Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of—

The Attorney-General for Victoria *v.* Ettershank	..	Victoria.
Ettershank *v.* The Attorney-General for Victoria	..	Victoria.
The Attorney-General for Victoria *v.* Glass	..	Victoria.
Glass *v.* The Attorney-General for Victoria	..	Victoria.
James Winter *v.* Same	..	Victoria.
William Irving Winter *v.* Same.. ..	..	Victoria.
Kate McMillan *v.* Same	..	Victoria.

delivered 22*nd June*, 1875.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.
SIR HENRY S. KEATING.

The Attorney-General for the Colony of Victoria (on behalf of the Queen) ... ... Appellant,
and
John Ettershank ... ... Respondent.
And
John Ettershank ... ... Appellant,
and
The Attorney-General ... Respondent.

THESE cross Appeals are the first of a series of seven Appeals to Her Majesty from Decrees of the Supreme Court of the Colony of Victoria in several suits brought against the Attorney-General of the Colony, representing the Queen, by persons claiming to be entitled to grants of land under the Colonial Land Acts.

The suit which gives rise to the two cross Appeals first to be considered was commenced by a petition of right on the Equity side of the Court under the Colonial Act, "The Crown Remedies and Liability Statute, 1865." By this petition, the suppliant, John Ettershank, claimed to be entitled to the grant in fee simple of an allotment, as the registered proprietor of a lease from the Crown issued under the Colonial Land Acts to Henry Strong.

The Acts to be considered are "The Land Act, 1862" (which consolidated and amended the laws relating to the sale and occupation of Crown lands), "The Amending Land Act, 1865," and "The Land Act, 1869."

By the Act of 1862 lands were to be set out "in agricultural areas" for selection. A scheme was provided by which any person becoming the selector of an allotment might purchase at once the fee of the whole upon payment of the price of 1*l.* per acre, or might purchase at once the fee of one moiety only, and receive a lease of the other moiety for a term of eight years, at a yearly rental of 2*s.* 6*d.* per acre; and upon full payment of this rent, being, in fact, the purchase money for what the Statute calls "the remaining moiety," the selector was entitled, at the end of the eight years, or at any intermediate time, if the rent was all paid in advance, to a grant in fee of this moiety.

The following are the material sections on this point:—

"XXI. Every selector of any such allotment shall be entitled either to purchase the fee of the whole allotment at the price of one pound for each acre or fractional part of an acre therein, or to purchase in like manner and at like price the fee of one moiety thereof, and receive a lease of the remaining moiety on the terms herein contained.

"XXII. Every such lease shall be for a term of eight years, at a rent payable yearly in advance of two shillings and sixpence for each acre or fractional part of an acre so demised, and shall contain the usual covenant for the payment of rent, and a condition for re-entry on non-payment thereof; and upon the payment of the last sum due on account of the rent so reserved, or at any time during the term upon payment of the difference between the amount of rent actually paid and the entire sum of one pound for each acre, the purchaser of the first moiety, his heirs or assigns, shall be entitled to a grant of the remaining or leased moiety as real estate, and the enrolment on record of the grant of the remaining or leased moiety shall have relation back to, and shall take effect from, the time when the grant of the first moiety took effect."

It is said that the Crown was desirous to benefit purchasers under former Land Acts, who had bought allotments at a high price, by allowing them to select further land on the same terms as selectors under the Act of 1862 were to hold the leased moiety of their allotments. Whatever may have been the policy, the Statute of 1862 certainly gave to former purchasers this new right.

Section XXIII is as follows:—

"XXIII. Every person, not being a mortgagee, seised at law of, or seised of an equity of redemption in, lands in fee simple within the Colony of Victoria purchased previously to the coming into operation of this Act shall be entitled to select an allotment of Crown lands in any agricultural area, and hold the same under lease on the same terms and in the same manner as hereinbefore provided for selectors of land in an agricultural area, and the payment of one year's rent shall constitute such person the selector of such land, provided the quantity to be selected shall not exceed in extent the land of which he is so seised, and in no case shall the said land so selected exceed three hundred and twenty acres; provided that no person shall be entitled to become a selector under this section unless he shall apply for this purpose within twelve months from the date of this Act."

