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*has been increased in value by such improvements*; (4) *the defendant abandoning an account of the rents and profits received by the plaintiff, an annual value by way of occupation rent to be set on the premises whereof the plaintiff has been in actual occupation. Case remitted to the Supreme Court to enter judgment upon the result of these accounts and inquiries according to law. Otherwise judgment affirmed. The appellant to pay to the respondent one half of the costs of this appeal.*

Solicitor for the appellant, *Joseph Barnett.*

Solicitors for the respondent, *Loughrey & Douglas.*

B. L.

Dist *Lands & Forests, Minister for* v *McPherson* (1991) 22 NSWLR 687

Appl *Vanmeld Pty Ltd* v *Cussen* (1994) 121 ALR 619

Cons *Fawthrop & Repatriation Commission, Re* (1994) 36 ALD 140

[HIGH COURT OF AUSTRALIA.]

DAVIES AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

LITTLEJOHN AND OTHERS . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 5, 6, 20.

KNOX C.J., ISAACS AND HIGGINS JJ.

*Will—Construction—Direction to pay "charges or encumbrances"—Conditionally purchased land in New South Wales—Unpaid instalments of purchase-money—Vendor's lien—Crown Lands Consolidation Act* 1913 (*N.S.W.*) (*No.* 7 *of* 1913), *secs.* 6, 38, 40, 44, 45, 47, 48, 51, 53-56, 150, 154, 181, 206, 259-261, 270, 272.

*Held*, that in respect of land conditionally purchased pursuant to the *Crown Lands Consolidation Act* 1913 (N.S.W.) and the Acts thereby consolidated, the Crown has not a vendor's lien for the instalments of purchase-money not yet

due, nor are such instalments a charge or encumbrance on the land or the interest therein of the conditional purchaser.

*Brett* v. *Hamilton*, (1900) 21 N.S.W.L.R. (Eq.) 84, overruled.

By his will a testator directed his trustees, until the "charges or encumbrances" on his station properties should be entirely liquidated, to appropriate the income of his residuary estate towards payment of those charges or encumbrances.

*Held*, that, there being nothing in the will requiring or permitting the expression "charges or encumbrances" to be given a meaning other than its ordinary legal meaning, that expression did not include the instalments of purchase-money on conditionally purchased lands forming part of those station properties which were not due and were unpaid at the date of the testator's death.

Decision of the Supreme Court of New South Wales (*Harvey* J.) varied.

APPEAL from the Supreme Court of New South Wales.

By the will of John Henry Davies, who died on 18th September 1908, it was provided (*inter alia*) as follows:—"I devise and bequeath all the residue of my real estate of every description and all the remainder of my personal estate . . . including the business of a station proprietor and grazier now carried on by me in New South Wales unto my trustees upon trust that my trustees shall as and when they shall in their absolute discretion think fit sell call in and convert into money my said real and personal estate or any part or parts thereof respectively and shall out of the net proceeds of such sale calling in and conversion or a sufficient part thereof pay my funeral and testamentary expenses and debts (including in particular any mortgages or charges over or on my said real and personal estate) and shall hold the residue of the proceeds of such sale calling in and conversion upon the trusts hereinafter declared concerning the same Provided always" that the trustees were to have power to postpone the sale and conversion of such real and personal estate or any part of it. "I further authorize my trustees to continue and carry on for such period as they shall in their uncontrolled discretion think fit my said business and to employ therein the whole or such parts as they shall think necessary of my real and personal estate with power from time to time to raise such sums or sum of money by mortgaging or charging all or any part of my real and

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personal estate as they may think desirable not only for the purchase or acquisition of stock and land of any tenure in connection with my station properties or any of them but also for the purpose from time to time of discharging either wholly or in part any mortgages or charges for the time being affecting any of my real or personal estate or for improving or enhancing the value of my station properties or any of them and also for the purpose of raising money for the advancement or benefit of any issue of any of my" three "sons . . . And I declare that all profits and interests which may accrue to my estate from the carrying on of the said station properties respectively and from the employment therein of any part of my estate and all rents and income accruing from any unconverted real estate or any part thereof or from any other source shall be treated and applied as if the same were income arising from my estate . . . I further authorize my trustees if at any time it shall seem to them in their uncontrolled discretion expedient to sell and dispose of any stocks funds and securities whereon my estate shall for the time being be invested to invest the money to arise from the sale or disposition thereof or any other moneys available in the purchase of any freehold conditionally purchased conditionally leased land or lands of any other tenure with or without any buildings or improvements thereon in New South Wales or any other Australian State with power to purchase subject to any special stipulations and to complete or accept any contract or title though not strictly enforceable or marketable to be held by them upon trust until such time or times as my trustees shall in their absolute discretion think fit to sell all or any of the said lands and to invest the proceeds of sale in or upon any such stocks shares or securities or in the purchase of any such lands as are hereinbefore authorized to be purchased with power to vary and transpose the same investments . . . I declare that my trustees shall stand possessed of and be interested in my residuary real and personal estate including my said business and the proceeds of the sale and conversion of such real and personal estate and the stocks funds shares and securities and investments in or upon which the same shall from time to time be invested (all of which are hereinafter referred to as "my residuary estate") and the annual produce and income thereof upon . . . trust to pay out of the income of my

residuary estate a sum of six hundred pounds per annum by equal quarterly payments . . . to . . . Mary Jane Nicholson first for the support maintenance and education of her daughter Phyllis Clare Nicholson and then for the maintenance and support of herself and the said Phyllis Clare Nicholson until the said Phyllis Clare Nicholson shall marry . . . And I expressly declare that nothing herein contained shall be construed as affecting or shall in any way affect limit or abridge the power hereinbefore conferred upon my trustees to sell manage carry on and deal with my residuary and other estate or any part or parts thereof as may be deemed advisable by them And that the said annuity payable as before directed shall not as between my trustees and any purchaser or purchasers lessee or lessees or any other person or persons or corporation be a charge against or encumbrance upon such estate . . . And subject as aforesaid I direct and declare that my trustees shall hold the whole of my residuary estate and the annual produce and the income thereof upon trust and until the charges or encumbrances on my said station properties respectively shall be entirely liquidated to appropriate or set apart all the net annual produce and income arising from my residuary estate over and above the sum of fifteen hundred pounds per annum in or towards payment of such charges or encumbrances investing any part of such annual produce and income which cannot be immediately applied in or towards reduction of the said charges or encumbrances in any of the investments authorized by this my will And upon trust to pay one third of the said net annual sum of fifteen hundred pounds and after my said station properties shall be sold or the charges or encumbrances on them respectively shall be entirely paid off and liquidated then to pay one third of the whole of such net annual produce and income to each of my said sons for his life " &c.

