[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR LANDS, NEW SOUTH WALES . . . . . } APPELLANT;

AND

BARKER AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1914.

SYDNEY, *Sept.* 2, 3; *Dec.* 16, 17, 18.

Griffith C.J., Isaacs and Gavan Duffy JJ.

Crown Lands—Conditional purchase—Appraisement—"Original conditional purchaser"—Transferred conditional lease—Conversion into additional conditional purchase—Exemption from conditions of residence—Appraisement Act 1902 (N.S.W.) (*No.* 109 *of* 1902), *secs.* 4, 10, 11.*

Held, by *Isaacs* and *Gavan Duffy* JJ. (*Griffith* C.J. dissenting), that where land is held under conditional purchase the person who first became the conditional purchaser of that particular land is the "original conditional purchaser" within the meaning of sec. 11 of the *Appraisement Act* 1902.

Held, therefore, by *Isaacs* and *Gavan Duffy* JJ. (*Griffith* C.J. dissenting), that the transferee of a conditional lease who had converted it into an additional conditional purchase was the original conditional purchaser of it, and,

* Sec. 4 of the *Appraisement Act* 1902 provides that "Any holder of land held under conditional purchase or conditional lease . . . who is resident on some part of his holding, of which such land is a portion, or who is excepted or excused from such residence under sec. 11, may apply to have the capital value of such land determined hereunder."

Sec. 10 provides that in the event of an applicant obtaining a reduction of the capital value of any land he shall thereafter reside upon some portion of his holding for a specified period.

Sec. 11 provides that "In any case where an applicant (*a*) is the holder of any conditional purchase, other than a conditional purchase under sec. 47 of the *Crown Land Act of* 1884, or of any conditional lease and is the original conditional purchaser or lessee, or a person on whom such purchase or lease has devolved under the will or on the intestacy of such original purchaser or lessee, and such purchaser, lessee, or person has not transferred such purchase or lease unless upon transfer by way of *bonâ fide* mortgage or security only; . . . the condition of residence under this Act shall not attach to such purchase or lease either at the date of the application or afterwards."

H. C. OF A. 1914.

MINISTER FOR LANDS, N.S.W. v. BARKER.

notwithstanding that he had never resided on it or on any land with which it formed part of a series, was entitled to apply for appraisement of it, and, if he obtained a reduction of the capital value, was excepted from the condition of residence imposed by sec. 10 of the above-mentioned Act.

The transferees of certain land consisting of conditional purchases and conditional leases, having converted the conditional leases into additional conditional purchases, applied under the *Appraisement Act* 1902 for appraisement of the capital value of the additional conditional purchases. The applicants had never resided on any part of the land in question or on any land which formed part of a series therewith.

Held, by *Isaacs* and *Gavan Duffy* JJ. (*Griffith* C.J. dissenting), that the applicants were "original conditional purchasers" within the meaning of sec. 11 (*a*) of the Act, and were therefore exempt from the condition of residence and entitled to apply for appraisement.

Decision of the Supreme Court of New South Wales: *In re Barker*, 13 S.R. (N.S.W.), 616, affirmed

APPEAL from the Supreme Court of New South Wales.

The Land Appeal Court stated the following case for the decision of the Supreme Court pursuant to the provisions of sec. 8 (VI.) of the *Crown Lands Act of* 1889:—

"1. By a transfer under the Crown Lands Acts dated 21st June 1909 the respondents, William Pitt Barker and John Barker, residents of Adelaide, in the State of South Australia, became the holders of an area of land comprising 14,912 acres, or thereabouts, consisting of freehold and conditionally purchased land, and also of ten conditional leases taken up in connection with such purchases, all situate in the land district of Tumbarumba.

"2. On 1st June 1911 the respondents applied to convert each of the said conditional leases into an additional conditional purchase under the provisions of sec. 25 of the *Crown Lands Act of* 1889, and such applications were confirmed on 7th August 1911.

. . . . . .