It was by virtue of this enactment (extended as to time by section 7 of the Act of 1865 hereinafter set out) that Strong became a selector, and obtained the lease which the suppliant Ettershank afterwards purchased.

Section XXXVI enacts as follows:—

"XXXVI. Every selector of an allotment as aforesaid, within one year after he becomes a selector, shall cultivate at least one acre out of every ten acres thereof, or shall erect thereon a habitable dwelling, or shall enclose such allotment wilh a substantial fence."

And the following clause is contained in Part VI of the Act, headed, "Trespasses and Penalties":—

"CXXVI. If any selector of an allotment in any agricultural area under this Act shall not within one year from the time of his having become the selector of the same, cultivate at least one acre out of every ten thereof, erect thereon a habitable dwelling, or enclose the said allotment with a substantial fence, he shall forfeit a penalty at the rate of five shillings for every acre comprised in such allotment; but no proceedings to recover such penalty may be taken, except by some person authorized in that behalf by the Board of Land and Works."

Section XI of this Act is as follows:—

"Notwithstanding any law or usage to the contrary, all Crown grants and leases which are issued after the commencement of this Act, shall bear date on the day when the persons named therein as grantees or lessees respectively first became entitled to such grants or leases, and shall be of the same force and validity as if they had been enrolled on the day on which the same bear date."

The 7th section of the Amending Land Act, 1865, provides that "former purchasers" entitled

to select under section 23 of the Act of 1862, and who had not done so within the twelve months mentioned in that Act, might exercise such selection within twelve months after the passing of the Amending Act, but

"subject to all the limitations, conditions, restrictions, and obligations attached by the said Act (1862) to such selection and purchase." * * * "Provided that the Board of Land and Works may from time to time make such regulations as may be thought necessary or expedient for the purpose of enforcing the conditions and obligations aforesaid, or of preventing the violation or evasion of any of the provisions of the Land Act, 1862."

The Land Act, 1869, contains the following clauses:—

"98. Whenever a penalty has been incurred by any person under the One hundred and twenty-sixth section of 'The Land Act, 1862," or the seventh section of the "Amending Land Act, 1865," it shall be lawful for the Governor to demand and receive the amount of such penalty in addition to the purchase money before issuing a Crown grant of any allotment in respect of which such penalty has accrued to such person or his assignee. Provided that no Crown grant of any such allotment shall be issued unless the person applying for such grant shall have proved to the satisfaction of the Board to be certified under its seal that the provisions of the thirty-sixth section of Act No. 145, or the seventh section of the 'Amending Land Act, 1865,' as the case may be, have been fully complied with in respect of such allotment, or in default of such certificate shall have paid a penalty at the rate of 5s. for every acre of such allotment.

"101. All notices heretofore published in the 'Government Gazette' purporting to declare that the Governor had revoked, forfeited, or declared void, any lease or licence issued under any of the Land Acts heretofore in force, or either of them, shall be received in all Courts of justice as conclusive evidence that the lease or licence was lawfully revoked, forfeited, or declared void, as the case may be."

The facts are these. On the 29th June, 1865, Strong, who was a "former purchaser" within the meaning of the 7th section of the Amending Act, 1865, and who availed himself of the extended time allowed by it, selected the allotment in question, containing about seventy-six acres, paid a year's rent in advance, and was put into possession. He failed to cultivate, build, or inclose within the year, as required by the 36th section of the Act of 1862. This omission was reported by the Crown Lands' Bailiff to the Board of Land and Works, and subsequently, with knowledge of this Report, the rents for the second and third years were received

from Strong by the proper Land Officers of the Crown, the last payment being on the 1st April, 1868.

No further rent was paid. On the 16th April, 1868, the following notice was published in the "Victoria Government Gazette":—

"Allotments forfeited for non-payment of rent, &c., under section 7 of the Amending Land Act, 1865. It is hereby notified that the leases of the several allotments specified in the schedule hereunto annexed have been by the Governor in Council declared forfeited for non-payment of rent, non-compliance with the provisions, and non-performance of covenants in the respective leases under the above section."

The schedule contained the allotment in question, and Strong's name as lessee.

