*Reasons for the Report of the Lords of the Judicial Committee of the Privy Council on the Petition for special leave to appeal of Moses* alias *Moss* v. *Parker and others, from the Supreme Court of Tasmania; delivered 5th March* 1896.

---

**Present:**

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

This is an application made to Her Majesty in Council to allow an appeal from an order passed by the Supreme Court of Tasmania in its "Claims to grants of Land Jurisdiction." The arguments addressed to their Lordships have touched very little on the injury done to the Petitioner by the order. They have been rested almost entirely on the contention that the Petitioner has a right of appeal, and that his right has been denied by the Court. As this contention raises a question of importance their Lordships proceed to deal with the application on that ground.

By the constitution of Tasmania the Supreme Court stands in the ordinary position of a Colonial Court of Justice. Subject to certain restrictions, every suitor under its general jurisdiction may appeal to Her Majesty in Council. Or if prevented from appealing as of right, any

88946. 50.—3/96 [11.] A

suitor may ask for special leave to appeal by virtue of Her Majesty's prerogative. In this case however the Court was not acting in its general jurisdiction, but in one of a very special kind.

Previously to the year 1858 disputes respecting claims to land vested in the Crown and not the subject of any prior grant, were referred to certain Commissioners, whose duty it was to report to the Governor who was "in "equity and good conscience" entitled to a grant. They were expressly relieved from all rules of law, and all technicalities and legal forms. The Governor was not bound by such reports, but made or withheld grants as he thought right. It is obvious that his decision could not possibly be open to a judicial appeal.

In the year 1858 the Tasmanian Legislature thought it right to refer questions of this class to the Supreme Court, and the powers of jurisdiction vested in the Commissioners were transferred accordingly by Act No. 10 of that year. It was enacted by Section 5 that the decision and report of the Court should be binding final and conclusive between the parties concerned. And the Governor also is to be bound to act in accordance with the report. Section 8 runs as follows :—

"In examining into and reporting upon all "such applications and matters as aforesaid, "the said Court and Clerk of the Court shall be "guided by equity and good conscience only, "and by the best evidence that can or may be "procured, although not such as would be re-"quired or be admissible in ordinary cases ; nor "shall the said Court or Clerk of the Court be "bound by the strict rules of Law or Equity in "any case, or by any technicalities or legal forms "whatever."

The present petitioner applied for a grant of land, and certain persons entered caveats,

alleging that the land was already granted to some one under whom they claimed. If so, the Court could not deal with the case. The question turned on the construction of a grant; whether it was made for life or in fee-simple. The Court held that it was a fee-simple grant, which, so far as their duties went, put an end to the case. The petitioner then applied for leave to appeal; and the Court held that they were precluded from granting such leave by section 5 of the Act of 1858. In this opinion they were clearly right.

This application however is made to the discretion of Her Majesty in Council; and the refusal of a claim to appeal as of right is only used, as it is often quite fairly used, to influence the discretion of the Crown in the petitioner's favour. So we are led to the further question whether the subject-matter is one to which the Prerogative of granting appeals from Courts of Justice can apply. The Supreme Court has rightly observed that Her Majesty's Prerogative is not taken away by the Act of 1858; but intimates a doubt whether it ever came into existence.

Their Lordships think that this doubt is well-founded. They cannot look upon the decision of the Supreme Court as a judicial decision admitting of appeal. The Court has been substituted for the Commissioners to report to the Governor. The difference is that their report is to be binding on him. Probably it was thought that the status and training of the Judges made them the most proper depositaries of that power. But that does not make their action a judicial action in the sense that it can be tested and altered by appeal. It is no more judicial than was the action of the Commissioners and the Governor. The Court is to be guided by equity and good conscience and the best evidence. So were

the Commissioners. So every public officer ought to be. But they are expressly exonerated from all rules of Law and Equity, and all legal forms. How then can the propriety of their decision be tested on appeal? What are the canons by which this Board is to be guided in advising Her Majesty whether the Supreme Court is right or wrong? It seems almost impossible that decisions can be varied except by reference to some rule; whereas the Court making them is free from rules. If appeals were allowed, the certain result would be to establish some system of rules; and that is the very thing from which the Tasmanian legislature has desired to leave the Supreme Court free and unfettered in each case. If it were clear that appeals ought to be allowed, such difficulties would doubtless be met somehow. But there are strong arguments to show that the matter is not of an appealable nature.

In the case of *Théberge* v. *Landry* (2 App. Cases, p. 109) this Board had to consider the effect of a Quebec statute which transferred the decision of controverted elections to the Legislative Assembly, from the Assembly itself to a Court of Justice. The statute provided that the judgment of the Court should not be susceptible of appeal. Though that provision would destroy the right of a suitor to an appeal, it did not taken by itself destroy the Prerogative of the Crown to allow one. But this Board held that they must have regard to the special nature of the subject; to the circumstance that election disputes were not mere ordinary civil rights; and that the statute was creating a new and unknown jurisdiction for the purpose of vesting in a particular Court the very peculiar jurisdiction which up to that time had existed in the Assembly. And they came to the conclusion that the intention of the Legislature was to create a tribunal in a manner which should make

its decision final to all purposes, and should not annex to it the incident of being reviewed by the Crown under its Prerogative.

The reasons there given apply closely to the present case. Applications for land yet ungranted by the Crown are certainly not ordinary civil rights. They are created and regulated by the law of each colony, and in this colony were, up to 1858, carefully kept out of the province of legal claims. In 1858 they were transferred to the Court with an express provision that its decision should be final. So far the case resembles the Quebec election case. But it has also the very important additional incident, that the Legislature ordered the Court to be guided by the same principles as were laid down for the Commissioners, and expressly exonerated them from all rules of law or practice. It is clear to their Lordships that these affairs have been placed in the hands of the Judges, as persons from whom the best opinion may be obtained, and not as a Court administering justice between litigants; and they hold that such functions do not attract the Prerogative of the Crown to grant appeals.

In *Théberge* v. *Landry* the Board pointed out that the case between the parties was one in which they would not think of admitting an appeal if the power existed. Their Lordships make the same remark here. Indeed if we were to cast about for illustrations of the absurdity of appeals under such conditions as are created by the Act of 1858, no more glaring one could be found than the present case. For the petitioner's complaint is that the Judges below have not sufficiently availed themselves of their emancipation from rules of law equity and practice, but on the contrary have suffered themselves to be guided by both law and common sense, first, in refusing to look at evidence tendered for the

purpose of contradicting the plain words of a formal instrument, and secondly in giving to that instrument its plain effect in accordance with English law. On an appeal Her Majesty in Council would be asked to alter all that, and to decide in some other way on some principles not yet explained.

Their Lordships have humbly advised Her Majesty to dismiss this petition.