[HIGH COURT OF AUSTRALIA.]

PERRY . . . . . APPELLANT;
PLAINTIFF,

AND

GILLESPIE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1912.

SYDNEY, *May* 13, 14.

Griffith C.J., Barton and Isaacs JJ.

Crown Lands—Conditional purchase—Instalments—Vendor and purchaser—Agreement for adjustment of instalments—Apportionment—Crown Lands Alienation Act 1861 (*N.S.W.*) (25 *Vict. No.* 1), *secs.* 13, 18—*Lands Acts Amendment Act* 1875 (*N.S.W.*) (39 *Vict. No.* 13), *sec.* 8—*Crown Lands Act* 1884 (*N.S.W.*) (48 *Vict. No.* 18), *secs*, 26, 35—*Crown Lands Act Amendment Act* 1903 (*N.S.W.*) (1903 *No.* 15), *sec.* 14.

The instalments payable in respect of conditional purchases of Crown lands, and which include interest and a portion of the balance of purchase money, are payable in respect of the current year at the end of which they are payable.

Held, therefore, that, where a contract of sale of conditionally purchased land contained a provision that an adjustment of all instalments should be made as at the date of settlement, there should be an apportionment made of all instalments which became payable after the date of settlement, so that the vendor and purchaser should respectively bear a portion of the instalments proportionate to the period of the year then past during which he had been in possession of the land.

The first instalment payable in respect of conditionally purchased land is payable at the end of the third year after the date of the application and not at the end of three months after the end of that year.

Decision of A. H. *Simpson* Ch. J. in Eq., 12 S.R. (N.S.W.), 17, affirmed.

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APPEAL from the Supreme Court of New South Wales.

On 29th May 1911 the plaintiff, William Benjamin Perry, agreed to sell to the defendant, Robert William Gillespie, certain land including a large quantity of conditionally purchased land. Of the conditionally purchased lands 14 blocks had been selected on 21st May 1908 and the annual instalments payable to the Crown in respect of them amounted to £853 17s. 3d., and were payable on 21st May in each year; two other blocks had been selected on 12th May 1887 and 23rd February 1888 respectively and the annual instalments on them, amounting to £18, were payable on 25th June in each year; and one block had been selected on 25th October 1888 and the annual instalment on it, amounting to £32, was payable on 11th July in each year. One of the terms of the contract of sale was: —"Adjustment of all instalments rents rates and taxes to be made as at the date of settlement." It was admitted that the word "instalments" referred to yearly or other payments to the Crown in respect of the conditionally purchased land. On 20th June 1911 the plaintiff gave possession of the land purchased to the defendant, and that day became the day of settlement within the terms of the contract. The plaintiff had not paid the instalment of £853 17s. 3d., which fell due on 21st May 1911 and, a dispute having arisen between the plaintiff and the defendant as to the adjustment of the instalments, the plaintiff, by arrangement with the defendant, paid the £853 17s. 3d. without prejudice to the ultimate adjustment. A similar course was adopted with respect to the instalments of £18 and £32 which fell due on 25th June 1911 and 11th July 1911 respectively.

An originating summons was then taken out by the plaintiff for the purpose of determining whether the plaintiff was entitled to recover from the defendant any portion of the instalments payable on 21st May 1911, 25th June 1911 and 11th July 1911, and whether the defendant was entitled to recover from the plaintiff any portion of the instalments payable on 21st May 1912.

The summons was heard by *Simpson* Ch. J. in Eq., who held that the plaintiff was not entitled to recover from the defendant any portion of the instalments payable in 1911, but

that the defendant was entitled to recover from the plaintiff so much of the instalments which fell due on 21st May 1912 as accrued due from 21st May 1911 to 20th June 1911: *Perry* v. *Gillespie* (1).

