[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPELLANT;

AND

HOPKINS AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Aug.* 2, 3, 4, 5, 6.

Griffith C.J., Isaacs, Gavan Duffy and Powers JJ.

Grazing Farms—Holding land as trustee—Application not bonâ fide—Agistment agreement made by selector with a Company—Fraud upon the Act—Land Act 1897 (*Qd.*) (61 *Vict. No.* 25), *secs.* 93, 149—*Land Act* 1910 (*Qd.*) (1 *Geo. V. No.* 15), *secs.* 5, 59, 69, 130, 131, 133.

Sec. 59 of the *Land Act* 1910 (Qd.) provides (*inter alia*) that "no person who is in respect of the land applied for or held or any part thereof or interest therein, a trustee, agent, or servant of or for any other person shall be competent to apply for or hold any selection."

A person may be a "trustee" within the meaning of that section notwithstanding that the trust upon which he has agreed to hold the land is illegal and unenforceable.

Sec. 69 of the *Land Act* 1910 provides that every application for a selection shall be made in good faith.

By sec. 130, sub-sec. 1, it is provided that "lands acquired by any evasion of or fraud upon this Act shall be liable to be forfeited," and sub-sec. 2 contains a provision that "in any case where any land is held in violation of this Act the lease or licence, as the case may be, shall be liable to be forfeited."

Sec. 133 of the Act empowers the Land Commissioner to hear and determine the question whether the lease of a selection is liable to be forfeited for any cause other than the non-payment of rent.

The respondents were the holders from the Crown of certain selections called grazing farms. Before making their applications they had entered into arrangements with a land company, and after the applications were granted they entered into an agreement to grant to the Company the right of agisting and depasturing their stock on the land and to assign to the Company, when granted, the leases of the land. Both before and after the respondents'

applications to select, the Company occupied the land and used it exclusively for the purpose of grazing the Company's stock. The Land Commissioner decided that the respondents, in violation of the *Land Act* 1910, held and were holding the land as trustees of the Company, and his decision was affirmed by the Land Court and the Land Appeal Court, but the Supreme Court reversed the decision of the Land Appeal Court. On appeal to the High Court,

Held, that there was evidence before the Land Appeal Court which justified the decision of that Court.

Decision of the Supreme Court of Queensland: *Hopkins* v. *The King*, (1915) S.R. (Qd.), 17, reversed.

APPEAL from the Supreme Court of Queensland.

Certain land which had formed part of a pastoral property in Queensland called "Eddington" held by the New Zealand & Australian Land Co. Ltd. under pastoral lease was resumed and thrown open by the Crown for selection under the *Land Act*, but was not selected, and the Company continued to depasture its stock upon it. In 1906 the land was again thrown open for selection. Richard Ashmore Robinson Hopkins, one of the respondents, who at the time was employed by the Company, advised the Company to secure part of the land thrown open to selection as being necessary to the successful working of the remainder of Eddington. The Company desired to acquire it, and Hopkins applied to select it, declaring that he applied for it in order that he might hold it for his own exclusive benefit according to law, and not as the agent, servant, or trustee of or for any other person. In the following year, 1907, a licence to occupy was granted to him. In March 1908 the Company entered into an agreement with Hopkins. This agreement witnessed that Hopkins granted to the Company the right to agist and depasture stock on the land; that he would fence and make improvements on it, and would pay the rent and rates; that the Company would not overstock, would keep the improvements in good repair, pay stock assessments, facilitate the appointment of persons to act as bailiffs to perform the conditions of residence on behalf of Hopkins, and would pay a yearly rent in advance; and that the Company at its discretion might erect further improvements on the land. This agreement was expressed to be made subject to the laws of Queensland and operative so far as the parties might

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lawfully enter into the same, and as operating from October 1907 until seven days before the expiration of the lease from the Crown to Hopkins. The agreement provided also that Hopkins would assign the lease of the land to the Company, as soon as it was granted to him, on the terms set out in the agreement. The amount of the annual sum payable by the Company to Hopkins was arrived at by allowing about 10 per cent. on the estimated value of the improvements necessary to be made by him plus such amount as might be payable to the Crown for rents. The bailiffs were employees of the Company, and were paid by it. In the meantime it had been considered necessary to acquire another portion of the land so thrown open for selection, and it was arranged that Hopkins should procure a relative of his, Miss Nora Elizabeth Throsby (now Mrs. Hopkins), to apply for it and hold it on the same terms on which Hopkins held the other selections, for which services she was to receive a bonus of £15 a year. Miss Throsby made the required application—the date of her application being 15th October 1907—for the purpose of the arrangement with Hopkins. No change ever occurred in the mode of occupation or use of the land, which continued to be used exclusively for the purpose of grazing the Company's stock. The Crown accepted rent from Hopkins.

In May 1912 notice was given under sec. 133 of the *Land Act* 1910 to each of the respondents, Richard Ashmore Robinson Hopkins and Nora Elizabeth Hopkins (formerly Throsby), calling upon them to show cause why their selections should not be forfeited upon several grounds of which the following two are material to this appeal:—"That the application to select the land was not made in good faith"; (2) "That you are in respect of the said land or some part thereof or interest therein a trustee, agent, or servant of or for another person." The Land Commissioner decided that the selections were liable to forfeiture as (*inter alia*) it had not been proved that the respondents' applications were made in good faith and that it had been proved to his satisfaction that the respondents were in respect of the land in question trustees for the New Zealand & Australian Land Co. Ltd. Appeals having been dismissed by the Land Court and the Land Appeal Court, the respondents appealed by way of special case from the decision of

the latter to the Supreme Court, which (by *Cooper* C.J. and *Lukin* J., *Real* and *Chubb* JJ. dissenting) allowed the appeal: *Hopkins* v. *The King* (1).

The Crown now appealed from the decision of the Supreme Court.

Further material facts are set out in the judgments hereunder.

