

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tooth v. Power from the Supreme Court of New South Wales ; delivered 2nd May 1891.*

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Present :

THE LORD CHANCELLOR.

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD MORRIS.

LORD FIELD.

*[Delivered by Lord Watson.]*

This appeal, from the Supreme Court of New South Wales, involves the consideration of the Conditional Purchase Clauses of the "Crown Lands Alienation Act of 1861" (25 Vict., No. 1); and the question which it raises would have been one of general importance had the leading enactments of these clauses not been in effect superseded by the provisions of the "Lands Acts Amendment Act, 1875" (39 Vict., No. 13).

The scheme of the Act of 1861 is simple enough. Section 13 declares certain Crown lands within the Colony to be open for conditional sale by selection, and empowers "any person" to tender an application to the local Land Agent for the purchase of not less than forty or more than three hundred and twenty acres of such lands at the price of twenty shillings per acre, along with a deposit of twenty-five per cent. of the purchase money. In the event of

there being no other tender for the same land, the applicant is to be declared the conditional purchaser; and Section 15 makes it the duty of the Land Agent to enter the particulars of the application in a book kept for the purpose, and to transmit an extract of the entry to the proper officer of the Government.

Section 18, which is the material clause in this case, enacts that, on the expiry of three years from the date of the entry, or within three months thereafter, the balance of the purchase money shall be tendered at the office of the Colonial Treasurer, together with a declaration by the conditional purchaser, or his alienee, or some other person competent, to the effect that improvements to the extent, and of the character, required by the Act have been made upon the selected land, and "that such land has been, "from the date of occupation the *bond fide* "residence, either continuously of the original "purchaser or of some alienee or successive "alienees of his whole estate and interest "therein and that no such alienation has been "made by any holder thereof until after the "*bond fide* residence thereon of such holder "for one whole year at the least." Upon the Minister being satisfied with the declaration, it is enacted that the Colonial Treasurer shall receive and acknowledge the balance of the purchase money, and that a grant of the fee simple, under reservation of minerals, shall be made to the then rightful owner. Payment of the balance may be deferred, upon condition of interest being regularly paid at the rate of five per cent. In default of compliance with the provisions of this section, the land reverts to Her Majesty, and the original deposit is forfeited.

Section 16 prescribes that the occupation of the conditional purchaser must commence within

one month from the date of his purchase. Under Section 21, purchasers of a parcel of land not exceeding two hundred and eighty acres may make an additional selection of land adjoining, so that their entire holding shall not exceed three hundred and twenty acres, and the addition so made is subject to all the conditions of the original purchase except residence.

It thus appears that a conditional purchase, effected by payment of one fourth of the statutory price, is an inchoate title, which merely gives the purchaser right to occupy a particular parcel of land in the manner required by the Act for its ultimate acquisition in fee. Upon due compliance with the prescribed conditions of residence for three years, and of making improvements, the conditional purchase becomes an absolute right to obtain a grant in fee simple upon payment of the remaining three fourths of the price. The right is capable of being alienated, but no owner of the right can legally alienate until he has resided upon the selection for one year at least. The residence which the Act requires in order to perfect the right must be the personal residence of the real owner of the right, whether he be the original purchaser or a legal alienee, and it must be *bond fide* and continuous. The purchaser's powers of disposal, after he has obtained a grant in fee from the Crown, are unrestricted; and their Lordships can find nothing in the Act which would prevent him, whilst his right is incomplete, from entering into a personal contract binding himself to convey the land to another after he has acquired it in fee.

The Appellant, Plaintiff in the Court below, is the occupant of a station or run in the county of Auckland, parts of which were liable to be taken up by selectors under the enactments already referred to. On the 17th November

1871 he entered the name of the Respondent and Defendant in the Land Agent's Book as the conditional purchaser of one hundred acres of land forming part of his own run; and, on the 15th August 1873, he added to the purchase previously made by him in the Defendant's name sixty-four adjoining acres of the same run, under the provisions of Section 21. The Plaintiff paid the deposit money for both parcels, and made the requisite statutory improvements at his own expense. After the lapse of the residential period prescribed by the Act, he arranged with the proper authority that payment of the balance of the purchase money should be deferred; and he continued to pay interest upon that balance until he instituted the present suit in August 1888. Since the date of the conditional purchase there has been no change in the possession of the selected land, which has all along been occupied by the Plaintiff as part of his run.

