Questions answered accordingly. The applicant Society to pay the costs of the reference.

H. C. OF A. 1909.

AMALGAMATED SOCIETY OF ENGINEERS v. AUSTRALASIAN INSTITUTE OF MARINE ENGINEERS.

Solicitors, for the applicants, *Barrow & Pearcey.*
Solicitor, for the respondents, *J. Woolf.*

B. L.

[HIGH COURT OF AUSTRALIA.]

DANIEL CAPEL . . . . . APPELLANT;
PLAINTIFF,

AND

JAMES LESLIE WILLIAMS,
NOMINAL DEFENDANT,
AND
FRANCIS WILLIAM MICHELL AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1909.

SYDNEY, *July* 20, *Aug.* 2, 16.

Griffith C.J. Barton and O'Connor JJ.

Volunteer Land Orders—Grant of Crown lands — Volunteer Force Regulation Act 1867 (31 *Vict. No.* 5), *sec.* 44—*Lands open to conditional sale—Areas set apart for holdings—Crown Lands Act* 1884 (48 *Vict. No.* 18), *secs.* 21, 22, 24, 26—*Crown Lands Act* 1889 (53 *Vict. No.* 21), *sec.* 18—*Crown Lands Act Amendment Act* 1903 (*No.* 15 *of* 1903), *sec.* 29—*Crown Lands Act Amendment Act* 1905 (*No.* 42 *of* 1905), *sec.* 4.

By sec. 44 of the *Volunteer Force Regulation Act* 1867 every volunteer not serving for pay after 5 years efficient service became entitled to a free grant of Crown land open to conditional sale under sec. 13 of the *Crown Lands Alienation Act* 1861, certificates of such service when registered being called Volunteer Land Orders. The *Crown Lands Act* 1884 repealed the Act of 1861 and substituted other provisions as to conditional sale. Sec. 21 specified

H. C. OF A. 1909.

CAPEL v. WILLIAMS.

certain classes of Crown lands which were to be exempt from such sale, and sec. 22 provided in effect that the rights of volunteers to free grants of Crown land should in future be exercised with respect to lands open to conditional sale under that Act and any later Crown Lands Acts which were to be read with it. The only express exemption of Crown lands open to conditional sale from applications by volunteers was that contained in sec. 29 of the *Crown Lands Act Amendment Act* 1903 which excepted lands within proclaimed special areas.

Sec. 4 of the *Crown Lands Act Amendment Act* 1905 authorizes the Minister to set apart by notification in the *Gazette* areas of Crown lands open to conditional sale to become available on specified dates for either of several classes of holdings under the Crown Lands Acts, and provides that land so set apart shall not be available for any class of holding not specified in the notification.

Held, that a setting apart of Crown lands by the Minister under that section had not the effect of withdrawing them from conditional sale so far as regards the holders of Volunteer Land Orders, but merely of limiting the classes of holdings under the Crown Lands Acts for which the lands were available.

An application by a volunteer for a free grant of land under the *Volunteer Force Regulation Act* is not an application for a holding within the meaning of the Crown Lands Acts. Sec. 4, therefore, does not authorize the Minister, nor does a notification under it purport, to close lands which are open to conditional sale as against applicants under the *Volunteer Force Regulation Act*.

Decision of *A. H. Simpson* C.J. in Equity : *Capel* v. *Williams*, (1909) 9 S.R. (N.S.W.), 23, reversed.

APPEAL from a decision of *A. H. Simpson*, Chief Judge in Equity of the Supreme Court of New South Wales.

This was a suit by the appellant, Daniel Capel, against the respondents James Leslie Williams, nominal defendant on behalf of the Government of New South Wales, and Francis William Michell and Frederick Richard Michell, to have it declared that two applications each for a free grant of 50 acres of land, made by the appellant as holder by assignment of two certificates under the *Volunteer Force Regulation Act* 1867, sec. 44, duly registered as Volunteer Land Orders, were valid ; that the areas of Crown lands described in the applications were available for those applications; and that upon the lodging of the applications the areas described in them became Crown lands contracted to be granted to the appellant, and ceased to be available for conditional lease ; and praying that, if necessary, an order be

made for the specific performance of the contracts so made, and for damages and consequential relief. The respondents Michell were applicants for certain portions of the area in question to be held under conditional lease, the Government having purported to grant their applications to the exclusion of those of the appellant.

The questions raised in the suit depended upon various sections of the Crown Lands Acts and other Acts of New South Wales, all of which, so far as are material, are set out in the judgments hereunder. The suit came on for hearing before *A. H. Simpson* C.J. in Equity, who dismissed the suit with costs: *Capel* v. *Williams* (1).

From that decision the present appeal was brought by special leave. The facts are sufficiently stated in the judgment of *Griffith* C.J.

The arguments are so fully stated in the judgments that it is not considered necessary to set them out in detail, but only to mention the authorities and sections referred to by counsel in the course of their argument.

