December in each year and the rates of license "fees shall be published in the *Gazette*, and if "within sixty days thereafter such fees be not "paid into the Treasury by the licensee, the "Minister may refuse to renew such license."

* * * *

"(IV.) Upon the granting of any lease or the "sale of any land under Occupation License the "licensee's right of occupation to the extent of "such portion shall thereupon cease, but he shall "be entitled to a refund of so much of the license "fee paid in advance and to reduction in future "rent as shall be proportionate to the area so "withdrawn and from the date of withdrawal,

" and shall be entitled to be paid such compen-
" sation for improvements on any portion so
" withdrawn as the Minister may determine after
" appraisement by the Local Land Board."

By the 199th Article of the Regulations made in pursuance of the Crown Lands Acts it is prescribed that the license fee of an occupation license (whether preferential or otherwise) shall be paid annually in advance before the 1st December in each year, but there is nothing to prevent the authorities from receiving payment of overdue license fees, and it appears from Section 48 of the Act of 1895 that they may do so. There are no conditions imposed on the holder of an occupation license except the payment of the license fee, and there is no power given to the Minister by the Act to refuse to renew an occupation license other than the qualified one conferred by Sub-section 2 of Section 81. The result is that until the land is leased or sold, the occupation license is renewable by the holder thereof subject to the Minister's right to refuse to renew if the license fee is not paid within sixty days after the amount of the license fee has been published in the Gazette as prescribed by Sub-section 2 of Section 81, and subject also to the Minister's right of directing a fresh appraisement to be made. This result seems to be in accordance with the scheme of the Act, for the right of the leaseholder to an occupation license of the "resumed area" and to a preferential occupation license of the "leasehold area" after the expiration of the lease would be of little value if he were liable to be dispossessed at the end of any year at the will of the Minister; and, on the other hand, it is for the public benefit that Crown lands not immediately required for permanent settlement by lease or sale should be occupied and yield some return to the revenue.

On the 8th August 1899 the Appellant applied to the Minister for Lands to have a re-appraise-

ment made of the areas comprised in both his licenses. On the 22nd August 1899 the Minister by letter of that date approved of the Appellant's application being granted subject to his bearing the costs, which were estimated at 20*l.* for the two appraisements. On the following 5th September the Appellant paid the sum of 20*l.* into the Colonial Treasury, and by letter of the 18th October 1899 the Minister definitively approved of the application being granted and informed the Respondent that the necessary instructions had been issued to the Local Land Board. To complete this portion of the story, the Local Land Board on the 4th and 5th December 1899 duly appraised the license fees for the occupation license of the resumed area and the preferential occupation license at 6*l.* 13*s.* 4*d.* per section of 640 acres, being an increase on the rate of the previous license fees. These re-appraisements were not, however, accepted by the Minister until the 19th January 1900 when they became definitive, there having been no appeal by the Appellant, and notice thereof was not inserted in the Government Gazette until the 17th February 1900.

In the meantime on the 30th September 1899 a notification was published in the Gazette requiring licensees to pay their fees for the year 1900. The material paragraphs of this notification are the following :—

" Notice is hereby given that the rates of " license fees for occupation licenses under " Section 81 of the Crown Lands Act of 1884 " payable in advance for the year 1900 are set " out and published in the annexed schedule.

" All occupation license fees must be paid to " the Colonial Treasurer within 60 days from the " date of the publication of this notice, and if " not so paid the licenses shall be deemed not to " have been renewed.

* * * *

"The licenses on which the fees remain "unpaid on the 31st December next will imme- "diately thereafter be notified in the Government "Gazette as not having been renewed for the "year 1900 and the lands will therefore be open "for the purposes of the Crown Lands Acts "from the 31st December."

The Schedule to this notice contained (amongst many others) particulars of the Barham licenses and specified the license fees payable for them at the old rates.

It will be observed that this notice was issued after the Minister had approved the Appellant's application for re-appraisement, subject to the payment by him of 20*l.* for the costs and after the payment by him of that sum. It did not and could not comply with the terms of Sub-section (2) of Section 81 as respects the Barham licenses, because the rates of the license fees payable for the year 1900 were not at that time determined. They might be either less (as the Appellant no doubt expected) or (as turned out to be the case) more than the rates of the fees payable for the previous year. It appears to have been assumed in the Court below that where lands were under re-appraisement, the old license fees continued to be payable until the re-appraisement had been made subject to subsequent adjustment. And this assumption underlay the very able argument of Mr. Vaughan Hawkins for the Respondent. But it was admitted that no enactment to that effect applicable to the present case can be found in the Acts. It was pointed out that in the 29th Section of the Act of 1889, by which a licensee is entitled to a re-appraisement upon application within ninety days from the commencement of the Act, it was thought necessary to provide in express terms that, pending re-appraisement, the licensee shall continue to pay the previous fee. That Section, however, has no application to a re-appraisement made at the will of the Minister

under Sub-section 1 of Section 81 of the Act of 1884, and their Lordships can find no grounds for holding that the Appellant was liable to pay his license fees according to the old rate, pending the re-appraisement, or was in default for not doing so. The construction of Sub-section (2) of Section 81 is free from ambiguity, and their Lordships think that in any notice on which the Minister can found a right to refuse to renew a license under that Sub-section the amount of the true license fee payable for the ensuing year should be stated. The result is that, in their Lordships' opinion, the Barham licenses were erroneously comprised in the Gazette notice of the 30th September 1899.

