[HIGH COURT OF AUSTRALIA.]

THOMAS . . . . . APPELLANT;
DEFENDANT,

AND

THE CROWN . . . . . RESPONDENT
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1904.

PERTH, *Oct.* 12, 13.

Griffith C.J., Barton and O'Connor JJ.

New trial—Surprise—Statute of Frauds—Part-performance—Ratification—Agreement for lease by subordinate officer of Government.

Acts relied on as part-performance to take a case out of the Statute of Frauds must be unequivocally referable to the alleged agreement.

The implication of a tenancy from year to year from the acceptance of rent by a landlord from a tenant holding over after the expiration of his tenancy may be excluded by the other circumstances of the case.

A new trial will not be granted on the ground of surprise if the evidence alleged to be in the nature of a surprise is immaterial.

The defendant was the lessee of the Perth City Markets from the Crown for a period of three years, with a right of extension for a further period of one year and fourteen days. The defendant alleged that before the expiration of the three years it was verbally agreed between him and one Cowen (then Director of Agriculture) that in consideration of defendant allowing certain structural alterations in the markets to be made, and paying, in addition to the rent, the sum of six per cent. upon the outlay, he was to have a further lease of seven years. Evidence was given of a conversation between defendant and the Minister, after the death of Cowen in which the terms of the agreement with Cowen were alleged to have been stated to the Minister. After this conversation the defendant wrote to the Minister asking for favourable consideration of the agreement, but the Minister refused to confirm it. The defendant remained in possession after the three years had expired until the expiration of the year and fourteen days, and paid interest at 6 per cent. on the value of certain improvements, but it appeared that he had agreed in writing to do so before making the alleged agreement with Cowen. The Crown then brought this action for recovery of possession of the land. The defendant set up the verbal agreement with Cowen, ratification by the Minister, and part-performance. The jury found that the alleged agreement

H. C. OF A. 1904.

THOMAS v. THE CROWN.

was made in fact, and the Judge held that the acceptance of the rent and interest amounted to ratification of the agreement and also to part-performance. The Full Court granted a new trial on the ground of surprise in the admission of the evidence of the conversation with the Minister.

Held, 1st.—That the agreement between the defendant and Cowen did not bind the Crown, as Cowen had no authority to make it.

2nd.—That as the payment and receipt of rent and interest were equally referable to existing obligations they did not establish either ratification or part-performance of the alleged agreement for a new lease for seven years.

3rd.—That the evidence of the conversation with the Minister was immaterial, and therefore a new trial should not have been granted on the ground of surprise.

Decision of Supreme Court of Western Australia (6 W.A.R., 91) varied, and judgment ordered to be entered for the plaintiff.

APPEAL from an order of the Supreme Court of Western Australia, setting aside a judgment obtained by the defendant and directing a new trial.

On 3rd September, 1903, the respondent commenced an action against the appellant, to recover possession of certain land and premises known as the Public Markets in the city of Perth, for mesne profits from 28th August, 1903, until possession was given, for an injunction to restrain the appellant from taking any proceedings, by distress or otherwise, to recover the rents and profits of the markets from the tenants or occupiers thereof, for the appointment of a receiver, and for a declaration that the Crown was entitled to the rents and profits, and that the defendant had no interest in the land in question.

By indenture dated 16th August, 1899, the mayor, councillors, and citizens of Perth demised the Perth markets, of which they were lessees from the Crown, to the appellant for a term of three years from 14th August, 1899, with a right of extension for a further term of one year and fourteen days.

On 21st September, 1900, the lessors surrendered their lease to the Crown, to whom the appellant attorned tenant.

The action was tried before *McMillan* J., and a jury of six. The jury found that, in December, 1901, it was verbally agreed between one Lindley Cowen, then Director of Agriculture, acting on behalf of the Crown, and the appellant that, in consideration of the appellant allowing certain structural alterations to be made in the markets and paying, in addition to the rent reserved,

six per cent. per annum on the outlay when the alterations were completed, he should have a further lease for seven years from the expiration of his current lease at a certain rental. It was contended by the appellant that this agreement was verbally ratified by the Minister, and that the verbal agreement was validated by part-performance. The learned Judge was of that opinion, and entered judgment for the defendant.

