[HIGH COURT OF AUSTRALIA.]

GANDER . . . . . APPELLANT;
DEFENDANT,

AND

MURRAY . . . . . RESPONDENT.
PLAINTIFF,

ZOBEL . . . . . APPELLANT;
DEFENDANT,

AND

MURRAY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, Dec. 4, 5, 6, 16.

Griffith C.J., Barton and Isaacs JJ.

Vendor and purchaser—Contract for sale of mining property—Vendor only entitled to limited interest—Enforcement—Rights of purchaser against subsequently acquired interests of vendor—Equitable estoppel—Authority to enter—Mining on Private Lands Acts (N.S.W.)—Partnership Act (N.S.W.), (55 Vict. No. 12), sec. 31.

G. and Z. were carrying on mining operations in partnership upon 20 acres of land, under an authority issued to G. under the Mining on Private Lands Acts. The authority conferred no interest in the land, but merely the right to enter and search for minerals upon a certain area for one year, in anticipation of a title to be subsequently acquired by lease from the Crown of the minerals contained in the area. G., believing himself to have authority from Z. to sell Z.'s share, though he had not such authority in fact, agreed to sell to M. the whole interest of the partners in the land, mining machinery, effects and ore, &c., upon the land. Before the expiration of G.'s authority to enter, M. made an unsuccessful application for an authority to enter an area of 33 acres including the 20 included in G.'s authority, and later, G.'s

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authority having expired, Z., on his own behalf, obtained an authority to enter the 33 acres, having previously agreed to take G. in as a partner in the new adventure, and the two proceeded to work the area on the same terms as before.

In a suit by M. against G. and Z., to have Z. declared a trustee for him of the authority to enter and the benefits attaching to it, and for an injunction and account, with consequential relief :—

Held, on the evidence that Z. acquired the authority free of all equities as far as M. was concerned ; and that, as the contract of sale, if it could take effect at all, could only take effect as to G.'s limited interest in the original undertaking, and that undertaking had terminated on the expiration of G.'s authority to enter, there was a complete break of title between G.'s first and second interests, and there was no equitable estoppel arising out of the contract by which G.'s subsequently acquired interest could be affected so as to entitle M. to have Z. declared a trustee for him of G.'s half share.

Held, further, that even if G.'s subsequently acquired interest could be regarded in equity as an accretion to or in substitution for his interest in the original undertaking, the interest which he had at his disposal on that assumption was so substantially different from what he contracted to sell that, whatever remedy M. might have by way of damages, he was not entitled in equity to have the contract enforced even to the extent of G.'s limited interest.

Principle stated by *Jessel* M.R. in *Cato* v. *Thompson*, 9 Q.B.D., 616, at p. 618, and adopted by *Farwell* J. in *Rudd* v. *Lascelles*, (1900) 1 Ch., 815, applied.

Held, also, that the contract operated as an assignment by G. of his share in a partnership, and, therefore, by sec. 31 of the *Partnership Act* 1892 could not be enforced as against Z. the other partner.

Decision of *A. H. Simpson* C.J. in Equity : *Murray* v. *Zobel*, (1908) 8 S.R. (N.S.W.), 81, reversed.

APPEAL from a decision of *A. H. Simpson*, C.J. in Equity.

This was a suit by the respondent against the appellant and one Zobel, in which the plaintiff sought to have it declared that Zobel was a trustee for him of the benefits attaching to what is termed an authority to enter under the Mining on Private Lands Acts. He also asked for an injunction restraining the defendants from dealing with certain machinery and other chattels alleged to have been sold by the defendants to him, for an account of profits derived from the working of the land included in the authority to enter, and for the appointment of a receiver, and for other consequential relief.

Upon the suit coming on for hearing *A. H. Simpson* C.J. in Equity made a decree declaring the defendant Zobel a trustee of the lands comprised in the authority to enter, upon trust as to one moiety for the plaintiff and as to the other moiety for himself, and ordered accounts to be taken of the receipts and expenses of the mine under the working of the defendants. No order was made as to Zobel's costs of suit: *Murray* v. *Zobel* (1).

