Appl
Halaga
Developments
Pty Ltd v
Grime (1986)
5 NSWLR 740

[HIGH COURT OF AUSTRALIA.]

WALSH . . . . . APPELLANT;
DEFENDANT,

AND

ALEXANDER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 4, 7, 8, 9, 10, 14.

Barton A.C.J., Isaacs, Gavan Duffy and Powers, JJ

Crown Land — Homestead grant — Conversion into conditional purchase — Sale before conversion — Performance of condition of residence — Possession — Legality of contract of sale — Specific performance — Breach of agreement — Injunction — Caveat — Crown Lands Act 1884 (*N.S.W.*) (48 *Vict. No.* 18), *secs.* 22, 35, 121, 122 — *Crown Lands Act* 1895 (*N.S.W.*) (58 *Vict. No.* 18), *secs.* 15, 16, 17, 29 — *Crown Lands* (*Amendment*) *Act* 1908 (*N.S.W.*) (*No.* 30 *of* 1908), *sec.* 3 — *Real Property Act* 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *sec.* 72.

Practice — Declaratory order — Right to consequential relief — Equity Act 1901 (*N.S.W.*) (*No.* 24 *of* 1901), *sec.* 10.

Under sec. 10 of the *Equity Act* 1901, which provides that "No suit shall be open to objection on the ground that a merely declaratory decree is sought thereby, and the Court may make binding declarations of right without granting consequential relief," a declaratory decree cannot be made unless there be a right to consequential relief capable of being granted if claimed.

The fact that under sec. 72 of the *Real Property Act* 1900 a caveat may be lodged which will have the effect of preventing any dealing with land under the Act in breach of an agreement, does not oust the ordinary jurisdiction of the Court to grant an injunction to restrain such breach.

An application under sec. 3 of the *Crown Lands* (*Amendment*) *Act* 1908 to "convert" a homestead grant into a conditional purchase is not an application to "make" a conditional purchase within the meaning of sec. 121 of the *Crown Lands Act* 1884.

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By sec. 3 of the *Crown Lands (Amendment) Act* 1908 it is provided by sub-sec. (1) that the registered holder of a homestead selection or grant may convert the same into a conditional purchase lease, a conditional purchase, or a conditional purchase and conditional lease; and by sub-sec. (3) that the conditional purchase lease, or conditional purchase, or conditional purchase and conditional lease shall be subject "(*b*) to the general provisions of the Principal Acts relating to the class of holding into which the homestead selection or grant is converted, except that (*c*) the term of residence shall commence on the date of the Board's confirmation of the conversion, but shall be reduced by the period during which continuous residence has been performed by the applicant upon the homestead selection or grant up to and immediately preceding the date of such confirmation."

Held, that where an applicant who holds a homestead selection or grant by assignment applies to convert it into a conditional purchase, the period during which his assignor and any prior assignors have continuously resided on the land may be added to the period during which he himself has continuously resided thereon in order to ascertain the period by which the term of residence shall be reduced under sub-sec. (3) (*c*).

The registered owner of a homestead grant, at a time when he had resided continuously upon it for a period of nine years and three months and had fulfilled all the conditions required by Statute to entitle him to convert it into a conditional purchase, executed an instrument whereby he purported to sell to a purchaser his homestead grant as a freehold and agreed to complete ten years' term of residence on the land, to immediately apply for the conversion of the same to a conditional purchase under the *Crown Lands (Amendment) Act* 1908, and to execute the necessary transfer thereof to the purchaser. He also agreed to give possession to the purchaser on the day the instrument was executed. The vendor having repudiated the agreement, the purchaser, at a time when the vendor had completed the ten years' term of residence, brought an action against the vendor claiming an injunction restraining him from dealing with the land except in accordance with the agreement.

Held, that the possession agreed to be given must be construed to mean such a possession as was consistent with a true residence by the vendor on the land as his home, that there was no attempted evasion of the Crown Lands Acts, and that the purchaser was entitled to an injunction and to a decree for specific performance.

Decision of the Supreme Court of New South Wales: *Alexander* v. *Walsh* (*Simpson* C.J. in Eq.) affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Louis Alexander against Patrick Walsh in which, by the statement of claim, it was alleged that the defendant by a contract in writing

agreed to sell to the plaintiff a certain homestead selection of which the defendant was the registered holder, and that the defendant subsequently repudiated the agreement. The plaintiff claimed an injunction restraining the defendant from dealing with the property the subject of the contract except in accordance with the terms of the contract, and such further or other relief as the nature of the case might require.

The terms of the contract, the nature of the defence, and the material facts are set out in the judgment of *Barton* A.C.J. hereunder.

The action was heard by *Simpson* C.J. in Eq., who made an order for specific performance of the contract, and granted an injunction in the terms asked.

From that decision the defendant now appealed to the High Court.

The nature of the arguments sufficiently appears in the judgments hereunder.

