

THE COURT allowed the appeal, holding that there was evidence to go to a jury.

*Appeal allowed with costs. Order appealed from discharged. Appeal to the Supreme Court allowed, with costs. Case to be reheard before a Judge of the Supreme Court. Costs in the County Court to abide the event of the rehearing.*

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1916.  
—  
CRAINE  
v.  
SODEN.  
—

Solicitor for the appellant, *W. S. Doria*.  
Solicitors for the respondent, *Cleverdon & Fay*.

B. L.

[HIGH COURT OF AUSTRALIA.]

EVERINGHAM . . . . . APPELLANT ;

AND

THE MINISTER FOR LANDS (NEW SOUTH WALES) . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

*Crown Lands—Conditional purchase—Restrictions on alienation—Original conditional purchase taken up after 1st February 1909—Acquisition as additional purchase by holder of original conditional purchase taken up before 1st February 1909—Subsequent alienation—Consent of Minister—Crown Lands Consolidation Act 1913 (N.S.W.) (No. 7 of 1913), secs. 267, 272.*

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SYDNEY,  
March 30.  
—  
Griffith C.J.,  
Barton,  
Gavan Duffy  
and Rich JJ.

Sec. 267 of the *Crown Lands Consolidation Act 1913* (N.S.W.) provides that "The holder of any conditional purchase . . . may . . . acquire by transfer one or more conditional purchases . . . (although a condition of residence may attach to such conditional purchases . . . ) as additional



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purchases . . . and in any such case the conditions of residence and improvement attaching to the original and additional holdings may be performed on any one of such holdings. Before any such acquisition takes place the local land board shall approve thereof and the Minister shall consent thereto, . . . and whenever an original holding shall have been acquired under such provision and shall thereby have become attached to another original holding, such first-mentioned holding shall in all respects be deemed to be an additional to the holding to which it is so attached." Sec. 272 provides that "(1) Holdings of the kinds hereunder specified, that is to say—(a) original conditional purchases . . . applied for on or after the first day of February 1909 . . . or (f) additional holdings held in virtue of any such holdings as aforesaid . . . shall respectively not be transferable except by way of mortgage only to a person who at the date of the proposed transfer already holds an area of lands that under the provisions of this Act are to be taken into account, which area when added to the area proposed to be acquired by transfer will in the opinion of the Minister exceed a home maintenance area . . . (2) Application for permission to transfer by way of sale mortgage lease or otherwise any such holding as is hereinbefore mentioned shall be made to the Minister in the prescribed form, and such transfer shall not be effected, or if effected shall not be valid, unless the Minister's consent thereto has been obtained."

*Held*, that where the holder of an original conditional purchase applied for before 1st February 1909 subsequently to that date and pursuant to sec. 267 acquired, by transfer, another original conditional purchase applied for after that date, the last-mentioned original conditional purchase was not thereafter subject to the provisions of sec. 272.

Decision of the Supreme Court of New South Wales : *Minister for Lands v. Everingham*, 15 S.R. (N.S.W.), 311, reversed.

APPEAL from the Supreme Court of New South Wales.

A special case was stated by the Land Appeal Court for the decision of the Supreme Court which was as follows :—

1. The respondent herein, Otho Leslie Everingham, was on and before 5th December 1913 the holder of an original conditional purchase No. 1908/195 and a conditional lease No. 1908/161 in the Land District of Grafton which had been applied for by him in the year 1908.

2. On 14th July 1914 a first certificate in respect of the said conditional purchase No. 1908/195 was duly issued to the said Otho Leslie Everingham.

3. In the year 1911 one Cyrus Everingham applied for an original conditional purchase (No. 1911/44) and in virtue thereof for a conditional lease (No. 1911/33) of Crown lands in the Land District of



Grafton, and the applications for the same respectively were subsequently confirmed by the Local Land Board.

4. On 5th December 1913 the said Cyrus Everingham transferred, under the provisions of section 267 of the *Crown Lands Consolidation Act* 1913, the said conditional purchase No. 1911/44 and the said conditional lease No. 1911/33 Grafton to Otho Leslie Everingham.

5. In the year 1914 the said Otho Leslie Everingham proposed to transfer by way of sale to one John James Timbs (who was already the holder of 320 acres of freehold land) both the said conditional purchases and both the said conditional leases, and the said Otho Leslie Everingham applied under the provisions of sec. 272 of the aforesaid Act to the Minister for Lands for his permission to transfer by way of sale conditional purchase No. 1911/44 and conditional lease 1911/33 aforesaid to the said John James Timbs.

6. On 23rd December 1914 the Minister referred to the Local Land Board the questions "whether the area already held by the said John James Timbs together with the area now proposed to be acquired by him from Otho Leslie Everingham would exceed a home maintenance area, and whether the subject application for permission to transfer should be granted or refused"; and the Local Land Board was required to hold an inquiry and make a recommendation and report upon the matter so referred.