In this state of things the suppliant, Ettershank, entered into a treaty for the purchase of the allotment from Strong, or from persons claiming under him; but before concluding an agreement, he had an interview with Mr. Grant, the President of the Board of Lands and Works. This took place in April 1872. The substance of what passed was, that Ettershank told Mr. Grant of his wish to purchase, if he could do so with safety, and asked if the Government would take the back rent and issue the lease. Mr. Grant desired time to make inquiries, and on a second interview told Ettershank that he found the land had been gazetted as forfeited some years ago, but there was nothing to prevent his taking the back rent and issuing the lease, and that he would do so. Ettershank on that assurance said he would purchase, and Mr. Grant gave instructions for the lease.

In July 1872 the lease was executed by the Governor and issued. It is dated, in conformity with section 11 of the Act 1862, on the 29th June, 1869, the day on which Strong became entitled, as selector, to have it.

The lease purports to be from the Queen to Strong. After reciting that, "under the 23rd and 24th sections of the Land Act, 1862, and the 7th section of the Amending Land Act, 1865, the lessee has become entitled to receive a lease of the land, and paid in advance one year's rent," it contains a demise of the land for the term of eight years, reserving a yearly payment of 2*s.* 6*d.* per acre; and a proviso of re-entry in case of non-payment of

rent, or failure to cultivate, build, or enclose within a year.

This lease having been issued, Ettershank completed his purchase, and on the 30th July, 1872, registered his title, and obtained a certificate of title under "The Transfer of Land Statute." This certificate states that Ettershank "is now the proprietor of a leasehold estate for eight years from the 29th July, 1865," in the piece of land, describing it, "being Crown allotment."

Ettershank has since been in possession of the allotment.

Soon after the lease had been issued, Mr. Grant ceased to be President of the Land Board, and was succeeded by Mr. Casey, who refused to receive the back rent when tendered by Ettershank, and disputed his title to the allotment and to a grant of the fee.

In his Petition in this suit the suppliant offers to pay the back rents and penalties for non-improvement, but submits he is not liable for the latter, which raises one of the questions in the cross Appeal.

The defence on the part of the Crown is that the lease to Strong, or the right to it, was forfeited—

(1.) By non-improvement within a year; and,

(2.) By non-payment of rent.

And, moreover, that by force of section 101 of "The Land Act, 1869," the notice published in the "Gazette" is conclusive evidence that the lease was lawfully forfeited.

It is further contended that the breaches of covenant above referred to are an answer to a suit for specific performance.

On the part of the suppliant it is answered that the Crown cannot now rely on these causes of forfeiture because—

(1.) The breach of the condition to improve was waived by the subsequent receipt of rent, and also by issuing the lease to Strong; and,

(2.) The non-payment of rent was waived by the lease issued to Strong; and if not, because a Court of Equity would relieve against a forfeiture on that ground.

It is further insisted that the certificate of title under "The Transfer of Land Act" is conclusive as to the suppliant's right to the lease.

The effect sought to be given to the notice in the

" Gazette " by the operation of section 101 of the Act of 1869 is also denied.

It will be convenient, in the first place, to consider this last point.

This section 101 applies only to notices "heretofore published." Its history appears to be this :—

By the 15th section of the Act of 1865, certain classes of persons were prohibited from becoming lessees or assignees of allotments of agricultural lands ; and it was provided that, if any person in violation of this prohibition became a lessee or assignee, the Governor in Council might "declare the lease to be forfeited ;" and upon publication of notice of such declaration in the Gazette, the term created by the lease should cease and determine, and the allotment might be resold or leased.

The Supreme Court of Victoria held that the operation of this section, and of the 26th section of "The Statute of Evidence, 1864," was to make the Gazette evidence only of the declaration of a forfeiture, but not that the right to declare such forfeiture had arisen (Macdowell *v.* Inglis, 6 W. W. & A, B. 16).

The Act of 1869 was passed soon after, and, it is said, in consequence of, this decision, and the effect of section 101, in all cases to which it applies, no doubt is to make notice in the Gazette conclusive evidence that the lease or license was lawfully forfeited.