Loxton K.C. (with him *Chubb*), for the appellant, referred to *Barraclough* v. *Brown* (1); *Lord Cowley* v. *Byas* (2); *In re McLean* (3); *Hawker* v. *McLeod* (4); *In re Hill, Clark & Co.* (5); *Turner* v. *Wight* (6); *Williams on Real Property*, 9th ed., p. 123; *Equity Act* 1901, sec. 10; *Real Property Act* 1900, *secs.* 41, 51, 72, 74; *Crown Lands Act* 1884, secs. 121, 122; *Crown Lands Act* 1895, secs. 17, 29, 32, 33; *Crown Lands* (*Amendment*) *Act* 1908, secs. 3, 5, 8.

Harvey (with him *Sanders*), for the respondent, referred to *In re Chern Lee* (7); *Troup* v. *Ricardo* (8).

[ISAACS J. referred to *White* v. *Southend Hotel Co.* (9).]

Cur. adv. vult.

BARTON A.C.J. read the following judgment:—The contract out of which this suit arises is in the following terms:—

(1) (1897) A.C., 615, at p. 623.
(2) 5 Ch. D., 944, at p. 950.
(3) Unreported (24th June 1904, *Walker* J.)
(4) 10 C.L.R., 628.
(5) 10 S.R. (N.S.W.), 402.
(6) 4 Beav., 40.
(7) 21 Land C.C., (N.S.W.), 62.
(8) 4 DeG. J. & S., 489.
(9) (1897) 1 Ch., 767.

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"I have this day sold to Louis Alexander of Oaklands my Homestead Selection No. 02/1 of 822 acres 3 roods . . . . being the whole of the land comprised in Homestead Grant dated Vol. 1866 Folio 127 for the sum of three pounds ten shillings per acre as a freehold. One hundred pounds cash deposit to be paid and out of the balance of purchase money and before completion of the transfer herein the purchaser agrees to pay off the private loan of six hundred pounds owing to Dr. Short provided the said Dr. Short will release the mortgage otherwise the said sum of six hundred pounds is to be retained by the purchaser until the term of mortgage expires the balance of the purchase money is to be paid when the title is to be handed over. And I agree to complete ten years term of residence on the land herein and to immediately apply for the conversion of same to 1908 Act C.P. and to execute the necessary transfer of same to the purchaser. All crops on the above property is to be paid for by the said Louis Alexander at the rate of one pound five shillings per acre. All the sheep (about 300 ewes) at twelve shillings per head.

Dated this 12th day of June 1911.

Patrick Walsh.

Witness—George Peck.

I agree to the within sale

L. Alexander.

Witness—George Peck."

Across the face of the document the following words are written in red ink:—"Possession of the property purchased herein to be given the purchaser this day. Patrick Walsh." The execution of this contract is not denied.

The vendor, who is the appellant, signed and the purchaser, the respondent, received an authority bearing the same date, "to date and otherwise complete the C. P. transfer of 822 a. 3 p. H. S. (and for which application has been made to convert to 1908 Act C. P.) as soon as conversion is complete."

The appellant also signed, and the respondent received, the following documents:—Transfer of this land as a conditional purchase (Form 78), the consideration and date being left blank; instrument of surrender of the grant on conversion of a home-

stead selection into a conditional purchase (Form 131), dated 12th June 1911, but without the signature of the mortgagee verifying his joinder in the surrender; application for the conversion of the homestead grant into a conditional purchase (Form 130), the land agent's receipt and the date of execution being in blank; and part of this form is an indorsed declaration that he (Walsh) was the applicant for conversion, and that he had not made a previous application for a like conversion under sec. 3 of the *Crown Lands (Amendment) Act* of 1908. This, too, was dated 12th June 1911. The declaration purports to have been made before a commissioner for affidavits, Mr. Woodhouse, who witnessed also the above-mentioned papers in Forms 78 and 131. He was a local bank manager, who drew up the contract as well as an antecedent offer, and furnished the Lands Office forms for signature. These forms are those prescribed by Regulations under the Crown Lands Acts for the conversion of a homestead grant into a conditional purchase, and the subsequent transfer of the land to a purchaser. It is not disputed that the contract, which purported to effect a sale of the land "as a freehold," and to bind the vendor to apply for conversion into a "1908 Act C.P. and to execute the necessary transfer of same to the purchaser," contemplated the processes indicated by these forms, which the respondent signed in part completion.

The appellant had acquired the land in question as a homestead selection by application dated 6th March 1902, and duly confirmed. He apparently began residence upon it on or within a few days of that date, for it is agreed that at the time of the contract he had continued to have "his home and place of abode" there for nine years and three months. Having fulfilled all the conditions required by Statute to enable him to obtain a homestead grant, a deed evidencing that title and bearing date 10th September 1907 had been issued to him. It purported to grant the land "unto the said Patrick Walsh, his heirs and assigns," subject to the conditions, reservations, &c., therein expressed, "to hold unto the said Patrick Walsh, his heirs and assigns, for ever." The various conditions followed, the most material being the statutory obligations that "the said Patrick Walsh, his heirs and assigns, shall live upon the land . . . . hereby granted,

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having his or their respective homes and places of abode thereon; and shall pay for the said land an annual quit rent"—stated at 2½ per cent. of the capital value as "from time to time determined in due course of law." The land was to be liable to forfeiture on failure by "the said Patrick Walsh, his heirs and assigns," to perform conditions. It is as well to observe that the grant itself imposes no restriction on alienation, so long as the obligations of living on the land and paying rent are duly performed.

