Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Blackwood and another v. *The London Chartered Bank of Australia, from the Supreme Court of New South Wales; delivered January 27th,* 1874.

Present:

LORD CHANCELLOR.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

MR. DICKINSON, their Lordships do not think it necessary to hear the Respondents in this case.

The only question, as it appears to their Lordships, deserving or requiring much consideration so far as they have thought it right to go into the arguments, is whether or not the 28th regulation was *intra vires* of the authority which made it. A doubt upon that subject seems to have been suggested in some of the judgments delivered in the court below, and it has been argued here that the power given by the 36th section of the Crown Lands Occupation Act of 1861 was only to provide for matters of form, and not to provide for any matters of substance, and particularly not to determine how and in what manner effectual transfers of rights to have leases granted under the Act might be made.

After considering what has been said upon that subject, both by the learned judges in the court below—at least by those of them who appear to have favoured that view—and by counsel at the bar, their Lordships are unable to concur in that opinion. This Act, the Crown Lands

Occupation Act of 1861, is upon a subject evidently of very great and general importance in the colony. It was intended to alter, and in a great measure to supersede, previous modes which had been established by law in the colony of dealing with Crown lands, under regulations referred to in the 4th sub-section of the 12th clause of the Act. This Act itself consists of only 37 sections; it is a comparatively short Act; it lays down certain leading rules, and manifestly is not intended to exhaust, or to provide for all the supplementary regulations which would be convenient or proper to be made in respect of the rights which it, to a certain extent, constitutes and regulates. Upon the particular subject of transfer it says not one single word. It distinguishes three kinds of rights: first, the rights to old runs as to which no payments shall have been made, entitling the holders of them to convert them into five-years leases; secondly, the rights of those persons who, having been holders of old runs, have taken the necessary steps under the 13th clause to convert them into five-years leases; and, lastly, the rights of those persons who have completed their title by taking actual leases. As to the mode in which these things are to be done, as to the power of transferring all or any of those rights, and the mode in which they shall be transferred, and the facts which are to bring the Government into privity of contract with particular persons, not originally entitled, in respect of those rights, the clauses of the Act are silent; but they contemplate a supplement for every purpose convenient and necessary, consistent with the provisions of the Act, and not expressly provided for, by regulations to be made in a manner inappropriate to things merely formal, but usual and very familiar in this country, as well as in the colonies, when matters substantial as well as formal are to be governed

by regulations to be made by a delegated authority, and not by the immediate action of Parliament itself; that authority in this case being the governor with the advice of his executive council. The regulations are to be published in the Gazette; and thereupon, by virtue of the Act itself they are declared valid in law; and this security is taken, which is very usual in such cases, but neither usual nor necessary as to mere matters of form, that a copy of every such regulation shall be, within a short limited time, laid before both Houses of Parliament, that they may be advertised of the manner in which the persons to whom they have delegated this legislative power have exercised it; and, if they disapprove of that manner, may take the proper steps to interfere. If these regulations, properly construed, are found to be reasonable and convenient regulations for carrying the Act into full effect, though they may govern not only the form but the effect of instruments of transfer of those rights which precede the grant of leases; if they are found to relate to matters arising under the provisions of the Act, which they unquestionably do; if they are found to be consistent with the provisions of the Act, which they unquestionably are; and if they are not in the Act expressly provided for, then their Lordships cannot do otherwise than come to the conclusion that they are valid in law, and that there is no ground for the objection that they are *ultra vires*. If indeed the Act had said that in any other manner these rights now in question should be transferred, then any regulation inconsistent with that enactment would necessarily have been *ultra vires* and void; but the whole subject of transfer is left open to subsequent regulation by the enacting clauses of the statute; and in their Lordships' opinion it was a proper and indeed a necessary subject to be regulated, for otherwise nobody would have known who

were or who were not to be regarded and treated as in privity of contract with the Crown concerning these important rights. The regulations appear to their Lordships to be perfectly and entirely reasonable; not only reasonable, but such as alone would be likely to accomplish the objects of the statute, as far as transfers are concerned, without such inconveniences as it might be expected the proper authority would provide against.

