Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Pearson and others v. *Spence, from the Court of Appeal, and from the Supreme Court of New Zealand; delivered November 19th*, 1879.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE question in this case arises upon demurrer to a declaration. The Plaintiff Richard Spence sued the Commissioners of the Waste Lands Board in the district of Southland, in the colony of New Zealand, and also certain persons of the name of Morison.

The substantial allegations of the declaration are as follows:—The Plaintiff states that "In "pursuance of and in accordance with the laws "then in force relating to the sale and disposal "of the waste lands of the Crown," he, on the "25th day of June 1873, applied to the Defendants, the Commissioners, for a certain piece of land, and in accordance with the regulations entered and signed his name in the book known as the application book, and delivered to the clerk a written application in this form: "Application for rural land "in the province of Southland, New Zealand. "To the Commissioners of the Waste Land "Board for the province of Southland. I hereby "apply to purchase in terms of the Southland "Waste Lands Act of 1865 the land described "in the schedule," and so on. He proceeds to allege that at a meeting of the Board on the

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27th of June 1873, upon the appearance of the Plaintiff, his written application was opened and read in the presence of the Commissioners, and was filed in the records and minutes of the office, and a minute or entry was made in the words which he sets out. Then he avers: "Al- "though the Plaintiff's said application was "received, opened, and filed as aforesaid on the "27th day of June 1873, and although there "then existed no good reason, either in law or "fact, why the application of the Plaintiff "should not be allowed and granted, the Com- "missioners of the said Board adjourned its "consideration to a future day." That pending the adjournment, namely, on the 9th day of July 1873, an order was made by the Governor in Council, in pursuance of the powers given him by the Southland Waste Lands Act, 1865, raising the price of the land from 1*l.* an acre, which it had been at the time of the application, to 3*l.* He goes on to aver that after being pressed to decide the case on many occasions, on the 1st of August 1873 the Waste Lands Board, sitting publicly at a place mentioned, resolved that the Plaintiff's application should be granted, and caused a minute to be entered of its decision to that effect in the record books kept by the Board. He further avers that on the 1st day of August 1873, and after the decision of the Board, the Plaintiff applied to the Waste Land Board for an order upon or authority directed to the Receiver of Land Revenue for the district of Southland aforesaid, authorising, directing, and empowering him to receive the purchase money payable by the Plaintiff upon and in respect of the said parcel of land, and the said Waste Lands Board thereupon issued and delivered to the Plaintiff two blank forms of receipts to be tendered by the Plaintiff to

the said Receiver of Land Revenue in the words and figures following:—"No 913. Office "of Receiver of Land Revenue, Invercargill, "1st August 1873. Received from Richard "Spence, per K. M'Ivon, the sum of one thou- "sand and sixty pounds sterling, being payment "on application for land 1,445, section 176, "Taringatura district 1060. No. 194. Office "of Receiver of Land Revenue, Invercargill, 1st "August 1873. Received from R. Spence, "per K. M'Ivon, the sum of thirty-seven pounds "10s. sterling, being deposit for survey "of application 1445, Taringatura district, "37*l.* 10*s.* 0*d.*" Then he avers, "The Plaintiff ten- "dered to Alexander Jamieson Ellis, Esquire, of "Invercargill aforesaid, the then Receiver of "Land Revenue for the district of Southland, "the sums mentioned in the said forms of "receipt, but the said Receiver refused to accept "payment thereof, upon the ground that the "price of land in the said district of Southland "had been by the Order of Council herein-before "mentioned raised from 1*l.* to 3*l.* an acre, and "that consequently the Plaintiff was legally "compelled to pay the said price of 3*l.* an acre, "which the Plaintiff then refused to do." Then the declaration goes on to state that, "After- "wards the Superintendent of the Province of "Otago, under the powers conferred by the "2nd section of the Southland Waste Lands Act Amendment Act, 1873, appointed Commis- "sioners to classify the unsold Crown lands "in the said district of Southland, and under "the classification afterwards made by such "Commissioners the lands previously applied "for by the Plaintiff were classed and declared "to be agricultural lands; and the report of "the said Commissioners, duly approved of by "the said Superintendent, was published in the "Otago Provincial Gazette." Then, "On the

