Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of O'Shanassy v. *Littlewood from the Supreme Court of the Colony of Victoria; delivered July* 21*st*, 1886.

Present:

LORD WATSON.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

THEIR Lordships do not think it necessary to take time for the purpose of considering the questions raised in this case, which are of some importance. Those questions arise upon the following issues which at the close of the trial in the Court below were submitted to the jury by Mr. Justice Molesworth. "Was there a re- "presentation made by Defendant that Kinnear's "Island was part of the Crown lands with the "run?" To that the jury answer "Yes." "Did Defendant at the time he made the "representation believe that Kinnear Island "was part of the Crown lands going with "the run, and did he form that belief on "reasonable grounds?"—to which the jury answer "No." "Did he make that repre- "sentation with intent to induce Plaintiff to buy "the Lower Moira Station at the price "mentioned in the contract?—Yes. Was "Plaintiff induced by that representation to "purchase at the price he gave?—Yes."

It is not matter of dispute that the representation charged was made by the Defendant Littlewood; and that he made it for the purpose of inducing the Plaintiff to buy the Lower

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Moira Station, as little admits of doubt. The Plaintiff says that on that representation he was induced to make the purchase. It appears from the evidence that Kinnear Island is a piece of land of the extent of 4,200 acres, which is under water from June or July to December, but during the rest of the year affords excellent grazing ground for sheep. The value of the possession, even under a mere license, of such an adjunct to a station, in Victoria, was admitted on all hands.

The full Bench, upon a motion made for a non-suit, right to move for which was reserved to the Defendant at the trial, have set aside the verdict found by the jury, and have entered a non-suit, on the ground that there was no evidence adduced by the Plaintiff, which ought to have been submitted to the jury, tending to show that Kinnear Island was not part of the Crown lands going with the run. Against that judgement the present appeal has been brought, and the first question their Lordships have to dispose of is, whether the Order of the Court below should be allowed to stand.

Their Lordships are unable to come to the conclusion that there was no evidence to go to the jury. It is not a sufficient ground for withholding evidence from a jury that it greatly preponderates in favour of one party or the other; but here there seems to have been a substantial issue raised by the evidence, which, although it was a mixed question of law and fact, was not the less a proper question for the jury to decide with the aid of directions from the presiding Judge. It is a significant circumstance that, in regard to the questions of law which were raised under that issue, and in regard to the answer which ought to be made to it, there has been a difference of opinion amongst the Judges themselves; the

learned Judge who tried the case being of opinion that the fact in issue ought to be found in favour of the Plaintiff, whilst the Judges of the full Court take a different view. The judgement of the full Bench is rested mainly, if not wholly, upon their finding in law, that the proclamation of 5th July 1869, by which Kinnear Island was made part of a State Forest Reserve, had not the effect of excising it from the Crown lands going with the Moira run. Their Lordships see no reason to impeach the soundness of that finding, but it does not appear to them that it necessarily entitles the Defendant to have the issue answered in his favour. The learned Judges appear to have overlooked the fact that, in the license of 1st January 1883, which was the only title the Defendant had to the Crown lands going with the run, at the date of the sale to the Appellant, it is expressly declared that "no lands temporarily or permanently reserved" shall be deemed to be "unappropriated lands or within the operation of this license." In the opinion of their Lordships, it would be very difficult to hold that Kinnear Island did not fall within the express terms of that exception.

But assuming that the evidence in question ought not to have been withdrawn from the jury, that does not, in the view which their Lordships take, materially affect the decision which they ought to give in the present case. Two counts in the Plaintiff's declaration were submitted to the jury, both of which are laid upon fraud, or fraudulent representation. The jury found for the Plaintiff upon both counts—upon the one that the Defendant made a material representation as to Kinnear Island, and upon the other that his agent, Mr. Shackell, made a material representation to the effect that the acreage of the Crown lands was 18,800 acres.

Practically these two representations, as explained by the evidence, mean one and the same thing, namely, that Kinnear Island was part of the Crown lands included in the run, for which the vendor had a license which he made over to the vendee, the Plaintiff.

Now the jury have answered the second question put to them, which is not very happily framed, by a single negative; and there may be some doubt whether they meant to assert that at the time these gentlemen made the several representations which are imputed to them, they honestly believed what they stated to be true, or that they did not believe it to be true. If the jury meant to affirm that they did not believe the representation to be true that would be fraud. But it is open to observation that the jury may have meant to affirm the other alternative, which is that they did believe that the lands went with the run, but had not reasonable grounds for entertaining that belief. It is not necessary to decide what the jury meant. If their verdict was not intended to amount to a finding of actual fraud it cannot support the Plaintiff's case. On the other hand, if it was intended as a finding of positive fraud, then their Lordships are of opinion that there was absolutely no evidence to go to the jury upon that part of the case. There is hardly a *scintilla* of evidence from which any such conclusion could be reasonably derived. The continuous possession of Kinnear Island for grazing purposes by himself and by his predecessor, Mr. Kinnear, from the year 1869 down to the year 1883, in which he sold to the Plaintiff, coupled with the other facts and circumstances of the case, were well calculated to induce a reasonable belief in the mind of Mr. Littlewood that he actually held these lands as licensee, and as part of Crown lands going with the Lower Moira run. He distinctly states

that he did entertain that belief, and there is nothing in the evidence calculated to suggest a doubt of the honesty of that statement, unless it is to be derived from the terms of a legal document, the license of the 1st January 1883, in regard to which, not a single question was put to him, on his examination before the jury.

In these circumstances it is unnecessary to consider the other grounds upon which a new trial is asked in this case. Being of opinion that there is really no evidence upon which an honest jury could reasonably come to the conclusion that Mr. Littlewood or his agent, Mr. Shackell, was guilty of fraud in making these representations, their Lordships have to consider whether this is a case in which the procedure indicated in Order 40, section 10, of the Rules annexed to the Victorian Judicature Act of 1883 ought to be applied. They are of opinion that it is a case of that kind, and that they ought now to pronounce the Order which ought to have been made by the full Bench, sustaining the defence upon the ground that there has been a failure to prove fraud, and dismissing the action. There has been no suggestion made that the Plaintiff will suffer undue prejudice by not having the opportunity of having a new trial and bringing forward other evidence, and there is nothing in the facts of the case to suggest that to allow him such an opportunity would be either expedient or proper.

Their Lordships are not bound to follow the course indicated in Order 40, sec. 10, unless they are of opinion that there ought to be no further trial of the case, but this is in their opinion one of the class of cases to which the rule was meant to apply.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgement appealed from, and to declare that in lieu of the Order

of the full Bench, dated 6th November 1884, it ought to be found that, in respect of the Plaintiff's failure to adduce evidence tending to establish that the representations complained of in the two counts submitted to the jury were fraudulently made, the Defendant ought to have judgement entered in his favour, with costs in both Courts below. The Respondent must have the costs of this appeal.