If that is the conclusion to be arrived at, what is the effect of those clauses? They deal with the very case which is before their Lordships, the case of a holder of a run of which the lease has not issued. The clauses are headed "transfers," and their object is to show how the inchoate right to this lease, so described, may be transferred. The holders may have their rights to call for leases transferred by an application addressed to the Chief Commissioner of Crown Lands, and authenticated in a particular manner. It has not been alleged in argument that this application was not authenticated in the manner required by the regulation; and their Lordships, therefore, must assume that that point could not successfully be made. Assuming that the authentication contemplated by this 28th section was not absent, then we have a case in which the only person known to the Crown, or who could possibly be known to the Crown consistently with this regulation, as the holder of this run of which the lease had not issued, did make the application, contemplated by this 28th regulation, to the Chief Commissioner of Crown Lands, with the concurrence of a party interested as a transferee for value, who desired to have his transfer recorded. Now, what was the effect of this according to the true construction and meaning of these regulations? "On such application being re-
" corded, the applicant will be,"—therefore in

this case he was—Glass was—" debarred from all " further claim to the lease, the right of which " will thenceforth become,"—therefore in this case became—" vested in the transferee," the respondent; and under the 31st clause that transfer carried with it all rights of the transferor, Glass, in connection therewith, with an exception not material to the present case.

Now it appears to their Lordships that unless there was something which, on equitable principles, would affect the transferee himself, his title could not possibly be called in question in consequence of any dealing, not being a transfer under that regulation, which had previously taken place before the transfer to him was made. There is nothing whatever in these regulations, and of course there is not intended to be anything in their Lordships' judgment, which would in the slightest degree whatever affect or prejudice any equity which could be asserted as against the transferee. He, as transferee, succeeds to the title of the transferor; but if his conscience is bound by contract, by trust, or by anything else which in a court of equity is equivalent in point of binding effect, there is nothing here to prevent him from taking *sub onere*. But this is not a case in which anything of that kind is pretended; what is alleged here is this, that some other person had in his possession a document which in equity affected the interest of Mr. Glass, the transferor, and that, for that reason, Mr. Glass was no longer the person entitled to the lease within the meaning of this 28th regulation; that he could not make the application; and that the right which became vested in the transferee was a right, if any, subject to that prior equitable interest which Mr. Glass had previously created. The argument, if good, really would be equally good though no notice whatever had been given to the transferee of the existence of that prior

equitable interest; but its effect is entirely to destroy the whole regulation, by treating as a transferee a person who has not complied with it, treating him as having acquired such an equitable right as would make the transferor, the original holder of the run, no longer the person entitled to go to the Crown and ask for the lease. The person entitled to the lease must mean, and does mean, the person entitled at that time to go to the Crown and ask for the lease. The alleged prior equitable transferees could not put themselves in that position under this regulation except by doing the thing which the regulation prescribes, which thing they had not done. The Crown, therefore, must have ignored them, must have granted the lease, unless the regulation were violated, to Mr. Glass, if no application in favour of a transferee had been made. Glass was the person entitled to apply to the Chief Commissioner;—he did apply; and upon that application he was debarred; all persons standing behind him, who could claim only through him, were debarred also: and the right thenceforth became vested in the transferee, subject, of course, as has been said, to any personal equities by which that transferee might have been bound.

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 is nothing more familiar than the doctrine of equity that a man, who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title, if he can, and may hold it; though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself. That is alleged to have happened in this case; but it is admitted that there is nothing in that state of the case, if a legal right was transferred, to prevent the transferee from holding it for his own benefit; and, indeed, the facts quite justify, in their Lordships' opinion, the observation of Mr. Justice Hargrave that the whole merits and real substantial equity and justice of the case are with the respondents. For what has happened? The documents said to have created this prior equitable interest in the appellants—which in truth are nothing whatever but this, a letter addressed to the Commissioner of Works for the purpose of effecting a transfer, and another saying that this is given by way of security—those documents, having been delivered to the appellants in July 1863 and April 1864, are kept in their custody and nothing whatever done with them for several years. In the interval, the appellants leave Glass, from whom they received those documents, to continue to deal with all the world as the ostensible owner of the run. He does the important act, during that interval,