At the time of his death the testator had two station properties in New South Wales, each of which included lands held on terms of " conditional purchase " under the Crown Lands Acts of New South Wales, and the amount then due to the Crown as instalments on those lands was £13,029. The testator owed to the Bank of New South Wales and to the Australian Mutual Provident Society certain sums of money which were secured by mortgage or charge. These debts were discharged by the trustees by 21st October 1911, and from

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that time onwards the trustees distributed the net income from the station properties among the testator's three sons. But the instalments not yet due in respect of the conditionally purchased lands had not then been paid; and on 31st October 1923 the balance of the instalments not then due amounted to £4,792 6s. 1d. and was unpaid.

An originating summons in the Supreme Court of New South Wales was taken out by Arthur Nelson Littlejohn, one of the trustees, asking for the determination by the Court of the question whether the expression " until the charges or encumbrances on my said station properties respectively shall be entirely liquidated " in the will referred only to charges or encumbrances which existed at the time of the testator's death or also to other and what charges or encumbrances upon such properties. The defendants to the summons were the three sons of the testator, namely, Reginald Laidlaw Davies, Arthur Leaper Davies and Jack Rupert Davies; Mary Jane Nicholson, mentioned in the will, who represented her two daughters; the Australian Mutual Provident Society, the mortgagee of the interests of the three sons of the testator; and Owen Mair Leaper Davies, who represented all persons entitled in remainder to the residuary estate after the determination of the respective estates of the three sons of the testator.

The summons was heard by *Harvey* J., who, in answering the question, declared that the charges and encumbrances directed to be paid out of the surplus income of the residue, over and above £1,500 per annum, included the unpaid balance of instalments on the conditionally purchased lands; and he directed the three sons of the testator to refund by annual instalments the money paid to them in excess of £1500 in any one year. A question, which was as follows, was subsequently, by leave of *Harvey* J., added to the summons: Does the said expression " charges or encumbrances " include the unpaid instalments owing to the Crown on conditional purchases held by the testator falling due after his death ?

From the decisions of *Harvey* J. the three sons of the testator now appealed to the High Court, the question argued being that last mentioned.

*Leverrier* K.C. (with him *Williams*), for the appellants. Instalments on conditionally purchased land under the *Crown Lands*

*Consolidation Act* 1913 (N.S.W.) are not a charge on the land. There is nothing in the Act which expressly makes them a charge on the land, and the only way in which a charge could be imposed would be by the Crown having a vendor's lien in respect of the instalments not yet due. In view of the provisions for forfeiture in secs. 54 and 55, it is not a proper implication that a vendor's lien exists. The only right of a vendor under his lien is to have the land sold to pay the purchase-money, and in view of the provisions of the Act there can be no implication that the Crown has such a right. (See *Walker* v. *Ware, Hadham and Buntingford Railway Co.* (1); *Halsbury's Laws of England*, vol. XIX., p. 15; *Williams on Vendor and Purchaser*, 2nd ed., vol. II., p. 1026.) The Act sets out the whole of the rights and liabilities of the Crown and the conditional purchaser. [Counsel also referred to the *Crown Lands Consolidation Act* 1913, secs. 41, 44, 47, 51, 54, 56; *Bull* v. *Attorney-General for New South Wales* (2).] The decision in *Brett* v. *Hamilton* (3) to the effect that the Crown has a vendor's lien for instalments not yet due on conditionally purchased lands cannot be supported.

[ISAACS J. referred to *Turner* v. *Walsh* (4); *Tooth* v. *Power* (5); *Blackwood* v. *London Chartered Bank of Australia* (6).]

Upon the construction of the will the term "charges or encumbrances" is not intended to include the instalments of purchase-money not yet due.

*Davidson* and *Hook*, for the respondent Mary Jane Nicholson.

*Teece* K.C. (with him *Wickham*), for the respondent Owen Mair Leaper Davies. The instalments of purchase-money not yet due on conditionally purchased land are "charges or encumbrances" on the land. The Crown has an ordinary vendor's lien for such instalments. It does not follow from sec. 6 that the contract described as a conditional purchase has not the ordinary consequences of a contract of sale. The conditional purchaser is in the same position as a purchaser of a fee simple (*Chisholm* v. *Macauley* (7).)

(1) (1865) L.R. 1 Eq. 195.
(2) (1916) 2 A.C. 564.
(3) (1900) 21 N.S.W.L.R. (Eq.) 84.
(4) (1881) 6 App. Cas. 636.
(5) (1891) A.C. 284.
(6) (1874) L.R. 5 P.C. 92.
(7) (1868) 7 N.S.W.S.C.R. 312

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[KNOX C.J. referred to *R.* v. *Redhead Coal Mining Co.* (1).]

Apart from there being a vendor's lien the instalments are "encumbrances," a word which has a very wide meaning (*Wallace* v. *Love* (2)). They are liabilities attaching to the property. There is an obligation to pay the money (sec. 51) and the Crown can sue for the annual payments (see sec. 239 (2)). The effect of the provisions as to forfeiture is that the liability to pay the instalments is an encumbrance on the land.

[KNOX C.J. referred to *Blackburn* v. *Flavelle* (3).]

