be what it will. Their Lordships do not find it necessary to express any opinion upon this point. The appellants, in their judgment, succeed upon the word "charitable." It is not necessary to go further.

It results that the appeal must be allowed, and the question set out in the commencement of this judgment must be answered in the affirmative and the matter remitted to the High Court of Australia so to modify the order of 9th November 1923 as to give effect to that answer. The appellants must have their costs in the Courts of Australia and before this Board.

Their Lordships will humbly advise His Majesty accordingly.

Cons *Bahr v Nicolay (No2)* 164 CLR 604 | Appl *Tsangaris v Gaymark Investments Pty Ltd* 82 FLR 269 | Foll *Evans v Davies* [1991] 2 QdR 498 | Foll/Appl *Smith v McKeough* (1953) 89 CLR 520

[HIGH COURT OF AUSTRALIA.]

BAIRD AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

MAGRIPILIS AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1925. SYDNEY, *Aug.* 17, 19, 20, 21; *Dec.* 17. Higgins, Rich and Starke JJ.

Crown Lands—Lease by tenant to alien—Illegality—Contract creating present interest in land—Agreement subject to provision for discharge—Land Act 1910 (*Q.*) (1 *Geo. V. No.* 15), *sec.* 94—*Leases to Aliens Restriction Act* 1912 (*Q.*) (2 *Geo. V. No.* 31), *secs.* 2, 3—*Sugar Works Act* 1911 (*Q.*) (2 *Geo. V. No.* 8), *sec.* 32—*Regulation of* 28*th October* 1915.

Practice—Supreme Court of Queensland—Conditions precedent—Action for specific performance—Readiness and willingness—Appeal—Jurisdiction of Full Court to draw inferences of fact not inconsistent with findings of jury—Finding of jury set aside—Rules of the Supreme Court 1900 (*Q.*), *Order XXII., rr.* 12, 14; *Order LXX., rr.* 11, 26.

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Held, by *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that sec. 3 of the *Leases to Aliens Restriction Act of* 1912 (Q.) applies to land selected and held of the Crown under the *Land Act of* 1910 (Q.).

One of the appellants, who was the lessee from the Crown of certain land under the *Land Act of* 1910, offered to grant to the respondents, who were then aliens, a sub-lease in a specified form of the land, subject to a proviso that the respondents should within a certain time qualify under sec. 94 of that Act either by naturalization or obtaining a certificate of passing the dictation test and that if the respondents failed to so qualify the undertaking should be null and void. The offer was accepted by the respondents.

Held, by *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the agreement operated as an agreement to give an interest in a parcel of land for a term of years subject to a provision for its discharge in the event of the failure of the respondents to secure naturalization or to pass the dictation test within the time limited, and was rendered illegal by sec. 3 of the *Leases to Aliens Restriction Act of* 1912 (Q.).

Per Higgins J. :—The *Land Act of* 1910 is a special Act applicable to Crown lands only—like a code for Crown lands ; and the *Leases to Aliens Restriction Act of* 1911 is a general Act which does not affect the Act of 1910. *Semble*, even if the latter Act did affect Crown lands, it merely invalidates agreements made with aliens under which before the alienage ceases there is to be some estate or interest ; and there is to be no such estate or interest here.

Per Higgins J. : Under Order XXII., rr. 12 and 14, of the *Rules of the Supreme Court* 1900 (Q.), where in an action for specific performance of a contract the defendant has not by his defence denied the readiness and willingness of the plaintiff to perform the contract, there is no issue as to such readiness and willingness, and therefore the fact that the jury has not found that the plaintiff was so ready and willing does not prevent the plaintiff from succeeding in the action.

Per Starke J. : Under Order LXX., r. 11, of the *Rules of the Supreme Court* 1900 (Q.), which authorizes the Court, upon the hearing of an appeal, "to draw inferences of fact, not inconsistent with the findings of the jury, if any, and to give any judgment and make any order which ought to have been given or made in the first instance, and to make such further order or other order as the case may require," the Full Court has jurisdiction, if it is satisfied that only one possible verdict could reasonably be given, to give any judgment and make any order which ought to have been made, notwithstanding the verdict of the jury.

Decision of the Supreme Court of Queensland (Full Court) : *Magripilis* v. *Baird*, (1925) S.R. (Q.) 279, reversed.

APPEAL from the Supreme Court of Queensland.

An action was brought in the Supreme Court by Kyriacos Magripilis and Nicholas Loucas Karakyriacos against Joseph Francis

Baird and Thomas Power Baird, in which by their amended statement of claim the plaintiffs alleged alternatively the making of three agreements between themselves and the defendant Joseph Francis Baird for a sub-lease of portion of an agricultural farm in the Cairns District, of which that defendant was the lessee from the Crown, to the plaintiffs. The first agreement relied on was alleged to have been made on 27th April 1923, the second on 16th November 1922 and the third on 24th July 1923. The plaintiffs claimed (*inter alia*) specific performance of these alternative agreements or damages for their breach. The action was heard before a jury, which found, in answer to specific questions, that none of those agreements was made. On appeal the Full Court made an order (*inter alia*) setting aside the jury's answer to the question (3 (a)) whether the agreement of 16th November 1922 had been made, and ordering that judgment should be entered for the plaintiffs as if that question had been answered in the affirmative, and ordering that that agreement should be specifically performed : *Magripilis* v. *Baird* (1).