"4. On 30th September 1911 the respondents applied under the provisions of the *Appraisement Act* of 1902 for the appraisement of the capital value of all the said additional conditional purchases.

"5. Before the date of the said application the respondents had paid up the balance of purchase money on all the other conditional purchases of the same series held at the time of the

said transfer. At the time of the said application the respondents were still residents of Adelaide aforesaid, and have not at any time resided on the said additional conditional purchases or any land which formed part of the series therewith.

"6. In response to question 10 of the declaration accompanying the said application ('10. If you apply to be excused from the condition of residence required by sec. 10 of the *Appraisement Act* of 1902, state what special circumstances, in your opinion, warrant you being excused from such condition?') the respondents answered as follows:—'We are the original selectors of the subject conditional purchases.'

"7. On 11th March 1913 the Local Land Board, sitting at Albury, held that the respondents were entitled to have the capital values of the said additional conditional purchases appraised, and in each case reduced such value below the sum of £1 per acre. They also held that the respondents were exempt from any conditions of residence prescribed by the *Appraisement Act* on the ground that they were the 'original conditional purchasers.'

"8. On 14th April last past the Minister for Lands referred the said decision to the Land Appeal Court on the grounds following:—

'1. That William Pitt Barker and John Barker were not qualified to apply for an appraisement of the subject lands under the *Appraisement Act* of 1902, inasmuch as they were not resident on any part of the holding of which such land formed part.

'2. That the said William Pitt Barker and John Barker were not excepted or excused from such residence under sec. 11 of the *Appraisement Act* of 1902.

'3. That, if qualified to apply for an appraisement, and having obtained a reduction of the capital value, they incurred the full penalty of five years' residence under sec. 10 of the *Appraisement Act* of 1902.

'4. That William Pitt Barker and John Barker were not the original conditional purchasers or lessees of the subject land within the meaning of the *Appraisement Act* of 1902.'

H. C. OF A. 1914.

MINISTER FOR LANDS, N.S.W. v. BARKER.

"9. On 28th May last past the Land Appeal Court heard the said reference, and on 5th June following upheld the decision of the Local Land Board and dismissed the said reference.

"10. The Minister for Lands had duly requested the Land Appeal Court to state a case for the opinion of the Supreme Court on the points of law following:—

'1. Is the transferee of a conditional lease, who has converted the same into an additional conditional purchase, the original conditional purchaser of such additional conditional purchase within the meaning of sec. 11 (*a*) of the *Appraisement Act* of 1902?

'2. Is such holder of an additional conditional purchase, who converted it from a conditional lease, but who is not residing on it or any holding of the series, entitled to apply for appraisement of the same?

'3. Is such holder as aforesaid, who upon such application has obtained a reduction of the capital value of the land, excepted under the circumstances in the case stated from the condition of residence under sec. 10 of the *Appraisement Act* of 1902?'"

The Full Court answered each of the questions in the affirmative: *In re Barker* (1).

From that decision the Minister for Lands now appealed to the High Court.

Canaway K.C. (with him *Hanbury Davies*), for the appellant.

Knox K.C. (with him *Pike*), for the respondents.

During argument reference was made to *Maclean* v. *MacAndrew* (2); *Goldsbrough, Mort & Co. Ltd.* v. *Quinn* (3); *In re Beeby* (4); *Attorney-General for Victoria* v. *Melbourne Corporation* (5); *Minister for Lands* v. *Wilson* (6); *Williams* v. *O'Keefe* (7); *Williams* v. *Dunn's Assignee* (8); *Hawker* v. *McLeod* (9); *Phillips* v. *Lynch* (10); *In re Cowan* (11); *In re*

(1) 13 S.R. (N.S.W.), 616.
(2) 43 L.J.P.C., 69.
(3) 10 C.L.R., 674.
(4) 16 L.C.C. (N.S.W.), 572.
(5) (1907) A.C., 469, at p. 474.
(6) (1901) A.C., 315, at p. 322.
(7) (1910) A.C., 186.
(8) 6 C.L.R., 425, at p. 441.
(9) 10 C.L.R., 628, at p. 645.
(10) 5 C.L.R., 12.
(11) 13 L.C.C. (N.S.W.), 97.

