Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Robertson v. *Dumaresq, from the Supreme Court of New South Wales; delivered 17th February,* 1864.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

THIS is an Appeal from the Judgment of the Supreme Court of New South Wales refusing a new trial in a proceeding in the nature of a Petition of Right brought by the Respondent against the Appellant, the Secretary for Lands and Public Works, nominated as Defendant to represent the Government under the provisions of an Act passed in the Colony "to give relief to persons having claims against the Government of New South Wales." The Respondent having, under the provisions of the Act, petitioned for and obtained leave to prosecute his claim, proceeded to file a Declaration against the nominal Defendant. It may be assumed that some rule or order of the Judges of the Supreme Court, made under the 3rd section of the Act, rendered this form of proceeding necessary, because the Act provides that if the Governor with the advice of his Executive Council shall think fit, the *Petition* itself shall be referred to the Supreme Court of the Colony for trial by Jury or otherwise, as such Court shall, after reference, direct. This remark is not unimportant, as it tends to show the untechnical nature of the proceedings contemplated by the Act.

The Plaintiff by his Declaration alleged (read 2nd, 3rd, 4th, 5th, 6th, and 7th paragraphs).

To this Declaration there appears to have been a

Demurrer which has not been transmitted with the other proceedings, but their Lordships were informed that it raised the question whether the Declaration disclosed any sufficient contract on which a right of action could exist. The Judgment of the Court upon the Demurrer was in favour of the Plaintiff, thereby determining that upon the face of the Declaration a sufficient cause of action was stated.

The action then proceeded upon the pleas, in the first of which the Defendant took issue upon the statements in the 2nd, 3rd, 4th, 5th, and 6th paragraphs of the Declaration, and to the 7th paragraph he pleaded that a fair equivalent for the grant promised was offered the Plaintiff and refused. This latter plea was clearly bad, and might have been demurred to, but it is unnecessary to consider it further, as it was not noticed by the learned Judge at the trial, nor by the Court upon the argument on the rule, nor is any question raised upon it in the reasons contained in the Appellant's case.

The parties being thus at issue they proceeded to trial before Mr. Justice Milford and a Jury.

Looking to the manner in which the inquiry was conducted, it is impossible not to see that all parties considered it to be a proceeding differing materially from an ordinary action, both in the considerations applicable to the claim, and in the extent to which evidence might be adduced in support of it. The Chief Justice also upon the motion for a new trial, seemed to treat the action as one of an exceptional character; much of the evidence might have been excluded, but it having been admitted without objection, the whole of it formed the materials upon which the Judgment proceeded, and it must be dealt with upon this Appeal to the same extent as in the Court below.

The learned Judge in summing up, directed the jury that "if the Governor promised to give the Plaintiff a piece of land, if and on condition that he would settle in the country, and he afterwards within a reasonable time did so, the promise was binding from that time. If he did so with an intention to complete the contract, he could take advantage of his having done so; but if he did so without reference to the contract, he could not. There was no consideration moving from him." And he put the question to them, "Did the Plaintiff perform the

condition—that is, did he settle with reference to the contract?" And with respect to damages, he told them that "they were to be estimated according to the present value of the land." The jury found a verdict for the Plaintiff, with 5,000*l.* damages. The Defendant moved the Supreme Court in the ensuing term for a new trial upon several grounds stated in his notice of motion, of which it will be only necessary to advert to four. 1st. That the verdict was contrary to law; 2nd. That it was against evidence; 3rd. That the damages were excessive; 4th. That the Judge misdirected the jury in telling them if they found for the Plaintiff, to assess damages on the basis of the present value of the land alleged to have been promised to the Plaintiff.

With respect to the first proposed objection, that the verdict was against law, it does not appear to have been raised upon the motion for a new trial, nor could it have been so. If the evidence of the contract offered at the trial shewed that it was invalid for some reason which was not apparent upon the face of the declaration, the Defendant should have applied to the Judge to nonsuit the Plaintiff, and whether he took this course or not it was not competent to him to raise the objection upon a motion for a new trial. And yet although the invalidity of the contract was not (and could not have been) a point for the consideration of the Court, upon the argument of the rule, it is assigned by the Appellant as the first of the reasons for his Appeal, and it was insisted upon at some length by his learned Counsel at the Bar. The objections which they urged were that the contract was without consideration, and that it was uncertain and indefinite as to the extent of the allotment to be granted and the character and cost of the building to be erected. But these objections not being open upon the present Appeal, they have been wholly excluded from their Lordships' consideration, as, in forming a judgment upon the case, they have endeavoured to confine themselves (as they were bound to do) to the questions raised in and determined by the Court below. They use the word "endeavoured" because it is a little difficult to ascertain the exact shape in which the objections to the verdict were presented to the Court. The only points which appear to have been argued are, that the verdict was

against evidence, that the Judge misdirected the jury as to the rule for estimating the damages, and that the damages were excessive.