Evidence was given at the trial of a conversation between the appellant and Dr. Jameson, Commissioner for Crown Lands after Cowen's death.

On motion to the Full Court to enter judgment for the plaintiff or for a new trial the Full Court ordered the judgment to be set aside and a new trial granted on the ground that the plaintiff was taken by surprise by the defendant's evidence as to his conversation with Dr. Jameson, which conversation had not been disclosed by the defendant until he was giving evidence at the trial, Dr. Jameson being then in South Africa.

The appellant asked that the order of the Full Court be annulled and reversed, and that the judgment of *McMillan* J., be affirmed and judgment entered accordingly for the appellant.

The further facts sufficiently appear in the judgment of *Griffith* C.J.

Haynes K.C. (with him *Stone*), for appellant. A new trial on the ground of surprise should not be granted. The respondent knew of Dr. Jameson's evidence and did not call it.

[GRIFFITH C.J.—Had Cowen any authority to make such an agreement?]

That point is not raised. The agreement made by Cowen is binding on the Crown if it is proved that there was ratification and part-performance.

[GRIFFITH C.J.—Could the arrangement made with Cowen constitute a binding agreement?]

Yes, if subsequently ratified. The ratification was by acceptance of rent up till September. The payment of 6 per cent. interest is sufficient part-performance to take the case out of the *Statute of Frauds*.

[GRIFFITH C.J.—In order that payment of an increased rent

H. C. OF A. 1904.

THOMAS v. THE CROWN.

may take a case out of the Statute it must be referable unequivocally to the alleged agreement.]

On the question of surprise, a new trial will not be granted on the ground of the discovery of fresh evidence unless there is reasonable probability of it securing a different verdict: *Anderson* v. *Titmas* (1); *Young* v. *Kershaw* (2).

[GRIFFITH C.J.—I think that decision goes dangerously far.]

[O'CONNOR J.—I do not see how it is material that you did not mention that conversation. You got the same evidence in writing two days later.]

The Court leans against granting a new trial on the ground of the discovery of fresh evidence: *Ward* v. *Hearne* (3); *Bishop* v. *Stone* (4). To constitute surprise a case must have been made at the trial which the other party could not reasonably have been expected to meet: *Dillon* v. *City of Cork Packet Co.* (5).

[GRIFFITH C.J.—We do not wish to hear you further on that point till we have heard Mr. Pilkington.]

Pilkington (with him *Hensman*), for the respondent. On the question of surprise, the application for a renewal is really an application for a separate lease.

[GRIFFITH C.J.—I should understand the letter as referring to negotiations for an extension of lease. It suggests that no agreement had been made, but an arrangement which it was requested should be carried out.]

As to the arrangement with Cowen, what the appellant wanted was a direct lease from the department, instead of a sub-lease from the council. The letter to the Minister did not suggest an extension of the term, while the conversation did. The letter was merely a request for a lease. The payment of increased rent was referable only to the extension of the original lease for one year and fourteen days. It must be shown, even assuming there was increased rent, that it was paid and received in respect of the contract to be ratified. The imposition of the 6 per cent. was a mere ancillary arrangement. Part-performance must be referable

(1) 36 L.T., 711.
(2) 81 L.T., 531.
(3) 10 V.L.R. (L.), 163.
(4) 6 V.L.R. (L.), 98.
(5) 9 Ir. R., (C.L.), 118.

only to the agreement set up. Here the agreement is explained by the documents themselves.

As to the alleged ratification, receipt of rent could not be a ratification as there was no agreement to ratify. The same applies to the suggestion of part-performance. There was an express repudiation of the alleged agreement in July, and therefore there could not have been a ratification in August. All the payments made were explained by written documents.