on the 31st December 1865, of changing the title from one species to another, from the right to a mere run into the right to a five years' lease. That is done by Glass as the person entitled, and the Crown knew nobody but Glass in the matter; and Glass, so left in the position of the ostensible and reputed owner, and the person who under the 28th section of the statute would be able in every action or suit at law or in equity for every purpose, offensive or defensive, to go into court with the Crown contract in his hand and use it as if it were an actual lease,—he being left by the appellants in that situation, gets 40,000*l.* from the respondents in April 1868, at which time it is not pretended they had any notice or means of knowledge whatever of these latent securities in the appellants' hands. If there ever were persons who were entitled to the benefit of the principle of equity, that having paid their money *bonâ fide* without notice they might afterwards get in the *tabulam in naufragio* if they could, the present respondents are persons in that situation; and it would be monstrous, as it appears to their Lordships, unless the matter were in some degree rendered less important by the Registration Acts of the colony, (a point into which their Lordships do not think it necessary to go,) if in a colony of this description rights of this kind, regularly perfected by following out the statutory formalities as between the Crown and transferees who have dealt *bonâ fide* for value with the only person known as owner to the Crown, and who had come to be recognized by the Crown in that way,—if they could be ousted by latent documents kept in the chests of bankers or other persons in London, and only intended to be used at such time and in such manner as might happen to suit their convenience.

It appears to their Lordships that the law and the justice of the case are upon this first ground alone entirely and altogether with the respondents, and that it is quite unnecessary to go into the subsequent points which might otherwise arise, when the legal title so initiated is found to have been further perfected by the actual grant of a lease before suit by the Crown, and subsequently after suit by priority of registration in the land or deeds register.

Their Lordships think it unnecessary to go into those points, because they entirely agree with what was said by Mr. Justice Hargrave in his judgment, that "it is of the utmost importance for this court to maintain that the "Crown lands of this colony are held by Her "Majesty only for disposition under the Constitution Act, and as now directed to be disposed "of under the Crown Lands Act of 1861, in "substitution for the old Orders in Council, and "that this court should not attempt to oust "Crown tenants like these Defendants, who have "acquired their leases strictly in accordance with "the Crown regulations, and who advanced their "money with perfect *bona fides* in all respects, "and especially on the faith of these regulations "being observed both by the Crown and by "the pastoral tenant borrowing their moneys." Their Lordships also agree with the substance, (as they understand it,) of what Mr. Justice Hargrave states at the beginning of that judgment to have been his chief ground for originally dismissing the Plaintiffs' bill; that, "as to the "broad and substantial contest between these "parties, the Plaintiffs were entirely without any "equity as against the Defendants, while the "Defendants had a clear and indisputable equity "against the Plaintiffs by having advanced their "40,000*l.* to Glass in 1868, without any notice "or knowledge, express or implied, of the Plain-

" tiffs' prior lien originating in 1863, and were " prevented by the Plaintiffs from obtaining " any such knowledge by the wilful neglect and " omission of the latter to record their letter of " transfer at the Lands Office till after the " Defendants had advanced their 40,000*l.*, and " after the Defendants' letter of transfer had " been duly recorded there." If indeed the learned judge were to be understood as meaning in that passage to suggest any attempt or intention by the Plaintiffs to mislead the Defendants, their Lordships have heard nothing which would lead them to adopt any such view, nor is any such view meant to be implied in any word which has been said; but it does not at all seem necessary to put that construction upon the language of Mr. Justice Hargrave. That language may very well mean this, with which their Lordships entirely agree, that the appellants did not think fit to use the documents of title which they had obtained; they intentionally left Glass in the position of an apparent owner, able to give to others, with the legal title, the better equity; and therefore it is just and equitable, that they should bear the consequences.

Their Lordships therefore will humbly advise Her Majesty to dismiss this appeal, with costs.