H. C. OF A. 1910.

SOUTHERN LAW SOCIETY v. WESTBROOK.

Solicitors, for the appellants, *Finlay, Watchorn & Clark.*
Solicitors, for the respondent, *Ewing, Hodgman & Seager.*

B. L.

[HIGH COURT OF AUSTRALIA.]

HENRY HAWKER . . . . . APPELLANT;
PLAINTIFF,

AND

JAMES McLEOD AND JOHN DICKINSON . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1910.

SYDNEY, *April* 12, 13, 21.

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

Crown Lands Act 1884 (*N.S.W.*) (48 *Vict. No.* 18), *secs.* 121,* 122—*Agreement to lease conditionally purchased and conditionally leased land—Option of purchase—Agreement made prior to issue of certificate of conformity—Illegal agreement—Meaning of "applicant."*

Sec. 121 of the *Crown Lands Act* of 1884 provides that every devise, contract, lease, &c., made before, at, or after the date of any application for a conditional purchase or conditional lease, with the intent or having the effect of enabling any person other than the applicant to acquire the land applied for, shall be illegal.

The respondent D. in 1902 applied for an original conditional purchase of Crown lands, and his application was confirmed in the same year. In September 1906 he agreed to lease these lands to the appellant for three years, with an option of purchase at any time during that period. In February 1908 the appellant gave notice to the respondent that he intended to exercise the option of purchase. In June 1908 a certificate of conformity was issued to the respondent.

*Sec. 121 is as follows: "Every devise contract lease agreement or security made entered into or given before at or after the date of any application to make a conditional purchase conditional lease or homestead lease with the intent or having the effect of enabling any person other than the applicant to acquire by purchase or otherwise the land applied for shall be illegal and absolutely void both at law and in equity."

Held, that a person ceases to be an applicant within the meaning of sec. 121 upon confirmation of his application, and that the agreement of September 1906, so far as it related to the option of purchase, was therefore valid.

Semble, the provisions of sec. 122 are complementary to sec. 121.

Decision of *A. H. Simpson*, Ch. J., in Eq. : (*Hawker* v. *McLeod*, 9 S.R. (N.S.W.), 582 ; 26 W.N., 125), reversed.

APPEAL by special leave from the decision of *A. H. Simpson*, Chief Judge in Equity, dismissing the plaintiff's suit for specific performance of an option to purchase dated 17th September 1906.

On 23rd January 1902 the defendant Dickinson applied for an original conditional purchase of 100 acres and a conditional lease of 300 acres. The application was confirmed in the same year. On 17th September 1906 Dickinson leased the land to the plaintiff for three years with an option of purchase at any time during the three years. On 4th February 1908 the plaintiff gave notice to Dickinson that he intended to exercise the option of purchase. In June 1908 a certificate of conformity was issued to Dickinson. On 10th July 1908 Dickinson offered the land for sale to the defendant McLeod. The offer was accepted and on 30th July 1908 Dickinson executed a transfer to McLeod, which had not yet been registered. The plaintiff's suit for specific performance of the option to purchase contained in the agreement of 17th September 1906 was dismissed upon the ground that under sec. 121 (1) of the *Crown Lands Act* 1884, 48 Vict. No. 18, the giving of such option was illegal.

Canaway, for the appellant. The question is whether the option to purchase enabled any person other than the applicant to acquire the land. It is submitted that a person ceases to be an applicant when his application is confirmed, and then becomes a holder, and that sec. 121 only applies to transactions prior to the date of the application or between the date of the application and its confirmation by the Land Board. Sec. 9 of the Act of 1875 invalidated contracts to take effect wholly or in part at or after the completion of the conditions, but there are no such words in sec. 121 of the Act of 1884. Between 1875 and 1884 there was a complete change in the policy of the legislature.

H. C. OF A. 1910.

HAWKER v. McLEOD.

Instead of the absolute prohibition contained in the earlier Act, the legislature in the Act of 1884 relies on the vigilance and powers of the Land Board to control conditional purchasers. Before 1884 no machinery for dealing with applications was provided. The aim of the Act of 1884 is to prevent the dummy getting the land in the first instance. The whole scheme of the Act shows that sec. 121 refers to the initiation of the transaction, and that "applicant" is a technical term, applicable to a person in a particular capacity. Thus in the group of sections dealing with the making of applications, secs. 25-31 of the Act of 1884, the word applicant is uniformly used. In the following sections dealing with the fulfilment of conditions after the application has been confirmed, the word used is "holder" or "conditional purchaser." Sec. 48 of the Act of 1884 enabled an "applicant" for a conditional purchase to apply for a conditional lease. It was held that this required the application to be made before confirmation, and sec. 26 of the Act of 1889 was passed to extend this privilege to the "holder" of a conditional purchase. The same distinction is recognized by the legislature in dealing with applications for additional holdings in the Acts of 1905 and 1908. Sec. 5 of the *Crown Lands Amendment Act* 1905 uses the words "the holder of" and the words "or applicant for" are inserted by sec. 42 of the *Crown Lands (Amendment) Act* 1908. The respondents' contention is that a person is an applicant until a certificate of conformity issues. If that construction is adopted then a devise of this land by Dickinson in favour of his wife and children would have been void if he died before the issue of a certificate of conformity. The word "devise" is not used in sec. 9 of the Act of 1875. Sec. 43 of the Act of 1895 provides for forfeiture of land which is not held for the exclusive benefit of the conditional purchaser. If the respondents' construction of sec. 121 is adopted this provision would be superfluous. Assuming that until the issue of a certificate of conformity there can be no transfer of the land, *non constat* that equitable rights cannot be created. It cannot be predicated of this contract that it enables a person other than the applicant to acquire land from the Crown. If sec. 121 is ambiguous and may be read as applying to the date of confirmation of the application, or the date of grant, the former

construction should be adopted, in accordance with the rule of law which favours the free alienability of property. The use of the word "applicant" in secs. 14, 16 and 17 of the Act of 1895 in connection with homestead selections will be relied on by the respondents. A person is there treated as an applicant until he gets possession of the land. But the scheme of that Act was that there should be no transfer before grant, and in every case the grant issued in the name of the applicant to save the expense of registry. A homestead selector has merely a right to occupy, but no title to the land. His position is quite different from that of a conditional purchaser or a conditional lessee, who after confirmation of his application becomes the holder of the land. The construction contended for by the appellant was adopted by the Land Court in *Re Browning* (1), and that decision should be followed. [Reference was also made to *Chippendall* v. *William Laidley & Co.* (2); *Dickson* v. *The Queen* (3); *Hayward* v. *Smith* (4); *In re French* (5); *In re White* (6).

