[HIGH COURT OF AUSTRALIA.]

NORTON . . . . . APPELLANT;
PLAINTIFF,

AND

ANGUS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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SYDNEY, *Aug.* 16, 17.

MELBOURNE, *Oct.* 14.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke J.J.

Vendor and Purchaser—Contract of sale—Specific performance—Illegality—Sale of perpetual lease selections—Area greater than maximum which one person can hold—Contract capable of being legally performed—Specific performance or damages——Discretion of Court—Land Acts 1910-1924 (*Q.*) (1 *Geo. V. No.* 15—15 *Geo. V. No.* 33), *secs.* 51, 59, 130A, 166.

The appellant was the holder of a perpetual lease selection under the *Land Acts* 1910-1924 (Q.) and his wife was the holder of another. The appellant, with the consent of his wife, entered into a contract for the sale of the two selections to the respondent. The contract contained a provision for the execution by the appellant of "a transfer." The purchase-money was £1,500, of which the respondent paid £500 as a deposit. The respondent applied for the permission of the Minister of Lands to a transfer of one selection to the respondent and of the other to his wife, and was informed that such permission would be granted if the transfers were in order when lodged. Having gone into possession and made certain improvements on the land, the respondent refused to go on with the contract. In an action by the appellant for specific performance of the contract, in which the respondent by counterclaim claimed repayment of the £500,

Held, by the whole Court, that the contract was not rendered illegal by the provision for the execution of "a transfer" and the fact that the total area of the two selections was greater than the maximum area which in the particular district might under the Act be held by one person; that the contract might be legally carried out by transfers to two persons; and therefore that the contract was one of which specific performance by the respondent might be ordered and that the respondent was not entitled to repayment of the £500.

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But *held*, by *Knox* C.J., *Isaacs* and *Starke* JJ. (*Higgins* and *Gavan Duffy* JJ. dissenting), that in the circumstances of the case the Court in the exercise of its discretion should not order specific performance, but in lieu thereof should order an inquiry, at the appellant's risk, as to damages.

Decision of the Supreme Court of Queensland (*Macnaughton* J.): *Norton* v. *Angus*, (1926) S.R. (Q.) 104, reversed.

APPEAL from the Supreme Court of Queensland.

On and before 6th May 1925 Edward Charles Norton was the holder of perpetual lease selection No. 4258 in the Warwick district of Queensland, having an area of 635 acres, and his wife, Agnes Elizabeth Ann Norton, was the holder of perpetual lease selection No. 4259 in the same district, having an area of 696 acres 1 rood. On 6th May 1925 Norton, with the consent of his wife, entered into an agreement with Frank Angus to sell to him the two selections for the sum of £1,500, of which £500 was paid as a deposit and the balance of £1,000 was to be paid on or before 31st August 1925. One of the conditions of the contract was that upon payment of the full amount of the purchase-money the vendor would "execute a transfer, to be prepared by and at the expense of the purchaser, such transfer to have the necessary stamp duty stamped thereon before being presented to the vendor for signature" (clause 7). Angus went into possession of the two selections shortly after 6th May 1925 and remained in possession until about the middle of October 1925. Angus did not pay the balance of purchase-money on 31st August or at all. On 7th October 1925 Norton instituted an action in the Supreme Court against Angus, claiming specific performance of the agreement or, in the alternative, damages for breach of it. The defences were (1) that the contract had been induced by false representations; (2) that the agreement was incapable of being performed in a legal manner inasmuch as it was incapable of being performed without violating the land laws of Queensland, and particularly secs. 51 and 130A of the *Land Acts* 1910-1924, and (3) that the agreement was entered into without the permission of the Minister for Public Lands and by reason thereof the leases were liable to be forfeited under sec. 166 of the *Land Acts* 1910-1924. The defendant, by counterclaim, claimed a

return of the £500 paid as a deposit and £380 10s. for money expended on improvements on the land and a crop which was lost.

The action was heard by *Macnaughton* J., who found that no false representation had been made, that the defendant prior to and at the time the agreement was made knew that the two selections must be held by two distinct persons, and that with such knowledge he entered into and retained possession of the selections and made the improvements thereon. The learned Judge, however, held that the contract was illegal and could not be enforced by decreeing specific performance or giving damages, and that there had been no part performance of the contract by the defendant which would prevent him from recovering the £500 paid by him. Judgment was therefore entered for the defendant on the claim and on the counterclaim for £500 : *Norton* v. *Angus* (1).

