Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Henry Harold Chippendall v. *William Laidley and Company, Limited, from the Supreme Court of New South Wales; delivered the 29th October* 1908.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD COLLINS.
SIR ARTHUR WILSON.

[*Delivered by Lord Atkinson.*]

This is an Appeal from a judgment of the Supreme Court of New South Wales, dated the 13th August 1907, making absolute a Rule Nisi for a mandamus directed to the Appellant, as Crown Lands Agent for the Land District of Newcastle, ordering him to receive an application by the Respondents, dated the 13th July 1906, to convert a conditional purchase into a conditional purchase for purposes of mining other than gold mining, in order that the same might be dealt with according to law. The Appellant, acting on instructions from the Minister for Lands, refused to receive the application.

There is no dispute as to the facts.

It is admitted that one William Johnstone, in the year 1879, had, under s. 13 of the Crown Lands Alienation Act of 1861, tendered a written application to the proper officer for the conditional purchase of the lands, 200 acres in

1 (22)55958. [61] 100.—10/08. Wt. 243. E. & S. A

extent, the subject-matter of this suit, at the price of 20*s*. per acre ; had paid a deposit of 5*s*. per acre ; had subsequently paid the residue of the purchase-money ; and had, on the 28th July 1884, obtained the certificate required by s. 18 of that Act, certifying that he had resided upon the selection and had made improvements on it. In 1899 he transferred all his interest in the lands so selected to the present Respondents, who on the 25th July 1901 became the registered owners of the lands so conditionally purchased in the books of the Land Department, and, on the 26th March 1906, paid to the Colonial Treasurer a sum more than sufficient to discharge what remained due in respect of the purchase money. The Respondents have thus performed every condition attaching to the purchase which they were bound to perform. They have not, however, obtained, or applied for, a grant of these lands in fee by the Crown ; and the question for decision is, whether they can now apply to have the purchase converted into a purchase for mining purposes under s. 19 of the same statute. In order to decide that question it is necessary to consider the provisions of several of the statutes and regulations now or heretofore in force in New South Wales, dealing with the subject of the conditional purchase of land, and ultimately to determine whether a purchaser, who has performed all the conditions of his purchase, can be held to be the holder of a "conditional purchase" within the meaning of these statutes.

By s. 13 of the above-mentioned statute provision is made for the conditional sale by selection of Crown lands not within a proclaimed gold field, for the purposes of the improvement of them and settlement upon them, at the purchase price of 20*s*. per acre. The selector must

make an application to the Land Agent for the district for the conditional purchase of these lands, not being less than 40 or more than 320 acres in extent; must pay a deposit of 25 per cent. of the purchase-money, 5*s*. per acre; and (by s. 18) must reside on the lands continuously for 12 months from the commencement of his occupation; must make certain improvements on the land, and after three years from the date of his conditional purchase, may, on satisfying the Minister named in the Act that these conditions have been fulfilled, obtain a conveyance from the Crown of the land in fee simple, all minerals being reserved to the Crown. Provision is made in the same section (18) for the deferring from year to year of the payment of the balance of the purchase-money by the annual payment of interest thereon at the rate of 5 per cent. per annum, on peril, however, of forfeiture of the purchase to His Majesty if the requirements of the section be not observed.

By s. 8 of the Lands Acts Amendment Act, 1875, provision is made for the payment of the balance of the purchase-money with 5 per cent. interest thereon by annual instalments of 1*s*. per acre. This is in lieu of the provision above mentioned for the deferred payment of the purchase-money. If the lands proposed to be purchased are situate in a proclaimed gold field, then the provision is added that, should gold be found in them, the purchase may be forfeited on certain conditions, but if the land sought to be purchased has been selected for mining purposes other than gold mining, then by s. 19 of the Act of 1861 the price is doubled—40*s*. per acre being charged instead of 20*s*. The deposit is doubled, no period of residence is required, nor need any improvements be effected, but instead of improvements an outlay of (on an average) 2*l*. per acre

must be made, and on proof that these conditions have been performed and the balance of the purchase-money paid, a grant of the lands without any reservation of minerals must, as in the other cases, be made to the purchaser.

