[HIGH COURT OF AUSTRALIA.]

PHILLIPS . . . . . APPELLANT;

AND

LYNCH, AND THE MINISTER FOR LANDS . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1907.

SYDNEY, *Aug.* 14, 15, 16.

Barton, O'Connor, Isaacs and Higgins JJ.

Crown Lands Act 1889 (*N.S.W.*) (53 *Vict. No.* 21), *sec.* 47—*Married Women's Property Act* 1901 (*N.S.W.*)—*Crown Lands Act Amendment Act* 1903 (*N.S.W.*) (*No.* 15 *of* 1903), *secs.* 3, 17—*Right of married woman to acquire additional conditional purchase*—"*Original application*"—*Construction.*

Under the Crown Lands Acts conditional purchases of Crown lands may be made by application to the Crown in the prescribed manner. By sec. 47 of the *Crown Lands Act* 1889 a married woman living with her husband is prohibited from conditionally purchasing Crown lands under the Crown Lands Acts, but under the decision of the Supreme Court in *Ex parte Luke*, (1901) 1 S.R. (N.S.W.), 322, she may out of moneys belonging to her separate estate acquire a conditional purchase by transfer from the holder.

Held, affirming the decision of the Supreme Court, that the general enabling words of sec. 3 of the *Crown Lands Act Amendment Act* 1903, which provides, *inter alia*, that "the holder of any conditional purchase" may apply for additional Crown land to be held as an additional conditional purchase, do not repeal the special prohibition as to married women contained in sec. 47 of the Act of 1889; and that nothing in the provisions of the *Married Women's Property Act* 1901 has that effect.

But *held*, reversing the decision of the Supreme Court, that sec. 17 of the *Crown Lands Act Amendment Act* 1903, confers upon a married woman, living with her husband, who has become the holder of a conditional purchase by transfer from the holder, and has obtained the consent of the Minister to her application, the right to apply to the Crown for an additional conditional purchase in virtue of her holding, and to acquire it, out of moneys belonging to her separate estate.

Hall v. *Costello*, (1905) 5 S.R. (N.S.W.), 573, overruled.

Decision of the Supreme Court: *Phillips* v. *Lynch*, (1906) 6 S.R. (N.S.W.), 645, reversed in part.

APPEAL from a decision of the Supreme Court of New South Wales on a special case stated by the Land Appeal Court.

The appellant, a married woman living with her husband, purchased at a sheriff's sale out of moneys belonging to her separate estate an original conditional purchase on 16th June 1903, and from that date continuously resided upon the holding.

On 12th February 1904 she applied to the Minister for Lands under the provisions of sec. 17 of the *Crown Lands Act Amendment Act* 1903 for his consent to her acquiring an additional conditional purchase of 59 acres in virtue of her holding of the original conditional purchase, and the Minister gave his consent. She then applied for an additional conditional purchase of the area mentioned. The deposit and the fees and expenses in connection with the application were paid by her out of her separate estate. At the same time the respondent Lynch applied for an additional conditional purchase including the area applied for by the appellant, and the local Land Board disallowed the appellant's application. She appealed to the Land Appeal Court, and the appeal was dismissed. That Court stated a special case for the decision of the Supreme Court under the provisions of the Crown Lands Acts, the following questions being submitted: whether under sec. 3 of the *Crown Lands Act Amendment Act* 1903 the appellant, having fulfilled the conditions as to residence on her original holding, was entitled to make application for an additional conditional purchase; whether under sec. 17 of that Act, having fulfilled the conditions required by that section, she was entitled to apply for and acquire such an additional holding with moneys belonging to her separate estate; and whether under the *Married Women's Property Act* 1901 she was capable of acquiring and holding such an area in the same manner as if she were a *feme sole*.

The Supreme Court answered the three questions in the negative and dismissed the appeal. The first question was the only one argued, it being considered that the second question had

H. C. OF A. 1907.

PHILLIPS v. LYNCH.

already been determined by the Supreme Court in *Hall* v. *Costello* (1), and the third in *Ex parte Luke* (2). *Phillips* v. *Lynch* (3).

From this decision the present appeal was brought.

Whitfeld (*Pike* with him), for the appellant. The general scheme of the Act of 1903 was to extend the rights of persons holding under tenures created by the previous Acts; and to give a wider discretion to the Land Board in dealing with applications for Crown Lands. There was therefore no longer any reason to restrict the rights of a married woman living with her husband to apply for land. The Board could take into consideration the area already held by her and her husband. See sec. 3 (*d*) of the *Crown Lands Act Amendment Act* 1903. Under the Act of 1884 there was no restriction upon the right of a married woman to take up land whether as an original or as an additional holding. The first restriction appeared in sec. 47 of the Act 53 Vict. No. 21, the effect of which, so far as it is material to this case, was to prevent a married woman living with her husband from applying to the Crown for an original conditional purchase. [He referred to *In re Ousby* (4).] It was held in *Ex parte Luke* (2) that there is nothing in that section to prevent a married woman living with her husband from acquiring by purchase from the holder a conditional purchase out of the moneys belonging to her separate estate. She may thus become a holder. Subsequent legislation must be taken to have adopted that construction, and to have used the word "holder" in the sense in which it had been interpreted by the Courts, especially in view of the fact that titles have been acquired upon the basis of that decision. [He referred to sec. 4 of the *Appraisement Act* 1902 (No. 109 of 1902).] Assuming that, at the time of the passing of the Act of 1903 such married women were debarred from taking up an additional holding by virtue of any holding which they might have acquired by purchase, and bearing in mind the purpose of the Act of 1903, *i.e.* to extend the rights of holders, there is nothing *a priori* improbable in the legislature including married women holders amongst those to receive benefit from the Act. Sec. 3 gives "the holder" of any conditional pur-