On the 6th January 1900 a notice was inserted by the Minister of Lands in the Government Gazette in the following terms:—

"It is hereby notified for general information "that the Occupation Licenses and Preferential "Occupation Licenses specified in the annexed "Schedule have not been renewed for the year "1900 in accordance with the provisions of the "81st section of the Crown Lands Act of 1884."

The Schedule again comprised the two Barham licenses. Their Lordships think that, reading this notice with the concluding paragraph of the notice of the 30th September 1899, it was probably intended to operate as a notice of the Minister's refusal to renew the licenses mentioned in the Schedule. But standing alone the latter notice does not seem to express such refusal with sufficient clearness. It is not, however, worth while to pursue this point because it follows from what has already been said that, in the opinion of their Lordships, the notice had no effect on the Barham licenses, notwithstanding that they were erroneously inserted in the Schedule.

The Appellant on the publication of the last-mentioned notice called on the 12th January 1900 at the Lands Office at Sydney, and after

an interview with one of the officials paid the license fees at the old rates into the Treasury to a suspense account. On the 19th January 1900, as already mentioned, the Minister accepted the new appraisements, and on the following day (the 20th January), as stated in the admissions in the action, he approved of the reversal of "the non-renewal" of the Barham licenses subject to any conflicting interests that might have arisen since the 31st December then last, and also subject to any annual lease application that might have been lodged since that date. A Minute to that effect was submitted to and confirmed by the Executive Council on the 23rd January following, and notice of it was gazetted on the 14th February 1900.

Their Lordships have already mentioned the Gazette notice of the 17th February 1900 of the new appraisement which had been made of the license fees of the Barham licenses. The notice stated that the amount shown in Column 10 of the Schedule (being the new and enhanced fees) represented the fees payable for the year 1900, which were stated to take effect from the 1st January of that year, and under the heading "amount now required" were entered the balances due after giving credit for the sums paid to a suspense account as already mentioned. In the view which their Lordships take of the 81st Section of the Act of 1884, and of the facts of this case, this was the first and only notice which complied with the requirements of Sub-section (2), and the Appellant could not be treated as in default until the expiration of 60 days from the date of it in case the fees should not then be paid. The Appellant, who had remained in possession, paid the balances due from him representing the difference between the amount of the old license fees and that of the new ones, and such payment, together with that of the sum previously paid by him which had temporarily

been placed to a suspense account, were accepted by the Minister.

On the 12th February 1900 the Respondent together with his three sons made written applications to the local Government Land Agent for four annual leases of 1,920 acres each (making together 7,680 acres) part of the Appellant's holding. These applications were made under Section 33 of the Act of 1889, the relevant words of which are as follows :—

"Crown lands not held under lease or license "and not reserved from lease or license shall be "open to annual lease in the prescribed manner "and the first applicant shall have a right to "an annual lease of the land applied for (subject "to modification by the Board," *i.e.*, the Land Board) "on payment of such rent as the Land "Board shall determine."

These words occur towards the end of a long Section, the earlier part of which relates only to the Eastern Division. It was contended before their Lordships that the words quoted also referred only to the Eastern Division. The Section is no doubt somewhat clumsily framed; but looking at the Section itself and the context in which it is found their Lordships think that the words relied on were intended to be a general enactment relating to the whole Colony subject, as to the Eastern Division, to the special enactment. The point was not taken in the Court below, and it may be assumed therefore that the opinion of their Lordships upon it is in accordance with the view taken of the Section in the Colony. The question therefore is, whether the lands in question were under lease or license within the meaning of the Act on the 12th February, the date of the application. If they were, the Respondent had no right to the lease applied for by him.

The applications of the Respondent and his sons were referred to the Local Land Board for

investigation. That of the Respondent only was in the first instance proceeded with. The Board found that the land which was the subject of the application was not available for annual lease, and recommended the refusal of the application. On appeal the Land Appeal Court reversed this finding. Their Lordships have not the reasons for the Judgment of the latter Court before them. The Judgment itself was not pleaded as an estoppel in this action.

Consequently on the decision of the Land Appeal Court all four applications were reconsidered by the Land Board, and in the result leases were granted to the Respondent and his three sons of the lands for which they had applied. The Respondent thereupon entered upon the lands comprised in his own lease and on the lands comprised in his sons' leases by their leave and license. This is the trespass complained of in the action. There was an allegation by way of new assignment in the replication that the Respondent had also trespassed on other lands not comprised in the leases, but this was negatived by the verdict of the Jury.

The action was tried by Mr. Justice Simpson and a Jury of four persons at the Circuit Court at Deniliquin. By arrangement the learned Judge ruled that the leases were invalid, and thereupon a verdict was given for the Appellant with 45*l.* damages for trespass on the annual leases, leave being reserved to the Respondent to move to set aside the verdict and enter the verdict for him.