Maughan, for the respondent Dickinson. The inability created by sec. 121 as to the various transactions referred to in that section is co-extensive with the inability to transfer the land. The Act of 1884 required residence on the holding for five years. During that period the conditional purchaser could not transfer his land, and sec. 121 intended to provide that during that same period no other person should be able to acquire the land, and that the conditional purchaser should not be able to make any valid agreement which would enable any other person to do so. In sec. 9 of the Act of 1875 there are two periods of time referred to, first, the time of the application; secondly, before, at, or after the purchase. In sec. 121 the draughtsman has attempted to combine both these periods and the word "the applicant" is used loosely as the most apt word to include the position of a person applying for land up to the time when the statutory conditions have all been complied with and a transfer can be made under sec. 117. It is so used in reference to homestead selections in secs. 14 to 22 of the Act of 1895. Sec. 125 of the

(1) 5 L. App. Ct. Cas., 174.
(2) (1909) A.C., 199.
(3) 11 H.L.C., 175, at p. 183.
(4) 9 N.S.W. L.R. (Eq.), 11.
(5) 19 W.N (N.S.W.), 230.
(6) 8 N.S.W. L.R., 135.

H. C. OF A. 1910.

HAWKER v. MCLEOD.

Act of 1884 allows a transfer during the five years of residence by devolution of law in the case of death or lunacy. The word "devise" in sec. 121 must be read as meaning a devise which is part of a dummying agreement. Devise is an inapplicable word if limited to the period between application and confirmation of the application. It is not reasonable to suppose, in the absence of clear words, that the legislature in the Act of 1884 intended to adopt such a radical change of policy in dealing with Crown lands as the appellant suggests. Under the Act of 1884, as under the Act of 1875, the intention was that at the completion of the period of residence, which in this case under sec. 29 of the Act of 1895 is ten years, the applicant should be untrammelled by any agreement affecting the land. But for sec. 117, by which conditional purchases may be transferred when all the conditions except payment of purchase money have been complied with, no transfer could take place while the land is Crown land. The nature of the right to the land as between the subject and the Crown is a statutory right: *Blackwood* v. *London Chartered Bank of Australia* (1). After it ceases to be Crown land it comes under the *Real Property Act*. In *Hayward* v. *Smith* (2) it was assumed by the Court that a contract made after confirmation was void under sec. 121. With knowledge of this decision the legislature passed the Act of 1895, dealing with the rights of a conditional purchaser, and sec. 121 is not repealed. In *R.* v. *Brien* (3) sec. 121 was held to apply to a lease of land after the application for the land had been confirmed, and in *Re Dempsey* (4) it was held that a lease before grant would be void.

Canaway, in reply.

Cur. adv. vult.

April 21.

GRIFFITH C.J. This suit, which was heard on motion for decree, was brought for specific performance of an agreement by which the respondent Dickinson agreed to lease to the plaintiff certain land held by him under conditional purchase and conditional lease, but which was not then transferable, for a term of

(1) L.R. 5 P.C., 92.
(2) 9 N.S.W. L.R. (Eq.), 11.
(3) 3 S.R. (N.S.W.), 410.
(4) 8 S.R. (N.S.W.), 111.

three years with an option of purchase. The respondent wrote on the margin of the agreement the words "Provided this is legal." The plaintiff having exercised his option after the land had become transferable, Dickinson refused to convey on the ground that the agreement was illegal.

The question depends upon the construction of sec. 121 of the *Crown Lands Act* of 1884, which is as follows:—"Every devise contract lease agreement or security made entered into or given before at or after the date of any application to make a conditional purchase conditional lease or homestead lease with the intent or having the effect of enabling any person other than the applicant to acquire by purchase or otherwise the land applied for shall be illegal and absolutely void both at law and in equity." For the interpretation of this section it is necessary to consider in some detail the system of conditional purchase in New South Wales, which was first initiated by the *Crown Lands Alienation Act* 1861. Under the scheme of that Act an applicant for land acquired by the mere fact of making his application an inchoate title to the land applied for. A system grew up, as pointed out by the learned Judge from whom this appeal is brought, popularly known as "dummying," which was described by *Martin* C.J. as follows:—"Persons possessed of capital were in the habit of providing money for persons with no capital to make conditional purchases, and comply with the provisions of the Act as far as residence is concerned. The capitalist so supplying the money to the person taking up the conditional purchase, made a contract binding the selector, when the conditions as to residence and improvements had been complied with, and the title was complete, to make a transfer to the person advancing the money": *O'Connor* v. *Thorn* (1). It was held by the Judicial Committee in the case of *Barton* v. *Muir* (2) in the year 1874 that these practices were not unlawful. In order to put an end to them it was enacted by the *Lands Acts Amendment Act* 1875, sec. 9, that: "No person shall become the conditional purchaser of any land who is in respect of the land which he applies to purchase or any part thereof a servant of or an agent or trustee for any other person

(1) 4 N.S.W. L.R., 309, at p. 311. (2) L.R. 6 P.C., 134.

H.C. OF A. 1910.

HAWKER v. MCLEOD.

Griffith C.J.

or who at the time of his application has entered into any agreement express or implied to permit any other person to acquire by purchase or otherwise the land for which he applies but all land applied for to be conditionally purchased shall be for the *bonâ fide* use and benefit of the applicant in his own proper person and not as the servant agent or trustee of any other person. And all contracts agreements and securities made entered into and given with the intent of violating or which (if the same were valid) would have the effect of violating the provisions of this section and all contracts and agreements relating to land hereafter conditionally purchased made or entered into before at or after such purchase and to take effect wholly or in part at or after the completion of the conditions required by the eighteenth section of the *Crown Lands Alienation Act* of 1861 shall be and are hereby declared to be illegal and absolutely void whether at law or in equity."