"14th day of September 1874 the Plaintiff "personally presented to Henry M^cCulloch, "Esquire, of Invercargill aforesaid, and the "then Receiver of Land Revenue for the district "of Southland aforesaid, the forms of receipt "before-mentioned, issued by the said Waste "Lands Board, and the Plaintiff tendered to "the said Henry M^cCulloch as such Receiver "the sums of money mentioned and referred "to in such receipts; and the Plaintiff says "that the said Henry M^cCulloch as such Receiver "of Land Revenue as aforesaid (although "perhaps in ignorance of the previous refusal "on the part of the said Alexander Jamieson "Ellis) accepted the moneys so tendered, "and signed the said receipts, which were "thereupon delivered back to the Plaintiff. "Some short time afterwards, the said Henry "M^cCulloch, as such Receiver of Land Revenue "as aforesaid, tendered to the Plaintiff the "moneys so as aforesaid paid by him, upon the "ground that they had been accepted in "mistake, but the Plaintiff declined to receive "back the moneys so tendered, insisting that he "was entitled to the lands applied for at the "price paid to the said Henry M^cCulloch as such "Receiver as aforesaid." Then it is stated that the moneys were paid by Mr. M^cCulloch into the Treasury, and had been applied accordingly for public purposes. Then comes this further statement: "On the 25th of May 1876 the "Defendants, the Morisons, with knowledge "of the Plaintiff's said application, applied "to the Waste Lands Board of the district of "Southland for a certain parcel of land. "Such application, so as aforesaid made by "the said George Morison, John Morison, and "Henry Bannerman Morison, came on to be "heard in due course by the Waste Lands "Board, and was opposed by and on behalf

" of the Plaintiff on account of his previously " vested right; and the Defendants, sued as " Commissioners of the said Waste Lands " Board, thereupon resolved to state a case " for the opinion of the Supreme Court in " order to ascertain and determine whether the " Plaintiff had acquired a vested interest in the " said parcel of land of 1,060 acres at the " price of 1*l.* an acre, and whether the said " Board could in consequence of the said " Plaintiff not having paid or tendered the " sum of 3*l.* an acre for the said land, treat " it as open for sale, and whether the said " Defendants, George Morison, John Morison, " and Henry Bannerman Morison, were entitled " to be declared the purchasers." A case " was accordingly stated by the said Waste " Lands Board for the opinion of the said " Supreme Court, and judgment was on the " 15th day of August 1877 delivered thereon " by His Honour Mr. Justice Williams, one of " the Judges of the said Court, who determined " (or advised the said Board) that the Plaintiff " was not entitled to have the land applied " for by him at less than 3*l.* sterling an " acre. Such price not having been paid or " tendered, the land was again open for sale, " and the Defendants, George Morison, John " Morison, and Henry Bannerman Morison, " were entitled to have their said application " granted." The Plaintiff then alleges that " the " Morisons will now apply for and insist that " their said application should and ought to " be granted, and the Plaintiff says that the " Defendants, sued as such Commissioners, will " grant the application." Then after stating that prior to the making the publication of the Order in Council herein-before referred to, he had done and performed every act and condition necessary, and so on, and that he is ready

and willing to perform and submit to whatever may be required of him by the Court, and so on; the declaration proceeds thus: "The "Plaintiff fears and believes that unless re- "strained by the injunction of this Honour- "able Court, the Defendants will mutually "combine to defeat him of his legal and "equitable rights to the said parcel or block "of 1,060 acres of land, wherefore the Plaintiff "prays—(1) That it may be decreed and declared "by this Honourable Court that he, the said "Plaintiff, having performed every condition "imposed by law necessary to entitle him to "be declared the purchaser at the price of "1*l.* an acre of the said 1,060 acres of land "prior to the making and publication of the "Order in Council in the declaration mentioned, "is entitled to the said land as against the "Defendants, the Messieurs Morison, and all "other persons. (2) That after the receipt of "the purchase-money of 1*l.* an acre in the "declaration mentioned, the sale and disposal "of the said 1,060 acres passed beyond the "control of the said Waste Lands Board. "(3) That in any event if the Plaintiff should be "held not entitled to be declared the purchaser "of the said lands at the price of 1*l.* per "acre, the said Waste Lands Board was not "justified in receiving the application of the "Defendants, George Morison, John Morison, "and Henry Bannerman Morison, for the pur- "chase of the said 80 and 180 acres, and ought "not to grant the same. (4) That if the price "payable in respect of the purchase of the said "1,060 acres of land was more than 1*l.* an "acre, the Plaintiff should have the option of "paying the higher price before any appli- "cation hostile to the Plaintiff was entertained "by the said Board. (5) That the Defendants, "George Morison, John Morison, and Henry