By memorandum of mortgage under the *Real Property Act* the appellant had, on 9th December 1909, mortgaged the land to Dr. William Short to secure £600 repayable with interest on 1st December 1912. That is the mortgage mentioned in the contract.

The appellant accepted but afterwards returned to the respondent the cash deposit prescribed by the contract. Possession was not given as agreed. The appellant did not apply for conversion to enable him to transfer the land to the respondent as a freehold.

Although the appellant on 12th July, a month after the contract, agreed in writing to give the respondent "power to take proceedings against Dr. Short of Corowa to recover all documents" belonging to the appellant and relating to the mortgage, he on the next day, or soon afterwards, repudiated the contract, and on 24th July the respondent caused a caveat to be lodged pursuant to the *Real Property Act* against any dealings with the land by the appellant.

Dr. Short declined to accept payment of his mortgage debt before its due date, and the appellant refused to ask him for his consent to the conversion.

The respondent has done all things possible to him to obtain performance of the contract.

On 28th May 1912 he brought this suit for an injunction to restrain the appellant from dealing with the property except in accordance with the provisions of the contract. At that date the appellant had resided over ten years upon the land.

By his statement of defence the appellant pleaded: (1) that when he signed the contract he was, to the knowledge of the respondent, so intoxicated that he could not and did not under-

stand the nature and effect of the contract; (2) that the appellant did not intend to sell the land otherwise than as the subject of a homestead lease, or rather a homestead grant, and that the words "as a freehold" were inserted in the contract by the fraud of the respondent; (3) that the land was to the knowledge of the respondent sold at an under-value so great as to disentitle the respondent to relief; (4) that the respondent's delay had disentitled him to maintain the suit.

The learned Chief Judge in Equity, who heard the suit, rejected all these defences, and the appellant does not now rely on any of them. He contends, however, apart from the pleadings, that the contract is one of a kind forbidden by the Crown Lands Acts, and therefore cannot be enforced. I will discuss this defence before dealing with certain more technical points which were elaborated by Mr. *Loxton* for the appellant.

His Honor's careful analysis, of which I take advantage, relieves me of the need of a full statement of the enactments, but I propose to refer to some others as well as those which he has quoted.

Sec. 42 of the Act of 1895 requires that every application for a homestead selection or conditional purchase (*inter alia*) be made in good faith, the sole object of the applicant being to obtain the land in order that he may hold and use it "for his own exclusive benefit according to law." The Board is to disallow an application for any such holding unless it be satisfied that the application is made in good faith. If it is satisfied to the contrary, it may declare the application money forfeited.

These provisions relate to the materials upon which the application is to be allowed or refused when it is first sought to acquire the land. They have no reference to anything which may occur after confirmation. Where a homestead selection made in good faith has been allowed in the first instance, this section at any rate places no further perils in the path of the settler, whatever other provisions may do. Sec. 43, on the other hand, relates to causes of forfeiture for want of good faith, but it has, in my judgment, no application to cases of conversion, as I hope to show. The question here is not as to an application to acquire land, or as to the tenure of land, open to conditional

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purchase in the ordinary sense. The land which is the subject of a homestead grant has at the outset been open to homestead selection, and been so acquired "in good faith" in terms of sec. 43 of the Act of 1895. The tenure ripens into one by way of homestead grant. The land is then no longer open to conditional purchase any more than to homestead selection. In order to relieve himself, "his heirs and assigns," of the obligation of residence in perpetuity, the holder of the grant applies to convert under sec. 3 of the Act of 1908, so that, on the completion of a definite term of residence, he may pay his balance, obtain an ordinary grant in fee, and so be able to sell out (see proviso to sec. 3, sub-sec. (3) (*d*)); perhaps to take up land elsewhere; or be able to raise money on the same land on better terms than any that the fetters of the homestead grant allowed him to secure. Now in this process of conversion he is by no means acquiring land in the sense in which a conditional purchase is made under other provisions of the Crown Lands Acts. He gains no land. In his homestead grant he holds, if he has not sold it, the same land which he first acquired as a homestead lease. In his conditional purchase, if he converts under the Act of 1908, he holds precisely the same land. His primary application for a homestead lease is quite a different process from his application for a conditional purchase by mere conversion. The former was an act of occupation and settlement; the latter is a mere act of transition. The first gave him land. The second, if successful, only alters the tenure of the same land. It does not seem reasonable to suppose that the transition to terms like those of conditional purchase, where there is no land open to conditional purchase, or "free selection," as it is commonly called, should be subject to checks like those of secs. 121 and 122 of the Act of 1884, rightly applied to secure that the primary acquisition of land shall be for the applicant's exclusive benefit. They were imposed to prevent land from passing out of the hands of the Crown to persons who were not *bonâ fide* settlers. But the *bonâ fide* settler was always allowed to transfer after a time, and his transfer was not and is not subject to the same checks as his original acquisition. So the homestead grantee who has developed from a homestead selector has long been entitled to transfer

to a person who will take his place on the grant. What reason is there to impute to the legislature an intention to apply to his transfer, after long years, of his own land, of which he is the *bonâ fide* owner, the trammels which were designed to prevent Crown land from being alienated except for the exclusive benefit of the settler? There is a reason of policy in the one case which cannot exist in the other.