This section contained two distinct provisions. The first was that a person should not become a conditional purchaser of Crown lands if he was at the time of application a servant of or agent or trustee for another in respect of the land applied for, or had then entered into any agreement by which another might acquire the land by purchase or otherwise, and, by way of antithesis, that the land applied for should be (applied for) for his own *bonâ fide* use and benefit. The second invalidated any contract relating to land conditionally purchased, whether made before, at, or after the purchase, if it was to take effect wholly or in part after the completion of the conditions. This may be regarded as a sanction of the first provision, ensuring, as it did, that, at any rate until completion of conditions, the land should continue to be, both at law and in equity, the property of the conditional purchaser.

The *Crown Lands Act* 1884 introduced important changes in the system. Applications for conditional purchase were required to be submitted to a local Land Board, and an applicant acquired no interest in the land applied for until his application had been confirmed by the Board, although by later legislation the confirmation had a retrospective effect. The Act of 1875 was repealed, and sec. 9 of that Act was not in terms re-enacted. The relevant enactments dealing with the same subject matter were

sec. 121, which I have already read, and sec. 122, to which I will afterwards refer. When an enactment is repealed and other enactments are substituted, couched in different language, no inference can be drawn that the legislature did not intend to make any substantial change in the law. Their intention can only be inferred from what they have said in the new enactment. The terms of sec. 121 of the Act of 1884 differ materially from those of sec. 9 of the Act of 1875. I will, therefore, first consider the language of sec. 121, in which the legislature thought fit to express their later intention.

This section deals not only with contracts, agreements and securities, which were dealt with by the Act of 1875, but also with devises and leases. With regard to devises I may remark that before 1884 it was reputed to be a common incident of the system of dummying to employ as an applicant a person supposed to be at the point of death, who was induced to make a will in favour of his employer which would operate upon the inchoate interest acquired by the application. Whether it would have had a similar effect under the new system if the applicant died before confirmation may have been considered doubtful. With regard to leases, the Act of 1884 provided for conditional leases as well as conditional purchases, so that a lease of land comprised in an application for a conditional lease executed concurrently with the application would, if valid, have operated by way of estoppel upon the land when acquired by the applicant. The transactions invalidated are transactions entered into "before at or after the date of the application," which I construe as meaning the date of lodging the application with the land agent.

It is conceded that some limitation must be placed upon these words, for in their widest signification they include all time past and future, and so read would be surplusage. It is further conceded that they cannot have been intended to apply to a time subsequent to the issue of a deed of grant on fulfilment of conditions and payment of purchase money, but it is contended that they apply, unless cut down by other provisions of the Act, to the whole period antecedent to the grant.

The conditions imposed by the Act of 1884 upon the conditional purchaser included personal residence by him for a period of five

H. C. OF A. 1910.

HAWKER v. McLEOD.

Griffith C.J.

years (afterwards extended to ten) from the date of confirmation of his application. This being a personal obligation, could not be delegated to anyone else, and it was therefore impossible for the holder of the land to transfer any present right of occupation so long as that condition remained unfulfilled. But by sec. 117 of the Act it was provided that conditional purchases might be transferred after the completion of the conditions of residence.

What, then, is the proper limitation of the word "after"? On the one hand it is contended that the word "applicant" denotes a *persona designata*, to whom the prohibition applies until removed by some other provision of the Act. On the other it is said that the purpose of the section is, on its face, to prevent any person other than the actual applicant from acquiring the land applied for, that it contemplates merely the period while the application is pending, and that when the application has been confirmed in favour of a *bonâ fide* applicant this purpose has been satisfied. In this view the person to whom the prohibition is directed is not a *persona designata*, but a person holding the status of an applicant for land which is for the time being the subject matter of an application, and when the conditions cease to exist the section is exhausted. It may be conceded that the words of the section are capable of both constructions. I turn then to other provisions of the Act which may assist in solving the difficulty.

Sec. 122, which I regard as complementary to sec. 121, and as enacted by way of further sanction, makes it a misdemeanour for any person "with intent to defeat or evade or commit any fraud upon the provisions or purposes of this Act" to induce or make use of another "to make any conditional purchase or to execute any will or to enter into any contract lease or agreement declared by this Act to be illegal, or to become the purchaser lessee or licensee of any land otherwise than for the use benefit and advantage of such purchaser." The words "to make a conditional purchase otherwise than" &c., obviously refer to becoming a purchaser from the Crown by application, and refer to a time antecedent to the confirmation of the application. The words "become the purchaser . . . of any land otherwise than for the use . . . . of such purchaser," are, of course, quite

inapplicable to the case of a transfer. These words are, therefore, directed to acts done before and during the period of application.

The words making it a misdemeanour to execute a will or enter into a contract, lease or agreement declared by the Act to be illegal refer to sec. 121, and afford of themselves no help in solving the question whether that section applies to wills executed and contracts, leases or agreements entered into after confirmation of the application. It would seem strange, however, that the earlier and later words of sec. 122 should relate only to a period antecedent to confirmation and that the intervening words should also relate to a period after it. It would, moreover, be a strange and unexpected provision that a man who had acquired a conditional purchase *bonâ fide* for his own sole use should for five years at least be deprived of the right of disposing of it by will for the benefit, perhaps, of his wife or children. The case of the death of a conditional purchaser is expressly dealt with by sec. 125, which authorizes his "representatives" to hold the land free from the condition of residence in trust "for the benefit of the persons rightfully entitled." There is nothing in sec. 125 to suggest that the term "representatives" does not include "executors," or that the term "persons rightfully entitled" means next of kin only. I think that the section points strongly in the other direction, and implies that the executors of a conditional purchaser take the land. If this is so, a devise by a conditional purchaser after confirmation is not one declared by the Act to be illegal, and sec. 121 has no application to such devises. And, since the period referred to in that section is the same in all cases, it would follow that it does not relate to the period after confirmation at all.

All these circumstances point to the conclusion that secs. 121 and 122 are directed to the period before confirmation only.