" Bannerman Morison, may be restrained by " the injunction of this Honourable Court from " further proceeding with their application to " purchase the said parcels of 80 and 180 acres " of land respectively, and that the Defendants, " sued as Commissioners of the said Waste " Lands Board, may be also restrained from " entertaining or taking any step or doing any " act, deed, or matter, or thing intended or " calculated to give effect to the said appli- " cation of the Morisons." And (6) for general relief.

To this declaration there was a demurrer, and the points intended to be raised are thus stated : that—(1)" No action lies against the Com- " missioners of the Waste Lands Board for not " disposing of land or granting applications " made for the purchase of land. (2) The " Commissioners having judicial functions to " perform, cannot be sued for any decision " given by them, unless corruption be alleged " against them. (3) The Commissioners cannot " be sued for gross negligence. (4) The Com- " missioners having obeyed, as they were by " law bound to obey, the opinion of a Judge of " the Supreme Court under the Waste Lands " Board Appeals Act, 1867, are not liable to be " sued for such obedience, and so on. Then " there is this stated. (7) If the Plaintiff has " paid the purchase-money for his land and " received receipts from the Receiver of Land " Revenue the jurisdiction of the Commissioners " of the Waste Lands Board is at an end. " (8) and (9) It appears from the declaration that " the Plaintiff is not entitled to be declared " the purchaser of the land in the declaration " mentioned," and that the Defendants, the Morisons, are entitled to purchase it.

On this demurrer being argued before the Court of Appeal, two questions were raised; the

first being what may be called the question on the merits as to whether the Plaintiff was or was not entitled to the land on payment of 1*l.* an acre; and the second being, whether supposing the Plaintiff to have had this right and to have been deprived of it, he had sought the proper remedy. Upon the latter question the Court was unanimous in his favour. Upon the first question the Chief Justice and one of the learned Judges were of opinion that the Plaintiff was entitled to purchase the land at 1*l.* an acre, the other learned Judge being of opinion that he was not entitled to purchase it at a less price than 3*l.* It is from this decision that the present Appeal is preferred.

The Southland Waste Lands Act, 29th Victoria, s. 26, is in these terms: "All lands not "included in the foregoing regulations"—viz., certain regulations relating to town lands, public reserves, &c.—"shall be open for sale as rural land "at the fixed price of 1*l.* per acre. Provided "always, that if at any time the Superintendent "and Provisional Council of the said province "shall recommend the Governor to raise such "price, then it shall be lawful for the Governor "in Council, if he shall see fit, to raise such price "in accordance with such recommendation." The Plaintiff made an application in pursuance of this section to the Commissioners who are constituted under this Act, and whose powers are defined principally in the 6th, 7th, 8th, 9th, 10th, and 11th sections, which are to the effect that a Board, to be called the Waste Lands Board, to consist of one Chief Commissioner and not less than three other Commissioners, shall be appointed and removable; that they shall sit at the principal land office; that all the meetings of the Board shall be attended by at least three Commissioners, and open to the public, and "all "applications for land and for pasturage, and "for timber licences, shall, after hearing evidence,

" when necessary, be determined by the Board " at some sitting thereof, and the Board shall " have power to hear and determine all disputes " between the holders of pasturage and timber " licences respecting the boundaries of runs."