The ground upon which the verdict appears to have been objected to as contrary to the evidence was, the jury having found that the Plaintiff had settled in the Colony with reference to the contract; in other words, that he performed the condition upon which he became entitled to the allotment of land. The Appellant's Counsel, however, objected to the verdict as against evidence upon another and a wider ground, and as their Lordships have no means of knowing whether the objection was or was not presented in this form to the Court below, they will not leave it unnoticed.

The Declaration alleges that the Governor promised the Plaintiff, as an inducement for him to settle in the Colony, to grant him a portion of Wooloomooloo; that the Plaintiff gave up his claim to the fulfilment of this promise in consideration of receiving a promise from the Governor of a grant of an allotment in Hyde Park Gardens; and that a portion of the land first promised to the Plaintiff was granted to Dr. Douglas by the Governor.

The Appellant's Counsel insisted that the Respondent had entirely failed in proof of these allegations; that he never had a promise binding upon the Governor in respect of Wooloomooloo, and that, therefore, his relinquishment of his claim to an allotment in that district could not be the consideration for the promise of a grant in Hyde Park Gardens. And for this they relied upon the terms of a letter written by Dr. Douglas, which was in evidence in the case as a part of the proceedings of the Committee of Legislative Council appointed to inquire into the Respondent's claim, in which, with reference to a particular portion of land in Wooloomooloo, he writes:—

"I should have applied for it before had I not understood it was Captain Dumaresq's intention to have done so. I have since learnt from that gentleman that he has abandoned the idea."

These expressions, however, are not at all inconsistent with the existence of a right at one time in the Respondent to select an allotment in Wooloomooloo if he chose to exercise it; and the evidence seems to be quite sufficient to have justified the jury (if this question had been submitted to them) in finding

that there was a binding promise of an allotment in Wooloomooloo, and that it was relinquished for the promise of a grant of a portion of Hyde Park Gardens.

Both these points appear to be fully established by the letter of the Respondent of the 2nd of June, 1830, and the answer of the Colonial Secretary, on behalf of the Governor, of the 9th of June, 1830.

The Respondent, in his letter, says, "I beg leave to bring to your Excellency's recollection the circumstance of your implied promise that I might have a building allotment in the neighbourhood of Sydney, and that on my renunciation of the land on Wooloomooloo Hills, afterwards given to Dr. Douglas, it was with the understanding that I should receive a portion of the Hyde Park Gardens in lieu thereof;" and he then requests the Governor to direct that an allotment may be measured off to him, and points out the one which, if permitted to select, he would prefer. The answer recites, in the usual official form, the purport of the Respondent's letter, and not denying, and therefore virtually admitting, the statement it contains, it informs the Respondent that the Governor had directed his application to be noted, "in order to its being considered with those of other applicants when arrangements may be making for the location of Hyde Park." The promise thus admitted to have been given was more distinctly recognized by Governor Darling in a Minute of the 15th October, 1831, made for the purpose of placing on record the claims of "the persons who were promised building allotments in Hyde Park," in which, arranging them in classes, he says, "The second class consists of William Dumaresq, Esq.; promised by me some considerable time back that he should receive an allotment as soon as the ground was measured, and he should have retired from the service," These letters and the official minute are amply sufficient to prove the allegations in the Declaration; and if the case had been left to the jury upon this proof, and they had found for the Respondent, their verdict could not have been disturbed. But, as already observed, the question seems to have been presented to the jury upon a narrower and different ground, viz., whether the Plaintiff had performed the condition upon which he became entitled to the allotment.

It appears that the learned Judge who tried the cause directed the jury that it was necessary for the Plaintiff to prove that he had settled in the Colony "with reference to the contract." But he afterwards agreed with the Chief Justice that the only material portion of the allegation in the Declaration was that after the promise or offer the Plaintiff, in fact, became resident, and that by so doing he performed the condition, and that it was not necessary to show a performance because and in consideration of the contract. The perplexity upon this part of the case seems to have arisen from the want of precision in the statement of the Plaintiff's cause of action, and from a misapprehension of the real nature of his claim. If it is necessary in this proceeding in the nature of a Petition of Right to state the claim in a technical form and to allege a consideration for the promise of an allotment, it is obvious that the true consideration was not the settling in the Colony, but the agreement to settle if a grant were made, and if this had been thought of at the trial an amendment of the Declaration might have been made which would have obviated all difficulty. It is not easy to understand how the actual settling in the Colony can be made a condition precedent to a grant of this description, because no proof of its performance can possibly be given; the utmost that any declaration, or act of the grantee prior to the grant, can amount to, being an intention to settle when the grant is made. But as the case was dealt with throughout as one in which the Plaintiff could only enforce the promise of the Governor by performing the condition, which was held to be the actual settling in the Colony, the question is whether, assuming this view to be correct, the evidence is not sufficient to support the verdict.

