Judgment of the Lords of the Judicial Committee of Her Majesty's Privy Council on the Appeal of Charles Brown Fisher v. William Alcock Tully, from the Supreme Court of Queensland; delivered 14th March, 1878.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

THIS is an Appeal from a Judgment of the Supreme Court of the Colony of Queensland, dismissing a suit of the Appellant, in which he prayed for a declaration that "a valid and binding statutory engagement" subsisted between the Government of the Colony and himself for the grant of certain land to him in fee simple, and further prayed that the Government might be decreed to issue a deed of grant to him.

The main defence set up by the answer of the Defendant, who represented the Government, was that a declaration made by the Appellant upon his original application to become a conditional purchaser of the land, viz., that he lived in Queensland, was untrue, and "a fraud upon the Government and people of the Colony."

In 1869 the Appellant applied to the Government for some agricultural and pastoral land, then open to selection by conditional purchasers, under "The Crown Lands Alienation Act of 1868." The land so applied for consisted of 1,014 acres, and was numbered 307.

The application was made under Section 46 of the Act of 1868, which enacts:—"The mode and terms

of selection shall be as follows: Any person may on any office day tender to the Commissioner or Land Agent for the district an application in the form contained in Schedule E."

The form is as follows:—

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"I do hereby state my desire to become the lessee of the Crown lands hereunder described, which is now open to selection without competition under the provisions of 'The Alienation of Crown Lands Act of 1868,' and I hereby tender the sum of pounds shillings and pence as the first year's rent, together with the survey fee. I declare that I live in Queensland, and that I am above the age of twenty-one years, and that I apply for such portion on my own behalf and for my own use, and not as an agent or trustee for any other person whatsoever. And I further declare that I apply for the said portion in order that I may use the same, and that I have not entered into any agreement to sell, demise, or mortgage the the said portion.

"Declared before me (Signature.)

"(Signature.)

"J. P."

A declaration in the above form was made by the Appellant before a Justice of the Peace, and delivered by his agent at the proper office on the 29th November, 1869, but it is to be noted that the only date on the declaration was that of the year, "1869;" neither the day nor the month was inserted.

The general scheme provided by the Act in the case of conditional purchases is, that a lease is first granted by the Governor to the selector for ten years, at a fixed rent (which may become purchase money), payable yearly in advance; then upon payment of the whole of the rent, and, speaking generally, upon performance of the requirements and conditions of the lease and of the Act, the lessee is entitled to a grant in fee simple.

Provision is made, as will be presently seen, for the acceleration of the right to the grant in fee simple upon prepayment of the whole rent.

The lease from the Governor to the Appellant bears date on the 14th October, 1871. It contains a recital that he had made an application for a lease in the mode and terms required by the 46th section of the Act. The term is ten years from the 1st January, 1870, and the days for the payment of the rent (65*l.* 10*s.*) are mentioned in a schedule, being the 31st of March in each year. The lease is expressed to be made "with, under, and subject to

the several rights, powers, privileges, terms, conditions, provisions, exceptions, restrictions, reservations, forfeitures, and provisoes in the 51st section of the Act of 1868, and all other the rights (repeating the above words) in the said Act, or any regulations thereunder, relating to selections of a like nature contained."

Before adverting further to the facts, it will be convenient to refer to some of the provisions of the Act of 1868.

Section 51 is divided into sub-sections.

By sub-section 3 the lessee is required, within six months from the date of selection, to erect boundary posts, or a good and substantial fence along the boundary.

Sub-section 5 enacts that "the lessee, his agent, or bailiff, shall reside on the selection continuously and *bonâ fide* during the term of his lease."

Sub-sections 6 and 7, which provide for an acceleration of the right to a grant in fee, are as follows:—

"(6.) If within three years from the date of selection by lease of any pastoral land the lessee shall prove by two credible witnesses to the satisfaction of the Commissioner that he has resided in person or by bailiff on the said land for a period of two years, and that a sum at the rate of not less than 10*s.* per acre for first-class pastoral land, and 5*s.* per acre for second-class pastoral land has been expended on substantial improvements on the said land, or that he has fenced in the whole of the said land with a good and substantial fence, then the Commissioner shall issue a certificate that the conditions aforesaid have been duly performed, and the said lessee shall be entitled to a deed of grant in fee simple on the payment of the balance of the ten years' rent.