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

Walsh, for the appellant. The contract could have been performed by transferring one of the selections to some person other than the respondent, and on the evidence it was intended to be performed in that way. It was, therefore, not illegal (see *Amalgamated Society of Engineers* v. *Smith* (2); *Hutchinson* v. *Scott* (3); *Langley* v. *Foster* (4); *Hawker* v. *McLeod* (5)).

[HIGGINS J. referred to *Egmont* v. *Smith* (6).

[STARKE J. referred to *Robertson* v. *Admans* (7).]

Sec. 51 of the *Land Acts* 1910-1924 does not apply so as to invalidate this contract of sale, but it would apply so as to prevent the legal estate in both being transferred to one person. The provision for "a transfer" being executed does not mean that there was to be only one transfer for both selections, for there could not, under the Act, be one transfer for two selections. The provision in sec. 166 requiring the permission of the Minister to a transfer is not a condition precedent to the validity of the contract, but its only effect is that the parties shall be deemed to have agreed that the contract is subject to that permission being obtained. Even if the

(1) (1926) S.R. (Q.) 104.
(2) (1913) 16 C.L.R. 537, at p. 566.
(3) (1905) 3 C.L.R. 359, at pp. 368, 369.
(4) (1906) 4 C.L.R. 167, at pp. 172, 181, 184, 187, 193.
(5) (1910) 10 C.L.R. 628, at p. 639.
(6) (1877) 6 Ch. D. 469.
(7) (1922) 31 C.L.R. 250.

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contract was illegal, the respondent was not entitled to recover the £500, for he went into possession of the land under the contract and that was a part performance of an illegal contract which prevented him from recovering money paid under it (*Halsbury's Laws of England*, vol. VII., p. 487; *Kearley* v. *Thompson* (1); *Scott* v. *Brown, Doering, McNab & Co.* (2); *Apthorp* v. *Neville & Co.* (3); *Harse* v. *Pearl Life Assurance Co.* (4)).

O'Sullivan, for the respondent. The contract could not be performed without violating the *Land Acts*, and is therefore illegal. Clause 7 of the conditions contemplates one transfer of all the land to one person, and the purpose of the contract was the holding of all the land by one person. It was intended that the person to whom the second selection was transferred should be a trustee for the respondent, which is contrary to sec. 59.

[HIGGINS J. referred to *Childers* v. *Childers* (5); *In re Lake*; *Ex parte Dyer* (6).]

The position in this case is the same as that in *Robertson* v. *Admans* (7). If the appellant was acting as agent of his wife in selling her selection, she was a necessary party to the action. Although the contract was illegal, the respondent was entitled to recover the £500. In order that part performance may prevent a party to a contract from recovering money paid under it, there must be performance of part of the illegality (*Williams on Vendor and Purchaser*, 3rd ed., vol. II., p. 839; *Taylor* v. *Bowers* (8); *Hermann* v. *Charlesworth* (9)). Going into possession of the land is not such part performance.

Walsh, in reply.

Cur. adv. vult.

Oct. 14. The following written judgments were delivered :—

KNOX C.J. This was an action for specific performance of an agreement for the sale to the respondent of lands comprised in perpetual lease selections Nos. 4258 and 4259 in the district of Warwick in the State of Queensland.

(1) (1890) 24 Q.B.D. 742.
(2) (1892) 2 Q.B. 724, at pp. 728, 731, 794.
(3) (1907) 23 T.L.R. 575.
(4) (1904) 1 K.B. 558.
(5) (1857) 3 K. & J. 310; 1 DeG. & J. 482.
(6) (1901) 1 K.B. 710.
(7) (1922) 31 C.L.R., at p. 258.
(8) (1876) 1 Q.B.D. 291.
(9) (1905) 2 K.B. 123.

The defences set up by the respondent were: (1) misrepresentation; (2) that the agreement was incapable of being performed by reason of the consolidated *Land Acts* of Queensland and was illegal and void, and (3) that the agreement was entered into without the permission of the Minister for Public Lands and by reason thereof the leases were liable to be forfeited. The respondent by his counterclaim sought to recover the deposit of £500 paid by him under the agreement and further amounts in respect of improvements made by him and damages sustained by the loss of a crop of wheat sown by him on the land in question.