Ryan (A.-G. for Queensland), *O'Sullivan* K.C. and *Woolcock*, for the appellant. On the question of jurisdiction of the Land Commissioner's Court secs. 16, 17, 19 (1) and 133 of the *Land Act* 1910 should be referred to. These proceedings were taken under sec. 133, dealing with the forfeiture of selections. The Land Commissioner found on the facts that the selections were liable to forfeiture under sec. 69, because they were not applied for in good faith, and that the respondents held the land as trustees for the Company contrary to sec. 59 (1) (*c*). All questions before the Land Commissioner are now open on appeal. [Secs. 31, 32, 35 (8), 36, 89, 109 (4) and 130 were referred to, and the following cases were cited:—*De Britt* v. *Carr* (2); *R.* v. *Justices of Roma*; *Ex parte Murphy* (3); *Walsh* v. *Alexander* (4).]

Feez K.C. and *E. A. Douglas*, for the respondents. This Court has to determine whether there was evidence upon which the Land Appeal Court could draw a possible inference that on 4th May 1912 the respondents held the land as trustees for the Company. In March 1908 the parties started on an entirely new basis, which was free from objection: *Lister & Co.* v. *Stubbs* (5); *Quarrell's Appeal* (6). There is nothing in the nature of a trust that a Court of equity could enforce. The whole point is what is the meaning of the term "trustee" in sec. 59 (1) (*c*). Whether there is a trust or not depends on the reading of the documents. The Crown accepted the documents and put them in as evidence, and are bound by them. The documents express the real transaction: *Barton* v. *Muir* (7). There may be a contract, but there is no trust.

O'Sullivan K.C., in reply.

Cur. adv. vult.

(1) (1915) S.R. (Qd.), 17.
(2) 13 C.L.R., 114.
(3) (1906) S.R. (Qd.), 192.
(4) 16 C.L.R., 293, at p. 307.
(5) 45 Ch. D., 1.
(6) 8 Q.L.J., 120.
(7) L.R. 6 P.C., 134, at p. 144.

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The following judgments were read :—

GRIFFITH C.J. The subject matter of this litigation consists of four selections called grazing farms, each containing 20,000 acres, held by the respondents under lease from the Crown for terms of twenty-eight years, three of them from 1st January 1907, and the other from 1st January 1908, at an annual rental. The leases were issued under an Act the provisions of which were re-enacted and continued by the *Land Act* 1910. That Act contains many provisions for the purpose of securing that Crown lands shall not be acquired by the tenure called selection except for the purpose of *bonâ fide* occupation by the real owner. The mode of acquisition is by application for land which has first been publicly notified to be open for selection. Sec. 59 provides that " no person who is in respect of the land applied for or held or any part thereof or interest therein, a trustee, agent, or servant of or for any other person shall be competent to apply for or hold any selection." This enactment is followed by the following provision :—" Proof that the stock of any person other than the selector are ordinarily depastured on a selection shall be *primâ facie* evidence that the selector is a trustee of the selection for the owner of the stock."

Sec. 69 provides that " (1) Every application for a selection shall be made in good faith." (3) " An application shall be deemed to be made in good faith when the sole object of the applicant is to obtain the land in order that he may hold and use it for his exclusive benefit." This section must be read with sec. 59 for the purpose of determining the meaning of the term " trustee " as used in that section.

Grazing farms are subject to the condition of occupation (sec. 109 (4)), which is to be performed by the continuous and *bonâ fide* residence on the land by the selector himself or a registered bailiff who is himself qualified to be a selector of a similar selection (sec. 89). The term " registered bailiff " is defined (sec. 4) to mean a person who is the actual and *bonâ fide* manager, agent, or bailiff of the selector for the purpose of the occupation of the selection—*i.e.*, as I understand the phrase, for the purpose of the occupation of it by the selector.

Sec. 130 of the Act provides :—" (1) Lands acquired by any

evasion of or fraud upon this Act shall be liable to be forfeited: (2) Upon the breach of any of the conditions to which a lease or licence of a holding is subject, or in any case where any land is held in violation of this Act, or upon any mortgage, transfer, or assignment which is contrary to this Act, whether by operation of law or otherwise, the lease or licence, as the case may be, shall be liable to be forfeited."

Sec. 133 is as follows:—"If at any time the Commissioner has reason to believe that the lease of a selection is liable to be forfeited for any cause other than the non-payment of rent, he shall cause to be served upon the lessee, either personally or by posting it addressed to him at the selection, a notice in writing specifying the alleged cause of forfeiture, and calling upon the lessee to appear upon the hearing of the matter at the sitting of the Commissioner's Court held next after the expiration of thirty days from the service of the notice. The Commissioner shall proceed to hear and determine the matter at the said sitting of his Court or at some adjournment thereof, and shall pronounce his decision in open Court. If upon the final decision of the matter any such liability to forfeiture is established, the Governor in Council may declare the lease forfeited."

An appeal lies from the Commissioner to the Land Court, which may be constituted of one or two members (sec. 31). From the Land Court an appeal lies to the Land Appeal Court constituted of a District Court Judge and two members of the Land Court (sec. 35). From the decision of the Land Appeal Court an appeal lies on a question of law or jurisdiction to the Supreme Court. The appeal is made upon a case stated "setting forth the facts and the grounds of decision" upon which the Supreme Court is required to hear and determine every question of law arising thereon.

In the present case the respondents were called upon by the Land Commissioner under sec. 133, by notice dated 4th May 1912, to show cause why their selections should not be forfeited on several grounds of which the first two were as follows:—"(1) That the application to select the said land was not made in good faith; (2) that you are in respect of the said land or some part thereof or interest therein a trustee, agent, or servant of or for another person."

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After hearing evidence the Commissioner found (*inter alia*) that it had not been proved to his satisfaction that the application of each of the respondents was made in good faith, and that it had been proved to his satisfaction that they were in respect of the land in question trustees for the New Zealand & Australian Land Co. Ltd.

