Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Minister for Lands v. *Harrington and others, from the Supreme Court of New South Wales ; delivered the 3rd May* 1899.

Present :

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
LORD DAVEY.

[*Delivered by Lord Hobhouse.*]

The Respondent Harrington is the owner of a conditional purchase, and the other Respondents are his mortgagees. They presented separate Appeals in the Land Appeal Court, but their interests are identical, and they unite in resisting this Appeal by the Minister for Lands. The Appeal is presented to contest an answer given by the Supreme Court on a special case, which in effect affirmed the right of the Respondents to take up as an additional conditional purchase land adjacent to Harrington's conditional purchase.

The material transactions with their dates of time may be stated briefly. On the 4th July 1896 the land in dispute was reserved by notification for a public purpose. On the 9th January 1897 that notification was revoked by a notification which added that the land was not to be sold until the expiration of 60 days from

that date. This addition was unnecessary because the 60 days delay is prescribed by Section 102 of the Crown Lands Act of 1884. But it was doubtless made to remind the public of that provision. On the same 9th January 1897 in the same Gazette it was notified that the Land was set apart for homestead selections under Sections X. and XIII. of the Crown Lands Act of 1895. On the 11th February 1897 the Respondents lodged an application to take the land as an additional conditional purchase.

The Local Land Board, and on appeal the Land Appeal Court, disallowed the application, on the ground that, being made before the expiry of 60 days from the 9th January 1897, when the reservation for public purposes was revoked, it was not a valid application.

The Land Appeal Court then stated a case for the opinion of the Supreme Court. The question submitted was as follows:—

"1. Whether under the circumstances herein-before set forth "the said Joseph Harrington was entitled under Section 11 of "the Crown lands Act of 1895 to take up as an A. C. P. or C. L. "the land set apart for the purposes mentioned in Section 10 of "the said Act notwithstanding that 60 days had not elapsed "from the date of the revocation of the reservation mentioned "in paragraph 2 hereof."

The learned Judges of the Supreme Court, three in number, returned an answer which so far as material was in the following terms. Chief Justice Darley is speaking of the Crown Lands Act of 1895. He says:—

"By S. 11 it is provided that a notification that Crown "Lands are set apart 'shall not operate to prevent the lands "'situate within the tract or area so set apart being or "'becoming available for the purpose of an application for an "'Additional Conditional Purchase or a Conditional Lease of a "'series of which the Original Conditional Purchase was "'made before the date of the notification, in any case where "'the application is made not later than 40 days after the "'date of the notification.' The application has to be made "within 40 days of the notification, and not 40 days from the "date specified in the notification as the date when the land "becomes available for homestead selection. The 40 days

" therefore, in this case run from the 9th January. Prior to " the 9th January this land had been reserved from sale, and " on that date a notification was published in the Gazette " revoking the reservation. It is not necessary to decide " whether the word 'sale' in S. 102 of the Act of 1884 " includes a conditional sale and conditional lease. For the " purpose of this decision, I will assume that it does. The " provision in that section that the lands shall not be sold " until after the expiration of 60 days from the revocation of " the reserve is got rid of by the provision in S. 11 of the Act " of 1895, which provides that the application may be made " within 40 days. The provision in the latter Act is clearly " inconsistent with the former Act, and therefore must be " held to override it. I am of opinion that S. 11, so far as it " gives the right to apply for an Additional Conditional " Purchase or Conditional Lease during the 40 days after the " notification, does *pro tanto* repeal the provision in S. 102 " which prevents the application being made until after the " lapse of 60 days. The application having been made within " 40 days was a good and valid application, and should have " been given effect to.

" The question submitted to us will be answered in the " affirmative, and the Appeal upheld with costs."

That is the judgment appealed from, and their Lordships must express dissent from it. The 102nd Section of the Act of 1884 and the 10th and 11th Sections of the Act of 1895 have different objects. The former Act is dealing with land which, after being temporarily reserved from sale, has been released from that reservation; and it provides that such land shall not be sold for 60 days after the release. The latter Act is dealing with land set apart under powers given by Section 10 for holdings of specified kinds, and thereupon rendered unavailable for holdings of other kinds. In that case Section XI. provides that the notification under Section X. shall not operate to prevent the land becoming available for certain applications (of which the application of the Respondents is one) if made within 40 days. But though the Respondents are for 40 days relieved from the bar created by the notification which set the land apart for homestead selections, there is nothing to relieve them from the bar created by the fact that the

land had been temporarily reserved from sale. They were under two restrictions, one to endure for 60 days from the 9th January 1897; the other avoidable for 40 days after the 9th January but afterwards to endure permanently. Their Lordships are at a loss to see any contradiction between these two provisions.

A few days after the decision of the Supreme Court in this case it fell to their Lordships to decide the case of Colless *v.* The Minister for Lands now reported in L.R. App. Cases 1899, p. 90.

In that case the Appellant held a conditional purchase, and he applied for a conditional lease of adjacent land on the 23rd January 1896. The land had been leasehold area of a pastoral holding. On 18th December 1895 it was notified to be set apart for settlement leases. The application therefore was made within 40 days of that notification. But it was not until the 25th January, two days after the application, that the notification was published which had the effect of turning the land from its condition of leasehold area when it would not be available for conditional lease, into that of resumed area when it would be so available. The Supreme Court decided that Colless' application on 23rd January was not competent, and their Lordships affirmed that decision. They cannot distinguish that case from the present one. Though the causes of disability are different in the two cases, the Applicant was in each of them disabled by two causes, one subject to the grace of 40 days accorded by Section XI. of 1895, and the other not so subject. And it was held that Section XI. operated only upon the disability imposed by Section X. and did not give any right to anyone who is not in a position to make application when Section X. is brought into operation.

With regard to the point which the Supreme Court found it unnecessary to decide owing to the view which they took of the point just disposed of, their Lordships see no reason to doubt that in providing that land released from a temporary reserve shall not be sold for 60 days, the Legislature intended to say that the interest of the Crown should not be disposed of for pecuniary consideration in the ways which the reservation had precluded. It would be an undue and rather fanciful restriction of the meaning of the provision to suppose that it does not apply to a conditional sale, but must mean a completed sale of the absolute interest.

On the question whether an appeal to the Queen in Council is competent, their Lordships do not think it necessary to add anything to the observations made during the argument. They will humbly advise Her Majesty to declare that the question put in the special case ought to have been answered in the negative and that the Appeal from the Land Appeal Court to the Supreme Court should have been dismissed with costs. The Respondents must pay the cost of this Appeal.