A condition breach of which may be followed by forfeiture is an encumbrance on the land (see *Jenks* v. *Ward* (4)). The payment of the instalments is called a "condition" throughout the Act. Under sec. 181 the conditions are analogous to covenants running with the land; so that they are in the widest sense encumbrances on the land. The payment of the instalments is a debt due by the conditional purchaser to the Crown. It is a Crown debt imposed by statute, and is therefore a charge upon the assets of the debtor under the statute 33 Hen. VIII. c. 39, secs. 52, 56 (see *Robertson's Civil Proceedings by and against the Crown*, p. 148; *Titles to Land Act* 1858 (N.S.W.) (22 Vict. No. 1), sec. 16; *Conveyancing and Law of Property Act* 1898 (N.S.W.), sec. 15). There is no context to show that the word "encumbrances" has not its ordinary legal meaning. [Counsel also referred to *Shore* v. *Wilson* (5).]

*Leverrier* K.C., in reply. The statute 33 Hen. VIII. c. 39 has no application except to land held in fee simple or in fee tail.

*Cur. adv. vult.*

Dec. 20.

The following written judgments were delivered:—

KNOX C.J. John Henry Davies was at the date of his death the owner of certain station properties, which comprised (*inter alia*) a considerable area of land conditionally purchased under the Crown Lands Acts, on which balances of purchase-money amounting in all to a large sum were owing to the Crown. These balances were not due

(1) (1886) 7 N.S.W.L.R. 279.
(2) (1922) 31 C.L.R. 156, at p. 172.
(3) (1881) 6 App. Cas. 628.
(4) (1842) 4 Metc. (Mass.) 404, at p. 413.
(5) (1839-42) 9 Cl. & F. 355, at pp. 525, 538.

at the time of testator's death, but were payable with interest by instalments extending over a number of years. By his will testator directed that his trustees should hold the whole of his residuary estate and the annual produce and income thereof upon trust, until the charges or encumbrances on his station properties should be entirely liquidated, to appropriate all the net annual produce and income arising from his residuary estate, over and above the sum of £1500 per annum, in or towards payment of such charges and encumbrances. The question raised on this appeal is whether the expression " charges and encumbrances " in this direction extends to and includes the instalments of purchase-money on the conditionally purchased lands.

I agree with *Harvey* J. in thinking that there is nothing in the will which requires or permits the expression " charges and encumbrances " to be given any meaning other than that which it bears as an ordinary legal term, and in this view the sole question is whether instalments owing but not yet due on conditionally purchased lands are charges or encumbrances on such lands within the ordinary legal meaning of those words. The learned Judge held, following the decision of *Simpson* C.J. in Eq. in *Brett* v. *Hamilton* (1), that the Crown had a vendor's lien on conditionally purchased land for the amount of the unpaid instalments, and that consequently the instalments constituted a charge on the land and were included in the charges and encumbrances directed to be paid out of the income of the residuary estate. I feel no doubt that, if the Crown has a vendor's lien for the amount of these instalments, his conclusion is correct, and therefore proceed to consider whether such a lien exists. The rule to be applied seems to be that, where a vendor delivers possession of land to a purchaser without receiving the purchase-money, equity gives the vendor a lien on the land for the money unless there is something in the transaction itself, or in the circumstances, leading to a clear and manifest inference that the intention of the parties is otherwise (*Dixon* v. *Gayfere*(2); *Winter* v. *Lord Anson* (3)). In the present case the rights and liabilities of the Crown and the purchaser are regulated by the *Crown Lands Consolidation Act* 1913. That Act provides by sec. 6 that

(1) (1900) 21 N.S.W.L.R. (Eq.) 84. (2) (1857) 1 DeG. & J. 655.
(3) (1827-28) 3 Russ. 488.

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Crown lands shall not be sold, leased or dealt with except under and subject to its provisions. It contains elaborate provisions regulating the acquisition, holding, disposition, and forfeiture of (*inter alia*) conditional purchases, which may be outlined as follows:—With certain specified exceptions all Crown lands are open for conditional purchase at a fixed price of 20s. per acre and, subject to certain restrictions and disqualifications prescribed by the Act, any person may apply for an original conditional purchase. The application is referred to the Local Land Board, which confirms it if satisfied that it is made in good faith, but may for sufficient reasons disallow it. The applicant must reside on the land for a period of ten years from the date of the application, and must also comply with certain conditions as to fencing or improvements. The purchase-money with interest at $2\frac{1}{2}$ per cent on the unpaid balance is payable by annual instalments of 5 per cent of the price of the land, the first instalment being payable at the end of the third year after the date of application, and the holder has the right to pay off the whole or any number of the instalments at any time after the issue of the final certificate that he has complied with the conditions other than payment of purchase-money. The land, together with any moneys paid in respect of it, is liable to forfeiture on default being made in performance of the conditions of residence, &c., or in payment of any instalment of purchase-money within three months of due date. Forfeiture is declared by notification published in the *Government Gazette* and takes effect thirty days after such notification, and sec. 206 provides that thereupon the land "shall become Crown lands . . . and be reserved from every form of sale or lease, until otherwise notified in the *Gazette*." The forfeiture may be waived or reversed by the Minister in accordance with the provisions of the Act. By sec. 181 it is provided that the conditions attaching to a conditional purchase shall bind, not only the original applicant, but also all persons deriving title through or under him. The title to a conditional purchase is to commence from the date of the application, if valid (sec. 150); and, when all conditions have been complied with and the balance of purchase-money and certain fees have been paid, "a Crown grant in fee simple of the land shall be issued upon application." By sec. 261 it is provided that a transfer

of conditionally purchased land made, executed and lodged in accordance with the regulations shall be as effective to pass the estate and interest of the transferor as if a conveyance under seal had been executed, subject to the conditions that the equities of all persons claiming any estate or interest in the land by matter prior to the execution of the transfer shall not be affected thereby. By reg. 329 no transfer may be registered or recognized if any payment to the Crown is in arrear. By sec. 270 it is provided that a sale of the estate of a conditional purchaser under the decree or order of any Court shall pass to a purchaser only such right, title and interest as the conditional purchaser was entitled to at the date of the decree or order, and subject to all conditions remaining to be performed at that date.