It is contended for the suppliant that the section applies only to cases where power has been given to the Governor by previous legislative enactment to declare, of his own will, a forfeiture, as in the cases comprised in the above-mentioned section 15 of the Act of 1865. Their Lordships agree with this view. It is conceded that no power of this kind had been given with respect to leases like the present, and they think it ought not to be presumed, without plain words, that the legislature intended, by a retrospective law, to give to the Governor an arbitrary power to declare void existing leases, especially such as the present, where the lessees are, in fact, inchoate purchasers of the fee, who, when this Act passed, might have paid all, or nearly all, the instalments of the purchase money. The words of the section "any lease or license issued under any of the Land Acts" are no doubt large ; but they should be read

with reference to the subject matter, and the object of the legislation; and so reading them, their Lordships think they may be properly limited to the cases where a substantive power to declare a forfeiture had been previously given to the Governor.

Other sections of the Act of 1869 were referred to by the learned Counsel for the Crown with a view to show that the Legislature intended by this Act to give a large discretionary power to the Governor. But these when looked at furnish reasons for the limited construction of section 101. Section 20 (like section 15 of the Act of 1855) prohibits certain persons from becoming licensees, and, in case of a violation of the prohibition, enables the Governor to declare the license to be forfeited; and then, upon publication of notice in the "Gazette" the interest is to cease. Again, section 22 enables the Governor, on certain things being proved to his satisfaction, to revoke licenses and resume possession of the lands, providing for notice in the "Gazette" of such revocation.

It thus appears that in the cases embraced by these sections, which it is to be observed extend to licenses only, substantive powers to forfeit and revoke are expressly given to the Governor.

Then by section 100 it is provided, that all persons whose leases or licenses under that or former Acts are deemed liable to forfeiture, except for non-payment of rent or fees, should be allowed to show cause to the Minister against such forfeiture, and that their cases should be publicly heard.

From the manner, therefore, in which forfeitures are dealt with in the above clauses, it is unreasonable to presume that section 101 was intended to make notice in the "Gazette" evidence not only of the forfeiture, but of the right to forfeit, in the cases where no substantive power had been given to the Governor to declare a forfeiture, nor any provision made for enabling the lessees to show cause against the exercise of such a power.

It is stated in the judgment of the Supreme Court that it was conceded by the Attorney-General that this enactment did not confer any new power, but merely gave to the "Gazette" notice greater efficacy as evidence than it previously possessed. Their Lordships cannot in a question of construction rest upon this concession, nor did the Supreme

Court act upon it, for the Judges gave their own reasons for coming to the decision, in which their Lordships agree, that the section is inapplicable to the present case.

It was further argued that, in any view, the section could not affect a lease issued after the Act came into operation. But the construction which their Lordships have given to the clause renders it unnecessary to determine this point, or the question of the effect of the certificate of title obtained by Ettershank under the Transfer of Land Act.

The questions to be next considered are, whether the forfeitures have been waived.

It was contended for the Crown, in the first place, that these forfeitures made the lease absolutely void, and incapable of being affirmed by any act of waiver.

Their Lordships are unable to concur in that view. So far as the obligation to improve depends on the Statutes, it is nowhere enacted that the non-fulfilment of it shall avoid the lease. A penal sum is in such case to be paid, and the 98th section of the Act of 1869 which makes the payment of such penalty, when incurred, a condition precedent to a grant of the fee, is conclusive to show that the Legislature did not treat the breach of the obligation to improve as being, *ipso facto*, an avoidance of the lease. Then, so far as the obligations to improve and pay rent, and the liability to forfeiture, are governed by the lease, any breach of these obligations, in their Lordships' opinion, would render the lease voidable only, and not void. There can be no doubt that this would be the construction of the condition for re-entry in a lease from a private person, and they think the construction cannot be different in the case of a lease of this kind from the Crown. It was held by the Master of the Rolls to be clear that a forfeiture incurred by a lessee under such a condition of re-entry contained in a Crown lease was waived by the receipt of subsequent rent. (Bridges *v.* Longman, 24 Beavan 27.) It is to be observed that what the Statute directs to be inserted in the lease is a condition for re-entry, and not a condition making the lease void.

Assuming then the condition of re-entry made the lease voidable only, their Lordships cannot doubt that with regard to the failure to improve

within a year, this ground of forfeiture was waived by the subsequent receipt of rent. It appears that the proper land officer received the second and third year's rent, with full knowledge of the failure to improve, and their Lordships see no reason for not attributing to these acts the ordinary consequence of affirming the tenancy.