The action was tried by *Macnaughton* J., and the facts found by him are not now disputed. They are as follows:—At and before the date of the agreement sued on the appellant was the holder of one of the selections and his wife was the holder of the other. The appellant with the authority of his wife put both selections in the hands of an agent for sale. Before entering into the agreement the respondent was told how the land comprised in the two selections was held and that it could not be held by one person, the area being more than 1,280 acres, which had been declared by Order in Council made under the *Land Acts* to be the maximum area which might be held by one person in the Warwick land district. Knowing this, the respondent signed an agreement, which is the agreement now sued on, to buy the two selections with certain farming plant thereon for £1,500, and paid a deposit of £500. The only term of the agreement to which I need refer is that which provided that the vendor would, on the payment of the full amount of the purchase-money, execute a transfer. The appellant appeared as vendor in the agreement. Shortly after the agreement was signed the respondent went into possession of the property, and remained in possession for about five months. While in possession the respondent instructed an agent to apply to the Minister for Lands for permission to have one of the selections transferred into the name of the respondent and the other into the name of his wife, and was informed that transfers in that form would be approved if in order when lodged. The balance of the purchase-money became payable on 31st August, but in the meantime the respondent's wife had refused to accept a transfer and the respondent was anxious to avoid

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performance of the agreement. He then, for the first time, alleged that misrepresentations had been made to him, but he remained in possession of the property for some weeks.

The learned trial Judge found that no false representation had been made to the respondent, that the respondent, before signing the agreement, knew that both selections could not be held by one person and with such knowledge entered into and remained in possession and made the improvements specified in his counterclaim. After further argument on the questions of law arising on these findings, he held that the agreement was illegal and could not be enforced, because it provided for one transfer of the two selections and that provision contravened the Order in Council limiting the area which could be held by one person in the Warwick district. On the counterclaim he held that the respondent was entitled to recover the deposit of £500 because no steps had been taken to carry out the part of the contract which he thought to be illegal, but dismissed the counterclaim so far as it related to payment for improvements and damages. Accordingly judgment was entered for the respondent on the claim and for the respondent for £500 on the counterclaim; and it is from this judgment that the appeal is brought.

I am unable to agree in the view that the agreement was illegal. It is true that the transfer of an area greater than 1,280 acres to one person was forbidden by law, and it is true also that the agreement provided for the execution of "a transfer." But it is well settled that as a general rule a purchaser can insist on a conveyance to himself or his nominee provided the nominee is willing to accept the conveyance and is under no disability. The rule is inapplicable in certain cases—for example, the transfer of an equity of redemption—where the purchaser without express stipulation becomes liable to the vendor to pay the mortgage debt and interest accruing after the purchase and may be required to covenant to do so; but there is nothing in the circumstances of the present case to prevent the application of the rule. It follows that the respondent, whose duty it was to submit transfers of the selections for execution, might have submitted transfers to two separate persons each holding

independently of and not as trustee or agent for the other. If this had been done the agreement could have been performed without infringing any enactment which has been brought to our notice. In this view the appellant is entitled to retain the deposit of £500 under clause 9 of the agreement, which provides that if the purchaser should make default in payment of the purchase-money when due—the date for payment being fixed by the agreement as 31st August 1925—the deposit should be forfeited to the vendor. It follows that the judgment on the counterclaim must be discharged and judgment entered for the appellant.

The agreement not being illegal, and the respondent having failed to prove the facts on which his other grounds of defence were founded, the appellant is entitled to relief on his claim; but the question remains whether judgment in his favour should be for specific performance of the contract or for damages in lieu thereof. I have been unable to find that any more definite rule has been laid down, as to the exercise of the discretionary power to order payment of damages in lieu of specific performance in cases of such a nature as to entitle the plaintiff to sue for specific performance, than that stated by Lord *Selborne* L.C. in *Wilson* v. *Northampton and Banbury Junction Railway Co.* (1), which is that, in a case in which the Court cannot satisfactorily do justice by means of a decree of specific performance and the best justice of which the case is capable will be done by giving damages, damages should be given in lieu of specific performance. The circumstances of the present case which require consideration on this point are as follows:—The appellant has not been guilty of any conduct disentitling him to specific performance. On the other hand, he has received and will retain £500 paid to him as deposit under the agreement, and the land will, if the agreement be not performed, belong, as before, to his wife and himself. He and she will also have the benefit of improvements to the property of a more or less permanent nature made by the respondent at a cost of £230. The respondent went out of possession of the property in October 1925, and presumably the appellant and his wife have been in possession since that time.