From this decision the present appeal was brought by the defendant Gander. An application by Zobel for special leave to appeal on the question of costs was allowed to stand over to the hearing of the main appeal.

The facts appear sufficiently in the judgments hereunder.

Cullen K.C. (*Maughan* with him), for the appellant. On the evidence Zobel acquired his authority free of all equities so far as Murray was concerned. He was a purchaser for value from the Crown, and as he owed no duty to any person but himself, he was at liberty to dispose of a share in the benefit of the authority, and could give Gander a good title thereto: *Harrison* v. *Forth* (2).

[ISAACS J. referred to *Barrow's Case*: *In re Stapleford Colliery Co.* (3)].

The appellant's interest in the undertaking carried on under Zobel's authority was not affected by any equities created by his contract with Murray. It was wholly distinct from his interest in the original enterprise. There was a complete break of title, and in the interval the land was open to the world. There was no continuity whatever between the interest of the holder of the second authority and that of the holder of the original one. It was a new authority granted to a new person in respect of a different area of land. [He referred to Acts 57 Vict. No. 32, secs. 8, 9, 11, 12; and 60 Vict. No. 40; *Hanrick* v. *Patrick* (4).] The appellant was not estopped in equity from enjoying the newly acquired interest as his own. The only interest that could be affected by the contract of sale had come to an end by force of law. This is not a case of the estate feeding the estoppel:

(1) (1908) 8 S.R. (N.S.W.), 81.
(2) Pre.Ch., 51.
(3) 14 Ch. D., 432.
(4) 119 U.S., 156, at p. 175.

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Smith v. *Osborne* (1); *Williams on Vendor and Purchaser*, p. 1056. The appellant was not in a fiduciary position towards Murray so as to be bound as to any rights he might subsequently acquire. He only sold his right, title and interest in the property at the date of the sale.

[ISAACS J. referred to *Watts* v. *Driscoll* (2)].

It was an assignment of a share in a partnership within sec. 31 of the *Partnership Act* 1892, and the suit should have been dismissed on that ground.

In any case the claim is barred by laches and acquiescence on the part of Murray: *Clarke* v. *Hart* (3); *Moore* v. *Morgan* (4) *Rowe* v. *Oades* (5).

Langer Owen K.C. (*Charles Manning* with him), for the respondent Zobel, having asked for special leave to appeal from the decision of *A. H. Simpson* C.J. in Equity as to Zobel's costs of suit, was heard on the question of costs.

Zobel should not have been deprived of his costs of suit merely because he admitted that he only claimed to be a trustee as to half the property for the appellant. He was altogether successful as to the half which he claimed for himself. Even if the appellant does not succeed on this appeal Zobel should be allowed his costs of suit: *Westgate* v. *Crowe* (6).

If the appellant is successful, it follows that Zobel was right in claiming to be a trustee for the appellant, and should have his costs.

The appellant should succeed. The benefit of the authority granted to Zobel was free of all equities. He was in no fiduciary position towards Murray: *In re Biss*; *Biss* v. *Biss* (7); *Kennedy* v. *De Trafford* (8). The appellant's interest in the new undertaking was not affected by the contract of sale: *Smith* v. *Osborne* (1).

Harvey, for the respondent Murray. The appellant when he made the contract with Murray honestly and rightly believed he

(1) 6 H.L.C., 375.
(2) (1901) 1 Ch., 294.
(3) 6 H.L.C., 633, at p. 656.
(4) 21 N.S.W.L.R. Eq., 158.
(5) 3 C.L.R., 73, at p. 78.
(6) 24 T.L.R., 14.
(7) (1903) 2 Ch., 40, at pp. 55, 57, 58.
(8) (1897) A.C., 180.