Canaway (*Pike* with him), for the appellant, referred to *Volunteer Force Regulation Act* (31 Vict. No. 5), sec. 44; *Crown Lands Alienation Act* 1861, sec. 13; *Ogilvie* v. *Harkin* (2); 41 Vict. No. 15; 48 Vict. No. 18, secs. 21, 22, 24; Act No. 42 of 1905, sec. 4; Act No. 30 of 1908, sec. 20; 53 Vict. No. 21, secs. 18, 44; *Interpretation Act*, No. 4 of 1897, sec. 12; 58 Vict. No. 18, secs. 4, 10, 11, 13; Act No. 51 of 1899, secs. 4, 5; *Abbott* v. *Minister for Lands* (3); *Fenton* v. *Dry* (4); *Bradlaugh* v. *Clarke* (5); *Parker* v. *Talbot* (6); Act No. 15 of 1903, sec. 29; *Blackburn* v. *Flavelle* (7); *Lee* v. *Stephenson* (8); Regulations, 3rd June 1895, Reg. 146; *Bowtell* v. *Goldsbrough, Mort & Co. Ltd.* (9); *Blackwood* v. *London Chartered Bank of Australia* (10).

Cullen K.C. (*Hanbury Davies* with him), for the respondent J. L. Williams, referred to 53 Vict. No. 21, secs. 1, 18, 39; 48 Vict.

(1) (1909) 9 S.R. (N.S.W.), 23.
(2) 1 S.C.R. N.S. (N.S.W.), 223.
(3) (1895) A.C., 425.
(4) 1 W.W. & aB. (L.), 64.
(5) 8 App. Cas., 354.
(6) (1905) 2 Ch., 643, at p. 655.
(7) 6 App. Cas., 628.
(8) 2 N.S.W. L.R., 32.
(9) 3 C.L.R., 444, at p. 455.
(10) L.R. 5 P.C., 92.

H. C. OF A. 1909.

CAPEL v. WILLIAMS.

No. 18, secs. 22, 24, 102; 58 Vict. No. 18, sec. 4; Act No. 42 of 1905, sec. 4; *Minister for Lands* v. *Bolton* (1); *Minister for Lands* v. *Harrington* (2); *Colless* v. *Minister for Lands* (3).

Harriott, for the other respondents, Michell, referred to 48 Vict. No. 18, secs. 22, 48; 53 Vict. No. 21, sec. 12; *Wynne* v. *Green* (4).

Canaway in reply.

Cur. adv. vult.

The following judgments were read :—

August 16.

GRIFFITH C.J. The appellant is the holder of two certificates, commonly called Volunteer Land Orders, issued under the *Volunteer Force Regulation Act* 1867, to members of the volunteer force named Ellis and Allen. The question of the assignability of such Land Orders was decided affirmatively by the Supreme Court of New South Wales in the case of *Ogilvie* v. *Harkin* (5), and is not now raised.

By that Act, sec. 44, it was provided that every volunteer not serving for pay should, after having served as an efficient volunteer for five years, be entitled to a free grant of 50 acres of such land as might be open to conditional sale under sec. 13 of the *Crown Lands Alienation Act* 1861, subject to such regulations and conditions as might from time to time be approved by the Governor and laid before both Houses of Parliament.

Conditional sale was a system introduced in New South Wales by the Act of 1861, under which a person desiring to acquire Crown lands could make application to become the purchaser of land not exceeding a specified area on terms which allowed deferred payment of the purchase money, and included obligatory conditions as to residence and improvement.

By Regulations of 3rd November 1870 it was provided that persons who desired to avail themselves of Volunteer Land Orders must register them in the Lands Department, and thereafter should be at liberty to present them at the Land Office of any district on any other than a Land Office day, accompanied

(1) 17 N.S.W. L.R., 389.
(2) (1899) A.C., 408.
(3) 20 N.S.W. L.R., 1; (1899) A.C., 90.
(4) (1901) 1 S.R. (N.S.W.), 40.
(5) 1 S.C.R. N.S., 223.

by an application in the prescribed form (Reg. 1). By Regulation 6 it was provided that, subject to certain conditions not material to the present case, applicants should be at liberty to take possession of the land applied for on obtaining the land agent's receipt for their applications. Under the Act of 1861 applicants for land by way of conditional sale could only make application on a Land Office day.

It is plain, therefore, that the question whether land was "open" for conditional sale on a particular day was not then regarded as in any way dependent upon whether any person could make application for it on that day.

The *Crown Lands Alienation Act* 1861 was repealed by the *Crown Lands Act* 1884, which substituted other provisions as to conditional sale. Sec. 21 of that Act provides that "Crown lands belonging to any of the classes hereinafter specified shall be exempt from conditional sale under this Part."

Then follows an enumeration of nine categories of land, one of which is "land reserved from sale or dedicated reserved or set apart for any public purposes other than as aforesaid" (*i.e.*, other than for town or suburban lands or village sites). Reservations, dedications, and setting apart were acts of the Governor in Council.

Sec. 22 provided that:—"All Crown lands if not within any of the aforesaid classes of exemption shall be open to conditional sale under and subject to the provisions and conditions of this Act and where in any Act relating to the Volunteer Force reference is made to the thirteenth section of the *Crown Land Alienation Act* of 1861 such reference shall in respect to all claims to free grants of land unsatisfied at the commencement of this Act be deemed and taken to refer to Crown lands open to conditional sale under this Act."

