

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Attorney-General for New South Wales v. Dickson and others, from the Supreme Court of New South Wales; delivered the 2nd March 1904.

Present at the Hearing :

LORD MACNAGHTEN.

LORD ROBERTSON.

LORD LINDLEY.

SIR ARTHUR WILSON.

[*Delivered by Lord Lindley.*]

The question raised by this Appeal is whether a small strip of land, 100 feet wide, adjoining the sea in Port Jackson, near Sydney, is the property of the Crown or of the Defendants. This depends on the true construction of a grant by the Crown to one Dumaresq, dated 12th August 1840. In order however to understand this grant it is necessary to explain the position of the parties to it at that date.

In 1826 a Charter was granted by the Crown incorporating a number of persons by the name of "The Trustees of the Clergy and School Lands" in the Colony of New South Wales," with power to cultivate, sell, lease, and mortgage any lands which might thereafter be granted to them by the Crown (Arts. 15, 17, and 20), and by Art. 33 it was granted and declared that all lands theretofore set apart within the Colony for the support of the Clergy of the Established Church and known by the name of the Glebe Lands or by whatever other name the same

might be known should, from and immediately after the death or resignation of the clergyman then in the occupation or enjoyment thereof, pass to and become vested in the Corporation upon the same trusts and for the same purposes as their other estates. By Art. 36 the Crown reserved to itself power to dissolve the Corporation and to resume all the lands previously granted to it, but subject to all mortgages and contracts for sale previously lawfully made.

It is common ground that the strip of land in question formed part of some glebe lands called St. Phillip's Glebe, and that before February 1828 arrangements had been made with the clergyman who held them for his resignation. It does not however appear when his resignation was formally completed.

It was contended that by virtue of Art. 33 of the Charter the glebe lands resigned became vested in the Corporation by virtue of the Charter and without any further grant from the Crown. Perhaps this is so; but there is nothing to show when on this assumption the lands did become so vested. It is obvious that a grant reciting and recognising the resignation and accurately defining the lands to which the Corporation has acquired a title would be useful and prevent disputes; and it appears that such a grant was in fact usually obtained, and was applied for in this case as early as October 1827. The Government officials promised that proper deeds should be completed upon the receipt from the Trustees of some formal document which was required. But no grant was in fact obtained before the sale which it is necessary now to notice.

On the 14th February 1828 part of St. Phillip's Glebe was sold by auction by the Corporation. The advertisements and conditions of sale stated that a transferable lease for 21 years with an

option to purchase the fee would be granted to the highest bidder. The advertisements and conditions also contained the following words, viz.:—"all clauses introduced in the grants to "the Trustees to be inserted in the leases and "conveyances." It was also stated that Lots 1 to 9 of the St. Phillip's Glebe lands adjoined the sea. The strip of land in question formed part of Lots 5, 6, 7. Lots 5 and 6, containing about 36 acres, were bought by Mr. Dumaresq.

No formal contract for this purchase is produced; but the relation of vendor and purchaser between the Corporation and Mr. Dumaresq upon the above terms was then established, and a conveyance by the Corporation to him was afterwards executed as will be stated presently.

In the meantime the Corporation obtained a grant of the glebe lands from the Crown. It is dated the 24th November 1829. It recites that by certain instructions under the Royal Sign Manual the Government is empowered by the Crown to grant to the Corporation certain lands in the Colony and refers to the charter of incorporation, and a grant is made to the Corporation of certain lands which are so described as to include the strip in question. But then come words which except it. The words are "Excepting and reserving to His Majesty" lands for sites of towns or villages or other public purposes "and also reserving to His Majesty his heirs and "successors all such part of the said piece "or parcel of land hereinbefore described as "may be within 100 feet of high water mark on "the sea coast or in any creek harbour or "inlet." Other reservations followed, but it is unnecessary to refer to them.

The effect of this last reservation is not open to any serious controversy. If the strip in question belonged to the Crown at the date of

the grant the strip was excepted from the grant. The word "reserving" would operate as an exception. If, on the other hand, the strip belonged to the Corporation under the Charter, the reservation would operate by estoppel, and have the effect of a grant by the Corporation to the Crown. After accepting this grant the Corporation could not successfully claim the strip of land from the Crown. But Dumaresq was not a party to this grant, and any equitable title which he may have acquired was not affected by it.