had authority to sell Zobel's interest. The partnership, therefore, was not dissolved: *Hooper* v. *Herts* (1). The contract was for the sale of the mining property, not merely of the benefit of the authority to enter, and the method by which Murray was to get the property was a mere matter of conveyancing. The appellant was estopped from saying that he had no authority from Zobel, or from saying that his subsequently acquired interest is not the same as that which he sold to Murray. He should be compelled to carry out the contract to the extent of his interest at least. He is estopped as between himself and Murray from contending that Zobel's authority to enter *quâ* the appellant's interest is not an accretion to his original interest. The authority obtained by Zobel must be taken to have been obtained for the partnership: *Featherstonshaugh* v. *Fenwick* (2); and Zobel stood in such a relation to Gander that, if he refused to ratify the sale to Murray, the partnership still continued, and, Murray having stepped into Gander's shoes, Zobel became a trustee for Murray, at any rate, to the extent of Gander's interest. On the evidence his Honor was in error in holding that Gander had no ostensible authority from Zobel to sell the whole property. There was no laches or acquiescence on Murray's part. In any event, if the suit is dismissed it should be without any order as to Gander's costs, as he misled the plaintiff.

Cullen K.C. in reply. The plaintiff failed to establish that there was any fiduciary relationship between Zobel and himself, or that he had placed Zobel in a better position than he was in himself with regard to obtaining an authority.

Cur. adv. vult.

Dec. 16.

GRIFFITH C.J. The subject matter of this suit may be described as an interest in a mining adventure carried on upon private lands under the provisions of the Mining on Private Property Acts. Mining operations seem to have been carried on intermittently upon the land in question for some years, at a place known as the Mount Bulga mine, the mineral sought for being copper. The nature of the title or interest conferred by the

(1) (1906) 1 Ch., 549. (2) 17 Ves., 298.

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Acts I have mentioned depends upon a document called an authority to enter, which may be granted by the Warden to the holder of a miner's right or business licence. The authority continues in force for one year, and authorizes the holder of it to enter upon the particular area of private land described in it, to prospect for the mineral or minerals specified, and to carry on mining operations subject to certain prescribed conditions. But it does not confer any title to the land itself; it is not transferable; it may be renewed; and it is regarded as being merely anticipatory to a title to be afterwards acquired by lease from the Crown of the minerals contained in the private land. So much for the nature of the property. The appellant Gander held an authority of this kind for an area of about twenty acres of land, which was granted on 2nd August 1904, and consequently expired on 1st August 1905. It is alleged in the statement of claim that the authority was held by Gander on behalf of himself and the defendant Zobel in equal shares, and it may be taken to have been established that, although the authority was in the name of Gander, he and Zobel were equally interested in the adventure. I use the neutral term "adventure" advisedly. In July 1905, very shortly before the authority expired, the respondent Murray entered into negotiations with Gander for the purchase of the adventure. At that time Gander represented, probably honestly, that he had authority from his co-adventurer Zobel to sell his share, and was consequently in a position to dispose of the whole adventure. On 1st August 1905 an agreement in writing was drawn up between Gander and Murray, by which Gander agreed to sell to Murray for £200 all the machinery, fittings, chattels, property, and effects used in connection with the adventure on the land, also the copper ore that had been mined and was lying upon the land. No one was then in possession of the land. The agreement was silent as to any title or interest in the land itself. With a view to carrying out the bargain between Gander and Murray, which was made in the first instance verbally, it was arranged between them that, in order to give effect to it, Murray should apply for an authority to enter the land in his own name. He, however, desired to have a larger area, viz., 33 acres, including the 20 acres comprised in the authority held

by Gander. Accordingly, on 20th July, before the execution of the written agreement of 1st August, Murray lodged an application with the Warden for authority to enter the 33 acres, and on 1st August, the day on which the agreement was signed, Gander notified the Warden that he had abandoned the 20 acres held by him under his authority. It seems to have been supposed that upon that intimation a fresh authority would be granted to Murray by the Warden for the 33 acres. The Warden, however, took a different view, and held, in effect, that as Gander's authority was still in force, it was a bar to Murray's application, and on 10th August he refused it. On the same day, 10th August, Zobel applied for authority to enter the 33 acres, and on 12th August Murray made a second application which was also refused. Then he lodged an objection to the authority being granted to Zobel. There followed what may be called a quasi-litigation between Murray and Zobel. The parties appeared before the Warden, Zobel pressing his application and Murray opposing it. Gander, loyally endeavouring to carry out his agreement with Murray, assisted him in trying to defeat Zobel's application. The result was that early in 1906 it was understood that the Warden would grant Zobel's application, and on 12th March in that year Zobel received a formal authority to enter the 33 acres. Shortly before 12th March, when it was known what the Warden's decision would be, Zobel had agreed to take in Gander as a partner with him in the new adventure, which was intended to be carried out under the new authority.