It is abundantly clear, from the provisions of the Act and of the Regulations, that the object of the Legislature was, not to provide for the making of ordinary contracts for the sale of land by the Crown to its subjects, but to make Crown lands available for purposes of settlement in limited areas ; not primarily to provide for raising revenue by sales of land, but to promote settlement on the land. This is illustrated by the restrictions imposed on auction sales and special sales, and by the limitation of the areas of holdings and of the rights of existing holders of lands to acquire by transfer or otherwise further holdings. Reference may be made to the schedule of questions which the applicant for a conditional purchase is required to answer (see form 9, sched. B). The mutual rights and obligations of the Crown and the applicant for, or holder of, a conditional purchase are to be ascertained by reference to the provisions of the Act and Regulations, for the Crown has no power to dispose of the land except in strict accordance therewith. The rights and obligations of the purchaser are statutory—not contractual. He does not, at any rate expressly, agree to perform the conditions or pay the purchase-money, though the statute imposes an obligation upon him to do so. There is no agreement on the part of the Crown to issue a Crown grant, though, no doubt, the purchaser could by appropriate proceedings compel the performance of the statutory obligation to issue a grant when the conditions have been complied with. These considerations lead me to think that it is unsafe to treat the rules governing ordinary sales of land by one person to another as necessarily applicable in determining

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the relations of the Crown to a conditional purchaser under the statute. But, whether such rules are or are not generally applicable, I am of opinion that the provisions of the Act lead to a clear and manifest inference that it was not the intention of the Legislature that the Crown should have a vendor's lien for the unpaid balance of purchase-money in respect of lands conditionally purchased under the Act. A vendor's lien can only be enforced when it has been established by judicial decree, and the method of enforcing it is by the sale of the land over which the lien exists. The adoption of this method in the case of conditionally purchased land is rendered impracticable by the provisions of sec. 270 of the Act. By force of that section the only estate or interest in the land which can be sold under the decree of a Court is the estate, right, title or interest to which the conditional purchaser was entitled at the date of the decree. On the hypothesis of default in payment having been made, that estate would be liable to immediate forfeiture and consequently of no value, and it seems to me that this provision is inconsistent with the existence of an intention that the Crown should have a vendor's lien. And the provision for forfeiture on default obviates the necessity for any such lien. As *Harvey* J. pointed out, the only decision in point is that in *Brett* v. *Hamilton* (1). It does not appear from the report that the question of a vendor's lien was argued, and the learned Judge seems to have assumed, rather than decided, that such a lien existed. If there be no vendor's lien on the land for the unpaid instalments, if they be not charged on or recoverable out of the land, I see no other ground on which they can be held to be " charges or encumbrances " on the station property. The right of the Crown to forfeit does not appear to me to amount to a charge or encumbrance, any more than a right to re-enter and determine a lease on default in payment of future rent could properly be said to be a charge or encumbrance on the leasehold estate. The true position seems to me to be that the continued possession and ultimate acquisition of the land is dependent on the payment in due course of future instalments of the price. For these reasons I am of opinion that the appeal should be allowed, and the order of *Harvey* J. varied by declaring that the charges and encumbrances to be paid out of the surplus income of the residuary estate of

(1) (1900) 21 N.S.W.L.R. (Eq.) 84.

the testator do not include the instalments on conditionally purchased lands which were unpaid at the date of his death, and by omitting the orders consequential on the declaration of inclusion of such instalments in such order. Costs of all parties out of estate, those of trustees as between solicitor and client.

Isaacs J.

ISAACS J. This appeal relates primarily to the interpretation of certain words in the will of John Henry Davies. The crucial words are "the charges or encumbrances on my said station properties." That question, however, cannot be settled without considering some very important matters of general concern. The station properties include some current conditional purchases under the New South Wales Land Acts. The learned primary Judge (*Harvey* J.) held that the Crown has a vendor's lien on the land until full and complete payment, and that such lien fell within the testamentary expression "encumbrances." This view, after some discussion at the Bar, was not pressed by the respondents; but there were substituted, in argument for the vendor's lien, two alleged Crown rights, namely, first, a general right of the Crown, at all events before the last Conveyancing Act, to hold a charge on all real property of its debtor, and, next, the liability to forfeiture under sec. 55 of the *Crown Lands Consolidation Act* 1913. I pass by the affidavits as immaterial for the purpose of influencing the Court with regard to the meaning of the term "encumbrance." The meaning of this expression must be determined from its inherent legal signification in such a collocation. There is no context in the will affecting its primary import. I cannot agree that the Crown has an ordinary vendor's lien. The doctrine of "vendor's lien" is one created by equity as part of a scheme of equitable adjustment of mutual rights and obligations applying, unless negatived, to every ordinary contract of sale of land. In *In re Thackwray and Young's Contract* (1) *Chitty* J. says:—"As is well known, where there is a contract for sale which is valid and can be specifically performed the equitable interest in the lands at once passes to the purchaser subject to his payment of the money, and, on the other hand, the vendor has a lien on the land for the unpaid purchase-money. That is the law, and it is scarcely necessary to refer to *Shaw* v. *Foster* (2) for that proposition." Again, equity, in the absence of express terms, regulates the

(1) (1888) 40 Ch. D. 34, at p. 38.

(2) (1872) L.R. 5 H.L. 321.