Then with regard to the forfeiture occasioned by the failure of Strong to pay the subsequent rent, it was contended that it was waived when the lease was executed and issued at Ettershank's instance in July 1872. It was answered for the Crown that inasmuch as the Statute requires that the lease, whenever issued, shall bear date on the day when the selector became entitled to it, and shall be of the same force as if enrolled on the day of its date, that not only must it be taken to speak from that date, but it must be assumed that it was then issued. It was also argued that the intention in issuing it was not to affirm an existing tenancy, but to give the selector the lease to which he was at one time entitled, so that he might avail himself of his rights (if any) under it, but without admitting that any such rights existed.

Their Lordships cannot concur in these views. They are of opinion that the fact of issuing the lease, under the circumstanees of the present case, operated as a waiver of previous forfeitures. Upon the assumption that the right of the selector had been determined by forfeiture, his interest would have been extinct, and the Crown could not have been required at his instance to execute a lease. When therefore, the Governor executed and the proper officer issued the document, it must be presumed that it was intended to waive any forfeitures, and to affirm an existing tenancy. Moreover, in the present case, the argument that it was meant to issue a lease simply for what it might be worth, can have no foundation; for it is not denied that Ettershank, on applying for the lease, was led to believe by the President of the Land Board that it would be issued for an existing interest, which he might safely purchase.

It was further contended for the suppliant that, if there had been no waiver, equity would relieve against the forfeiture for non-payment of rent; whilst, on the other hand, it was insisted for the

Crown, that these interests, being in Crown lands, and governed by statutory regulations, the ordinary relief afforded by the Court could not be granted. As this question arises in the other appeals, as well as in the present, it will be convenient to consider it in this place.

The argument for the Crown was that, in giving relief, the Court proceeds on the presumption that the condition of forfeiture is intended merely as security for payment of the rent; and it was said that this presumption cannot be made in the case of conditions imposed by a statute. This would be so, where a statute, either expressly or by necessary implication, annexes a condition to an estate, making it determinable on non-payment of rent, without more. But that is not the present case. What the Act of 1862 authorises and prescribes in the case of a selector is, that he shall receive "a lease," and by section 22 such lease is to contain "the usual covenant for payment of rent, and a condition for re-entry on non-payment thereof." When, therefore, the Statute authorises a lease with these usual and well understood provisions, it is reasonable to suppose that the Legislature intended that it should operate as a contract of the like nature made between private persons. The Statute does not direct that the lease should contain a condition making the lease void on non-payment; and there is nothing to indicate that it meant the condition of re-entry to have a more stringent effect, or to be regarded otherwise than the like condition in ordinary leases.

The principal case cited by the Counsel for the Crown (Keating *v.* Sparrow, 1 Ball and Beattie, Irish Ch., Rep. 367) is not opposed to this view. In that case a tenant for lives with power to renew a life within six months, having allowed the time to expire, applied for relief against this lapse. The Statute of the 19th and 20th Geo. 3rd, c. 30, which directed Courts of Equity in certain cases to grant such relief, contained this important provision:—

"Unless it be proved to the satisfaction of the Court that the landlords entitled to receive fines had demanded such fines, and the same had been refused or neglected to be paid within a reasonable time after such demand."

The fine having been demanded and not paid within a reasonable time, Lord Manners held he had no power to relieve the tenant. His decision could scarcely have been otherwise. The statute which gave a right to relief, beyond that ordinarily granted by the Court, in favour of tenants in some cases, restrained the power of the Court in favour of landlords in others. Lord Manners said :—

"After a demand by the landlord, the provisions of the statute apply, it then ceases to be merely a contract between the parties, and comes within the opinion of Lord Macclesfield, that relief cannot be given against the provisions of the law."

To have given relief in the case cited would have been opposed to the clear provisions and intention of the statute, and Lord Manners consequently held that any equitable authority that might have existed independently of the Act could not be exercised. That case bears no analogy to the present, where the statute provides for a contract of lease, with, as before observed, usual and well understood covenants and conditions.