(1) (1874) L.R. 9 Ch. 279, at p. 285.

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The position of the respondent is that if specific performance be ordered, he will be compelled, in order to obey the judgment, to find some person willing to accept a transfer of one of the selections, not as trustee or agent for the respondent, but bona fide for the benefit of the transferee. Unless he can find a person willing to purchase one of the selections he can only comply with the judgment by making a present of one of them to some stranger, or to a member of his family, and it appears from the evidence given on the trial to be extremely doubtful whether any member of his family would accept a transfer involving, as it does, an obligation to reside on the land transferred. If the respondent should procure some person to accept a transfer as trustee for him, the land so transferred would be liable to forfeiture. The annual rent payable to the Crown in respect of one portion of the land is £51 15s. 11d., and in respect of the other £61 18s. 5d.; and these facts coupled with the obligation of residence imposed on the holder might and probably would give rise to difficulty in finding a purchaser on the occasion of a forced sale, as a sale by the respondent in order to comply with the judgment would be. Moreover, on such a sale, it is almost inconceivable that he would obtain anything like a fair price for the land sold.

As against the respondent it must be remembered that the costs of the litigation have been increased by the defence of fraudulent misrepresentation set up by him, which the learned trial Judge found was not supported by the evidence. On the other hand, the respondent will, if this appeal succeeds, be saddled with the whole costs of the action and of this appeal. On a consideration of all these matters I have come to the conclusion that the best justice of which the case is capable will be done by entering judgment for the appellant on the counterclaim and by granting the appellant, at his own risk, an inquiry as to the damages (if any) sustained by him by reason of the breach of contract of which he complains. Having regard to the fact that the appellant has received and retains the £500 deposit and has had the benefit of the improvements made by the respondent, it seems at least doubtful whether the appellant will succeed in proving that he has sustained any damage.

ISAACS J. The learned primary Judge (*Macnaughton* J.) dismissed the claim for specific performance. I agree with that decision, but not quite for the same reason. His Honor's reason was that, by agreeing to execute and accept a transfer of two perpetual leases exceeding in the whole 1,280 acres—the legal maximum—the parties had agreed to do what, when consummated, the law, by sec. 51 of the consolidated *Land Acts*, prohibited. The reason given is certainly supported by the literal words of the 7th condition, if that clause be read by itself. The attempted transfer to one person of land contrary to the provisions of sec. 51 is, to my mind, whatever the penalty may be, so opposed to the intention of the Legislature that no Court can, in my opinion, countenance or assist it. If, therefore, I construed the terms of the condition according to their literal signification, I should agree with the reason of *Macnaughton* J.

Condition 7 is in these terms: "That the vendor will, upon the payment of the full amount of the purchase-money in manner aforesaid, execute a transfer, to be prepared by and at the expense of the purchaser, such transfer to have the necessary stamp duty stamped thereon before being presented to the vendor for signature." When, however, the agreement is read as a whole and by the light of the circumstances known to both parties when it was made, the literal expressions contained in condition 7 require, in my opinion, some modification in interpretation—that is, in order to ascertain what the parties must have meant by the words they used. For, as was stated by Lord *Atkinson* for the Judicial Committee in *Vatsavaya Venkata Jagapati* v. *Poosapati Venkatapati* (1), "in the construction of written or printed documents it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject matter to which it was designed and intended they should apply" (see also *Bacon* v. *Purcell* (2)).

The second finding of fact, as summarized by the learned Judge, is that the respondent prior to and at the time of the making of the agreement knew that the two selections must be held separately by two distinct persons. The appellant, of course, was equally aware of that requirement. The mere statement in the contract that the

(1) (1924) L.R. 52 Ind. App. 1, at p. 20. (2) (1916) 22 C.L.R. 307, at p. 309.

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land sold comprised two distinct perpetual leases exceeding in area 1,280 acres, in conjunction with the basic knowledge of both parties referred to, carries with it the implication that condition 7 was meant to be legally effective, and therefore, unless the words are intractable, they should be so read. Obviously, then, the words "a transfer" in that condition could not reasonably mean to either of the parties one instrument only, executed by the appellant only, to the respondent only. That would make the agreement self-destructive, and the respondent, if that were his intention, would scarcely have paid a deposit of £500. The substantial meaning of condition 7, in the circumstances, is that in exchange for the full purchase-money there should be an effective transfer to the purchaser, or at his direction, of the land purchased. I, therefore, see no agreement to violate sec. 51.