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

The facts material to this report are stated in the judgments hereunder, where the nature of the arguments also appears.

Stumm K.C. (with him *Hutcheon*), for the appellants.

Hart (with him *Fahey*), for the respondents.

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered :—

HIGGINS J. The facts of this case, with its two trials, have been so fully set out in the judgment of the Full Court of Queensland that I do not think it would serve any useful purpose for me to restate them.

In my opinion, the Full Court was amply justified in the circumstances in setting aside the answer of the jury to question 3 (a), and in entering judgment for the plaintiffs as if question 3 (a) had been answered Yes instead of No. In that opinion, I assume that the

(1) (1925) S.R. (Q.) 279.

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Full Court had power to deal with the answer in such a way. I am accepting the statement, in which counsel on both sides concur, as well as the Full Court of Queensland, that that Court, sitting on appeal, has been given such a power to interfere with the verdicts of juries. The rule to which counsel referred us, however—Order LXX., r. 11—is not the same as that adopted in England and in other States on the subject. Under this Queensland rule the Court has power to draw inferences of fact *not inconsistent with the findings of the jury*, but has no express power to set aside a finding, make its own finding, and enter judgment accordingly. In the case of *Clark & Fauset* v. *Brisbane Municipality* (1) in 1895, it was held that the Court had this latter power. *Chubb* J., with whom were *Cooper* and *Real* JJ., based the power on the rule as then existing, Order XXXIX., r. 10, saying that this rule was not like the English rule which for a long time merely enabled the Court to draw inferences of fact, but only "if not inconsistent with the findings of the jury" (2). This rule, however, has reappeared as r. 26 of Order LXX. in the Rules of Court dated 10th October 1900, but with these very words inserted—there is power to draw inferences of fact "not inconsistent with the findings of the jury." The same words are found in Order LXX., r. 11. The decision in *Clark & Fauset* v. *Brisbane Municipality* was affirmed by the Judicial Committee in 1896. But, notwithstanding the marked change of language in the rules of 1900, *Clark & Fauset's Case* has been followed by the Queensland Court under the rules of 1900 in *Barns* v. *Queensland National Bank* (3), and it was recognized as an authority in *Russell Wilkins & Sons Ltd.* v. *Outridge Printing Co.* (4)—although in the latter case the inference does not seem to have been inconsistent with any finding of the jury. After all, this is a point of procedure, not affecting the merits; if we in this Court were to refuse to follow the procedure sanctioned by the Queensland Court and approved by both parties, the only alternative would be to send this unfortunate case back for a third trial, in which the jury would have to be directed to find the existence of the agreement, and we are not here to decide law as to which no question is raised.

(1) (1895) 6 Q.L.J. 131.
(2) (1895) 6 Q.L.J., at p. 137.
(3) (1906) S.R. (Q.) 133.
(4) (1906) S.R. (Q.) 172.

Taking it, then, that question 3 (a) is answered in the affirmative —that there was a binding agreement made on 16th November 1922 for the sub-lease of the land to the plaintiffs for ten years as from 18th January 1922—it follows that, if there was no illegality in the agreement, it should be enforced now that the condition precedent to the performance of the agreement has been fulfilled. The condition was (see the "undertaking" of 21st September 1922 and the letter of 17th August 1922) that the lessees should "on or before 30th June 1923 or within a reasonable time thereafter qualify *under sec.* 94 *of the Land Act of* 1910 by either getting naturalization or obtaining a certificate of passing the dictation test." The plaintiffs, natives of Greece, got naturalization on 9th March 1923. Therefore, unless this agreement was illegal, the judgment of the Full Court for specific performance should be upheld.

Perhaps it is well to say at this point, in view of a misapprehension which has arisen, that I regard this condition as a condition precedent to the *enforcement* of the agreement, not as a condition precedent to the *existence* of the agreement. The agreement was binding on both parties, although it was not to be carried into effect unless and until the alienage of the plaintiffs ceased. A may promise B that he will do something—say, buy a house—if J. S. go to Rome. Until J. S. go to Rome A remains bound by his promise, though not liable to its performance while the condition is unfulfilled (see *Anson on Contracts*, 10th ed., p. 313). I do not regard the *ligamen* of contract as non-existent or suspended in the meantime (cf. *Wallis* v. *Littell* (1)).

Now, was this agreement illegal? In my opinion, it was not. The defendants rely for illegality on the provisions of the *Land Act of* 1910 with the amendments, the *Sugar Works Act of* 1911, and the *Leases to Aliens Restriction Act of* 1912 as making the agreement illegal; but the most formidable difficulty in the way of the plaintiffs is the *Leases to Aliens Restriction Act of* 1912. It is to be noticed that the condition, as expressed in the agreement, refers only to the *Land Act of* 1910, sec. 94; as if the Act of 1912 had nothing to do with the matter. This view, taken by the parties themselves, seems to me to be right—that the *Land Act* of 1910 was a special Act applicable to Crown lands only—was in effect a

(1) (1861) 11 C.B. (N.S.) 369.