Accordingly a Rule Nisi was obtained by the Respondent, and argued before three Judges of the Supreme Court. By the Judgment of that Court, dated the 1st May 1902, the Rule Nisi was made absolute, and the verdict in favour of the present Appellant was set aside, and a verdict was entered for the present Respondent with costs. The present Appeal is against that Order.

Two of the learned Judges before whom the rule was argued (Mr. Justice Owen and Mr. Justice Simpson) held in substance that the Appellant was in default for non-payment of the license fee required by the notice of the 30th September 1899, and the Minister had the option at his discretion of refusing to renew the license, and that he exercised that option by the notice of the 6th January 1900, and the Appellant's licenses thereupon ceased to exist. They further held that the Executive Council had no power to reverse the decision of the Minister not to renew, and its action on the 23rd January 1900 was a nullity. The other Judge (Mr. Justice Stephen) dissented from his brethren, holding that the Gazette notice of the 6th January 1900 was not an exercise of the Minister's option not to renew, and, if it were, it was not irrevocable, and the Minister might and did change his mind, and the Minute of the 22nd January being passed on his recommendation was an effectual reversal by himself of his former decision, notwithstanding that he unnecessarily sought the confirmation of the Executive Council.

For reasons which have already been stated, their Lordships cannot agree with the decision of the majority of the Court. Shortly, they think that the Appellant was not in default on the 6th January 1900, and the Minister had no power at that date to refuse to renew the license, and they regard the insertion of the Appellant's licenses in the Schedules to the two Gazette notices of the 30th September 1899 and the 6th January 1900 as being made in error, and the Minister's refusal to renew (if he did refuse) as given without authority. They think it was not only competent for the Minister, but it was his duty to rectify the mistake on his attention being called to it, and this he did by his approval of the reversal of the non-renewal on the 20th January 1900, which was none the

less his act because he presented it to the Executive Council for confirmation. This being so, their Lordships think that the Land Board took the correct view in holding that the lands were not available for annual lease on the 12th February, the date of the Respondent's application.

Their Lordships also think that the Appeal can be maintained on the Act of 1891, 55 Vict., No. 1, relating to the reversal of forfeitures. This point was very fully argued before them. They therefore think it right to express their opinion upon it, but they do so with some reserve, as it is not mentioned in any of the Judgments delivered in the Supreme Court. By the third Section of the Act of 1891 the Minister is empowered to reverse, whether provisionally or otherwise, any forfeiture already notified, declared, or otherwise asserted or enforced, subject to certain conditions; and by the sixth Section it is provided that in any case in which a purchase, lease, or license has become liable to forfeiture by reason of the non-fulfilment of any condition by mistake or other innocent cause, the Minister may waive the forfeiture. By the interpretation clause "forfeiture" includes the lapse or voidance of any contract with the Crown under any repealed Act or the Principal Act (*i.e.*, the Act of 1884) for the purchase or leasing of Crown lands. The word "lapse" seems an apt expression for the loss of any interest in land by reason of an omission to renew, or the non-performance of a condition, such as the payment of money. But it is said that the words "purchase or leasing of Crown lands" (assuming that they are to be read with "contract") do not include the grant of an occupation license. Their Lordships think this a narrow construction of the words. An exclusive and transferable license to occupy land for a defined period is not distinguishable from a demise,

and in the legislative language of the Land Acts the words "leased," "lease," and "lessee," are frequently used as words of a generic import, including lands held under occupation license, or the license or the holder thereof. In this Act a "license" is by express words within Section 6, and there is nothing in Section 3 which forbids or is inconsistent with its extension to licenses. It would therefore seem that assuming the Gazette notice of 6th January 1900 to have been equivalent to a refusal by the Minister to renew, and that he was in a position to refuse to do so, his approval on the 20th January 1900 operated as a reversal of the "forfeiture" thereby asserted or notified. As remarked in another connection, it was none the less the act of the Minister because it was subsequently submitted to the Executive Council for confirmation. By the third and sixth conditions of Section 3 the absolute reversal of a forfeiture has the same effect as if the forfeiture had never been notified or declared or otherwise asserted or enforced, and the date of such reversal is the date of the Minister's approval thereof. As, however, their Lordships have not the advantage of having the opinion of the Supreme Court on this point, which does not appear to have been taken there, they do not intend by this expression of their opinion to preclude this Board from re-considering it, if it should come before them in another case.

Act of 1884, s. 98, Subs. 1.
Act of 1884, s. 126.
Act of 1889, s. 10.
Act of 1895, s. 53.

Their Lordships will not part with this intricate and complicated case without expressing their obligation to Counsel on both sides for the assistance rendered by them in the consideration of it. Their Lordships believe that every point which could fairly be taken on either side was brought to their attention and fully and thoroughly discussed.

Their Lordships will humbly advise His Majesty that the Order of the Supreme Court of the 1st May 1902 should be reversed and that instead thereof the Rule Nisi obtained by the Respondent on the 12th November 1901 should be discharged with costs. This will leave standing the verdict of the Jury in the Appellant's favour with 45*l*. damages. The Respondent will pay the costs of this Appeal.