Sec. 166 was relied on in argument as an obstacle to the validity of the agreement. But that section does not invalidate this contract to transfer, even though there was no prior permission, and even though the intended transferee was not yet a qualified person. The contract did not contain an agreement to transfer without the previous permission of the Minister. But sec. 166 creates a condition precedent to a valid and effective transfer, namely, previous permission, the penalty for which is liability to forfeiture. The fact that the forfeiture may be waived does not detract from the statutory requirement in the first place of prior permission. The section is directed to the holder, because the "breach of condition" is his breach, and the lease or licence which may be forfeited is his. It is at his peril to see to the prior permission or its subsequent waiver. As between the Crown and the holder, the qualification of the proposed transferee and obtaining the permission are the concern of the holder; as between him and the purchaser from him and so far as no express relevant provision extends, they are partly the concern of the party insisting on performance of the contract and partly that of the other party. But the section does not strike at a contract which does not itself contemplate a breach of the statute.

The contract itself being good, what is the position as to breach and remedy? The respondent has admittedly refused to complete, and the first question is whether specific performance is the proper

remedy. The appellant, so far as transfer to the respondent and Mrs. Angus is concerned, is ready and willing lawfully and effectively to complete. If Mrs. Angus were willing, the respondent, in the circumstances, could not say that that was not a sufficient readiness and willingness on the appellant's part, and would, in my opinion, entitle the appellant—I use the word "entitle" advisedly—to a judgment for specific performance. There being no illegality in the contract itself and there being the departmental assent of 28th July 1925, I would see no difficulty whatever in directing the respondent to accept the permitted transfers and to pay the full price. In specific performance a Court of equity applies "the general principle of disregarding the letter for the substance" (per Lord *Haldane* for the Privy Council in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1)). But, as Mrs. Angus is not willing, the position is different. As things stand, and apart from whichever lease the respondent might take for himself, no person except his wife would be a permitted transferee, and therefore no one but she would have a secure title. And, what is more, any transfer by the appellant to a person other than the respondent or his wife would be a breach of a statutory condition, and, in my opinion, no Court would be at liberty—much less bound—to enforce a transfer in violation of the statute.

Specific performance is, no doubt, like all equitable remedies, a matter of discretion. But, as Lord *Eldon* said in *White* v. *Damon* (2), "that is not an arbitrary, capricious, discretion. It must be regulated upon grounds that will make it judicial." A little later, in *Hall* v. *Warren* (3), *Grant* M.R. phrased it even more strongly. My own view as to this is expressed in *Goldsbrough, Mort & Co.* v. *Quinn* (4), and I would repeat what I there said, that "the remedy of specific performance has now been so constantly applied and has become so deeply rooted in our system of jurisprudence that, if only the case is of a class regarded as appropriate, some sound and recognized reason must stand in the way before the Court refuses the remedy."

Here, however, there is such a reason. Even apart from a more serious objection to be presently mentioned, the Court cannot

(1) (1915) L.R. 43 Ind. App. 26, at p. 33.
(2) (1802) 7 Ves. 30, at p. 35.
(3) (1804) 9 Ves. 605.
(4) (1910) 10 C.L.R. 674, at pp. 697 *et seqq.*

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justly force the respondent to accept and pay for so precarious a transfer of a very substantial part of the land purchased. As Lord *Haldane* said in *Jamshed's Case* (1), in speaking of the circumstances in which equity would not assist :—" Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction." Specific performance, then, cannot in any case be ordered.

As to the alternative of damages, it may be observed, *in limine*, that the appellant, having had the opportunity, neither proved nor suggested any. Damages were in issue, and no attempt was made to prove them, probably because the £500 deposit, which was security to that extent, more than covered any possible damage. Consequently, as a matter of discretion, I do not see any reason for reopening the matter at this stage for the purpose of further litigation of a very problematical character. It is problematical in more senses than one.

