Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of O'Shanassy v. *Joachim and others, from the Supreme Court of New South Wales; delivered 5th February* 1876.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THREE infants of the name of Joachim, of the ages respectively of 16, 14, and 12 years, brought separate actions in which they complained that the Defendant had trespassed upon their closes. They claimed their land under grants made by the Governor in pursuance of the Crown Lands Alienation Act, 1861. The only defence which is now insisted upon is that the grants to the Plaintiffs were absolutely null and void, inasmuch as when those grants were made they were under the age of 21 years. The question would undoubtedly be one of very great importance and wide application in the colony, were it not for a recent Statute which has decided it with respect to all cases except those pending at the time of the passing of the Act; the Act affirming the validity of all grants to infants of whatever age before its passing, and of all subsequent grants to infants of and above the age of 16 years.

Upon an application which was made in pursuance of leave reserved to enter a verdict for the Plaintiff on the ground that the grants were void because the Plaintiffs were under 21, the

Court refused to grant the Rule Nisi, on the ground that the question had already been decided in the colony, in the two cases which have been referred to at the Bar. The first case was a case of Emery *v.* Barclay, decided in 1869, in the report of which this statement occurs:—"The Court "were agreed in the opinion that a selec- "tion might be made by a person under 21 "years, and by a father in the name of his "son." It is true that the Chief Justice, Sir Alfred Stephen, said in a subsequent case that the point was not argued, but was decided, as it were, incidentally and without much consideration. At the same time the case as reported appears to have been understood in the colony as deciding this point, and their Lordships cannot doubt that Mr. Justice Hargrave is right in saying that a good deal of land was purchased upon the strength of that decision, and that many titles may have depended upon it.

The subsequent case was decided in 1871. It was a case of *Drinkwater* v. *Arthur*, in which one of the questions was whether an infant of the age of 3½ years was capable of taking land under the Act referred to. The Chief Justice held that an infant of that age was not capable, on the ground apparently that it was of too tender age to be able to execute the necessary documents, or even to form any understanding of the transaction; but it is to be observed that the Chief Justice then expressed an opinion that an infant of the age of 16 or thereabouts would be capable of labouring, capable of occupying the ground, and capable of understanding the nature of the transaction in which he was engaged,—and would therefore be capable of taking under the Act. The other two judges decided that the infant

was capable, Mr. Justice Cheeke no doubt considering himself bound by the former decision. That was in 1871, and from that time until these actions were brought, the doctrine so laid down would not appear to have been questioned; and their Lordships must treat it as having been laid down by a course of decisions in the colony.

Their Lordships are now asked to reverse these decisions, and the ground on which they are said to be wrong is, in effect: that the sections of the Crown Lands Alienation Act which have been a good deal referred to, chiefly the 13th, the 16th, and the 18th, impose upon the person who is to apply, and who is to be the conditional purchaser, several obligations, such as the making of a written application, the payment of money by way of deposit, the ascertaining the temporary boundaries, the exercising of an option of whether to withdraw his application or to have the land re-measured, and at the end of three years the duty of improving the land, without which improvements it would be forfeited.

Undoubtedly there is a good deal of force in the arguments which have been drawn from these provisions, and their Lordships would be disposed to give them very great weight if the question before them was, whether the Governor would be bound to accept an application from an infant of so tender years as to be incapable of subscribing the necessary form, or of exercising any judgment, or even understanding the question with which it had to deal. It may be that the Governor would be justified in refusing such an application. It may also be that the Governor might repudiate such a transaction, if it were entered into, on the ground that the Crown had been imposed upon in its grant, or that the grant "improvide emanavit." These, however,

are not the questions which are before their Lordships. The Defendant has to make out, not merely that the Governor might exercise or might not exercise an option of refusing applications under certain circumstances, but he has to go the length of satisfying their Lordships that the word "person" used in section 13 must be limited to persons above the age of 21, and that any grant made to any person under that age is void, although he may be of years sufficient to reside on and cultivate the land, and to execute improvements, and to be able to decide for himself as to whether he should or should not exercise the option referred to; the Defendant has to satisfy their Lordships that the word "person" must necessarily be restricted to all persons above 21, and that a grant made to any person under 21, no matter how near he may be to that age, is so completely null and void that a stranger can take advantage of it in order to excuse a trespass.

Although their Lordships have not been entirely free from difficulty in considering this question, they have come to the conclusion that the Defendant has not established that which he had to make out. He has not satisfied their Lordships that they ought to reverse a series of decisions in the colony, and to lay down that a grant made to any person under the age of 21 is necessarily void to all intents and purposes. It has been, indeed, contended on the part of the Appellant that the meaning of the word "person" in the sections above referred to must be somewhat restricted, and cannot be held to have the effect of enabling any person to take who could not previously take a grant of crown lands, and so far their Lordships are disposed to agree with the view of the Counsel for the Appellant; but it is to be observed that the construction which they put

upon the clauses does not enlarge the powers of infants, inasmuch as before the passing of the Act the Crown might grant to infants, and infants might take.

On the whole, their Lordships think that no sufficient case has been made out to satisfy them that the Court was wrong, and to reverse decisions which have been acted upon for several years, and under these circumstances they will humbly advise Her Majesty to dismiss this Appeal.

A printed case was lodged on behalf of the Respondents, although they did not appear by Counsel at the Bar on the hearing. Under these circumstances their Lordships will direct that the Respondents should be allowed their costs down to the lodging of their case, inclusive. This sum will be paid to them out of the sum deposited by the Appellant in the Registry as security for the costs of the Appeal.