The whole matter, as it seems to me, can easily be tested in another way. Let us make a comparative analysis of sec. 17 of the Act of 1895 together with sec. 3 of the Act of 1908. I should premise that when sec. 3 says in sub-sec. 3 (*b*) that the class of holding into which the homestead lease or grant is converted, shall be subject to the general provisions of the Principal Acts relating to that class of holding, except, &c., it is clear to my mind that the reference is not to the provisions relating to the past acquisition of land, but to those which deal with the new holding or tenure.

Now, sec. 17 of the Act of 1895 treats of a period beginning at least five years after the confirmation of the homestead selection application. Upon the arrival of that period the selector may obtain his grant. That deed is to contain provision for (*a*) annual payment of rent by "the grantee, his heirs and assigns for ever"; (*b*) obligation on "the grantee, his heirs and assigns for ever to live upon the land granted, having his or their home and place of abode there"; (*c*) forfeiture in case of failure to perform the obligation to live thereon or the obligation to pay rent. In this State the phrase "the grantee, his heirs and assigns" means, as used in these sub-sections, which are not limitations of real estate, the grantee, his personal representative, and any person to whom he has transferred. Now, it will be observed that the grant issues to "an applicant" (See lines 2, 5, and 7 of the section). First, then, we have the "applicant," and on his obtaining a certificate or a report that he deserves the grant, we know him as the "grantee," who it is clear has the right of alienation. From this point, in a very long section, we hear no more of the "applicant." True, the words "grantee, his heirs and assigns," are not again used, but the phrases "the aforesaid obligation," "obligation to live on the lands granted," "obligations

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of the grant," "obligations under the grant," recur at intervals, and refer, without doubt, to the obligations of the "grantee, his heirs and assigns." Take, then, the power to make regulations given by the same section. The regulations may provide for "exemptions from the performance of the aforesaid obligation or for the relaxation thereof" in cases of "inability, difficulty, or hardship," and then follows a recurring use of the words "exemption or relaxation." Now let us turn to sec. 3 of the Act of 1908, sub-sec. (3) (*c*). By it the term of residence is to be reduced by the period during which continuous residence has been performed "by the applicant upon the homestead selection or grant." The term applicant is there used to denote, not only the applicant for a homestead selection before grant, but obviously the applicant who has become a grantee. Is he identical with the "grantee, his heirs and assigns?" In the homestead grant (Form 12, in which form the appellant's homestead grant is framed) the person who is recited to have "applied for a homestead selection" is the person to whom, "his heirs and assigns," the homestead grant is issued, and on that person, "his heirs and assigns," rest the obligations of the grant. So we have the "applicant" in sec. 17 of the Act of 1895 identified with the "grantee, his heirs and assigns," in the same section; and in sec. 3 of the Act of 1908 we have the same term "applicant" applied to the person performing continuous residence upon the homestead selection or grant, which is the obligation of the deed. It is plain then that "applicant" in the earlier section and the same word in the later one denote the same person—the grantee, his heirs and assigns. Hence the obligation upon the applicant must also be upon his heirs and assigns; that is, the obligation cannot be held to be exclusively personal to the "applicant." If he has sold while still grantee, his transferee is equally designated by the term "applicant," and the transferee can go on performing the obligation of residence, and may receive the concession that his term of residence (*i.e.*, ten years) may be reduced by the period during which continuous residence has been performed by him *or his transferor* "upon the homestead selection or grant up to and immediately preceding the date of . . . confirmation." This view is strengthened by the proviso to sub-sec. 3 (*c*): "Provided that the

period of any lawful exemption or relaxation shall be reckoned in such term of continuous residence." The term "exemption" is used elsewhere in the series of Acts, but in conjunction with the term "relaxation" it is used only in sec. 17 of 1895, and in the present section; in the former it refers to the obligation "to live upon the lands granted"; in the latter it refers to continuous residence upon the homestead selection or grant, which must be the same thing. The appellant, then, is at law "the applicant" within sec. 3 of 1908, being the grantee, by whom and by whose heirs and assigns the obligations of the grant are to be performed. And the respondent could, on purchase, have taken a simple and immediately operative transfer on 12th June 1911, on the completion and acceptance of which he could have become the assign of the applicant or grantee, and as such entitled to take his place in respect of the nine years and three months of residence, and on conversion to have the term of ten years' residence on the 1908 conditional purchase reduced by that period.

If he could lawfully have done all this by taking an immediate transfer, it seems unreasonable to contend that where there is merely a contract such as the present, with that which amounts to a promise to transfer when the term of ten years shall have been completed, either the contract in those bare terms should be void, or that it should be made void by the stipulation for immediate possession, seeing that a contract for immediate possession, with an even shorter residence on the part of the vendor, would have been good.

I am of opinion, then, that the contract is valid.

