HIGH COURT OF AUSTRALIA

Goodwin

Vs.

Phillips

(Griffith C.J., Barton, O'Connor and Isaacs JJ.)

3rd September 1908

Griffith C.J.

The Crown Lands Act 1884, as has been often pointed out, dealt with the whole subject of Crown lands in the Colony. It established a number of new tenures, including several forms of lease, and the conditions attached to these leases varied considerably, being in each case such as were prescribed by the Act. Sec. 93 contained a provision that every lessee of Crown lands desiring to ringbark trees upon his leasehold land should obtain a permit to do so from the Land Board, giving particulars of the boundaries and area of the land he proposed to ringbark, and provided further that the Land Board might in their discretion refuse or grant permission to ringbark accordingly. That was one of the many conditions of tenure provided by the Act, and it was attached to all leases, except, possibly, scrub leases, which were provided for in sec. 87, since repealed. This particular condition had a sanction in the latter part of the section, which provided that any person who should ringbark without the required permission should be liable to a penalty of not less than one shilling nor more than ten shillings for each tree ringbarked, and for a second or subsequent offence to a like penalty and the forfeiture of his lease.

The present respondent was prosecuted and convicted for ringbarking trees without the permission of the Local Land Board, he being the holder of what is called an improvement lease. An improvement lease was a new tenure introduced by the *Crown Lands Act 1895* (58 Vict. No. 18), sec. 26, which provided that the Governor might under it grant leases of Crown lands which by reason of inferior quality, heavy timber, scrub, noxious animals, undergrowth, or other cause, were not suitable for settlement until improved, and could only be rendered suitable by the expenditure of large sums in improvement. In a case of that sort the main purpose of the lease would be not the preservation of the timber, provided for by sec. 93 of the Act of 1884, but the destruction of timber, and therefore, there might easily be an inconsistency in a particular case between the provisions of the two sections, or at any rate an inconsistency between the general requirement of the protection of timber and the purpose of the new form of lease, which was the destruction of timber. The Act 58 Vict. No. 18 was by sec. 1 to be read with the *Crown Lands Act of 1884* and the intermediate Acts, and to "form part of the said Acts and each and every of them, to the extent to which and so far as the provisions of any of the said Acts are unrepealed." The effect of that provision is this: so far as possible the Acts are to be read together and as forming one document, and so far as there is anything in a later Act inconsistent with the provisions of the earlier Acts the later Act must be read as a proviso or exception to the former, if possible, but if the provisions are quite inconsistent the later must necessarily operate as a repeal of the earlier. As I pointed out in the case of *Mitchell v. Scales*[1], a law may be repealed by necessary implication. I there said:—"I think that the cases of Michell v. Brown21 El. & E., 267; 28 L.J.M.C., 53.; Youle v. Mappin330 L.J.M.C., 234, at p. 237.;

and Fortescue v. Vestry of St. Matthew, Bethnal Green4(1891) 2 Q.B., 170., establish this proposition, that when by a Statute the elements of an offence are re-stated, and a different punishment is indicated for it, that is a repeal by implication of the old law." That proposition is only an instance of a more general rule, that is, that where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.

In the Act of 1895 the legislature made special provision with regard to improvement leases, and provided in sub-sec. iv. of sec. 26, that "the lease may contain such covenants and provisions as to the Governor may seem expedient according to the circumstances of each case, and all such covenants and provisions shall be notified in the Gazette and in a local newspaper before the lease is offered for sale or tenders called for. The lease shall contain covenants and provisions for the improvement of the land leased and for the expenditure of money thereon, for the payment of rent, and for the determination of the lease upon any breach by the lessee of the covenants and provisions thereof." It was faintly suggested, but I do not think seriously argued, that any covenants or provisions which the Governor could direct to be inserted in a lease must necessarily be such as were consistent with the provisions of the Act of 1884. But in respect of the provisions against ringbarking, the Act of 1884 was altogether inconsistent with the object of the legislature in providing for the case of lands to be let upon improvement lease conditions, that is to say, lands which by reason of heavy timber or other cause are unfitted for settlement until improved. I think that sec. 26 must be read as authorizing the Governor to insert in any lease any directions he may think fit with respect to the preservation or destruction of timber, including ringbarking, and the provisions so inserted become the law *quoad* that lease, just as much as if they had been expressly enumerated in the Act itself. If the provisions of the lease having that effect are found to be inconsistent with the provisions of the earlier Acts, the result is that the lease must be read as an exception from the earlier Acts as to that particular piece of land. There can be no doubt that that was the intention of the legislature. On the other hand, the lease may contain nothing inconsistent with the Act of 1884. If so, that Act operates upon it to its fullest extent. Or it may operate inconsistently with the lease only in some one or more particulars. If so, effect can be given to it accordingly. In each case the question is what are the obligations of the lessee under the particular improvement lease, and in the present case the question is whether the obligations contained in the lease are consistent with the obligations that would be imposed by sec. 93 of the Act of 1884 if it were applicable.