The consequence was that all Crown land was divided into two classes, one open, and one not open, to conditional sale, and that any land of the former class might be the subject of a grant under a Volunteer Land Order. This provision has not been altered except in one particular, which does not directly affect the present case.

The land in respect of which the present suit is brought was

H. C. OF A. 1909.

CAPEL v. WILLIAMS.

Griffith C.J.

reserved from sale in 1893, and so brought within the exemptions of sec. 21. It was thenceforth, while so reserved, not open for conditional sale under the Act of 1884. But by a Proclamation dated 25th April 1906 the reservation was revoked, the revocation taking effect on 24th June 1906. If there were no more in the case it would be clear that on 25th June the land fell into the class of land "open for conditional sale" under the Act of 1884, in respect of which the right of a free grant might be claimed by the holders of Volunteer Land Orders.

On 27th June the appellant made application in due form for grants of the land in question, and obtained the land agent's receipts, but the Government refused to give effect to the application on the ground that the land was not then open for conditional sale. The question to be determined in this suit is whether it was so open.

Since the year 1884 many amendments have been made in the land laws of New South Wales. The successive Acts have all purported to be amendments of the Principal Act of that year, and I think that the words "under this Act" in sec. 22 must be read as meaning "under this Act as amended by any later Act."

Under the Act of 1884 an application for land by way of conditional purchase was required to be tendered to the land agent of the district on some "Land Office day" (sec. 26), that term being defined as meaning (sec. 4) "any day notified as such in the *Gazette* on which land agents are required to attend at their land offices for the purpose of receiving application for sale or lease of Crown lands."

Originally Thursday in each week was so notified. But it often occurred that two or more applications were made for the same land at the same time, and by the Act of 1889 (53 Vict. No. 21) provisions were made for a ballot between competing applicants. By the Act No. 51 of 1899 these provisions were repealed and others substituted, and the Governor was empowered to make regulations prescribing the period during which applications for the same land might be received by a land agent in order that they might be deemed to have been made lodged or tendered simultaneously (sec. 5).

By Regulations of 14th October 1905 it was provided that

applications lodged on any Thursday and between such Thursday and the following Wednesday inclusive, or received by the land agent by registered letter within the same period, should together be deemed to have been made tendered or lodged simultaneously on the Thursday. The practical effect was that every day became *sub modo* a Land Office day.

Sec. 24 of the Act of 1884 allowed the reservation of certain lands by Proclamation, to be called "special areas," with respect to which the conditions were to be different from those relating to other lands. By the Act of 1889 it was provided (sec. 18) that certain lands which were included in the categories of sec. 21 of the Act of 1884 might by Proclamation be set apart as "special areas," and should when so set apart be open to conditional purchase on special conditions notwithstanding anything to the contrary in the Principal Act. Lands so proclaimed under either power were known as "proclaimed special areas."

The Act of 1895 (58 Vict. No. 18) provided (sec. 10) that for the purpose of effecting a proper classification of Crown lands the Governor might declare by notification in the *Gazette* that any Crown lands comprised in a specified tract or area should be set apart for holdings of the kinds specified in the notification, and that the land so set apart should thereafter cease to be "available" for the purpose of any application for a holding of a kind not specified in the notification, with certain exceptions; and that for the purpose of effecting proper survey and subdivision the Governor should have like power to declare by notification that the Crown lands within any tract or area should not be available for the purpose of any application until a further notification should have been published.

It is plain that the subject matter of any such notification was Crown land already open to conditional sale. The effect of the notification was that the lands specified were not for the time being available for application under the Land Acts, except as prescribed. But, in my opinion, the land was still "open for conditional sale" within the meaning of sec. 22 of the Act of 1884, although no one, or only certain persons, could for the time being make application for it by way of conditional purchase,

H. C. OF A. 1909.

CAPEL v. WILLIAMS.

Griffith C.J.

just as land was within the meaning of that section "open for conditional sale," on every day of the week, although applications could only be lodged on Land Office days.

Various new tenures were created under the amending Acts, but the definition of land "open to conditional sale" has never been altered.

By the Act No. 15 of 1903 it was provided (sec. 4) that the Minister may, by notification in the *Gazette*, "set apart areas (to become available on and after such dates as may be specified) for additional conditional purchases or conditional leases, or additional homestead selections or additional settlement leases"—some of which were new tenures—"(whether for one or more of such additional holdings)" at prices to be specified, and might in like manner set apart areas for original holdings to the exclusion of any of the additional holdings mentioned. By the same Act (sec. 29) sec. 22 of the Act of 1884 was amended by a provision, the effect of which was that lands, in the "proclaimed special areas" to which I have already referred, could not be taken up under Volunteer Land Orders, but no such provision was made with respect to areas set apart by the Minister under the powers conferred by sec. 4. It follows, I think, by necessary implication, that the legislature intended that land comprised in such areas should still be free to be taken by the holders of such Land Orders, and consequently that such land was still to be regarded, so far as they were concerned, as land "open for conditional sale" within the meaning of sec. 22.

