[HIGH COURT OF AUSTRALIA.]

HIGGINS . . . . . APPELLANT;

AND

BERRY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908.

SYDNEY, *July* 28, 29; *August* 11.

Griffith C.J. O'Connor, Isaacs and Higgins JJ.

Crown Lands Act 1884 (*N.S.W.*), (48 *Vict. No.* 18), *sec.* 141—*Crown Lands Act* 1895 (*N.S.W.*), (58 *Vict. No.* 18), *secs.* 24, 25—*Rights of holders of adjoining land—Fence erected on common boundary—Contribution towards cost—Liability of freeholder—Right of settlement lessee to contribution—Construction of Statutes.*

A holder of land in freehold is liable to contribute towards the cost of a fence erected on his boundary by a person entitled under sec. 141 of the *Crown Lands Act* 1884 to call upon an adjoining holder for contribution.

So *held*, *per Griffith* C.J., *O'Connor* and *Isaacs* JJ.

But *held* (*per totam curiam*), that the holder of a settlement lease under secs. 24 and 25 of the *Crown Lands Act* 1895 is not entitled to claim contribution under the section.

Per Higgins J.—Sec. 141 has no application as against or in favour of owners in fee simple under old titles, but is restricted to purchasers and others who are still in contractual relations with the Crown under the Crown Lands Acts.

Decision of the Supreme Court: *In re Berry*, (1907) 7 S.R. (N.S.W.), 768, affirmed on the first point, and reversed on the second.

APPEAL from a decision of the Supreme Court of New South Wales upon a case stated by the Land Appeal Court under sec. 8, sub-sec. vi. of the *Crown Lands Act* 1889.

The appellant became the holder in freehold of certain land in New South Wales. Subsequently to the purchase the respon-

dent became the holder of a settlement lease of land adjoining that of the appellant, and having a common boundary on one side. The respondent erected a fence on the common boundary and served the appellant with a claim for half the cost of the fence. The appellant refused to pay, and the respondent brought the matter before the Local Land Board, who decided in his favour, holding that the appellant was liable under sec. 141 of the *Crown Lands Act* 1884 to contribute half the cost of the fence, assessing the amount payable at £55. The appellant appealed to the Land Appeal Court against this decision upon the ground that a freeholder was not liable under sec. 141 to contribute towards the cost of boundary fencing. The Land Appeal Court sustained the appeal, and at the request of the respondent stated a case for the decision of the Supreme Court on the question " whether the holder of land in freehold is liable under the provisions of the Crown Lands Acts to contribute towards the cost of a fence erected by the holder of a settlement lease on the common boundary of the land held in freehold and that held under settlement lease."

The Supreme Court were of opinion that a freeholder was liable under the circumstances stated, and, assuming that a settlement lessee was entitled to contribution under sec. 141, answered the question submitted to them in the affirmative: *In re Berry* (1).

From this decision the present appeal was brought by special leave.

The material sections are set out in the judgment of *Griffith* C.J.

Pike, for the appellant. A freeholder is not liable under sec. 141 to contribute towards the cost of a boundary fence. The rights and liabilities of freeholders are dealt with by the *Dividing Fences Act*, No. 63 of 1902, which consolidates 9 Geo. IV. No. 12. Prior to 1884 the burden imposed upon conditional purchasers was that of improvement; there was no duty to fence, though fencing was included in improvements. The *Crown Lands Act* 1884 did away with the obligation to improve, and

(1) (1907) 7 S.R. (N.S.W.), 768.

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substituted the obligation to fence in the case of conditional purchases, whether original, additional or non-residential: secs. 33, 42, 43, 44, 47 (4) (5); conditional leases: sec. 51; converted pre-emptive leases: sec. 52; and homestead leases: sec. 82. There were certain other holders who were not bound to fence: see secs. 46, 61, 63, 64, 66, 78, 81, 85, 86, 89, 90. 92. "Fencing within the meaning of this Act" in sec. 141 means fencing erected in fulfilment of the duty imposed by the Act, not fencing of any particular kind, for the Act prescribes no particular class of fence. "Alienated" should be construed to mean alienated under the provisions of the Act. It is applied to conditional lease in sec. 21. [He referred also to sec. 50.] If it was intended to include all land alienated, in the ordinary wide sense, the words "conditionally or otherwise" were superfluous. Some meaning should be given to those qualifying words. Construing them *reddendo singula singulis* with "alienated" and "leased" they exclude freeholders and deal only with those who are bound under the Act to fence. The section confers no right to contribution on a freeholder. If there is any ambiguity the section should be construed in such a way as not to impose the burden without the corresponding benefit. The Act was only intended to apply to Crown lands. Holders of land in fee simple are not bound to fence. There is no reason why they should contribute towards a fence which they may not want and would not otherwise have to erect. But a Crown tenant escapes his statutory liability to fence by paying half the cost of the boundary fence erected by his neighbour. There is nothing in the later Acts to impose a liability on a freeholder if it is not imposed by sec. 141. [He referred to 52 Vict. No. 7, secs. 2-8; 53 Vict. No. 21, sec. 23.] But whatever the liability of the freeholder, a settlement lessee is not entitled to claim contribution. In 1884 there was no such tenure, and, therefore, sec. 141 of the Act of that year cannot refer to a settlement lease. The tenure was introduced by 58 Vict. No. 18, sec. 24. The duty to fence was imposed by sec. 25. Sec. 22 expressly provides that the provisions of sec. 141 of the Act of 1884 shall apply to homestead selections. It must, therefore, be inferred that it was intended to exclude settlement leases. Moreover, sec. 141 is only

to apply to homestead selections "until the grant thereof," which tends to show that there was no intention to include land held in fee simple in the operation of that section. Sec. 141 expressly mentions the holdings to which the right of contribution is attached, (1) conditional purchase, (2) conditional lease, (3) homestead lease. There is no expression which can include a settlement lease. The "adjoining land" referred to must, therefore, adjoin one of these classes of holding. The Supreme Court did not consider this point, but assuming apparently that a settlement lessee was entitled to contribution under sec. 141, dealt only with the question of the liability of a freeholder. [He referred to *Johnston* v. *Deeney* (1).]

Hanbury Davies, for the respondent. No argument was addressed to the Supreme Court on this point.

[GRIFFITH C.J.—Both points are necessarily involved in the question submitted to the Supreme Court, and that is what we have to answer.

ISAACS J.—This Court is bound to decide according to the law. Admissions cannot affect the law: *per Jessel* M.R. in *Chilton* v. *Corporation of London* (2).]