Pike, for the appellant. The payments of instalments on conditional purchases of land are payments in advance for the ensuing period. Thus the first payment of two shillings an acre, called a deposit, is a payment for the right to occupy land for three years, the payment of the instalment of one shilling an acre at the end of the third year is a payment for the right to occupy the land for the fourth year, and so on. The conditional purchaser has a fee simple defeasible on non-payment of an instalment, and payment of an instalment keeps the title good until the next payment is due. [He referred to *Crown Lands Alienation Act* 1861 (25 Vict. No. 1), secs. 13, 18; *Lands Acts Amendment Act* 1875 (39 Vict. No. 13), sec. 8; *Crown Lands Act* 1884 (48 Vict. No. 18), secs. 26, 35; *Crown Lands (Amendment) Act* 1908 (1908 No. 30), sec. 37. The instalments are treated by the Treasury as payments for the ensuing year, and the parties contracted on that footing. The contract must be looked at to see what the parties intended. All the other payments which were to be adjusted were payments in advance, including the rents for conditionally leased land: See *Crown Lands Act* 1889 (53 Vict. No. 21), sec. 12. What the parties intended was that the instalments which were payable in advance, or which they treated as being payable in advance in respect of a period which had not expired at the date of settlement, should be apportioned. The instalments of £853 17s. 3d. were not due or payable until three months after the 21st May 1911: See *Crown Lands Act* 1884, sec. 35, which is not affected in this respect by the *Crown Lands Act* 1889, sec. 22.

[ISAACS J. referred to *Chippendall* v. *William Laidley & Co. Ltd.* (2).]

Langer Owen K.C., and *Maughan*, for the respondent. The instalment payable at the end of the third year is in respect of

(1) 12 S.R. (N.S.W.), 17. (2) (1909) A.C., 199.

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past occupation. He referred to *Crown Lands Act* 1884, secs. 26, 34, 35, 37; *Crown Lands Act* 1889, secs. 21, 22. By sec. 14 of the *Crown Lands Act Amendment Act* 1903 (1903 No. 15), the interest which forms part of an instalment is treated as being payable for the year at the end of which it is payable, and therefore the portion of the principal is also payable for that year. The parties by their contract intended not that there should be an apportionment of debts which the vendor had paid or ought to have paid before the date of settlement, but that there should be an apportionment of instalments which began to accrue due after the last payment before the date of settlement had been made or ought to have been made by the vendor. The three months grace given by sec. 35 *Crown Lands Act* 1884 are taken away by sec. 22 of the *Crown Lands Act* 1889, and even if they still exist, the instalments still become due and payable at the beginning of the three months. They also referred to *Crown Lands Act* 1889, sec. 49.

[ISAACS J. referred to *In re Buckinghamshire County Council and Hertfordshire County Council* (1).

Pike in reply. The respondent must be taken to have known that the instalments due on 21st May 1911 had not been paid. Sec. 14 of the *Crown Lands Act Amendment Act* 1903 only marks the period from which interest is to begin to run.

GRIFFITH C.J. The question for determination depends upon the construction of a contract entered into between the plaintiff and the defendant for the sale of a pastoral property of which a great part consisted of land held on conditional purchase and additional conditional purchase. The contract was made on 29th May 1911 and was to be completed on or before 20th June. The contract contained a stipulation as follows :—" Adjustment of all instalments rents rates and taxes to be made as at the date of settlement." It is conceded that the " date of settlement " means 20th June, and that " instalments " means " instalments on conditional purchased land." The difficulty arises in relation to the instalments payable in respect of certain of the conditional pur-

(1) (1899) 1 Q.B., 515, at p. 527.

chased lands. It is necessary, in order to understand the difficulty, to consider the scheme of the Acts in respect of that tenure.

Under the law in force at the time the contract was made, on an application being made to purchase land conditionally the applicant was required to pay a deposit of two shillings per acre. The next step was confirmation of the application. The applicant was not required to make any further payment for three years, but he was required to reside on the land for a certain time, unless residence was dispensed with by reason of residence on adjoining land, or the period was reduced. He was also required to improve the land. At the end of three years from the date of the application, or within three months thereafter, he was required to pay another shilling per acre, and if at the end of the three months he had not paid it, the land was liable to forfeiture. After that he was required to pay at the end of each succeeding year one shilling per acre until the balance of seventeen shillings per acre together with interest thereon at 4 per cent. per annum had been satisfied. Every payment of one shilling per acre after that made at the end of the third year would therefore represent in part principal and in part interest. For instance, at the end of the fourth year there would be owing seventeen shillings and interest for one year thereon, which would be about eight pence. The applicant would then pay one shilling of which eight pence would represent interest and four pence principal, so that the principal would be reduced to sixteen shillings and eight pence. Then at the end of the fifth year the amount owing would be sixteen shillings and eight pence and interest thereon, and the payment of one shilling would in the same way go in payment of interest and in reduction of principal. And so on during the rest of the period. That was the scheme of the Acts.