The case comes very close to the line whether there is any right whatever to damages. So far as relates to damages in lieu of specific performance, there is no right at all. For the reasons given, the nature of the case itself, as matters stood at the institution of the action and as they still stand, renders it absolutely impossible, in my opinion, to order specific performance. Such an order would violate the statute. It would compel the parties to do what, if done, would be a breach of a statute regulating a matter of high public policy. It would direct an act in breach of a condition imposed by the Crown and Parliament in relation to the tenancy of Crown lands. Whatever the penalty for such a breach, the breach itself is unlawful, and no Court, in my opinion, is empowered to direct any breach of a statute. Therefore, equitable damages in substitution for specific performance seem to me to be altogether out of consideration.

But regarding the action from a common law standpoint, the position is different. A principle here comes into play which, while not affording any ground for specific performance in this case

(1) (1915) L.R. 43 Ind. App., at p. 33.

owing to the nature of the circumstances, does theoretically establish a breach of contract by the respondent. For this reason I limit my objection to an inquiry as to damages to discretion. The principle to which I refer is that formulated by Lord *Blackburn* in *Mackay* v. *Dick* (1) in these words: "Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing." Needless to say, that is subject to any express provision to the contrary, and there is no such provision in this contract. The principle quoted was affirmed by the Judicial Committee, speaking by Viscount *Dunedin*, in *Sprague* v. *Booth* (2). Now, in the present case, if sec. 166 were satisfied, there would be no difficulty in carrying out the contract in every respect. Neither of the parties, nor both of them together, nor the Court, nor anyone else, can control the Minister's discretion to grant or refuse permission. Therefore specific performance is impossible. But, on the principle stated, it behoved each of the parties to the contract to do all that was reasonable to secure the lawful transfer of the leases. The order of necessary events for this purpose is all-important. The first step had to be taken by the respondent, by nominating some qualified persons to be transferees. The burden would then have lain on the appellant to procure the required permission. If he failed, the respondent would not have been in fault. But the attitude of the defendant was not that of a person trying to perform the contract by nominating a proposed transferee. He repudiated the bargain, and in doing that failed to take a step that might have eventuated in a lawful and effectual performance of the agreement. There is, therefore, theoretically, a breach by respondent, but, as I have said, the circumstances—and I include in them the indefinite possibility of Ministerial permission for a yet conjectural transferee —are not such as would induce me to create practically fresh litigation to find out whether the appellant has sustained loss by non-performance of the contract, as contrasted with the present position. In

(1) (1881) 6 App. Cas. 251, at p. 263. (2) (1909) A.C. 576, at p. 580.

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view, however, of the opinions of the Chief Justice and *Starke* J. on this point, I formally assent to the order they propose.

Passing to the counterclaim, it follows from what has been already said that the ordinary rule as to a deposit of this nature applies, and it remains the property of the vendor, the appellant.

The judgment should, in my opinion, be varied by discharging the order on the counterclaim and entering judgment thereon for the appellant with costs.

HIGGINS J. I am of opinion that the appeal should be allowed; that the order for repayment by the vendor of the £500 should be set aside; and that the contract ought to be specifically performed by the purchaser.

All the facts have been found in favour of the vendor, and are undisputed. There was no misrepresentation by the vendor such as is alleged in the defence. The only point that remains is that raised by par. 8 of the defence, that the agreement "is incapable of being performed in a legal manner inasmuch as it is incapable of being performed without violating the Land Laws of Queensland, and particularly sec. 51 of the *Land Acts* of 1910-1914 and sec. 16 of the *Land Acts Amendment Act* of 1924."

There is nothing in the *Land Acts* to make the agreement to sell the two selections illegal in itself; and, as to the completing of the agreement, it can be completed without any illegality.

The position is that under sec. 51 of the *Land Act* of 1910 the Governor in Council has declared that in the district in question the maximum area of Crown land that may be "held" in perpetual lease selections is 1,280 acres. The only prohibition, so far, is as to the "holding"—the holding in law. But then, by sec. 16 of the Amendment Act of 1924 (now sec. 130A of the Consolidated Acts 1910 to 1924, sub-sec. 3), it is provided that any person who holds any selection, and in respect of the same or any part thereof or interest therein is a trustee, agent or servant of or for any other person, shall be deemed to have acquired land by fraud upon the Act, and liable to forfeiture. Sec. 59 of the Act is not mentioned in the defence; but, treating it as comprehended by the defendant in his paragraph, it provides that no person who is in respect of the

land held or any part thereof or interest therein a trustee, agent or servant of or for any other person shall be competent to "hold" any selection.