Sec. 141, construed in its ordinary natural sense, makes a freeholder liable to contribute. There is no injustice in his being made liable. A freeholder is benefited by the boundary fence as much as the holder of the adjoining land who erects the fence. It would certainly not be just that the person who erected it should have to bear the whole burden. He is compelled by Statute to erect it and his neighbour gets the benefit of it. It may fairly be assumed that the legislature intended to give the section operation wherever there was on one side of the boundary a holder who was bound to fence his holding. The opening words as to improvement are wide enough to cover all forms of tenure, whether under the Crown Lands Acts or in fee simple. A special exception is made of lessees who have less than five years to run. It should be inferred that only they and the Crown are exempt. "Alienated" is wide enough to include all kinds of sale, conditional or unconditional. No

(1) 8 L.C.C. (N.S.W.), 8.

(2) 7 Ch. D., 735, at p. 740.

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other portion of the Act suggests any limitation of the meaning of that word in this section.

[GRIFFITH C.J.—There is this difficulty, that the freeholder does not seem to have any reciprocal right to claim contribution.]

It is not necessary to contend that he has, but it has been decided by the Land Appeal Court that he has such a right: *Ryan* v. *Scottish Australian Investment Co. Ltd.* (1). In sec. 74 "alienated" must include land alienated by grant in fee simple. The word has not acquired any special or technical meaning, and should be construed in its ordinary sense. The use of the word "alienee" in sec. 141 instead of "transferee" points towards something more than a transfer under the Act.

As to the right of a settlement lessee under sec. 141, no inference is to be drawn against the inclusion of a settlement lease within the operation of that section from the fact that special mention is made of homestead selection in sec. 22 of 58 Vict. No. 18. The latter is a peculiar tenure, being neither a purchase on conditions nor a lease. A settlement lessee is bound to fence: sec. 25 (*d*) of 58 Vict. No. 18, and is therefore a holder to whom sec. 141 might be expected to apply, and the words of the latter section are wide enough to include it. It is a form of conditional lease. Undoubtedly that term is used to mean a special kind of tenure, dependent upon a conditional purchase, but in sec. 141 the term is apparently used in a general sense.

[O'CONNOR J.—If so, it would include a homestead lease, and there would have been no necessity to expressly mention that tenure.]

The latter part of the section implies that any form of lease is within the section provided that it is one which has more than five years to run. It was held by the Land Appeal Court in 1898 that a settlement lessee was within the section: *Currell* v. *Withers* (2); *Johnston* v. *Deeney* (3). Even if the matter is doubtful, the Land Appeal Court having so decided, and the legislature having dealt subsequently with the subject of Crown lands and the various rights and obligations of Crown tenants without overriding that decision, it should be inferred that the

(1) 8 L.C.C. (N.S.W.), 79. (2) 8 L.C.C. (N.S.W.), 9.
(3) 8 L.C.C. (N.S.W.), 8.

decision was in accordance with the intention of the legislature: *Phillips* v. *Lynch* (1).

[ISAACS J.—But the legislature have not dealt with the particular subject.

GRIFFITH C.J.—In any case the legislature would not be likely to override a decision so obviously fair and just even if it were not a correct statement of the law.]

The appellant should not be allowed costs if he is successful only on a point not raised in the Court below.

Pike in reply. "Conditional lease" throughout the Crown Lands Acts is a term used to denote only one thing, viz., a lease taken up by the holder of a conditional purchase by virtue of his holding. It is a tenure that may be converted into a conditional purchase, and so lead to acquisition of the fee simple. [He referred to 50 Vict. No. 21; 50 Vict. No. 34; 52 Vict. No. 7; 53 Vict. No. 21, sec. 12; 58 Vict. No. 18, sec. 42, 55; No. 51 of 1899, secs. 2, 3; No. 109 of 1902, sec. 11; No. 15 of 1903, sec. 5.] The Land Appeal Court in *Commercial Banking Co. of Sydney Ltd.* v. *Bragg* (2), held that a freeholder was not liable under sec. 141. [He referred also to 48 Vict. No. 18, sec. 132; 52 Vict. No. 7, sec. 11.]

Cur. adv. vult.

August 11.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court of New South Wales upon an appeal from the Land Appeal Court on a case stated submitting for the decision of the Supreme Court this question: "Is the holder of land in freehold liable, under the provisions of the Crown Lands Acts, to contribute towards the cost of a fence erected by the holder of a settlement lease on the common boundary of the land held in freehold and of the land held under settlement lease." The appellant is the holder of land in freehold adjoining land held by the respondent under a settlement lease, and the question is whether the appellant is liable to contribute towards the cost of a fence erected by the respondent on the common boundary. The answer to that question depends upon the construction of

(1) 5 C.L.R., 12, at p. 25. (2) 10 L.C.C. (N.S.W.), 76.

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sec. 141 of the *Crown Lands Act* 1884. Before reading that section I remark that the Act deals generally with Crown lands. It is entitled—and the contents justify the title—"An Act to regulate the alienation occupation and management of Crown lands and for other purposes." The Act provides for the disposition of land by the Crown by alienation, that is, by conveying the fee to a subject, for leasing in various ways, and for sales, including sales by auction and sales under special circumstances, and it creates or re-enacts various other tenures, amongst them that which is called a conditional purchase, a form of tenure which had been known in New South Wales since 1861. That was a method of alienation by which the purchaser obtained occupation of the land immediately, and upon the performance of certain conditions became ultimately entitled to the fee. The Act also provided for conditional leases, homestead leases, pastoral leases, and certain other methods of disposition to which it is not necessary now to call attention. In the case of conditional purchases, conditional leases, and homestead leases one of the conditions of the tenure was that the purchaser or lessee should during the term of his conditional occupation fence the land. In the case of a pastoral lease no such obligation was imposed. The object of the system of conditional purchase, and of the Act in general, was to promote the use of the Crown lands of New South Wales by occupation. And, when it was being provided that a Crown tenant should erect a fence and enclose his land, it was not unnatural that the legislature should consider the question whether the whole of that burden should fall upon him, or might not very fairly be shared by a neighbour who already had or might afterwards acquire adjoining land. It was, I say, not unnatural that the legislature should have considered that question. There was another Act which had been in force in New South Wales for a long time, providing for contribution towards the cost of dividing fences by adjoining holders of land, and the legislature might conceivably either have left that subject to be dealt with by that Act alone, or have dealt with it by that Act together with the *Crown Lands Act*. But it is really no concern of ours what the Legislature might have done, all that we are concerned with is what they have done.