These being the facts, this suit was brought by Murray. His claim was put in this way: That the property being a mining adventure ought to be treated as one which may be properly the subject of specific performance; that Zobel by his agent agreed to sell his share, so that the whole adventure was really sold to Murray; that Zobel, having immediately afterwards taken up the land himself, was acting in fraud of the agreement; and that an equity attached to the whole property, by virtue of which the plaintiff, Murray, was entitled to claim the benefit of the new adventure. There were some legal difficulties in the frame of the suit as it was brought, but they were not pressed before us, and it was assumed that they could be got over. The suit was

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founded on the doctrine in *Keech* v. *Sandford* (1), applicable to the renewal of a lease by a trustee in his own name.

As I have already pointed out, the adventure was the joint adventure of Zobel and Gander. Before further dealing with the facts of the case, it is important to consider what was the nature of their joint interest in the mining adventure. There was clearly no estate in the land itself. Whatever right the partnership had with regard to the land was not in the nature of partnership assets, but a mere right to work it, belonging to Gander, to the benefit of which both partners were entitled so long as the partnership existed. In his statement of defence Zobel denied Gander's authority to sell his interest in the partnership, and the learned Judge has found that Gander had no such authority, so that the attempted sale of the whole adventure failed. The defendant Gander in his statement of defence alleged that the only authority he had held from Zobel was contained in three letters to which he craved leave to refer. He further alleged that he informed Murray that that was all the authority he had, and that Murray understood that, except so far as these letters conferred authority, he had none. The facts being, as the learned Judge found, that Gander had no authority to sell Zobel's interest, the transaction could not be carried out in the form originally intended. The plaintiff did not make any alternative claim, or ask for an amendment claiming that he was entitled to a half share in the mine, as in *Price* v. *Griffith* (2), if he could not get it all; but it seems to have been assumed that there was no difficulty in giving the plaintiff the same relief with respect to the half share as he would presumably have been entitled to with respect to the whole. The learned Judge in his judgment declared that Zobel held the land, with respect to which he had received the new authority to enter, upon trust, as to one moiety for the plaintiff and as to the other moiety for himself, and he directed that there should be a reference to the Master to take an account of the receipts and expenses in respect of the mine as between the defendants and the new partner Murray from 1st February 1906, with some other directions.

It is obvious that this decree is founded on two propositions

(1) Sel. Ch. Ca., 61.

(2) 1 D.M. & G., 80.

that were assumed to be established: (1) that the contract regarded as applying to the half share was one of which specific performance could be granted; and (2) that the substituted property, that is to say, the share which Gander acquired in Zobel's new adventure of March 1906, ought to be regarded in equity as an accretion to, or in substitution for, the subject matter of the original contract, or rather for the half share which is now assumed to be the subject matter of the original contract. The second proposition proceeds upon what is sometimes called equitable estoppel.

These being the two propositions upon which the plaintiff's claim rests, in my opinion he fails on both points. In *Thomas* v. *Dering* (1), before Lord *Langdale* M.R. in 1837, the plaintiff brought a suit for specific performance of a contract of sale. It appeared that the defendant could not give the plaintiff what he had contracted to give him, as he was only partially interested in the property. The plaintiff thereupon claimed that he was entitled to a decree that the defendant should give him as much as he could give him. I quote from the judgment (2):—"Though the vendor cannot be heard to suggest the difficulties which he has occasioned, the Court cannot avoid them. It is impossible not to see that the *cyprès* execution of the contract which is given in these cases is in fact the execution of a new contract which the parties did not enter into, in which there is no mutuality, and in which there are no adequate means of ascertaining the just price. . . . I therefore apprehend it to be clear that the Court will not, in all cases, afford the sort of relief which is here asked." And again (3):—"But without derogation, in any respect, from the jurisdiction, it is apparent that the Court will not, in every case, compel the vendor to convey such estate as he can: and omitting on this occasion those cases in which the purchaser, at the time of the contract, knew of the limited interest of the vendor, or in which an attempt has been made to commit a fraud on a power, which have no application to the present case, I apprehend that, upon the general principle that the Court will not execute a contract, the performance of which is unreasonable, or would be prejudicial to persons interested in the property, but