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code for Crown lands ; and the Act of 1912 was a general Act which did not amend or affect this code : *Generalia specialibus non derogant.* This principle is supported by the presumption that the Crown is not intended to be bound unless there be express words or necessary implication to that effect. It is not at all probable that where leasing or sub-leasing to aliens is specifically dealt with in an Act specially relating to Crown lands, lands not yet alienated in fee simple, lands still under the administration of the Crown Lands Department, Parliament would apply the provision of a subsequent Act relating to such leasing or sub-leasing to aliens without amending or referring to the *Land Act.* As Mr. *Hart* pointed out, the provisions as to a certificate in sec. 94 of the *Land Act of* 1910 are not at all the same as the provisions in the Act of 1912. Under the former Act the dictation must be of not less than fifty words ; under the later Act there may be any number. The Minister, acting under one Act, may select one language ; acting under the other Act, he may select another. Clearly the Minister is fettered in the exercise of his discretion under the *Land Act* if he has to comply also with the Act of 1912. Under the former Act the Minister has complete discretion as to any proposed sub-lease, subject to the condition as to personal residence and as to aliens ; and as to aliens he is free unless by the agreement some interest in the land *passes* to an alien. Under sec. 94 (2) the lessee of a selection is empowered, with the approval of the Minister after the issue of his lease to sub-let the whole or any part of his selection subject to certain conditions ; and under sub-sec. 2 (*a*) the sub-lessee shall be a person who is himself qualified to become the lessee—" Provided that in no case shall it be lawful for any lessee to sub-let the land, or any part thereof, to any alien or to enter into any partnership or agreement, either written or oral, with any alien, *under which any interest in the land or any part thereof shall pass to such alien, unless or until* such alien has obtained in the prescribed manner a certificate that he is able to read and write from dictation not less than fifty words in such language as the Minister may direct." Moreover, by sub-sec. 3 as amended in 1916 —after the *Leases to Aliens Restriction Act of* 1912—it is provided: " If a lessee sub-lets the whole or any part of his selection *otherwise than in accordance with this Act* " (the *Land Act of* 1910) " the lessee

shall be deemed to have committed a breach of condition." This amendment of 1916, made after the Act of 1912, ignores that Act and limits the duty of a lessee to that of acting "in accordance with this Act" (of 1910)—not in accordance with the Act of 1912. Now, in the *Land Act of* 1910, sec. 94, no agreement with an alien is forbidden unless it be an agreement which passes the land—"under which any interest in the land or any part thereof shall *pass* to such alien;" and under this agreement no interest *passes* to an alien—it is to pass to the plaintiffs when they cease to be aliens, and then only. If the plaintiffs remained aliens, they were to have no estate or interest in the land, even equitable. The common expression that after the contract the purchaser is the owner in equity does not apply to a *conditional* contract such as this (*Counter* v. *Macpherson* (1)). No interest is to pass, under this agreement, to an alien, so long as he remains an alien. If there were a fire or other loss it would fall on the defendants—unless and until the alienage ceased; if there were a windfall, it would enure to the benefit of the defendants—unless and until the alienage ceased.

So far, it seems clear that there was no illegality in the agreement. But we must consider, with precision, the *Leases to Aliens Restriction Act of* 1912. By sec. 3 it is provided:—"It shall not be lawful to grant any lease or enter into any agreement whether oral or in writing for any lease of any parcel of land exceeding five acres in extent *to* or *with* any alien who has not first obtained in the prescribed manner a certificate that he is able to read and write from dictation words in such language as the Secretary for Public Lands may direct. Any such lease or agreement shall be null and void." But the word "lease" has an expanded meaning by sec. 2: it includes any contract, agreement, scheme or device "(*a*) by which any estate or interest in land less than fee simple is created, or is agreed or is intended to be created." Therefore, although "lease" includes agreement for a lease, the agreement must be an agreement by which any estate or interest is created, or is agreed or is intended to be created. What is made null and void by sec. 3, and a criminal offence by sec. 4, is (so far as material for the present purpose) an agreement with any alien by which an estate or interest in land (less

(1) (1845) 5 Moo. P.C.C. 83.