By the Act No. 42 of 1905 sec. 4 of the Act of 1903 was repealed and other provisions were substituted (sec. 4), which are in substance a mere grammatical expansion of the provisions of sec. 4 of the Act of 1903, with the addition of a provision that the setting apart of areas for original or additional holdings should be mutually exclusive, and a declaration that land in such areas should not be "available" for any class of "holding" not specified in the notification.

This provision being in substance a mere substitution for that of sec. 4 of the Act of 1903, the same considerations apply to it. It follows that the mere setting apart of an area under this section does not withdraw land from being "open to conditional

purchase" so far as regards the holders of Volunteer Land Orders.

It cannot be, and is not, contended that a grant under the rights conferred by the *Volunteer Force Regulation Act* 1867 is a "holding" within the meaning of the section. The concluding declaration is therefore irrelevant to the question now before us.

But it is contended that, although the setting apart of the area does not withdraw the land comprised in it from the class of land open to conditional selection, yet, until the date on and after which the land is to become available under the notification for the particular tenure specified, it is not "open to conditional sale" in any sense—in other words, that the fixing of that date makes the land not "open" in the interval.

By a notification dated 25th April 1906, when the land in question was still reserved from sale, an area in which it was included was set apart by the Minister for Additional Conditional Purchases or Conditional Leases (with certain exceptions), to become available on 28th June, when the revocation of the reservation would have taken effect. The respondents argue that until the land had become so "available" it was not "open for conditional sale" within the meaning of sec. 22 of the Act of 1882.

I cannot accept this argument. The power conferred by sec. 4 can only be exercised with respect to land which is within the class of land open to conditional sale. It does not authorize the Minister to add land to that class, nor does it purport to authorize him to withdraw land from it. The notification must, therefore, be read as dealing with such land only, *i.e.*, land open to conditional sale, and its effect is that, as regards persons entitled to apply for holdings under the Land Acts, the right to apply is restricted, and they cannot apply until the day specified.

But I do not think it can be read as having the effect of declaring that other persons entitled to apply for land "open to conditional sale," and who are not referred to, directly or indirectly, by the section itself, shall not be entitled to apply in the interval. In this regard the provision seems to me to be entirely analogous to the provision that applications must be made on a "Land Office day."

In my opinion, therefore, the provisions of the later Acts as to

H. C. OF A. 1909.

CAPEL v. WILLIAMS.

Griffith C.J.

the days on which applications for land may be made under the Crown Lands Acts have no relevancy to the question whether the land is within one or the other of the classes of "land open" and "land not open" to conditional sale so far as regards the holders of Orders issued under the *Volunteer Force Regulation Act* 1867. It follows that the land in question was on 26th June "open for conditional sale" within the meaning of sec. 22 of the Act of 1884, and that the plaintiff's applications should have been accepted.

Any other construction would, in these days of unsatisfied land-hunger, practically deprive the holders of Volunteer Land Orders of any substantial right of choice, since they could never apply until after all other persons desirous of purchasing had been satisfied.

It is not disputed that in this view of the Statutes the appellant is entitled to the relief which he seeks.

The respondents Michell set up a defence of *bonâ fide* purchase for value without notice. It appears on the evidence that they had notice of the appellant's applications at the very moment when they made their own. This defence therefore fails.

There should be a declaration in the terms of the first and third paragraph of the statement of claim with consequent relief.

BARTON J. The *Crown Lands Act* 1861 provided in its 13th section that on and after the beginning of 1862 Crown lands not being within the classes of exemptions therein specified should be "open for conditional sale by selection." Any person might upon any Land Office day tender to the land agent for the district a written application for the conditional purchase of any such lands. The maximum and minimum areas to be applied for, the price, and the required deposit were specified. Although the conditional purchaser became entitled to possession immediately upon the receipt of his application and deposit, he had to perform conditions of residence and improvement, and to pay the balance of the purchase money before becoming entitled to his grant. Crown lands, though "open to conditional sale," could only be selected on Land Office day. The *Volunteer Force Regulation Act* 1867 by sec. 44 enacted that every person who

had served continuously for five years as an efficient volunteer and not for regular pay should be entitled to receive from the Government, in consideration of his efficient service, a free grant of 50 acres of any land "open for conditional sale under the thirteenth section of the *Crown Lands Alienation Act* 1861," subject to regulations and conditions to be approved by the Governor in Council and laid before Parliament. The certificate of the officer commanding the volunteer force was to suffice as evidence of efficient service for the prescribed period. Though this section was repealed by the Act 41 Vict. No. 15, such repeal was expressed not to affect the claim or right of any volunteer, then (April 1878) serving as an efficient volunteer, to a free grant of Crown land after his period of service. As this restriction applied only to those who might enrol after the repeal, Parliament in effect confirmed the privilege to those who had then completed or were undergoing their term of service. Regulations under the *Volunteer Act*, made in 1870, provided that volunteers holding certificates of service might present them personally or by agent at any Land Office "on any other than a Land Office day," together with an application in the given form, for a grant of 50 acres of "Crown lands open to conditional selection." On obtaining the land agent's receipt for their applications, the holders of certificates were at liberty to take immediate possession of the land described in their applications, and a "free grant" was to be issued to "the volunteer entitled to the same or to any person to whom he may have duly transferred his entire interest therein."