It is said for the appellant that the statement of claim discloses no case for equitable relief. I am of opinion that the evidence is such as would impel the Court to grant such relief if claimed. If amendment is necessary by adding facts or claims, or both, it can be ordered now, if insisted on. The contract is proved. It is now in the power of the appellant to execute it. The respondent has done nothing to disentitle him to the benefit of his bargain. The appellant's repudiation is absolute as to the whole. I think the Court can now grant specific performance, and with it the injunction sought.

It is urged that the respondent's caveat sufficiently protects

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him, and therefore he cannot have an injunction. I do not agree. The caveat does not give the purchaser relief as comprehensive or as direct as he gains by the jurisdiction *in personam*, and therefore it cannot be held to be the exclusive remedy. This is not the case of another tribunal, or another remedy, as in *Troup* v. *Ricardo* (1), for a caveat is not a remedy for a wrong. Looking at the sections cited from the *Real Property Act*, it cannot be said that a claimant from a registered proprietor excludes his other remedies by filing a caveat.

For the above reasons, I think the appeal must be dismissed.

ISAACS J. read the following judgment:—The appellant raises two contentions. First, assuming there is no illegality, he says the action is premature as far as relates to substantive relief either by way of specific performance or injunction, and, that being so, he urges that a declaration cannot be made. That is a proposition of considerable general importance.

Sec. 10 of the *Equity Act* 1901 is in these terms:—"No suit shall be open to objection on the ground that a merely declaratory decree is sought thereby, and the Court may make binding declarations of right without granting consequential relief." The provision is with immaterial change of verbiage identical with that made by sec. 50 of the *Chancery Act* 1852 (15 & 16 Vict. c. 86). Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer: *Per* Lord *Macnaghten* in *Fischer* v. *Secretary of State for India* (2).

In *Rooke* v. *Lord Kensington* (3) *Wood* V.C. held that after the section was passed the Court could make a binding declaration of right without giving consequential relief only where some equitable relief could be granted if plaintiff chose to ask for it. That case has been followed in several cases by the Judicial Committee—as in *Rajah Singh* v. *Kally Churn* (4); *Kathama* v. *Dorasinga* (5); and so in a dictum of Lord *Davey* in *Barraclough* v. *Brown* (6). But it is important to notice an interpret-

(1) 4 De G. J. & S., 489.
(2) L.R. 26 I.A., at p. 28.
(3) 2 Kay & J., 753.
(4) L.R. 2 I.A., 83, at p. 85.
(5) L.R. 2 I.A., 169.
(6) (1897) A.C., 615, at pp. 623, 624.

ation put upon the decisions and the enactment, by the Privy Council in *Kathama's Case* (1), as well as in a previous case there cited, namely, that the "declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court or in certain cases in some other Court." That is to say, if the consequential relief can only be obtained in another form, there is no objection to the Court of Equity making a declaratory decree establishing the foundation of that relief. Of course, the declaration sought in that case must not be an anticipation of the very question to be tried in the other Court: *Kathama's Case* (2) and *Barraclough* v. *Brown* (3). The more expansive and very useful rule introduced in England in 1883, and afterwards in some other parts of Australia, enabling the Court to make declarations of right, whether consequential relief could be claimed or not, has not yet been adopted in New South Wales. Its adoption is a matter worth consideration.

If, therefore, in the present case no substantial relief could, if claimed, be granted, the objection taken would be good. But, on the assumption of legality, there has been a distinct breach of the contract by the appellant. Possession was agreed to be given on the day of the contract, and this has been always refused; so that an actual continuous breach has been committed. The nature of that possession will be stated later. Another breach occurred when the defendant requested the mortgagee not to recognize the plaintiff. In addition, there has been, as admitted in the defence, a constant repudiation of the whole agreement, and that is an anticipatory breach entitling the respondent to sue either at law for damages (*Johnstone* v. *Milling* (4)), or in equity for a decree that the contract ought to be specifically performed. The defendant's absolute repudiation of the contract involves a claim to sell or use the land henceforth as he pleases, to alter its condition, and to abstain from making the application for a conditional purchase which he agreed to do. Plainly, unless the alleged illegality is established, an equity exists to enforce observance of his contractual obligations, by the ordinary means in such cases. Mr. *Loxton* argued that as the legislature has pro-

(1) L.R. 2 I.A., 169, at p. 187.
(2) L.R. 2 I.A., 169, at pp. 182, 183.
(3) (1897) A.C., 615.
(4) 16 Q.B.D., 460.

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vided for a caveat which effectually prevents a "dealing" being registered contrary to the agreement, that ousts the ordinary jurisdiction of the Court to grant an injunction. There are two answers to that. The narrow one is that a dealing by way of transfer or lease or mortgage is not the only method of transgressing the contract. Retention and user and alteration of the property by the defendant himself could not be prevented by a caveat, and these are equally within the dominion claimed by him. But the broader ground is this: that where rights and liabilities are not created by a Statute, but arise by common law, then, even though they are affirmed by a Statute which gives a special and peculiar form of remedy different from the remedy which existed by common law, yet, unless the Statute expressly or by necessary implication excludes the common law remedy, the latter still remains. See *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1); *Stevens* v. *Chown* (2).