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mutual rights as to interest on the one hand and the rents and profits on the other. But where an Act of Parliament says that a contract for the sale of land does not of itself create any interest therein, the whole equitable scheme is inapplicable. For instance, such a provision was made by sec. 54 of an Indian *Transfer of Property Act*, and upon that was decided the case of *Maung Shwe Goh* v. *Maung Inn* (1). Lord *Buckmaster* L.C. said :—" In the English Courts a contract for sale of real property makes the purchaser the owner in equity of the estate, and *from this principle* it follows that, where the rights as to payment of interest on the purchase-money are not regulated by the terms of the contract, the purchaser is deemed to be entitled to the rents and profits of the property as from the time when he did take, or could safely have taken, possession ; and interest on the purchase-money runs in favour of the vendor from that time. It has been pointed out to their Lordships that the *underlying principle* upon which this rule depends has no application to the sale of real estate in Lower Burma, since by sec. 54 of the *Transfer of Property Act* 1882 (a statute made applicable to Lower Burma), it is expressly provided that such contract creates no interest in or charge upon the land." The view then taken, it will be seen, rests entirely on the absence of " the underlying principle," which, as Lord *Cairns* says in *Shaw* v. *Foster* (2), constitutes the vendor a trustee of " the property for the purchaser " and makes the purchaser " the real beneficial owner " and allows to the trustee " a right to protect " his " interest, and an active right to assert that interest if anything should be done in derogation of it." A " vendor's lien " is thus one of the equitable rights recognized in the scheme for the protection of the vendor's own interests. But does " the underlying principle " exist here ? because, if it does, then I would be prepared to concede, in accordance with Lord *Romilly's* decision in *Walker* v. *Ware, Hadham and Buntingford Railway Co.* (3) under the *Lands Clauses Consolidation Act*, that a vendor's lien exists. This consideration calls for a careful examination of the Crown Lands Act with reference to conditional purchases. I suggested to learned counsel during the argument that the respective rights and obligations of the Crown and a conditional purchaser

(1) (1916) L.R. 44 Ind. App. 15, at p. 19.

(2) (1872) L.R. 5 H.L., at p. 338.

(3) (1865) L.R. 1 Eq. 195.

created by the Act were purely statutory and legal and not of an equitable nature. No reason was stated in opposition to that view; and, on mature consideration, I hold it to be correct. The principle on which that conclusion rests was given effect to by the House of Lords in *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney General* (1). The question was whether the *Worcester and Birmingham Canal Act* 1791, imposing duties and obligations on the Canal Co., could be supplemented by common law doctrines. Reversing the Court of Appeal, the House of Lords held in the negative. Lord *Haldane* L.C. said of sec. 61 (2): "It contains a code, so far complete in itself, and it is self-contained." Lord *Dunedin* said (3): "Where the statute deals with the subject its provisions form a code on that subject, and cannot be added to by what has been called a common law doctrine." Lord *Atkinson* (4) agreed with Lord *Dunedin*. Lord *Parker* said (5):—"It is one thing to rely on a common law principle where a statute is silent. It is quite another thing to invoke a common law principle in order to impose an obligation different from or *in addition to* the obligations which are defined by the statute." Lord *Parmoor* was substantially of the same opinion.

The Crown Lands Act (by which I mean present and past legislation) is a code as to "conditional purchases." It creates them, shapes them, states their characteristics, fixes the mutual obligation of the Crown and the purchaser, and provides for the mode in which they shall cease to exist, either by becoming unconditional purchases or by termination *en route*. It is necessarily a code, because it starts with a basic declaration in sec. 6 that "Crown lands shall not be sold leased dedicated reserved or dealt with except under and subject to the provisions of this Act. The Governor on behalf of His Majesty may grant lease or make any other disposition of Crown lands in any case where he is hereby authorized so to do, but only for some estate interest or purpose authorized by this Act and subject in every case to its provisions." This was the law at all times material to this case. Whatever estates, interests or other rights are created by the Crown

(1) (1915) A.C. 654.
(2) (1915) A.C., at p. 662.
(3) (1915) A.C., at p. 663.
(4) (1915) A.C., at p. 667.
(5) (1915) A.C., at p. 669.

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must owe their origin and existence to the provisions of the statute. In other words, they are statutory or legal estates, interests and rights. They are not and cannot be equitable, that is, owing their existence to some doctrine or principle of equity. This, which is plain from the nature of the matter, was emphasized by the Privy Council in *Blackwood* v. *London Chartered Bank of Australia* (1) in a passage to which I invited the attention of counsel. There Lord *Selborne* L.C., speaking of the right of a Crown lessee under the Act of 1861, which was certainly not more precise on this point than the present statute, said :—" Now what was the nature of that right ? It is a fallacy to call it an equitable right. It was a statutory right, and there is nothing higher among legal rights than a right created by statute. It was a legal right, one consequence of which was, no doubt, that *the owner of that legal right* could call upon the Crown, in which, until a lease was granted, *the legal estate in the land would remain*, to execute a conveyance of the legal estate in the land by way of lease. But it was a legal right created by statute, and, therefore, an absolute right, subject to the statutable conditions, to call for that conveyance; and that legal right with all its consequences, including the title to call for the conveyance, was by the express terms of these regulations transferred to the transferee. The matter, therefore, seems very clear, if there be no equity as against these respondents personally, and it is admitted there is none." There the distinction is shown. As between the Crown and its purchaser, the question is purely statutory, and, therefore, legal in the highest sense as between the purchaser and third persons. In dealing with reference to the purchaser's rights when acquired, the ordinary rules of equity may apply according to the circumstances. The Act, then, must be looked at as the sole repository of the respective rights and obligations of the Crown on the one side and its conditional purchaser on the other.

The relevant sections of the Act of 1913 are :—Sec. 41, which confers the right to apply for an original conditional purchase ; sec. 44, prescribing the mode and conditions of applying, which include a deposit ; sec. 45, enacting that the method of acceding to the application is simply by the Local Land Board in open Court confirming the application and by the chairman subsequently issuing a certificate

(1) (1874) L.R. 5 P.C., at pp. 110-111.