Other sections of the Act tend to confirm this view. In sec. 121 the word "applicant" is naturally and accurately used to denote the person whose relation to the land at the time spoken of is described by calling him an applicant for it. But, when the Act refers to a person whose application has been confirmed, it, equally naturally, and with equal accuracy, describes him as the "conditional purchaser" (*e.g.*, secs. 32, 33, 40 and 125), or as "the

H. C. OF A. 1910.

HAWKER v. MCLEOD.

Griffith C.J.

holder of a conditional purchase" (*e.g.*, sec. 42) or as "the owner of a conditional purchase" (*e.g.*, sec. 123). I think then that, but for the reflected light supposed to be thrown on the case by sec. 9 of the Act of 1875, there would have been no difficulty in coming to the conclusion that sec. 121 related only to the period of the existence of the application *quâ* application, and not to any later period.

It is suggested, however, that contracts made during the first five years of compulsory residence are within the mischief to which the law was directed. The argument founded upon what is called the "mischief of the Act" is always dangerous and unsatisfactory, for it assumes a mischief which the legislature perhaps did not recognize as one. As I have already pointed out, the non-alienability of the land for five years was already secured by the provision requiring personal residence, and the legislature, which repealed the Act of 1875 and did not re-enact sec. 9 of that Act, may have thought that that provision, together with sec. 122, would be sufficient to obviate all mischief to which they had any regard. It is said that this could have been evaded by a declaration of trust made on the day after confirmation, and that if such a declaration had been made the usufruct of the land would have belonged to the *cestui que trust*. I doubt, notwithstanding the case of *Barton* v. *Muir* (1), whether this consequence would have followed, or whether a man can effectually constitute himself a trustee of that which is incapable of alienation by reason of its being held on a tenure of personal service, *e.g.* in England the freehold of a parson. But, if it would, the case was afterwards expressly dealt with by the Act of 1895, sec. 43, under which a conditional purchase may be forfeited if it appears to the satisfaction of the Land Board that the land is not held for the exclusive benefit of the selector. Apart from this Act, which affords, perhaps, some ground for thinking that in 1895 the legislature regarded the case as one not already dealt with, it seems to me, at best, to be equally consistent with the terms of sec. 121 to hold that the legislature did, or that they did not, intend to deal with a period after the date of confirmation. The absolute independence of the applicant up to that time is secured in any event.

(1) L.R. 6 P.C., 134.

If the arguments in favour of either view are equally balanced, I think that the general rule of law which favours the free alienability of property should prevail, and that the alleged prohibition, not being plain and explicit, cannot be held to be imposed. But in my opinion the arguments against the prohibition greatly preponderate.

Even assuming, however, that any contract creating an interest in the land to take effect before fulfilment of conditions is prohibited by sec. 121, I can see no apparent reason why a contract to take effect after fulfilment should be held to be prohibited. I accept for the purposes of this decision the view that, if the alienation of particular property is not allowed, it is impossible to create an equitable interest in it during the period of inhibition, but I do not think that such an inhibition extends to invalidate a contract to confer such an interest after the period has expired. Such a contract does not create a present interest in the land, and operates by way of contract only, just as if a man in possession of land with an option of purchase were to agree that in the event of the exercise of his option he would sell the land to another, with or without a promise to exercise the option.

The case was mainly argued as one of a contract to take effect on fulfilment of the conditions, but the contract also included what purported to be a lease for three years, a term which began a short time before, and extended for more than two years after, the five years of compulsory residence. I doubt whether this was in reality a demise, which imports a parting with possession of the land, both because such a parting with possession would have been inconsistent with the intention of the parties that the so-called lessor should continue to perform the condition of personal residence in his own right and not as tenant to another, and also because by the terms of the contract itself he was to perform certain stipulated conditions of improvement, such as would properly be performed by an owner in possession.

In any view, even if the lease was invalid, I do not think that it invalidated the agreement to sell at the expiration of it.

For these reasons I have come to the conclusion that the contract sued upon was not illegal, and that the appellant was entitled to judgment for specific performance.

H. C. OF A. 1910.

HAWKER v. McLEOD.

O'Connor J.

O'CONNOR J. The substantial question involved in this appeal is whether sec. 121 of the *Crown Lands Act* 1884 applies to a contract for the sale of a conditional purchase entered into by a conditional purchaser after the confirmation of his application. At the hearing of the suit the defendant contended that the contract was illegal if made at any time before the conditional purchase could be lawfully transferred. The plaintiff's contention was that the section rendered illegal and void those contracts only which were made by an applicant for conditional purchase before confirmation of his application by the local Land Board. The learned primary Judge, interpreting the section in accordance with the defendants' view, dismissed the suit. This Court has now to determine whether that interpretation is right. Taking the words of the section in their ordinary meaning, they are capable in my opinion of either interpretation, without any undue straining of the language used. In support of the plaintiff's contention it is pointed out that the word "applicant" is used throughout the Lands Acts to describe the intending conditional purchaser between the making and the confirmation of his application; that when by confirmation he has been accepted as a conditional purchaser he is no longer properly described as an applicant. From that time the estate is in him subject to the performance of the conditions of his purchase. From that time he is designated throughout the Acts as "holder" or "conditional purchaser." Speaking generally, various sections of the Acts would seem to support that contention. The distinction between applicant and holder is not however preserved with respect to all classes of holdings. In the case of homestead selections under the Act of 1895, secs. 14 to 22, the homestead selector is described as applicant all through the period of his holding, up to the time when a homestead grant is issued to him. From which it would appear that when the legislature thinks it necessary to do so it uses the word applicant in the wider sense. As far however as conditional purchasers are concerned, it does seem to be established that before confirmation of the application the conditional purchaser is in general described in the Lands Acts as applicant and after confirmation as holder or conditional purchaser. It is contended that the legislature in the framing of sec. 121

followed that nomenclature, and used the word "applicant" expressly to define the initiatory stage of the conditional purchase as the only period during which the conditional purchaser should be prohibited from entering into the transactions forbidden. The contention on the other side is that the prohibition is not confined to the initiatory stage, that the words "before at or after the date of any application" are entirely inconsistent with that limitation. It is common ground that the prohibition was intended to apply to the initiation of the conditional purchase. It is argued that the use of the word "application" was necessary to cover that stage, and that the express words of the section clearly indicate an intention to prohibit transactions of the kind mentioned entered into at any time even after that stage. The word "applicant" occurring later in the section is used, it is said, only for the purpose of identifying the person whose exclusive occupation and dominion over the land the section prohibits from being bartered away. The prohibition might no doubt have been directed by express description against both the applicant and the holder or conditional purchaser. But when the same person is the applicant and afterwards the "holder" or conditional purchaser, there would appear to be no reason why, when identification of the individual is the only object of the description, he should not be with equal correctness described as the "applicant." That view of the section, taking the language used in its ordinary sense, is I think reasonable, and in my opinion therefore the words used are capable of being interpreted as rendering illegal and void every contract of the class named made at any time after the date of the application whether before or after confirmation. Both constructions being thus equally open, the rule of construction applies that that meaning is to be adopted which will most effectively carry out the object of the enactment as indicated by its provisions.