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than a fee simple) is created or is agreed to be created or is intended to be created; and it is clearly implied that the estate or interest forbidden is an estate or interest *in the alien.*

Therefore, even if this Act—the *Leases to Aliens Restriction Act of* 1912—did apply to Crown lands, to lands already regulated by the Act as to Crown lands, it is very doubtful whether it would make this agreement invalid. Secs. 2 and 3 of the more recent Act are very comprehensive, but it may be that they merely invalidate agreements with aliens under which *before the alienage ceases* an estate or interest is created or agreed or intended to be created, by the agreement. This agreement did not purport to "create,"or "agree" or "intend to create" any estate or interest in land *unless and until the alienage should have ceased.* The evil—such as it is—at which the Act is aimed does not arise if alienage must necessarily cease before the agreement become operative to give to the proposed lessee (or sub-lessee) any interest. Indeed the Full Court in their judgment have relied on the words of the late Chief Justice, Sir *Samuel Griffith,* in *Hawker* v. *McLeod* (1). In that case, under the New South Wales *Crown Lands Act of* 1884, every contract made before at or after the date of any application for a conditional purchase, with the intent or having the effect of enabling any person other than the applicant to acquire the land applied for, was made illegal. It was held by the Full Court (*Griffith* C.J., *O'Connor* J. and *Isaacs* J.) that a person ceased to be an "applicant" on confirmation of the application (September 1902); and that an agreement to lease to another in 1906 for three years was valid. *Griffith* C.J., however, made some deliberate remarks (2) which must, I suppose, be regarded as made obiter—not a binding decision:—"Even assuming, however, that any contract creating an interest in the land to take effect before fulfilment of conditions is prohibited by sec. 121, I can see no apparent reason why a contract to take effect after fulfilment should be held to be prohibited. I accept for the purposes of this decision the view that, if the alienation of particular property is not allowed, it is impossible to create an equitable interest in it during the period of inhibition, but I do not think that such an inhibition extends to invalidate a contract to confer such an interest after the period has

(1) (1910) 10 C.L.R. 628.

(2) (1910) 10 C.L.R., at p. 639.

expired. *Such a contract does not create a present interest in the land*, and operates by way of contract only, just as if a man in possession of land with an option of purchase were to agree that in the event of the exercise of his option he would sell the land to another, with or without a promise to exercise the option."

This dictum has been quoted—as I understand with approval—by the Full Court of Queensland in *In re McSharry*; *McSharry* v. *Harding* (1). But, from my point of view, it is not necessary for me to decide this question as to the precise effect of the Act of 1912. I prefer to rest my judgment on the ground that the Act of 1912 does not apply to Crown lands.

As for the objection based on the *Sugar Works Act of* 1911, the appellant relies on a regulation under that Act, dated 28th October 1915, providing as follows :—"No person shall sell or lease or transfer or enter into an agreement to lease or sell or transfer to any other person any land or any interest in land within any sugar works area unless he has *previously* received the consent in writing of the corporation" (that is, the Treasurer of Queensland (sec. 2)) "to such lease or sale or transfer or agreement therefor. Any such lease or sale or transfer or agreement therefor made or entered into contrary to the provisions of this regulation shall be null and void for all purposes, and in addition any person who infringes this regulation shall be liable on summary conviction to a penalty not exceeding five pounds." In this regulation the term "lease" includes any contract, agreement, scheme or device by which any estate or interest in land less than fee simple is created or is agreed or is intended to be created or relating to the leasing of land on the share system.

It will be noticed (1) that this regulation does not refer to aliens distinctively and that *any* agreement for lease &c. of land within a sugar works area is null and void unless with the consent of the Treasurer; (2) that the definition of "lease" follows almost *verbatim* the words of sec. 2 of the *Leases to Aliens Restriction Act of* 1912, as if the *Sugar Works Act* had nothing to do with that Act; (3) that the agreement, &c., must have *previously*—before the making—have received the consent. In this case, the Treasurer on 26th August

(1) (1911) S.R. (Q.) 75.

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1922 consented to Baird and the plaintiffs (all named) entering into an agreement for the sub-lease (with the option of purchase) by the plaintiffs from Baird of this very land, being land within the sugar works area of Babinda. The appellants urge that this consent is of no good, as the consent must, under the regulation, be given to the specific lease proposed. Perhaps this argument hardly gives full weight to the word "previously" in the context. But it is clear from the *Sugar Works Act*, and the cognate Acts, that the provisions thereof are all Crown provisions, for the development of the sugar industry and sugar works at the risk of advances made by the Crown from the Treasury to help the industry; and, in my opinion, there is no sufficient ground for saying that the provisions of the *Leases to Aliens Restriction Act* apply to transactions as to sugar works in addition to the provisions of the *Sugar Works Act* and its special regulations.

But *Mr. Stumm* has thought fit to press another objection—of a very technical nature. The jury, having answered No to the contract of 16th November 1922 (3 (a)), gave (of course) no answer to the dependent question (3 (b))—"If so, have the plaintiffs at all material times been ready and willing to carry out such contract?" The argument is that the plaintiffs, having now no finding in their favour of readiness and willingness to perform this contract, must fail in this action. I can only say that if this were a real defect in the plaintiffs' case, I should not hesitate to amend the judgment of the Full Court under our power (*Judiciary Act*, sec. 37) to give such judgment as ought to have been given in the first instance; for there is ample material in the evidence to satisfy anyone that the plaintiffs were throughout ready and willing to perform this contract. It is true that they wanted better terms, if possible—encouraged, as they were, by the negligence of the defendants' solicitors in drawing up the contract; but there is no doubt that they never ceased to press for the completion of the agreement, whatever it was, in the best form that they could get. They never repudiated it or tried to avoid carrying it out (and see *Berners* v. *Fleming* (1)).