Darmody (1); *In re Kelly* (2); *In re Gale* (3); *Abbott* v. *Minister for Lands* (4).

H. C. OF A. 1914.

MINISTER FOR LANDS, N.S.W. v. BARKER.

Dec. 18.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. The question to be determined in this case arises under the laws relating to the acquisition of title to Crown lands by the method called "conditional purchase," to the nature of which I must briefly refer.

A person entitled to take advantage of those laws with respect to land available for acquisition under them may make application in the prescribed manner for an area not less than 40 and not more than 2,560 acres (in some parts of the State, a smaller maximum). The application, which must be accompanied by a deposit of a prescribed sum per acre, comes in due course before the Local Land Board for confirmation, and if it is confirmed the applicant is required within three months from the date of confirmation to take up his residence on the land and to continue so to reside for the prescribed period (generally five years) from that date. Certain privileges as to the place of residence are allowed in some cases, but are not material to the present question. The balance of the price of the land is payable by annual instalments with interest at 4 per cent. After payment of the last instalment, and on obtaining from the Local Land Board a certificate of fulfilment of conditions, the conditional purchaser is entitled to a grant in fee simple.

The holder, commonly called the "selector," of land so taken up, which is called "a conditional purchase," may, if the land comprised in his original application is of less than the permitted maximum area, make additional conditional purchases of land adjoining the original conditional purchase or any prior additional conditional purchase, up to that maximum. Sec. 42 of the *Crown Lands Act of* 1884 begins with the words "Every original conditional purchaser." The meaning of these words in that section is not open to doubt. Sec. 43 provides that "the area embraced

(1) 11 L.C.C. (N.S.W.), 208; 12 L.C.C. (N.S.W.), 52.
(2) 12 L.C.C. (N.S.W.), 139.
(3) 11 L.C.C. (N.S.W.), 280.
(4) (1895) A.C., 425.

H. C. OF A. 1914.

MINISTER FOR LANDS, N.S.W. v. BARKER.

Griffith C.J.

by any original conditional purchase . . . and any additional conditional purchase made in virtue thereof may for all purposes of residence and fencing be held to be one holding and conditional purchase." The abbreviated expressions O.C.P. and A.C.P. have long been in use to denote what sec. 43 calls the "original conditional purchase" and an "additional conditional purchase" respectively.

Sec. 48 of the same Act allows an applicant for a conditional purchase or additional conditional purchase who desires to obtain in connection with it a conditional lease of adjoining lands to make application for such a lease. The area to be allotted under the lease may not exceed three times the area of the conditional purchase by virtue of which it is applied for, and the total area of the land comprised in the conditional purchase or purchases or conditional lease or leases must not exceed the maximum area allowed to be acquired by conditional purchase in that part of the State. Sec. 51 allows the condition of residence in respect of the conditional purchase to be performed by residence on a conditional lease attached to it.

Sec. 26 of the *Crown Lands Act of* 1889 dispensed with the necessity of making an application for a conditional lease at the same time as an application for a conditional purchase, and allowed the holder of a conditional purchase to apply for a conditional lease at any time, subject to the same limitations as to area and situation. That section went on to declare that "all conditional purchases of the same series, and all conditional leases granted in virtue thereof, shall, for all purposes of residence, fencing, or improvement, be deemed to be one holding."

By sec. 4 of the same Act the term "series" or "same series," when used in connection with conditional purchases, was defined as meaning "an original conditional purchase . . . and any additional conditional purchases which may have been, or may be, made by virtue thereof." The same Act provided by sec. 25 that the holder of any conditional lease might at any time apply for the whole or any part of the land comprised in it as an additional conditional purchase or purchases subject to the ordinary conditions as to such applications. This process is commonly spoken of (as in the special case now before us) as converting the

conditional lease into an additional conditional purchase. By an amendment of sec. 25 made by the Act of 1908 it was enacted that this provision should apply to the holder of a conditional lease taken in virtue of an additional conditional purchase which is also held by him, notwithstanding the fact that he may not be "the holder of the original conditional purchase of the series."