(1) 1 Keen, 729. (2) 1 Keen, 729, at p. 746. (3) 1 Keen, 729, at p. 747.

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not parties to the contract, the Court, before directing the partial execution of the contract by ordering the limited interest of the vendor to be conveyed, ought to consider how that proceeding may affect the interests of those who are entitled to the estate, subject to the limited interest of the vendor." In *Lumley* v. *Ravenscroft* (1) the same question was discussed by the Court of Appeal. In that case there were two vendors, one of whom was an infant, so that the contract as far as he was concerned could not be enforced. *Lindley* L.J. said (2):—"What is the law? Specific performance is out of the question. You cannot get specific performance against an infant, and upon the evidence before us no case is made out for specific performance against the other defendant either. This case is not within the exception as to misrepresentation or misconduct stated in *Price* v. *Griffith* (3) and *Thomas* v. *Dering* (4), but comes within the general rule that where a person is jointly interested in an estate with another person and purports to deal with the entirety specific performance will not be granted against him as to his share. The plaintiff's only remedy is by way of damages. As to that I say nothing. But if it would be wrong to grant specific performance, it follows that it would be wrong to grant an injunction." I will also refer to *Rudd* v. *Lascelles* (5) decided by *Farwell* J., which also was a case in which the vendor could not give all that he had contracted to sell. *Farwell* J. said (6):—"But in this case, if I grant specific performance I shall decree specific performance not of the contract made by the parties, but of a new contract made for them by the Court." He then quoted the passage which I have just read from the judgment of Lord *Langdale* in *Thomas* v. *Dering* (7), and continued:—"In the present case the bargain between the parties contains no provision for compensation, such as is now common in conditions of sale. Cases where there is such a provision do not present so much difficulty because compensation is part of the bargain. But here nothing of the sort was contemplated, and if I enforce the contract with compensation I am compelling the vendor to

(1) (1895) 1 Q.B., 683.
(2) (1895) 1 Q.B., 683, at p. 684.
(3) 1 D.M. & G., 80.
(4) 1 Keen, 729, at p. 744.
(5) (1900) 1 Ch., 815.
(6) (1900) 1 Ch., 815, at p. 818.
(7) 1 Keen, 729, at p. 746.

perform a contract into which she did not enter." Then he referred to the fact that the case rested upon equitable estoppel, and he went on (1)—"But I am not compelled to decide the case on that ground alone; there is a further ground which depends on a dictum of *Jessel* M.R. in *Cato* v. *Thompson* (2), a dictum, I need not say, of very great weight. One ground for refusing specific performance with compensation is the great difficulty of properly assessing the compensation, and in *Cato* v. *Thompson* (3), in which there were restrictive covenants like those in the present case, and the purchaser brought an action to recover his deposit, *Jessel* M.R. said in answer to an argument that the purchaser ought to complete with compensation:—'Now, in the first place, this is not a case for enforcing specific performance on a purchaser with compensation. It is almost impossible to assess compensation for covenants of this nature. I think that cases of specific performance with compensation ought not to be extended. In many of them a bargain substantially different from that which the parties entered into has been substituted for it and enforced, which is not right. I think this not a case for compensation.'" There is no question of compensation here, because the plaintiff is willing to pay the whole price for the half share, but I think the general observations made in the judgment are applicable to this case. There was another case before *Farwell* J. in the same year, relating to the sale of a partnership, where it was sought to carry the doctrine to this extent—that in no case would specific performance be granted of the sale of a share in a mine, but the learned Judge said that he could see no reason why the contract should not be enforced to the extent of a half share where there had been a sale of the whole. (*Hexter* v. *Pearce* (4)). But that is a very different thing from the case where all that the vendor can do in pursuance of his part of the agreement is to give a share in a partnership. Applying this doctrine to the present case, it is clear that the contract cannot take effect as it was intended to take effect. The Court is really therefore asked to make a new bargain between the parties. Supposing the authority, instead of terminating almost immediately after the contract