Having said so much by way of preface, I will now read the provisions of sec. 141. The section begins by providing that:— "Fencing within the meaning of this Act shall be deemed an improvement common to the land on either side of the line of such fencing and whenever land adjoining that which forms a conditional purchase or lease or a homestead lease has been or shall be alienated or leased by the Crown conditionally or otherwise the person who shall fence his land may demand and enforce from the purchaser or lessee of such adjoining land or his alienee a contribution towards the cost of such fencing to the extent of one half of the appraised value thereof but so far only as such fencing marks a common boundary line." Then follow some other provisions of which it is only necessary to mention that the Local Land Board has power "to hear and determine all disputes and claims as to fencing between conditional purchasers and contributories and to appraise all values and estimate all costs and determine the kinds of fencing to be erected"; and the section concludes with a proviso that "no holder of an annual lease under this Act and no holder of any lease having less than five years to run shall be liable as a contributory under this section towards the original cost of fencing but shall be liable as a contributory towards the cost of maintaining such fencing." It is contended by the appellant that land which has been granted in fee by the Crown does not come within the term "land which has been alienated by the Crown." That is, putting it baldly, the contention of the appellant. This is simply a question of construction.

Before referring to the arguments in support of the contention that land which has been granted in fee by the Crown is not alienated land within the meaning of that section, I will refer to one or two authorities that have been quoted often enough before in this Court as to the principles to be applied in construing Acts of Parliament. First, I will read what was said by *Tindal* L.C.J. in the *Sussex Peerage Case* (1):—"My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute

(1) 11 Cl. & Fin., 85, at p. 143.

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are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver." What then is the plain, natural, and ordinary sense of the words "land alienated by the Crown?" Without any historical inquiry I should have supposed that they meant, in New South Wales, land of which the fee had been conveyed by the Crown to a subject. And I find on further inquiry that the word has been used in that sense ever since there have been laws upon the subject in New South Wales. The earliest Act in New South Wales was that of 1842, 5 Vict. No. 1. Up to that time land had been dealt with by the Governor under his commission and under instructions from the Secretary of State. That Act recited: (His Honor read the preamble and secs. 2 and 5 of that Act and continued). "Alienation" there was used in the sense of alienation of any estate whether fee simple or leasehold. In 1861 the *Crown Lands Alienation Act* dealt with the whole subject and introduced conditional purchases, which were carried on by the Act of 1884. Now I look at sec. 141, and I see that the words used are as large as can possibly be used, "whenever" (that is, in every case in which) "land adjoining that which forms a conditional purchase or lease or a homestead lease has been or shall be alienated or leased by the Crown conditionally or otherwise." That is a plain and unambiguous statement that in every case of alienation, either before or after the event of fencing referred to, the person to whom the land has been alienated is to contribute towards the cost of fencing. He is described in the same words as in the Act of 1842 as a purchaser. He is a purchaser if it is a case of alienation. If it is a lease then he is described as a lessee. These words seem to me so clear that they need no exposition. Now, it is said, that is only a mistake; that is only the apparent meaning. And, it is said, the legislature could not have meant that, but must have meant something else. Well, in the words of *Willes* J. in *Abel* v. *Lee* (1), "I utterly repudiate the notion that it is competent to a Judge to modify the language of an Act of Parliament in order to bring it into accordance with his

(1) L.R. 6 C.P., 365, at p. 371.

views as to what is right and reasonable." So it is entirely irrelevant whether it is right or reasonable that a freeholder should be liable to contribute. The question is whether the legislature has said that he shall do so. What are the reasons suggested for his not being liable? First this, that the introductory words are idle as applied to a freeholder. Those words are in the nature of a preamble. They assert a truism, for it is just as true of a freeholder as of anyone else that fencing is an improvement to his land. The fact that the Act does not deal with improvements upon freehold land, or does not require a freeholder to make them, seems to me quite irrelevant. Then, it is said, there is no reciprocity; a freeholder may be made liable to contribute under this Act, but there is nothing to enable him to call upon a conditional purchaser adjoining him to contribute towards fencing the common boundary. I do not know whether that is so or not, or whether any other Act deals with that subject. The question does not arise for consideration here. It is said that the Land Appeal Court has expressed an opinion upon that subject, and has held that a freeholder is entitled to enforce contribution, and that they gave as a reason for so holding that, otherwise, there would be no reciprocity, taking for granted that in a case like the present a freeholder would be liable to contribute. That decision was given by the Court during the time the late Mr. Oliver was Chairman, and no doubt his opinion on matters connected with the land laws is entitled to great weight. But I do not think that any argument can be based on reciprocity. If there is a *casus omissus* that is a matter for the legislature. They can correct it if they wish, but it is not for us to do so, or to say that the plain words do not mean what they say, merely because one person may possibly be in a worse position than another upon a literal construction of the Act. It is suggested that the word "alienated," although it has a plain and precise meaning in the ordinary sense, does not bear that meaning here, because there are some passages in the Act where it is used in a wider sense than land actually conveyed, so as to include land before it is conveyed. Granting that the word is used in the wider sense, so as to include land contracted to be granted but not actually granted, is that any reason why it should not include land after

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it has been granted? If the attribute of "alienation" has begun to attach to it by virtue of the contract, surely it does not cease to attach upon completion of the contract. It seems to me that that argument is utterly fallacious. There is, therefore, nothing in the context to cut down the plain and obvious meaning of the words. The Land Appeal Court held that the freeholder was not liable to contribute, and, as I understand them, so held upon the supposed authority of an earlier case decided in their own Court. But that was a case quite different from the present. It was a case of a small block of 40 acres of freehold included within the boundaries of another much larger area. They held that that was not a case of fencing upon land adjoining a conditional purchase. Whether they were right or not in that particular case is, I think, open to question. But certainly it does not conclude the present case. I think that, even if they are bound to follow their own previous decisions, they were not bound to follow that. The Supreme Court were of a different opinion. They thought that there was nothing in the Act to cut down the natural meaning of the word "alienated." An argument was addressed to us that the words "alienated or leased by the Crown conditionally or otherwise" should be read *reddendo singula singulis* in this way, alienated by the Crown conditionally or leased otherwise. But that contention cannot, in my opinion, be supported, and I do not think it necessary to elaborate my reasons for that opinion.