"(7.) If within three years from the date of selection of any agricultural land the lessee shall prove by two credible witnesses to the satisfaction of the Commissioner that he or his bailiff has resided on the land for a period of not less than two years, and that he has expended a sum equal to 10*s.* per acre on the land comprised in such lease, or if at any time during the currency of any such lease the lessee shall prove by two credible witnesses to the satisfaction of the said Commissioner that he has cultivated one-tenth part of the land, or if within three years from the date of selection the lessee shall prove by two credible witnesses to the satisfaction of the said Commissioner that he or his bailiff has resided two years on the said land, and fenced in the whole with a good and substantial fence, then the said Commissioner shall issue to such lessee a certificate that he has duly complied with the conditions of this Act, and the said lessee shall be entitled to a grant of the land in fee simple on the payment of the balance of the ten years' rent."

Sub-section 8 provides that no lease shall be transferred until the original selector has obtained the certificate mentioned in the above sub-sections.

Sub-section 9, which is material in one view of the case, is as follows :—

"If after a lessee has obtained a certificate by the Commissioner that he has duly completed the conditions of cultivation or improvement and residence required by this Act, he shall pay into the hands of the land agent a sum equal to the aggregate amount of the annual rents which would become due during the unexpired portion of the term of ten years' lease, together with the amount of the deed fee, such lessee shall be entitled to a deed of grant in fee simple of the lands comprised in such lease. If during the currency of any such lease the lessee shall not have duly fulfilled the conditions hereinbefore specified, then, on the expiration of the term of lease it shall absolutely cease and determine, and the lessee shall not have any claim whatsoever to any renewed lease, or priority of claim to either lease, or to purchase the land comprised therein, or the improvements, or to compensation for any part thereof."

The 57th section of the Act, containing the provision on which the Judgment of the Supreme Court rests, is as follows :—

"(57.) So soon as a lessee shall have made the last payment of instalments as hereinbefore provided, he shall be entitled to a grant in fee simple of the land leased to him, subject, however, to the payment of the fees chargeable on the issue of deeds of grant, and provided that he shall prove to the Governor in Council that he has faithfully complied with all the covenants and conditions contained in or implied by his lease under the provisions of this Act."

To revert to the facts of the case. On the 20th March, 1872, the Commissioner of Lands granted a certificate to the Appellant that he had by his bailiff resided on the land for two years and had properly fenced it ; and it is not disputed that this certificate was duly obtained, and satisfied the requirements of the 6th and 7th sub-sections above set out.

On the 27th June, 1872, the Appellant paid into the Colonial Treasury at Brisbane **the** aggregate amount of the rents for the unexpired portion of the term, together with the proper fee for a deed of grant, and the money was received at the Treasury and a receipt given for it by the authority of the Colonial Treasurer.

Having thus complied with the conditions of the 6th and 7th sub-sections, the Appellant applied to the Government for a grant in fee simple, but was met by the objection that the declaration that he lived in Queensland, made on his application for the lease, was untrue, and that the Governor would on that ground withhold the grant. Thereupon the Bill in this suit was filed.

The Judgment of the Supreme Court proceeded on the ground that the Appellant was not entitled to a grant of the fee until, in addition to the certificate of the Commissioner, he had satisfied the provision of the 57th section, and proved to the Governor in Council "that he had faithfully complied with all the covenants and conditions contained in, or implied by, his lease under the provisions of this Act."

The Court also held that the decision of the Governor in Council was conclusive, but declared its opinion, if the question was open to the Court, that the declaration that the Plaintiff lived in Queensland was, in point of fact, untrue.

On the part of the Appellant it was contended that, upon the true construction of the Act, his title to a grant was complete under the 6th, 7th, and 9th sub-sections of section 51 upon his obtaining the certificate of the Commissioner, and paying the full rent reserved by the lease, his learned Counsel insisting that the provision in the 57th section was applicable only to leases which had expired by effluxion of time.

It is somewhat singular that the Answer does not refer to the 57th section, nor in terms raise the objection as a bar to the suit, that the Appellant had not proved or offered to prove to the Governor in Council his compliance with the conditions of his lease. If the 57th section is applicable to the case, it would seem to be clear that such a bill as the present could not be sustained until an offer, at the least, to give such proof had been made to the Governor in Council.

Their Lordships, however, in consequence of the opinion they have formed on the nature and effect of the declaration made on the application for the land, do not think it necessary to decide the question whether the 57th section applies to cases like the present, or whether, if it were applicable, the

decision of the Governor in Council would be conclusive.