The lease was granted in pursuance of a notification in the *Gazette* setting out the conditions. The second condition was that "the lessee shall carefully preserve clumps of timber for shade purposes of not less than 60 acres in extent at suitable intervals on the area the total area of such clumps to be not less than 685 acres and shall also carefully preserve all trees of four inches or over in diameter measured at three feet from the ground which are useful or likely to be useful for fencing or building purposes or for railway sleepers subject to the provision that the lessee may cut and use any timber for fencing or other improvements within the leased area. Subject to the above exceptions the lessee may at his own option ringbark and destroy all trees on the area." This lease therefore made quite a different provision from that contained in sec. 93 of the Act of 1884. It required the lessee to preserve certain trees according to their quality—which is a matter of opinion in many cases—and

to the likelihood of their being useful for certain purposes, and with that exception authorized him to ringbark the rest of the trees as he pleased. Under that lease, if he had gone to the Local Land Board and asked for permission to ringbark trees which he was forbidden by the lease to ringbark, the Board would have been bound to refuse permission, but he was certainly not bound to ask the Board for permission to ringbark trees which he had permission to ringbark by the lease. The application to the Board, therefore, from either point of view would have been futile. That alone seems to me to show that the terms of this lease were quite inconsistent with the continuance of the obligations that would otherwise have been imposed upon the lessee by sec. 93. Again, the consequences of a breach were provided for under the Act of 1884. The consequence of ringbarking without lawful permission was a fine of not less than one shilling or more than ten shillings per tree, and for a second offence a similar fine and forfeiture of the lease. In the lease, however, it was provided, by condition 10 that the Minister for Lands should have the power to charge the lessee any sum not exceeding £25 as a fine for any breach of the conditions which he might consider not sufficiently grave to warrant forfeiture. It was also provided by condition 19 that any question of fine or forfeiture for breach of conditions might be referred by the Minister to the Local Land Board, whose decision after investigation in open Court should be final unless appealed from in the prescribed manner. So that not only was the obligation itself different, but the consequences of breach of the obligation were different. In the one case it was a fine imposed by justices, in the other a fine imposed by the Minister. In the one case there might be a forfeiture upon a second conviction, in the other case upon the first conviction at the option of the Minister. In the first case the tribunal appointed was the justices in a Court of Petty Sessions (subject to review in the manner prescribed by law) who had to decide merely the question of fact whether permission had been granted. In the second case, under the lease, the question might be referred to the Land Board, from which an appeal would lie to the Land Appeal Court, and from that to the Supreme Court, and from that to other tribunals. It seems to me, therefore, that the scheme of the lease for the destruction of timber is entirely inconsistent with the condition as to ringbarking in sec. 93 of the Act of 1884, and, therefore, that by necessary implication this lease is excepted from the operation of that section.

For these reasons I am of opinion that the decision of the Supreme Court was right, and that the appeal should be dismissed.

Barton J.

Before coming to the conclusion that there is a repeal by implication "The Court must," to use the words of *Hardcastle* in his work on the Interpretation of Statutes (*Craies on Statute Law*, 4th ed., p. 303) "be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together, before they can from the language of the later imply the repeal of an express prior enactment, i.e., the repeal must, if not express, flow from necessary implication." If, therefore, there is fairly open on the words of the later Act, a construction by adopting which the earlier Act may be saved from repeal, that construction is to be adopted. And as has been already pointed out by the learned Chief Justice, it is easy in this case to construe the second Act not as working a repeal, but as enabling the Governor to make exceptions from the obligations imposed by the earlier Act, by means of terms and conditions imposed upon the lessee. If the conditions are irreconcilable with the prior enactment, then to that extent the two cannot stand together. But as this lease is an exercise of a power, then to the extent of its exercise the later Act may be read as authorizing an exception to the earlier Act. That seems to me the reason of the matter, and seems also to be in accordance with the recognized canons of construction.

For these reasons I agree with the learned Chief Justice in the judgment which he has just delivered.