of such confirmation—that is the only Crown document issued at that stage. Sec. 47 prescribes a condition of residence. Sec. 48 prescribes a condition of fencing, which is modifiable. Sec. 51 enacts the obligation of paying by instalments the balance of purchase-money. This is an important section. It imposes an obligation on "the holder of a conditional purchase" to pay a first instalment at the end of the third year at the rate of 5 per cent of the price of the land, and a similar instalment each year until the whole is paid. Sec. 55 is in these terms: "Upon default in the payment of any instalment of purchase-money for three months after the day when the same falls due, the conditional purchase, together with any moneys paid in respect thereof, shall be liable to be forfeited." There are other provisions relative to conditional purchases but not relevant to this case. As to the point that all Crown debts are or were at the material time charged on all lands of the debtor, I do not stop to discuss it. It has no relevance here, because the lands comprised in a conditional purchase are *ex necessitate* the lands of the Crown itself. With regard to the other point, whether sec. 55, enacting a liability to forfeiture, is, like a vendor's lien, an encumbrance, a more arguable position is created. Lord *Selborne's* judgment already quoted, however, is decisive as to the governing principle. There is no equitable estate in the conditional purchase. The equitable estate of a purchaser is simply a convenient expression for his right to compel in equity the transfer of the legal estate. In *Central Trust and Safe Deposit Co.* v. *Snider* (1) Lord *Parker* said:—"It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would in a Court of equity be enforced specifically." I place no special reliance for this purpose on the word "contract." I do not think it necessary to inquire whether the mutual relation of the Crown and the purchaser is a contractual relation or not. The important consideration is always the nature of the relation itself, and not how it originated. The nature of the relation, by which I mean the nature and extent of the

(1) (1916) 1 A.C. 266, at p. 272.

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rights and obligations subsisting between the parties, however created, is what the law regards and, if necessary, by appropriate remedies enforces. No more definite instance of this principle can be found than the case of *Minister of Justice for Canada* v. *Levis City* (1). There Lord *Parmoor*, for the Judicial Committee, said (2): "The case stands outside of the express provisions of the statute, and the rights and obligations of the appellant are derived from *the circumstances and from the relative positions of the parties.*"

If parties are in such circumstances and relative positions that the law, either by express enactment or by implication, recognizes rights and obligations, it will, apart from special exceptions, enforce them. The circumstances and relative positions of the Crown and its conditional purchaser are governed entirely by the code, and the rights and obligations are simply those which Parliament has created, and are neither to be enlarged nor restricted by any common law doctrines, whether legal or equitable, which may attend the unqualified bargain of private individuals. There is no room for equity to intervene and modify the nature of a conditional purchase as Parliament has shaped it. When that nature is considered, the liability to forfeiture created by sec. 55 is not an encumbrance in any legal sense. I think the test of the matter is that which I put to Mr. *Leverrier* during the argument. An encumbrance, whatever else it may connote, involves at least this, that it is distinct from the thing it encumbers or burdens. In *Jones* v. *Barnett* (3) *Romer* J. says: "In *Wharton's Law Lexicon* I find 'encumbrance' defined as being 'a claim, lien, or liability attached to property.'" That indicates that conceivably the "encumbrance" could be removed and the "property" left intact. A mortgage is an encumbrance on the clean title otherwise existing, and you must be able to conceive of the principal object freed of the encumbrance. So of a charge on property, or a lien of any description, the "property" must be capable of having existence in a condition free of the encumbrance. The load is not an essential part of the thing it bears upon. But a clause for re-entry in a lease, thus making the term a defeasible term, or a rescission clause in a contract

(1) (1919) A.C. 505.
(2) (1919) A.C., at p. 513.
(3) (1899) 1 Ch. 611, at p. 620.

making the bargain a defeasible bargain, or the forfeiture clause (sec. 55) making the statutory right a defeasible right, are not independent creations; they are not burdens or encumbrances placed on the lease or the contract or the conditional purchase. They are essential parts of the thing itself, helping to mould its character, and, if omitted, the thing itself would be different. You cannot conceive of the same thing without those features. So long as the statutory relation between the Crown and the subject is that of "conditional purchase" the liability to forfeiture of the conditional purchaser's statutory interest in the land continues. So soon as either by reason of sec. 55 that relation ends by dissolution of all rights, each party standing free of obligation to the other both as to land and money as at the moment of dissolution, or by reason of sec. 56, where the defeasible right or interest of the purchaser is transformed into an undefeasible right to demand a Crown grant, the purchase being now not conditional but unconditional, in either case the relation of "conditional purchase" is non-existent. The liability to forfeiture being, therefore, an inherent quality of every conditional purchase, it cannot be considered as an extrinsic object called an "encumbrance" on the conditional purchase.

For this reason in my opinion the appellants succeed.

HIGGINS J. This is an appeal from part of an order made by *Harvey* J. of the Supreme Court of New South Wales, on originating summons. The summons was taken out for the determination of certain questions arising under the will of John Henry Davies, grazier, who died in 1908. The appellants are the three sons of the testator, life tenants. The will directs the trustees to hold the residuary estate and the income thereof "upon trust and *until the charges or encumbrances on my said station properties respectively shall be entirely liquidated* to appropriate or set apart all the net annual produce and income arising from my residuary estate over and above the sum of fifteen hundred pounds per annum in or towards payment of such charges or encumbrances investing any part of such annual produce and income which cannot be immediately applied in or towards reduction of the said charges or encumbrances in any of the investments authorized by this my will." The trustees are to pay one third

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of the £1500 to each son and, after the charges or encumbrances on the station properties respectively are entirely paid off and liquidated, to pay each son for his life one third of the net income.

At the time of his death, the testator had one station property called "Yarrandi" and another station property called "Curragundi." Both of these stations included lands held on terms of "conditional purchase" under the Crown Lands Acts of New South Wales. The testator owed considerable debts to the Bank of New South Wales and to the Australian Mutual Provident Society, and these debts were secured by mortgage or charge. The trustees discharged these debts by 21st October 1911, and have ever since distributed all the net income of the stations among the three sons. But the instalments not yet due in respect of the conditional purchases had not been paid, and have not yet been fully paid. Indeed, as the rate of interest payable on unpaid instalments was only $2\frac{1}{2}$ per cent, much lower than the market rate for money, it would have seemed absurd, as a matter of business, to pay them off before their due date, or to treat the testator as bringing pressure to bear for an early payment of the instalments. The trustees at all events did not regard these instalments as "charges" or "encumbrances" within the meaning of the will. In giving his judgment on certain other points raised by the summons, however, the learned Judge has declared that the charges and encumbrances to be paid out of the surplus income of the residue over and above the £1500 per annum included the unpaid balances on the conditional purchases; and he directed the sons to refund by instalments the money paid to them in excess of £1500 in any one year.