The Supreme Court, being of opinion that a freeholder was liable, allowed the appeal. But it is to be observed that the question submitted by the Land Appeal Court was not simply the question whether a freeholder was liable under sec. 141, but whether he was liable to contribute towards the cost of a fence erected by the holder of a settlement lease. That question appears to have been raised before the Land Appeal Court, though they did not decide the point, because they thought that they had considered the question previously and determined it.

Before the Supreme Court, according to the report of the case, the point was not argued, and the learned Judges did not refer to it in their judgment. But it is distinctly raised in the case submitted, and we are bound to consider it. A settlement lease was

a new tenure. It had not been introduced in the Act of 1884, but was introduced for the first time by the *Crown Lands Act* 1895 (58 Vict. No. 18), sec. 24. Amongst other conditions to which this new tenure was subject was the condition that the lessee should fence his farm within five years; sec. 25, sub-sec. (*d*). The question, then, is whether such a tenure as that comes within the terms of sec. 141, that is, whether it is land which forms a conditional purchase or lease or a homestead lease within the meaning of that section. The term conditional purchase is used in the Act of 1884, as well as in the Act of 1861, and refers to a particular kind of tenure. The word "lease" immediately following clearly means a conditional lease, which was also created by the Act of 1884. The other words are "homestead lease." The term "settlement lease" does not fall within those terms unless it comes within the term conditional lease. But having regard not only to the terms of the Act of 1884, but also to those of the Act of 1895, it is clear that a settlement lease was never treated by Parliament as a conditional lease. In several sections of the Act of 1895 the two kinds of lease are mentioned together, conditional lease and settlement lease, not as synonymous but as distinct tenures. Moreover, the Act of 1895 established a tenure called homestead selection, different from anything in the Act of 1884, and expressly provided that the provisions of sec. 141 and other provisions of the Act of 1884 should apply to such holdings for a certain time, showing, I think, a clear intention that settlement leases should not be included within the provisions of sec. 141. For these reasons I have come to the conclusion that, although the fact that the appellant is a freeholder is no answer to the claim for contribution, the fact that the claimant is a settlement lessee is a complete answer.

I should add that upon this point the Land Appeal Court were of opinion that they were bound by a previous decision in a case before their own Court, in which it was held that the holder of a settlement lease was entitled to contribution. But in that case the neighbour was also the holder of a settlement lease, and there was a common boundary which each of the adjoining owners was liable to fence, and the decision might have been based on the ground that it was only just that they should share the liability

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between them. But that does not settle the question whether a settlement lessee can claim contribution from a freeholder under sec. 141.

For these reasons, while entirely concurring with the Supreme Court upon the point decided by them, I am compelled to come to the conclusion that the question as submitted must be answered in the negative; that a freeholder is not liable to contribute towards the cost of a fence erected by a settlement lessee. If this is a *casus omissus* it is a matter for which the legislature may provide.

O'CONNOR J. read the following judgment. The question submitted by the Land Appeal Court to the Supreme Court and now before us for decision is as follows:—"Is the holder of land in freehold liable, under the provisions of the Crown Lands Acts, to contribute towards the cost of a fence erected by the holder of a settlement lease on the common boundary of the land held in freehold and of the land under settlement lease?" Two matters of law are there involved. First, whether any holder of land in freehold is liable to contribution under sec. 141 of the *Crown Lands Act* 1884 at the suit of a person entitled under that section to call upon an adjoining owner for contribution; secondly, is the holder of a settlement lease entitled to call upon any adjoining owner for contribution under the section? The last-mentioned aspect of the case, although referred to in the judgment of the Land Appeal Court, was not argued either before that tribunal or before the Supreme Court. But as it is raised on the face of the question submitted and our decision has been asked for by the appellant, we are, I think, bound to consider it.

The Act deals with all the different tenures under which the subject may acquire and hold possession of lands from the Crown. In respect of three of the tenures compliance with certain fencing conditions, laid down by the Act and administered by the Land Board, is essential to the right of holding possession and of obtaining title. These are conditional purchases, conditional leases, and homestead leases; and it is in respect of these tenures only that compliance with fencing conditions is required. It was, no doubt, within the contemplation of the legislature that in

a large proportion of cases land under these tenures would adjoin lands similarly held, and that in such cases the boundary fence erected on one holding by order of the Land Board would become the boundary fence also of the holding adjoining. Sec. 141 would appear to have been passed with the object of ensuring that the whole cost of the boundary fence, which, under these circumstances one holder was compelled to erect, should not fall upon him alone, but should be fairly apportioned between both holders whom it benefited. Incidentally, the section declares that the fence shall be an improvement common to both holdings, that is to say, an improvement for the purposes of the Act.

Turning now to the words of the section, the class of holders, who may demand and enforce contribution in respect of boundary fences which they have erected, are specifically defined. They are conditional purchasers, conditional lessees, and homestead lessees. The class of holders from whom the contribution may be demanded is, in my opinion, equally clearly marked out on any reasonable construction of the words of the section material on this point. It is, however, in regard to the construction of those words that the present controversy has arisen. The section provides that whenever the land adjoining that of the conditional purchaser, conditional lessee, or homestead lessee, entitled to demand contribution " has been or shall be alienated or leased by the Crown conditionally or otherwise the person who shall fence his land (*i.e.*, the conditional purchaser, conditional lessee, or homestead lessee) may demand and enforce from the purchaser or lessee of such adjoining land or his alienee a contribution towards the cost of such fencing," &c.

It is, of course, common ground that in the case of land held in fee simple, or in freehold as it is described in this case, the Crown has parted with all its right, title and interest. It must also be admitted that, if the word " alienate " is to be taken in its ordinary sense, land at one time Crown land, but afterwards held in freehold, would be land which has been alienated within the meaning of the words quoted. The appellant's case rests on two contentions: first, that in the sentence quoted the word " alienate " is qualified by " conditionally," but " conditionally " is not in its turn qualified by the words " or otherwise " which

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immediately follow it; that consequently the only alienation referred to is a conditional alienation which could not, of course, apply to a transfer in fee simple. Secondly, that the word "alienate" is not to be read in its ordinary sense, but in the limited sense of a vesting of Crown lands subject to the fulfilment of conditions by the holder. As a reason for adopting the appellant's construction the opening words of the section and several other sections of the Act under consideration and of subsequent Lands Acts were quoted by Mr. *Pike* as tending to show that it would be unfair and contrary to the general object and purpose of the Act to compel the freeholder to contribute to the cost of fencing erected under the section as the Act gave him no corresponding right of obtaining contribution in respect of fences erected by him. No doubt the opening words of the section, though conferring beneficial rights in respect of improvements on lands of all other tenures, can have no application to lands which have been once granted by the Crown. But that is of no moment if the legislature has expressed a clear intention, as I think it has, to impose this obligation on the grantee without the counterbalancing advantage which holders under other kinds of tenure will obtain.