(1) (1905) 5 S.R. (N.S.W.), 573.
(2) (1901) 1 S.R. (N.S.W.), 322.
(3) (1906) 6 S R. (N.S.W.), 645.
(4) 14 N.S.W. L.R., 506.

chase the right to take up an additional area subject to the conditions specified. *Primâ facie*, that includes married women who are holders, whether living with their husbands or not, and that is the construction put upon the words, by a long course of practice and legal decision. The old presumption against the inclusion of married women, in legislation as to rights of property in land, had disappeared with the *Married Women's Property Act* 1893 (consolidated in 1901, No. 45, secs. 3, 8, 9). The construction of sec. 3 of the Act of 1903 should not be cut down by reference to prior legislation. If the meaning is to be so limited, sec. 47 of the Act of 1884 would make the exception of non-residential conditional purchases unnecessary.

Sec. 17, at any rate, confers upon married women in the position of the appellant the right to acquire, *inter alia*, a conditional purchase in any way except by an "original application," provided that they have fulfilled the other requirements of the section. The words "the provisions of the principal Acts to the contrary notwithstanding" suggest that something is to be granted which might conflict or appear to conflict with earlier enactments. "Conditional purchase" would include additional as well as original, and the only exception is that the holding may not be acquired by "original application." That may mean either an application for an original holding of a series, or an application direct to the Crown for any holding. If the latter construction is adopted, no new right is conferred by the section, because under the previously existing law a married woman could become a holder by purchase from a holder or by devolution or devise, &c. If the former construction is adopted a new right of a kind in conformity with the scope of the Act is conferred, and that construction is consistent with the use of the word original throughout the Crown Lands Acts in connection with applications for holdings.

Canaway, for the respondent Lynch. The prohibition in sec. 47 of the 53 Vict. No. 21 against a married woman "conditionally purchasing" extends to the holding of a conditional purchase as well as to making. *Ex parte Luke* (1) was wrongly decided, but as

(1) (1901) 1 S.R. (N.S.W.), 322.

H. C. OF A. 1907.

PHILLIPS v. LYNCH.

titles have been established under its authority this Court may refuse to review it. The legislature indicated in that section the persons who are to be deemed holders of conditional purchases, and has excluded married women living with their husbands. Sec. 23 of the 48 Vict. No. 18 would exclude married women without separate estate, because their disabilities had not then been removed. See also sec. 124 of that Act. The policy of the legislature, as shown by the 48 Vict. No. 18, was to restrict the area to be enjoyed by one man, and with that view a married woman living with her husband was prohibited from acquiring an area which would, in effect, be added to that held by the husband. This restriction was held not to apply to married women with separate estate : *In re Melvil* (1). The Act 53 Vict. No. 21, sec. 47 was intended to get rid of the effect of that decision, except as to a married woman judicially separated from her husband, who from the nature of the case might require a holding of her own to support herself and family. That section clearly barred a married woman living with her husband from applying for a conditional lease, and there is no reason why it should not apply equally to an additional conditional purchase. Both are holdings appurtenant to an original conditional purchase. The natural meaning of the words should not be cut down unless a strong reason is shown for doing so. "Crown land" includes land held under conditional purchase until a grant has been made, and it would therefore seem that the prohibition extends to the acquisition of an area by purchase from the holder. The appellant must go to the length of contending that that section is repealed, as regards applications for additional holdings, by sec. 3 of the Act of 1903. But the general rule of construction is that a particular enactment of a negative character, such as sec. 47, is not impliedly repealed by an affirmative enactment in general terms. If sec. 3 is not to be read in the light of the earlier Acts on the same subject, "holder" would include lunatics and all persons debarred under those Acts, although, by sec. 1, the Act of 1903 is to be read and construed with the Principal Acts. Those Acts should be applied except so far as expressly repealed. [He referred to sec. 3, sub-sec. (*f*) of No. 15 of 1903; *In re Smith's*

(1) 10 N.S.W.L.R., 286.

Estate; *Clements* v. *Ward* (1); *Kutner* v. *Phillips* (2); *Healey* v. *Egan* (3).]

In sec. 17 "original application" means the application from which the particular holding in question originates, that is to say, the application to the Crown for that area, whether the holding is the first of a series or an additional one. The parenthesis ending with the word "*notwithstanding*" may be attributed to a doubt in the minds of the legislature as to the correctness of the statement of the law in *Ex parte Luke* (4). Original application must be something which can be predicated of all the forms of tenure referred to in the section. But it can have no sensible reference to a conditional lease, if construed in the way contended for by the appellant, because such a holding can only be taken up by virtue of a conditional purchase. But if it means the application to the Crown, in contradistinction to the application for a transfer, the expression can be applied to all the tenures referred to. [He referred to *Ex parte Bone* (5); secs. 13, 25, 26 of the 53 Vict. No. 21; sec. 27 of 58 Vict. No. 18; sec. 14 of the *Crown Lands Act* 1905.]