The respondents appealed from these decisions to the Land Court, which affirmed them with a formal variation. They then appealed to the Land Appeal Court, which also affirmed the decisions with a further variation, the actual decision as set out in the case stated for the Supreme Court being that "the selectors Richard Ashmore Robinson Hopkins and Nora Elizabeth Hopkins, in violation of the *Land Act of* 1910, have held and are holding the grazing farms Numbers 1071, 1072, and 1073, and the grazing farm Number 1098, respectively as trustees for the New Zealand & Australian Land Co. Ltd."

The substantial question of law formally submitted was whether the Land Appeal Court was right in law in finding that the then appellants were holding the grazing farms as trustees, &c. Since, however, an appeal only lies to the Supreme Court on questions of law it is plain that the real question is whether there was any evidence before the Land Appeal Court upon which they could find the facts actually found by them, and the question must be so construed.

The learned Judges of the Supreme Court were equally divided in opinion upon the point; *Cooper* C.J. and *Lukin* J. thinking that there was no such evidence, *Real* and *Chubb* JJ. thinking that there was. Before referring to the evidence relied upon by the Land Appeal Court and by the appellant to establish the alleged trust, I remark that the question must be determined irrespective of the consideration that such a trust would be illegal and unenforceable. A provision forbidding the creation of a trust under the penalty of forfeiture of the estate would otherwise be contradictory and futile.

The same principles are to be applied in considering the evidence as in a case where a deed purporting to be an absolute conveyance is alleged to be in reality a mortgage only, or where a registered

bill of sale is impeached on the ground that the real bargain between the parties included a condition which is not expressed in the registered document. Further, I remark, in view of an argument strenuously addressed for the respondents, that a trust may be created in many ways. One way is that expressed in the passage cited by *Lukin* J. from the case of *Wilson* v. *Lord Bury* (1) :—"A trustee is a person holding the legal title to property under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called the *cestui que trust*." Such a trust may arise from contract properly so called. Another way is by the acceptance of a fiduciary position in reference to property, as, for instance, in the case of executors or trustees of a will or trustees of a settlement. Another case is that of a man buying land in his own name with money supplied by another, there being no circumstances to exclude the presumption of a trust. The relations between trustee and *cestui que trust* may be and often are defined by express or implied contract, as, for instance, the right of a trustee to indemnity, which is often so described. The existence of such a contract is immaterial if the trust is established, although it may be relevant and material to the question whether the real relations between the parties are those of trustee and *cestui que trust* or purely contractual.

With these preliminary observations I proceed to state, as briefly as I can, the relevant facts established by uncontroverted evidence before the Land Appeal Court.

The land now comprised in the grazing farms, which had formed part of a pastoral property called "Eddington" held by the New Zealand & Australian Land Co. Ltd. under pastoral lease from the Crown, was resumed from lease in the year 1905 or 1906. The respondent R. A. R. Hopkins had been for some years manager of another of their pastoral properties called "Wellshot," but had in the year 1905 been appointed to the position of salaried inspector of the whole of the properties. In August 1906 the lands now in question were notified as open for selection as grazing farms. Hopkins advised the Company to secure three of the blocks "as," he said, "it is the most important piece of country to the station." After

(1) 5 Q.B.D., 518, at p. 530.

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inquiries made by the Company's agents as to the mode in which the land could be acquired by the Company, and on ascertaining that the acquisition could only be made by purchase from a selector, Hopkins offered to take them up and transfer them accordingly. This offer appears to have been accepted, for on 29th September 1906 the Company's Australian agents communicated to them by cablegram as follows :—" We have arranged Hopkins selects 60,000 paying him £50 premium yearly for lease other 20,000 there is no reason to fear selection inferior land." It is not in controversy that this communication is a correct record of the actual facts.

Hopkins accordingly in October 1906 made application for three of the blocks, in each case declaring, as he was required by law to do, that he applied for it in order that he might hold it for his own exclusive benefit according to law, and not as the agent, servant, or trustee of or for any other person, his application was accepted and approved by the Land Commissioner, and leases were issued in due course. No change occurred or has ever occurred in the mode of occupation or use of the land, which continued as before to be used exclusively for the purpose of grazing the Company's stock. So far as regards human occupation, Hopkins signed blank forms of appointment of bailiffs for registration, and handed them to the Company who filled in the names of their own nominees. The so-called bailiffs were in all cases the Company's servants. The first instalments of rent, which was payable with the applications, were paid by Hopkins himself, but shortly afterwards repaid to him by the Company. The £50 " premium " for the year ending 30th September 1907 was paid to him in April of that year.

Pausing here, it is difficult to conceive a clearer case of a trust. If a leasehold estate was given by a testator to A.B. with a condition that A.B. should allow C.D. to have the exclusive possession and enjoyment of the land, he paying the rent and an annual premium of £50 to A.B., I suppose that no one would dispute that A.B. was a trustee of an interest in the land for C.D. Such a case is really not distinguishable from the present.

But this position, in view of the provisions of the *Land Act* to which I have referred, was obviously uncertain and dangerous.

The mere fact that the Company's stock were ordinarily depastured on the land was *primâ facie* evidence that the selector was a trustee for them, and in the circumstances there was no possibility of adducing any evidence to rebut the *primâ facie* inference. It was, therefore, obviously necessary to regularize the position, and to formulate something in the shape of a written document which could be produced in answer to this inference, and which would account for the Company's stock being in entire occupation of the land.

Steps were accordingly taken for this purpose to which I will directly refer. But in the meantime it had been considered necessary to acquire the fourth of the selections, and it was arranged that the respondent R. A. R. Hopkins should procure the other respondent, Miss Throsby, who was a relative of his, to apply for it and hold it on the same terms on which Hopkins held the three, for which service she was to receive a bonus of £15 a year.