By sec. 18 of the Act of 1899 it is declared that in all the Crown Lands Acts, and any Act amending them, the term "series" and "same series," when used in connection with conditional purchases and conditional leases, shall mean and be deemed to have meant "an original conditional purchase . . . and any additional conditional purchases and conditional leases made by virtue of any such conditional purchase or conditional lease."

The general nature of the scheme of legislation is plain enough. The maximum area allowed to be acquired by one person by way of conditional purchase was fixed, but the land might be taken up piecemeal so long as it remained open for application. The condition of residence might be performed upon any part of the whole area or "series," which was regarded as a unit, the first parcel of land applied for, called the "original conditional purchase," being regarded as the root of title, or nucleus to which all additional conditional purchases or all conditional leases made by virtue of it were regarded as accretions.

By sec. 30 of the Act of 1895 the condition of residence was dispensed with as to an additional conditional purchase or a conditional lease "so long as the person upon whom the performance of the said condition would for the time being devolve is the person who applied for the original conditional purchase of the series, and for the said additional conditional purchase or conditional lease." That is to say, the condition was dispensed with in that case so long as the original selector still held the land originally selected, whether before or after its conversion into freehold. By the Act of 1899 the words quoted were repealed, and the following words (also since repealed) substituted: "if the applicant for such additional conditional purchase or conditional lease is the person who applied for the original conditional purchase of the series." And by sec. 31 the privilege of adding to

H. C. OF A. 1914.

MINISTER FOR LANDS, N.S.W. v. BARKER.

Griffith C.J.

the original conditional purchase by additional conditional purchases and conditional leases was not to be terminated merely by payment to the Crown of the balance of the purchase money due upon a conditional purchase. The unity of the series was therefore not necessarily determined by the conversion of part of it into freehold, so long as it remained in the hands of the person who was the original conditional purchaser.

The question for decision in the present case depends upon an Act passed in 1902, at which time the State of New South Wales had suffered from a severe and prolonged drought. The object of the Act was to allow a re-appraisement of values of land held under conditional purchase and conditional lease in certain cases with the view of relieving the holders in respect of their purchase money or rent. By sec. 2 the term "holding" was defined to mean "any number of portions of land held by one person *bonâ fide* in his own interest in fee simple or on conditional purchase or conditional lease of the same or of different series, and being contiguous or separated only by roads or watercourses." By sec. 4 any holder of land held under conditional purchase or conditional lease who was resident on some part of the holding of which such land was a portion, or who was exempted from residence under sec. 11 of the Act, might apply to have the capital value of such land determined under the Act. By sec. 5 (2) the application was required to include all conditional purchases and conditional leases of the same series then held by the applicant, and might include more than one series.

By sec. 10 a person obtaining re-appraisement was made subject to a new and onerous condition of residence.

Sec. 11 provided that if the applicant "is the holder of any conditional purchase . . . . or of any conditional lease and is the original conditional purchaser or lessee, or a person on whom such purchase or lease has devolved under the will or on the intestacy of such original purchaser or lessee," and such purchaser, lessee or person has not transferred it otherwise than by way of mortgage "the condition of residence under this Act shall not attach . . . either at the date of the application or afterwards." That is to say, the person who has the prescribed qualification need not be a resident at the time of making the

application for appraisement, and is exempt from the new condition of residence.

In the present case the respondents acquired by purchase from a previous holder certain land held by him under conditional purchases and conditional leases. They afterwards applied for the land comprised in the conditional leases as additional conditional purchases, and their applications were granted. Thereupon they claimed to be the original conditional purchasers of the land comprised in these additional conditional purchases, and, as such, to be entitled to the benefit of sec. 11 with respect to the whole holding, and the Supreme Court has held by majority that their claim is a good one.