There are no such exclusive words in the *Real Property Act* 1900 relevant to a case like the present, and so the objection fails.

Then as to the illegality. I agree with the argument of Mr. *Harvey* that application under sec. 3 of the *Crown Lands (Amendment) Act* 1908 to "convert" a homestead grant into a conditional purchase is not an application to "make" a conditional purchase within the meaning of sec. 121 of the *Crown Lands Act* 1884. The power to "make" a conditional purchase is primarily given by sec. 22 of the Act of 1884, where that word is used both in its present and its past tense. To "make" the conditional purchase requires certain prescribed formalities, and involves certain competition and certain discretion in determining whose application shall succeed. The word "convert" was in the same Act (sec. 35) used to denote not a right of competition, but a vested personal right in the holder of a conditional purchase "made" before the Act, to come under the provisions of that section. So that in the same section, and in the same sentence, as far back as the Principal Act, we have the two expressions "convert" and "make" used in distinct and appropriate significations. The words "convert" and "make" have been retained in their contrasted meanings throughout this class of legislation. See, for

(1) 6 C.B.N.S., 336.

(2) (1901) 1 Ch., 894, at p. 905.

instance, sec. 7 of the Act of 1886, and secs. 4 and 10 of 1908. The conversion is as to tenure only (see sec. 12 of the Act of 1908); the land is already acquired for ever.

The case is, therefore, outside sec. 121 of the Act of 1884, and as the word "purchaser" must have reference to the "purchase" mentioned in the preceding section, it is outside sec. 122 also.

But that does not end the matter. Apart from any specific provision as to illegality, the question arises whether there has been an attempted evasion of the Act—that is, an evasion in the sense of an agreement or attempt to do something outside the Act, and contrary to its provisions, under the false appearance of coming within it and conforming to its requirements. See *per* Lord *Lindley* in *Bullivant v. Attorney-General for Victoria* (1). I adopt the mode of expression contained in *Maxwell on Statutes*, 5th ed., pp. 184, 185, as follows:—"It is simply a fraud,—it is an attempt to pass off a state of things which falsely represents itself as a something which it is not. Words, of course, may be used for the purpose of helping to produce the illusion, but it is rarely that the meaning of such words will be in question; the question will be, Is an illusion being attempted? If so, the Court will make short work of it."

The appellants contend that the test of this is what is called the policy of the Act. In *Tooth* v. *Power* (2) a case arising under the Act of 1861, the Judicial Committee said that the expression "policy of the Act" "is apt to mislead, because it may signify either the general scheme of land settlement which the legislature was desirous of promoting, or the special machinery which has been devised and enacted for the purpose of carrying out that scheme." And so they went on to inquire whether there had been a substantial fulfilment of the conditions under which a statutory right or interest in a conditional purchase might be acquired. They held that there had not, for the reason that what had been done was simply a colourable attempt to comply with the provisions of the Act. And this was based upon the conclusion that, the right of selection not being personal to the defendant, his three years' residence upon the selection before he was ten years of age, whether that residence was at the

(1) (1901) A.C., 196, at p. 207.

(2) (1891) A.C., 284, at p. 290.

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instigation of the plaintiff or not, could not constitute *bonâ fide* residence on a selection within the meaning of the Act.

The present case then resolves itself into this:—Was the residence of Walsh on the homestead grant for approximately the last nine months of the period of ten years a merely colourable pretence to comply with the requirements of the Act, or was it a substantial compliance according to the true statutory conditions? Now, that depends, in my opinion, on two things. The first is a matter of fact; the second, a question of law. The matter of fact is the nature of the continued residence of Walsh agreed upon in the contract. The main purpose of Walsh's agreement to complete ten years' residence, and immediately—that is, immediately thereafter—to apply for a conditional purchase, was that the statutory condition should be fulfilled. There is nothing to show that this was not to be a real fulfilment by Walsh having his home and place of abode on the land. The implication is that it was to be real. The writing across the face of the document referring to possession, must be taken as secondary to that, and as promising possession of the property purchased so far as was consistent with the main purpose of the stipulation to complete.

"Possession" does not necessarily connote personal occupation. *Lake* v. *Dean* (1) is an illustration. The headnote sufficiently explains it:—"The plaintiff agreed to sell the defendant an orchard, described as being in the 'occupation of L.P.,' and that the purchaser should have 'possession' on the day appointed for completion. *Held*, that 'possession' did not mean 'personal occupation,' and a decree for specific performance was made against the defendant, although the plaintiff was unable, by reason of L.P.'s tenancy, to put him in actual occupation of the premises."

It has frequently been determined that possession must be considered in every case with reference to the peculiar circumstances of the property. The latest case is *Kirby* v. *Cowderoy* (2).

Without assuming a deliberate scheme to deceive the Crown, the promise as to giving possession must be construed so as to be consistent with a true residence by Walsh on the land as his home and place of abode.

(1) 28 Beav., 607.

(2) (1912) A.C., 599, at p. 603.

The question of law raises the proper interpretation to be given to the compound expression in paragraph (*c*) of sec. 3, sub-sec. (3), of the Act of 1908, as follows:—"the period during which continuous residence has been performed by the applicant upon the homestead selection or grant up to and immediately preceding the date of such confirmation."