At this stage of the proceedings the Company's former manager came upon the scene. He was most anxious to avoid every appearance of evil, and insisted that nothing must be done that would savour of illegality. At the same time his dominant purpose was to secure for the Company the exclusive use and benefit of the four selections for the terms of twenty-eight years. Various forms were prepared for expressing the relations of the parties in writing. One proposed was that the Company should advance to Hopkins all money required to be expended on improvements, he giving the Company a mortgage upon the leases to secure repayment. But this was thought too dangerous. At another stage it was arranged that the Company should occupy the land on the terms that they should pay the Crown rent, that the necessary improvements estimated to cost about £2,500 should be made by Hopkins, and that the Company should pay him a sum of £250 per annum under the name of rent, which it was pointed out would represent £10 per cent. on his outlay and, as the manager said, "a portion should go against depreciation." A sum of £15 was to be paid to "some friend of Mr. Hopkins who will take up Number 3 block" (*i.e.*, Miss Throsby's selection). The £250 was afterwards increased to £300, and on 20th March 1908 a formal agreement between Hopkins and

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the Company was drawn up and executed, reciting that he was desirous of making use of the pasturage of his three holdings until he was prepared to carry on pastoral business on his own account, and that Miss Throsby, his relative, was in a similar position and had asked him to include her rights in the arrangements made by him with the Company in respect of the pasturage of his own holdings. The agreement then testified that Hopkins could allow to the Company the right to agist and depasture live stock upon the four selections. Hopkins was to see to the paying of the Crown rents and local rates and the Company was to pay him yearly in advance £577 10s. (to be increased if the Crown rents were increased), of which amount £261 was represented by the Crown rents, and £15 paid by him to Miss Throsby, leaving £300 a year to Hopkins to recoup him for his outlay and other services.

The agreement was to take effect from 1st December 1907 and continue during the term of the leases, less seven days in each case. At this time a line of railway was being constructed connecting the district in which the property was situated with the seaboard, the probable effect of which would be greatly to increase the value of the property for pastoral purposes. It is obvious that the sum of £300 was not fixed with any regard to the probable future value of the usufruct of the land. It may be that this document of 20th March 1908 might be held, if the other facts warranted such a conclusion, to be a genuine agreement made by a proprietor of land in the exercise of his right of dominion over it and in his own interests. But when it is regarded, as it might be, as an agreement made by a person who had acquired the land and was then holding it as a trustee for the Company, it is at least open to the construction that it was not an independent agreement in the exercise of the right of ownership, but a mere collateral agreement altering the terms of the trust on which the land was to be held by him. In my judgment it was, to say the least, open to the Land Appeal Court to take the latter view. They did so. I am, therefore, unable to say that there is no evidence upon which they could find that the respondents were trustees for the Company.

I have not thought it necessary to refer to the many other questions which were discussed in the argument.

The appeal should therefore be allowed.

The judgment of ISAACS AND GAVAN DUFFY JJ. was read by ISAACS J. The effect of sec. 36 of the *Land Act* 1910 is that the appeal from the Land Appeal Court to the Supreme Court is only on a "point of law" or "excess of jurisdiction," and that all the facts necessary to determine those questions of law must be set out in the case stated.

The Supreme Court cannot find facts; and, as inferences from facts are themselves conclusions of fact, all necessary inferences must be drawn by the Land Appeal Court, and set out in the case. The law on this point, which is common to many Statutes, is stated in *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1), where many authorities are collected. To these may be added the case of *New Zealand Shipping Co.* v. *Stephens* (2), particularly the judgment of *Moulton* L.J.

The facts as found by the Land Appeal Court and appearing in the case it submits, must be taken to be the true facts, and the only facts, for the purpose of the determination of law which the Supreme Court is empowered to make. And as we have only to give the same judgment as the Supreme Court ought to have made, the same considerations apply now.

The questions, then, for us are: (1) Do the conclusions of fact arrived at by the Land Appeal Court sustain the decision that on 4th May 1912 the respondents respectively held as trustees for the Company; and, if so, (2) was the evidence such that the Court could properly arrive at those conclusions? It will be found to contribute to a simpler examination of the second question if the issues be considered in this order.

The findings of fact are "that the dominant purpose throughout the transactions was to secure to the Company the country comprised in the selections in order that it might continue to be used and worked as an integral portion of the Eddington Run. We are of opinion that the selectors from the time they appear in the

(1) 16 C.L.R., 591, at pp. 622, 623. (2) 24 T.L.R., 172.

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transactions, and thence continuously throughout, were acting for the Company in respect of the selections they took up."

Those findings involve the position of agency. We have to consider both the respondents, and, as both are treated on the same footing, it is evident that the agency was not as servants—because Mrs. Hopkins never was a servant of the Company. Treat them both, then, as agents by independent contract of agency, and the question is how equity would regard the situation supposing the facts stand as found. Apart from illegality, would equity have regarded the respondents as trustees for the Company of the land? Learned counsel for the respondents contended strongly that agency did not involve trusteeship. It does not always involve that relation; but does it not here?

It is a firmly established doctrine of equity that whenever a person agrees with another to purchase property as his agent, he is trustee for his principal of the property so purchased.

In *Austin* v. *Chambers* (1) Lord *Cottenham* L.C. said:—"There have been two points made for the appellant, impeaching the sale; one was, that when Mr. Austin, the owner of the property, found that there must be a sale, he desired Mr. Chambers to attend and buy it for him as his agent. The other point was, that Mr. Chambers being his attorney, and bound to do the best he could for his employer, could not support a purchase, which he had made, of his client's property. My Lords, I have no hesitation in saying, that if either of these propositions were made out in the affirmative, the appellant would be entitled to recover this property, making, of course, compensation, or repayment rather, to Mr. Chambers, of the moneys which he has expended upon the property, it being quite clear, according to the doctrine of a Court of equity, that an agent or solicitor, acting at the time as solicitor for the vendor, cannot himself purchase it for his own benefit. That doctrine is so well established that it is hardly necessary to refer to any decision or dictum upon it; but two cases are referred to, *Lees* v. *Nuttall* (2) and *Ex parte James* (3)." The headnote of *Lees* v. *Nuttall* (4), a decision of Sir *John Leach*, is as follows:—"An attorney having

(1) 6 Cl. & F., 1, at p. 36.
(2) 1 Russ. & M., 53.
(3) 8 Ves., 337.
(4) Taml., 282.

been employed to purchase an estate for his client, entered into a contract in his own name, and insisted upon holding it in his own right. Decreed to convey to his client, the plaintiff." The Master of the Rolls after stating a certain fact says (1) :—" This circumstance alone would fix on Nuttall the character of *agent* in this transaction, and would make it impossible for him to hold this purchase to his own use. I am clearly of opinion, therefore, that Mr. Nuttall must be considered as a *trustee* for the plaintiff." The essence of the doctrine is that the fiduciary relationship, the trust reposed by the principal in the agent with reference to the very transaction, and with respect to the ownership of the property, attracts the equitable interference of the Court. The case of *James* v. *Smith* (2) is in accord with this.

