Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Abbott v. *The Minister for Lands, from the Supreme Court of New South Wales; delivered 30th March* 1895.

Present:

The LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.

[*Delivered by the Lord Chancellor.*]

The Appellant on the 20th March 1871 purchased 40 acres of Crown land in the county of Brisbane, which had been offered for sale by public auction and not sold, and they were granted to him in fee simple. The sale was carried out under the authority of section 25 of the Crown Lands Alienation Act 1861 (24 Vict No. 1).

On the 27th November 1873 the Appellant took up a conditional purchase of 40 acres adjoining the land he already held, and on subsequent dates he became the conditional purchaser of four other areas of 40 acres each.

On the 17th March 1892 the Appellant tendered to the Land Agent at Scone an application for an additional conditional purchase of 150 acres adjoining the holding formed by the purchases already mentioned and lodged with such application a deposit at the rate of 2*s.* an acre.

On the same day he also applied for a conditional lease of 440 acres in virtue of the additional conditional purchase referred to.

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The Local Land Board disallowed these applications and their decision was confirmed by the Land Appeal Court subject to a Case which they stated for the Opinion of the Supreme Court.

The questions raised for the Opinion of the Court were; first:—whether the Appellant's conditional purchase of the 27th November 1873 constituted him the holder of an original conditional purchase within the meaning of section 42 of the Act of 1884, 48 Vict No. 18; secondly:—whether section 2 of the Crown Lands Act of 1884 preserved to the Appellant the right to make additional conditional purchases of adjoining Crown lands to the full area of 640 acres allowed by the repealed Acts less the area of the freehold portion he originally purchased; and thirdly:—whether the Appellant supposing him to be entitled to the additional conditional purchase which he applied for on the 17th March 1892 was entitled in virtue thereof to the conditional lease which he applied for on the same day.

The Crown Lands Alienation Act of 1861 repealed the Orders in Council under which sales of Crown lands had theretofore been made and provided that they might lawfully be granted in fee simple under and subject to the provisions of that Act and not otherwise.

By section 13 it was enacted that Crown lands, other than certain excepted Crown lands specified, should be open for conditional sale by selection, and that any person might tender to the Land Agent for the district a written application for the conditional purchase of any of such lands, not less than 40 nor more than 320 acres, at the price of 20*s.* per acre, paying to the Land Agent a deposit of 5*s.* an acre. If no other like application was tendered at the same time such person was to be declared the conditional purchaser. If there was more than one such application and deposit the choice between the applicants was to be made by lot.

By section 18 it was (amongst other things) required before a grant of the fee simple could be obtained that there should have been three years' *bonâ fide* continuous residence either of the original purchaser or of his alienee or alienees and that no alienation should be made by any holder thereof until after his *bonâ fide* residence thereon for one whole year at the least.

It was by section 21 enacted that conditional purchasers of portions of Crown lands under section 13 not exceeding 280 acres might make additional selections of lands adjoining the first selection or each other, not exceeding in the whole 320 acres, subject to all the conditions applicable to the original purchase, except residence, and provided that nothing therein contained should prevent the sale of the adjoining lands to any other person before such further conditional purchase should have been made.

By section 22 holders in fee simple of lands granted by the Crown in areas not exceeding 280 acres might make conditional purchases of adjoining lands (not exceeding with the lands held in fee simple 320 acres) which should not be subject to the condition of residence applicable to conditional purchases in other cases. The section contains a proviso identical with that found in section 21.

Some modifications of these provisons were made by subsequent legislation. Prior to the year 1884 the area allowed to be purchased was increased from 320 to 640 acres, and the holder of land in fee simple making a conditional purchase of adjoining land under section 22 of the Act of 1861 was not to be entitled to the grant in fee simple of such adjoining land unless he should have resided for three years upon the land held in fee simple or on the land conditionally purchased in right thereof.

It is unnecessary to refer to the other changes

which were made. In 1884 the Crown Lands Act of that year was passed. By section 2 the Crown Lands Act of 1861 and the Acts which had amended it were repealed, subject to a saving provision to which attention will be called. Many of the provisions of the previous Acts were by that Statute re-enacted either in their original form or with modifications or additions. Crown lands with specified exceptions were still open for conditional purchase, but the terms of such purchases were somewhat altered. Any person above the age of 16 was allowed to become a conditional purchaser. The conditions as to residence were made more stringent. Every original conditional purchaser was required to reside for five years on the conditionally purchased land, continuously and *bonâ fide* living on such land "as "the conditional purchaser's usual home without "any other habitual residence." This Act, like the Act of 1861, provided for additional conditional purchases, but section 22 of the Act of 1861 had no counterpart in the later Act, there being no provision relating to the conditional purchase of adjoining lands by a holder in fee simple of lands granted by the Crown. It was obviously deemed a matter of policy to exclude such holder from the provisions relating to additional conditional purchases and to confine them to original conditional purchasers.