[ISAACS J. referred to *Tearle* v. *Edols* (6), and sec. 48 of 48 Vict. No. 18.]

If the matter is in doubt, the onus is on the appellant to establish that the policy of the earlier Acts has been departed from. The Act of 1903 is not merely an enabling Act. It may have the effect of curtailing the rights of applicants, in that the Board has a discretion to disallow upon grounds not previously open to it. The cross headings in the printed Act cannot control the interpretation. They are merely for convenience of reference: *Hardcastle on Statutory Law*, 2nd ed., p. 229; 3rd ed., pp. 214, 217.

[BARTON J. referred to *Eastern Counties and London and Blackwall Railway Companies* v. *Marriage* (7).

ISAACS J. referred to *Inglis* v. *Robertson* (8).]

Bethune (*Hanbury Davies* with him), for the Minister. The

(1) 35 Ch. D., 589.
(2) (1891) 2 Q.B., 267.
(3) (1905) 5 S.R. (N.S.W.), 107.
(4) (1901) 1 S.R. (N.S.W.), 322.
(5) 9 N.S.W.L.R., 363.
(6) 13 App. Cas., 183.
(7) 9 H.L.C., 32; 31 L.J. Ex., 73.
(8) (1898) A.C., 616.

H. C. OF A. 1907.

PHILLIPS v. LYNCH.

Barton J.

general policy of the legislature, as revealed in the Crown Lands Acts from 1889 to 1905, having been to exclude a married woman living with her husband from acquiring land direct from the Crown, it will not be presumed that an intervening Act in 1903 has a contrary effect unless very clear words are used. The *Crown Lands Act* 1905 in secs. 14 and 23 manifests the same policy as the Acts before 1903. The rights conferred by sec. 3 of the Act of 1903 should be taken as subject to the limitations in sec. 47 of the 53 Vict. No. 21. In *Ex parte Luke* (1) a judicial interpretation had been placed on the words "original application." Sec. 17 should be construed in the light of that case. It appears to be a declaration of the law, which may have been considered doubtful on the wording of the earlier Acts, in view of the decisions of the Supreme Court in *Ex parte Luke* (1), and *In re Melvil* (2).

Whitfeld in reply, referred to *Hack* v. *Minister for Lands* (3); *Fielding* v. *Morley Corporation* (4).

Cur. adv. vult.

BARTON J. I have had the advantage of reading the judgment which *O'Connor* J. is about to read, and it so clearly expresses my views upon the matter that I need only say that I concur in it. The first question will be answered in the negative, the second question in the affirmative, and as to the third question, which has not really been brought before us, it may be taken that we agree with the Supreme Court in giving a negative answer to it.

O'CONNOR J. read the following judgment. The appellant, a married woman living with her husband, purchased out of her separate estate, at a sheriff's sale in 1903, an original conditional purchase upon which she has since resided. In the following year, having obtained the consent of the Minister under sec. 17 of the *Crown Lands Act Amendment Act* of 1903, she applied for an additional conditional purchase in virtue of the original conditional purchase. The matter for determination is whether she could legally do so.

(1) (1901) 1 S.R. (N.S.W.), 322.
(2) 10 N.S.W.L.R., 286.
(3) 3 C.L.R., 10.
(4) (1899) 1 Ch., 1; (1900) A.C., 133.

It may be taken as established by *Ex parte Luke* (1) that, notwithstanding the provisions of sec. 47 of the *Crown Lands Act* of 1889, a married woman may legally become the holder of a conditional purchase which she has bought from the sheriff out of her separate estate. The correctness of that decision was not impeached by the respondent's counsel, and if it had been I see no reason to differ from it.

It was claimed on behalf of the appellant that, being the lawful holder of a conditional purchase, she was entitled under sec. 3 of the *Crown Lands Act Amendment Act* of 1903 to make application for an additional conditional purchase irrespective of sec. 17 of that Act. The Supreme Court decided that she was not so entitled, and that, although she was the lawful holder of the conditional purchase which she had purchased from the sheriff, she was subject to the disabilities in respect of acquiring any conditional purchase by her own application direct from the Crown which sec. 47 of the *Crown Lands Act* of 1889 imposes on all married women who do not come within the exceptions mentioned in that section. That decision is so plainly right that I do not think it necessary to add anything upon that portion of the subject to what was said by the learned Chief Justice in the Court below.

The real difficulty in the case is to determine what are the rights of a married woman living with her husband who has, in accordance with sec. 17 of the Act of 1903, obtained the consent of the Minister to acquire an additional holding. In the Supreme Court no argument was heard on that question, the Court considering itself bound by its judgment in *Hall* v. *Costello* (2) which decided that sec. 17 did not so far remove the disability imposed by sec. 47 of the Act of 1889 on a married woman living with her husband as to enable her even with the consent of the Minister to make an application for a conditional lease in respect of a conditional purchase of which she was then the lawful holder. It becomes necessary for us therefore to consider whether that case was rightly decided.