But there is no such defect in the plaintiffs' case. Under the Queensland Rules and these pleadings, there was no issue joined on

(1) (1925) 1 Ch. 264.

the subject of readiness and willingness. Under Order XXII., r. 12, an averment of the performance or occurrence of all conditions precedent necessary is implied (not expressed) in the statement of claim (see Form XII., "statement of claim"; *Wilson & Graham's Supreme Court Practice*, p. 498); and when the performance or occurrence is denied, the condition precedent must be distinctly specified in the defence. The defendants must (under r. 14) raise by the defence all matters of fact which show that the claim of the plaintiffs is not maintainable; and all grounds of defence must be pleaded which, if not raised, would be likely to take the plaintiffs by surprise. The defence here merely denied all the *allegations* of the statement of claim (not the implications); there was no issue, and, therefore, no need of a finding, as to readiness and willingness; and, in my opinion, no evidence was even admissible, on that mere subject, at the trial.

I am of opinion that the appeal should be dismissed.

RICH J. Assuming the documents comprised in exhibits 2, 8 and 13 (the draft lease, the undertaking of 21st September 1922 and the letter of 16th November 1922) form a completed agreement, I construe it as conferring on the respondents a present interest defeasible on the non-fulfilment of the condition stated. So construed, it is of the class of agreements aimed at and hit by the *Leases to Aliens Restriction Act of* 1912—a special Act designed to restrict the leasing of land to aliens. I need not express my reasons for this construction of the agreement and the Act, as they coincide with those expressed in the judgment of my brother *Starke*.

I also agree with the reasons of my brother *Starke* for making an order for a new trial and with the terms of the order proposed by him.

STARKE J. This is an appeal from the Supreme Court of Queensland, which set aside one finding of a jury, and, being satisfied that it had before it all the materials necessary for finally determining the questions in dispute and awarding the relief sought in the action, declared that a certain agreement was made between the plaintiffs and the defendant Joseph Francis Baird for a lease of land, and

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then directed the agreement to be specifically enforced. This finding was that it was not agreed in or about the month of November 1922 by and between the plaintiffs and the defendant Joseph Francis Baird that a lease of land the subject matter of this action and containing an option to purchase should be granted by the defendant Joseph Francis Baird to the plaintiffs, if the plaintiffs became naturalized by 30th June 1923, on terms and conditions mentioned in a draft lease and in certain correspondence between the parties in and between the months of August and November 1922. The suggested agreement did not depend upon any conflict of evidence but upon the effect of certain written documents. On 7th August 1922 the solicitors for the defendant Joseph Francis Baird forwarded to the solicitors for the plantiffs, for perusal, a draft agreement, and stated in the covering letter:— "This document is submitted subject to the lessees qualifying under sec. 94 of the *Land Act* either by naturalization or obtaining a certificate of passing the dictation test, which we think the lessees should undertake to do on or before 30th June next: otherwise this agreement to be deemed to be determined and the lessor to hold the land free from all claims by the lessees." The document was returned, with some alterations, which were rejected. But on 21st September 1922 the defendant Joseph Francis Baird undertook in writing to grant to the plaintiffs a lease in the form already submitted, subject to an addition and a proviso that the proposed lessees shall on or before 30th June 1923, or within a reasonable time thereafter, qualify under sec. 94 of the *Land Act of* 1910 by either naturalization or obtaining a certificate of passing the dictation test. "Should the proposed lessees fail to so qualify, this undertaking to be null and void and I to hold the said land free from all claims of any description whatsoever by the proposed lessees. This undertaking is subject to immediate acceptance by the proposed lessees." Some further correspondence took place, and on 4th November 1922 Joseph Francis Baird's solicitors wrote that their client insisted upon the terms of his undertaking being accepted unconditionally. On 16th November the plaintiffs' solicitors replied, protesting, but accepting unconditionally on the plaintiffs' behalf the defendant's undertaking. The plaintiffs, who had previously obtained possession of the land from the

defendant Joseph Francis Baird, continued in possession and spent large sums of money in grubbing, clearing and improving the land, and in planting it with sugar-cane.

Now, was this arrangement conditional; that is, was it intended that it should not operate as an agreement but should be suspended until the happening of the stated event? Or was the real intention of the parties, gathered from the documents and the surrounding circumstances, that the arrangement should operate and take effect as an agreement, but containing within itself the elements of its own discharge if the event stated did not happen within the time prescribed? (Cf. *Wallis* v. *Littell* (1); *Anson on Contracts*, 8th ed., p. 338; *Fry on Specific Performance*, 4th ed., p. 424, par. 982, and p. 398, par. 912; *Counter* v. *Macpherson* (2).) If the former is the proper implication from the documents, then, no doubt, the finding of the jury was correct, but otherwise it is wrong. The learned Judge at the trial took the latter view, and directed the jury that the documents constituted an agreement in law, and the Supreme Court on appeal took the same view. And in my opinion the learned Judges were right. The Court should look at the substance of the arrangement rather than its form. No doubt the parties desired to enter into some arrangement that would not contravene the *Leases to Aliens Restrictions Act* of Queensland. Nevertheless, there is evidence of an intention to set up a real agreement. Thus, possession was given, and clauses were inserted in the documents imposing immediate duties and obligations upon the plaintiffs, notably those requiring them to grub, plough and plant not less than twenty acres before 18th January 1923, to take every precaution against fire, to leave spaces for fire-breaks, to keep the cultivated area free from burrs and other noxious weeds and within six months from the date of the agreement to erect a dividing fence between the demised land and certain other lands. And further, the covering letter of 7th August and the undertaking of 21st September stipulate respectively for the agreement "*to be determined*" and the undertaking to be null and void in the event of the plaintiffs' failure to qualify. All this, to my mind, shows that the arrangement set forth in the documents was intended to take effect as an agreement,