It is clear that so far as regards the conditional purchases which they acquired by transfer they are not the original conditional purchasers. The application for appraisement, as already pointed out, must be a single application in respect of a single estate which is regarded as a unit, of the whole of which the original conditional purchase is the nucleus or root of title. In my opinion, the term "original conditional purchaser" in sec. 11 is correlative to and co-extensive with the term "original conditional purchase" so often used in the provisions to which I have referred, and denotes the person who is the original conditional purchaser in respect of the whole series as to which the application for re-appraisement is and must be made, or, in other words, the original selector. The use of the definite article, in itself, I think, implies this. For, just as there can only be one parcel of land of which it can be predicated that it is "the" original conditional purchase of the series, so there can be only one person of whom it can be predicated that he is "the" original conditional purchaser in respect of that series. To construe the words in any other sense involves the substitution of the words "an original purchaser" (in the sense of an original purchaser of some conditional purchase of the series) for the words "the original purchaser." The *verba subaudita* after "the original conditional purchaser" must, therefore, be "in respect of the land comprised in the application," and not "in respect of some part of the land" so comprised.

This construction gives full effect to the provisions as to

H. C. OF A. 1914.

MINISTER FOR LANDS, N.S.W. v. BARKER.

Griffith C.J.

exemption from residence contained in sec. 11. The only persons who, not being actually resident on some part of the holding, can make application for re-appraisement are, on that construction, persons in respect of whose holdings exemption from residence has already been earned by the fulfilment of the condition of residence, since that condition could only be fulfilled by the person who took up the original conditional purchase. Under this section it is not enough that the condition should have been fulfilled by some one. The applicant must also be the original conditional purchaser and not a transferee. The privilege is therefore limited to persons who have already fulfilled the condition in person. On the contrary construction a person who had acquired by transfer a holding of (say) 2,500 acres might, by acquiring an additional conditional purchase of (say) 60 acres (whether directly or by way of conversion of a conditional lease), and then making application for re-appraisement, obtain exemption from residence for the whole holding, although that condition had not been fulfilled before his application. This result would be so astonishing that it would require very plain words to compel the adoption of such a construction.

It should not be forgotten that in sec. 11 as originally passed the concluding sentence ran: "the condition of residence under this Act shall not attach to such purchase or lease either at the date of the application or afterwards," suggesting, as did an Act of 1899, that the condition of residence was in some way distributable. The words "to such purchase or lease" were struck out by an Act of 1908, no room being thus left for doubt that the condition of residence is single and indivisible in respect of the entire holding, as expressed in sec. 4.

Reliance was placed by the respondents on certain temporary provisions of an Act passed in 1899, and a decision of the Land Appeal Court in the case of *Re Darmody* (1), decided in 1901. Sec. 1 of that Act provided that under certain circumstances "the holder of any land held under conditional purchase or conditional lease" who from the commencement of the Act to the date of application had been in continuous residence on some portion of the holding of which it formed part might apply for

(1) 11 L.C.C., 208.

re-appraisement of the capital value of a small portion of it. Sub-sec. 5 required the applicant, if successful in obtaining a reduction of the capital value, to continue to reside on the holding on the usual terms for not less than five years from the date of application, less a deduction for previous residence, with a proviso that "where any conditional purchase or conditional lease . . . brought or applied to be brought under the provisions of this section is held by the original conditional purchaser or lessee, or any person on whom" it had devolved "under the will or on the intestacy of such purchaser or lessee" . . . the condition of residence prescribed by the section should not apply. The Land Appeal Court held in *Darmody's Case* (1) that a person who was not the person who applied for the original purchase of the series, but who had after acquiring that original conditional purchase by transfer applied for an additional conditional purchase, was in respect of that additional conditional purchase the original conditional purchaser within the meaning of the proviso.

