Judgment of the Lords of the Judicial Committee of the Privy Council in the Appeal of James Newnham Blackmore v. *The North Australian Company, Limited, from the Supreme Court of South Australia; delivered 13th November* 1873.

Present:

LORD PENZANCE.
SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE merits of this case, so far as they relate to the main subject in dispute, appear to their Lordships to fall within a very narrow compass. The Respondents, under the powers of the Northern Territory Act of 1863, paid in the early part of the year 1864 certain large sums of money for the purpose of procuring land orders, which were to entitle them to grants of land in the colony. The Northern Territory Act had provided that 500,000 acres of the waste lands of the crown, in country lots and town lots, might be sold by private contract at certain prices and according to certain conditions which were to be arranged and settled by regulations. Those regulations were published, and after the publishing of them, the Respondents on the faith of them paid their money. The statute provided that within five years from the date of the land order, land surveyed by the Government for the purpose should be allotted to each holder of such order, the holder being entitled to make his selection of the land so to be allotted, according to a system

provided by the regulations. In point of fact, the five years passed away without any lands having been surveyed and placed in such a position by the Government that the purchasers had the opportunity of selecting from them. There were surveys made, to which it will be necessary to allude presently, but the matter, as originally contemplated under the Act of 1863, and the regulations framed under it, was never carried out so as to enable the purchasers to obtain their land under that scheme. At the close of the year 1868, before the five years had expired (for the five years did not expire from the date of the Respondent's land order until the 23rd December 1869), a second Act of Parliament was passed, the substance of which appears to have been that fresh regulations should be made, and that all who held land orders should obtain, not 160 acres of land for each order, but 320; the quantity of land, that is, was doubled, the price remaining the same, but the regulations which determined the mode of selection, and other details, were not similar under the second Act to what they had been under the first.

The purchaser, the Respondent, having been unable to obtain his land under the first Act during the five years, the substantial question which seems to their Lordships to arise on the merits of the matter is, whether in point of fact he was obliged to come in and select his land under the second Act. If any obligation was created upon him by the second Act to take his land under the new set of regulations, and in the manner provided by those regulations, his claim to recover the amount back could not in justice succeed. It appears to their Lordships that the entire language of the second Act is opposed to any such conclusion. The second Act treats it as a matter

of option only, and goes so far as to say that if the holder of a land order does not come forward within nine months, and under his own hand agree to take the 320 acres instead of 160, he shall not be entitled to more than the 160; but there are no words to be found in that Act that impose upon a purchaser the obligation of taking land at all under the new Act or after the five years have expired.

The purchaser then not being bound to come in under the second Act, his right to recover his money is perfectly unquestionable. The consideration on which it was paid has failed; he was not able to obtain what he paid his money for, and he is entitled on failure of consideration to receive it back. So far matters are clear, and in argument they were not very strenuously disputed.

Then comes the question whether he is entitled to recover interest on his deposit. That question seems to depend upon whether in the form into which these proceedings have ultimately fallen, commencing as they did with a petition, but being afterwards followed out in the form of an action, it can be said with truth that the written documents, and the statute, and the payment of money under the statute, did or did not give rise to a contract such as is stated in the declaration. It is material to ascertain that for the purpose of settling this question of interest, and for that purpose alone, because on the main matter, as has been already pointed out, his claim would arise equally upon the money count in the declaration. Now their Lordships are of opinion that the payment of money by the holder of a land order, coupled with the statute, did constitute a contract between these parties. The Northern Territory Act speaks of lots to be sold "by private contract at the "prices and in manner herein-after mentioned."

It then speaks of the mode in which persons, authorized agents, are to offer these lots to be alloted to the public; and it then provides "That every pre-"liminary land order or land order issued under "the preceding clause shall entitle a purchaser, "or his transferee, within five years from the "date thereof, to select from and out of the sur-"veyed country lands in the said territory, the "particular lands of which he wishes to become "the purchaser." Then it goes on to say that the Government Resident shall make a valid grant.

Now it has been contended that, inasmuch as neither the land order nor the Act says in so many words that the land shall be surveyed, the Court should come to the conclusion that there was no bargain on the part of the Government that it should be surveyed, and we are invited to look upon this contract as meaning, not that the Government shall survey the land, but that if they survey the land within five years, then the purchaser shall obtain his grant, and further, that they will use reasonable and due diligence to survey the land within that period. Their Lordships cannot concur in that view. Surveying the land is not a thing in itself which on the face of it ought to offer any insuperable difficulty. There is nothing, therefore, in the nature of the thing to lead to the conclusion that the Appellants intended to make the contract conditional upon the survey of the land. It is treated throughout both the Act and the land order as if the surveying was to be a matter of course. The surveying of the land lay wholly in the hands and power of the Government who received the money, and nothing was to be done or could be done by the purchasers in the matter. All contracts must be construed according to the surrounding circumstances, and a reasonable conclusion arrived at, as to what, looking at those circumstances, the

parties intended. It does not seem to their Lordships to be a very reasonable or probable intention of the parties, that it should be an open question whether the land should be surveyed or not, and that if any difficulties should intervene to prevent the survey as early as intended, the contract should remain open for years, the purchasers being out of their money.