As to the authority of Cowen, under the *Crown Lands Act* the Governor in Council is the only one empowered to alienate, and a subordinate officer of the Government has no power to grant a lease. Any agreement not in accordance with the Act is absolutely void: *Reg.* v. *Hughes* (1).

As to the surprise, if the conversation is confined to the subject matter of the letter, it is immaterial, and, if it goes beyond that it took the respondent by surprise: *Young* v. *Kershaw* (2). If there is any question of ratification, that ought to have been left to the jury.

Haynes K.C., in reply. The payment of increased rent can be used as evidence of the agreement for a new lease: *Wills* v. *Stradling* (3). The payment of rent is an equivocal act, and the Court will look to the parol evidence to connect it with the agreement: *Miller and Aldworth Ltd.* v. *Sharp* (4).

[GRIFFITH C.J.—Where a person is holding under a subsisting lease there is no reason to suppose he is holding over under another agreement. Therefore, it is not until the original lease has expired, that remaining in possession is evidence of any other lease.]

The acceptance of rent after the conversation with Dr. Jameson, and proceeding with the improvements, constitute evidence of ratification. No doubt Cowen had no authority to make the lease, but when Dr. Jameson came in and took advantage of it, he was bound by it. A Court of Appeal ought only to decide in favour of an appellant on a ground then put forward for the first time, if it is satisfied that it has before it all the facts bearing on

(1) L.R., 1 P.C., 81.
(2) 81 L.T., 531.
(3) 3 Ves., 378.
(4) (1899) 1 Ch., 622.

H. C. OF A. 1904.

THOMAS v. THE CROWN.

the new contention: *The Tasmania* (1). If the Crown was a registered proprietor, then any act of its agent would bind it just as effectively as the agent of a private person could bind his principal. The title of the Crown was admitted; but that cannot affect the appellant's lease. It would have been open to the appellant to shew that this land was under the *Titles to Land Act*, and not the *Crown Lands Act*. Further, this is an action for possession, and the plaintiff must rely on the strength of his own title. Where title at Common Law is admitted, possession is also admitted. That is not the case in Equity: *Attorney-General* v. *Corporation of London* (2).

October 13.

GRIFFITH C.J. This is an appeal from a judgment of the Full Court of Western Australia granting a new trial on the ground of surprise. A new trial can only be granted upon that ground if it appears that the evidence which is alleged to be in the nature of a surprise was material. It is necessary, therefore, to consider what was the question that was being tried between the parties. The action was one by the Crown to recover possession of land alleged to be the absolute property of the Crown. The defendant pleaded possession, and by an equitable defence he said he was in possession of the land under a lease for three years which had expired in August, 1902; but that, before the expiration of the lease, it was verbally agreed, between an officer of the Western Australian Government and the defendant, that he should get a further lease for seven years on certain terms, one of which was that the defendant would allow certain alterations to be made in the premises in question, which were the markets in the city of Perth, and that he had done so to his detriment, owing to interference with his occupation, and that after the expiration of the lease the defendant continued in possession of the markets and paid the rent agreed upon between the officer of the Government and himself. The Crown replied that the alleged agreement was not in writing as required by the Statute of Frauds, and that the officer with whom the agreement was alleged to have been made had no authority to make any such agreement. Then there was a rejoinder setting up, by way of estoppel, that the plaintiff

(1) 15 App. Cas., 223.