In ascertaining the object of an enactment its legislative history is generally of value. It is so particularly in the case of an Act which forms part of the system of the Crown Lands Acts in this State. The learned Judge in the Court below has accurately stated the state of things which followed on the decision of the Privy Council in *Barton* v. *Muir* (1), and which rendered

(5) L.R. 6 P.C., 134.

H. C. OF A. 1910.

HAWKER v. McLEOD.

O'Connor J.

necessary the enactment of the first provision of this kind in sec. 9 of the *Lands Acts Amendment Act* of 1875. From the date of that enactment that section embodied the settled policy of New South Wales in checking the fraudulent use of the conditional purchase provisions of the law. Having regard to the important difference in form between the provision in this respect of the 1884 Act and that of the Act of 1875 it will become necessary to examine the latter somewhat in detail. At the outset it forbids the conditional purchaser from making his application as the servant, agent or trustee of another, or in any other way than "for the *bonâ fide* use and benefit of the applicant in his own proper person." It next declares that all transactions entered into with the intention of disregarding that prohibition shall be illegal and void. It then goes on to render illegal and void all contracts and agreements relating to land thereafter conditionally purchased entered into "before at or after such purchase and to take effect wholly or in part at or after the completion of the conditions required" by sec. 18 of the Act of 1861, that is the condition of residence and improvement. A conditional purchase acquired in violation of any of these provisions becomes liable to forfeiture. The making of any of the prohibited agreements is declared a misdemeanour in both parties. The object of these provisions was obviously to check abuse of the conditional purchase system by ensuring not only that the original taking up of the conditional purchase should be safeguarded against contracts intended to vest in persons other than the applicant the real beneficial interest in the land, but similarly to protect the conditional purchase while the statutory conditions were in course of fulfilment. We have now to inquire whether in the Act of 1884 the legislature has expressed an intention, as the respondent alleges it has done, to adhere to that object in its entirety. That intention is not to be ascertained by a consideration of sec. 121 only. Due effect must be given to the radical alteration in the whole method of dealing with conditional purchases which the Act of 1884 instituted. In the 23 years that had elapsed since the passing of the comparatively simple *Lands Acts* of 1861 experience had shown the necessity for many important changes in the existing system of disposing of Crown lands. To take a

few illustrations—the Act of 1884 adopts a new method of initiating the estate of a conditional purchaser. Local Land Boards are established. The making of the application, instead of vesting the land in the conditional purchaser, as under the Act of 1861, confers merely a right to have the application considered by the local Land Board. The consideration is in open Court, and the Land Board may decide between conflicting applications. Confirmation of the application is essential to the commencement of the conditional purchaser's estate. The period of residence is extended to five years. At the end of the third year the conditional purchaser is bound to make a declaration of fulfilment of conditions of residence up to that period, "residence" being defined for that purpose to be (see sec. 32) "continuous and *bonâ fide* living on such land as the conditional purchaser's usual home without any other habitual residence." At the end of the period of residence the conditional purchaser's conduct in the use and occupation of his land must again come within the cognizance of the local Land Board before he can obtain his certificate of conformity. The Minister for Lands may at any time refer to the local Land Board for its final decision subject to appeal any question of lapse, voidance, and forfeiture. The feature of all these changes which is of importance in relation to the matter now under consideration is that the conditional purchaser's connection with the land, from the initiation of his application until the completion of the conditions of residence and improvement, are at different periods subject to observation and inquiry at the hands of the local Land Board.

Turning now to sec. 121, the differences between its provisions and those of sec. 9 of the Act of 1875 are very significant. The language used, though as I have pointed out capable of a wider meaning, is expressly directed to the stage of application. By the Act of 1884 the period of the pending application is given a distinct existence separated from every other stage in the acquisition of the conditional purchaser's title as being the period before confirmation. The express and separate prohibition against making agreements after the conditional purchaser's estate has become vested in him is deliberately omitted. By the section next following the making of the forbidden agreement is

H. C. OF A. 1910.

HAWKER v. McLEOD.

O'Connor J.

a misdemeanour in one party only, the party who induces the conditional purchaser to break the law or uses him for the purpose of defeating the law. Having regard to the new system of dealing with conditional purchases, the creation of the Land Boards, and their extensive powers of supervision and inquiry over the conditional purchaser's fulfilment of his conditions, I have come to the conclusion that these differences between the provisions of sec. 121 of the Act of 1884 and sec. 9 of the Act of 1875 were deliberately made in altering the whole system of dealing with conditional purchases, and that the breaking of them indicates an intention on the part of the legislature to abandon the prohibition against the making of agreements of sale after the conditional purchaser had by confirmation acquired all the rights of a conditional purchaser. In my opinion the object of the legislature in enacting sec. 121 was not, as under the old law, to prohibit the transactions mentioned during the whole period of conditional occupation, but to prohibit them only during the period before confirmation. It was strongly urged by Mr. *Maughan* that the consequences of such an interpretation will be that a conditional purchaser may with impunity immediately after confirmation make over all beneficial interest in his land to another, and become in reality the agent of that other to hold the land for him until completion of the conditions made it transferable. The answer to that position is I think obvious. No agreement that would prevent the conditional purchaser from honestly fulfilling his conditions of residence and improvement would be permitted by the Land Board to continue, after it had been once brought under their notice. And, unless the conditional purchaser elects to run the risk of making a false declaration, it must be brought under their notice within three years after confirmation, when the law compels him to make a declaration as to the fulfilment of his conditions. Under the law as it stands the intervention of the Land Board on behalf of the Crown might indeed take place at any time after confirmation. The provisions of sec. 43 of the Act of 1895 enable the local Land Board to find judicially at any time during the fulfilment of the conditions that the conditional purchaser does not hold or use the land for his own exclusive benefit, and on that finding it may be forfeited.