Volunteer Land Order certificates are assignable—that is to say, the last quoted regulation is valid: see *Ogilvie* v. *Harkin* (1), the authority of which decision is not now questioned.

The appellant is the assignee of two of these certificates, originally issued to volunteers.

In 1884 a new Act was passed which repealed the Act of 1861, and made new provision for the disposal of Crown lands, including provision for conditional sale. It exempted from such sale nine specified classes of Crown land (sec. 21, the 5th sub-section of which comprises "Lands reserved from sale or dedicated reserved

(1) 1 S.C.R. N.S., 223.

H. C. OF A. 1909.

CAPEL v. WILLIAMS.

Barton J.

or set apart for any public purpose other than for town or suburban lands or for village sites," which by sub-sec. 4 had also been exempted). The 22nd section keeps alive the privilege of the holders of Volunteer Land Orders. It provides that "All Crown lands, if not within any of the aforesaid classes of exemption, shall be open to conditional sale under and subject to the provisions and conditions of this Act and where in any Act relating to the Volunteer Force reference is made to the thirteenth section of the *Crown Lands Alienation Act* of 1861 such reference shall in respect to all claims to free grants of land unsatisfied at the commencement of this Act be deemed and taken to refer to Crown lands open to conditional sale under this Act." By a later Statute (1903, No. 15, sec. 29), lands within "special areas" proclaimed as such by the Governor in Council are exempted from Volunteer Land Order selection. If land were at any time within the class designated as "Crown lands open to conditional sale," sec. 22 made it subject to selection by any holder of a Volunteer Land Order so long as it remained "open"; that is, so long as it did not fall within any exemption then or thereafter to be prescribed by law.

The reservation of Crown lands from sale and the dedication, reservation, or setting apart of Crown lands for any public purpose (sec. 21, sub-sec. 5) are executive acts for the Governor in Council to perform. In this manner an area of some 4,500 acres, containing the lands now in dispute, was reserved from sale, and the reservation was notified in the *Gazette* of 8th July 1903. While so reserved the land was admittedly included in the exemptions prescribed by sec. 21 already mentioned, and consequently was not "open to conditional sale" so long as the reservation remained effective, as it did for nearly three years, that is, until 25th April 1906, when the Governor in Council notified in the *Gazette* its revocation. But under the law (sec. 102 of 1884) the land could not be sold before the expiration of 60 days from the date of this revocation—that is, until 25th June 1906. This suspension of sale was included in the notification, probably for greater caution. On 25th June, a Wednesday, the appellant presented his transfers and the two certificates, with applications for land within the area thus opened, to a land agent, who gave him

the prescribed receipts. He has, however, been denied his "free grants," and the land has been allotted to the respondents Michell, whose claim arises in this way. On 25th April 1906, the date of the *Gazette* notice revoking the reservation from sale, and giving the revocation effect after 60 days from that date, the Minister, acting under sec. 4 of the Act of 1905, notified in the *Gazette* a "setting apart" of an area which contained the land in question for additional conditional purchases and for conditional leases of a certain kind. The lands, it was further notified, were to become "available" (the word used in sec. 4) for the two purposes specified, on 28th June 1906. Thus they were not "available" for these purposes when the appellant made his application, although the revocation of the reservation from sale had taken effect. On 28th June the respondents Michell applied for the conditional lease to them of an area covering that previously applied for by the appellant, and it has been allotted to them. It is not disputed that, but for the notification by the Minister under sec. 4 of the Act of 1905, the appellant by virtue of each application would have been entitled to a free grant of the land described in it. He contends that the notification by the Minister is no bar to him. He argues that in the interval between 25th and 28th the lands were "Crown lands open to conditional sale," albeit they had been, within the meaning of sec. 4 of the Act of 1905, "set apart," and were not yet "available" for the holdings specified in the notification. If the lands were "open to conditional sale" no doubt they were "contracted to be granted in fee simple" to him, and therefore he is entitled to his grant. The appellant brought a suit to have this right established, joining Mr. Williams, who, as nominal defendant, represents the Crown. The respondents on the other hand all contend that the land applied for by the plaintiff at the time of his application was exempt from conditional sale within the meaning of sec. 21 already cited, that having been "set apart" by the Minister and not being "available at that time for the purposes specified by him," it was also not "open to conditional sale," and therefore not open to Volunteer Land Order selection. Further, the respondents Michell claim to be purchasers for valuable consideration without notice, but that defence is obviously untenable, as the land agent told

H. C. OF A. 1909.

CAPEL v. WILLIAMS.

Barton J.

them of the appellant's applications and their nature at the time they made their own. At the hearing the learned Chief Judge in Equity dismissed the suit, holding that the land was not "open to conditional sale" until 28th June 1906, and so was not open to Volunteer Land Order selection till that date; that the appellant's applications were too soon, and void, and thus the land was open to conditional lease by the Michells on 28th June. His Honor has evidently given the word "open" in the 13th section of the Act of 1861, and the 22nd section of the Act of 1884, the same meaning and effect as the word "available" in the 4th section of the Act of 1905. As it is conceded that but for the Minister's notification under that section the appellant would be entitled to his grants, the question turns on the effect of the notification, which depends on the meaning of the section. If the section applies in its operation to Volunteer Land Order selections, so that a setting apart by the Minister for a certain kind or kinds of "holdings" may have the effect of excluding that class of selectors, then the notification has that effect in this case, and the appeal fails. Again, if the land, because it was not "available" till 28th June, was not until then "open to conditional sale" under the Act of 1884—of course as amended—the appeal equally fails.