(2) 2 Mac. & G., 247.

ought not to be allowed to deny the authority of the officer on the ground that it had accepted the benefit of the agreement. The case seems to have been treated as resting on a verbal agreement with the Government which, although not in writing, could be supported by proof of part-performance. At the trial before Mr. Justice *McMillan* and a jury, the only question left to the jury was whether what was called an agreement between the defendant and Cowen, the alleged agent, was made in fact. All other questions seem to have been left to be determined by the Judge himself. The jury found that the so-called agreement was made in fact, and application was then made by the plaintiff, the Crown, to the Full Court to enter judgment for them on the ground that there was no evidence by which the defendant could establish title against the Crown, and the plaintiff also moved for a new trial on the ground of surprise. The evidence alleged to have been in the nature of a surprise was evidence of a conversation between the defendant and the then Minister for Lands, which it may be as well to read. This occurred in February, 1902, Dr. Jameson being then the Minister. The defendant says the Minister for Lands met him in the markets, and that he (Dr. Jameson) referred to the death of Mr. Cowen. He went on to say: "The Minister looked round and said: 'There are a lot of improvements going on, Mr. Thomas, could you tell me something of the arrangements you made with the late secretary?' I said I had agreed to pay six per cent. interest on about £1200, the estimate of Mr. Wright; that I had undertaken to ask for no rebate of rent during re-construction; that he in return agreed that I should pay the same rent as I was then paying, and that in consideration he would prepare a new lease for seven years. Dr. Jameson said it seemed an equitable arrangement. I said that there was a moral obligation on the City Council to give me a further renewal. I said I thought I was entitled to a further renewal after the seven years. He said he was going away and would return in a week, and asked me to place in writing what I had told him, so that the whole matter would be on his table before him on his return." That is the evidence. I have very considerable difficulty in seeing how that is relevant. At most, it amounts to this: The defendant said "I made an agreement

H. C. OF A. 1904. THOMAS v. THE CROWN. Griffith C.J.

with Mr. Cowen"—whether he was the authorized agent of the Government is another matter altogether—"and I told his principal the nature of the arrangement." It is difficult to see how that evidence was material to the question whether he made the arrangement or not. If that is so, the verdict of the jury should not be set aside on that ground. But there were other questions dealt with by the Judge without the jury. The alleged agreement is a verbal one, and it is not contended that a subordinate officer can bind the Government to grant a lease for a term of years. That is conceded by the defendant; but he says that the Minister for Lands, having been informed of this agreement, ratified it, and that this evidence was material for the purpose of showing what he ratified. It was also contended for the respondent that, after he had made this so-called agreement with Cowen, the Minister of Lands assented to it by receiving rent, or allowing it to be received, for the markets. Upon that, it occurs to me, first of all, to remark that the rent paid was payable under the lease, and had to be paid whether this conversation took place or not. It appears further that, about six months before this time, proposals had been made that the Government should make certain improvements in the markets at considerable expense which was then estimated at about £1000, and a letter had been written (in the preceding February) when there had been some proposals for making improvements in the markets, and the defendant was asked distinctly whether, in the event of such improvements being made, he would be willing to pay six per cent. on the cost of the improvements, in addition to the usual rent. The defendant replied on the following day by letter to the effect that he agreed to those terms.

It was contended that the evidence of the conversation was admissible, as showing that the Minister knew what agreement had been made by Cowen. If it was material to prove that it was brought to the knowledge of the Minister that there had been an actual agreement, using the term in its proper legal sense, I should be disposed to think that it was. I assume for the present that it is possible to establish an agreement against the Crown by a verbal agreement with a subordinate officer or even with a Minister of the Crown, but I must not be supposed to express an opinion