(1) (1861) 11 C.B. (N.S.) 369.

(2) (1845) 5 Moo. P.C.C. 83.

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subject to a provision for its discharge, and was not dependent, as an agreement, upon the qualification of the plaintiffs. It was argued that the plaintiffs did not immediately accept the defendant's undertaking, but the subsequent acts of the parties establish beyond all reasonable doubt that this term of the undertaking was not insisted on with absolute strictness, and was waived.

Consequently, in my opinion, the Supreme Court was quite right in setting aside the finding of the jury: it was not a finding which the jury, viewing the evidence reasonably, could properly reach. But though the verdict of the jury must be set aside, was the Supreme Court entitled itself to find a verdict and enter judgment accordingly?

Under the Judicature Rules, an appellate Court, where all the facts are before it, and it is satisfied that the evidence is such that only one possible verdict could reasonably be given, is not bound to order a new trial, but has jurisdiction to give any judgment and make any order which ought to have been made, notwithstanding the verdict of a jury (*Millar* v. *Toulmin* (1); *Allcock* v. *Hall* (2); *Skeate* v. *Slaters Ltd.* (3); *Winterbotham, Gurney & Co.* v. *Sibthorp and Cox* (4); *Clouston & Co.* v. *Corry* (5); *Paquin Ltd.* v. *Beauclerk* (6); *Everett* v. *Griffiths* (7); and cf. *Toulmin* v. *Millar* (8)). The *Rules of the Supreme Court* of Queensland are not precisely the same as the Judicature Rules (cf. Order LXX., rr. 11 and 26). They allow "any inferences of fact not inconsistent with the findings of the jury, if any." It is not disputed that the Supreme Court has always exerted the same power under its Rules as the Court of Appeal has exerted under the *Judicature Act*. And I think this practice can be supported as a matter of law. The Court clearly has jurisdiction to set aside the verdict of a jury which is unreasonable or perverse, and if a finding is set aside and no longer exists, then it seems to me that the authority to draw inferences of fact under the Rules may be exercised (cf. *United States* v. *Motor Trucks Ltd.* (9)). But that authority will only be exerted where the evidence is such that only one possible verdict could reasonably be given upon the evidence: it is a strong power and must be exercised with considerable caution.

(1) (1886) 17 Q.B.D. 603.
(2) (1891) 1 Q.B. 444.
(3) (1914) 2 K.B. 429, at p. 441.
(4) (1918) 1 K.B. 625.
(5) (1906) A.C. 122.
(6) (1906) A.C. 148.
(7) (1921) 1 A.C. 631.
(8) (1887) 12 App. Cas. 746.
(9) (1924) A.C. 196.

Now must be examined the grounds upon which the defendant Joseph Francis Baird opposes the execution of the agreement.

(1) It was said that the plaintiffs had not proved readiness and willingness on their part to perform the agreement. The jury made no finding on this point, and the Supreme Court held that the plaintiffs were anxious to complete the lease and were prevented from so doing by the defendants. I do not stay to consider whether the matter is open to the defendants on their pleadings, for I agree with the finding of the Supreme Court and think that Court was competent in the circumstances so to find (see Order LXX., r. 26).

(2) It was suggested at the Bar that the agreement had been rescinded; but rescission was not pleaded and was not relied upon at the trial. It cannot be relied upon now.

(3) That the defendant Joseph Francis Baird in the month of September transferred the land to the defendant Thomas Power Baird for valuable consideration without notice of the plaintiffs' rights. The jury found this fact in favour of the defendants, but it is quite clear on the evidence that the finding is not one that the jury, viewing the evidence reasonably, could properly reach. It is perverse—to use no harsher term—and must be set aside. Only one finding is possible, namely, that the two defendants knew all about the plaintiffs' rights and were working together to defeat them.

(4) That the agreement is illegal, and is prohibited by the *Leases to Aliens Restrictions Act of* 1912, the *Sugar Works Act of* 1911 and the *Land Act of* 1910. The *Leases to Aliens Restrictions Act* provides that "it shall not be lawful to . . . enter into any agreement . . . for any lease of any parcel of land . . . with any alien who has not first obtained . . . a certificate that he is able to read and write from dictation words in such language as the Secretary of Public Lands may direct. Any such . . . agreement shall be null and void." And "lease" includes "any contract, agreement, scheme, or device *by which any estate or interest* in land less than fee simple *is created, or is agreed or is intended to be created.*" The plaintiffs were aliens when they entered into the agreement. They were naturalized on 8th March 1923, but they never passed any dictation test.