In this case the plaintiff Norton held a selection of 635 acres; and his wife held a selection in the same district of 696 acres 1 rood. The two selections, therefore, exceeded 1,280 acres; but there is no evidence, nor is it contended, that Mrs. Norton held the selection in her own name as trustee for her husband. On 5th May 1925 Norton agreed to sell the two selections, with his wife's consent, to Angus for £1,500. Angus paid £500; and the remaining sum of £1,000 was to be paid on or before 31st August 1925. Angus took possession in May with his family. According to the findings of the learned Judge, Angus knew before the agreement that the selections were in the names of the two Nortons, and that it would be necessary for him also to put one of the selections in the name of his wife or some other person. On this subject the learned Judge, who saw the witnesses, found that Angus was guilty of "wilfully false evidence." Angus failed to pay the £1,000 on 31st August, and began to make excuses. On or about 1st September Angus told the agent, Daveney, that his wife declined to have anything to do with the property. On 16th September the solicitor for Angus wrote to Norton that Angus had no one who was prepared to hold one of the leases *for him*. In a conversation with the clerk in the district lands office, Angus said he did not want to put one selection in his wife's name: "I don't want to *dummy* for anybody." But, even assuming that his wife genuinely objected to have one of the leases put in her name, there is not, from first to last, any evidence that she refused to have a lease put in her name *for her own benefit*. Mrs. Angus was not called as a witness. On 28th August the Under-Secretary for Lands had written, in answer to a request made at the instance of Angus, for permission to transfer to Angus and his wife, that such permission "will be approved" (by the Minister under sec. 166). The defendant having failed to pay the £1,000 on 31st August, the plaintiff brought his action on 30th September. The learned Judge has reluctantly ordered the £500 to be returned to Angus under the counterclaim, and dismissed, on the plea of illegality, the claim of Norton for specific performance or damages.

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It is clear that if Angus took such a conveyance of the two selections into his own name as to become the holder thereof, it would be in disobedience of the Act (sec. 51), and an illegality. But it is also clear that the plaintiff did not and does not seek to compel the defendant to take such a conveyance. The plaintiff has always been ready and willing to transfer any part of the two selections to any nominee of Angus; and, according to *Jessel* M.R., Angus could even compel the vendor to convey to such person or persons as the purchaser should direct (*Egmont* v. *Smith* (1): and see *Williams on Vendor and Purchaser*, 3rd ed., vol. I., pp. 43-44, 581; *Delves* v. *Gray* (2)). The learned Judge of the Supreme Court has evidently been impressed by the words of the agreement (clause 7) that the vendor would "execute *a* transfer"—not transfers; but in the case just cited the agreement was to execute "a proper assurance"; and yet the Master of the Rolls held that the vendor would be compelled to execute such assurances and to such persons as the purchaser should direct, subject to the right of the vendor to insist that any additional burden caused to him by the form of the assurances should be borne by the purchaser. In the exercise of its equitable jurisdiction as to specific performance, a Court of equity looks to the substance of the matter, and is not deterred from making a decree for conveyance in a different fashion from that contemplated in the contract (cf. *Cooper* v. *Cartwright* (3); *Clark* v. *May* (4)).

But it is urged for the defendant that if one of the selections, or part thereof, be transferred to his nominee as a trustee for him the nominee becomes, under the Act, liable to forfeiture of the land (sec. 130A (3)); and that a trustee for another is not competent to "hold" a selection (sec. 59). This does not make such a transfer illegal, in the sense that it would be illegal for the defendant to "hold" more than 1,280 acres under sec. 51; there arises a mere risk of forfeiture of the land held by the trustee. But it is surely a sufficient answer to the argument to say that the nominee need not be a trustee for the defendant or for anyone. The defendant is free to sell the second selection, or part thereof, to anyone who will

(1) (1877) 6 Ch. D. 469.
(2) (1902) 2 Ch. 606.
(3) (1860) John. 679.
(4) (1852) 16 Beav. 273.

purchase it; and he may even make provision for his wife or children by nominating them or one of them, as transferee, by way of advancement for his or their benefit. In my opinion, sec. 166 is misunderstood. The Minister, if he has approved of Mrs. Angus as transferee, is not thereby precluded—if Angus wish to sell the leases or one of them—from approving of some purchaser as transferee. Under sec. 166, the permission of the Minister must precede the transfer; it is not a condition precedent to the making of a contract. The usual course is to make the contract subject to the approval of the transferee by the Minister; and if the Minister refuse to approve of one person as transferee, there is nothing to prevent the parties from submitting another. There is no more forcing a sale under such circumstances than under ordinary circumstances; and if it were a forced sale, it is the mere consequence of the bargain which Angus made, and ought to carry out.