There is a subsequent Act of the 10th October 1867, the Southland Waste Lands Act, 1865, Amendment Act, No. 64, wherein, by section 29, it is enacted that, "Notwithstanding anything " in the said Act to the contrary, no section or " block of land shall be selected or taken so as, " in the opinion of the Board, to render less " available for sale or other disposal or injuriously to affect in value any other portion of " the waste lands in the province; provided " always, that in all cases wherein the Board " may deem it advisable to withdraw from sale " any block or section of land, or refuse to grant " any application for such land, the reason or " reasons for such withdrawal or refusal shall " be recorded in the minutes of their proceedings."

It is material in the first place to determine what the application of the Plaintiff was. It appears to their Lordships that it was an application for the purchase of the land in question at the price of 1*l.* an acre. It is true that the application does not state the price, but the applicant applies to purchase in the terms of the Southland Waste Lands Act, which declares that the land shall be open for sale at the fixed price of 20*s.* an acre, with a proviso that the Governor, under certain circumstances, may raise the price. Their Lordships think, therefore, that the application was to purchase the land at the price of 20*s.* an acre, that being the fixed price at the date of the application, and that to construe it according to the Defendant's contention as an application to purchase at any sum to which the ruling price might afterwards

be raised would be a forced construction. The application was lodged, received, and filed by the Board on the 27th July; and their Lordships may observe, in passing, that that distinguishes the case from *Bell* v. *The Receiver of Land Revenue*, L. R. App. Cases, H. of L. & Privy Council, Vol. I., p. 707, which has been quoted, where the application had not been received or dealt with, or completely made at the time when the change of price was made. If on the 27th July the Commissioners had granted the application, as in the ordinary course they would have done, beyond all doubt the price would have been 20*s.* an acre. Afterwards the price was raised; but the Commissioners, after adjourning the consideration of the question upon grounds which it is not necessary to consider, came to a final determination on the 1st of August that the application should be granted, and they entered a minute of their decision.

What then was granted? It appears to their Lordships that the effect of the decision of the Board was to grant the application in its entirety, and the entirety of the application was to purchase the land at the price of 1*l.* an acre. The contention on the other side must be that it was an acceptance of so much of the application as related to the purchase of the land, but not of so much as related to the price. Their Lordships are unable to accede to this distinction.

It appears to their Lordships that there being no other applicant for the land, and no grounds for refusal such as are referred to in the 29th section of the Southland Waste Lands Amendment Act, the Plaintiff had a right to have his application granted, and when it was granted it was granted in the terms of that application, one of which was to purchase at a price of 1*l.* an acre. This view disposes of the main question in the case.

The next question which has been raised before their Lordships, but which does not appear to be very distinctly, or at least not in the same form, stated in the grounds of demurrer, is that inasmuch as the Commissioners decided upon a question within their jurisdiction, namely, that the Plaintiff had not paid the proper price for the lands, the only remedy is by appeal, and that this action will not lie. This question depends on the powers of the Commissioners, and upon the operation of certain Acts containing provisions with respect to appeals. The provisions with respect to appeals are contained mainly in the 4th section of the Southland Waste Lands Amendment Act, 1867, which is in these terms: "The decision of the Board on all matters to be "by it heard and determined shall, subject to the "right of appeal to the Superior Court as herein- "after provided, be final and conclusive. Pro- "vided always, that the Board may, on the "application of any person, grant a rehearing of "any case decided by it if it shall think that "justice requires it," &c. There follows a power to grant a case for the opinion of the Supreme Court, which is stated in the declaration to have been acted upon in this case, and some appeal clauses which would appear to be superseded by Act No. 67 of the same session, which contains an appeal clause to this effect: "If any person "consider himself aggrieved by any decision of "the said Board, such person may apply to the "Supreme Court, provided such person shall "within 30 days after the giving of such decision "give notice of such appeal to the Board, and "also to such persons, if any, as shall have "appeared before the Board as opponents of the "case or claim or application of such person, and "also give security, to be approved of by the "Registrar of the Supreme Court, for the cost "of the appeal," and so on, "and after hearing