O'Connor J. read the following judgment:—

O'Connor J

The respondent was summarily convicted upon an information under sec. 93 of the *Crown Lands Act 1884* charging that "he, being the holder of a certain improvement lease, did, without obtaining permission to do so from the Local Land Board, unlawfully cause to be ringbarked on the said improvement lease certain trees, &c., contrary to the Act," &c. It was clear on the evidence that the respondent had ringbarked the trees, and it was not denied that he had done so without obtaining permission from the Local Land Board. His defence was that the terms and conditions of his holding under sec. 26 of the *Crown Lands Act 1895* removed his lease from the operation of sec. 93. The Supreme Court upheld that defence, and this Court is called upon to decide whether they were right in so doing.

The Act of 1884 provided for several kinds of leases. In those for pastoral purposes, involving in most cases the improvement of the grazing capabilities of the land, ringbarking came directly under the control of the Local Land Boards by the operation of sec. 93. In scrub leases under secs. 86, 87, and 88, the only other kind of lease in which ringbarking might be necessary for the profitable occupation of the land, the Government were empowered to insert conditions defined by regulations as to clearing and destruction of scrub. Ringbarking might no doubt be dealt with in these conditions. But the conditions were to be carried out at the time and in the manner prescribed by the Local Land Board. Thus in those cases also ringbarking came ultimately under the control of the Local Land Boards.

It appeared therefore from the various provisions that the policy of the Act of 1884 was to place all ringbarking on leased lands of the Crown under the control of the Local Land Boards. In pursuance of this policy sec. 93, a modification of the *Crown Lands Ringbarking Act 1881*, was enacted, and its main purpose is, no doubt, that set out in the first portion, which directs any lessee who wishes to ringbark trees on his lease to make application in the specified form to the Local Land Board for permission. The Board may inquire into the application, and may refuse it or grant it with or without conditions. It is to enforce obedience to that direction, and thus make the control of the Land Board effective, that the offence with which the respondent is now charged was created.

Eleven years after the enactment of that Statute a new kind of lease, described as an improvement lease, was authorized by sec. 26 of the Act of 1895. The opening words of the section at once define its nature and differentiate it from leases under the earlier Acts. "The Governor may" (I leave out the words added in 1903), "under this section, grant leases of Crown lands, which, by reason of inferior quality, heavy timber, scrub, noxious animals, undergrowth, marshes, swamps, or other similar cause, are not suitable for settlement until improved, and can only be rendered suitable by the expenditure of large sums in the improvement thereof." Then follow provisions of which sub-sec. (iv.) is the only one material:—"The lease may contain such covenants and provisions as to the Governor may seem expedient according to the circumstances in each case, and all such covenants and provisions shall be notified in the Gazette and in a local newspaper before the lease is offered for sale or tenders called for. The lease shall contain covenants and provisions for the improvement of the land leased and for the expenditure of money thereon, for the payment of rent, and for the determination of the lease upon any breach by the lessee of the covenants and provisions thereof."

It was not, I think, seriously disputed that the sub-section conferred ample power on the Government to insert in the lease conditions dealing completely with the ringbarking of the area.

Indeed, the conditions of the lease itself, all of which are in my opinion valid under the Act, very well illustrate the scope of the sub-section. By the second condition the lessee covenants to preserve certain clumps of timber for shade purposes and also to "carefully preserve" all trees of a certain measurement "which are useful or likely to be useful for fencing or building purposes or for railway sleepers." The last words of the condition are as follow:—"Subject to the above exceptions the lessee may at his own option ringbark and destroy all trees on the area." The 23rd condition renders the lease liable to forfeiture for failure on the part of the lessee to comply with any of the conditions, provisions, or covenants, and condition 10 empowers the Minister for Lands "to charge the lessee any sum not exceeding £25 as a fine for any breach of the foregoing conditions which he may not consider sufficiently grave to warrant forfeiture." By the 19th condition, following the terms of sec. 20 of the Act of 1884, any question of fine or forfeiture arising from a breach of the conditions may be referred by the Minister to the Local Land Board, and the decision of the Board "after due investigation in open Court shall be final unless appealed from in the manner prescribed in the Crown Lands Act 1889."

Sec. 26 may be taken to embody potentially all these provisions, and when the conditions of the lease deal with ringbarking, the subject matter of ringbarking is taken out of the Local Land Board's control and arranged by contract between the parties. The lessee thus knows before he undertakes the liabilities of the lease exactly what his rights of ringbarking will be instead of being obliged, as he is in regard to ordinary pastoral holdings, to bind himself to a lease without any certainty as to the conditions or limitations which the Local Land Board may think fit to impose in ringbarking on the area.