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The objection based upon the *Leases to Aliens Restriction Act* is, in my opinion, fatal to the plaintiffs' claim which rests upon the agreement of November 1922. If the arrangement operated as an agreement to give an interest in a parcel of land for a term of years subject to a provision for its discharge in the event of the plaintiffs' failure to secure naturalization or to pass the dictation test within the prescribed time—and in my opinion it did so operate for reasons I have already stated and need not repeat—then it is directly struck by the words of the statute: it was an agreement whereby an interest in land less than a fee simple was agreed or intended to be created. It is therefore rendered null and void. I regret the conclusion but am, nevertheless, compelled to give effect to my view of the law.

An attempt was made at the Bar to avoid this conclusion. The land is part of a selection under the *Land Act of* 1910, and by sec. 94 the lessee of a selection may sub-let the whole or part of it subject to the approval of the Minister, but it is not lawful for him to enter into any agreement with any alien under which any interest in the land or any part of it passes to the alien unless or until he passes a dictation test. Now, it was said that this Act constituted a code in relation to Crown lands and necessarily excluded the operation of the *Leases to Aliens Restriction Act.* Assume that this latter Act does not bind the Crown in relation to the grant by the Crown of leases of Crown lands, still I cannot see any sound reason for excluding from its operation agreements made by subjects with aliens in respect of lands selected under the *Land Act* and held of the Crown. The *Land Act* prohibits certain agreements with aliens; the Restriction Act, dealing specifically with the subject of leasing lands to aliens, enlarges the area of that restriction, and relates to "any parcel of land." The effect of the *Land Act* would require consideration if it excluded the operation of the *Leases to Aliens Restriction Act* as to Crown lands, but it is unnecessary, in the view I take, to say more upon the matter.

But the case does not end here. The plaintiffs alleged another agreement, of 24th July 1923, in much the same terms as the November agreement. The jury negatived this agreement. But I have thought it necessary to examine the facts surrounding the

allegation, and have reached the conclusion that the jury's finding must be set aside. A mistake was made in the engrossment of the agreement for a lease prepared pursuant to the arrangement of November 1922, and the defendant Joseph Francis Baird rightly refused to sign it. The execution of the agreement hung fire, and in June 1923 Joseph Francis Baird refused to go further with the matter, and gave the plaintiffs notice to render an account for work done on the land up to the date of the notice. But the plaintiffs and Thomas Power Baird met in July 1923, and Baird prepared a document, addressed to Joseph Francis Baird, for the signature of the plaintiffs, who are Greeks, and speak but little English. I set it out: "We the undersigned Messrs. Magripilis and Karakyriacos of Merriwimi wish to state that we did not instruct our solicitors . . . to insert in the draft lease dated eighteenth day of January 1922 the provision reading 'that if that portion of the land now cleared and estimated by the lessor at 50 acres is found subsequently to fall short of such 50 acres then the total area required to be planted by the lessees prior to the first day of January 1925 shall not exceed the actual area of such present clearing' (marked clause 9). We signed our copy of the agreement and it was not with our knowledge such provision was included as we did not instruct anyone to insert it, and furthermore we agreed that the minimum of £300 royalty should come into force after the eighteenth day of January 1925 and not as it was stated in the said agreement. The said agreement is not a correct interpretation of what we agreed upon, and we are prepared to go to Cairns and arrange to eliminate the inaccuracies and annul the said agreement and enter into a correct agreement of what we agreed upon."

The plaintiffs signed this document, and handed it over to Thomas Power Baird, and he and his brother Joseph Francis Baird have retained it ever since. The plaintiffs and one Fardooly, who was present at the meeting, affirm that Baird said that so long as clauses to which objection was taken remained in the engrossed agreement, Joseph Francis Baird would not sign it, but that if the plaintiffs were willing to abolish those clauses, then a lease would be signed from which they were omitted. Thomas Power Baird's account of this transaction is that it meant nothing and that the document was

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only prepared by him and signed by the plaintiffs to prove that he had not treated them unfairly. Joseph Francis Baird denies that Thomas Power Baird had any authority to enter into these negotiations with the plaintiffs, and the jury so found, but there is ample evidence that Thomas Power Baird had a general authority to act for his brother Joseph Francis Baird, and did so act on various occasions. There is evidence, and strong evidence in my opinion, fit to be submitted to a jury of a new agreement in July 1923.

Now, trial by jury must not be whittled away, and a jury's findings must not be disturbed on light grounds, but if the Court is satisfied, "contrasting the evidence on both sides," that the jury acted unreasonably, then a new trial may be granted. In the present case the jury, as to one of their findings, acted in opposition to the direction of the learned trial Judge, and in all of them, prejudice against the plaintiffs is, in my opinon, plainly manifest. The jury acted perversely, and wilfully disregarded what they were about, and "did not consider the evidence." The trial has miscarried, but the evidence upon the question whether an agreement was made in July 1923 is not such, in my opinion, that only one verdict is possible, and a new trial should therefore be ordered of the question.