The whole controversy turns upon the interpretation of the words "original application" as used in sec. 17. The Supreme Court adjudged them to mean any application by which a person

(1) (1901) 1 S.R. (N.S.W.), 322. (2) (1905) 5 S.R. (N.S.W.), 573.

H. C. OF A. 1907.

PHILLIPS v. LYNCH.

O'Connor J.

acquires land direct from the Crown as contrasted with the acquisition of land before then purchased by another person directly from the Crown. The appellant asks us to read the words as meaning the application to the Crown for the foundation holding of a series, in virtue of which additional holdings have been or may be applied for. If the former is the correct interpretation the appeal must fail, if the latter is the correct interpretation it must succeed.

The expression "original application" as it stands in the context is very indefinite whichever meaning is to be attached to it. But there is no doubt that it is capable of either meaning. The well recognized rule in such cases is to endeavour by examination of the context, and a consideration of other provisions of the Act and of other enactments *in pari materia*, to ascertain the real intention of the legislature, and then to give the expression that meaning which will best carry out that intention.

Before entering upon such an investigation it will be useful to consider the sense in which the words have been used in the various Lands Acts and in the judgments of the Supreme Court.

Mr. *Canaway*, in an argument which evidenced careful research, has put before us several instances from the Lands Acts and the Supreme Court judgments in which the expression has been used in the sense for which he contends. I shall briefly refer to them. By sec. 13 of the Act of 1889 the Land Board is empowered to allot lands not included in the application for conditional purchase or conditional lease. They are alluded to as "allotted lands not described in the original application." The meaning in that connection is obviously "allotted lands not originally described in the application." In sec. 34 of the same Act the expression is used in the same connection, and evidently with the same meaning. In the Act of 1895, sec. 47, which deals with exchanges of land between pastoral lessees and the Crown, preserves "the right of an applicant to complete an exchange where the lease by virtue of which it was made has expired pending its being dealt with, the rights preserved are described as rights under the "original application." In *Ex parte Bone* (1), sec. 47 (2) of the Act of 1884 was under consideration. It declared that

(1) 9 N.S.W. L.R., 363.

no person who had made a conditional purchase under the section should be permitted to make or hold any other conditional purchase under the Lands Acts, and the question was whether a person who had become a transferee of a conditional purchase made under the section came within the prohibition. *Windeyer* J., in delivering judgment, says (1):—"The sub-section, in my opinion, applies only to persons who have made an *original application for a conditional purchase*, and the language of the Act prevents our extending it to transferees." There the phrase was used to distinguish the person who first obtained land from the Crown from the person who afterwards by transfer became the holder of the same land. In *Ex parte Luke* (2) before referred to, *G. B. Simpson* J., in the course of his judgment, expresses the opinion that "the intention of the legislature was to take away the right of a married woman to make an *original application* for Crown land," thus using the expression as *Windeyer* J. used it in the previous case to distinguish the person whose application first acquired the land from the Crown from the person who afterwards obtained it by transfer. The illustrations from the two sections of the Act of 1889, and from the section of the Act of 1895, throw no light on the matter, because in none of them is the expression used in the sense which Mr. *Canaway* seeks to attach to it in sec. 17. In the judgments referred to no doubt the phrase is used with the meaning for which he is contending. But from both of them it is evident that the words are used, not as having acquired any definite recognized legal signification, but merely as being a concise convenient form of expression for describing the conditional purchase application by which the land is acquired from the Crown in the first instance.

Except in the instances to which I have referred, the phrase "original application" is not used in any of the Lands Acts so far as I have been able to find, but all through the Acts the expression "original conditional purchase" is used to describe the first conditional purchase of a series to distinguish it from those which the holder acquires later, and by virtue of it, and which are called additional conditional purchases. Throughout

(1) 9 N.S.W. L.R., 363, at p. 365.
(2) (1901) 1 S.R. (N.S.W.), 322, at p. 334.

H. C. OF A. 1907.

PHILLIPS v. LYNCH.

O'Connor J.

the Act of 1903 this nomenclature is preserved. By sec. 3, for instance, the holder of any "original conditional purchase" (non-residential conditional purchases excepted) may make application for additional land to be held as by the section provided. In sub-sec. (*c*) of that section the expressions "original conditional purchase of the series," "original homestead selection," and "original settlement lease," are used in distinction from the "additional conditional purchase, homestead lease, and settlement lease," to be applied for in virtue of the original holdings. Sub-sec. (*e*) of the same section gives to the applicant for an additional holding a preferent right, pending the disposal of his application, over a person who is applying for the same land as an "original holding"—the phrase there covers applications for original conditional purchases, original homestead selections, and original settlement leases. By sec. 4 the Minister is empowered to set apart areas for "additional holdings" to the exclusion of "original holdings," and for "original holdings" to the exclusion of "additional holdings." Without further multiplying instances, it may be affirmed generally that throughout the Act the word "original" prefixed to any class of holding signifies the first holding of the series, the holding by virtue of which all subsequent holdings of the series have been applied for.

Turning now to sec. 17, it appears to me that it is at least as permissible a use of language to describe the application for an original conditional purchase by the expression "original application," as it is to use that expression for describing the application by virtue of which a piece of land is in the first instance acquired from the Crown. The words "original application" as they stand in the section are thus ambiguous, and the Court must attach that meaning which will most effectually carry out the purpose of the legislature as indicated by the whole Statute.