It appears that there were two periods at which an intention on the part of the Respondent to settle in the Colony was manifested; first, when he had received an offer of a Colonial appointment, and was, as he states, induced by it to go on half-pay; and afterwards, when having been placed on whole pay again, he determined upon selling his commission and settling in the country. It is to be observed that his evidence that "it was not the promise of the land which induced him to go upon half-pay and settle in the country, but the prior offer of the office

of Deputy Surveyor-General and other consequential advantages," relates to the land at Wooloomooloo, which he afterwards relinquished for the promised allotment in Hyde Park. As to this latter promise the Respondent states in his evidence at the trial: "In selling my commission and determining on settling in the country, I was influenced not alone by the specific promise, but also by my knowledge of the regulations which entitled me to a town allotment and a country allotment if I settled in the country."

There is no proof of the exact time when the Respondent sold his commission, but in the Minute of the 15th October, 1831, to which reference has been already made, Governor Darling says the allotment in Hyde Park was promised to him "as soon as the ground was measured and he should have retired from the service." Therefore the promise must have been made while he retained his commission, and if so, his retirement from the service was a performance of the condition. Even, therefore, if Mr. Justice Milford was right at the trial in saying that it was necessary for the Plaintiff to show that he settled in the country with an intention to complete the contract, there was here ample evidence to establish that fact.

But Mr. Justice Milford was of opinion that if his mode of presenting the case to the jury was correct, they were not warranted in finding that the Plaintiff had performed the condition unless his settling in the Colony was solely with a view to the contract, and to the exclusion of all other motives. But as he agreed with the Chief Justice that a residence in fact, after the promise, was all that it was material for the Plaintiff to establish, he thereby admitted that he had left the case improperly to the jury. It may, therefore, be considered unnecessary to examine his opinion that in order to show performance of the conditions upon which the promise was made, it was necessary for the Plaintiff to prove that it was his sole motive for settling in the Colony. But in order that no part of the case should appear to have been omitted from their Lordships' consideration, a few remarks may be made upon this opinion, and upon the opposite view of the Chief Justice.

It may be asked, if the opinion under consideration should be held to be correct, in what way could a person

holding a permanent official appointment in the Colony, who is promised an allotment, or a person who has already one allotment and is promised another, show that he has performed the condition in the strict and exclusive manner required? It seems only necessary to consider the nature of these grants to be satisfied that such a rigid rule can never properly be applied to them. When an application is made to the Governor for an allotment of land, and a promise is obtained, the application always implies a promise on the part of the applicant to settle in the Colony, because the grants invariably contain a condition to that effect. A continuance in the Colony, therefore, till the grant of the allotment is made, is necessarily connected with the promise, as without remaining, the applicant can never be entitled to the promised grant. In every way, therefore, in which this case either was or might have been presented to the jury, the evidence was sufficient to warrant the verdict.

The only remaining questions relate to the damages; whether the proper rule for their estimation was given by the Judge, and whether they are excessive. Supposing the rule for the measure of damages properly given, they do not appear to have been excessive. The Committee of the Legislative Council selected to investigate the Respondent's claim reported that he should be allowed to purchase land at auction for 5,000*l.*, a sum apparently fixed with reference to land granted to Sir F. Forbes, which was sold by auction in 1842 for that sum. It was contended on the part of the Appellant that the land of Sir F. Forbes had buildings upon it, and was therefore an improper standard of the value of land which the Respondent was to receive under an obligation to build upon it. But it appears very clearly by the evidence that Sir F. Forbes's land had never been built upon, and that even at the time of the trial it remained in its original unimproved state. If, then, the present value of the land was the proper criterion of the measure of damages, no objection can justly be taken to the amount awarded by the jury.

But upon what ground can it be alleged that the Judge was wrong in telling the jury to find their damages upon the present value of the land? The cases which were cited as to the measure of damages

upon contracts for delivery of goods and for the re-transfer of Stock have very little application. The distinction between these two classes of cases is said to be that in the former the damages should be only the value of the goods at the time when they ought to have been delivered, because the purchaser has his money in hand, and may go into the market and purchase similar goods; but as to Stock, that the borrower who neglects to re-transfer at the time agreed upon holds in his hands the money of the lender, and prevents him from using it.

The principle upon which damages are estimated upon the breach of an agreement for the re-transfer of Stock is more applicable to the Respondent's claim than that which is applied to contracts for the sale and delivery of goods, but the right of the Respondent to the highest value of the land which he has not received in performance of the promise made to him seems to be even stronger than that of the lender of Stock upon the borrower's omission to replace it. The owner of the Stock might have the means of purchasing other similar Stock at the day, but the allotment of land promised to the Respondent was a thing which he could not obtain except by the performance of the promise. If he had received his allotment as he ought to have done, he would have had it, with the benefit of the increased value which it might have acquired while in his possession. Of this the other party has deprived him by the breach of his promise; and whether he has obtained the benefit himself, or has hindered the Respondent from enjoying it, it seems to be equally just and reasonable that he should pay the full value of the property to the person from whom he has wrongfully withheld it. Their Lordships are therefore of opinion that the Judgment of the Court below is right; they will recommend to Her Majesty that it be affirmed, and the Appeal dismissed, with costs.