Another case of *re* Braine, L.R., 18, Eq. cases, 389, was cited on the part of the Crown, for the sake of some observations of Vice-Chancellor Malins. In that case the learned Vice-Chancellor said he was very much inclined to decide the question then before him (the forfeiture of a gale in the forest of Deane) upon the ground referred to in Keating *v.* Sparrow, viz., that the rights were statutable rights, and that if properly exercised the Court as against the Crown could not give any relief. This dictum of the learned Vice-Chancellor was not necessary to the determination of the case, which he decided on other grounds, and was based on his construction of the Forest of Deane Acts and the grants under them. These Acts, although bearing some resemblance to the Colonial Land Acts, relate to mining grants and special customs, and are not so analogous to the enactments in question that the observations of the Vice-Chancellor would govern the question now under consideration, even if they had formed the ground of the decision.

The contention of the Crown, that a Decree for specific performance ought not to be granted when breaches of the conditions of the contract have been

proved, cannot, in their Lordships' view, prevail, when it has been established to the satisfaction of the Court, as has been done in this case, that such breaches have been waived. The waiver of the forfeiture recognizes and affirms the tenancy, and, as a consequence, all the interests springing from it, one of which, in the present case, is a right to a grant of the fee. There can be no ground for holding that the contract is affirmed otherwise than in its entirety.

It is to be observed also, with regard to the forfeiture by non-payment of rent, that assuming it was not waived by the subsequent issuing of the lease, yet if, as their Lordships think, a Court of Equity would have relieved against it, the mere non-payment, the lessee continuing in possession, would not prevent a Decree, upon proper terms, for specific performance.

An objection was taken to the petition on the ground that the claim was not within "The Crown Remedies and Liability Statute, 1865," the 27th section of which enacts that nothing shall be deemed a claim within the meaning of the Act unless the same shall be founded on, and arise out of, some contract entered into on behalf of Her Majesty. It was said that the right to the grant of the fee was not given by contract but by Statute. It is true that the right is created by the Statute, but it is conferred upon the holder of a lease, and accrues to him by reason of such lease, and only upon payment of the full rent agreed to be paid under it. It is a statutory right annexed to the lease, and an implied term of the contract, and therefore may be properly said to be founded on and to arise out of it.

For the above reasons their Lordships think the Appeal on the part of the Crown fails.

In the cross Appeal the suppliant complains of that part of the Decree which directs him to pay the penalty of 5*s*. per acre for non-improvement, and interest on the tendered rent.

The right of the Crown to insist on the penalty, and of the Court to impose payment of it as a condition of their Decree, is not, in consequence of the obscure language of the Statutes, free from difficulty.

The contention on the part of the suppliant is that the persons entitled to exercise rights of selection

under section 7 of the Amending Act of 1865 are not liable to the penalty imposed by section 126 of the Act of 1862. Their Lordships cannot accede to this view. The persons so empowered are those only who had already become entitled to select under the 23rd and 24th sections of the Act of 1862, but who had failed to exercise such rights within the time appointed by that Act; and the object of the 7th section was to give an extended time for making the selection. This indulgence, as might be expected, was given " subject to all the limitations, conditions, restrictions, and obligations attached by the Act of 1862 to such selection and purchase." It was not disputed that the words " conditions and obligations " applied to the obligation to improve contained in section 36; but it was said that they did not comprehend the payment of the penalty. It is plain, however, that the enactment imposing the penalty imports an obligation to pay it, which is as compulsory as that requiring the land to be improved, and both, in their Lordships' view, may properly be held to fall within the word " obligations." Besides, it is not probable that the Legislature, in granting an indulgence to dilatory selectors, intended to place them in a better position as regards these penalties than those who duly came in under the former Act. Strong reasons are required before an interpretation having this effect can be adopted.

What was most relied on by the suppliant was the proviso in the 7th section to the effect that the Board of Land and Works might make regulations for the purpose of enforcing the conditions and obligations or preventing the violation or evasion of the provisions of the Act of 1862. It was suggested that the penalty, being a personal obligation only, had been found insufficient for these purposes, and that the new regulations were intended to be in lieu of it. But the answer to this suggestion is, that the power to make these regulations is in no way inconsistent with an intention to keep alive the enactment as to the penalty, and to provide, by means of regulations, cumulative remedies. Although numerous sections of the Act of 1862 are expressly repealed by the Act of 1865, the penalty clause is not. Section 36 (the improvement clause) is so repealed; but it is to be observed that this and other repealed clauses are, in a proviso to section 6 of the

Act of 1865, expressly declared to remain in force as to lands to be selected under the 7th section, which indicates a clear intention on the part of the Legislature that selectors under that clause should be subject to the terms contained in the Act of 1862.