It may, however, be observed that even in the cases to which the 57th section is applicable, whilst it might be within the province of the Governor to determine conclusively whether the conditions of the tenure had been in fact performed, it is not to be assumed that his decision on the question of what are or are not conditions would, as supposed by the learned Chief Justice, be equally conclusive.

Passing, then, to the declaration itself, the first question to be considered is the meaning of the word "live." It is not a technical word, and was evidently used by the Legislature in a popular sense. So reading it, no one can reasonably doubt that the word implies something different from the transient presence in the Colony of the applicant for land, and that it imports that the applicant is dwelling in Queensland, having made it, for the time at least, his home. This construction does not exclude his having residences in other places, where he may sometimes be consistently with Queensland being his then place of abode, nor does it require an intention on the part of the applicant to make the Colony his permanent home, in the sense required to create a new domicile there.

The issue as to the truth of the declaration is distinctly raised in the pleadings. The bill alleges that the Plaintiff duly made "the solemn declaration required by the 53rd section" (which is nearly in the same terms as that required by the 46th), and alleges also that the Governor pretended that the Plaintiff did not then live in Queensland, whereas he charged that he did then live in the Colony within the meaning of the Act. The answer, as already stated, alleges that the declaration in this respect was untrue, and a fraud upon the Government.

How then does the evidence given in the cause, on this issue, stand?

The Appellant filed two affidavits, one sworn at Melbourne on the 8th January, 1874, the other at Sydney on the 13th January, 1874.

The Appellant nowhere says in his first affidavit that he lived in Queensland, and although in this affidavit he states that he had residences in the three Colonies of Victoria, South Australia, and Queens-

land, he does not say where they were situate, or of what nature they were, or that he ever occupied any particular "residence" in Queensland. The only mention in this affidavit of any particular place is that he describes himself as "of Headington Hill, Darling Downs, in the Colony of Queensland."

The second paragraph of this affidavit is as follows :—

"2. I first arrived in the Colony of Queensland in the month of July, 1868, shortly after which I acquired the most part of the aforesaid property in Queensland. Since that time I have frequently visited and resided in the said Colony of Queensland, and have also frequently visited and resided in each of the aforesaid Colonies of Victoria and South Australia."

It is to be observed that this paragraph omits to point out any house or place where the Appellant at any time resided.

Still more significant is the manner in which the paragraph specially directed to the 29th November, 1869 (the day of the application), is framed. All he ventures to say in it is that he had on that day residences in each of the three Colonies, "ready to be occupied by me at any time at my option."

The second affidavit is still more general, and abstains altogether from giving particulars capable of being met and answered.

In the 4th paragraph he swears that "the declaration was true in substance and in fact." The 20th paragraph is as follows :—"At the time when I made the declaration as aforesaid, I was living in Queensland." Although he thus swears that he was living in Queensland at the time he made the declaration, he omits to supply the date of making it, which may have been some months before his application was tendered to the Commissioner, and he abstains from stating particular facts. The conclusion is irresistible that he purposely refrained from doing so, finding himself unable to go beyond the loose statements already made in his first affidavit.

Affidavits by two Land Officers, Mr. Hume and Mr. McDowell, were filed on the part of the Government. Mr. Hume was Staff Surveyor of the district of Darling Downs, Queensland, and resided in it from 1865 to 1870. He also constantly visited the

Darling Downs district after 1870, his family having continued to reside there. In his first affidavit the Appellant had described himself "of Melbourne, in the Colony of Victoria; also of Hill River and Bundaleer, in the Colony of South Australia; and of Headington Hill, Darling Downs, in the Colony of Queensland." In his second affidavit he describes himself, after mentioning the other two Colonies, "of Talgai, and Headington Hill, Darling Downs." Mr. Hume says that he became well acquainted with the residents in the Darling Downs district. He states that the residence called Headington Hill was built in 1868, and was occupied in that year and in 1869 by Mr. Davenport; and that another house known as Headington Hill was afterwards built, and occupied by Mr. Davenport's manager. He also says that the place called Talgai was during all the time he knew the district occupied by Mr. Hanmer and his family. He adds (par. 10) "The Plaintiff did not, to my knowledge or belief, ever live at either of the Headington Hills mentioned in my affidavit, or at Talgai, or elsewhere in Queensland, unless it may have been during some short visit to the Colony." He says that about five years previously he was introduced to the Appellant by Mr. Davenport, but never met him in the Colony upon any other occasion. Mr. Hume concludes his affidavit in these words:—

"A man of the Plaintiff's position could not have lived in this district or been in it for any length of time without my knowing it or having heard of it. I never knew or heard that the Plaintiff ever lived or resided in this district or in this Colony, and I believe he has never been a resident of this Colony."