The question as added to the originating summons by leave of *Harvey* J. is this: "Does the said expression 'charges or encumbrances' include the unpaid instalments owing to the Crown on conditional purchases held by the testator falling due after his death?" All parties concur in applying the question to the *Crown Lands Consolidation Act* 1913 as it stands; no point is made as to any differences of this Act from former Acts.

This question is, of course, ultimately a question as to the construction of the will—what do the words of the will mean? But in order to apply the words of the will to the facts, we have incidentally

to consider the nature and character of "conditional purchases" under the *Crown Lands Consolidation Act*. The trust is for sale, conversion and collection of the residuary real and personal estate and from the proceeds to pay his funeral and testamentary expenses and debts "(including in particular any *mortgages or charges* over or on my said real and personal estate)"; and for investment. There is power to postpone sale, power to carry on the business, power to raise any money by *mortgaging or charging* all or any of the estate, not only for the purchase or acquisition of stock and land *of any tenure* but also for discharging any *mortgages or charges* affecting the estate. There is power to realize any investments, and to invest the proceeds "in the purchase of any freeholds *conditionally purchased* conditionally leased land or lands of any other tenure." There is an annuity given to the Nicholson family out of the income—an annuity which is not to be "a *charge* against or *encumbrance* upon" the estate as between the trustee and any purchasers. Then follow the directions which I have set out at the beginning of this judgment.

Several affidavits have been filed, made by bankers and others, to the effect that the balances owing to the Crown on conditionally purchased land are not "usually" spoken of as charges or encumbrances on the land. I concur with the learned Judge in his view that these affidavits cannot be regarded as evidence of the meaning of the words of the will. Yet, when one looks at the scheme and manifest general purpose of the will and the context, even before closely considering the nature of a conditional purchase under the *Crown Lands Consolidation Act*, one would naturally hesitate before treating in one and the same category an obligation which is a mere burden on the estate, and an obligation which, if satisfied, will increase the estate. Almost immediately before the clause under discussion, the testator directs that the Nicholson annuity, although payable out of the income, shall not as between the trustees and any purchaser "be a *charge* against or *encumbrance* upon" the estate. These are the precise words used as in this clause. The annuity is a mere burden on the estate; the payment thereof does not bring any increase to the estate; whereas by paying all the instalments on a conditional purchase a fee simple title can be acquired instead of a mere conditional purchase title. There is surely a clear distinction

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between an obligation to pay what brings nothing to the estate, and an obligation to pay what brings to the estate an addition. It may well be that the testator in this clause refers to charges and encumbrances which resemble the "mortgages or charges" mentioned in the previous part of the will. But, as we are dealing with technical words, we have to consider more elaborately the precise relation between the Crown and the holder of a conditional purchase. Had the Crown any charge or encumbrance over the conditional purchases at the time of the death of the testator in respect of the instalments not then due?

Now, looking at the *Crown Lands Consolidation Act*, we find that it is meant to be an exhaustive code for the disposal of the Crown lands of the State (sec. 6); that all Crown lands (with specified exceptions) are to be open for conditional purchase at 20s. per acre (sec. 38); that any person not disqualified may apply, depositing 5 per cent of the price (sec. 40); that transfers and mortgages of conditional purchases are permitted (sec. 44 (4), sec. 154, sec. 181, sec. 259, sec. 260, sec. 261, sec. 270, sec. 272); that the *holder* of a conditional purchase *shall* at the end of the third year after application pay an instalment of 5 per cent of the price, and in each succeeding year at the recurring date a like instalment until the balance of purchase-money together with interest at $2\frac{1}{2}$ per cent has been paid (sec. 51); that the holder of a conditional purchase may pay off the whole or any number of the instalments at any time after the final certificate (as to conditions of residence, fencing, &c.) has been issued by the Local Land Board (sec. 51); that if the conditions as to residence, fencing, &c., be not performed the conditional purchase together with any moneys paid in respect thereof shall be liable to be forfeited (sec. 54); that upon default in payment of any instalment of purchase-money, the conditional purchase together with any moneys paid in respect thereof shall be liable to be forfeited (sec. 55); that subject to payment of the balance of the purchase-money, stamp duty, &c., a Crown grant in fee simple of the land shall be issued upon application (sec. 56); that the title to a conditional purchase shall commence from the date of the application (sec. 150); that the conditions attaching to conditional purchases shall bind not only the persons who in the first instance applied for the same, but also all persons deriving title

through or under them and all persons upon whom title shall devolve by operation of law (sec. 181); that whenever any forfeiture takes effect the land comprised shall (if not already such) become Crown lands, reserved from every form of sale or lease until otherwise notified in the *Gazette* (sec. 206 (2)); that every transfer of land conditionally purchased shall be deemed to pass to the transferee the whole estate or interest of the transferor as if by a conveyance, but subject to any equities, and only if the transfer be executed and lodged in accordance with the regulations (sec. 261). Sec. 270 provides for transfers under legal process (execution, &c.). Under sec. 272, limitations are put on the right of mortgagees to hold possession, and there cannot be foreclosure without the consent of the Minister.

It is plain from these and other provisions of the Act (I may have omitted some that are relevant to the question) that we have here to deal, not with any ordinary contract for the sale and purchase of lands in fee simple (assuming it to be even a contract at all), but with a statutory scheme for the settlement of population and the disposal on conditions of lands of the Crown irrespective of value. The transaction is called a *conditional* purchase—apparently it does not become a purchase until the conditions are fulfilled. The title to the fee simple does not, as in ordinary contracts, become the (conditional) purchaser's in equity, subject to certain rights of the vendor. There can therefore be no vendor's lien; and on this point I fully agree with the Chief Justice. There can be no application to the Court for a sale of the land, the Crown not having parted with the right to the fee simple in equity. The Crown here has the higher right of saying: "You have not fulfilled the conditions, and therefore you are not a purchaser of the fee simple; but we will hold the instalments which you have paid, and withdraw even such title as you have as conditional purchaser in the meantime." Even under ordinary contracts of sale, there is no vendor's lien implied where the parties have evidently meant that some other security shall be given in substitution for such a lien (*Capper* v. *Spottiswoode* (1); *Dixon* v. *Gayfere* (2); *Mackreth* v. *Symmons* (3); *Earl of Jersey* v. *Briton Ferry Floating Dock Co.* (4);

(1) (1829) Taml. 21.
(2) (1855) 21 Beav. 118; (1857) 1 DeG. & J. 655.
(3) (1808-09) 15 Ves. 329, at p. 341.
(4) (1869) L.R. 7 Eq. 409.