The Defendant was, in November 1871, an infant about six years of age, his parents being servants in the employment of the Plaintiff. The father, who was examined as a witness, denies that he gave the Plaintiff any authority to use his son's name, but admits that he was aware, at the time, of the use which was made of it. Upon the pleadings and evidence the residence of the Defendant upon the land, and its attendant circumstances, are left in a very unsatisfactory state. It appears to be the fact that, for at least three years following November 1871, the Defendant was taken by his mother from his father's house to a dwelling of some kind on the selected land belonging to the Plaintiff, and there resided with her. The Plaintiff alleges that the Defendant was taken there at his request, which seems probable; and the Defendant, whilst not admitting the allegation,

gives no explanation of how he came to be there.

The Defendant attained majority in 1885, but does not appear to have asserted that he had any personal interest in the selection until March 1888, when he tendered payment of interest upon the balance of purchase money, and was informed by the Land Agent that it had already been paid by the Plaintiff. He then attempted to sell his interest as selector, whereupon the Plaintiff brought this action, in which he claims to have the Defendant declared to be trustee for him of both conditional purchases, and ordered to transfer to him; or, otherwise, to have the Defendant restrained from alienating except to the Plaintiff.

The Primary Judge in Equity gave the Plaintiff a decree in terms of the first alternative of his claim; but his decision was reversed on appeal by the Full Court, consisting of His Honour the Chief Justice, with Stephen and Windeyer, J. J., who dismissed the action, with costs. The learned Judge in Equity, and in the Appeal Court the Chief Justice, were of opinion that there was a resulting trust in the Defendant for behoof of the Plaintiff. The majority of the Full Court held that the transactions of the Plaintiff with regard to the conditional purchase of the land in question did not comply with, but were a mere attempt to evade the conditions of the Act of 1861, and could not therefore raise any statutory right either in the Plaintiff or in the Defendant.

At the hearing of this Appeal, their Lordships had not the advantage of having any argument addressed to them in support of the reasoning which prevailed in the Full Court. Both parties impeached that reasoning, and were at one in maintaining that a valid right of conditional purchase had been constituted as against the

Crown, entitling the true owner of the right to a grant of the lands in fee simple upon payment of the price in full; and the controversy at the Bar was limited to the question—which of the parties ought to be regarded as the true owner? On the one hand, the Plaintiff contended that the real interest was in himself, the interest of the Defendant being merely nominal, and that there was a resulting trust in favour of the Plaintiff. On the other hand, it was argued for the Defendant that the doctrine of resulting trusts had no application to the right of conditional purchase, and that he was under no obligation, legal or equitable, to transfer it to the Plaintiff; because, in the first place, the Plaintiff, in order to acquire the right, had used, not his name only but his individual right of pre-emption under the Act of 1861; and, in the second place, the condition of residence, which he had personally fulfilled, was a material part of the consideration.

If it were clear that the Plaintiff's proceedings did create a right of conditional purchase in terms of the Act, their Lordships would not be prepared to differ from the Primary Judge in Equity and the learned Chief Justice. The right of selection was not personal to the Defendant, but was open to any person in the Colony; and their Lordships do not think that the Defendant's residence upon the land could, in the circumstances already explained, be regarded as consideration moving from him. When he came of age he was free either to ratify or repudiate the use which had been made of his name; but he could not then accept the right, and at the same time decline to recognize the beneficial interest of the person by whom it had been created, with his own funds, and for his own benefit. If he chose to repudiate, the statutory purchase being valid, the Plaintiff, as the real purchaser,

could have enforced his rights as such by a direct claim against the Crown, passing over the nominal intermediary.