The first section of the Act of 1895 directs that the Act shall be read with and form part of the other Acts then in force relating to Crown lands, including the Act of 1884, and it is the duty of the Court to read the Acts so that each section shall as far as possible have its full effect. The word "lease" in sec. 93 is undoubtedly wide enough to include any lease of Crown lands, but it is clear that it cannot be applied to an improvement lease such as this without manifest contradiction and inconsistency. Sec. 93 cannot be applied except in cases where the lessee is free to ask and the Local Land Board to grant permission to ringbark with or without conditions. But the Local Land Board could give no permission to the improvement lessee to ringbark in contravention of the conditions of his lease, and if they did, the permission would be no justification for a breach by the lessee of those conditions. It would seem to follow that the improvement lessee cannot be liable for ringbarking without the permission which the Local Land Board have no power to grant. It is clear, therefore, that the provisions of sec. 93 are not applicable to an improvement lease containing these conditions.

The conflict between the two sections is one of the kind to which *Sir George Jessel* M.R., refers in *Taylor v. Oldham Corporation*[5]. Where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply. It has been contended that under this rule all improvement leases are excepted from the operation of sec. 93. If sec. 26 of the Act of 1895 had made it imperative in the Government to insert conditions in all improvement leases similar to those in the lease under consideration, there would be strong ground for contending that the new method of dealing with the whole subject of ringbarking in the new tenure, providing a new control under a new scheme complete in itself, with its conditions, its tribunal for determining questions as to breach and its fines and penalties for ensuring compliance, was intended to replace the old, and that there was an implied repeal of sec. 93 in regard to all improvement leases on the principle laid down in *Michell v. Brown*[6].

But that is not the case here. The form and nature of the conditions depend entirely upon the discretion of the Government. They may exercise that discretion, as in this case, in such a way as to render the provisions of sec. 93 entirely inapplicable. On the other hand, they may so exercise their discretion as to grant an improvement lease on terms which are entirely consistent with the full operation of that protection of Crown lands from unauthorized ringbarking which it is the object of sec. 93 to ensure. In other words, the form of tenure created by sec. 26 of the Act of 1895 is not necessarily inconsistent with the application of sec. 93 of the Act of 1884. But power is conferred upon the Government to issue leases under that tenure containing conditions which might become impossible of fulfilment if sec. 93 is applicable.

Pilkington v. Cooke[7], cited by Mr. *Holman*, is exactly in point. The question in that case was whether the Statute 29 Eliz. c. 4 (against extortion by sheriffs) was wholly repealed by 1 Vict. c. 55, which gave the Judges certain powers fixing sheriffs' fees, or whether it was repealed only to the extent of being inapplicable so far as the Judge's order in any particular case might extend. *Parke* B. said[8]:—"The question then is, whether the enactment of the Statute of Victoria is not in effect the same thing as a positive contingent exemption from the operation of the Statute of Elizabeth, which still continues in force. We think that it is, and that the operation of the Statute of Victoria is to constitute an exemption from the Statute in those cases, in the same way as if it had been expressly enacted that such cases should be exempt from the operation of the Statute of Elizabeth."

In my opinion, therefore, sec. 26 of the Act of 1895 must be read as a proviso to sec. 93 of the Act of 1884, but in such a way as to make the latter inapplicable to improvement leases only in those cases in which the conditions of the lease have dealt with ringbarking in the area in such a way as to be inconsistent with any power in the Local Land Board to grant permission to the lessee to ringbark in the area. For the reasons I have given the conditions of the lease now under consideration are, in my opinion, such as to be entirely inconsistent with the exercise of any power by the Local Land Board over ringbarking on the area.

It follows that the lease does not come within sec. 93, and that the respondent was wrongly convicted. In my opinion, therefore, the Supreme Court was right in setting aside the conviction, and this appeal must be dismissed.

Isaacs J. read the following judgment:—

Isaacs J

The respondent was not prosecuted for ringbarking trees which he had permission by his lease to ringbark. If he had been, *Pilkington v. Cooke*[9] would have been a direct answer, because it decided that an act authorized under a subsequent Statute cannot be treated as unlawful by reason of an earlier enactment. He was proceeded against in respect of the trees, which the lease not only did not permit him to destroy, but positively provided he should not destroy. The decision in *Pilkington v. Cooke*[10] does not extend to that branch of the case, because there the defendant was not charged with any excess of the later authority. Here there has been such excess. But the fundamental principle underlying both branches is the same.