that that is so. But does this conversation tend to prove any such agreement? In considering that question, one must bear in mind the relationship between the parties. This Mr. Cowen was the head of a sub-department. It must be taken for granted that everybody knew that, by law, the head of a sub-department could not grant a lease for seven years, or make any agreement binding upon the Crown. Both he and the person dealing with him must be taken to have known that he only had authority to negotiate with the defendant, and to submit the terms to the Government for their approval. The conversation ended by the Minister asking Thomas that his proposal should be put in writing, and saying that, if that were done, he would deal with it. That, so far, does not tend to suggest that there were any dealings in the nature of an agreement by which the Minister was to be bound without further consideration. That was on the 26th of February. On 28th February the defendant wrote a letter to the Minister for Lands, the terms of which are very important. He said: "As arranged by the late Secretary for Agriculture I purpose giving you as near as possible the conditions on which the market improvements were to be made and recognized by myself. £1000 or more was promised by Mr. Sommers, the late Minister for Lands—that at least £1000 should be spent on the market buildings and all work to be subject to my approval, as lessee. A portion of this money was to be devoted to putting the building into thorough repair in every way, and that when the work was completed, that I pay at the rate of 6 per cent. per annum on any outlay made by the Government and recognized by myself. I am, however, prepared to pay interest *pro ratâ* on all money advanced from the commencement of the alterations, and in consideration of this arrangement with the late Secretary for Agriculture, he agreed to the handing of the building over to me in good order and condition, and that he would prepare a new lease direct with this department, at the present rental of £527 10s. 0d. per annum, myself covering the insurance of the building up to £5000. Regarding the insurance premium he also considered that excessive as there is no value equal to that amount. The City Council was paying the Government something like £420 per annum, so that you will see that the department are receiving

H. C. OF A. 1904.

THOMAS v. THE CROWN.

Griffith C.J.

considerable advantage through me taking possession of the building. You will understand that interest on the additional outlay will be plus that of the present rent. You will be aware that the Government accepted me as a direct lessee in lieu of the Perth City Council, and I expect to be treated as liberally, at any rate, as they were. Regarding the painting of the exterior of the market, I may point out to you that the City Council was due to paint the building when the unexpired portion of their lease with the Government was surrendered to the Public Works Department, and at the time I entered a protest. Consequently you will see that I have been endeavouring to raise the interest of this institution with every possible disadvantage, and, further, I have been left to my own resources, and it is only by the unswerving object I had in my mind that the markets are now in a fairly prosperous position." The letter then goes on, "I will admit that since I came under the control of the Department for Agriculture, my position has improved, and I respectfully ask that a new lease be prepared for a term of seven years as existed with the Perth City Council, with a right of renewal, and that I engage myself to work in the best interests of the department and public. Up to the present there has been hard work for nothing, and as I have devoted my energies for so long in the interests of the market, I feel sure the Government and public will be well served by you granting what I respectfully ask. I also point out, and I think it was publicly acknowledged, that had I not taken over the markets from the Perth City Council the building would have been closed long ago. I also would respectfully point out to you that I am constantly working for cheap food supplies, which is fully appreciated by the public, and that my introduction of the frozen meat into Perth, and the markets, has brought the value of meat supplies down fully 40 per cent. And, in conclusion, I beg to suggest that these matters be discussed at the earliest possible opportunity, as I have an important project under consideration which must be completed within two months that will bring the market into still greater usefulness."

Now that letter is substantially to the same effect as the alleged conversation between the parties. In the conversation the preliminary negotiations with the head of the sub-department of

Agriculture were discussed, and this letter conveyed a request that the preliminary arrangements made might be taken into favourable consideration, and nothing more. That letter of itself absolutely negatives the idea of there being in the contemplation of either party a binding agreement. The matter was treated as a project under discussion; the terms that the defendant desired were stated, and he asked the Minister's favourable consideration of the proposed arrangement. While it was under the consideration of the Government the rent and interest were paid, as they were bound to be paid, under the existing agreements. Now, the learned Judge of first instance appears to have thought, if I understand his judgment rightly, that the conversation with the Minister for Lands conveyed to his mind that an agreement, assumed to be binding, had been made with his subordinate officer; that he had forgotten all about it, but that, notwithstanding his forgetfulness, the receipt of the rent and interest operated by way of ratification. But there was at this time no suggestion on the part of the defendant that there was a binding agreement. There was merely a negotiation, and pending any new agreement the defendant merely did what he was bound to do under the existing agreements. There was nothing in the nature of a contract. Mr. Cowen had no authority to make a contract, and the Minister was dealt with on the footing that there was no contract, but he was asked to agree to one. Considerable delay occurred, and when the answer came it was to point out that Mr. Cowen had no authority either to waive or to modify the lease or to negotiate. This was the answer to the request that effect should be given to these preliminary negotiations, and from that time forward the parties were at arms' length. Upon that evidence there is nothing to show that there was any agreement to carry out the proposals made. There was only negotiation, inchoate negotiation, submitted for the approval of the Minister, but never approved. Then it has been suggested that this negotiation became an agreement by ratification and part-performance. The evidence relied upon for ratification is that to which I have already referred, that rent and interest were paid, but I have already pointed out that the defendant was bound to pay them. Now, apart altogether from the question