7. On 5th February 1915 the said matter came before the Local Land Board sitting at Grafton, when a preliminary objection was taken on behalf of the said Otho Leslie Everingham to the effect that the said reference was unnecessary, the said application also being unnecessary, for the reason that the said conditional purchase No. 1911/44 and the said conditional lease No. 1911/33 Grafton had ceased to be an original holding under the provisions of sec. 272 and had become "in all respects" an additional holding under the provisions of sec. 267 to an original holding not affected by the provisions of sec. 272 of the Act aforesaid.

8. On 9th February 1915 the said Local Land Board reported that the area of 320 acres already held by Timbs together with the area now proposed to be acquired substantially exceeded a home maintenance area, and recommended that the said application for permission to transfer be refused.

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9. The said Otho Leslie Everingham appealed to the Land Appeal Court against the said decision on the grounds :—

- (1) That the Board was in error in holding that the proposed transfer was one coming within the provisions of sec. 272.
- (2) That the Board was in error in overruling the preliminary objection taken on behalf of the parties.
- (3) That the consent of the Minister for Lands to the proposed transfer was not required.
- (4) That the finding of the Board that the combined areas exceeded a home maintenance area was against the evidence and weight of evidence.

10. On 21st April 1915 the Land Appeal Court sustained the said appeal on the first three grounds, holding that the said conditional purchase No. 1911/44 and the said conditional lease No. 1911/33 Grafton had, after the aforesaid transfer of 5th December 1913, to be regarded as an additional holding attached to or held in virtue of the holding taken up by respondent in the year 1908, and that the said conditional purchase and conditional lease were not affected by the provisions of sec. 272, but were transferable without the Minister's consent, under the provisions of sec. 260 of the *Crown Lands Consolidation Act* 1913. The said Court gave no decision on the fourth ground as aforesaid.

11. The Minister for Lands has duly requested the Land Appeal Court to state a case for the opinion of the Supreme Court on the questions of law hereunder set forth :—

1. Whether at the date of the Minister's reference the before mentioned conditional purchase No. 1911/44 and conditional lease No. 1911/33 had by the operation of sec. 267 of the *Crown Land Consolidation Act* 1913 ceased to be subject to the provisions of sec. 272 of that Act.
2. Whether the Minister's consent was necessary to the transfer of the aforesaid conditional purchase and conditional lease by the respondent to the aforesaid John James Timbs.

The Full Court (by majority) answered the first question in the negative and the second in the affirmative : *Minister for Lands v. Everingham* (1).



From that decision Otho Leslie Everingham now, by special leave, appealed to the High Court.

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*Rolin* K.C. (with him *Coffey*), for the appellant. Under sec. 267 of the *Crown Lands Consolidation Act* 1913 the conditional purchase acquired by the appellant on 5th December 1913 became, for all purposes, an additional holding attached to the original conditional purchase applied for by him in 1908. That is the plain meaning of sec. 267. That being so, sec. 272 no longer had any application.

*Canaway* K.C. (with him *Hanbury Davies*), for the respondent. When in 1911 Cyrus Everingham took up the original conditional purchase which he afterwards transferred to the appellant, one of the terms of the contract with the Crown was that his right of alienation should be subject to the restrictions contained in sec. 272. The provision at the end of sec. 267 was not intended to remove those restrictions. The word "holding" in sec. 267 connotes the continued existence of those restrictions. The words "in all respects" in the provision at the end of the section mean in all the respects which the Legislature then contemplated: *Hill v. East and West India Dock Co.* (1); *Midland Railway Co. v. Pye* (2); *Young v. Adams* (3). Those are contained in secs. 167, 183 (7), 184 (2) and 189. That provision lays down an artificial rule, and the Court will inquire for what purpose it was laid down, and will apply it for that purpose only: *Hocking v. Western Australian Bank* (4). One of the results of deciding this case in favour of the appellant will be that the precautions adopted by the Legislature to give effect to the principle that a man shall only acquire a home maintenance area will be swept away. The words "in all respects" mean in respect of all the incidents which accrue in the future. The words have, *primâ facie*, a prospective meaning, and will not be given a meaning which will take away the vested rights of the Crown unless the reason for doing so is very clear: *Main v. Stark* (5).

(1) 9 App. Cas., 448.

(2) 10 C.B. (N.S.), 179, at p. 192.

(3) (1898) A.C., 469.

(4) 9 C.L.R., 738, at p. 745.

(5) 15 App. Cas., 384, at p. 388.



