[HIGH COURT OF AUSTRALIA.]

DAVID BUCHANAN . . . . . APPELLANT;
PLAINTIFF,

AND

EDWARD BYRNES . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *April* 18-19, 23.

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

Lease—Breach of covenants—Surrender by operation of law, effect of plea of—Appeal direct from nisi prius to High Court.

To establish that a lease has been surrendered by operation of law, it is necessary to prove acts from which that inference follows, and which are unequivocally referable to an agreement between lessor and lessee that the respective abandonment and resumption of possession shall terminate the lease.

In an action for damages for breaches of covenants contained in a lease, it is no defence to show that after breach the lease was surrendered by operation of law.

Where a tenant, in breach of his covenants, abandons the demised premises and throws possession upon the lessor, the latter is entitled to take such steps as may be necessary to protect the interests of all parties interested.

Whether, if such steps amount to complete resumption of possession, they will necessarily be taken to prove a surrender by operation of law, *quære*.

Where, under the practice of the State Supreme Court, the Judge at Nisi Prius has power, after verdict and argument on motion for judgment, to draw all necessary inferences of fact not inconsistent with the findings of the jury, and enter judgment for either party, an appeal lies direct to the High Court without the necessity of an intermediate appeal to the Full Court of the State.

Musgrove v. *McDonald*, 3 C.L.R., 132, distinguished.

APPEAL from the Supreme Court of Queensland.

In an action by a landlord against his tenant for damages for breaches of covenants contained in the lease of an hotel, judgment was entered for the defendant by *Chubb* J., notwithstanding the findings of the jury, on the main ground that the plaintiff had by his conduct estopped himself from denying that the lease was extinguished by reason of a surrender by operation of law before the commencement of the period covered by the plaintiff's claim. The plaintiff appealed direct to the High Court. The material facts of the case and findings of the jury are fully set out in the judgments hereunder.

Shand, for the appellant. This is an appeal from a judgment entered by *Chubb* J. for the respondent defendant, notwithstanding the findings of the jury in the appellant's favour.

[GRIFFITH C.J.—Can you appeal direct to us without making intermediate appeal to the Full Court: *Musgrove* v. *McDonald* (1)? What is the practice of Queensland with regard to a Judge entering judgment at *nisi prius* notwithstanding a verdict?]

On motion for judgment the Court may draw all necessary inferences of fact not inconsistent with the findings of the jury: Order XLII., r. 6, *Queensland Supreme Court Practice*, p. 194.

[GRIFFITH C.J.—Then this is not an appeal from the mere verdict of a jury, as in *Musgrove* v. *McDonald* (1), but from an act of the Court. That case, therefore, does not stand in your way.]

The substantial question is whether the Judge, notwithstanding the findings of the jury, was justified in finding that there was a surrender by operation of law before the period covered by the claim for rent and damages had commenced, *i.e.*, was the lease in existence on the 30th June 1904? The plaintiff was obliged, by reason of the defendant's abandonment of the premises, to save the licence by putting in an agent to run the hotel, and re-let the house as soon as possible; it is upon these acts of virtual salvage that the defendant relies as evidence of surrender by operation of law; this is the whole substance of the defence, as the breaches of covenant were established at the trial. The Judge held that a plea, which sets up re-entry by the plaintiff without alleging his

(1) 3 C.L.R., 132.

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intention to terminate the lease, was a good plea of surrender by operation of law. The jury negatived by their findings any agreement or intention to surrender or determine the unexpired term of the lease.

No estoppel, independent of the intention of the parties, can arise in this case, as in *Lyon* v. *Reed* (1). What plaintiff did after resumption was authorized by the power of attorney contained in the lease in case of breaches of covenant. Acts of ownership exercised by the landlord do not amount to acceptance of surrender unless such acts are unequivocally referable to some agreement to surrender: *Mollett* v. *Brayne* (2); *Bessell* v. *Landsberg* (3); *Oastler* v. *Henderson* (4); *In re Panther Lead. Co.* (5). A landlord is entitled to do what is reasonable for the benefit of all parties concerned, where possession is thrown on his hands, without being estopped from denying a surrender and acceptance: *Johnstone* v. *Huddlestone* (6). Plaintiff's acts were not referable to any such agreement, and took place after negotiations had been broken off, and after defendant had notified his intention to abandon the premises in any event. In considering plaintiff's steps to save the property the nature of the property must be taken into consideration. The putting in of licensees by the plaintiff was reasonably necessary in order to save the premises from loss of licence; they were really only caretakers of the licensed premises whom he was entitled to instal there.