The Privy Council in *Reid-Newfoundland Co.* v. *Anglo-American Telegraph Co. Ltd.* (3) said :—" In *Lyell* v. *Kennedy* (4), Lord *Selborne*, in deciding that the facts were sufficient to establish a fiduciary character against a manager of property who had received rents on behalf of a principal said : ' For the constitution of such a trust no express words are necessary ; anything which may satisfy a Court of equity that the money was received in a fiduciary character is enough.' "

The facts referred to—unless found to be unsustainable—establish that, on ordinary principles, the licences once acquired by the respondents would be held by them in trust for their principals, the Company, subject, of course, to recoupment and indemnity.

Then, with respect to the second question—whether the Land Appeal Court could properly so find on the evidence. As to this the equitable doctrine already stated presents the test in this way : Is there evidence that though the titles stood in the names of the respondents on 4th May 1912, the respondents held them as agents of the Company ?

The first observation is that which has been adverted to on every side, namely, that sec. 59 (2) enacts that " proof that the stock of any person other than the selector are ordinarily depastured on a selection shall be *primâ facie* evidence that the selector is a trustee

(1) Taml., at p. 287.
(2) 65 L.T., 544.
(3) (1912) A.C., 555, at p. 560.
(4) 14 App. Cas., 437, at p. 457.

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of the selection for the owner of the stock." The nature of *primâ facie* evidence is thus stated by Lord *Loreburn* L.C. in the *Draupner Case* (1) :—" *Primâ facie* evidence is evidence which raises a rebuttable presumption of fact ; it stands till rebutted ; it therefore cannot establish more than a probability, but a probability which may be displaced by evidence." The sub-section is not limited in the way suggested by the prevailing judgment in the Supreme Court. It does not say the fact is to be *primâ facie* evidence if it stands alone ; but simply that it is " *primâ facie* evidence " of the ultimate fact of trusteeship. Lord *Loreburn* went on to state what is practically a test apposite to this case in these words :—" In my opinion there is here a *primâ facie* case or probability which has not been displaced by evidence and which accordingly must stand."

So that, as the fact postulated in the sub-section has been established, we have to see whether its effect has been displaced.

For that purpose it is, of course, necessary to bear in mind what the trusteeship is of which the postulated fact is evidence. That fact does not constitute a trusteeship ; it is consistent, and is assumed by the sub-section to be consistent, with the absence of trusteeship. It is consistent with agistment, which implies that the selector is himself in actual occupation, and though, not an insurer of the animals agisted, has by the common law a duty to take reasonable care of them. It is also consistent with a contract of tenancy which, however it might be in contravention of the Act, would not be this particular contravention. And whatever form of trusteeship is possible consistently with the postulated fact in the sub-section, nothing will sustain the appellant's case here but the form actually found, namely, trusteeship by agency, in accordance with the doctrine adverted to. The point made for the respondents is this : They say the evidence shows incontestably that the relative positions of the parties on 4th May 1912 is defined in law by the agreement of 20th March 1908—an agreement intended to be acted on, and, indeed, insisted on, by Hopkins—that whatever could be said before that instrument was executed, the moment it was executed all other relations disappeared, they merged, so to speak, in the purely contractual and independent relation to be

(1) (1910) A.C., 450, at p. 451.

gathered from the ordinary legal interpretation and effect of that agreement. It is believed that that view places the respondents' contention as strongly as they would wish it. And they further give—if that were necessary— a reason for the *bona fides* of the instrument, that Mr. Davidson deliberately insisted on the arrangement there embodied, because he refused to continue on the basis existing previously. This, say the respondents, was so new, so radical an alteration of the relations that the trust, if it ever existed, henceforth ceased, and thereafter a pure agistment agreement remained, obnoxious neither to trusteeship nor breach of occupation condition. But the history of the document and of the conduct of the parties exhibits a series of transactions which—to say the least of it—are marked by two persistent facts. The first is that, so far as appears from the evidence, never for a single instant from the moment of the original application for the leases, down to the execution of the agreement of 20th March 1908, did the Company relax their hold on the land, or relieve the respondents of their obligation to pass on the beneficial occupation, or leave them free to agree or not to agree to complete such transfer of the land to the Company as the legal difficulties presented by the *Land Act* would permit. The other fact is that during that period there were what a reasonable man might well consider constant and violent efforts on the part of the Company and their legal advisers to frame methods of transfer that would pass muster, and yet would give the Company something like a legal title, and by debits and credits and otherwise to mould the remuneration of their agents for their services so as to resemble compensation for the land itself.

The position of Mrs. Hopkins from the moment she enters upon the scene is so completely identified with that of her foster-father that, subject to one observation to be made presently, whatever position he is found to occupy carries hers with it. She simply added the fourth allotment to the other three.

The genesis of the whole transaction was that in August 1906 Richard Hopkins, the Company's salaried inspector in Queensland, pointed out to the Company in Edinburgh the importance to the Company that they should "secure" the four blocks of 20,000 acres each. The Company applied to the Minister for these blocks,

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but, being refused, it was arranged that Hopkins should select three blocks—no one individual being allowed more—and the Company should pay him £50 a year premium for a lease, and was to have the "agistment" as it was called. The fourth block was inferior land, and, as it was thought improbable that anyone would select it, it was for the time neglected. Hopkins accordingly applied for the three blocks on 13th October 1906.