Section 42 which governs additional conditional purchases is in these terms :

"Any holder of a conditional purchase not exceeding in the "Eastern Division six hundred acres or in the Central Division "two thousand five hundred and twenty acres may make "additional conditional purchases of Crown Lands adjoining "the original or any prior additional conditional purchase or "each other provided that the original and such additional "conditional purchases do not exceed in the whole six hundred "and forty acres in the Eastern Division and in the Central "Division two thousand five hundred and sixty acres and that "all the conditions and obligations applicable to original con-"ditional purchases be fulfilled by such holder in relation to "every such additional conditional purchase except as herein-

" after provided And for the purposes of this section it " shall be immaterial whether the original or prior additional " conditional purchases were made under any of the Acts " hereby repealed or under this Act or partly under one and " partly under the other Provided that additional conditional " purchases may in special areas within the Eastern Central " and Western Divisions be made by holders of conditional " purchases such purchases original and additional not " exceeding one hundred and sixty acres."

It was contended for the Appellant that in right of the first conditional purchase which he had made under the provisions of section 22 of the Act of 1861 he might make the additional conditional purchase he claimed to make under the section just quoted.

Their Lordships concur with the Supreme Court in thinking that the Appellant is not a holder of a conditional purchase within the meaning of that section and cannot claim the benefit of it.

But it was further contended on his behalf that although section 22 of the Act of 1861 is repealed and there is no corresponding provision in the Act of 1884 yet that the saving proviso of the repealing section of the latter Act, (section 2,) enables him still to make an additional conditional purchase as if section 22 remained in force. The words relied on are these :

" Provided always that nothwithstanding such repeal—
" (*b*) All rights accrued and obligations incurred or " imposed under or by virtue of any of the said " repealed enactments shall subject to any " express provisions of this Act in relation " thereto remain unaffected by such repeal."

The Appellant argued that under the repealed enactment he had a right to make the additional conditional purchase and that this was a " right " accrued " at the time the Act of 1884 was passed and that notwithstanding the repeal it remained " unaffected by such repeal."

It is important to consider what a holder in fee simple of Crown land was enabled to do by section 22 of the Act of 1861. The section in terms empowers such a holder to make

conditional purchases adjoining such lands provided that the area of the land so conditionally purchased does not with the lands held in fee simple exceed 320 acres. But this though in form it was an enabling power was in reality rather in the nature of a restriction.

Under section 13 "any person" might tender for a conditional purchase of unsold lands. There was nothing therefore to prevent an owner in fee simple from tendering for and becoming the conditional purchaser of adjoining lands up to an area of 320 acres. It may be that if some other person tendered for the same lands at the same time section 22 would have entitled the fee simple holder to the preference instead of leaving the matter to determination by lot. But beyond this, that part of section 22 which has been quoted cannot be said to have conferred upon him any power which he had not already under section 13. What was of importance to him was the provision which followed—that the lands conditionally purchased should not be subject in his case to the condition of residence which was applicable to conditional purchases in other cases.

The substantial effect of section 22 therefore was that whilst it limited the fee simple holder of lands to conditional purchases which with the lands so held in fee simple should not exceed 320 acres, it dispensed with the condition of residence on the lands conditionally purchased.

Their Lordships think it fallacious to say that the section in question conferred on the fee simple holder of land the "right" to make conditional purchases. The only right which as it appears to them can be said to have been conferred was that he should be absolved from the condition of residence in the case of lands which he had conditionally purchased. The distinction is important, for it shows how broad

the contention of the Appellant is. It must, their Lordships think, necessarily go to this extent, that all the enactments of the Act of 1861 of which anyone could before their repeal have taken advantage continue for an indefinite time in force and may notwithstanding the repeal still be taken advantage of. It is difficult to see how the contention for example could stop short of this:—that any person entitled to make a conditional purchase under and on the terms of section 13 has an accrued right which is reserved to him by the saving proviso. For there is no difference between his position and that of the holder in fee simple, except that the latter may conditionally purchase without the obligation of residence and perhaps with the right to a preference in case of simultaneous applications for the same land.

It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to any one who could have taken advantage of any of the repealed enactments still to take advantage of them the result would be very far reaching.

It may be as Windeyer J. observes that the power to take advantage of an enactment may without impropriety be termed a "right." But the question is whether it is a "right accrued" within the meaning of the enactment which has to be construed.

Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words "obligations incurred or imposed." They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act

done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment.

Even if the Appellant could establish that the language of section 2 (*b*) was sufficient to reserve to him the right for which he contends he would have to overcome further difficulties. That enactment only renders "rights accrued" unaffected by the repeal "subject to any express "provisions of this Act in relation thereto."

And section 3 which is an express provision relating to the preceding section prescribes that—

"(1) No application to make any additional conditional "purchase of Crown Lands whatever by virtue of any holding "under any of the said repealed Acts shall be entertained or "dealt with otherwise than in accordance with the provisions "of this Act."

If this enactment is applicable to the Appellant's application it would seem fatal to his claim. It is said that it is inapplicable because it refers only to applications by virtue of a holding under the repealed Acts and that the Appellant made his application by virtue of a fee simple grant which was not a holding under the Crown Lands Acts.

The Chief Justice of the Supreme Court held that the words "under any of the said repealed "Acts" were to be read as referring to the application to make a conditional purchase and not as defining the nature of the holding.

Their Lordships think this is probably the true construction. Even if the other construction be the correct one it is not clear that a holding which has been obtained under the authority of the repealed Acts, and which could only have been obtained by virtue of them, cannot properly be termed a holding under those Acts.

Their Lordships think that the appeal fails

so far as regards the application for the additional conditional purchase, and it is conceded that if this be so the claim to a conditional lease must also fail.

Their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court should be affirmed and that the Appellant should pay the costs of this appeal.