It appears that the Supreme Court had expressed an opinion in a former case, that the penalties did not attach upon persons becoming selectors under this Section 7. (Kettle *v.* the Queen, 3 W. W. and A, B. 141.) The Court is reported to have said that although not repealed "the Penal Clause was allowed to fall through." The opinion thus expressed was not necessary to the determination of the questions then before the Court; and whatever weight may be due to it is overbalanced by the decisions of the same Court in the suits now under Appeal, in all of which the selectors under Section 7 have been declared to be liable to the payment of the penalties.

The remaining complaint in the cross Appeal was against the direction to pay interest on the over-due rent. The suppliant contended that having tendered the rent he was not liable to interest. This might be so in the case of ordinary rent; but the annual payments are in substance (as indeed was contended for the suppliant upon other parts of the case) instalments of the purchase-money for the fee; and inasmuch as the suppliant has had possession of the land, and has not paid the money into Court, their Lordships see no reason for disturbing the Decree which directs interest to be paid.

For these reasons their Lordships think the suppliant's Appeal also fails.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss both Appeals, and to affirm the Judgment appealed from.

There will be no order as to costs.

The Attorney-General *v.* Glass.

Glass *v.* The Attorney-General.

In this case, Harpham, the holder of a certificate under the Land Act, 1862, on the 20th December, 1865, exercised the right of selection under Section 7 of the Act of 1865. He paid the rent of 2*s.* 6*d.* per acre for the first year in advance, and also the second and third year's rent; but did not improve the allotment within a year as required by the 36th Section of the Act of 1862.

A lease was granted to Harpham, dated the 20th December, 1865, containing terms and conditions similar to those in the lease to Ettershank; but it was not issued until the 20th of August, 1869. On the 30th of that month the suppliant, Glass, obtained a transfer from Harpham, and on the same day registered it, and obtained a certificate of title. Previously, viz., on the 26th of the same month, the sum of 1*l.* 5*s.* had been paid to, and accepted by, the proper officer on account of rent then due.

On the 28th of January, 1870, a notice was published in the "Gazette," notifying that the leases of several allotments, including Harpman's, had been declared forfeited by the Governor in Council, for non-payment of rent and non-performance of covenants.

This case differs from Ettershank's only in these respects:—(1.) That the lease to Harpham was issued before the notice of forfeiture was published in the "Gazette;" and, (2.) That if Section 101 of the Act of 1869 applies, the notice, being published on the 28th of January, 1870, which was after the date of the passing of the Act (29th of December, 1869), but before the time appointed for its coming into operation (1st of February, 1870), a question would arise whether it was within that Section as a notice "*heretofore* published."

These differences, however, and the determination of this last question, have become immaterial, in consequence of their Lordships' decision in the former case that section 101 is not applicable to leases like the present.

It was, indeed, suggested for the Crown in this case that the notice in the "Gazette," if not conclusive under the Statute, was at least evidence that the Governor had declared his election to avoid

the lease, and that it thereby became determined. But the condition in this case gave a right of re-entry only, and it is by no means to be assumed that a mere notice of this kind, without some further act, would be sufficient, independently of the Statute, to put an end to the interest. The necessity for resorting, for this purpose, to the old procedure by Inquisition taken and office found, or for actual re-entry, was abolished in England in the case of the Crown by the Queen's Remembrancer Act, 22nd and 23rd Vict., cap. 21, sec. 25; but it does not appear that a similar Statute has been passed in the Colony. It is unnecessary, however, to determine whether the above procedure, or a re-entry, would be required in this case, or what would amount to a re-entry; because as to the forfeiture accruing from non-improvement, their Lordships must hold, in accordance with their former decision, that it was waived by receipt of rent before the notice was published; and as to the non-payment of subsequent rent, the mere publication of such a notice, whilst the lessee was allowed to remain in possession, would not, in their opinion, preclude a Court of Equity from giving him relief, if he was otherwise entitled to it.

These being the only causes of forfeiture relied on by the Crown, and both being governed by the opinion of their Lordships expressed in the former case, they must hold that the Appeal on the part of the Crown in this case has not been supported.