As to the meaning of the section, it must first be observed that a "setting apart" of special areas of land in pursuance of it by the Minister's notification in the *Gazette* does not make them "proclaimed special areas" within the meaning of sec. 29 of the Act of 1903. A "proclaimed special area" is set apart by the Governor in Council, not the Minister, and the proper means of making that act known is a Proclamation, and not a mere notification. See for examples sec. 24 of the Act of 1884, and sec. 18 of the Act of 1889. Sec. 29 therefore does not touch the appellant's claim. But it is worth mentioning as to that section that there was no necessity for its enactment, if the legislature meant that Crown lands set apart by any process as special areas formed a tenth class of exemptions under sec. 21 of the Act of 1884, which is what the respondents must in effect contend. The fact that the legislature thought such a provision necessary goes to show that, in the absence of express enactment to secure that end,

the exercise of the power to "set apart" Crown lands does not take them out of the class, if they are once within it, of "Crown lands open to conditional sale." In a sense, special areas set apart under sec. 4 of the Act of 1905 may be, or be equivalent to, proclaimed special areas; but this is of no consequence to the present case unless a Volunteer Land Order selection is a "holding"; for the power given to the Minister is expressly limited to the purposes of the section. Sec. 4 of the Act of 1905 is in place of sec. 4 of the Act of 1903, which the later Act repeals. The purposes of the two sections are similar. The new section gives power to the Minister, notwithstanding anything in the Principal Acts, to set apart areas of land by *Gazette* notice which are to become "available" on and after such dates as the notice may specify, either for "original holdings," or for "additional holdings," the classes included under each term being set out. The setting of an area apart must not be so done as to make it available simultaneously for original and additional holdings. Land may be made available for one or more varieties of these holdings, but "shall not be available for any class of holdings not specified in the notification." Is a Volunteer Land Order selection a "holding" within this section? Plainly it is not. The "holdings" are tenures created or regulated by the Land Acts, and have no reference to the independent rights of a certificate holder under the *Volunteer Act*, whose privilege upon the issue of the certificate becomes unconditional. The Land Acts conserve that privilege: they do not profess to touch its exercise, except as to "proclaimed special areas." Therefore the exclusion of holdings not specified does not affect Volunteer Land Order selections, which are not holdings in the sense of the section. Dr. *Cullen* indeed did not contend that the Volunteer Land Order selections were "holdings," but I have thought it desirable to say a few words on that subject.

The other question is whether land set apart under sec. 4 for specified kinds of holdings exclusively is "open to conditional sale" under the Act of 1884 and the amending Acts, when or while the date on which it is to be available has not arrived, or at any subsequent time while it remains so set apart. Sec. 4 makes no mention of Land Orders under the *Volunteer Forces Regulation Act*. It deals only, as already pointed out, with

H. C. OF A 1909.

CAPEL v. WILLIAMS.

Barton J.

holdings under the *Land Act*. The various enactments authorizing the setting apart of Crown lands as special areas deal only with Crown lands "open to conditional purchase," (that is to say, lands not within the class of "exemptions"), except where other classes of land are expressly made liable to be so set apart. Sec. 4 of the Act of 1905 as drawn could only have operated on "Crown lands open to conditional sale" at the date of the notification, because it does not provide for the removal of any exemption under which any other classes of land had previously been placed. It merely prescribes the manner in which certain lands not exempted from conditional sale shall be dealt with, whether by way of "original holdings," among which are original conditional purchases, or of "additional holdings," among which are additional conditional purchases. True, it makes lands of the non-exempted class subject after notification to be taken for certain kinds of tenures under the Land Acts; but each of these is a tenure applicable to lands within that class. Being within it, that is to say, "open to conditional sale" under the Acts, the fact that the land may be made available for these special holdings (to the exclusion of other holdings to which apart from the notification the lands were applicable), and that it is to be available only on and after specified dates, while it may narrow the range and time of choice of those who seek tenures under the Land Acts, does not deprive the land of the quality it had at the date of the notification. The section is a mere regulation of tenures under the Land Acts. It prescribes how and when lands "open to conditional sale" may be taken up, after being set apart, by certain kinds of applications permitted by the series of Land Acts. It does not exclude from these areas the Volunteer Land Order selector, for the land remains within the class which is open to him, although it may not yet be available to those of the public who seek it under the Land Acts.