H. C. OF A. 1904.

THOMAS v. THE CROWN.

Griffith C.J.

whether part-performance can be set up against the Government of Western Australia, having regard to the Constitution and to the Land Act, acts of part-performance must be referable unequivocally to the alleged contract. The alleged part-performance is merely the payment of the rent with the addition of six per cent. interest on the value of certain improvements. The rent was already payable under the lease. The only increased rent therefore was the six per cent. interest upon the value of the improvements. But that was also under special agreement, so that it would be referable at least as much to the original agreement as to the proposed agreement. So that, according to any test that can be applied, defendant has failed to establish part-performance. It was suggested then that under the circumstances a tenancy from year to year might be implied. Upon that the facts are these. The lease expired in August, 1902, but there was a condition in it that it might be extended for a year and fourteen days on terms to be mutually agreed upon. Just after the termination of the lease the defendant intimated his desire to extend it; but the terms were not agreed upon for some time. While negotiations were going on he paid the rent as before, as he was bound to do. No doubt the holding over by a tenant and the acceptance of rent are evidence of a new tenancy from year to year; but that is only if the other circumstances of the case do not repel that inference. In this case the holding over was clearly only done pending negotiations. At the expiration of the one year and fourteen days these proceedings were commenced. Upon the admitted facts, the defendant was a tenant holding over after the expiration of his lease without any agreement as to renewal. It is therefore perfectly immaterial whether the conversation with the Minister took place or not, and the element of materiality of the evidence as a ground for a new trial is wanting. But the appeal to us is not from the grounds of the decision, but from the decision itself, and it is open to this Court to give that judgment which they think the Court ought to have given. Upon the undisputed facts of the case, the Crown is entitled to judgment. In these circumstances, the proper course for this Court is to give that judgment, unless some evidence might be given by the defendant to produce a different result; but on the admitted

facts in this case, the only question to be determined is one of law, and no evidence that could be adduced can make any difference. It seems to me that the judgment of this Court must be to vary the judgment of the Full Court by giving judgment for the plaintiff.

BARTON J. I concur.

O'CONNOR J. I am of the same opinion.

Pilkington. I move that judgment be entered for the plaintiff for possession of the land, with costs of the appeal, and of the proceedings in the Court below.

GRIFFITH C.J. Yes. The appellant will have the costs of the action and of the appeal, except the costs of the issue in which the defendant succeeded.

Judgment varied by directing judgment to be entered for the Crown with costs of the action and of the appeal, except the costs of the issue as to the agreement with Cowen.

Solicitor for appellant, *A. S. Canning.*
Solicitor for respondent, *F. W. Sayer.*

H. E. M.

[HIGH COURT OF AUSTRALIA.]

CLOUGH . . . . . APPELLANT;

AND

LEAHY . . . . . RESPONDENT.

SYDNEY, *Nov.* 29, 30; *Dec.* 1, 2, 5.

Griffith C.J., Barton and O'Connor JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Constitutional law—Royal Commission—Limitations on power of Executive to appoint—Commission to inquire into matters within the jurisdiction of the Industrial Arbitration Court—Validity of Commission—Witness—Refusal to be sworn—Reasonable excuse—Royal Commissioners Evidence Act (N.S.W.), (No. 23 of 1901), secs. 3, 8.