The latest expression of the will of Parliament must always prevail. An express repeal of or exemption from an earlier enactment is not more effectual than if it were created by implication. The only difference is in ascertaining the fact and extent of the implied exemption or repeal. It is clear in this case that the power of the Governor to insert in the lease such provisions as to him may

seem expedient enables him to authorize a lessee to ringbark timber and so to make that conduct lawful, notwithstanding an earlier prohibition. In *Powell v. Apollo Candle Co.*[11] the Judicial Committee of the Privy Council said that Customs duties, which under the authority of an Act of the New South Wales legislature were by Order in Council directed to be levied, were really levied by the authority of the Act under which the Order was issued. So here the provisions inserted by the Governor under the authority of the Act permitting certain trees to be ringbarked have parliamentary sanction, and are as effectual as if directly enacted. The right of ringbarking those trees under the later Act, and the unlawfulness of doing so if sec. 93 is to apply are as *Fry* J. says in dealing with a case of implied repeal, "physically inconsistent": *Yarmouth Corporation v. Simmons*[12]. The exemption when the Act and lease are read together is so far express.

But the other branch is not so easily determined, namely, how far the provisions of the lease exempt the case from the operation of sec. 93. As to this the exemption is not express, and the implication depends entirely upon construction. I repeat what I said in *Mitchell v. Scales*[13] that every Act "which is relied upon as a repeal" (and I add exemption) "must be considered to see whether its necessary implication is to abrogate the former law." The Court must determine whether upon a fair construction of the later Statute the legislature intended to supersede either wholly or *pro tanto* the former enactment.

Here the Act of 1895 enables the Governor to cover to any extent he pleases, in relation to improvement leases, the whole or any part of the subject matter of ringbarking dealt with in sec. 93 of the Act of 1884, and to prescribe any covenants or provisions he considers expedient. These may not unnaturally include a specific penalty for breach, more particularly for disregarding the limits of a permission to do what would otherwise be unlawful, and therefore, to the extent to which the field of the lessee's responsibility is covered by the authority of the later enactment, the former, though not repealed, is on an exactly similar principle inapplicable. The provisions of the two enactments cannot in such case stand together and operate at the same time and for the same purpose, but with varying effect, upon the same set of circumstances.

To illustrate what I mean:—If an improvement lease says nothing whatever about ringbarking, there is nothing to affect the operation of the Act of 1884 upon facts that come within sec. 93.

If the lease gives unlimited permission to ringbark, sec. 93 cannot apply to penalize what Parliament has by later legislation sanctioned. If the lease absolutely prohibits ringbarking but makes no provision as to penalty, sec. 93 can well operate without collision. Although the Land Board could not in such a case lawfully give permission to ringbark, that is no more than if sec. 93 contained a proviso prohibiting permission where the Governor forbade ringbarking. The lessee would know that permission would be unlawful, and therefore he could not lawfully ringbark. A mere prohibition in a lease without more, leaves the general law to otherwise operate. But if the lease prohibits, either *in toto* or partially, the ringbarking of trees and also proceeds to declare its own penalty for breach, thereby specifying the limits of responsibility for contravention, and states the tribunal to determine as to liability and as to amount of the penalty, it appears to me to be more than a cumulative or auxiliary provision. It could not be intended by Parliament that a lessee should suffer the two penalties for the same act. It is substitutory, and takes the place of the earlier provision. That is precisely the present case. I therefore think the judgment of the Full Court was correct and should be affirmed.

Appeal dismissed with costs.

Solicitor, for appellant, The Crown Solicitor for New South Wales.

Solicitors, for respondent, Brown & Beeby.

[1] [1907] HCA 66; 5 C.L.R., 405, at p. 412.

[2] 1 El. & E., 267; 28 L.J.M.C., 53.

[3] 30 L.J.M.C., 234, at p. 237.

[4] (1891) 2 Q.B., 170.

[5] 4 Ch. D., 395, at p. 410.

[6] 1 El. & E., 267.

[7] 16 M. & W., 615.

[8] 16 M. & W., 615, at p. 627.

[9] 16 M. & W., 615.

[10] 16 M. & W., 615.

[11] 10 App. Cas., 282, at p. 291.

[12] 10 Ch. D., 518, at p. 527.

[13] [1907] HCA 66; 5 C.L.R., 405, at p. 417.

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