As between the vendor and purchaser in this case, therefore, there is no valid ground on which the Court should refuse to compel the purchaser to fulfil his contract. Hardship in itself is no ground. In *Storer* v. *Great Western Railway Co.* (1) a railway company agreed with a property owner through whose land the railway passed to construct and maintain an archway sufficient to permit a cart to pass with a load of hay, wherever the vendor should think most convenient. It appeared that there were grave practical difficulties in the way of carrying out this agreement; but *Knight Bruce* V.C. said that if the thing be reasonably possible, it must be done—the difficulty and expense were no objection; and specific performance was ordered: and see *Helling* v. *Lumley* (2). The contract is binding on the purchaser; and it does not lie in his mouth to say that he did not mean to carry it out in a manner permitted by the law. The discretion of the Court as to refusing specific performance is not to be arbitrary or capricious: it has to be based on some definite, solid, ground of injustice, generally a ground attributable to some fault in the conduct of the vendor (*Fry on Specific Performance*, 6th ed., p. 19; *Williams on Vendor and Purchaser*, 3rd ed., pp. 36, 1051-1052). But there is neither hardship nor injustice in this case. It is conceded by every member of the Court that Norton is to

(1) (1842) 2 Y. & C.C.C. 48.

(2) (1858) 3 DeG. & J. 493.

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retain the £500 paid to him, and to retain the improvements made, and, if specific performance were ordered, it would mean that Angus would get land which is presumably worth £1,500, and his improvements, by making an additional payment of £1,000.

In my opinion, the appeal should be allowed, and an order made for specific performance.

My brother *Gavan Duffy* desires me to say that he agrees with me in thinking that there should be judgment for the plaintiff appellant, and an order for specific performance.

STARKE J. There is nothing, in my opinion, in the *Land Acts* of Queensland 1910-1924 which makes the agreement relied upon in this case unlawful or which necessarily renders its carrying out unlawful. It is for the defendant to satisfy the Court that the agreement cannot be carried out in a lawful manner, and although difficulties have been suggested, the defendant has failed to discharge the burden which lies upon him. I feel bound to say that I see no substantial distinction between the Queensland Acts and the Act which was the subject of decision in *Robertson* v. *Admans* (1).

The relief which should be given to the plaintiff is another matter. I cannot shut my eyes to the fact that secs. 51 and 59 of the *Land Acts* may involve the defendant in a forfeiture if he takes and holds lands in excess of the aggregate area permitted by the Acts; yet the decree for specific performance may, in the last resort, compel the defendant to so take and hold the lands. It is not unlikely that this very position will arise, and not altogether owing to the fault of the defendant. It creates, in my opinion, a real hardship.

The discretion to grant specific performance is no doubt judicial, but the cases show that a serious risk of forfeiture may afford a good reason for refusing specific performance and leaving the party injured to his remedy in damages for non-performance of the contract.

I agree with the Chief Justice that specific performance should not be decreed and that an inquiry as to damages should be ordered in lieu thereof.

I also agree that the judgment for the defendant on the counterclaim cannot be supported.

(1) (1922) 31 C.L.R. 250.

Appeal allowed. Judgment of the Supreme Court discharged. Order an inquiry at the risk of the appellant as to what damages (if any) he has sustained in the circumstances by reason of the respondent not having performed the agreement of 6th May 1925 *in the pleadings mentioned according to its terms. Judgment for the appellant on the counterclaim. Case remitted to the Supreme Court to do what is right in accordance with this judgment. All parties to be at liberty to apply to the Supreme Court as they may be advised. Respondent to pay the costs of the action and counterclaim and of this appeal, except the extra costs occasioned by the transfer of the appeal to Sydney for hearing, which are to be paid by the appellant. Set off of costs.*

Solicitors for the appellant, *Leeper & Leeper*, Warwick, by *Hughes & Hughes.*

Solicitors for the respondent, *Brennan & Macnaughton*, Warwick, by *Fitzgerald & Walsh*, Brisbane.

B. L.