Neither in the Act of 1861 nor in that of 1875 is any provision whatever made for the conversion of a selection for residential or settlement purposes made under s. 13 of the former Act into a selection for mining purposes under s. 19, nor for a purchase, conditional or completed, made under the one into a like purchase made under the other. This is all the more remarkable, as by ss. 27 and 28 of the Act of 1875 provision is made for the conversion of mineral leases into mineral conditional purchases.

Moreover, by s. 18 of the Act of 1861, as well as by s. 8 of the Act of 1875, the conditional purchaser who has fulfilled all the conditions, and is in a position, as the Respondents are in this case, to require a grant to be made to him, is styled the " rightful owner ".

Much argument was addressed to their Lordships as to the rights of the purchaser in such a position. The statute sets that at rest: he is the " rightful owner "—needing, indeed, the formal grant to clothe him with the legal estate in the lands, but on all equitable principles as much the owner before the grant is made as after it has been made. And it does not appear to their Lordships that there can be any reason in the nature of things why the person who is thus rightful owner should be permitted to convert his purchase before the grant of the lands is made to him, but not afterwards. In either case he would only acquire, in addition to the lands of which he was already the owner, the minerals under them. Where a grant had already been made, an additional deed would

have to be executed, that is all. In both cases the additional purchase money would have to be paid, and the outlay of 2*l.* an acre on an average certified.

Mr. Levett, for the Respondents, relied much on ss. 21 and 22 of the Act of 1861 to show the kind of regeneration worked upon a conditional purchaser by the execution of a grant of the lands to him, and the different light in which such a purchaser is regarded by the statute before the grant and after it, he being in the latter case treated as an owner in fee and not in the former. But s. 22 is not confined to converted conditional purchasers. It applies to all owners in fee, whether they acquired the fee, as did the plaintiff in *Abbott* v. *The Minister for Lands* (1895 A.C. 425) by purchase under s. 25 of the Act of 1861, or otherwise.

S. 30 of the Act of 1861 and s. 47 of the Act of 1875, however, empower the Governor to make regulations. In exercise of that power, Regulations, dated the 28th August 1875, were issued by him. By one of these (variously numbered 40 and 54) it is provided that a conditional purchaser under ss. 13, 21 or 22 of the Act of 1861 may apply on a particular form to the Lands Agent of the district on payment to him of 5*s.* an acre, "being the difference "between the rate of deposit on the respective "selections, to have his purchase so converted. "Provided that at the time of such proposed "conversion the original selection has not been "forfeited or liable to be forfeited for any breach "of the conditions thereof." The proviso could scarcely apply to a purchase all the conditions of which had been performed, since it obviously has in view purchases which have been, or still may be, forfeited for breach of condition.

It is equally strange that the Regulations should not contain any provision whatever for giving the purchaser in such a case as the present credit for the sums other than the deposit theretofore paid in discharge of the purchase money. The purchaser under s. 13, who, like the Respondents in this case, has paid the whole of the purchase money, is treated in precisely the same way as one who has paid a deposit and nothing more. For instance, in the present case the Respondents, who have paid 200*l.*, are required to pay 50*l.* as an additional deposit just as if they had paid the original deposit of 50*l.* and nothing more. It is strange that this should be so, if it was ever intended that the liberty to convert should have been given after all the purchase money had been paid. It leads strongly to the conclusion that the option to convert was to be exercised before anything beyond the deposit had been paid, that is, before three years from the date of the purchase had elapsed. For the provision for the suspension of the payment of the balance of the purchase money under s. 18 of the Act of 1861, and s. 8 of the Act of 1875, only comes into operation after the lapse of that period. It may possibly be that a purchaser who, by the performance of all the conditions, had become "rightful owner" of the lands, entitled to demand and to receive his grant, would, for the sake of acquiring the minerals under them, jeopardize all he had already securely obtained. Such a hazard, however, does not appear to be within the purview of these Regulations.