" the parties, the Court shall give its decision,
" and cause the same to be certified in writing
" by the Registrar or Deputy Registrar of the
" Court, to the Board, and the Board shall be
" bound to follow such decision, and shall reverse,
" alter, modify, or confirm their decision in
" accordance therewith, and the Supreme Court
" may make such order as to payment of costs
" to either party as to it shall seem meet." Then it goes on to say, " Such appeal shall be in the
" form of a case agreed on by such Board and
" the Appellant, and if they cannot agree on the
" case to be stated, then such appeal shall not be
" in the form of a case, but the Supreme Court
" shall hear such appeal and may receive evidence
" either orally or by affidavit, and it shall be
" lawful for the Supreme Court, if to the Court
" it shall seem fit, instead of deciding any matter
" of fact in dispute upon affidavit or personal
" examination by it of witnesses, to order any
" such question of fact to be found and deter-
" mined by a jury."

The question arises, whether the Board, in deciding as they did that the Plaintiff had no title to the land because he had not paid 3*l*. per acre purchase-money, did or did not act within their jurisdiction. If they acted within their jurisdiction it would certainly appear that their decision could only be questioned on appeal. It is true that the Board had a right to entertain—indeed were bound to entertain—the application of the Morisons, and so far as the Morisons were concerned, to decide whether or not the lands were waste lands which they were at liberty to grant to the Morisons; but it appears to their Lordships that the Board had not jurisdiction on the application of the Morisons to decide as against the Plaintiff that he had not previously acquired a preferable title to the land. They had no jurisdiction to de-

termine the price of the land. Their jurisdiction as against the Plaintiff was spent when they granted or refused to grant his application. But it is said that the Plaintiff by appearing before the Commissioners acknowledged their jurisdiction. Even if it were assumed that in such a case consent could give jurisdiction, their Lordships do not think that his appearance before the Commissioners is to be so interpreted; they interpret it as a protest on his part against their dealing with the claim of the Morisons on the ground that he, the Plaintiff, having himself acquired a title to the land, it could no longer be granted to another. It is true that the Commissioners would be entitled to inquire incidentally how and in what way he made out his title, but it appears to their Lordships that when he showed that his application had been granted, and produced the certificate from the proper officer, acknowledging the payment of the purchase money, the jurisdiction of the Commissioners was at an end, and that they were not entitled to determine as against the Plaintiff, that nevertheless he had not a valid title. Indeed this view seems to be put forth to a certain extent by the Defendants in a portion of their demurrer, where they state that " if the " Plaintiff has paid the purchase-money for his " land and received receipts from the Receiver " of Land Revenues, the jurisdiction of the " Commissioners of Waste Lands is at an end." If the Commissioners had no jurisdiction to deal with the question of the Plaintiff's title, the submission by them of a case on the subject to the Supreme Court cannot of course affect the case. For these reasons their Lordships are of opinion that the Plaintiff is not put to his appeal, the jurisdiction of the Superior Court is not ousted, and the Plaintiff has a right to obtain a declaration of his title to the land. He has

further a right to apply to the Court to restrain the Morisons from interfering with his rights or using legal process for that purpose. But it has been further argued that even assuming the right to a declaration of title, and the right to restrain the Morisons, still no injunction can issue against the Commissioners to restrain them from hearing and determining any question which they have power to determine judicially. Their Lordships observe that the question raised at present is upon general demurrer, and it is enough for the Plaintiff to show that under the circumstances which he states he may be entitled to some relief; and inasmuch as the Commissioners are not merely a judicial body, but are also an administrative body, and performing many functions which are certainly not judicial, and many which are merely ministerial, the declaration may be supported on the ground that at all events the Plaintiff shews a case under which he may be entitled to relief against some of the acts of a ministerial character which they are about to do for the purpose of perfecting the title of the Morisons as against him. It may be if the case comes on for hearing, that the injunction may be so far modified as to be confined to such acts. but considering the case as it arises upon demurrer their Lordships are unable to say that the demurrer on this ground is sustainable.

For these reasons their Lordships have come to the conclusion that this demurrer cannot be maintained, that the decision of the Court of Appeal is right, and they will humbly advise Her Majesty that the decision of that Court be affirmed, and that this Appeal be dismissed with costs.