One of the main objects of the Act of 1903 was, as its title declares, "to provide for granting increased areas to present holders." It is full of provisions conferring on different classes of holders the right of enlarging their holdings. That right can be effectively exercised only by the acquisition of additional land from the Crown. The Act of 1889 had placed a married woman living with her husband under a disability in regard to

the acquisition of land direct from the Crown by conditional purchase, and that disability had been again enacted in regard to homestead selections and settlement leases by the Statute creating these new tenures. *Ex parte Luke* (1) had decided that a married woman living with her husband might lawfully become the holder of a conditional purchase by purchase from the sheriff. The provisions of sec. 47 of the Act of 1889, however, still prohibited her from becoming the applicant for either an original or an additional conditional purchase. Unless, therefore, she was to be shut out from the benefits which the Act of 1903 was conferring on other lawful holders of Crown lands, it became necessary to deal with her case specially. Sec. 17 was evidently enacted for that purpose, and in the first few words of it the expression is used "the provisions of the Principal Acts to the contrary notwithstanding." From all which I think it is plain that the legislature intended to confer on a married woman living with her husband some new and substantial right to increase her holding.

It is here that Mr. *Canaway's* suggested interpretation fails. If the meaning which he suggests is to be adopted, no right is conferred on her to extend her holding by the acquisition of any additional land from the Crown. She may, it is true, convert one kind of holding into another, she may make her title more indefeasible and thus make her holding more valuable, but she can acquire no additional area of land from the Crown. Such an interpretation would fail to give any substantial effect to the plain object of the section.

The interpretation suggested by the appellant's counsel would read the words "original application" as meaning original conditional purchase, original conditional lease, original homestead selection, and original settlement lease—the effect of which would be to give a married woman living with her husband the same rights of acquiring additional lands by virtue of her present holding as other lawful holders have, but with the limitation that the consent of the Minister must be obtained before she makes any application, and that the application must not be for an original conditional purchase, original conditional lease,

(1) 1901) S.R. (N.S.W.), 322.

H. C. OF A. 1907.

PHILLIPS v. LYNCH.

O'Connor J.

original homestead selection, or original settlement lease. The necessity for obtaining the Minister's consent, and the large discretionary powers vested under the Act of 1903 in the Land Board in allotting the area of additional land in accordance with the reasonable requirements of an applicant and his or her family, were no doubt considered by the legislature to be adequate safeguards against the abuse of these new rights in the interest of the husband.

It was argued against that interpretation that the expression "original application," in the sense of application for an original holding, could not apply to a conditional lease, that there could not from the nature of the holding be an original conditional lease. But, in my opinion, that criticism is not sound. The conditional lease which is taken up by virtue of and at the same time as the original conditional purchase may fairly be described as an original conditional lease. The original conditional purchase and conditional lease together would in such a case constitute an original holding in contradistinction to the additional holdings which the Act of 1903 authorizes. This view has legislative sanction in the provisions of sec. 4 of the *Crown Lands Act Amendment Act* of 1905, No. 42, which, in providing for the setting apart of Crown lands for original and conditional holdings respectively, defines original holdings (sub-sec. 1 (*b*)) as including "original conditional purchases and conditional leases to be taken up in virtue of and at the same time as the original conditional purchases within the said area." I can see no ground for objection to the interpretation contended for by the appellant, which is strictly reasonable, and is indeed the only interpretation which gives effective meaning to the words of the legislature.

I am therefore of opinion that the appellant, having obtained the Minister's consent under sec. 17, was lawfully entitled to apply for an additional conditional purchase in virtue of the conditional purchase of which she was then the lawful holder. It follows that the second question must be answered in the affirmative and the appeal, in so far as that question is concerned, must be upheld.

ISAACS J. read the following judgment. This case depends

upon the construction to be placed upon secs. 3 and 17 of the *Crown Lands Act Amendment Act* 1903 (No. 15 of 1903.)

I was very much impressed by the arguments of Mr. *Canaway*, and if the matter were *res integra* I am not at all sure what conclusion I should arrive at as to the proper interpretation of the sections mentioned. But there is a distinct starting point in the case of *Ex parte Luke* (1).

That case, whatever were the grounds for the decision, determined that "a married woman living with her husband may out of her separate estate purchase a conditional purchase from the sheriff and hold the same": *Per G. B. Simpson* J. (2). This view of the decision is recognized by *Darley* C.J. in the case now under appeal, where His Honor after stating the effect of *Ex parte Luke* adds (3): "I assume that if she bought from any persons other than the sheriff the same law would have been laid down."

It is too late now to question *Ex parte Luke* (1). Parliament has legislated twice since that case was decided, and has not overridden the law there declared. Titles have doubtless been based upon it, and in those circumstances a Court would have to find very clear words to reverse a decision of that nature.

Approaching the consideration of sec. 17 of the Act of 1903 from that starting point, two positions may be predicated. One is that some change in the law was intended, and the other is that the section is evidently an enabling and not a disabling enactment.

The words "the provisions of the Principal Act to the contrary notwithstanding" preclude the argument that the section is merely declaratory; while it is abundantly plain from several circumstances, some of which I shall presently refer to, that the object of the section is not to place a married woman in any worse position than she previously occupied.