By s. 2 of the Crown Lands Act of 1884 the above-mentioned Act of 1861 is (with others) repealed, but not so as to

> "prejudice or affect any proceeding, matter, or thing "lawfully done, or commenced, or contracted to be "done, under the authority of any enactment or "regulation hereby repealed"

and saving, subject to the express provisions of the Act, all rights accrued and obligations imposed by virtue of the repealed Acts. By s. 37, however, the procedure is modified this far, that the grant of the lands purchased is, after all the conditions have been performed, only made on the application of the purchaser and on payment by him of stamp duty and a deed fee, but neither in this nor in any of the statutes subsequent in date to which their Lordships have been referred is any provision whatever made for the conversion of lands selected for residence, cultivation, or pasture into a selection for the purposes of mining. Regulations were, however, on the 3rd June 1895 published to carry into effect the provisions, not only of the Crown Lands Act of 1884, but also of the Crown Lands Act of 1889, and the Crown Lands Act of 1895. Nos. 115 to 118 (both inclusive) of these Regulations deal with the conversion of conditional purchases made under ss. 13, 21, or 22 of the Act of 1861 into conditional purchases for mining purposes. No. 115 is practically identical with No. 40 (or 54) of the Regulations of 1875, save that the words "the "holder of a conditional purchase" are used in the former instead of the words "any conditional purchaser" used in the latter. Regulation 116 purports to deal to some extent with the financial anomalies already referred to, and provides that the holder of any conditional purchase converted as aforesaid shall not, during a period of 3 years succeeding such conversion, be required to pay any interest or instalment of purchase money, but at the expiration of such period, or within three months thereafter, he shall pay for each current year interest at the rate of 5 per cent. if he has not previously paid instalments, or, if otherwise, instalments at the rate of 2*s*. per acre. No. 117 provides that the holder of any

conditional purchase for mining purposes may bring his purchase under the regulation for payment by instalments. And Regulation 118 provides that—

> " the holder of any conditional purchase converted
> " as aforesaid shall, at the end of the third year from
> " the date of the application to convert the same,
> " make a declaration in the Form 38 that a sum of 2*l.*
> " per acre has been expended in mining operations
> " thereon other than for gold."

The provisions of these several Regulations strengthen rather than weaken the inference to be drawn from those of the earlier Regulations of 1875, namely, that the application to convert is to be made while the proceedings for purchase are in progress, and not after they have been completed by performance of all the conditions.

While the Respondents admit that, by obtaining the grant of this land from the Crown, their power to convert their purchase into a purchase for mining is destroyed, yet they insist that they can, by abstaining from applying for their grant, reserve their option to convert for an indefinite time. That construction of the statute would, in effect, disable the Crown from disposing of the minerals during the purchaser's pleasure, since the right to select for mining given under s. 19 of the Act of 1861, or to convert under the Regulations, seems absolute. It is reasonable enough that the Crown should be restrained from alienating the minerals for the period of three years during which the purchaser under s. 13 is making improvements upon his lands and becoming acquainted with its possibilities, but it is utterly unreasonable that their hands should be thus tied indefinitely at the will and pleasure of the purchaser.

The words used in the Act of 1884 and Regulation 115, are not "conditional purchaser," but "holder of a conditional purchase." If by

those words it is intended to describe a person who purchased originally on certain conditions, then the description will be applicable to him whether he obtained a grant or not. On the other hand, if the words mean a person who still holds the land he purchased on some condition which remains unfulfilled, they are entirely inapplicable to a purchaser who has fulfilled all these conditions. The payment of the stamp and the deed fee, and the application for the conveyance, cannot be treated as conditions, inasmuch as these are things which a purchaser is obliged to do under the most absolute form of contract of purchase.

The Australian authorities to which their Lordships have been referred show that the Australian Courts have, in construing s. 21 of the Act of 1861, held that the words "conditional purchaser" mean a purchaser who purchased originally on certain conditions which have not been fulfilled, and not a purchaser who has fulfilled those conditions. In their Lordships' opinion the words "holder of a conditional purchase," as used in s. 7 of the Act of 1884 and in No. 115 of the above-mentioned Regulations, equally mean a person who holds all the lands he purchased on conditions, still unfulfilled, and not a purchaser who holds his lands free from conditions, since all the conditions originally attaching to the purchase have been fulfilled. Their Lordships will therefore humbly advise His Majesty that the Appeal should be allowed, the judgment appealed from reversed, and the Rule Nisi for a Mandamus discharged with costs.

The Respondents must pay the costs of the Appeal.