The Edinburgh letters of 17th October and 8th November are important. From the first, it appears that the Company rather than run the risk of clause 15 of the 1902 Act, for six months, which, if successful, carried a lower rental for the land, thought "it was better to secure it on the terms now arranged with Mr. Hopkins." On 8th November Edinburgh writes to Melbourne:—"Regarding the resumed area, I am pleased to learn that the Brisbane solicitors consider there will be no difficulty, or danger, in Mr. Hopkins taking up the 60,000 acres, and leasing it to the Company. You know my views on the matter, and I am glad *we can acquire the land without any risk*—in fact I knew you would never have suggested this *move* without being fortified by first-rate legal opinion." (Italics here and elsewhere are ours).

Now, there can be no doubt, or it would at the least be open to any tribunal to conclude, that the "move," as it is termed by the head office, by which "we can acquire the land without any risk" was one in which form was to disguise substance, in which Hopkins was to be a mere name; that he acted entirely as the confidential agent of the Company in respect of the application, and that neither he nor the Company ever intended that he should use the land in any sense for himself, but that as to any beneficial interest in the land he was to be a mere conduit pipe for the Company. And yet his application of 13th October, for which not only he was responsible, but which was put in with the connivance of the Company by their representatives, contains the following statement:—"I apply to select the land in order that I may *hold and use it for my own exclusive benefit according to law, and not as the agent, or servant, or trustee of or for any other person.*"

It was clearly open to any tribunal—we say no more than that, because it is outside our province—to regard that statement as a

deliberately false statement, intended and calculated to mislead the Department, and the Commissioner who was placed by Parliament at the threshold to see that all such applications were *bonâ fide*—in short, to find that the acquisition of the land was bottomed in fraud to which applicant and Company were both parties.

The Commissioner was necessarily deceived, and on 13th November 1906 he accepted the application. On 13th December 1906 the Land Court approved the acceptance, and the matter became final, that is, for the issue of the licence, and on 31st January 1907 the licence to occupy was issued.

Nothing can be more decisive than the avowal in the correspondence (Dennys & Co. to Edinburgh, 16th January 1907) that "Mr. Hopkins selecting was so as to secure you a lease."

But by this time Hopkins agreed (sec. 16) to endeavour to "arrange" the selection of the fourth block "so that the Company can get a lease of it." This was for the purpose of a bore to water all four blocks. The first phase or arrangement still subsisted, which was that the Company were to have the land, and Hopkins was to have £50 a year for his services in getting the land, and posing as the true owner.

Mr. Davidson, the Company's Edinburgh manager, arrived in Australia in January 1907, reaching Melbourne on the 14th of that month.

By 11th July 1907 (sec. 17) a new arrangement had—according to Mr. Davidson—been made by him with Hopkins as to the *terms* "on which the Company leases the three grazing farms he has." There does not seem to have been any dissatisfaction on Hopkins' part respecting his remuneration, but the Company were apparently uneasy about the appearance of the arrangement. They had, as yet, no documentary title, they were in actual possession and had nothing to show in explanation should it be demanded. They ran the patent risk of losing the land, and Hopkins ran the risk of losing his future remuneration. But what form should the title take? The proposed agreement and conditions were to be put into shape by the Brisbane lawyers, that is, Fitzgerald and Power. This is represented by one of the proposed agreements, the first clause of which recites (*inter alia*) that Hopkins was desirous of utilizing

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the grazing rights and advantages of the three farms *until* he had completed all conditions of improvement, and was entitled to leases, and thereafter of carrying on grazing business on his own account. That is an undeniable untruth. Hopkins intended and everybody else intended that he should not carry on any such business. The proposed agreement was irretrievably false.

It was to purport to be an agistment agreement, and it is trite law that an agistment agreement carries no interest in the land. Consequently, on the face of it, the word " agistment " would suggest that Hopkins did not really part with any interest in the land, notwithstanding the avowed understanding was that he was to " lease " it to the Company. No time was fixed for the duration of the agreement, and it was to be terminable by three months' notice. In other words, it was to go on until an event which both sides intended—as it might be found—should never really happen. It was, to say the least of it, a possible inference that this proposed agreement was a sham, the real arrangement being that the original understanding should as between Hopkins and his principals be honourably kept.

This is the second phase—namely, an endeavour to reduce to writing that would hold water the result of the efforts of the Company to " secure " the land.

The absence of definite term was observed upon in the Melbourne letter of 30th August to the solicitors, and a suggestion is made to make the termination by notice accord with the due dates of payment of rent to the Government.

For these, and other reasons, it is suggested that " the documents need alteration so that the lease to the Company is more secure and that they can carry out improvements, which outlay, should be protected as an advance." Why as an " advance " for improvements that the Company wish for their own purposes to carry out? Davidson notes these remarks and the solicitors say that all the suggestions can be met. " Met," that is, by draftsmanship, as it is possible to conclude. Eventually on 7th September 1907 Davidson writes to the Melbourne office, and says that he thinks " as there appear to be a number of difficulties in the conditions under which *we had arranged to occupy the land* owned by Mr. Hopkins " certain

new terms mentioned are preferable. How, in view of the Company's own occupation of the land, they could pretend to be mere "agistment," it is difficult to comprehend.

Observe, then, the old arrangement that the Company were to "occupy the land" is adhered to. The conditions of occupation are to be altered. But how? Hopkins had already paid for fencing £103. The Company claimed £250 for fencing, though he had already paid it in the preceding February. He was to put in an artesian bore on Number 4 block, and put in drains, in all £800. That sum was not for his purposes. It was utterly foreign to an agistment pure and simple. Why should he agree to do that? He was also to put up two huts for £80, and two sets of yards for £200, in all £280. Why? He did not need the yards. And agistment would not involve him in this. Then he was to spend £25 in acquiring Number 3 block, that is the fourth block. Why again? What relevancy had this to agistment on the three blocks? And why should he himself expend that sum, and get interest upon it, if it was to be genuinely some "friend" to take it up? That little incident of itself is eloquent. The total of these outpockets was £2,428. The sum of £1,000 for fencing was not expendable at once, but over three years. The two items £800 and £200—that is, £1,000—as well as the £25 were quite unnecessary for compliance towards the Crown or for his own purposes. Yet there was 10 per cent. interest allowed to him on the whole £2,428, as if he expended it all at once and on his own account. The Company lumped this by agreeing to pay him £250 per annum as for rent, that is, rent for a twenty-eight years lease—he finding the £2,428; and the Company were to pay the amount of his Crown rents, and, although this is in advance, to charge no interest on that; also to pay £15 a year "bonus" to some "friend" of Hopkins, whom he is to procure to take up Number 3 block, which, says Davidson, "we must have for artesian watering purposes." The "friend" then was to take up Number 3 block, to get £15 a year bonus, fixed not by the friend, who was still unascertained, but Hopkins was to pay the survey fees, and the Company to pay the rent to the Crown and also occupy the land. Could the friend be more obviously a dummy? And yet this is the basis of the agreement that is put forward as

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entirely independent, and absolutely free from all suspicion of dummying or, in legal parlance, trusteeship.

The total sum payable to Hopkins was £526 a year, increased by correction to £577 10 . Then says Davidson :—" Under the foregoing plan it is a ' clean ' job, and preferable to another plan." The £250 representing interest on outlay did not, however, allow for any remuneration for services, and so, some errors in accountancy having also occurred, it was altered ; and by a letter of 9th September 1907 the £250 rent was raised to £300, and it was recognized that the future holder of the fourth block might expect a little more than the £15. On what basis the £15 was fixed, it is hard to conjecture. And what does " bonus " mean ? This is the third phase, and the basis of the agreement of 20th March 1908 relied on as a radical departure from their original relations. What was the " clean job " ? To begin with : Miss Throsby, the friend to take up the fourth block, had to make the required application for it, and she did, and notwithstanding that she came in then for the first time—the date of her application being 15th October 1907, being over five weeks after the letter referred to and a fortnight after the date to which the agreement of March 1908 was to relate back—and notwithstanding that she came in for the sole purpose of that arrangement, she stated, just as Hopkins had stated, that it was to be held and used by her for her own exclusive benefit, and not as the agent, servant or trustee of or for any other person. Compare that with her sworn testimony. Then the recital of the deed teems with untruthful statements. Hopkins was not, nor was Miss Throsby, proceeding to comply with bailiffing conditions ; they never contemplated, during the twenty-eight years at least, carrying on pastoral business on their own account, or making use of the pasturage, which there meant true agistment. Such statements were clearly not for the purpose of deceiving the parties themselves ; and, as the titles were not transferable, whom were they to deceive, if not the Crown ? The condition as to not overstocking is ludicrous, seeing that the Company were to retain the land for twenty-eight years, and leave only seven days to run. Other clauses, however *bonâ fide* they appear in the absence of the history of the deed, call for grave suspicion when that is known. Learned counsel pointed

to the strenuous insistence of Hopkins on adhering to the terms of the deed as proof of its genuineness. No doubt Hopkins' remuneration and Miss Throsby's (now Mrs. Hopkins') remuneration is fixed by it, and the conditions of that remuneration. No doubt he and she must comply with its terms in order to preserve the appearance of the true selector. But that is all perfectly consistent with the document being the best execution possible in the circumstances of the trust undertaken by Hopkins and Miss Throsby, and the safest possible method of attempting to preserve the status so laboriously and artificially created, and is therefore perfectly consistent with the lessees still holding the land on 4th May 1912 in trust for the Company, for all the interest in the lease except seven days, or even for the seven days.

When the Department's suspicions were aroused, this document of 20th March 1908 was offered to the Department as a full and faithful explanation of the position, with a letter from the solicitors, from which it is impossible to obtain an adequate idea of the actual state of affairs. The evidence in support of the findings of the Land Appeal Court is manifestly superabundant, the devious methods and untrue assertions and suggestions resorted to might well be thought not explicable on any other theory, but that of concealing the one permanent design by the Company to secure the land and ward off detection, a design never relinquished for an instant. Therefore, holding as we do, with the Commissioner, the Land Court, the Land Appeal Court, and *Real* and *Chubb* JJ., that there is evidence on which to rest the findings, we are of opinion that this appeal should be allowed.

We desire to add, in fairness to the judgment from which we are differing, that, as appears by its concluding words, it was arrived at only after some hesitation.

GAVAN DUFFY J. I desire to add that, whatever be the meaning of the word "trustee" in sec. 59 of the *Land Act* of 1910, the depasturing of the Company's cattle on the selections of Mr. and Mrs. Hopkins was *primâ facie* evidence under the provisions of that section that they were such trustees of their selections for the

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Company, and the Land Court was at liberty to hold that the *primâ facie* evidence had not been displaced and to act on it.

POWERS J. I agree with the judgments delivered by my learned brothers, and I have very little to add.

The main question to be decided by this Court is whether there was evidence on which the members of the Land Appeal Court could find that on 4th May 1912 the selectors, the respondents, held the lands in question, or any interest in them, as trustees for the New Zealand & Australian Land Co. Ltd.

All the learned Judges of the Supreme Court held that there was evidence on which the Land Appeal Court could find that under the first and under the second arrangements the selectors were trustees for the Company, and Mr. *Feez*, for the selectors, although not admitting that the selectors were trustees up to that time, admitted that he would have great difficulty in contending that there was not evidence on which the Land Appeal Court could find the selectors were trustees.

Counsel for the selectors rested principally, if not altogether, on the fact that the third arrangement, made in September and October 1907, caused the selectors (if they ever were trustees) to take on the position of *bonâ fide* owners, merely allowing the Company, after that, to agist cattle on their lands, and that the terms of the agistment agreement made in September and October 1907 were embodied in a contract, namely, in the agreement of 20th March 1908, which agreement has been so fully referred to by my brothers in their judgments. This contract, or agreement, was insisted upon as if it were the only evidence the Land Appeal Court could look at, although counsel did refer to part of the evidence of Mr. Davidson, the managing director in Edinburgh, and to some of the letters written after 20th March 1908. The Land Appeal Court was, I think, justified in considering all the evidence submitted by the Crown and by the selectors, and in deciding, on all the oral and written evidence submitted to it, whether the selectors were, on 4th May 1912, trustees for the Company. The evidence was, in my opinion, sufficient to enable the Court to hold that the selectors

were trustees for the Company up to the time the third arrangement was entered into. Under the first arrangement the selector Hopkins agreed to take up the land for the Company and transfer it to them (when they could legally hold it) without any remuneration, allowing the Company to continue the sole use and occupation of it in the meantime. The Company had the use and occupation of the land—the full beneficial use of it up to that time—and the selectors only received compensation for the use of their names as selectors for the land. Under the second arrangement the Company were to continue the beneficial use of it and pay him (Hopkins) £50 bonus, and all moneys he expended to effect the improvements necessary to enable him to retain the legal title to it under the land laws—and all rents payable to the Crown by him.

The Land Appeal Court, on the evidence submitted to it, found that the land was held by the selectors under the three arrangements entered into between the parties as trustees for the Company. Had they any evidence to warrant them in doing so? The Court had the evidence of the only selector who gave evidence (Mrs. Hopkins). In the notes of Mrs. Hopkins' evidence we find, *inter alia*, that she "has put no stock on it; has no stock in the district, and never had; never paid bailiffs any money or gave them any instructions or received any reports from them"; and that "she knew when she signed the agreement she was to get £15 per annum—she not being liable for rent, or to pay bailiff, or rates, or cost of improvements; the Company was to pay the bailiff." It must be remembered that Mrs. Hopkins did not come into the matter until September 1907. The manager of the Company, Mr. Wilson, proved, if his evidence was believed, that the occupation continued the same after the third arrangement as before. He said (according to the notes of his evidence):—"When he went to Eddington first" (9th April 1906, before the first application) "the four selections were being worked in parts of Eddington under occupation licence from the Crown. They have remained ever since being worked as part of Eddington. The fact of the land being selected never made any change in the working of the land. Neither selector Hopkins nor Mrs. Hopkins ever put any stock on the selections. As far as he knew they never had any stock in the

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locality. Eddington Station stock on the four farms when selected, and have been there ever since. Witness appointed all the bailiffs for the farms. There were many changes. Had a set bailiff forms signed in blank by the selectors. When any change in bailiffs he filled in names, and then sent on to Mr. Cox for registration at the Lands Office. He paid wages of bailiffs and their rations out of the station account, and they appeared as bailiffs in the station books. They were under his orders. He considered he had right to order them to do work on the station. He never consulted the selectors about the personnel of bailiffs, and any instructions as bailiffs he gave, and he did this as part of his duties as manager of Eddington." This appears to me strange evidence to submit in support of an agistment agreement.

The Land Appeal Court could surely take this evidence into consideration when deciding whether there was a radical change or any change in the position of the parties in September 1907 or at any time, and in considering whether the agreement of 20th March 1908 was a *bonâ fide* agreement for agistment or only an agreement allowing increased compensation to the selectors, as trustees of the land of which they were legal owners and of which the Company were the beneficial owners in May 1912, and up to the date of the hearing.

The Land Appeal Court could, I think, also hold that the letter of 15th November 1909 showed that it was a matter of indifference to the selectors of which selection they were legal owners, and that the compensation to be paid for their trusteeship was the only matter for consideration by the selectors. To benefit the Company (the alleged beneficial owners) Mr. Hopkins, in that letter, offers to transfer one of his blocks to his nephew's wife, although, in a letter dated 26th September 1906, he described that selection as so bad that it should not be taken up, and he would not touch it—that is, he would not advise the Company to have it taken up for them.

I have referred to these detailed portions of the evidence in addition to the facts proved or admitted referred to by my learned brothers in their judgments, all of which were before the Land Appeal Court, and all of which the Court had a right to consider, as well as to the agreement of 20th March and the evidence of Mr. Davidson, referred to so fully by counsel for the respondents.

The Act provides, sec. 59 (2):—"Proof that the stock of any person other than the selector are ordinarily depastured on a selection shall be *primâ facie* evidence that the selector is a trustee of the selection for the owner of the stock."

In this case, I think the Land Appeal Court could, on the evidence, reasonably come to the conclusion that the *primâ facie* evidence had not been rebutted. I also think that the Land Appeal Court could, on the evidence, properly hold that the only real alteration made by the third arrangement was to increase the remuneration to be paid to the selectors, the legal owners, for the continued exclusive occupation by the Company of the land, for the beneficial use of the Company.

It was argued that no reasonable men could, on the evidence, come to the conclusion that the Land Appeal Court did.

The Land Commissioner, experienced in hearing cases under the land laws, found the selectors were trustees. A member of the Land Court, on appeal, found the same fact. The members of the Land Appeal Court, including a District Court Judge, unanimously found the same fact. Two learned Judges of the Supreme Court (out of four) found that the evidence was sufficient to support the decision of the Land Appeal Court, namely, that the selectors were on 4th May 1912 holding the land as trustees for the Company.

I hold that the Land Appeal Court could, on the evidence submitted to them, properly find that on 4th May 1912 the selectors, the respondents, held the land in question as trustees for the New Zealand & Australian Land Co. Ltd.

I therefore think that the appeal should be allowed.

Appeal allowed. Judgment appealed from discharged and appeal from Land Appeal Court dismissed with costs. Respondents to pay costs of appeal.

Solicitor, for the appellant, *T. W. McCawley*, Crown Solicitor for Queensland.

Solicitors, for the respondents, *Fitzgerald & Walsh.*

R. G.