It therefore becomes necessary to consider whether any right of conditional purchase has been constituted in the name of the Defendant which can be the subject of a resulting trust for the Plaintiff. In dealing with that question their Lordships do not find it necessary to canvass the policy of the Act—an expression which is apt to mislead, because it may signify either the general scheme of land settlement which the Legislature was desirous of promoting, or the special machinery which has been devised and enacted for the purpose of carrying out that scheme. The Act, in so far as it relates to conditional purchases, is not prohibitory, but enabling. It confers the privilege of acquiring in fee a certain area of Crown land, at a cheap rate, upon any person who chooses to comply with the conditions which it prescribes; and no one can be held to have acquired a statutory right or interest unless it is shown that he has substantially fulfilled these conditions.

The Act of 1861 gives the privilege of conditional purchase to “any person,” and the amending Act of 1875 (Section 6) declares that these words shall, “in respect to conditional purchases applied for and made previous to the passing of this Act be held to mean and include any person, whether under or over the age of twenty-one years.” Their Lordships do not doubt that, under these enactments, an infant of maturer years might personally apply for and complete a conditional purchase of Crown land. Nor do they question the authority of the colonial cases which were before this Board in *O’Shanassy v. Joachim* (1 App. Ca., 82), in which very young children were held to

have become purchasers, they residing with their parent upon the selection, and the parent making improvements and paying the purchase money by way of advancement to them. It is quite consonant with legal principle that what is done in the name and in the interest of an infant by one who stands *in loco parentis* shall be held to have been done by the infant himself, so as to constitute compliance with the Act sufficient to create a valid interest in him; but it does not follow that what is done by a stranger, in name of an infant, for his own behoof, and with no intention of benefiting the infant, can be regarded as fulfilment by the latter of the statutory conditions.

Upon the facts of this case, their Lordships have come to the conclusion that the proceedings taken by the Plaintiff with the view of creating a right of conditional purchase in the infant Defendant as trustee for him were simply a colourable attempt to comply with the provisions of the Act. There does not appear to them to have been substantial compliance with any one of the conditions which the Act prescribes. The deposit was neither paid by the Defendant nor on his account. The statutory improvements were not made by the Defendant nor for his benefit. And, in these circumstances, their Lordships are unable to hold that the three years' residence of the Defendant upon the selection before he was ten years of age, whether that residence was at the instigation of the Plaintiff or not, could constitute the *bond fide* residence of a selector within the meaning of Section 18 of the Act.

It appears from the judgment delivered by the learned Chief Justice that he and the Primary Judge in Equity would have agreed with the majority of the Full Court, had they not been



constrained to decide otherwise by the authority of *Barton v. Muir* (L.R., 6 P.C., 134). The circumstances of the present case differ so widely from the facts with which this Board had to deal in *Barton v. Muir* as to render it unnecessary for their Lordships to enter upon a critical examination of the reasons assigned for its decision. In that case the Defendant was of full age, and all the conditions prescribed by the Act were performed by him voluntarily and personally, and not by another individual under cover of his name.

Their Lordships think it right to add that, although, for obvious reasons, the case of *Barton v. Muir* was relied on as an authority absolutely binding upon them by both parties at the bar, yet it would have been their duty, had the necessity arisen, to consider for themselves whether the decision is one which they ought to follow. It was given *ex parte*; and that being the case, although great weight is due to the decision of this Board, their Lordships are "at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law." These are the words used by Earl Cairns when delivering the judgment of the Board in *Ridsdale v. Clifton* (L.R., 2 P.D., 306), which contains a full exposition of the law upon this point.

Their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The defence set up by the Respondent has not been meritorious. He attempted but has failed to show that any right of conditional purchase vested in him, and if he had succeeded in establishing that proposition he would not have been in a position to resist

the claim of the Appellant. Some costs ought to be allowed to a party who has been compelled to oppose an improper decree being made against him. Possibly the more logical course would be to deprive the Defendant of costs in the Court below, and give him costs here, but it appears to their Lordships that justice will be done by permitting the decree of the Full Court to stand, and allowing no costs of this appeal.

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