The provisions of the *Leases to Aliens Restrictions Act* and of the *Land Act of* 1910 do not hit this alleged agreement, for the plaintiffs were naturalized in March 1923. Nor, in my opinion, would the *Sugar Works Act of* 1911 and the Regulations of November 1924 under that Act affect the July transaction. The Regulations prohibit any lease or agreement to lease any land or interest in the sugar work area therein mentioned until the consent in writing of the corporation of the Treasurer of Queensland has been obtained. That consent may, I think, be given generally : a consent to a specific lease or agreement is not required. I am not clear, on the evidence, whether the land is within the area covered by those Regulations, but if it is, then the necessary consent was obtained in August 1922.

Further, and for reasons already set forth, I think a new trial should be had upon the allegations contained in par. 23 of the statement of claim. It seems an alternative case. But it might be advisable to amend this allegation so as to accord with the plaintiffs'

evidence that the defendants or one of them promised that, if the lease were not granted, they or he would pay for all the work done by the plaintiffs, and to add the common count for work and labour done and materials provided by the plaintiffs for the defendants or one of them at their or his request.

I recognize that a new trial is a great hardship to the parties, and must entail heavy additional expense. It must be limited to the July agreement, and the count for work and labour, but still the history of the earlier transactions will necessarily be admissible in evidence, and relevant upon the question of such agreement: the trial will thus be much prolonged, at great expense. The action ought to be settled, on fair terms. If, however, the parties cannot settle it, no doubt the Supreme Court of Queensland will see that a new trial is held in some place where racial prejudice is unlikely to warp the minds of jurors.

Appeal allowed. Verdict of the jury and judgments of the Supreme Court of Queensland wholly set aside. New trial ordered of the issues raised as to the agreement of 24th July 1923. *Restrain the defendants and each of them from disposing of or in any way dealing with the lands in the statement of claim mentioned until further order of the Supreme Court of Queensland or a Judge thereof. Continue the receiver and manager (if any) appointed herein until further order of the Supreme Court of Queensland or a Judge thereof. Order the parties to abide their own costs of the trial before Brennan A.J. Order that the defendants do pay the plaintiffs their costs of appeal to the Supreme Court of Queensland from the judgment of Brennan A.J. and the findings of the jury upon the trial before him and subject to any special order that the Supreme Court or a Judge thereof may make under Order XCI., r. 2, of the Rules of the Supreme Court. Order that the plaintiffs and defendants abide their own costs of this appeal. Subject to the order of this Court dated 19th December* 1924 *and to this order, reserve all costs in this action for the determination of the Supreme*

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Court of Queensland or a Judge thereof upon the new trial as aforesaid. Remit the cause to the Supreme Court of Queensland.

Solicitors for the appellants, *Tully & Wilson.*

Solicitors for the respondents, *MacDonell & Harris*, Cairns, by *Macnish & Macrossan.*

B.L.

Appl *Carnival Cruise Lines Inc v Sitmar Cruises Ltd* (1994) 120 ALR 495

Foll *Malibu Boats West Inc v Catanese* (2000) 51 IPR 134

Foll *Malibu Boats West Inc v Catanese* (2000) 180 ALR 119

Appr *Carnival Cruise Lines Inc v Sitmar Cruises Ltd* (1994) 31 IPR 375

Cons *Esprit International v Komesaroff* (1999) 46 IPR 420

[HIGH COURT OF AUSTRALIA.]

A. & F. PEARS LIMITED . . . . APPELLANT; OPPONENT,

AND

THE PEARSON SOAP COMPANY LIMITED . RESPONDENT. APPLICANT,

H. C. OF A. 1925.

SYDNEY, *Nov.* 23, 24; *Dec.* 18.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Trade Mark—Registration—Likelihood of deception—Onus of proof—Discretion of Registrar—Trade Marks Act 1905-1922 (*No.* 20 *of* 1905—*No.* 25 *of* 1922), *secs.* 16, 24, 25, 44, 114.

An application was made by a company named the Pearson Soap Co. Ltd. for registration of the words "Pearsonia" and "Pearsonette" as a trade mark in respect of detergents and cleansers. The applicant was the registered proprietor of a trade mark "Pearson's" in respect of sand-soap. The application was opposed by A. & F. Pears Ltd., a company which manufactured the well-known Pears' Soap, and which was the registered proprietor of many trade marks in connection with soap which included the word "Pears." The application was granted subject to a condition that the marks should be applied respectively to pumice powder and pumice paste put up in containers on which the name and address of the applicant company appeared in visible proximity to the mark.

Held, by *Isaacs*, *Higgins* and *Rich* JJ. (*Knox* C.J. and *Starke* J. dissenting), that on the evidence the applicant had not discharged the onus of showing that the marks were not likely to deceive, and, therefore, that it was not entitled to registration of the mark either with or without the condition.