On the 1st July 1830 the Corporation conveyed to Dumaresq the lands which he had purchased in 1828, and by the same deed he mortgaged them to the Corporation for part of the purchase money. The conveyance recited the letters patent of 1826, and the grant by the Crown to the Corporation of the 24th November 1829, and the resolution to sell the lands comprised in that grant by public auction, and that, as the grant to the Corporation had not then been made out, it had been proposed that the conveyances to the purchasers should be delayed until the grant to the Corporation had been obtained, and that Dumaresq had become the purchaser of the piece or parcel of land hereafter mentioned, "the same being parcel of the land comprised in the herein-before in part recited grant of the 24th November 1829." The conveyance then went on to convey to Dumaresq 36 acres of land, "being parcel of the land comprised in the herein-before in part recited grant of the 24th November 1829 and which said piece or parcel of land intended to be hereby granted and enfeoffed is bounded on the north-east by the water of Port Jackson Harbour." The rest of the conveyance and the re-mortgage contain nothing material. There is no reservation or exception in this deed, but the grant of

Shep. Touch. 78 *sqq.*
Co. Lit. 143a.

1829 is referred to not only in the description of the parcels, but in the recital where the property granted by it is described as "bounded as in the said grant . . . mentioned to hold the same subject to the reservation and conditions in the now recited grant contained." This deed of 1830 is by no means so clear as it should have been. Its legal effect appears to their Lordships to have been that the purchaser only acquired so much of the land described as the Corporation itself acquired by the grant of 1829. But the purchaser might very naturally think that the land which he agreed to buy extended to the water's edge, and that the land conveyed to him did the same. Both the particulars of sale and the conveyance of 1830 so describe it, and it is only by reference to the grant of 1829 that any doubt on this point arises.

In 1853 the Corporation was itself dissolved, and its property thereupon reverted to the Crown, as provided by Article 36 of the Charter of 1826.

On the 12th August 1840 Dumaresq paid off his mortgage to the Crown and the Crown made the grant which has given rise to this litigation. The grant is not a simple re-conveyance of the property mortgaged which would be the ordinary form if all that was intended was to re-vest in the mortgagor what he had mortgaged to the Corporation.

The Crown not having been the mortgagee, recitals showing the title of the Crown to the mortgaged property and of the Crown Receiver to receive and give a good discharge for the mortgage money would be quite in ordinary course, and the grant in question contains recitals showing this. But there are passages in the grant which do more than this and which require attention.

In reciting the conveyance of 1830 the purchase by Dumaresq in 1828 is pointedly noticed and the parcels conveyed by that deed are described as bounded by the water of Port Jackson and the operative part of the grant runs thus:—

“ Now know ye that in fulfilment and execution of the
 “ contract so made and entered into by the trustees of the
 “ clergy and school lands aforesaid for the sale and conveyance
 “ of the said lands to the said William Dumaresq his heirs
 “ and assigns as aforesaid and in consideration of the payment
 “ by the said William Dumaresq of the said several sums of
 “ 40*l.* and 32*l.* 12*s.* to the said Oswald Bloxsome as aforesaid
 “ on our behalf we do hereby grant and confirm unto the said
 “ William Dumaresq and his heirs all that said parcel of land
 “ estimated and accepted as aforesaid to contain 36 acres
 “ comprised in the hereinbefore in part recited indenture of the
 “ 1st July 1830 and hereinbefore particularly mentioned and
 “ described with the appurtenances thereto belonging to hold
 “ the said lands and other hereditaments with the appurten-
 “ ances thereto belonging unto the said William Dumaresq his
 “ heirs and assigns to and for the end intent and purpose
 “ that the said term of 1,000 years therein mentioned for the
 “ now residue thereof shall and may henceforth become
 “ merged and extinguished in the freehold reversion and
 “ inheritance of the said lands and hereditaments so by these
 “ presents and the hereinbefore part recited indenture conveyed
 “ to or otherwise vested in the said William Dumaresq and his
 “ heirs as aforesaid and wholly cease determine and for ever
 “ become void to all intents and purposes whatsoever.”