It may also, I think, be conceded, although it is not necessary to decide the point in this case, that the section does not entitle a holder of freehold to demand contribution for fences erected by him on his boundary adjoining a neighbour compelled to fence under and in accordance with the Act. But neither does the section entitle holders of Crown leases having more than five years to run to demand contribution from conditional purchasers, conditional lessees, or homestead lessees, under like circumstances; yet it is quite clear that the lessee would be liable to contribute under the circumstances mentioned in the section. This would seem to indicate that there was no intention on the part of the legislature to confine the liability to contribute to those holders only who had reciprocal rights of contribution against each other. On the contrary, it would appear from a consideration of the whole section that it was intended to empower Land Boards to enforce contribution only in respect of fencing, the erection of which they had power to direct and

control. The Act gives this power to Land Boards in respect of the classes of holders on whom fencing subject to Land Board directions is made compulsory, but in respect of the holders of freehold lands they have no such jurisdiction. I can see, therefore, nothing in the Act to indicate any intention that freeholders shall not be made contributors under the section.

Apart, however, from that consideration, other portions of an Act can be properly used in aid of the interpretation of particular words only where some ambiguity appears in the language to be construed. Here I can see no ambiguity either in the language used or in its application to the subject matter of the section. That brings me to the real question in the case, namely, what is the proper interpretation of the portion of the section which I have quoted.

As to the respondent's suggestion that "otherwise" must be read as qualifying the words "leased conditionally" only and as having no application to the word "alienated," it is only necessary to say that such a construction is grammatically impossible and unreasonable. It is necessary to read "conditionally" as qualifying both "alienated" and "leased," otherwise conditional purchases would not be included, and it is impossible to suppose that the legislature intended to omit them. But as "conditionally" must qualify both "alienated" and "leased," so also the words "or otherwise" must apply to lands alienated conditionally as well as to those leased conditionally. As to the respondent's other contention that "alienated" must be taken to have been used in the limited sense of "conditional alienation," the plain answer is that such a construction is impossible, because the section expressly includes, as I have pointed out, not only lands alienated conditionally, but lands alienated "otherwise" than conditionally, that is all lands alienated, whether conditionally, or unconditionally.

There is, indeed, only one meaning which by any reasonable interpretation can be placed upon the words which the legislature have used, namely, that contribution may be exacted from holders of land adjoining in cases where such land shall have been alienated either conditionally or unconditionally, or shall have been leased conditionally or unconditionally. In other

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words, as Mr. Justice *Pring* has pointed out in the Court below, all lands, with the possession of which the Crown has parted, are included, except those specially exempted in the end of the section.

For these reasons I entirely concur in the view taken by the Supreme Court that the holder of land in freehold, who happens to adjoin land to which section 141 applies, is liable to contribute towards the cost of a boundary fence erected by any of the classes of holders entitled under the section to demand contribution.

The second matter of law involved in the question stated by the Land Appeal Court is whether the holder of a settlement lease comes within the class of holders entitled under section 141 to demand contribution. That class of tenure was first created by secs. 24 and 25 of the *Crown Lands Act* 1895. By the latter section (sub-sec. (*d*)) fencing within five years on the settlement lease is made compulsory. In the case of another new tenure created by the same Act, homestead selections, the provisions of section 141 of the Act of 1884 are expressly made applicable "until the grant thereof" (sec. 22). But there is nothing in that or any later Act making sec. 141 applicable to settlement leases.

It was argued by Mr. *Davies* for the respondent that a settlement lease is a conditional lease within the meaning of that expression as used in sec. 141, and that, as the new tenure was brought into existence, the section applied to it. It might well be argued, no doubt, that a general word such as "lease" would become applicable to new forms of lease as they came into existence. But in sec. 141 lease must be read as "conditional lease," and the expression is used there, as it is all through the *Crown Lands Act* 1884 and the subsequent Acts, to describe not any lease made subject to conditions, but the particular kind of lease created by sec. 48 of that Act in succession to and in substitution for the old pre-emption lease, that is to say, a lease appurtenant to a conditional purchase and having an existence only in connection with a conditional purchase. Not only is it clear from the context that "conditional lease" is thus used in sec. 141 and throughout the remainder of the *Crown Lands Act* 1884 as a legal term to describe a particular kind of estate, but in the

Crown Lands Act 1895, by which settlement leases were created, the new tenure is classed, wherever the different tenures are enumerated, as a separate kind of holding from a conditional lease. For instance, sec. 42 opens with these words:—"Every application for a homestead selection or conditional purchase, or settlement, conditional, or homestead lease, is hereby required to be made in good faith." In secs. 43 and 55 the same tenures are in enumeration similarly distinguished. In the *Crown Lands Acts* 1899, 1902, and 1903, the same distinctive enumeration is made.

For these reasons I am of opinion that a settlement lease is not one of the class of holdings to which is attached the right of contribution conferred by sec. 141, and that the answers of the Court to the question should be as follows:—The holder of land in freehold is liable under the provisions of the Crown Lands Acts to contribute towards the cost of a fence such as is described in sec. 141 at the suit of one of the class of holders entitled under that section to demand contribution. But the holder of a settlement lease is not amongst the class of holders so entitled. While, therefore, affirming the decision of the Supreme Court on the first ground involved in the question stated, the appeal must be allowed on the second ground.

ISAACS J. read the following judgment:—I agree with the judgments of my learned colleagues who have preceded me.