I do not suggest that the construction of the 1884 Act is necessarily affected by a provision even though *in pari materia* of the Act of 1895. But the existence of the powers conferred by sec. 43 of the latter Act is, it seems to me, a practical safeguard against the evil consequences which it is suggested might flow from the interpretation contended for by the appellant. It may on the other hand be urged with good reason that the present case affords a good illustration of how the construction which the respondents are putting forward may operate to make void an apparently honest business-like transaction, the completion of which could in no way be opposed to the end and purpose of the *Crown Lands Act.*

I have considered the question under discussion thus far as apart from authority, because none of the cases cited in the course of the argument can be regarded as definitely deciding the point which has now been raised. At the same time it is advisable to use any light which may have been thrown upon it even indirectly by judicial authority. In 1895 Mr. *Pike* in *Re Browning* (1), distinctly raised the question. The agreement there under consideration was entered into after confirmation, and before the term of residence had expired. The learned President of the Land Appeal Court in delivering the judgment decided that the agreement was not a violation of sec. 121, holding in effect that the prohibition of the section did not extend to the end of the period for fulfilment of conditions, but he declined to commit the Court to any opinion on the objection relied on by Mr. *Pike.* So far however as the case is an authority at all it is in the appellant's favour. In *Hayward* v. *Smith* (2), the interpretation of sec. 121 of the Act of 1884 was not involved in the matter to be decided. The learned Chief Justice's reference to the section in that case was obviously merely an *obiter dictum.* In *R.* v. *Brien* (3) the interpretation of sec. 121 of the Act of 1884 was directly under consideration, and the majority of the Court held that a lease of the homestead selection made in that case by the homestead selector was invalid under sec. 121. The lease was in fact made after the confirmation of the homestead

(1) 5 L. App. Ct. Cas., 174. (2) 9 N.S.W. L.R. (Eq.), 11.
(3) 3 S.R. (N.S.W.), 410.

H. C. OF A. 1910.

HAWKER v. McLEOD.

O'Connor J.

selector's application. But neither party appears to have attached any significance to that aspect of the case, it being apparently assumed on both sides that if the lease had the effect of enabling a person other than the selector to acquire the selection it was invalid whenever made. The case cannot be used as an authority for more than this, that the Supreme Court has always assumed that contracts coming otherwise within sec. 121 will not be excluded from its operation merely because they were entered into after confirmation. With respect to some branches of the law such an assumption might be used in argument as of some value, but in regard to such a subject as the land laws of New South Wales the assumption is for obvious reasons of little importance. Under these circumstances it may well be said that the Court is at liberty to consider what is the right interpretation of the section entirely unfettered by authority. Arguments have been advanced on both sides based on the difficulty of giving a meaning to the word "devise" or to the word "lease" in either view of the section. The appellant has relied on the impossibility of fixing any limit of time in the operation of sec. 121 unless the interpretation for which he is contending is adopted. As to the arguments first mentioned no substantial aid can in my opinion be obtained from them. As to the latter contention it may I think be fairly answered as Mr. *Maughan* has answered it. The Act must be read as a whole, and sec. 117, enabling a transfer to be made on fulfilment of conditions, supplies the limit which is wanting in the language of sec. 121. I prefer to base my judgment on the broad ground that taking the *Land Act* of 1884 as a whole, viewing sec. 121 in relation to its other provisions, and comparing it with the provision in the Act of 1875 which it replaced, I find the legislature expressing a clear intention to relax the stringency of the earlier legislation, and to rely upon the vigilance and the wide powers of the Land Boards. For these reasons I am of opinion that the agreement which was the subject of the suit was not made in violation of sec. 121, and ought to have been enforced, and that his Honor the Primary Judge should have so held. I therefore agree that the appeal must be allowed.

ISAACS J. Sec. 121 of the Act of 1884 means the same now as when that Act was passed. The first step, therefore, is to ascertain its meaning if possible by the light of that Statute alone. Subsequent legislation may confirm or alter that meaning, or if it be doubtful may make it clear. The Act of 1884 repealed all other enactments of the kind, and replaced all former law upon the subject of Crown lands by its own regulations. Among other things it provides for conditional purchases, conditional leases and homestead leases. As to conditional purchases there are three distinct stages,—application, contract, and grant.

The Act first exempts specified lands from conditional sale (sec. 21), and then declares (sec. 22), that all Crown lands exempted shall be open to conditional sale under and subject to the provisions and conditions of the Act, providing however that no person shall make more than one conditional purchase except by way of additional conditional purchase in virtue of an original purchase, unless he has received a certificate of fulfilment of conditions or had been compelled through adverse circumstances to abandon a *conditional purchase which he had made "bonâ fide and solely in his own interest."*

I emphasize sec. 22 because (1) it contains what is afterwards referred to as "provisions and purposes" (sec. 122); (2) it introduces an important disqualification; (3) it regards the making of the conditional purchase as the crucial point; and (4) it specifically stipulates as an element of relief that the purchase should have been *made* by the purchaser "*bonâ fide* and solely in his own interest."

Sec. 23 disqualifies persons under 16. Sec 25 relates to marking out the land; sec. 26 requires personal application and a declaration, thus indicating the importance attached to the identity of the applicant, and the truth of his statements at that stage. The formidable consequences of misleading the Crown into making the contract are expressive of the purpose of the legislature to secure *bona fides* in the application.

By sec. 28 the land agent is to transmit all applications to the local Land Board to be "dealt with." They are dealt with in open Court. The Board, under sec. 29 of the Act of 1884 (since repealed), might either confirm or disallow the application. Dis-

H. C. OF A. 1910.

HAWKER v. McLEOD.

Isaacs J.

allowance was subject to appeal. If confirmed, the Board issued a certificate to the applicant.