From these considerations the conclusion at which the Court has arrived is, that there was a positive contract on the part of the Government to survey the land within five years, to permit the selection by the purchaser, and, when selected, to make the grant. At the same time it may well be that the Government might, by the occurrence of some such events as have been shadowed forth in argument as being within the range of possibility, be exonerated from performing it. It is not necessary to pursue this suggestion, because their Lordships are of opinion upon the facts and pleadings that there is no trace of any such event.

Their Lordships are therefore of opinion that the purchaser is entitled to recover upon this first count and, consequently, to recover the interest falling due for the number of years he has been kept out of his money, unless the matters alleged in the equitable plea formed any defence to that claim.

Their Lordships propose to consider that plea for a moment as if it had been allowed to be pleaded, and not struck out. The substance of the plea is this, that a survey having been made in October 1864, and therefore in plenty of time for the selection and grant of lands within the five years under the first Act, a large number of the holders of the preliminary land orders objected to the site at Adam Bay which had been selected by the Government surveyor. The words of the allegation are as follows: "And the

" Defendant further says, that numerous holders " of preliminary land orders and their agents " visited Adam Bay aforesaid, and the town or " city of Palmerston situate in or near Adam " Bay aforesaid, the site chosen by the said " Boyle Travers Finnis for the principal town of " the said northern territory, and such numerous " preliminary land order holders and their agents " disapproved of the same site, and in or about " the month of December 1864 and January 1865, " gave notice of such disapproval to the Colonial " Government of South Australia, and requested " the said Colonial Government to have another " site selected for the principal town of the said " northern territory. And the Defendant further " says that a great number of the preliminary " land order holders held a meeting at Adelaide " aforesaid, on the 10th day of January 1865, " which said meeting passed certain resolutions, " that a committee, consisting of five of the " holders of land orders in the northern territory, " be appointed to prepare an address to the " governor, requesting him not to allow the site " of the settlement or of the capital to be decided " on until a proper examination of the country has " been made and reported to and approved by the " governor and executive council, and to cause " such examination to be made without delay," and so forth. " And the Defendant further says, " that the said committee, appointed by the said " meeting, presented an address to the governor " of the said colony, the 18th day of January, " 1865, as follows:" and then follows the address. It then goes on to say that the Colonial Government being " desirous of giving the holders " of preliminary land orders every possible satis- " faction, and of having the chief town in a " place, approved of by the general body of " holders of preliminary land orders, and also of " having the chief town in the best possible

" place if a better place than that selected by " the said Boyle Travers Finnis could be found, " and also of discovering if possible a better " locality for the survey of the said country " lands than that determined and chosen by the " said Boyle Travers Finnis, and of having a " further survey and exploration of the said " northern territory, and believing that further " exploration would result in finding a better " site," and so forth, " and being influenced by " the said disapproval of the said preliminary " order holders and of the said meeting, and by " the said address of the said committee, and es- " pecially by the request of John McKinlay, the " agent for the Plaintiff herein-after mentioned, " determined not to approve of the site so chosen " by him, and did not approve thereof, but dis- " approved thereof, and instructed the said Boyle " Travers Finnis accordingly, and further in- " structed him to examine Port Darwin," and so on. So that according to the statement in the plea about the beginning of January 1865, a large number of the holders of these orders had pointed out that the site was not a desirable one, and the Government had yielded to their suggestions, and determined not to approve the site, or adopt the survey. That was in the commencement of January 1865.

Now, no doubt, if they had gone on to show that the Respondents had been some of those who had urged this course upon the Government, the Appellant would have been a long way on the road towards establishing a discharge on the part of the Respondents from the obligation of the Appellants to make the survey in five years, if the result of abandoning that first survey was to preclude the possible making of the second survey within that period. But up to this point the plea contains no statement that the Respondents had any hand in the matter,

except the averment that an active part in these representations was taken by "John McKinlay, the agent of the Plaintiffs hereinafter mentioned."

But further on in the same plea, at the bottom of the page, there comes this statement: "The De- "fendant further says that one John McKinlay "was, by the Plaintiffs, in or about the month "of March 1865, made and appointed the agent "of the Plaintiffs for the purpose of selecting "their town and country lots." So that it appears on the face of the plea that McKinlay did not become the agent of the Defendants, or, at least, it does not appear that he did become their agent until March 1865, whereas the representations, and the yielding of the Government to those representations, took place in the month of January. Not only is there no allegation therefore that McKinlay urged the change of site as the agent of the Respondents, but, as far as appears on the plea, he was not agent for any purpose at the time when he so interfered. The rest of the plea carries it no further. It explains the circumstances fully. The substance is that the Government chose in the year 1865, listening to these representations, to abandon their survey, and although they afterwards commenced other surveys, the practical result was that there was no opportunity afforded for the purchaser to obtain his land within the five years. We are far from saying that the Government was not right in yielding to those representations. It was probably a right and proper thing to do, especially as the representations came from large bodies of the holders of land orders. But it does not follow that when the change was effected the holders of the land orders who had been no parties to it were bound by it, and precluded from adhering to their original bargain. The equitable plea therefore is no defence.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below, with costs.

They desire to add a word with respect to the land orders. It is suggested now (though the point does not seem to have been suggested in the Court below) either, that the Respondents are not the holders of the land orders, or that if they are the holders they do not propose to give them up on being paid. It can hardly be conceived that that is the true state of the case, bu their Lordships must express their opinion tha unless the Respondents are prepared to give the land orders up upon payment of the amount due, the Government ought not to satisfy this claim.