

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Barton v. Muir, from New South Wales ; delivered 14th November, 1874.*

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR JOHN STUART.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

THE view of this case taken by the majority of the Judges seems not reconcilable with the established principles of equity. It is a view founded on what appears to be rather a misapprehension of the authorities which they cite as applicable to the case.

Properly understood, the authorities establish the principle that, to deprive the Appellant of his right to relief in equity, there must be such a degree of illegality in the transaction as is free from all doubt.

It is rightly admitted that the transaction is not immoral or against public policy. In the beginning of his judgment the Chief Justice says it is against public policy, but that seems an accidental inaccuracy.

It is not quite easy to follow the reasoning of the Judges.

One says that the most palpable objection is that there is "fraud in effect on the 18th section of the Act." Another says, in the last passage of his judgment, that he rests his decision not merely on the ground that it is contrary to the policy of the Act, which he considers might possibly be a questionable ground, but that by necessary implication it is expressly prohibited by the Statute.

These views, whatever may be thought of their consistency in other respects, are consistent in this,

that they reduce the matter to a question of construction of the Act, especially of the 18th section.

As a question of construction, it seems little less difficult to adopt the opinion that there is beyond all doubt a clear and constructive prohibition, as the other opinion that there is an express prohibition.

The established doctrine is, that to annul such a transaction there must be no doubt whatever as to the construction and effect of the Statute.

There seems danger in countenancing the notion of a constructive policy in such a case as the present. This is illustrated by what is said by Mr. Justice Hargrave, so far as it can be legitimately referred to. The circumstances of climate and soil and produce in the Colony of New South Wales are essentially different from those of Queensland, where the policy of prohibition of such transactions was established by express enactment.

As to the policy of the Act in question in this case, and the construction of the 18th Section, the *prima facie* view of the policy which restricts the quantity of land that may be purchased by free selection, seems to be the reasonable purpose of securing residence and improvement of the land.

If that be a just view of the policy it is not easy to see how it is violated by a transaction the essence of which is to bind the Respondent as purchaser to reside and improve. But this is only conjecture. It is dangerous in the construction of a Statute to proceed upon conjecture.

The view of policy taken by the majority of judges is conjectural also. It seems a conjecture not so well founded as the other.

It is not an accurate view to treat the Appellant as the purchaser. The purchase is a transaction between the Respondent and the Government. The right of the Appellant is not that of purchaser, but of *cestui que trust*. In the case often referred to in the Law of resulting Trusts, where a man purchases land with the money of another, although there is no written evidence of the trust, a trust results to the owner of the money by operation of law. He is in equity, but only in equity, the owner of the land, and has a right to compel a conveyance to himself, or to such person as he may direct. He is not the purchaser, but a *cestui que trust*, and the whole

legal right and legal rightful ownership is in the purchaser.

Although we think this case was rightly decided by the Court of the first instance, the form of the decree does not seem to be quite right.

There should be a declaration that the legal title of the Respondent as purchaser is held by him as trustee for the Appellant, and a direction that the Respondent do proceed to complete the purchase according to his contract with the Government, and to do all necessary acts for that purpose, and when complete to execute a proper conveyance to the Appellant, who is to pay the costs of such conveyance, with liberty to apply to the Primary Judge for any directions necessary to carry this Decree into effect. The Respondent is to pay the costs of the Appeal to the Colonial Court, and costs of this Appeal.