The section replacing sec. 29, namely, sec. 13 of the Act of 1889, does not affect the point I am now referring to. It does however use an expression of importance to be presently mentioned.

Provision is also made for caveats against applications. But with sec. 31 ends the first stage of the process of alienation, namely, the dealing with the application. The application is the offer of a contract to purchase, the disallowance is the rejection, and the confirmation is the acceptance of the offer. Once it is confirmed the application is at an end, and the applicant becomes the purchaser under a contract of conditional purchase from the Crown, henceforth the vendor.

The term "applicant" is used up to this point, and denotes a person to whom the land is not yet sold or promised. Similarly the phrase "land applied for" is employed to describe land not yet sold or promised. It will be convenient to say here that this connotation is preserved throughout the various Acts, as for instance in secs. 11, 12, 13, 14, &c. of the Act of 1889, the Act of 1908, Schedule items 3 and 18. But once the second stage is entered upon—once the contractual relation between the Crown and the applicant is established—the phraseology is changed to accord with the actual position, which is one in which the purchaser has a legal statutory and enforceable right—though a conditional one—against the Crown.

The sub-heading of the group of sections commencing with sec. 32 is "Conditions and obligations of *Conditional Purchasers.*" Nowhere is a person whose application has been confirmed referred to as an "applicant," or his land as "land applied for." He is styled "the conditional purchaser" (sec. 32), or "holder of a conditional purchase" (secs. 36, 54), the "purchaser" (sec. 111) and in the Act of 1889 (sec. 20), the "owner." The land is called "conditionally purchased land," and see the word "alienated" in sec. 141. Statutory conditions are imposed which must be fulfilled before he can pass to the third stage, namely grant, but by sec. 36 (now replaced by sec. 29 of the Act of 1895) provision was made which enabled him to obtain recognition of his right to

do so. If all conditions except payment of balance of instalments were in the opinion of the Board satisfied, it might issue a certificate of conformity, a form of expression commonly used to denote the certificate of fulfilment of conditions, and now adopted by the legislature, as in sec. 43 of the Act of 1895.

Sec. 36 is of the first importance in determining the question now before the Court. It provides that "Such certificate shall be transferable subject to the prescribed conditions, and shall be *primâ facie* evidence of the title of the holder thereof to the land therein described subject to the fulfilment of the prescribed conditions of payment."

In other words, the certificate was the recognition by the State that the contract was performed by the purchaser, and that he was entitled to his grant, subject only to a money payment. It was statutory evidence of title to the land itself, subject only to completion of payment, and was transferable as such in the prescribed manner, giving the holder of the document for the time being a statutory right against the State as well as against the transferror to obtain the grant in his own name. It, however, in no way touches the *primâ facie* common law right of the purchaser to contract with another person so as to create a personal obligation with respect to his holding and enforceable subject to any existing statutory requirements. This is collateral to, and independent of the purchaser's relation to the Crown. As Lord *Fitzgerald* said in *Thomas* v. *Kelly* (1) in a passage I recently quoted in another connection, "An assignment of non-existent property, that is, of property which might or might not be acquired in the future, was at common law inoperative; but if for value, it was in equity regarded as a contract of which specific performance might be enforced when (if ever) the thing came into actual existence."

Sec. 37 completes the claim of the conditional purchaser's rights under his contract with the Crown. It enacts specifically that subject to the issue of such a certificate, and upon payment of the balance of instalments, stamp duty and deed fee, a grant in fee simple of the land shall be issued on application.

Sec. 38 is a recognition of the property nature of the pur-

(1) 13 App. Cas., 506, at p. 515.

H. C. OF A. 1910.

HAWKER v. MCLEOD.

Isaacs J.

chaser's right, because it provides that default in payments may result in forfeiture, and then, "the conditionally purchased land shall *revert* to Her Majesty and become Crown lands" and any payment made in respect of such purchase shall be forfeited.

The recent case of *Chippendall* v. *William Laidley & Co. Ltd.* (1) materially assists the present discussion. The Privy Council, regarding the words "conditional purchaser" and "holder of a conditional purchase" as identical, determined on the ground, which is as applicable to the Act of 1884 as to that of 1861, that they mean "a person who holds all the lands he purchased on conditions still unfulfilled, and not a purchaser who holds his lands free from conditions, since all the conditions originally attaching to the purchase have been fulfilled."

They held, therefore, that a right to convert a conditional purchase into a conditional purchase for mining purposes ceases after the right to a grant has accrued, and before the grant issues. This indicates the clear line of demarcation between the second and the third stage—namely, conditional purchaser and the grantee, or what is the same thing, the person entitled to the grant under secs. 36 and 37. As regards a conditional purchase, therefore, the three stages are by the original Act distinctly marked, appellations of "applicant" and "conditional purchaser" being confined to the appropriate respective stages.

The subsequent legislation preserves and strengthens the distinction between applicant and purchaser. The following instances show this. Act of 1889 sections already quoted, also sec. 26; the Act of 1891, secs. 4 and 6; the Act of 1895, secs. 29, 43 and 52; the Act of 1903, secs. 8 and 11; the Act of 1905, sec. 5; the Act of 1908, sec. 25. But more than this the Act of 1889, sec. 13, contains a passage which shows that in sec. 22 of the Act of 1884 the *bona fides* of the applicant as such is the point on which the eyes of the legislature were still focussed. The words are: "When the land has been measured, if no sufficient objection exist, and the local Land Board be satisfied that *the applicant has, bonâ fide, applied for the land for his own sole use and benefit* either wholly or subject to the provisions of sec. 20 of the Act, the Board shall, in open Court, confirm such application," &c.

(1) (1909) A.C., 199, at p. 209.

No such stipulation as to *bona fides* of the "purchaser" as distinguished from the "applicant" is to be found. Indeed the legislature in 1895 by secs. 42 and 43 found it necessary to provide for the case of the applicant changing his mind after he becomes a purchaser.