(1) (1900) 1 Ch., 815, at p. 819.
(2) 9 Q.B.D., 616, at p. 618.
(3) 9 Q.B.D., 616.
(4) (1900) 1 Ch., 341.

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was made, had had nine months to run, and under these circumstances Gander had agreed to sell to Murray the whole interest in the mining adventure, and the plaintiff had sought to enforce that bargain as to the half share, the plaintiff would not be asking for specific performance of a contract for sale of property but of a contract for the sale of a share in the partnership and that as against the other partner. The *Partnership Act* (55 Vict. No. 12) forbids such a suit. Sec. 31 provides that:—"An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any account of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners." It is therefore clear that as between Murray and Zobel, so long as the adventure was carried on under the existing authority, Murray would have acquired no rights against Zobel to be treated as a partner, nor could he have compelled Zobel to take out a new authority for his benefit. He could not claim any share in the land itself. For these reasons it seems to me that, if the case had not been complicated by the termination of the original authority and the substitution of the new one, it would have been clear that the plaintiff could not have obtained any relief in equity against Zobel, though he might have had a remedy in damages against Gander.

Turning now to the other assumption, that there is a substantial identity between the old adventure and the new one: What are the facts? At the expiration of Gander's authority on 1st August 1905 he had no further right to the land, or in any way connected with the land. Zobel, whose share in the partnership had been ineffectually sold, was, when that authority expired, perfectly free to obtain authority for himself to enter the land. There was no privity between him and Murray. Zobel only did what he was entitled to do when he got his authority

to enter the land, and it cannot be disputed that he acquired that authority free from all equities as far as Murray was concerned; consequently any rights which the plaintiff could acquire in the new adventure did not accrue until Gander became a member of the new partnership with Zobel. His only claim as against Zobel was founded on the supposition that Gander before entering into the new partnership had agreed to sell him his rights in that partnership. Under these circumstances, as I have pointed out, he was not entitled to any ruling as against Zobel; certainly not to have Zobel declared a trustee for him. Again: As against Gander the plaintiff cannot have any greater rights *quoad* the property than he would have had if, instead of relying upon an equitable estoppel, he had relied on a legal estoppel, such as is created by a conveyance in the case of a property capable of being conveyed. If he had relied upon anything of that kind the case of *Smith* v. *Osborne* (1) is conclusive to show that such an estoppel would not have applied to an interest arising under a new and distinct title. There is no doctrine that I am aware of under which a general right can exist, as one might say *in gremio*, to any interest which another man may acquire in property, at any future time, or by any means. A contract to that effect may be made, but there is no equitable doctrine that lays down that it may be enforced specifically, or otherwise than by a claim for damages for breach of contract. *A fortiori* there is no doctrine that, because a man has made an ineffectual contract to buy the share of a partner in a partnership which has since terminated, he is entitled to claim that partner's share in another partnership entered into six months afterwards relating only in part to the same property. For these reasons I am of opinion that the plaintiff's case entirely fails on both grounds, and that the appeal should be allowed.

BARTON J. As to the enforcement of specific performance on a vendor with compensation for defects, in *Rudd* v. *Lascelles* (2), *Farwell* J. expressed the opinion that relief should be confined to cases where the actual subject matter is substantially the same as that stated in the contract, and should not be extended to cases

(1) 6 H.L.C., 375. (2) (1900) 1 Ch., 815.