The freeholder's liability to contribute where there is a proper claimant depends upon the meaning to be attached to two expressions in sec. 141. The first is "land adjoining" [which] "has been or shall be alienated or leased by the Crown conditionally or otherwise"; the second is, "the purchaser or lessee of such adjoining land or his alienee." If the words "or otherwise" refer to "alienated" as well as to "leased," the first expression necessarily includes an unconditional alienation as by way of auction sale. Taken by itself "alienation" naturally includes such an unconditional disposal: it is a general and comprehensive term, and is used in the very widest sense in various parts of the Act of 1884, as, for instance, in the title, and the heading to sec. 21. In sec. 7 it undoubtedly includes the grant. The natural expecta-

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tion then would be that the words "or otherwise" attached equally to "alienated" as to "leased"; and they were inserted, as it seems to me, to avoid the possibility of any doubt as to the extensive signification of "alienated." To apply them to "leased" only, does violence to the structure of the section, because the phrase "by the Crown" certainly applies both to alienated and to leased land, and it would be an extraordinary method of interpretation to sever the application of the following words, and attach them *reddendo singula singulis* to words from which they were separated by an expression of conjoint application. No other part of the Act, so far as I have seen, assists that view. Sec. 45 is opposed to it. Goldfield purchases since 25th May 1882 are described as "sold conditionally or by auction or in virtue of improvements or otherwise"; goldfield purchases after 1884 are described as "any such land alienated under this Act." There the word "alienated" is compendiously used for the whole of the foregoing expression. It is noticeable too that in that section the purchaser is called the "proprietor." Sec. 47 of the Act of 1889 affords an even closer example. It allows a married woman judicially separated and living apart to "purchase or lease land conditionally or otherwise."

An alienation under sec. 61 by public auction, which is an unconditional alienation in fee, therefore falls within the description adopted in sec. 141.

Does then the second expression "purchaser" &c. cut down the application of the section so as to exclude the grantee of land purchased? I can quite understand a doubt existing as to this. But upon the whole my opinion is that the freeholder is not excluded. It would practically destroy the effect of the words "or otherwise" as applied to alienation. It would be quite anomalous and unreasonable to make a purchaser at auction liable to contribute to the cost of fencing from the moment he purchased at auction until he got his grant, and then to free him from any such liability immediately afterwards. The benefit to him is certainly as great when his grant is issued as before. And if the freeholder who has purchased at auction is bound, so must the freeholder be who has purchased conditionally. It is said the absence of reciprocity is some reason for excluding freeholders

from contribution. But that cannot be the test, because, assuming want of reciprocity, there are, as Mr. *Pike* pointed out, many classes of alienation in fee simple and of disposal by way of lease without fencing obligations. Fee simple:—sec. 46, improvements; sec. 63, water frontage; sec. 64, adjoining; sec. 66, special cases. Leases:—sec. 78, pastoral; sec. 81, occupation; sec. 85, annual; sec. 86, scrub (now repealed); sec. 91, mineral. All these are clearly contributories but are not holders of a "conditional purchase, or lease or a homestead lease"; and if there be an absence of reciprocal obligation, they suffer the disadvantage as much as freeholders. Indeed, a pastoral lessee has a greater moral claim to consideration than a freeholder because he pays for construction of the fence if he has more than five years to run, but must leave the fence behind him without any compensation, while the freeholder, if he pays, still retains the benefit.

Contributories have one circumstance in common, and this appears to me the decisive consideration. They receive a benefit from the compulsory expenditure of their neighbour and are accordingly required to share the cost proportionately. This applies, of course, with greatest force to a freeholder, and unless he is clearly exempted from the general words imposing liability, I think he should be held bound.

"Purchaser" is used to denote the person who originally purchases land conditionally or otherwise, and his identity and interest are the same after as before the grant. The provision as to maintenance helps this construction, for it would, as *Cohen* J. suggests, be strange to invariably impose, as the word "owner" undoubtedly imposes, the liability of maintenance on the freeholder and yet invariably absolve him from sharing the original cost. The word "alienee" is somewhat restricted, and in the case of a devisee or a person taking by devolution of law, may leave a gap,—perhaps temporary. But that is an exception which was apparently intended to protect some cases of unsought ownership and is not to be extended. The exception in favour of annual leaseholders, and leaseholders with less than five years to run was by reason of the limited nature of their

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tenure: the permanency of a freehold naturally points in the opposite direction.

I therefore think that freeholders who have purchased and alienees within the Act are liable to contribute to the cost of fencing, and if this were all, the appeal should be dismissed.

But with regard to the other point, namely, as to whether settlement lessees are persons who can claim contribution under the Act, I am of opinion they are not. A settlement lessee is certainly not a conditional purchaser, or homestead lessee. Is he then a conditional lessee? A conditional lease is a well known class of holding. It is attached to a conditional purchase, and has certain attributes different from those of a settlement lease. A settlement lease has only been created since the Act of 1884 was passed, and is a separate mode of alienation. Its distinct character is recognized by the legislature in many sections of the Act of 1895, as, for instance, secs. 43 and 55, and no room can be found for it in sec. 141 of the Act of 1884 as at present framed.

The judgment appealed from for this reason should be reversed, and the question raised by the Land Appeal Court answered in the negative.

HIGGINS J. read the following judgment:—

The question stated for decision is compound:—"Is the holder of land in freehold liable, under the provisions of the Crown Lands Acts, to contribute towards the cost of a fence erected by the holders of a settlement lease on the common boundary of the land held in freehold and of the land held under settlement lease"? We are bound to answer the question as it has been put, whether the appellant put, or failed to put, in the Supreme Court, the point as to the rights of a settlement lessee.

I am clearly of opinion that the holder of a settlement lease has not any right to enforce contributions for fencing from any adjoining holder. Settlement leases were first authorized by the Act of 1895 (58 Vict. No. 18, sec. 25); and there is no provision giving him the right to contribution which had been conferred on others by sec. 141 of the Act of 1884. Under sec. 141, the only persons who can enforce contribution for fencing are, (*a*)

conditional purchasers, (*b*) conditional lessees, (*c*) homestead lessees. It is not for us to say that from the nature of the case the legislature would give to settlement lessees the same right. We cannot act on conjecture. Moreover, in the same Act of 1895, the right is expressly given to those who take up what is called a "homestead selection" (sec. 22): *expressio unius exclusio alterius.*

The question asked would be sufficiently answered in the negative on this one ground. But it is the desire of the parties that the other branch of the compound question should also be answered: is an ordinary owner of land in fee simple liable to be compelled (say, by a conditional purchaser) to contribute to the cost of fencing under sec. 141? This is a more difficult point. The learned Judges in the Supreme Court have decided that he is liable. They think that his land comes within the words "land adjoining" which "has been or shall be alienated or leased by the Crown conditionally or otherwise." But this is an Act "to regulate the alienation occupation and management of Crown lands and for other purposes;" and, *primâ facie*, its sections are not meant to deal with old fee simple titles, with lands which no one would think of describing as "Crown lands."