Every application for a conditional or a homestead lease is "required to be made in good faith," but an extended meaning is now given to that term, namely, that the sole object of the "applicant" is to obtain the land or lease in order that he may "hold and use" the land for his exclusive benefit according to law. The local Land Board must disallow, or recommend the refusal of the application unless it is satisfied that "the application is made in good faith." And the Minister is allowed to forfeit as to applications granted *after the commencement of the Act*, if (*a*) the application was not made in good faith, or (*b*) notwithstanding the application was originally made in good faith the land is not in fact *held and used* for the exclusive benefit of the purchaser or lessee. Observe that even there the word "applicant" is not employed as relating to land actually conditionally purchased or land actually leased.

This evidences to me that when the Act of 1884 was passed the anxiety of the legislature was to see that the original ostensible applicant should be the real applicant; and if that was so, the purchaser it was true was bound to strictly comply with statutory conditions before being entitled to get his grant, but no obstacle was placed in his way as to any personal contract he chose to make.

I have already referred to sec. 36 creating the transferability —really negotiability—of the certificate of conformity. But besides transferring the certificate—that is after all conditions were performed except final payments—sec. 117 permits, in the case of conditional purchases and conditional additional purchases, a transfer of rights under prescribed conditions after completion of residence. That is really a novation; and in 1884 the transferree in good faith—not otherwise, see sec. 26—would have a statutory right as against the Crown to proceed to the grant. In 1895, when the Crown took further powers of forfeiture, a transferree *before certificate of conformity* in respect of

H. C. OF A. 1910.

HAWKER v. MCLEOD.

Isaacs J.

a conditional purchase is deemed to take with notice. Two things are here to be noted: (1) that these permissions and prohibitions are relative to the Crown, and not as between subject and subject; and (2) a transfer before certificate of conformity in respect of a conditional purchase, whether *made before or after* 1895 (sec. 43), is recognized as valid. Consequently the limits of sec. 121 cannot be the certificate of conformity.

Conditional leases are dealt with by sec. 48 to 54 of the Act 1884, and the same signification attaches to "applicant" before confirmation or allowance of the application, and to "holder" afterwards as in the case of purchase.

Homestead leases were dealt with by secs. 82, 83 and 84 of the Act of 1884, and there the same distinction was made between applicant and holder. Sec. 84 treats "holder" and "owner" as synonymous.

We are now in a position to properly appreciate the meaning of sec. 121. That section in my opinion means this: that where an ostensible applicant adopts any device, whether by will or contract, lease, agreement or security, and whether before, at, or after the date of his application, which is intended to have, or in fact has the effect of enabling, *not himself*, but some other person to be the real applicant, and so in substance to acquire from the Crown the land applied for by conditional purchase, or conditional lease or homestead lease, and whether by going through the form of purchase from the ostensible applicant or otherwise—because it must in form be from him—the device is illegal and void. It is a fraud on the Crown, it deceives the Crown, it is really dummying, as it is called, and is contrary to the provisions and purposes of the Act. It is not in the words of sec. 22 of a conditional purchase "*bona fide* and solely in his own interest"; and it is in clear violation of sec. 26 of the Act of 1884. The word "acquire" is a suitable word to denote acquisition by an applicant from the Crown, as shown by sec. 22 of the Act of 1908. And the conjunction of the three expressions following the word "enabling," viz. (*a*) "any person *other than* the applicant," (*b*) "*to acquire* by purchase or otherwise," (*c*) "the *land applied for*," and especially the position of the word "acquire" between the two specially distinct phrases leads

to but one conclusion, which is that the prohibition of the section extends no further than the duration of the application, that is, until it is either confirmed or disallowed.

The scheme and verbiage of the Act are, as I have shown, distinctly opposed to any extension of that prohibition, but if it were regarded as merely doubtful, and so much at least must be conceded, the rule of law is that it is not sufficient to strike down the contract. "The established doctrine is," said the Privy Council, in *Barton* v. *Muir* (1), "that to annul such a transaction there must be no doubt whatever as to the construction and effect of the Statute."

Still more is the doctrine to be observed when so notable a departure from unambiguous legislation has taken place as has occurred in relation to this matter, by the abrogation of sec. 9 of the Act of 1875 and its replacement by sec. 121 of the Act of 1884. This consideration is still further strengthened by the frame of sec. 122, which makes it a misdemeanour punishable with imprisonment with hard labour up to two years for any person knowingly, and with intent to evade the provisions or purposes of the Act, to induce an applicant to do any of the things mentioned in sec. 121. The alleged offence is against a supposed purpose. But the purpose is quite conjectural, namely, to prevent a purchaser making a contract not immoral and not expressly or even by necessary implication forbidden by the Act, while other contracts are in terms forbidden. Read as the respondent reads secs. 121 and 122, these sections are a legislative trap, by which both money and liberty may easily be unwittingly lost. Not only so, it is highly improbable, and to me quite incredible, that it should be made illegal for a conditional purchaser, who had *bonâ fide* become so, and who had for say three years complied with all conditions, suddenly finding himself about to die, to make a devise of his interest in the land in favour of his wife and children. Equally improbable is it that if his wife or son should induce him to do so, it would make the wife or child a criminal. Yet such is the inevitable result of the construction contended for the respondent. It was suggested by Mr. *Maughan* that the word "devise" must be taken to be part

(1) L.R. 6 P.C., 134, at p. 144.

H. C. OF A. 1910.

HAWKER v. McLEOD.

Isaacs J.

of a transaction of which some contract was another part. But the section does not warrant such a limitation; nor if it did would it really affect the matter.

The chief argument by which the contention is supported is that sec. 117 fixes a time when transfers may be made. But that is inconclusive, because, as already stated, it merely permits a novation, or transfer of the statutory right to call upon the Crown to complete the purchase. That affects the land and the vendor. The section in no way assumes to deprive the holder of his common law of personal contract, and cannot control the meaning of sec. 121, which is under a different subdivisional heading and directed to another purpose.

For these reasons I am clearly of opinion that the agreement under consideration in the present case was not rendered illegal by sec. 121, and that the judgment appealed from was erroneous and should be reversed.

Appeal allowed.

Solicitors, for appellant, *P. P. Abbott*, Glen Innes, by *T. E. Creswell.*

Solicitors, for respondent Dickinson, *A. W. Simpson*, Armidale, by *Sly & Russell.*

Solicitors, for respondent McLeod, *W. W. Legh*, Glen Innes, by *Lane & Gardner.*

C. E. W.