That construction was possibly open upon the words of that Statute, but the provisions of the Act of 1902 are very different. Under the Act of 1899 the application might be made in respect of any conditional purchase, original or additional.

Under the Act of 1902 the application must be made in respect of the whole series, and the exemption from residence, if granted, applies to the whole series. Whether, therefore, the words the "original conditional purchaser" as used in the Act of 1899 were rightly construed or not in their then context, I think that in their new context they necessarily apply to the whole of the land in respect of which the application is made, *i.e.*, the whole series in respect of which the application is made, just as under the former Act they were limited to a part of it.

It is suggested that on the construction which I adopt no effect can be given to the words "original conditional lessee." No doubt the phrase is inapt, but I do not think that its inaptness overbalances the other weighty arguments by which I am impressed. It is perhaps capable of meaning a conditional lessee who has not obtained the lease by transfer. Its most nearly accurate meaning is a conditional lessee who has become such

(1) 11 L.C.C., 208.

H. C. OF A. 1914.

MINISTER FOR LANDS, N.S.W. v. BARKER.

Griffith C.J.

under the right of an original conditional purchaser. The former construction involves reading "original" as merely equivalent to "first." But this involves a disregard of the sense in which the word "original" has been uniformly used through the whole series of Land Acts.

For these reasons I think that the appeal should be allowed. It is right to add that the view which I adopt was not presented to the Supreme Court, nor at first to us, but I do not feel justified for that reason in judicially construing the section in a way which I believe to be contrary to the plain intention of the legislature.

In my opinion the appeal should by allowed.

The judgment of ISAACS and GAVAN DUFFY JJ. was read by

ISAACS J. The case turns on the meaning of the word "original" in the phrase "original conditional purchaser."

The Minister contends that it indicates one of two things: (1) the person who first obtained the conditional purchase which gave a right to obtain the land in question; or, alternatively, (2) the person who originally dealt with the Crown in respect of that particular land, whether he did so by way of conditional purchase or conditional lease. The respondents contend it indicates the person who first became the conditional purchaser of that particular land, if it is then held under purchase, just as when used with reference to "lessee" it indicates the person who first became the conditional lessee, if the land is then held under lease.

The Supreme Court held to the last mentioned view, and we think that is right. It is the natural construction, and, while giving force to every word, requires no addition to the enactment. In view of the traditionally intricate character of the Land Acts, it is specially necessary to adhere to the natural meaning of the precise words of Parliament, unless some repugnance or absurdity stands in the way, or unless there is some recognized secondary signification or governing context. In the present case we do not see any such circumstances. It is evident that whatever meaning is attributed to the word "original" as to "purchaser" must be also its true meaning as to "lessee." Now, a conditional lease on

the one hand can only arise by reason of a conditional purchase (sec. 48 of the Act of 1889); and, on the other hand, while a conditional purchase can be converted into a conditional lease, a conditional lease cannot be converted into a conditional purchase.

We think it therefore a necessary connotation that "original conditional lessee" means a conditional lessee holding under a lease which was first issued to him. And as the Act regards the "original conditional lessee" as having rights not only independent of, but also on the same footing as, the "original conditional purchaser," the word "original" as applied to the latter means that the conditional purchaser must hold under a "purchase" which was first issued to him.

The purchaser or lessee cannot, however, claim exemption rights, although he remains purchaser or lessee, if he has "transferred" his "purchase" or his "lease," as the case may be, otherwise than by way of mortgage or security only. "Transfer" does not pass the title until registration (see secs. 117, 118 and 120 of the Act of 1884). In other words, his application for exemption from residence must be *bonâ fide* for himself.

We have had considerable argument as to inequalities, and other results, said to arise from the construction we have adopted; but, even if we were satisfied they existed, we do not think, in view of the governing principles of statutory construction, that those circumstances are sufficient to affect the interpretation of the section.

In our opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor, for the respondents, *W. M. J. Walsh*, Wagga Wagga, by *McDonell & Moffitt.*

B. L.