If then, as necessarily follows, sec. 17 was to confer new rights, what are these rights? It includes "any married woman," that is whether judicially separated from her husband or not. Already by sec. 47 of the Act of 1889 as interpreted by *Ex parte Luke* (1) a married woman though living with her husband could, out of

(1) (1901) 1 S.R. (N.S.W.), 322.
(2) (1901) 1 S.R. (N.S.W.), 322, at p. 334.
(3) (1906) 6 S.R. (N.S.W.) 645, at p. 647.

H. C. OF A. 1907.

PHILLIPS v. LYNCH.

Isaacs J.

her separate estate, purchase from a subject his rights already granted by the Crown under an original purchase or a conditional lease, and therefore sec. 17 could have no relation to the grant of such a power. It was not needed for that purpose, and if confined to acquisition from a subject it would have no effect whatever. It is proper to notice that Mr. Justice *Cohen* in the case under appeal says (1):—"Looking, too, at sec. 17, we see that while it apparently recognizes the decision in *Luke's Case*, it adds to it the obligation that before a married woman can acquire land, *i.e.*, Crown lands, otherwise than by original application, she must have the Minister's consent."

But it is difficult to adopt this reasoning, because sec. 17 speaks of "any married woman," and therefore applies equally whether she is living with her husband, or is judicially separated from him, and I cannot think the legislature meant to require a woman judicially separated to also obtain the Minister's consent to purchase from a subject.

Upon a review of the whole situation I am driven to the conclusion that the married woman was enabled by sec. 17 to acquire in some instances from the Crown direct. This construction is aided, not merely by the considerations already adverted to, but also by the position and surroundings of the enacting words of the section. Looking at sec. 16 we find it headed "Parents may assist children to acquire land." The acquisition there referred to refers exclusively to an application direct to the Crown, and is enabling.

Then sec. 17 is similarly preceded by the heading "Married women may acquire land." There is no incongruity to begin with in the word "acquire" including the acquiring by means of an application to the Crown.

One would naturally *primâ facie* assume from such a heading in a Crown Lands Act, particularly in such close connection with the subject already dealt with in sec. 16, that when Parliament is proposing to enact that "married women may acquire land" it intends to enable them in some way and to some extent to acquire land from the Crown. That meaning is frequently attached to the words in the Lands Acts, for instance, in sec. 11 of the Act

(1) (1906) 6 S.R. (N.S W.), 645, at p. 652.

of 1903 and sec. 23 of the Act of 1905. This assumption is strengthened too by the somewhat significant fact of the departure in expression in sec. 17 from that employed in the immediately preceding section. Sec. 16 speaks of "an application," which of course refers to any application. Sec. 17, however, uses the term "an original application." The change of language is not decisive, but in a case of doubt it is important. There are extraneous circumstances relative to the matter which are urged to be of some weight on either side. The expression "original application" was used in two cases: *Ex parte Bone* (1), and *Ex parte Luke* (2), as contradistinguished from acquiring as a transferee.

On the other hand the same expression "original application" has been sometimes used in previous legislation, as in sec. 13 of the Act of 1889, and sec. 47 of the Act of 1895, No. 18, to contrast one application with another actual or presumed. But I do not think reliance can be placed on either set of references, because on the one hand to attribute to the phrase "original application" the meaning of all applications to the Crown direct would reduce the section to a nullity, or, if the section were regarded as disabling, would restrict existing powers of judicially separated married women who were quite outside *Luke's Case* (3). The looseness of expression in this section is only what *Darley* C.J. in *In re Charles Baldwin* (4) aptly described as "the inexactitude of language which is so characteristic of the Land Acts." *Hall* v. *Costello* (5) decided that the expression "original application" meant any application for a conditional purchase, &c. But no reasons for the decision were given by the Court, nor does it appear from the report of the case that any reasons in support of that view were advanced by learned counsel. The difficulties that press upon us were apparently not presented to the Supreme Court.

In face of those difficulties we are thrown back upon general principles. Courts are not at liberty to speculate as to the intention of Parliament. The only safe and legitimate guide to the legislative intention is the language of the legislature itself

(1) 9 N.S.W. L.R., 363, at p. 365.
(2) (1901) 1 S.R. (N.S.W.), 322, at p. 334.
(3) (1901) 1 S.R. (N.S.W.), 322.
(4) 12 N.S.W. L.R. 128, at p. 133.
(5) (1905) 5 S.R. (N.S.W.), 573.

H. C. OF A. 1907.

PHILLIPS v. LYNCH.

Isaacs J.

fairly interpreted. Some effect must be given to that language if possible, and, therefore, laying aside the view that the section is merely declaratory or a nullity, and the view that it is a purely disabling section, striking alike at judicially separated women and women living with their husbands, the necessary result is that it enlarges the previous rights of married women not judicially separated. It can only do this by permitting them in some cases to obtain additional land from the Crown, while not enabling them to start the series by an original application.

Sec. 3 must be read with the rest of the Crown Lands Acts. It is a general enactment but subject always to the provisions of the Lands Acts making specific provision for particular cases as in the case of married women.