At the time that the *Crown Lands Act* 1884 was passed there was in force another Act, 9 Geo. IV. No. 12, which settled the obligations of ordinary "owners" of land and possessors with regard to contribution to fencing.

The opening words of this very section 141 tend to show that the draftsman had in his mind only such lands as had not yet been granted in fee simple. For they provide that "fencing within the meaning of this Act shall be deemed an improvement common to the land on either side of the line of such fencing." Fencing is the kind of improvement required of conditional purchasers by the Act of 1884 (sec. 34); and of conditional lessees (sec. 51); and homestead lessees (sec. 82); whereas those who have the fee simple already are under no obligation to make "improvements," and the word is inappropriate as applied to them.

There is no correlative right conferred by sec. 141 on the holder of an old fee simple title to compel a conditional or other purchaser or lessee to contribute to fencing.

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Under sec. 141 the settlement of all disputes between all contributories, all questions of value, of costs, of the kind of fencing to be erected, is left with the Local Land Board—a tribunal created expressly for persons under contract with the Crown as to lands, and not for holders of old titles.

These considerations are of great weight, but I admit that they are not conclusive. They are so strong, however, that if a meaning can fairly be given to the other words of sec. 141 without holding the holders of old titles liable, we should adopt that meaning. It is our duty to bear steadily in mind the scope of the Act, which in the main is one prescribing the machinery for the "alienation occupation and management of Crown lands," and to confine the application of the Act within that scope, unless the words of the Act clearly and demonstrably compel us to go further.

Now, the only person expressly made liable, according to the words of the section, is "the *purchaser* or lessee of such adjoining lands or his *alienee*." These are not apt words, in a Crown Lands Act, to describe the holder of an old title in fee simple. Of course, most of such titles must have been at one time purchased, but the word "purchaser" here clearly refers to one who is the purchaser—who is still in a contractual relation with the Crown as purchaser. Wherever in the Act it becomes necessary to refer to a person in his capacity as a proprietor in fee simple, the draftsman uses appropriate words :—

Sec. 64 "any proprietor in fee simple."

Sec. 66 "the proprietor or proprietors in fee simple of adjacent lands."

Sec. 67 "the proprietor in fee simple of land adjoining a road."

Sec. 89 "Crown lands fronting any land held in fee simple."

Nor will the word "alienee" cover the case of the holder of an old title if he is a devisee (sec. 4, "alienee"). Why should devisees be excepted? On the other theory, that the word "purchaser" means merely the person who holds a contract of purchase of Crown lands, it is reasonable to think that the draftsman had in mind the provisions of sec. 125, under which in the case of lunacy, insolvency, execution, purchase under deed of assignment

or under decree, the alienee of a conditional purchaser was made subject to all the unfulfilled conditions imposed on the conditional purchaser. (See also secs. 119, 40).

In other parts of the Act the word "purchaser" is used in this natural ordinary sense of person purchasing—buying from the Crown—a person who has bought but who has not yet got his grant:—

> Sec. 66 *purchasers* of land "between granted land and a street."
>
> Sec. 111 "every *purchaser* of Crown lands and every holder of a lease or licence *shall be entitled* to a road of access."
>
> Sec. 122 "If any person knowingly and with intent to defeat or evade . . . this Act shall induce . . . any other person . . . to become the *purchaser* lessee or licensee of any land otherwise than for the use benefit and advantage of such purchaser . . . shall be guilty of a misdemeanour." And
>
> Sec. 131 deals with the case of a purchase lease or licence being forfeited or otherwise made void; and "forfeited" is not a word applicable to granted land at all.

According to the plaintiff's contention, a person who—or whose predecessor in title by transfer—has got a grant in fee simple by gift or by exchange would not be liable to contribution; for there was no "purchaser" in the first instance. It is not easy to conjecture why he should not be liable—why an exception should be made in his favour, as there must be made according to the plaintiff's theory.

So far, therefore, there is nothing to prevent us from taking the word "purchaser" in this ordinary and natural sense of person in the course of purchasing; and, so far, there is no ground for treating the holder of an old title as a "purchaser," within sec. 141, who is liable to contribution. No one pretends that the word "purchaser" is used in the technical conveyancing sense of the person from whom descent is to be traced. It is used in the popular, commercial sense. But it is said that the description of the adjoining land (of which the "purchaser or lessee" is liable to contribution), compels us to treat as liable a man who holds

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under an old fee simple title. The words are "*land* . . . *alienated* or leased by the Crown conditionally *or otherwise*."

I agree with my colleagues, and with Mr. *Hanbury Davies*, that grammatically the phrase "by the Crown conditionally or otherwise" applies to the word "alienated" as well as to the word "leased," and I shall so treat it. We must find the meaning of "alienated"; and we must find the application of the words "*alienated otherwise*" (than conditionally); although it is probable that the draftsman had chiefly in his mind the most recent word which he had used—the word "leased"—and meant to include "homestead leases," previously referred to in the section, as distinguished from "conditional leases."

The word "alienated" has two possible meanings. It may mean *sold* (by the Crown); or it may mean *granted* (by the Crown). "Alienated" is not a precise, technical term for land granted in fee simple by the Crown. Technically, the Crown does not transfer or part with all its rights; it merely grants estates in the land, and the highest estate is the fee simple. "Alienated by the Crown" is a fit expression to be applied to personal property transferred by the Crown; but not to real property. I make this obvious verbal criticism merely in order to meet the assumption that "alienate" bears, as between the Crown and the subject, the definite, rigid, meaning of "granted in fee simple," and that we have no right to cut down that meaning by examining the other provisions of the Act. The question is wholly one of intention of the legislature, to be ascertained from a full examination of the whole Act. "Alienated" is, at the least, equally applicable—apart from the Act—to land which the Crown has merely contracted to sell in fee simple. For, as soon as the contract is made, the purchaser becomes the "owner" in equity, as between the Crown and himself, but subject to the performance of the conditions of the contract: *Tasker* v. *Small* (1); *Inland Revenue Commissioners* v. *G. Angus & Co.* (2). As between the Crown and the purchaser, the land has been "alienated"—parted with to another owner—as soon as the contract is made. The word "alienated" is capable of either meaning—*sold* or *granted*—and it must depend on the context,

(1) 3 My. & C., 63.

(2) 23 Q.B.D., 579.

as well as on the nature of the Act, which meaning it is to bear. I have already considered the nature of the Act; and the nature of the Act is all in favour of the meaning "sold" under contract of sale.