It is difficult to have stronger negative evidence than this gentleman's affidavit supplies.

Mr. McDowell became Commissioner of Lands for the district of Darling Downs on the 1st January, 1870, and appears to have known the district only since that time. He says that the Appellant, at long intervals, used to visit the Colony, remaining about four weeks at a time, but was never a resident of the district; and that, as far as he knows and believes, "he could only have lived at Headington Hill or elsewhere in the Colony during his temporary visits thereto."

This evidence on the part of the Crown might

not have availed against satisfactory proof on the part of the Appellant that he had lived in Queensland; but no such proof is forthcoming. Their Lordships have already commented on the unsatisfactory and defective nature of the Appellant's affidavits, and even the meagre statements contained in them are wholly unsupported by any witnesses on the part of the Appellant. It is obvious that if the Appellant had really lived in Queensland abundant evidence of the fact might have been produced. Moreover, the Appellant declined to submit himself to be cross-examined when the Government desired to do so. It appears that his legal advisers took some objection to the regularity of such a proceeding; but if the Appellant had chosen to meet the challenge of the Government, an opportunity would have been gained for explaining his real position.

Again, the omission of the month in the declaration, and the absence of any proof of the time when it was in fact made, are circumstances pregnant with suspicion.

Their Lordships are therefore driven to the conclusion, agreeing in this respect with the Judges of the Supreme Court, that the declaration is untrue.

Then could the Appellant have himself believed in its truth? Could he have mistaken the sense in which the word "live" was used in a declaration of this kind? In their Lordships' view it is impossible to suppose that a man of ordinary intelligence could so far misunderstand the meaning of the word as to believe that short and transient visits to the Colony, which is the utmost that has been shown to have occurred, would satisfy it. The facts were entirely within the personal knowledge of the Appellant, and if sheltering himself, it may be, under some assumed uncertainty of the meaning of the word "live," he chose to make the declaration without a *bonâ fide* belief in its truth, that would constitute such misrepresentation as would in law defeat the contract, provided it is established that the declaration was of a material matter, and one of the inducements for entering into it.

On this point their Lordships think that the declaration was not only of a material matter, but that it formed one of the bases on which the contract was founded. The 46th and 53rd sections both

require the declaration containing the representation that the Appellant lives in the Colony to be made before a Justice of the Peace, and upon it, when made, the contract proceeds. It is also recited in the lease as the foundation of the grant. Further it may be gathered from the general scope of the Act that residence in the Colony was meant by the Legislature to be an essential qualification of applicants for lands of the class selected by the Appellant. The object was to encourage and obtain settlers in the Colony.

The learned counsel for the Respondent, Mr. Kekewich, likened the present suit to one for specific performance, and cited Cadman *v.* Horner (3 Mer. 10), and other decisions of the same class, in which the Court refused to exercise its jurisdiction to decree specific performance, where the Plaintiff had been guilty of misrepresentation, or did not come into Court with clean hands. There is no doubt an analogy between the cases, though it may not be complete, the intervention of the Statute creating differences in some respects between the present contract and those which are purely personal. That the condition in question is imposed by a Statute does not, however, create a distinction in favour of the Appellant, and therefore, upon the principle of the cases referred to, and independently of the 128th section of the Act of 1868, their Lordships think that the Appellant, who is an actor in this suit, and asks the Court to enforce a right springing from what he describes in his Bill as a valid and subsisting statutory engagement, is not entitled to the relief he prays. In one of the cases referred to by the learned Counsel for the Defendant, Mr. Wood, the Judges very clearly point out the distinction between suits brought to enforce contracts, and those brought to avoid them (Feret *v.* Hill, 15 C. B. 207; see also Canham *v.* Barry, ibid, 597).

No questions of waiver, or of election to affirm the contract, arise in this case, there being an entire absence of evidence that the officers of the Government knew that the declaration was untrue, either at the time when the lease was granted, or when the rents were received.

Nor are their Lordships now called on to determine whether the Government is bound to repay to

the Appellant the prepaid rents, or whether possession of the land can be retained by him until they are refunded. Questions of this kind might arise in a suit brought to avoid the contract, and recover the land.

In the result their Lordships will humbly advise Her Majesty to affirm the judgment of the Supreme Court with costs.

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