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*In re Brentwood Brick and Coal Co.* (1) ); and the whole scheme of the Act is inconsistent with a resale of the land under any lien.

There are, in effect, two titles recognized by the Act—the title as conditional purchaser, and the title as owner of the fee simple after all the instalments have been paid. The title as conditional purchaser may be sold and transferred, just as an ordinary lease may be transferred, and the law does not treat the liability for future rent as an " encumbrance " on the lease. There is, in short, no encumbrance on the fee simple title, for the holder of the conditional purchase has not got it, either in equity or in law ; and there is no encumbrance on the conditional purchase title, for that can be transferred without the concurrence of the Crown. There is a direct statutory liability imposed on the holder for the time being of the conditional purchase to pay the instalments as they come due (sec. 51) ; if the so-called forfeiture take place under sec. 55, it is a forfeiture of the conditional purchase title and of the instalments paid, and the holder of that title for the time being bears the loss. All that the testator had as to the land in question was a conditional purchase title ; and the fact that that title can be freely transferred without the consent of the Crown is, perhaps, the best test that there is no " charge or encumbrance " on that title. We have not to consider what would be an " encumbrance " on the fee simple title, for the testator had no fee simple title that could be encumbered. At the time of his death the testator had a statutory right to possess the lands so long as the instalments were duly paid ; and he, or his transferees, had a right to get the lands in fee simple if and when all conditions were fulfilled. On the other hand, the Crown had a right to forfeit the conditional purchase rights, and to retain the instalments already paid ; but this is not an encumbrance on the conditional purchase title. No one, I think, would call the right of a landlord to re-enter leased premises if future rent due be not paid an " encumbrance " on the lease.

In the case of *Wallace* v. *Love* (2) I dealt at some length with the technical meaning of " encumbrance " ; and although two of my learned colleagues thought that that meaning was not the meaning in the particular will then under consideration, I do not understand them to reject my view as to the technical meaning. The *Oxford Dictionary*,

(1) (1876) 4 Ch. D. 562.

(2) (1922) 31 C.L.R. 156.

when speaking of the word " encumbrance " as used in law, defines it as a burden on property ; and, quoting from *Wharton's Law Lexicon*, " a claim, lien, or liability attached to property; as a mortgage, a registered judgment, &c." The *Standard Dictionary* defines it as " a paramount claim or interest resting as a charge upon land, *lessening its value to the owner or tenant* ; any lien or liability attached to real property." If the test of lessening the value to the owner (the owner of the conditional purchase) be applied, it is clear that the value of the conditional purchase title—the only title held by the testator—is not lessened by the fact that if future instalments are not paid the holder of the conditional purchase title cannot get the fee simple, and at a price of £1 per acre, fixed irrespective of value.

The word " charges " in this will has to be examined from a different aspect. Is the liability of the holder of the conditional purchase from time to time to pay future instalments, becoming due while he is holder, a " charge " on his conditional title ? According to the *Oxford Dictionary* a charge, in the relevant sense, is " a liability to *pay money* laid upon a *person* or *estate*." We may ignore liability laid upon a person, in construing this will ; for the will refers to liability laid upon estate only. The direction to apply the income is " until the charges or encumbrances on my *said station properties* respectively shall be entirely liquidated." Moreover, we may dismiss from our minds any mere liability to lose a possible better title as being a " charge " ; for the words " liquidated " and " paid " in this clause clearly refer to money burdens only. I cannot find any ground for saying that the conditional purchase title, treating it as title to property, was either " charged " or " encumbered " in the hands of the testator.

The Act 33 Hen. VIII. c. 39, s. 52, on which Mr. *Teece* relied as creating a charge in favour of the Crown, has no application to a conditional purchase.

In my opinion, therefore, the appeal should be allowed, and the order of *Harvey* J. varied as proposed by the Chief Justice.

*Appeal allowed. Order appealed from varied by declaring that the charges and encumbrances to be paid out of the surplus income of the*

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*residuary estate of the testator do not include the instalments on conditionally purchased lands which were unpaid at the date of his death, and by omitting the orders consequential on the declaration of inclusion of such instalments in the order. Costs of all parties to be paid out of the estate, those of the trustees as between solicitor and client.*

Solicitors for the appellants, *Windeyer, Fawl & Osborne.*

Solicitors for the respondents, *Vindin & Littlejohn; Minter, Simpson & Co.*

B. L.

Cons *Commonwealth v Ling* (1993) 118 ALR 309

Cons *New South Wales v Bardolph* (1934) 52 CLR 455

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[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH OF AUSTRALIA . . APPELLANT;
DEFENDANT,

AND

THE COLONIAL AMMUNITION COMPANY LIMITED . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 19, 22, 23, 1923; *Mar.* 21, 1924.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

*Contract—Interpretation—Agreement by Commonwealth—Taking over of ammunition factory—Indemnity in respect of agreement with employees—Executive act of Commonwealth—Necessity for Order in Council—Validation of agreement by Parliament—Effect of Appropriation Act—Defence Act* 1903-1918 (*No.* 20 *of* 1903—*No.* 47 *of* 1918), *secs.* 4, 63—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 53, 54, 62, 63.

The respondent company, which carried on an ammunition factory, had been in negotiation with the Department of Defence of the Commonwealth in respect of the taking over by the Commonwealth of the business and the leasing by it of the land and premises used in connection therewith, and certain heads of agreement had been drawn up. A letter was written by the Secretary of