Grimman v. *Legge* (7); *Dodd* v. *Acklom* (8); *Phené* v. *Popplewell* (9); and other cases to be cited by respondent are distinguishable, because in all these there were acts found from which an agreement was inferred that surrender should be accepted. There was no agreement proved here, nor any estoppel established.

[GRIFFITH C.J.—The obligations of the lease could only be got rid of by a release or by accord and satisfaction.]

There should have been judgment for the plaintiff for the full amount found by the jury; his claim was made out to the satis-

(1) 13 M. & W., 285.
(2) 2 Camp., 103.
(3) 7 Q.B., 638.
(4) 2 Q.B.D., 575.
(5) 65 L.J. Ch., 499.
(6) 4 B. & C., 922.
(7) 8 B. & C., 324.
(8) 6 Man. & G., 672.
(9) 12 C.B., N.S., 334.

faction of the jury; the proof of the plea of surrender by operation of law was on the defendant, and no such surrender is shown by the findings of the jury.

Jameson, for the respondent. Plaintiff, having resumed possession with the consent of the defendant, is estopped from averring that the lease is in existence; his intention in resuming possession is immaterial; the consent of the tenant is all that is necessary to establish surrender, if the landlord resumes.

[GRIFFITH C.J.—If the landlord resumes voluntarily. What is the effect when the tenant throws the premises on his hands?]

The fifth finding of the jury is that plaintiff resumed possession of the premises; the onus is on the plaintiff to account for his being in possession; he must prove that there was "no resumption of possession inconsistent with the continuance of the lease:" *Oastler* v. *Henderson* (1), but he has failed to discharge that onus.

[O'CONNOR J.—You must read the sixth finding together with the fifth.]

No; plaintiff's intention in his mind is no use to him; it must be communicated to defendant.

In *Dodd* v. *Acklom* (2), there was a surrender by operation of law on facts much weaker than the present case. No more complete possession could have been taken of the premises than the plaintiff's acts in resuming possession of the hotel, purchasing all the furniture, dealing with the licence and transferring it to his nominees, and carrying the house on as an hotel for his own benefit and risk. There was upon this resumption of possession a complete change of relationship between the *quondam* landlord and tenant; this effected a termination of the lease: *Hamilton* v. *Chapman* (3).

[O'CONNOR J.—In that case the change of relations was made by express agreement.]

The present case shows a "change of possession with the consent of both parties," as in *Dodd* v. *Acklom* (4).

[GRIFFITH C.J.—The jury have here expressly negatived such an agreement. You say that a landlord cannot re-enter in any circumstances without effecting a surrender.]

(1) 2 Q.B.D., 575.
(2) 6 Man. & G., 672.
(3) (1902) Q.W.N., 86.
(4) 13 L.J.C.P., 11.

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The cases which refer to the necessity of a previous agreement only introduced that element because of the occurrence of some equivocal act, such as the handing over of keys, which required explanation.

It would be reasonable to put in a caretaker to prevent delapidations and effect repairs when the house was abandoned; but it was unreasonable for plaintiff at his own risk to carry on the hotel as a losing business and claim damages for the losses incurred.

[*Shand.*—Sec. 101 of the *Licensing Act* of 1885 required the licensee to keep the house open for the public or lose the licence.]

The plaintiff might claim for the licence fee lost by relinquishment of the premises, but not for the losses sustained in carrying on the hotel.

[GRIFFITH C.J.—There was no certainty that the licence, once lost, could ever be regained. Can you say that the term is at an end before the landlord has had a reasonable time to make his election to affirm or avoid the contract ?]

He should make his election at once. The plaintiff should at the time of accepting possession give express notice that he does not intend the lease to terminate: *In re Panther Lead Co.* (1). No such notice or any reservation of the plaintiff's rights was communicated to the defendant after the plaintiff resumed possession. Once it is established that both parties consented to the resumption of possession, it does not matter what their intentions were as to the continuance of the lease: *Kneelan* v. *Schmidt* (2). The plaintiff made his election by assuming complete control of the premises, and later by letting to a new tenant; his acts were wholly "inconsistent with the continuance of the lease." This was either evidence of a prior agreement to surrender, or constituted an estoppel: *Rice* v. *Dudley* (3); *Phené* v. *Popplewell* (4).