A large quantity of the land in question was applied for on 21st May 1908 and in respect of it the deposit of two shillings per acre must have been paid when the application was made. On 21st May 1911, a week before the contract, the payment of the third shilling per acre fell due amounting to £853 17s. 3d. It had not been paid when the contract was made, and, indeed, was not paid until August. The question is, who is to bear the

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burden of that payment? The appellant contends that the term "adjustment" as applied to these instalments includes an apportionment of the amount of that payment, which he afterwards made without prejudice to his right to recover it from the respondent. The respondent contends that the instalments to be adjusted refer to a different matter altogether. The word "adjust" may be used in any way the parties choose. In reference to rents and rates, which are payable in respect of a calendar year, it obviously means "apportion." As to instalments, which are paid every year, but not in respect of a calendar year, the word "adjust" must, I think, be also used in the sense of "apportion." The parties therefore agreed both that there was to be an apportionment of all instalments, and that it should be made as of 20th June. The question therefore is, what instalments were to be apportioned?

The argument of the appellant was principally based on the assumption that each payment of an instalment made by a conditional purchaser is a payment in advance for the right to occupy the land for the succeeding year. The contention for the respondent is that each payment of an instalment is in reality not a payment in advance, but a payment for the right already enjoyed of occupying the land during the past year. When the scheme of these Acts, beginning with what was called the *Free Selection Act* of 1861, is considered, it is clear that the desire of the legislature was to secure settlement of the waste lands of the Crown, and for that purpose to insist on personal residence on, and improvement of, the land, regarding that as part of the price paid for the land to the Crown. In consideration of that occupation and improvement the Crown exacted a small price, and gave long terms of payment. The idea, I suppose, was that the selector would be enabled by the use of the land to find the money to be paid in each year. Accordingly, as I have said, under the particular scheme in force when this land was taken up a deposit of two shillings per acre was all that was first asked, and no more was required to be paid for three years, when another shilling per acre was to be paid. After that there were annual instalments of one shilling per acre which included principal and interest

until the total amount, which was to be £1 per acre, had been paid.

It was contended by the appellant that the first deposit of two shillings per acre covered the right to occupy for three years. So it did, in the sense that the occupier was entitled to remain in occupation for three years without paying anything more. But when he had paid another shilling he could continue in occupation on the terms that there what was treated as a debt of seventeen shillings per acre, payable to the Crown by instalments with interest thereon at four per cent. per annum, interest began to run from the beginning of the fourth year and was payable at the end of that year with some contribution of principal. There cannot be any doubt that the interest payable at the end of the fourth year was payable in respect of that year, and for that year it would represent more than two-thirds of the instalment of one shilling. How then can it be contended that the portion of the principal which was then payable should be regarded as payable in respect of the next year? It is an almost impossible contention. That that is the view which the legislature took of the instalments is shown by sec. 14 of the Act of 1903, to which Mr. *Owen* referred us this morning. It makes provision for the reduction of the rate of interest from 4 per cent. to 2½ per cent. and contains a provision that "interest shall not be computed at the lower rate except where it commences to accrue for a full year of the purchase after 31st December, 1902, and shall be charged at the original rate where it has commenced to accrue before 1st January, 1903, for such year of the purchase as may be current at the passing of this Act." The language, though somewhat involved, is clear enough to enable us to discover what is meant. It treats the interest as accruing in respect of each year at the end of which it is included in the instalment of one shilling then payable. I think, therefore, it follows that after the third year all payments made are to be regarded as made in respect of the current year at the end of which they are made. That being so, all payments made by the purchaser after he takes possession will be made in respect of the current year ending at the due date of payment. So far as the vendor has enjoyed the land during portion of that year, he

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ought to contribute to the payment made to the Crown by the purchaser for the enjoyment for the whole year and no further, but so far as regards payments due at the end of the third year, that is, due before the date of the change of occupation, I cannot find any principle upon which the vendor can claim any right to be recouped by the purchaser. He was bound to pay the instalments, and the fact that he had three months' grace in which to pay them can make no difference. In my opinion the payments made up to the end of the third year are the price of the right of occupation during those three years, the privilege being given to the selector to pay the rest of the price of the land, with interest, by instalments.