The word "alienated" as applied to the land corresponds precisely with the word "purchaser" as applied to the person liable; and if the word "purchaser" is clear," and the word "alienated" ambiguous, the ambiguous word should follow the meaning of the clear word, and not *vice versâ*. Without a violent straining of language, the word "purchaser" means simply the man who is purchasing from the Crown, not the person who at some remote time had purchased from the Crown and obtained a grant; and the word "alienated" would then mean merely purchased from the Crown—sold by the Crown. To apply the words of *Tindal* L.C.J. in the *Sussex Peerage Case* (1) the word "purchaser" being in itself precise and unambiguous, we should construe the word in its natural and ordinary sense, and the correlated word "alienated" which is capable of two meanings should receive the corresponding interpretation. As Lord Chief Justice *Tindal* added:—"But if any doubt arises from the terms of the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the Statute."

As for the context of the Act, I find, to start with, the word "alienated" used in several places; and there is not one instance in which it is inapplicable to land *sold* but not yet *granted*. In sec. 4 "vacant land" means land not *alienated* by the Crown or held under lease, &c. Inasmuch as occupation licences and homestead leases may be granted over "vacant land" (secs. 81, 82), the word must necessarily include (if, indeed, it does not solely refer to) land held under a contract of purchase. Secs. 69 and 110 deal with the opening of roads through "*alienated*" land; and there is no ground for restricting the meaning to granted land. Under sec. 74 the Minister is to mark on a plan of a pastoral holding "all portions of *alienated* land not already shown thereon." This must include conditional and other purchases. There is, therefore, no ground, so far, for saying that in

(1) 11 Cl. & Fin., 85, at p. 143.

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sec. 141 the word "alienated" cannot be applied to land *sold* and not yet *granted*.

But there is more than this. The word "alienated" is sometimes used in such a connection that old titles in fee simple cannot be referred to :—

Sec. 7. "land has been *alienated* subject to the minerals *being* reserved." This is distinguished in the very same section from *grants* which *contain* a reservation ;

Sec. 45. If a goldfield be found on land "*alienated* under this Act," the Governor may "cancel wholly or in part the sale"—not "revoke the grant."

Sec. 132 makes it felony to destroy a dam on land "whether *alienated* by or under lease or licence from the Crown under this Act or *any Act hereby repealed*." The Acts repealed are all Crown Lands Acts, from 22 Vict. No. 17 onwards: so that the word "alienated" in this section cannot refer to old titles in fee simple. The subsequent part of the section, also, protecting improvements other than dams, applies only to the cases of a conditional purchase, lease or licence.

Not only is the word "alienated" applicable in every case to land under contract of sale; not only is it wholly inapplicable in some cases to land granted; but, where the draftsman wants to distinguish a sale from a grant, he does so in appropriate words :—

Sec. 5. "Crown lands shall not be *sold*," &c.

Sec. 6. "The Governor . . . . may *grant* . . . . Crown lands," &c.

Sec. 22. Claims to free *grants* of land unsatisfied at the commencement of this Act.

Sec. 46. Governor may *sell* and *grant* (improvement leases).

Sec. 63. Power to rescind reservation of water frontage in any Crown *grant*, and to *grant* the land.

Sec. 64. Power to authorize reclamation of land, and to *grant* the land.

Sec. 66. Crown lands between *granted* land and a road may be sold.

Sec. 69. Where new road opened through alienated land, old road may be *granted* as compensation.

Sec. 75. Power to accept surrender of land of which run-holder holds a *grant*, or is entitled to demand a *grant*.

Sec. 104. Land reserved for public purposes may be *granted*.

Sec. 105 gave power to revoke dedication, and make new dedication, and issue such *grants*, &c., as required.

Sec. 137. Every *grant* to be a record of the Supreme Court.

But it is urged—and *Cohen* and *Pring* JJ. treated this justly as the principal point that can be urged for the plaintiff—that unless the holders of old fee simple titles are liable to contribute, effect cannot be given to the words "or otherwise" in the phrase in sec. 141, "land . . . . alienated or leased by the Crown conditionally or otherwise." Having regard to the indications in favour of the contrary view which I have mentioned, and to the fact that in a section so loosely and inartistically worded the words "or otherwise" probably referred in particular to homestead and other lessees (not conditional lessees), I do not think that, even if the words "alienated conditionally" had no precise application, we should come to the extremely unlikely conclusion that all holders of old titles (other than devisees, &c., and other than those who hold titles originally obtained by gift or by exchange) are made liable. But is it even correct to say that the words cannot be strictly satisfied except by adopting such a conclusion? I think that they can. For even in the simplest case —the case of land sold by auction—the purchaser has three months, or, by permission of the Minister, even a longer time, indefinite, for the payment of three-fourths of the purchase money; and if he fail to pay, the land is to be again put for sale for others to bid. In the meantime, and before full payment and grant, the man who purchased has not the legal title, and the land, although it may be "alienated" unconditionally to him (as between himself and the Crown) is still Crown land—land under the control of the department; and there is nothing extraordinary in making him liable for fencing, as between him and other purchasers from the Crown, or in subjecting him to the decision of the Local Land Boards as to fencing.

The fact that mere annual lessees, and lessees with less than

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five years to run—persons holding such very brief titles—are expressly exempted from contribution for fencing, does not in any way show that holders of old titles, who are not under any contractual obligation to the Crown, are liable.

The case of maintenance of the fence, after erection, involves different considerations altogether. A conditional or other purchaser, after he has got his grant, may be liable to contribute to the maintenance of that fence which he has helped to erect. But we must not beg the question as to the meaning of the word "owner" in connection with the liability to maintain. It may simply mean purchaser—the owner in equity.

For these reasons I am of opinion—if we have to decide the point in this case—that the holder of an old grant in fee simple is not liable under sec. 141 to contribute to the cost of fencing, even if he should be the original purchaser from the Crown, or an "alienee" from the original purchaser, within the meaning of sec. 4.

I concur with my learned colleagues in saying that the appeal should be allowed; but on both grounds, and not merely on the ground that a settlement lessee cannot call for contribution. I am of opinion that the Land Appeal Court was perfectly right in its conclusion of law.

Appeal allowed. Order appealed from discharged. Question answered in the negative. Respondent to pay the costs of the appeal to the Supreme Court. Costs paid to be refunded.

Solicitor, for the appellant, *J. D. Kennedy* by *Abbott & Allen.*
Solicitor, for the respondent, *H. Weaver* by *A. W. E. Weaver.*

C. A. W.