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where the subject matter is essentially different. That is surely right. The property here (if it can be called property) is not in substance identical. The original authority granted to Gander was for 20 acres, and that was the interest which was the subject of the agreement between Gander and Murray, as to which Gander appears to have assumed authority to dispose of Zobel's interest as well as his own. That area of 20 acres was the subject of Gander's application. Gander's authority to enter had expired, but it could have been regranted or renewed in certain circumstances, in pursuance of the agreement. Gander appears to have done his utmost to see that Murray obtained a fresh authority. These authorities are personal rights, and they do not seem to stand on anything like the same footing as ordinary estates the subject of contracts which may be ordered to be specifically performed. At any rate we find that, notwithstanding the efforts of Gander in his support, Murray failed to obtain an authority to enter and search the 20 acres, or the 33 acres which included the 20 acres. It appears to me, that when the authority to Gander ran out, there was, as Dr. *Cullen* contended, an entirely fresh departure in title (if title it can be called), and that there was nothing which could for a moment be successfully contended to be the identical subject matter upon which the application of Gander originally had been granted. It seems impossible to contend that what Murray applied for was the same subject matter respecting which Gander held authority to enter. The fact that the same acreage was applied for by Zobel afterwards, cannot possibly be held to make it the same right in respect of which the contract or agreement between Gander and Murray was entered into. The title against which specific performance is sought is an entirely new one. Gander had abandoned, but he had done so in assisting Murray to obtain a new authority. By applying at the wrong time, Murray failed, and he repeated his failure for the same cause. In these failures Gander was in no sense concerned, nor was he responsible for either of them. Gander had done all that was demanded of him. He had done his best in assistance of Murray's application. Gander cannot be said to have broken his contract. Murray's failures were not the fault of Gander. They were due to his too hasty application in the first instance,

and his too tardy application in the second, in competition with Zobel, who seems to me to have been under no obligation whatever to him to abstain from applying or to give him any of the fruit of his application. He was free to do as he did. Between him and Murray there were no transactions whatever out of which a trust in him in Murray's favour could arise. As to the alleged estoppel, my learned brother the Chief Justice has pointed out that the case of *Smith* v. *Osborne* (1) completely disposes of the plaintiff's contention. For these reasons I am of opinion that the appeal should be allowed.

ISAACS J. My judgment is based on the view I take of the nature of an authority under the Mining on Private Property Acts, and of the effect of the contract between Murray and Gander.

An authority under those Acts is nothing more than a permission to enter on another man's land, and to prospect for whatever metal is mentioned in the authority, for such a time, consistent with the provisions of the Acts, as will give a proper opportunity to the holder of determining whether he will apply for a lease or not. The authority holder obtains no interest in the land itself. He has rights and obligations with respect to the land; rights of prospecting and, if he wishes, of applying for a lease, and obligations to observe statutory conditions on pain of losing all his rights. But the rights, like the obligations, are purely personal, and no provision exists to transfer any of them. The landowner retains his full estate and interest in the land, qualified only by the right of entry for the purpose of prospecting and discovery, by the possibility or option of the authority holder applying for a lease, and of the Government choosing to grant it to him. But with the termination of the authority itself all the attendant rights and obligations come to an end. A succeeding authority holder, whether the predecessor's authority is abandoned voluntarily or is cancelled, no more inherits the rights of the predecessor than his obligations, say, to pay rent in arrear, that is rent not paid within one month after it falls due. Each authority is a new departure, and all the provisions of the Act must be

(1) 6 H.L.C., 375.