There is not a word here to show that the strip of land next the sea was excepted from the lands agreed to be purchased by Dumaresq in 1828 and conveyed to and mortgaged by him in 1830. So far is this from being the case that those lands are described in this grant of 1840 as bounded by the waters of Port Jackson. Moreover, if a strip of 100 feet is deducted 36 acres are a considerable over-estimate.

The Chief Judge in Equity, before whom the case first came, decided that upon the true construction of this grant of 1840 the strip of land reserved to the Crown in the grant of 1829 was included in the land conveyed to Dumaresq by the Crown in 1840. The Full Court

took the same view and affirmed his decision. From this decision the present Appeal is brought.

The Respondents claim through Dumaresq. He sold to Gibson in 1841, who died shortly afterwards and the Respondents are the trustees of his will and purchasers from them.

After Gibson's death, viz., in 1873, his widow applied to the Crown for permission to purchase and retain the mud flat in front of her land. This was refused. Later, viz. in 1880, being told that the land was not hers, she applied for a rescission of the reservation by the Crown, and ultimately a portion of it was acquired by her trustees from the Crown. In October 1885 a certificate of title was obtained by Gibson's trustees but with a note of the reservation of the 100 feet. This led to much correspondence, and ultimately, in November 1887, the note was removed and Dickson and Dodds, the trustees, were registered as the owners of the land which Gibson bought including the strip now claimed by the Crown.

In June 1900 the Crown again claimed the strip of land notwithstanding the registration; and the present proceedings to enforce the claim were instituted on the 12th December 1901.

If their Lordships had come to the conclusion that the grant of 1840 had not included the sea frontage it would have become necessary to consider the very important question whether the registered title thus acquired was conclusive against the Crown. But their Lordships having arrived at the same conclusion as the Colonial Judges as to the effect of that grant, the question whether the Crown is bound by the registered title does not call for decision on the present occasion.

Their Lordships have already stated that in their opinion the Grant of 1829 did not convey to the Corporation the strip of land in dispute or

leave the ownership of it in the Corporation if vested in them before. It remains to consider the other documents.

Great reliance is placed by the Crown on the statement in the conditions of sale in 1828 that the leases and conveyances to the purchasers would contain "all clauses introduced in the "grants to the Trustees," and it is contended that the purchasers must have known from this that they would not obtain a sea frontage. Their Counsel, on the other hand, contends that the statement that lots 1 to 9 adjoined the sea was misleading if the sea frontage of those lots was to be excepted; and that the words relied upon by the Crown, which were general words applicable to all the property, could not be applied to those lots or, if they could, should be confined to reservations for roads and mines and minerals and restrictions on user which the Crown might think proper to impose. Their Lordships feel considerable difficulty in deciding this controversy. If it was generally known in the Colony in 1828 that Crown grants of lands adjoining the sea always excepted a strip just above high-water mark, the purchaser could not reasonably complain that he was misled. But if there was not any such common knowledge, the purchaser would undoubtedly have great reason to complain if he did not obtain a sea frontage.

The conveyance of 1830 is so worded as to be open to two constructions. The parcels conveyed by it are first of all described as comprised in the grant of 1829, but then they are said to be bounded by the water of Port Jackson. This is perfectly true in one sense, *i.e.*, if the description of the parcels in the grant of 1829 is looked at, but the exception from them is disregarded. The legal effect of the conveyance of 1830, so far as the Crown was concerned, was only to pass the property which the Corporation had

power to grant ; but as between the Corporation and the purchaser it was so framed as to warrant him in supposing that he had got a grant of land coming down to the water's edge.

Such was the doubtful state of the title to the sea frontage when the Crown made the grant of 1840. This grant is so worded as, in their Lordships' opinion, to remove the doubt to which they have referred, and the frame of the grant leads them to think it was intended to remove this doubt. The grant, in their opinion, conveys the land bought in 1828 down to the water's edge. It might no doubt have been made plainer ; but their Lordships concur in the view taken of it by all the Judges in the Colony, and they will therefore humbly advise His Majesty to dismiss the Appeal. - The Appellant must pay the costs of the Respondents.