[GRIFFITH C.J.—This lease did not cease to exist before the main breach was committed, viz., the abandonment of the premises by the defendant, from which all the damages naturally flowed.

(1) 65 L.J. Ch., 499.
(2) 78 Wis., 345; 8 Amer. Dig., 403.
(3) 65 Ala., 68; 32 Amer. Dig., 408.
(4) 31 L.J. C.P., 235; 12 C.B. N.S., 334.

The defendant is unable to say that he surrendered his lease before he abandoned. Even if the lease was by operation of law surrendered, this action is not for rent under the lease, but for damages for breaches of covenants. It is analogous to an action for wrongful dismissal: *Hochster* v. *Delatour* (1); *Frost* v. *Knight* (2).]

That ground was never taken before the Court below. There can be surrender by operation of law, irrespective of the intention of the parties, so long as they were *ad idem* as to the abandonment: *Lyon* v. *Reed* (3). There was no interval of time between the abandonment and the resumption which completed the surrender. The surrender was complete before any damages could have accrued under the breach of covenant.

[GRIFFITH C.J.—The landlord can treat the lease as at an end for all purposes except for the purpose of bringing an action for damages: *Johnstone* v. *Milling* (4).]

The plaintiff's acceptance of the surrender by operation of law proves his consent to the breach of the covenants in the lease; once the lease is concluded, no action for damages can lie, for rent and covenants are completely gone, and damages for losses in working the hotel cannot have been in the contemplation of the parties; *Smith* v. *Roberts* (5); *Duffy* v. *Day* (6); *Lane* v. *Nelson* (7).

Shand in reply. Mere physical possession by the landlord is not sufficient to end the lease and all rights thereunder. The findings of the jury are conclusive that there was no possession so inconsistent with the continuance of the lease as to raise an irresistible inference of an agreement to that effect: *Oastler* v. *Henderson* (8); *Peter* v. *Kendal* (9).

The alleged surrender did not take place before the commission of the main breach by abandonment; and the jury expressly negatived any "relation back." The measure of damages covers what the plaintiff did, which was fair and necessary under the

(1) 2 El. & Bl., 678.
(2) L.R. 7, Ex., 111.
(3) 13 M. & W., 285.
(4) 16 Q.B.D., 460, at p. 467.
(5) 9 T.L.R., 77.
(6) 42 Mo. App., 638; 32 Amer. Dig., 401 *f*.
(7) 167 Penn., 602; 32 Amer. Dig., 406.
(8) 2 Q.B.D., 575.
(9) 6 B. & C., 703.

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circumstances in the interests of both parties. It would be a mere matter of form to send back the case to the jury to find a verdict for unliquidated damages instead of liquidated damages; no appeal can succeed on that ground.

Cur. adv. vult.

GRIFFITH C.J. This is an action brought by the appellant against the respondent for damages for breach of covenants contained in a lease dated 1st February 1899, by which the appellant let to the respondent for a term of 15 years from that date a hotel property in the city of Townsville at a rental of £480 per annum. By the lease the defendant covenanted, as alleged in the statement of claim, to pay the rent at the times mentioned, to pay the rates and taxes, to keep the property in repair, and during the currency of the lease, that is, 15 years, to use exercise and carry on in and upon the premises the trade or business of a licensed victualler or publican and retailer of spirits, &c., and keep open and use the said hotel as a public house for the reception accommodation and entertainment of travellers &c.; and that he would not do, or permit or suffer to be done or committed, any act matter or thing whatsoever, whereby any licence should or might be forfeited or become void and liable to be taken away suppressed or suspended, but would from time to time during the continuance of the term at proper times endeavour to obtain at his own expense such licences as might be necessary to keep it up as an inn or public house.

The covenant to carry on business and not to do anything whereby the licence might be forfeited covered the whole period of 15 years.