I think, therefore, that the contention of the respondent is right.

As to the contention that the instalment was not payable on 21st May but three months afterwards because the land could not be forfeited until that time had elapsed, I think it is quite untenable.

Another argument addressed to us by Mr. *Pike* was that the purchaser, as well as the vendor, must be supposed to have known that the instalments payable on 21st May had not been paid, and, therefore, that those instalments must have been intended to be included in the adjustment that was agreed to be made. I can find no reason why the purchaser should be taken to have known that the instalments had not been paid, and, even if he should, I see no reason why it should have been intended that these instalments should be included in the adjustment, any more than payments of instalments made in the previous year. The instalments to be adjusted are those made in respect of the period during which both the vendor and the purchaser have had enjoyment of the land. That is the principle adopted by the learned Judge, and his declaration seems in all respects to be in accordance with that principle.

The appeal therefore fails.

BARTON J. I am of the same opinion. Adopting all that has been said by the Chief Justice, I should like to add that the difficulty in the construction of this clause of the contract arises

on its application to the subject-matter. The question is whether the instalments to be adjusted include the last which fell due before the date on which the plaintiff contracted to sell to the defendant or whether the term relates only to any instalment which would fall due after the sale. What is the presumption which naturally arises on reading a contract by a person to sell land, in respect of which he is under an obligation to a third person to make certain payments to obtain his title? It is, I think, that the vendor, if he says nothing on the subject as vendor, has done, or intends before completion to do, his duty in discharging any obligation of the kind under which he rested up to the time of the sale so as to make title to the land. That is, I think, the assumption upon which a contract of this kind must be read. If that is the right view where nothing more is said, surely it goes as far as this, that the vendor will before completion discharge that obligation. Now, it seems to me that the instalment payable on 21st May 1911 was clearly something which had become a debt by the vendor to the Crown. That being so, whether there was a search beforehand or not does not seem to be very material, because it would be assumed that the vendor would discharge a duty the non-performance of which might subject the very thing which he was selling to forfeiture.

I am therefore of opinion that the word "instalments" mentioned in the contract refers, not to the instalments which had become due on the day fixed for the settlement, but to the instalments which were to become due after that date. Those were the instalments that were to be adjusted and the adjustment must have been intended to be by way of apportionment. The use of the words "as at the date of settlement," that is, the time of the transfer of possession, shows that the adjustment was to be in relation to the time between the last due date of an instalment and the time when the purchaser went into possession; that, in respect of the batch of conditional purchases numbered 15 to 28 as to which the instalments were due on 21st May would be, the time between the 21st May 1911 and the time when the purchaser went into possession. I think that construction is really the plain one, and gives the clause the meaning which any two

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men in the position of the vendor and the purchaser would intend it to bear when they made the contract.

ISAACS J. I also am of opinion that the appeal should be dismissed. The Chief Justice has so fully stated the reasons which govern my mind that any statement of them by myself would be mere repetition. I would only add that, however debateable the question was previously, the moment Mr. *Owen* pointed out sec. 14 of the Act of 1903, in which the legislature had disclosed its mind on the question, the appellant's position was absolutely hopeless.

Appeal dismissed with costs.

Solicitors, for the appellant, *A. J. Taylor & Greenwell*, for *W. F. McManamey*, Dubbo.

Solicitors, for the respondent, *Sly & Russell.*

B. L.

Cons *Brickworks Markets Pty Ltd v Corp of the Town of Thebarton* 67 SASR 180

[HIGH COURT OF AUSTRALIA.]

MILNE AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

THE MUNICIPAL COUNCIL OF SYDNEY . RESPONDENTS.
DEFENDANTS,

H. C. OF A. 1912.

SYDNEY,

May 14, 15, 17.

Griffith C.J., Barton and Isaacs JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract—Offer to do work—Acceptance of offer—Implied promise to employ.

The plaintiffs agreed with the defendants in effect to do all the mechanical repairs required to the defendants' electrical plant for the term of twelve months, at certain rates of payment: