[HIGH COURT OF AUSTRALIA.]

ROBERTSON . . . . . APPELLANT;
DEFENDANT,

AND

ADMANS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 27, 30.

SYDNEY, *Dec.* 7.

Knox C.J., Powers and Starke JJ.

Closer Settlement Lands—Agreement for transfer of two allotments to one person—Validity—Consent of Closer Settlement Board—Contract—Specific performance—Closer Settlement Act 1915 (*Vict.*) (*No.* 2629), *secs.* 75, 84, 86, 129 *—*Closer Settlement Act* 1918 (*Vict.*) (*No.* 2987), *sec.* 39.*

Held, by *Knox* C.J. and *Powers* J. (*Starke* J. dissenting), that the effect of secs. 84 and 129 of the *Closer Settlement Act* 1915 (Vict.) as amended by the *Closer Settlement Act* 1918 (Vict.) is that, except in the specified instances, no person shall become or be at any one time beneficially entitled to any estate or interest, legal or equitable, in more than one closer settlement allotment, and therefore that it would be unlawful for the Closer Settlement Board to consent to a transfer to one person of two allotments at the same time or of one allotment at a time when he has a beneficial interest in another allotment.

* The *Closer Settlement Act* 1915 (Vict.), as amended by the *Closer Settlement Act* 1918 (Vict.), provides by sec. 75 that the Closer Settlement Board may dispose of certain lands on conditional purchase leases. By sec. 84 it provides that "(1) Subject to this Act no person shall be granted or hold in his own name or the names of any other person or persons a lease of more than one allotment . . . . (2) If any person holds any estate or interest in the lease of an allotment contrary to the provisions of this section such estate or interest shall become forfeited to His Majesty. . . . (3) If any person by or under any will or as one of the next of kin of any deceased person or by reason of any estate or interest in expectancy falling into possession or by survivorship or by the foreclosure of any mortgage becomes the lessee of any allotment and thereby becomes a lessee of more than one allotment such person shall not be deemed to hold such land contrary to the provisions of this section until the expiration of three years from the death of the testator or intestate or the falling of such estate or interest into possession or the death of

The appellant was the lessee under the *Closer Settlement Act* 1915 of two closer settlement allotments, of one in his own right and of the other as executor of his deceased wife. Under the leases a certain sum was still owing to the Closer Settlement Board. The appellant agreed for valuable consideration to transfer his interest in the two allotments to the respondent, subject to the Board agreeing to the transfer, the respondent agreeing to take over the appellant's liability to the Board.

Held, by *Knox* C.J. and *Powers* J. (*Starke* J. dissenting), that under the agreement the respondent was not entitled to insist on a transfer by the appellant of either allotment to a third person; that it would be illegal for the Board to consent to transfers of the two allotments to the respondent, even if at the time the consent was sought the respondent tendered a transfer by him of one of the allotments to a third person; and therefore that the respondent was not entitled to specific performance of the agreement or to damages for breach of it by the appellant.

Decision of the Supreme Court of Victoria (*McArthur* J.) reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by George Alfred Admans against Robert Robertson for specific performance of a certain agreement in writing dated 2nd October 1920, or, in the alternative, for £5,000 damages for breach of such agreement. The

the person upon whose death any estate or interest accrues by survivorship to such first-mentioned person or the foreclosure of such mortgage (as the case may be). (4) Any person holding any estate or interest in more allotments than one contrary to the provisions of this section, in addition to the liability to forfeiture hereinbefore provided for, shall be liable to a penalty of not more than two pounds per centum on the value of such lands held by him contrary to the provisions of this section, and an additional penalty of the same amount for each year he may hold the same." By sec. 86 it provides that "Except as otherwise provided in this Act every conditional purchase lease . . . shall contain . . . (9) A condition that if at any time after the expiration of the first six years of any such lease the Board is satisfied that all the covenants and conditions thereof have been complied with the lessee may with the written consent of the Board transfer . . . the whole or any part of the land demised." By sec. 129 it provides that "(1) No person shall hold as beneficial owner either in his own name or in the name or names of any other person or persons more than one allotment disposed of under the Closer Settlement Acts previously in force or under this Act. (2) For the purposes of this section a person shall be deemed to hold lands as beneficial owner if he holds them otherwise than as a trustee executor administrator assignee of an insolvent estate or mortgagee for any estate or interest in possession freehold or leasehold or of any other description whether such estate or interest be legal or equitable; or if he is the settlor grantor assignor or transferor of such lands or any such estate or interest therein by settlement grant assignment transfer or conveyance not made *bonâ fide* for valuable consideration; and any beneficial owner of lands or of any estate or interest therein jointly or in common shall be deemed the owner of a proportion of such lands estate or interest equal to his undivided share therein. . . . (3) This section shall not render void any transfer certificate of title lease devise or conveyance or mode of acquiring title to lands or any estate or interest in lands whether by

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defendant, by counterclaim, asked for a declaration that the agreement was duly avoided by him and was null and void. The agreement was substantially as follows :—

"I hereby agree to exchange my property, viz., 425 acres at Aviation Road, Laverton, retaining 20 acres out of the original block situated along the boundary of the railway line on the north side of the present property, subject to the Closer Settlement Board agreeing to the transfer of same to Mr. Admans and also to elimination of the 20 acres, which I am reserving for myself for a private residence (the fencing of same to be paid for by Mr. Admans and myself in equal proportions), for Mr. Admans' terrace 16 houses, Rutland Street, Clifton Hill, and subject to a loan of £5,000 being arranged for on the Rutland Street, Clifton Hill, property. Mr. Admans to pay me the sum of £200 cash and transfer his property to me, and subject to my paying Mr. Admans the sum of £5,000 in cash, each side paying their own solicitors for their legal charges, also each side paying half of the survey fee for eliminating the 20 acres as mentioned above. . . . Mr. Admans to take over the existing liability to the Closer Settlement Board.—(Signed) G. A. Admans.—(Signed) R. Robertson.—Witness: R. W. Johnston.

"And I the undersigned, George Alfred Admans, hereby agree to exchange my terrace at Rutland Street, Clifton Hill, for the said 425 acres at Laverton belonging to Robert Robertson, together with all crops now growing and the whole of the property (approximately 200 acres oats and 65 acres barley) with all buildings improvements and fixtures thereon. I agree to give an unencumbered title

operation of law or act of the party except as regards any lands estate or interest comprised therein or affected thereby with respect to which legal proceedings to enforce a forfeiture are pending at the time the same is made takes effect or is suffered and against which (unless the estate or interest is one which does not appear upon the register book) a caveat has been lodged on behalf of His Majesty under the *Transfer of Land Act* 1915 claiming to take advantage of such forfeiture. (4) If any person (except as hereinafter mentioned) holds lands or any estate or interest in lands contrary to the provisions of this section such lands or so much thereof as may be held contrary to the provisions of this section or the estate or interest of which such person is beneficial owner therein shall be liable to be forfeited to His Majesty . . . . (6) If any person by or under any will or as one of the next of kin of any deceased person or by reason of any estate or interest in expectancy falling into possession or by survivorship or by the foreclosure of any mortgage becomes the beneficial owner of more allotments than one such person shall not be deemed to hold such lands contrary to the provisions of this section until the expiration of five years from the death of the testator or intestate or the falling of such estate or interest into possession or the death of the person upon whose death any estate or interest accrues by

to same to Mr. R. Robertson, subject to the equity of the 425 acres at Laverton being transferred to me, and the sum of £5,000 being paid in cash, as per agreement on other side. . . . (Signed) G. A. Admans.—Witness: R. W. Johnston.

"Subject to the clauses under Table A of *Transfer of Land Act* A.D. 1915 to apply to this contract.—(Signed) R. Robertson.—(Signed) G. A. Admans.—Witness: R. W. Johnston."

The 425 acres of land referred to in the agreement consisted of two closer settlement allotments held by the defendant under conditional purchase lease under the *Closer Settlement Act* 1915. The lease of one had been granted to the defendant on 1st April 1911 and of the other to his wife on 2nd March 1914. She had died on 28th March 1916, and probate of her will had been granted to the defendant on 11th August 1916. The area of the former was 223 acres 1 rood 33 perches, and its capital value at the date of the lease was £2,458; the area of the latter was 221 acres 1 rood 22 perches, and its capital value at the date of the lease was £2,435 5s. There was still owing to the Closer Settlement Board in respect of the two allotments the sum of £4,700.

The terrace of houses mentioned in the agreement had been purchased by the plaintiff on 1st October for £5,950, subject to a loan of £5,000 being raised upon it, and the plaintiff had on that day paid £50 as a deposit upon the purchase. On 6th October 1920

survivorship to such first-mentioned person or the foreclosure of such mortgage as the case may be. . . . (8) Any person holding any lands or any estate or interest in lands contrary to the provisions of this section, in addition to the liability to forfeiture hereinbefore provided, shall be liable to a penalty of not more than two pounds per centum on the value of such lands held by him contrary to the provisions of this section, and an additional penalty of the same amount for every year he may hold the same. . . . (12) No transfer of a fee simple estate in the whole or any part of any such closer settlement allotment disposed of after the commencement of the *Closer Settlement Act* 1904 under that Act or any amendment thereof or under the Principal Act" (the Act of 1915) "or any amendment thereof shall be registered by the Registrar of Titles unless and until there is delivered to the Registrar of Titles a statutory declaration by the transferee stating that he did not at the time of the acquisition thereof by him and does not and will not upon registration of the transfer hold as beneficial owner contrary to the provisions of this section either in his own name or in the name or names of any other person or persons more than one closer settlement allotment disposed of under any of the said Acts and also that he will not upon registration of the transfer hold the land transferred in trust for or on behalf of any other person or persons not qualified by law to hold the same as beneficial owner or owners."

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the defendant caused a letter to be written to the plaintiff stating that he declined to go on with the transaction on the grounds that a loan of £5,000 could not be obtained on the Rutland Street property and that certain misrepresentations had been made by the plaintiff.

The action was heard by *McArthur* J., who gave a judgment for the plaintiff, the effect of which is set out in the judgment of *Knox* C.J. and *Powers* J. hereunder, where the other material facts are also stated.

From the decision of *McArthur* J. the defendant now appealed to the High Court.

Pigott and *Eager* for the appellant. The contract is void *ab initio*; for the transfer to one person of the two closer settlement allotments is illegal by reason of secs. 84 and 129 of the *Closer Settlement Act* 1915 and sec. 39 of the *Closer Settlement Act* 1918, and it would be illegal for the Closer Settlement Board to consent to such a transfer. The contract being illegal, the refusal of the defendant to perform it on a ground which cannot be supported does not prevent him from now relying on the illegality (*Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1)).

C. Gavan Duffy (with him *Fraser*), for the respondent. There is nothing in the Closer Settlement Acts which prevents this contract being carried out by a direct transfer of both allotments to the respondent, for all that those Acts intend to prevent is the beneficial enjoyment by one person of land beyond a certain value. If the respondent, immediately after the two allotments are transferred to him, transfers one of them to his wife or some other person there is no infringement of the Acts. There is nothing in the Acts which is directed to prohibiting contracts for the transfer of closer settlement allotments. When the documents of transfer from the appellant to the respondent are presented to the Closer Settlement Board for their consent, there may properly be submitted to them a transfer of one allotment from the respondent to a third person (see *Bowen* v. *Wratten* (2)). Even if the contract cannot be carried out in full detail because of the taint of illegality, if its substance was

(1) (1888) 39 Ch. D., 339.

(2) (1892) 18 V.L.R., 371; 13 A.L.T., 267.

that the land should be transferred to the respondent or some person whom he nominated, the Court will order it to be performed by transferring one of the allotments to the respondent and the other to his nominee (*Fry on Specific Performance*, 6th ed., p. 469; *Halsbury's Laws of England*, vol. XXVII., p. 63; *Carolan* v. *Brabazon* (1)).

[KNOX C.J. referred to *Watson's Bay and South Shore Ferry Co.* v. *Whitfeld* (2); *Gelling* v. *Crespin* (3).]

Pigott, in reply.

Cur. adv. vult.

Dec. 7.

The following written judgments were delivered:—

KNOX C.J. AND POWERS J. In this action the plaintiff claimed specific performance of an agreement dated 2nd October 1920 for the exchange of certain properties between himself and the defendant, and, in the alternative, damages for breach of the agreement. The property to be transferred by the defendant to the plaintiff consisted of two parcels of land, held by the defendant under conditional purchase lease under the *Closer Settlement Act* 1915, containing 425 acres in all. The defendant held one of these parcels in his own right and the other as executor of the will of his deceased wife, as he was entitled to under the Act. The agreement was expressed to be subject to the Closer Settlement Board agreeing to the transfer of these parcels to the plaintiff and subject to a loan of £5,000 being arranged for on the property to be transferred by the plaintiff.

The grounds of defence set up on the pleadings were (1) that the Closer Settlement Board did not agree to the said transfer; (2) that the said transfer was not one to which the Closer Settlement Board would agree (par. 3 of the defence); (3) that the advance of £5,000 was not and could not be arranged for (par. 4); (4) that the defendant was induced to make the agreement by the fraud and misrepresentation of the plaintiff (par. 5). And on these grounds the defendant counterclaimed for a declaration that the agreement was duly avoided and alternatively for rescission of the agreement.

At the trial it was proved that the defendant's solicitor on 6th

(1) (1846) 3 Jo. & Lat., 200.
(2) (1919) 27 C.L.R., 268.
(3) (1917) 23 C.L.R., 443.

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October 1920 informed the plaintiff that the defendant refused to carry out the agreement on the ground that it had been induced by misrepresentation, and stated that the defendant cancelled the agreement.

Upon the evidence given at the trial *McArthur* J. held (1) that the defendant was not induced to make the agreement by any fraud or misrepresentation of the plaintiff; (2) that on 6th October 1920 a reasonable time had not elapsed for obtaining the consent of the Closer Settlement Board or for arranging the loan of £5,000; (3) that the performance of both conditions was prevented by the wrongful repudiation of the contract by the defendant; (4) that the amount of damage sustained by the plaintiff if the agreement were not performed would be £1,000; (5) that the advance of £5,000 could probably have been arranged for; (6) that there was no legal bar to the Closer Settlement Board giving its consent to the transfer.

On these findings judgment was entered for the plaintiff as follows: —(1) A declaration that the plaintiff was entitled to specific performance of the agreement. (2) An order that the defendant execute and deliver to the plaintiff transfers of the property to the plaintiff or to whom he should appoint and take such steps as might be necessary, reasonable and proper to obtain the consent of the Board to such transfer. (3) A declaration that in the event of the Board consenting in writing to the transfers the remaining terms and conditions of the agreement should be specifically performed. (4) A declaration that if it shall be found that the agreement could not be specifically performed because the consent of the Board could not be obtained or the advance of £5,000 could not be arranged for, but such consent could have been obtained or such advance could have been arranged for if the defendant had taken proper steps to obtain the consent or to co-operate in the arrangement for the advance, the plaintiff was entitled to £1,000 damages. (5) A declaration that if the agreement should be specifically performed the plaintiff was entitled to the value of the crop taken off the land less £200 cost of cutting, stooking and stacking as provided in the agreement. (6) A declaration that the loss sustained by the plaintiff if the agreement should not be carried out had been contingently

assessed at £1,000. (7) An order that defendant pay costs of the action and that the counterclaim be dismissed with costs.

The defendant appealed to this Court against the whole of this judgment on a number of grounds; but the only grounds pressed were (1) that the finding that the defendant was not induced by misrepresentation of the plaintiff to make the agreement was against the evidence; (2) that the Closer Settlement Board could not lawfully consent to the transfer of the 425 acres in accordance with the agreement; (3) that even if the Board could lawfully consent to such transfer it would not have done so; (4) that in any event the plaintiff was not entitled to recover more than nominal damages.

So far as the appeal is rested on the first of these grounds, we think it must fail. The decision of *McArthur* J. on this point was based entirely on the oral evidence given at the trial. The defendant and his witnesses swore definitely and positively that the plaintiff had made a false representation as to the rent of the property agreed to be transferred by him. The plaintiff swore positively that he made no such statement. The onus of proving the misrepresentation alleged was, of course, on the defendant. The documentary evidence threw no light on the question on which side the truth lay. The learned Judge said that he was not satisfied that any of the representations alleged to have been made by the plaintiff to the defendant were in fact made, and that he was satisfied beyond any doubt and found that the defendant was not induced by any fraud or misrepresentation of the plaintiff to make the agreement. He could only have reached this conclusion by disbelieving the evidence of the defendant and his witnesses. In these circumstances this Court ought not to interfere with his finding. The rule laid down in *Dearman* v. *Dearman* (1) and constantly followed by this Court is conclusive on this point.

The second ground relied on by the appellant turns on the construction of the *Closer Settlement Act* of 1915 and the amending Act of 1918, No. 2987. Mr. *Pigott* for the appellant argued that the agreement could not lawfully be performed because the plaintiff was prohibited by the Act from holding more than one allotment and the Closer Settlement Board could not lawfully consent to the

(1) (1908) 7 C.L.R., 549.

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transfer to him of the two allotments which were the subject of the agreement—the consent of the Board being required by the terms of the lease in accordance with sec. 86 (9) of the Act. Mr. *C. Gavan Duffy* for the respondent conceded, we think rightly, that, if the agreement could not lawfully be carried out, the plaintiff was not entitled to either specific performance or damages, but he argued that there was nothing in the Closer Settlement Acts to prevent a transfer of the allotments to the plaintiff or to make it unlawful for the Board to consent to such transfer. He argued further that, even if both allotments could not lawfully be transferred to the plaintiff, the Court could and should order the defendant to transfer one allotment to the plaintiff and the other to the plaintiff's wife or other nominee, and that there was nothing in the Acts which would prevent this course being followed.

But having regard to the facts (a) that it was only in effect an interest equivalent to an equity of redemption in the defendant's land which was to be transferred, (b) that it was a condition of the agreement that the Board should agree to a transfer to *the plaintiff*, and (c) that the agreement provided that *the plaintiff* should take over the existing liability to the Closer Settlement Board, we do not think the plaintiff would be entitled to insist on a conveyance by the defendant to a third person, though he probably might insist on the execution of separate conveyances to himself of the two allotments if they were tendered for execution at the same time (see *Earl of Egmont* v. *Smith* (1)). Therefore, the real question for decision is whether a conveyance of both allotments—together or separately—by the defendant to the plaintiff is prohibited by the Act. If either the making or the taking of such a conveyance be prohibited by the Act, we apprehend that the Board cannot lawfully give its consent to it.

The provisions of the Act which are directly relevant are secs. 84 and 129 with the amendment inserted by the Act of 1918 in the latter section. Sec. 84 prohibits the granting to or holding by any person of a lease of more than one allotment on penalty of forfeiture. An exception is made by sub-sec. 3 in favour of certain classes of persons becoming lessees of more than one allotment, by providing that they shall not be deemed to hold such land contrary to the

(1) (1877) 6 Ch. D., 469.

provisions of the section until the expiration of three years from the happening of the event on which they become entitled in possession. And by sub-sec. 4 a monetary penalty is imposed on any person holding any estate or interest in more allotments than one contrary to the provisions of the section. By sub-sec. 1 of sec. 129 a person is prohibited from holding as beneficial owner more than one allotment disposed of under the Closer Settlement Acts, and by sub-sec. 2 a person is to be deemed to hold lands as beneficial owner if he holds them otherwise than as a trustee, &c., for any estate or interest in possession whether legal or equitable or if he be the settlor or transferor of such lands by any instrument not made *bonâ fide* for valuable consideration. Sub-sec. 4 renders liable to forfeiture lands held by any person contrary to the provisions of the section. Sub-sec. 6 excepts from the category of beneficial owners for a limited period after acquisition of their interest certain classes of persons who become beneficial owners of more than one allotment. Sub-sec. 8 imposes a monetary penalty in addition to the liability to forfeiture on persons holding lands or any estate or interest in lands contrary to the provisions of the section. By sub-sec. 10 it is provided that if any person who is the beneficial owner of any estate or interest in more allotments than one is an infant or lunatic any trustee in whom such land may be vested on his behalf or his guardian or committee shall within five years after the date on which such infant or lunatic became the beneficial owner of such estate or interest sell such estate and interest or so much thereof as may be necessary to reduce the extent of which such infant or lunatic is beneficial owner to the extent permitted by the section. Sub-sec. 12, added by the Act of 1918, prohibits registration under the *Transfer of Land Act* of a transfer of a fee simple estate in a closer settlement allotment unless and until the transferee furnishes a statutory declaration that he did not at the time of the acquisition of the land by him or subsequently and will not on registration of the transfer hold as beneficial owner contrary to the provisions of the section more than one closer settlement allotment. From these provisions we think it appears clearly that the intention of Parliament was that, except in certain specified instances which do not affect this case, no person should become or be at any one

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time beneficially entitled to any estate or interest, legal or equitable, in more than one closer settlement allotment. If this be so, it seems to follow that the Board would be acting in direct opposition to the expressed intention of the Act if it gave its consent to a conveyance to one person of two allotments at the same time or of one allotment at a time when he has a beneficial interest in another allotment.

It was, however, suggested in argument that if the defendant executed conveyances of the two allotments to the plaintiff and, at the time of tendering such conveyances for the purpose of obtaining the consent of the Board, the plaintiff tendered also a conveyance of the allotment to his wife or some third person, the plaintiff would not, if consent were given to all such conveyances, hold as beneficial owner within the meaning of sec. 129 more than one allotment. We cannot assent to this proposition. We think it is clear that, even if this contrivance for defeating the intention of the Act were adopted, the plaintiff would immediately upon the execution of the conveyance to him become the beneficial owner of an estate or interest in both allotments, and the provisions of sub-sec. 4 of sec. 129 show that the prohibition is against *becoming* the beneficial owner of more than one allotment. That the intention was to prohibit not merely the permanent holding but the acquisition of more than one allotment is also clearly shown by the provisions of sub-sec. 3 of sec. 84 and sub-secs. 6 and 10 of sec. 129. Each of these is an excepting proviso, and according to the ordinary rules of construction must be read as excepting out of the preceding portion of the enactment something which but for the proviso would be within it. In each case it is clear that but for the proviso liability to forfeiture would accrue immediately upon the acquisition by one person of more than one allotment, whether or not he continued to hold the land acquired.

We think the appeal should be allowed, the judgment of *McArthur* J. set aside, and judgment entered for the appellant in the action and on the counterclaim. The respondent should be ordered to pay the costs of the action and of the counterclaim except such costs as are exclusively referable to the issue raised by par. 4 of the statement of defence and to the issues of fraud and misrepresentation, which appellant must pay to the respondent. The appellant

having on this appeal persisted in the charges of fraud and misrepresentation, and having again failed on those issues, we think the proper order as to the costs of the appeal is that the respondent pay to the appellant one-half of the costs of the appeal.

STARKE J. The judgment of the Supreme Court declared that the plaintiff in this action was entitled to specific performance of an agreement in writing between the plaintiff, Admans (respondent), and the defendant, Robertson (appellant), dated 2nd October 1920. On appeal to this Court against the judgment, the defendant insisted that specific performance of the agreement necessarily involved the plaintiff in an unlawful act, namely, a contravention of the provisions of the *Closer Settlement Act* 1915 (No. 2629), secs. 84 and 129. If this be true, then, no doubt, the decree of the Supreme Court cannot be supported.

There is no section in the Act, it must be observed, that makes the contract in this case illegal, and, as I read the Act, a transfer or conveyance made pursuant to the contract is neither prohibited nor avoided by its provisions (see sec. 129 (3)). But sub-secs. 1, 4 and 8 of sec. 129 provide that no person shall hold as beneficial owner more than one allotment disposed of under the Closer Settlement Acts, and that any person holding lands contrary to the Act shall be liable to a penalty, and the lands, or so much thereof as may be held contrary to the Act, shall be liable to be forfeited to His Majesty. The provisions of sec. 84 of the Act do not add anything to this provision, and the provisions of sec. 39 of Act No. 2987 do not apply to the case, for a transfer of a fee simple estate is not here proposed.

Now, the words of sec. 129 do not, in my opinion, strike at the mere acquisition of lands within its ambit, but at the retention of lands when acquired. If at the instant of the acquisition of title a disposition of the lands is made, that will avoid a contravention of the provisions of the section, then the mere acquisition of title does not appear to me to be obnoxious to those provisions. Thus, if a person purchased more than one allotment of land falling within the provisions of the *Closer Settlement Act*, I do not see why the purchaser could not direct a transfer or conveyance to a

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sub-purchaser, so as to avoid a contravention of the Act. Again, if a father purchased more than one allotment for the advancement of his sons, I do not see why he could not *bonâ fide* and for valuable consideration direct a transfer of an allotment to each son without contravening the Act (*cf.* sec. 129, sub-secs. 1 and 2).

It is said, however, that a purchaser could not avoid the section if he did these acts by means of a transfer or conveyance directly to himself, followed by an immediate disposition, transfer and conveyance of the lands to another, *bonâ fide* and for valuable consideration: he would, it is contended, though a mere conduit pipe, become a holder of the lands and fall within the prohibition of the section. But the real substance of such a transaction must be examined. If it appeared that more than one allotment of lands subject to the *Closer Settlement Act* was vested in a person momentarily, but that the lands—or all except one allotment—were immediately disposed of, and transferred or conveyed to another person *bonâ fide* and for valuable consideration, then the facts negative, in my opinion, the conclusion, based on the mere acquisition of title, that such person held, as beneficial owner, more than one allotment of land subject to the Act.

Let me now turn to the contract in this case. Assume that the nature of the obligations of the contract is such that the transfers or conveyances of the land must be made to the parties themselves and not as the parties may direct. Unless the mere acquisition of title is sufficient to infringe the provisions of the *Closer Settlement Act*, it is then quite impossible to say that the plaintiff in the action is necessarily involved in an unlawful act if the contract be performed. It may be, for aught the Court knows, that he has so disposed, or will so dispose, of the lands as to avoid a contravention of the Act. Indeed, the evidence rather tends to prove that the plaintiff will avoid a contravention of the Act if he can. But it is not for the Court to speculate either way. It must, I apprehend, be satisfied that an unlawful act is certain, or at least reasonably certain, before it refuses to give effect to an agreement between parties which is not illegal (*Johnson* v. *Shrewsbury and Birmingham Railway Co.* (1); *De Hoghton* v. *Money* (2)).

(1) (1853) 3 DeG. M. & G., 914. (2) (1866) L.R. 2 Ch., 164.

In my opinion, the learned Judge below acted rightly in decreeing specific performance of the agreement, but the actual form of the decree should be modified. The plaintiff did not establish at the trial his title to the Rutland Street property which he had agreed to exchange for the defendant's property, and the contract between the parties is subject to two conditions, the agreement of the Closer Settlement Board, and a loan of £5,000 being arranged on the Rutland Street property. A better form of decree would have been to the effect that the contract be specifically performed in case a good title be made to the Rutland Street property and in case the conditions mentioned in the contract be fulfilled, and inquiries should be directed accordingly. The decree also contains a very novel order as to damages—a contingent assessment of damages. The plaintiff did not press for the retention of this order, and it could not, in my opinion, have been supported. The plaintiff might possibly make some case for damages by reason of delay in completion of the contract if it were performed, but that is not what is decreed in the present case: the damages ordered to be paid are for loss of the contract in certain contingencies. As at present advised, I am unable to see any foundation whatever for the damages contingently so awarded. The plaintiff did not accept the defendant's repudiation of the contract, but kept it open and insisted upon its performance. He must take the risks as well as the benefits of that election.

Appeal allowed. Judgment appealed from set aside and judgment entered for the defendant in the action and on the counterclaim. Plaintiff to pay costs of action and of counterclaim except such costs as are exclusively referable to the issue raised by par. 4 of the defence and to the issues of fraud and misrepresentation. Respondent to pay to appellant one-half of the costs of the appeal.

Solicitors for the appellant, *W. R. R. Blair, Son & Falconbridge.*
Solicitors for the respondent, *Gummow & Cray.*

B. L.