Something was said in argument as to Land Office days. I do not think much turns on that question. It is admitted that if the land was open to conditional sale the appellant's application made on a Wednesday should have been accepted. It is true that land so open is not available to an applicant for con-

ditional purchase or the like except on a Land Office day, and that it is not available to an applicant for a Volunteer Land Order selection, save on a day which is not a Land Office day. But the question whether the word "available" in the section relied on by the respondent is used in the same sense as the word "open" in the 22nd section of the Act of 1884 is not quite the same question. The inference, though not a strong one, tends in favour of the appellant. But I prefer to rest my judgment on the ground that Crown lands are for the purposes of selection divided into two classes, those under exemption and those not exempt, which are "open" to Volunteer Land Order selection; that no exemption has been added which causes this land to be no longer "open" for that purpose; and that, whatever restrictions subsequent Acts have placed on the action of conditional purchasers, this land remained so "open," whether then available to conditional purchasers or not, at the time of the appellant's application.

I am therefore of opinion that the appeal should be allowed.

O'CONNOR, J. A great many sections of various Lands Acts have necessarily been referred to in the course of this case, but as the argument went on it became apparent that the real matter to be determined lies within a very narrow compass. It is not denied that at the time of the appellant's application the land in question would have been open to be taken up under Volunteer Land Order, but for its inclusion in the Minister's notification under sec. 4 of the *Crown Lands Act Amendment Act* 1905. By that document it was notified in pursuance of the section that certain lands therein described were set apart for additional conditional purchases or conditional leases, and that the particular area, including the lands in question, should become available therefor on 28th June 1906. That was the day following that on which the appellant made application by virtue of his Volunteer Land Orders. Dr. *Cullen*, counsel for the Government, conceded that on and after the date named in the Minister's notification the lands were open to application under Volunteer Land Order, notwithstanding that they were set apart for particular classes of holdings. But he contended that until that date arrived they were locked up by the Minister's notification, not only against

H. C. OF A. 1909.

CAPEL v. WILLIAMS.

O'Connor J.

the applicants for the specified kind of holdings but against applicants of every kind whatsoever, as effectually as if the notification had been a Proclamation by the Governor with the advice of the Executive Council reserving the lands from sale. Whether that position can or cannot be supported depends mainly on the effect to be given to sec. 4 of the *Crown Lands Act Amendment Act* 1905 when read in connection with the *Volunteer Force Regulation Act*, and with sec. 22 of the *Crown Lands Act* 1884. The *Volunteer Force Regulation Act* 1867 declares by sec. 44 that volunteers "shall be entitled," in consideration of efficient service, to "a free grant of fifty acres of such land as may be open to conditional sale under the thirteenth section of the *Crown Lands Alienation Act* 1861," subject to certain regulations and conditions. The regulations and conditions referred to are under the *Volunteer Act*, and have no bearing on the matter now in controversy. The volunteer is also empowered to transfer his right in accordance with certain regulations, and on compliance therewith all his rights under the Act vest in his transferee. The *Crown Lands Act* 1884 repealed the Act of 1861, and by sec. 22 enacted that the reference to the 13th section of the Act of 1861 in the Volunteer Force Regulation should thereafter, in respect to all unsatisfied claims to free grants of land, be deemed and taken to refer to Crown lands open to conditional sale under the Act of 1884. That is to say, the holder of a Volunteer Land Order, provided he complied with the regulations as to the day and form of application, was entitled to obtain a free grant out of any land open to conditional sale under the provisions of that Act. It was not contended that any subsequent legislation had in any way altered or diminished that right, but it was urged on behalf of the respondents that Crown lands cannot be the subject of any application unless they are available as well as open to conditional sale, and that, by reason of the Minister's notification before referred to, the lands were not open or available for conditional sale at the time of the appellant's application. That contention must rest on the powers for the classification of holdings conferred on the Minister by sec. 4 of the *Crown Lands Act Amendment Act* 1905. The first enactment dealing with

classification of holdings is sec. 10 of the *Lands Act* of 1895, the opening words of which are as follows:—"For the purpose of affecting a proper classification of Crown lands the Governor shall have power," &c. The section then goes on to empower the the Governor to notify in the *Government Gazette* that certain lands shall be set apart for holdings of the kind specified in the notice, and it declares that the lands comprised in such notification shall then cease to be available for any application for a holding of a kind not specified in the notification. The holdings at that time in the mind of the legislature were homestead selections and settlements leases first created by that Act, but as the time went on other kinds of holdings were subjected to classification. In the *Lands Act* of 1903 by sec. 4 the Minister is empowered to set apart by *Gazette* notification areas to become available at a date named for specified kinds of additional holdings to the exclusion of original holdings, and to set apart similarly areas to become available on a day named for original holdings to the exclusion of additional holdings. It is plain from sec. 29 of that Act that the legislature did not intend the setting apart to take the lands for all purposes out of the class of Crown lands open to conditional sale. With reference to lands set apart and proclaimed as special areas under sec. 24 of the Act of 1884 and sec. 29 of the Act of 1895, the section of the Act of 1903 which I have mentioned makes special provision by amending sec. 22 of the *Lands Act* of 1884. It excepts from the operation of Volunteer Land Orders, Crown lands open to conditional sale if they are within a proclaimed special area. It may be fairly inferred that the legislature deemed that amendment necessary, and considered that without it lands in proclaimed special areas, being lands open to conditional sale, would remain open to application by holders of Volunteer Land Orders notwithstanding their being included within a proclaimed special area. The inference fairly follows that, if they had intended that lands, which were Crown lands open to conditional sale and which had been notified as set apart by way of classification of holdings under the Acts of 1903 and 1905, should be thereby withdrawn from application under Volunteer Land Order, they would have indicated that intention by some express

H. C. OF A. 1909.

CAPEL v. WILLIAMS.