It is said for the appellant that that means by the "applicant" himself, and himself alone; and, for the respondent, that it means by the applicant either by himself or his predecessors, to whose future rights and liabilities he succeeds, or by both him and his predecessors.

It is plain that, if the appellant is right, the *bonâ fide* and continuous residence of all previous holders of the homestead grant, though far surpassing the required ten years, goes for nothing if the new holder applies; and that he must work out another period of ten years in respect of the conditional purchase. And this, it is said, is the inexorable law even if the new holder is the son of the late holder by descent or will, and retaining the land for the family.

If the meaning of words of an Act is clear and unambiguous, it must be given effect to regardless of consequences; but we have to inquire whether the meaning suggested satisfies the intention of the legislature, ascertained from its words as applied to the subject matter. We have to find the meaning of the expression referred to within the four corners of the legislation—a connected, though uneven, series of Statutes. To begin with, there is an ambiguity in speaking of "continuous residence" being "performed." That is an unnatural expression; and some ellipse undoubtedly exists. It is not as if the Act said distinctly "the period during which the applicant has continuously resided." Obviously, what is meant is that the statutory "obligation" as to continuous residence is to be "performed," though "by the applicant," whatever that imports. We are then driven back to see what the legislature means by the applicant "performing" the obligation. For that purpose we look at sec. 17 of the *Crown Lands Act* 1895. That section prescribes that the Governor shall issue a grant of the homestead selection to an "applicant" who has duly obtained the necessary certificate—to which I shall

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presently refer,—and then proceeds to state the provisions as to certain obligations. Starting with the position that the land is "granted"—that is, vested in the grantee as his property for ever, and with no express restriction on alienation,—the first obligation is the annual payment of a perpetual rent by the "grantee, his heirs and assigns," the yearly rent being $2\frac{1}{2}$ per cent. of the capital value as fixed under the Act; and the second is "the performance by the grantee, his heirs and assigns for ever" of an obligation to live upon the selection, and then, says the Act, "having his or their home and place of abode there." The Statute adds:—"The obligations to live on the lands granted and to pay rent shall be incidents in perpetuity of the tenure of the lands held under a homestead grant." This in express terms makes the obligations run with the land, as they would at common law: *Parker* v. *Webb* (1), as to rent; *Tatem* v. *Chaplin* (2), as to residence.

Now, the obligation as to rent, as will be presently seen, is of great importance in determining the rights of the assignee as to residence. The rent is a percentage on the value. It is provided further on in sec. 17 as follows:—"The value of the homestead selection shall for the first period of ten years after the issuing of the grant thereof be the value, as notified in accordance with the provisions hereinbefore contained"—that is, in sec. 13; and then the provision continues: "and for every succeeding period of ten years shall be determined, irrespective of improvements, in accordance with the provisions of sec. 6 of the *Crown Lands Act* of 1889." That brings in a new appraisement by the Local Land Board, a right of appeal to the Land Appeal Court, and so on. It is quite manifest, therefore, that *an assignee is affected as to rent by the prior residence of the first grantee,* and of all the grantees anterior to himself, and if prejudicially affected by it so that his rent may be raised whenever prior residence has reached ten years or its multiple, some reason ought to appear why he is not to have such benefit as it may confer. The case of *White* v. *Southend Hotel Co.* (3), though not precisely in point, is based on that principle.

(1) 3 Salk., 5.
(2) 2 H. Bl., 133.
(3) (1897) 1 Ch., 767.

The word "assigns" is, as was said in *Baily* v. *De Crespigny* (1), "a term of well-known signification, comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law;" and the passage quotes *Spencer's Case* (2). It was urged that the express mention of "assigns" is immaterial. In one sense that may be so, but, as *Jessel* M.R. said in *Osborne* v. *Rowlett* (3), "The word 'assigns' was used by the old conveyancers in addition to the word 'heirs' merely to show that the grantee or devisee took an assignable estate: nothing more. The word has remained in the common forms, as many words do remain, simply because they are there, and it is much easier to copy than to expunge, and perhaps also because using superfluous words does not tend to shorten a deed." So *per Romer* L.J. in *Milman* v. *Lane* (4), where, speaking of a will, he says: "We find constantly in this will the word 'assigns' put in unnecessarily, having no conveyancing virtue at all, and as merely declaratory of a power of alienation in a donee which he would have without it." But in this homestead legislation, novel in 1895, the legislature desired to be emphatic as to the assignability of the land, and as to the assign being in the same position as the original lessee, and this last is shown by the words of the obligation "having *his* or *their* home and place of abode there." Nevertheless, says the appellant, "it is the personal residence of the applicant" alone that is to go in reduction of the time.

There are two main considerations which, in view of the ambiguous phrase referred to, lead me to the other conclusion.