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observed with regard to it, irrespective of anything that has occurred under a previously existing authority. It is simply a statutory licence. It is not in any sense a grant. Although there is involved in it the permission to take away and appropriate metals found, yet that is only because it is a necessary, though subsidiary, part of prospecting which is the direct and real object of the enlarged powers granted by the Act of 1896. Now assuming, as has been assumed throughout the argument, that Gander's oral promise to assist Murray in his new application was a binding term of their agreement, though not inserted in the written document, the effect, and the necessary effect, of carrying out the bargain was to entirely put an end to the authority under which Gander was working, and having extinguished that authority, to throw the land again open to the world, so that whoever got it would get it under a new, distinct and independent authority, quite unconnected with Gander's old authority, not flowing from or consequent upon it in any shape or form, and therefore in no sense an adjunct to or a renewal or continuation of the old right under which Gander operated for the benefit of himself and Zobel. The agreement, shortly put then, may be summarized thus:—Sale of chattels, abandonment and extinction of existing authority which was for copper, agreement to leave the ground open to Murray's application to the Warden whether for copper or any other mineral, and not to compete with him but to assist him to get an authority to himself. That ended when Murray got delivery of the chattels, and when his application, which was for both copper and iron, failed. There was nothing further on which the agreement could operate. He had had his chance, the chance bargained and paid for. Thenceforth Gander was free so far as anything remained to be done under the contract. Zobel was always free because he had never authorized the sale of his interest. When he found himself improperly deprived by the cancellation of Gander's authority of all rights to prospect the land, he applied for and got a new authority for himself, again for copper. In this Murray had no interest; it was not only independent of but adverse to him, and if Zobel had chosen to remain solely interested in it, Murray could not have asserted

any rights in it. But if so, where was Gander's disability to receive from Zobel any interest Zobel chose to give him ?

The bargain between Murray and Gander raised no fiduciary relations between them except as to Gander's interest in the chattels sold, and, possibly, in the then existing authority until its extinction; but only in the sense in which the vendor is regarded as a trustee for the purchaser with respect to the property sold. There was nothing of a continuously fiduciary character in their relations which would extend beyond that, and attach to any other property, and convert Gander into a trustee for Murray of whatever interest in the land he might at any future time become possessed of.

Their relations were contractual, and for any breach of the contract or of warranty of Zobel's authority, Murray may or may not have a legal cause of complaint. But I see no reason for importing into the matter the doctrine of trusteeship, and the case must therefore fail.

For distinctness of principle I have so far treated the case as if the authority which Gander agreed to assist Murray in obtaining was for the original area of 20 acres. But the fact that Murray applied for a much larger area, 33 acres, though including the former 20 acres, the authority being indivisible, leads to one of two results: either the promise to assist was not binding in relation to an application for 33 acres, or if it was, it bound Gander only, inasmuch as Zobel's alleged authority to sell the partnership property could not be supposed to cover a personal undertaking by him with respect to a matter known to be altogether outside the partnership business.

The 33 acres too, being outside that business and beyond the ambit of the original authority, cannot by any process of reasoning be regarded as appertaining to the property sold, or in any way connected with it.

My judgment would be the same if there were no extension of area, but in face of that extension, the hopelessness of Murray's case is clear to demonstration.

I would add with regard to acquiescence, it is unnecessary, taking the views I have already expressed, to determine it; but I feel bound to say that Murray's conduct impressed me as lacking

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that promptitude which is so important a feature when a man is asserting an equitable right to interests in a speculative enterprise.

For the reasons I have given I agree that this appeal should be allowed.

Appeal allowed. Judgment appealed from discharged. Suit dismissed, against Zobel with costs, against Gander with costs subsequent to the statement of defence. Respondent, Murray, to pay the costs of the appeal and in the Supreme Court.

Solicitors, for the appellants, *McLachlan & Murray.*
Solicitors, for the respondent, *Robson & Cowlishaw.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MANN . . . . . APPELLANT;
COMPLAINANT,

AND

DOO WEE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA EXERCISING FEDERAL JURISDICTION.

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PERTH, *Nov.* 5.

Griffith C.J., Barton and Isaacs JJ.

Justices Act 1902 (*W.A.*), (2 *Edw. VII. No.* 11), *secs.* 135, 137, 191—*Criminal Code* 1903 (*W.A.*), (1 & 2 *Edw. VII. No.* 14), *secs.* 553, 614—*Appeal from justices—Order for rehearing—Abandonment of appeal—Proof of charge de novo—Absence of accused.*

Where an appeal from a summary conviction is heard by way of rehearing, the fact that the appellant at the outset abandons his appeal and absents himself from the Court is no ground for allowing the appeal and quashing the conviction.