O'Connor J.

provision. The *Lands Act* 1905 by the first sub-section of sec. 4 more clearly defines the Minister's powers, enabling him by *Gazette* notification to set apart areas for certain kinds of additional holdings named in the section. The sub-section concludes with these words:—"But the Minister shall not in such notification set apart an area in such a way as to be available for original holdings at the same time as for additional holdings; but, save as aforesaid, land may be made available for one or more of the foregoing classes of holdings, and shall not be available for any class of holding not specified in the notification." It was under that sub-section that the *Gazette* notification on which the respondents now rely was issued. It will be observed that in all three Acts the classification is amongst "holdings." The areas are to be available or not available as between holdings, and the prohibitory declaration at the end of the sub-section last quoted, namely, that the area "shall not be available for any class of holding not specified in the notification," marks unmistakeably the limits of the excluding operation of the sub-section. It is obvious that an application for a free grant under a Volunteer Land Order is not an application for a "holding" within the meaning of the Acts I have been considering. The volunteer or his transferee is in the position of a purchaser who has paid the consideration and has only to identify the land of which he claims the grant. When he has done that by his application he is entitled to have his grant issued. When he has received it his relations with the Crown in respect of the land are at an end. It being clear therefore on the face of it that the sub-section under consideration has no reference to applications under Volunteer Land Order, it is difficult to see how it can affect the appellant's rights. But the respondents put their case thus. The holder of a Volunteer Land Order is entitled to his grant out of land open to conditional sale under the *Land Act* 1884. Where any land is open to conditional sale he may apply, but during the time when it ceases to be open he cannot apply. Therefore whatever Crown land is open to applicants for conditional purchase is open to him, whatever is closed to them is closed to him. The fallacy of the argument is apparent in the conclusion which purports to state

the effect of the Statutes. The land for which holders of Volunteer Land Orders are entitled to apply is land open to conditional sale. But such land may be at the same time open to one kind of applicants and not open to another. Land open to conditional sale within the meaning of sec. 22 of the *Lands Act* of 1884 may be applied for by two classes of applicants. First, those who apply for conditional purchases, conditional leases and the other kind of holdings which the law allows to be applied for out of such lands. Secondly, those whose applications are not for holdings but for free grants under Volunteer Land Order. Assuming that in the enactments for the classification of holdings the expression "available" has been used in the same sense as the expression "open" in sec. 22 of the *Lands Act* of 1884, the operation of the Minister's notification was to close the lands specified only against the former class of applicants. The Statute under which the notification was issued does not authorize the closing against the latter class of Crown lands otherwise open to conditional sale, nor does the notification on the face of it purport to have any such effect. As far as the holders of Volunteer Land Orders were concerned the lands in question were not by the notification rendered any less open to conditional sale under sec. 22 than they had been before its issue. The notification therefore left untouched the appellant's rights under that section, and as he in compliance with the regulations duly made his applications for portions of Crown lands which were then open to conditional purchase, he was entitled to have his application accepted, and to have issued to him a free grant of the land which he claims. For these reasons I am of opinion that the judgment of the learned Chief Judge must be set aside, and the appeal allowed. I agree that the declaration as to rights which the appellant claims should be made in the form mentioned by my learned brother the Chief Justice.

Appeal allowed. Judgment and decree appealed from discharged. Substitute declaration in terms of 1st and 2nd paragraphs of statement of claim. Declaration that plaintiff is entitled to

H. C. OF A. 1909.

CAPEL v. WILLIAMS.

specific performance of the consequent contracts. Respondent Williams to pay costs of suit up to hearing. Further consideration reserved, with liberty to apply. Respondent Williams to pay the costs of the appeal.

Solicitors, for the appellant, *Ellis & Button.*

Solicitors, for the respondents, *J. V. Tillett*, Crown Solicitor; *B. A. McBride.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MUTUAL LOAN AGENCY LTD. . . . APPELLANTS;
DEFENDANTS,

AND

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES. . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1909.

SYDNEY, *August*, 4, 5.

Griffith C.J. Barton and O'Connor JJ.

Applicability of English law in New South Wales—Prohibition of lotteries—10 & 11 *Wm. III. c.* 17, *secs.* 2,* 3—42 *Geo. III. c.* 119, *sec.* 2†—9 *Geo. IV. c.* 83, *sec.* 24.

*10 & 11 Wm. III. c. 17. Whereas several evil disposed persons, for divers years last past, have set up many mischievious and unlawful games, called lotteries . . . and have thereby most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen . . . to the utter ruin and impoverishment of many families . . . by colour of several patents or grants under the great seal of England for the said lotteries, or some of them . . . for remedy whereof be it enacted . . . that all such lotteries, and all other lotteries, are common and public nuisances, and that all grants, patents and licences for such lotteries, or any other lotteries, are void and against law.

2. And be it further enacted by the authority aforesaid that from and after the nine and twentieth day of December, (1699) no person or persons whatsoever shall publicly or privately exercise, keep open, shew or expose to be