In the cross Appeal the points raised with respect to the liability of the suppliant to penalties and to interest on the tendered rent are the same as in Ettershank's case, and must be decided in the same way.

Both Appeals in this suit, therefore, fail; and their Lordships will humbly advise Her Majesty that they be dismissed, and the Judgment of the Supreme Court affirmed. There will be no order as to costs.

James Winter *v.* The Attorney-General.

William Irving Winter *v.* Same.

McMillan *v.* Same.

In these three suits the Supreme Court, reversing the judgment of Mr. Justice Molesworth, dismissed the petitions with costs.

The question in each Appeal turns upon the construction of the 98th section of the Land Act, 1869.

The Appellants established, to the satisfaction of the Courts below, and their finding on the facts is not now disputed by the Crown, that the obligations under their leases, including the obligation to improve imposed by section 36 of the Land Act, 1869, had been in all respects performed. But the Supreme Court has held, that by the operation of the 98th section of the Act of 1869, the Appellants are not entitled to grants in fee of their allotments until they shall have obtained a certificate from the Board of Land and Works that the provisions of section 36 had been complied with, or in default of such certificate, shall have paid the penalty of 5*s.* per acre.

This 98th clause is not merely ambiguous, but, according to the literal meaning of its language, insensible. There is no doubt, however, to what the first and substantive part of the clause applies. It clearly applies only to cases where a penalty has been incurred. So far the clause is intelligible; it enacts that the payment of the penalty, which was a personal obligation only under the former Act, might be insisted on from the selector or his assignee as a condition of obtaining the grant. The difficulty arises in the proviso. The Supreme Court, in construing this proviso, has severed it from the previous part of the section, and regarded it as an independent enactment, rejecting the words of reference. So treating the proviso, the Court held that it applies to all allotments the selectors of which might become liable to penalties for the breach of the 36th section, whether such penalties have been incurred or not. If the Judges are right in thus holding, the view they take of the scope of the Act so construed would be correct, viz., that the Legislature has conferred on the Board of Land and Works the power of deciding whether the obligation to improve has been fulfilled; and that the applicant

must either obtain the certificate of the Board to that effect or pay the penalties before he is entitled to a grant.

The conclusion that this was the purpose of the Act ought not, however, to be come to, unless the language of the section clearly expresses it, for the enactment so construed would materially affect existing contracts, by transferring the determination of the liability of the lessees to the payment of heavy penalties from the Courts of Law to a Board of Executive Officers.

The opposite interpretation is, that the clause applies, wholly and solely, to cases where a penalty has been incurred, and that the matter introduced in the form of a proviso should be regarded as a proviso, and not as an independent clause.

It is not disputed that, whatever construction may be given to this obscure clause, some violence must be done to its language. Their Lordships are disposed to accept the interpretation put on it by the Appellants as being more consistent with the frame of the clause, and, on the whole, with its language, than the other view. Reading the clause as a whole, its meaning would appear to be, that whenever a penalty has been incurred, the Governor may demand it before issuing a grant, but it is not made obligatory on him to do so; then the proviso, which is imperative, may be taken to mean that no grant shall be issued, in a case where a penalty has been incurred, unless the applicant has obtained the certificate of the Board that the provisions referred to have been, at some previous time, complied with, or, failing that, has paid the penalty. No doubt this interpretation does not give to the words "fully complied with" their entire and natural meaning, as it assumes that the improvement had not been made within the prescribed time, and that the provisions in that respect had not been complied with; but this modification does less violence to the clause and its language than would be done by wholly changing its framework, and striking out the words of reference in the proviso.

On the whole, therefore, having regard to the structure of the clause, and to the plain words of relation to the substantive part which are found in the proviso, their Lordships agree with Mr. Justice

Molesworth's construction, and consequently with his opinion, that no penalties having been incurred in the case of either of these Appellants, their respective claims to receive grants are unaffected by the clause in question.

Their Lordships will, therefore, humbly advise Her Majesty that the judgments of the Supreme Court in these three suits should be reversed, and the Decrees of Mr. Justice Molesworth affirmed, and that the several suppliants should have their costs of their respective Appeals to the Supreme Court, and to Her Majesty.

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