One is: that if you find in the one part of a document—whether an Act or other instrument—a word or phrase used in a manner that leaves no doubt as to its definite meaning, there is a presumption that it is so used elsewhere, where, by itself, its meaning is not clear. The immediate context may, of course, alter that; but the presumption is a fair one to start with. *Lindley* M.R. says that whether such a consideration is law, or a canon of construction, he does not know, but he regards it as good sense; and he acted on it. Sir *Francis Jeune*, in the same case, said that to

(1) L.R. 4 Q.B., 180, at p. 186.
(2) 5 Rep., 16.
(3) 13 Ch. D., 774, at p. 786.
(4) (1901) 2 K.B., 745, at p. 750.

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proceed otherwise would be doing less than justice to common sense. See *In re Birks*; *Kenyon* v. *Birks* (1). Of course, it is only a working rule, and has to yield to the control of the words in connection with which in any particular place the word or phrase in question is used.

Now, in sec. 15 of the Act of 1895, in dealing with homestead selections, Parliament says:—"The applicant shall perform" certain conditions as precedent to the right to a grant. Among them is a condition of residence. He must commence to live on the selection, and have his house and place of abode there until the issue of the grant. But he may die before the required five years (secs. 16 and 17) have expired. He may die within the first year, and, if he dies, then by sec. 15 this condition may be performed by any member of his family or any other person approved by the Local Land Board.

If he dies within the first twelve months, the condition as to erecting upon the selection a dwelling-house of the required value within eighteen months, may have to be performed by his successor.

Then, by sec. 16, the Board, at the expiration of five years, is to hold an inquiry, which is thus stated:—"Whether the applicant has, up to the date of the inquiry, duly performed all conditions as aforesaid." If "applicant" there is to be restricted to the original applicant, then *he* certainly has not performed all the conditions; if it is to be restricted to his successor, he also has not continuously resided for the whole five years, and if the original selector happened to erect the dwelling himself, the successor cannot claim to have "performed that condition." But, says the section:—"If, upon the final inquiry, the applicant satisfies the Local Land Board that he has, up to the date of the inquiry, duly performed all the said conditions, it shall issue to him a certificate to that effect." If the Board is not satisfied that "he has duly performed all conditions," then "the applicant's interest" may be forfeited. The meaning here of "the applicant performing" the conditions, including that of residence, is clear,—namely, that the authorized and recognized applicant at the time the Crown has to decide upon the next step and to say whether

(1) (1900) 1 Ch., 417, at pp. 418, 419.

the statutory right has accrued, has to satisfy the Crown that the conditions imposed by the legislature have been duly performed by the person or persons who for the time being was or were required or authorized to perform them. This is reasonable, the contrary construction is not; and there is a "rule that where the language of an Act of Parliament is equivocal, the legislature must be supposed to have intended to enact that which is reasonable" (see *per* Lord *Campbell* L.C. in *Eastern Counties &c. Companies* v. *Marriage* (1)). Then, says sec. 17, the grant is to be issued to an applicant, who has duly obtained the certificate. If this "applicant" may, in the case of the occupation period, be a son of the original applicant, with a right of linking on his father's residence with his own, and if this is clear, why should not the legislature be presumed to have meant the same thing in the case of an absolute grant merely converted into a different tenure? In my opinion, having regard to the meaning of the corresponding phrase in the earlier Act, and to the provision already mentioned whereby the assignee of a homestead grant may have to submit to re-appraisement by reason of previous residence of his predecessors, the expression "the period during which continuous residence has been performed by the applicant" means the period during which the "registered holder" for the time being has duly performed the obligation of residence. This is much strengthened by remembering that the owner of the selection ungranted (see sec. 23 of the Act of 1895 as well as sec. 17 of the Act of 1908) has the same right of conversion as the registered holder of a grant, and by the reference to exemptions and relaxations. I think Mr. *Harvey's* contention is well founded, that the reference in paragraph (*b*) of sec. 3 (3) of the Act of 1908 to the general provisions of the Principal Acts is, after the conversion is effected, and that the confirmation by the Board relates to the conditions enacted by the Act of 1908. And if, as already shown, the owner of the ungranted selection may link on previous possession to obtain a grant, it is inconceivable that he cannot do so to obtain a conditional purchase. And if he can, why cannot he do so, if he first gets a homestead grant and then desires to proceed to a conditional purchase?

(1) 9 H.L.C., 32, at p. 67.

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Once we arrive at that point, it involves this position: that Alexander could himself have taken over the personal right of Walsh, could have completed the required residence of ten years himself, and could then have applied for the conditional purchase in his own name. If that be so, the method actually adopted by the parties was a mere matter of form. Whichever course was taken, the direct or indirect, there was no defeat of the "intention" of the legislature, and, adopting the test laid down by the Privy Council in *Tooth* v. *Power* (1), the conditions of the Act would be substantially complied with.

In my opinion, therefore, the appeal should be dismissed.

GAVAN DUFFY J. I have had the advantage of reading the judgment of my brother *Isaacs*, and I agree with the reasons which he has given for saying that the appeal should be dismissed.

POWERS J. I agree that the appeal should be dismissed, and I do not wish to add anything to what has already been said.

Appeal dismissed with costs. Costs to be deducted from purchase money.

Solicitor, for the appellant, *J. A. Hargrave*, Yarrawonga, by *Vindin & Littlejohn.*

Solicitor, for the respondent, *P. M. Sanders.*

B. L.

(1) (1891) A.C., 284.