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GRIFFITH C.J. With all respect to the learned Judges of the Supreme Court who formed the majority, this case seems to me to be free from any substantial doubt. The system of the Crown Lands Acts of New South Wales is too well known to require detailed explanation. With regard to conditional purchases the scheme is that a person may apply for and take up vacant Crown land under a title which is called "conditional purchase." The tenure is conditional for ten years, during which the condition of residence must be performed together with making certain improvements. The purchase money is payable by instalments. The holder of such a conditional purchase, which is generally called "an original conditional purchase," may, if other Crown land is available adjoining the first purchase, apply for an additional conditional purchase, which, if granted, becomes an accretion to the original conditional purchase, and the obligations with respect to both are consolidated. But the right of taking up land by way of additional conditional purchase was limited to vacant Crown land. Then, in 1903, the Legislature were minded to remove that limitation. It was said:—"If a piece of land adjoining an original conditional purchase is held by another man also as an original conditional purchase, and one of them is willing to go out so that the two may be consolidated, why should they not be consolidated?" The law was then altered by an enactment which now forms the first paragraph of sec. 267 of the *Crown Lands Consolidation Act* 1913, and which, leaving out immaterial words, provides that "The holder of any conditional purchase . . . may . . . acquire by transfer one or more conditional purchases . . . as additional purchases, . . . and in any such case the conditions of residence and improvement attaching to the original and additional holdings may be performed on any one of such holdings." Such a transfer was, however, subject to the approval of the Local Land Board and the Minister. The Legislature therefore put the newly acquired conditional purchase which had for a time been held by another person as an original conditional purchase, on the same footing as an additional conditional purchase acquired by taking up vacant Crown land. In other words, the two holdings were to be treated as a consolidated or single holding on any part of which the



conditions of residence and improvement may be performed. Upon that language I should not myself have thought there was any reason for doubt. The Legislature treated the land so acquired as an ordinary additional conditional purchase.

Later, in 1908, the Legislature imposed certain restrictions upon dealings with certain holdings, but the restrictions were limited to holdings applied for after 1st February 1909. One of the restrictions imposed, which now appears in sec. 272 of the consolidated Act, was that the holder of an original conditional purchase applied for after 1st February 1909, or of an additional holding held in virtue of any such holding, should not be at liberty to transfer it except subject to certain restrictions, which are the restrictions now in question.

In 1912 a further enactment was made. Apparently someone had suggested a doubt whether an additional conditional purchase acquired by transfer of an original conditional purchase under the Act of 1903 was an additional purchase for all purposes, and to remove this doubt the provision which now appears at the end of sec. 267, that "whenever an original holding shall have been acquired under such provision and shall thereby have become attached to another original holding, such first-mentioned holding shall in all respects be deemed to be an additional to the holding to which it is so attached," was enacted. The fact that the provision now appears as part of sec. 267, to which it properly belongs, does not alter its meaning. The declaration is that when land is acquired in that particular way it shall in all respects be treated as additional to the original conditional purchase to which it is an accretion.

In the present case, the appellant before 1st February 1909 became the holder of an original conditional purchase, and thereupon became entitled to acquire an adjoining conditional purchase if land was available. On 5th December 1913 Cyrus Everingham transferred an original conditional purchase, which he had acquired after 1st February 1909, to the appellant. That transfer was approved by the Local Land Board and by the Minister, and thereupon the conditional purchase so acquired by the appellant lost its character of an original conditional purchase, and became an additional conditional purchase as an accretion to the appellant's original

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conditional purchase. Under those circumstances it does not come within sec. 272 at all, because the original conditional purchase by virtue of which it is now held was applied for before 1st February 1909.

There is, therefore, no question of conflict between the two sections. If there were any room for doubt before, the words "in all respects" removed it. The appellant is therefore the owner of an original conditional purchase applied for before 1st February 1909, attached to which is the additional conditional purchase in question. He has as much right to transfer the one as the other, for the acquired holding is not within sec. 272, which is the only law that can be suggested as forbidding the transfer.

A difficulty was suggested, arising from the fact that attached to Cyrus Everingham's original conditional purchase was a conditional lease. That lease was transferred to the appellant with Cyrus Everingham's purchase to which it was attached, and no point is raised in the case as to the validity of the transfer. It therefore forms part of the series of which the appellant's original conditional purchase acquired in 1908 is the root, and sec. 272 does not affect it any more than the other holding.

I desire to express my entire agreement with the judgment of *Pring J.*, and the reasons which he gave for it.

BARTON J. I agree. I think it unnecessary to add anything to what has been said.

GAVAN DUFFY J. I agree.

RICH J. I agree.

*Appeal allowed. Judgment appealed from discharged. Questions to be answered: (1) Yes; (2) No. Respondent to pay costs of special case and of appeal.*

Solicitors for the appellant, *McGuren & Pollack*, Grafton, by *Arthur J. McDonald & Kemmis*.

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

B. L.