As to sec. 47 of the Act 1889 it is only necessary to say that the prohibition extends quite clearly to additional as well as to original holdings.

In the result the appeal substantially succeeds. The first question resting the claim solely on sec. 3 should be answered in the negative; the second question should be answered in the affirmative, and the third relying on the *Married Women's Property Act* alone is properly answered in the negative.

HIGGINS J. read the following judgment. I have come to the same conclusion. The Land Appeal Court has stated three questions for the Supreme Court; but the only question argued before the Supreme Court was the first—as the second and third had been the subject of previous decisions. The first question is, whether under sec. 3, taken by itself, of the Act of 1903, the appellant was entitled to acquire the land. The Supreme Court has held that she was not; and I concur with this view. The Act of 1903 (sec. 1) provides that the Act is to be read and construed with the Act of 1889 as well as with other Acts; and under the Act of 1889 (sec. 47), a married woman was not entitled to conditionally purchase Crown land. This prohibition applies, in my opinion, to an additional conditional purchase as well as to an original conditional purchase. It is true that the words of sec. 3 of the Act of 1903 are general, and do not expressly exclude married women—"The holder of any original conditional purchase

may make application . . . for additional land to be held by him as an additional holding under the same class of tenure"—; but the general words cannot be treated as repealing the special prohibition contained as to married women in sec. 47 of the Act of 1889. The principle is well summed up in the old formula—*generalia specialibus non derogant*: see *Seward* v. "*Vera Cruz*" (1).

The third question is whether the *Married Women's Property Act* of 1901 enables the applicant to acquire the land. I see no reason for differing from the view taken by the Supreme Court on this point in *Ex parte Luke* (2).

The second question is much more difficult. It involves the interpretation of sec. 17 of the Act of 1903. Does that section enable a married woman, who already holds an original conditional purchase by purchase from the sheriff, or from some party other than the Crown, to acquire an additional conditional purchase from the Crown? With the assistance of counsel on both sides, and of my colleagues familiar with the New South Wales Acts, I have found my way to the light, I think, after struggling through the jungle of the Lands Acts. The only reading of sec. 17 that will give meaning to all its words seems to be that pressed upon us by the appellant. For I take it that that section was clearly meant to enlarge the powers of married women, and to clear away some obstructions created by the earlier Acts. The section is headed "Married women may acquire land"; the section itself is enabling in form; and the powers are conferred, "the provisions of the Principal Acts to the contrary notwithstanding." Now, at the time of the passing of this Act, sec. 47 of the Act of 1889 had provided (*inter alia*), "Except as aforesaid a married woman shall not be entitled to lease or conditionally purchase Crown land under the Principal Act or this Act"; and it had been decided in *Ex parte Luke* (2) that a married woman might, notwithstanding that section, purchase an original conditional purchase from the sheriff, or, indeed, by parity of reasoning, from any private holder. To read sec. 17, therefore, as the respondent reads it, as merely allowing a married woman to purchase from another holder, would be to treat the section as

(1) 10 App. Cas., 59, at p. 68. (2) (1901) 1 S.R. (N.S.W.), 322.

H. C. OF A. 1907.

PHILLIPS v. LYNCH.

Higgins J.

conferring no privilege further than the married woman already enjoyed. Judging from the form and substance of the section, it was drawn by one who had sec. 47 of the Act of 1889 before his mind, in all its lengthy obscurity; and, with sec. 47 in view, he provided that a married woman may, notwithstanding the provisions of the previous Acts, "acquire by purchase or otherwise than by an original application a conditional purchase, conditional lease, homestead selection, or settlement lease."

The question is, what is the meaning of "original application" in sec. 17. Does it involve, as the respondent argues, that a married women may not apply to the Crown for land at all; or does it mean that she may not be an applicant for an original conditional purchase? If the respondent is right, there is no force in the word "original." The only authority to which an "application" can be made, in the sense of the Lands Acts, is the Crown. As the only thing prohibited to the married woman by the section is an "original" application, it seems to follow that she can acquire land by application (to the Crown), provided it be not an "original" application. Therefore, *primâ facie*, she may apply for an additional conditional purchase. The original application is for the original conditional purchase; the secondary, or ancillary, application is for the additional conditional purchase. The words "acquire by purchase or otherwise" are not happily chosen, on either view of the clause; but, as the Act is a Crown Lands Act, and as a married woman could already acquire by purchase from a private person, they must mean acquire from the Crown. What the draftsman seems to have had in his mind was the phrase used in sec. 47 of the Act of 1889—"purchase or lease land conditionally or otherwise"; but inasmuch as new provisions for acquiring lands had been devised since that Act, (*Homestead Selections Act* of 1895, secs. 13 to 23; settlement leases, *ib.* sec. 25), provisions to which the word "purchase" and the word "lease" might not be deemed strictly applicable, he uses the general words "by purchase or otherwise"; and a married woman is thereby enabled to acquire, not only a conditional purchase (otherwise than by an original application), but also a "conditional lease, homestead selection or settlement lease."

It seems to me that the key to the provisions of sec. 17 is to be

found in sec. 3. The first object of the Act, as stated in its title, is "to provide for granting increased areas to present holders." Accordingly, sec. 3 enabled the holder of any homestead selection, any settlement lease, any original conditional purchase, to apply for additional land to be held by him as an additional holding under the same class of tenure. Also, the holder of an original or additional conditional purchase was enabled to apply for a conditional lease. These new privileges, as well as certain old privileges, the legislature intended to extend to married women, by sec. 17. If she has acquired by purchase from another person a homestead selection, she may now acquire an additional homestead selection. If she has acquired, by such purchase, a settlement lease, she may now acquire an additional settlement lease. If she has acquired, by such purchase, an original conditional purchase, she may now acquire an additional conditional purchase, or additional conditional lease. Secs. 3 and 4 use the words "original" and "additional" as applicable to all these tenures. It is probable that sec. 17 also allows a married woman to exercise such powers as that of converting part of land held under a settlement lease into a homestead selection; and this may explain the omission of the word "additional" before the words "conditional purchaser, homestead selection or settlement lease" in sec. 17. But it is not necessary, in the present case, to decide what are the limits of the powers conferred by the section. It is enough to say, generally, that if a married woman has already become, by virtue of a transaction with some party other than the Crown, the holder of land on which a secondary application to the Crown might, if the land were not held by a married woman, be based, for some further or other holding, she may make that secondary application, and acquire land thereby. But the prohibitions as to application for original holdings still apply (sec. 14 of the Act of 1895; sec. 24 (v.) of the Act of 1895; sec. 47 of the Act of 1889). It is true that there is some difficulty in applying this theory to the case of a conditional lease. Conditional leases are not granted except in connection with conditional purchases; and it is asked, what can be meant by an "original" application for a conditional lease? But even if the word "original" in this sense cannot be applied to a conditional

H. C. OF A. 1907.

PHILLIPS v. LYNCH.

Higgins J.

lease, it does not follow that the meaning suggested is wrong. The word is clearly applicable to the three other tenures mentioned; and, if it cannot be applied to conditional leases, it simply follows that the married woman's right to acquire conditional leases, under the same circumstances as other persons, is unrestricted. It may be, however, as suggested by some of my colleagues, that in the case of conditional leases, "original" has a reference to the conditional lease which may be taken up at the time of taking up a conditional purchase, as distinguished from that which can be taken up subsequently. But it is not necessary to decide this question.

This view of sec. 17 is strongly confirmed on a consideration of the title and scope of the Act of 1903. The title is unusually lengthy and exhaustive, setting out, apparently, all the objects of the Act; but the primary and dominant object is "to provide for granting increased areas to present holders." All the other objects can be assigned to specific sections of the Act. But unless this sec. 17 can be treated as coming under the primary and dominant object, "to provide for granting increased areas to present holders," it cannot be brought under any specific objects. Mr. *Canaway* urges that the section was meant to clear away doubts as to the validity of the decision in *Ex parte Luke* (1) as to the right of the married woman to purchase from the sheriff, &c.; but there is nothing in the section, or in the heading, to show any intention to clear away doubts, or even to declare existing rights. The section applies to the future, not to the past: "*may* acquire." The Act is mainly one to enable present holders to get increased areas; and as a married woman could already be a holder of an original conditional purchase by purchase from the sheriff or a private person, I think that the legislature meant that she also should have the privilege of getting an increased area, and probably, the privilege of converting her tenure into some other tenure.

Appeal allowed. Questions 1 and 3 answered in the negative, and question 2 in the affirmative.

(1) (1901) 1 S.R. (N.S.W.), 322.

Solicitor, for the appellant, *F. Crommelin* by *Ellis & Button*. Solicitors, for the respondents, *J. N. Moffitt*, by *McDonnell & Moffitt*; *The Crown Solicitor for New South Wales*.

C. A. W.

H. C. OF A. 1907.

PHILLIPS v. LYNCH.

[HIGH COURT OF AUSTRALIA.]

AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS, AUSTRALIAN DISTRICT . . . PROSECUTORS, } . APPELLANTS;

AND

THE HABERFIELD PROPRIETARY LIMITED . . . . . DEFENDANTS, } . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1907.

SYDNEY, *Aug.* 22, 23, 26, 30.

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

Industrial Arbitration Act 1901 (*N.S.W.*), (*No.* 59 *of* 1901), *sec.* 37—*Jurisdiction of Court of Arbitration—Breach of common rule—Question for determination by Court—Relationship of employer and employé—Element of offence charged—Effect of erroneous decision—Prohibition.*

Although a Court of limited statutory jurisdiction, from which there is no appeal, cannot give itself jurisdiction by an erroneous decision upon a preliminary question upon the answer to which its jurisdiction depends, an erroneous decision upon a point which, however essential to the validity of its order, it is competent to try is not a ground for prohibition.

Sec. 37 of the *Industrial Arbitration Act* 1901 provides that the Arbitration Court may declare that any term of agreement or condition of employment shall be a common rule of an industry, fix the limits of the operation of the rule, and impose penalties for its breach, and that the penalties may be recovered either in the Court of Arbitration by a person entitled to sue, or before a stipendiary or police magistrate in Petty Sessions, subject to an appeal in the latter case to the Arbitration Court instead of to the Supreme Court. There is no appeal from any decision of the Arbitration Court.

In a proceeding before it the Arbitration Court made an award fixing a minimum daily wage for carpenters, and subsequently made the award a