The statement of claim alleges that the respondent entered upon the premises, took possession, and paid rent up to 30th June 1904, but that he has not since that date paid rent or rates or taxes, or kept the property in repair, or carried on the business of a licensed victualler, or kept open or used the hotel as an inn or public house, briefly alleging breaches of each stipulation of the covenants, and that on that day the respondent abandoned the demised premises, and has ever since absented himself without the permission in writing of the Police Magistrate and justices,

whereby the licence might be forfeited, &c. It goes on to allege that, by reason of the abandonment by the respondent, the appellant was obliged, in order to prevent the licence from becoming forfeited and to keep up the hotel, to put in an agent to occupy it and keep it open at great loss to the appellant, and was also obliged to pay rates and taxes and expend money in repairs, and lost money in carrying on the business. Particulars were given of the claim for damages under the heads of rent, money paid for rates and taxes, money paid for repairs, money lost in keeping the place going, money paid for the licence, and for painting, &c. The defence puts in issue the lease and the breaches (which were proved), and sets up that before the alleged breaches the premises and all the unexpired residue of the term were duly surrendered by the defendant to the plaintiff by operation of law. Particulars are given of that defence, to which I do not think it necessary to refer. The defence properly alleges that the surrender by operation of law took place before the alleged breaches, for it is manifest that, after a breach had been committed, and a cause of action had already accrued in respect of it, a subsequent surrender could not, unless it operated by way of accord and satisfaction, have any effect on the plaintiff's right to recover damages for the breach already committed. The respondent has not pleaded by way of accord and satisfaction, so it is not necessary to say anything more on that point.

At the trial the plaintiff's case was proved. The defendant, in endeavouring to prove the defence of surrender, established facts which may be briefly stated thus:—Shortly before the end of June 1904, the defendant informed the plaintiff that he did not intend to carry on the premises, and intimated in the plainest language that he would not do so after that date. Negotiations then took place between defendant and plaintiff for a surrender of the lease, but they did not result in any agreement. Two or three days before 30th June the defendant gave the plaintiff formal notice that he would not carry on the premises any longer, and advised the plaintiff to do whatever he thought fit to protect his own interest. On the 29th and 30th the defendant had a sale by auction of all the furniture in the hotel—a plain intimation, if anything further were wanted, of his intention

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not to carry on. Plaintiff, under these circumstances, and for his own protection, bought the furniture, partly at auction and partly from the auctioneer, and the defendant in pursuance of his threat left the premises on 30th June. Plaintiff then went in and made arrangements for carrying on the premises, so that the licence might not be forfeited. The licence was held in the name of a nominee of the defendant, and shortly afterwards it was transferred to a nominee of the plaintiff, and subsequently to another nominee of the plaintiff. Plaintiff then tried to let the premises, but did not succeed in doing so for nearly 12 months. Certain questions were left to the jury, which were answered specifically thus:—They negatived any agreement between the plaintiff and defendant for a surrender; they found that on 30th June defendant relinquished possession of the premises with the intention that plaintiff should resume possession of the premises—I suppose that means having no objection to his resuming possession, or expecting that he would do so—that on 30th June or 1st July plaintiff did resume possession, but not with any intention of determining the unexpired term of the lease; and they assessed damages under the several heads I have mentioned amounting to £899 odd. Upon these findings both parties moved for judgment. The subject particularly discussed before the learned Judge from whom this appeal is brought was whether, under these circumstances, there was a surrender of the lease by operation of law. The learned Judge pointed out, and quite correctly in my opinion, that in every such case it is a question of fact whether there was an agreement, express or to be implied from the facts, to put an end to the term. If there is an agreement between the lessor and the tenant to put an end to the term, followed by resumption of possession by the lessor, that operates as a surrender by operation of law; but in all the cases that were cited to us, and in all that I am aware of, an agreement between the landlord and the tenant was an essential element of the surrender. A mere agreement is not sufficient, because of the Statute of Frauds; but an agreement followed by resumption of possession is sufficient to take the case out of the Statute. The learned Judge was of opinion that, under the circumstances, the plaintiff was estopped from saying that he had not

agreed to the surrender of the premises; he thought that the acts which the plaintiff had done in entering on 1st July, immediately after the lessee had gone out, the making of the arrangements for carrying on business, the trying to let, and the final succeeding in letting, operated in point of law as an estoppel, that he could not be allowed to say that he had not agreed to the lessee putting an end to the term. The jury negatived any intention on his part on 30th June to determine the term; but so soon as he succeeded in letting the premises to a new tenant, there is no doubt that his doing so was conclusive evidence that he had then assented to the proposal of the lessee that the lease should be determined. Whether, under the circumstances of this case, what he did in the meantime, at the request of the lessee, to protect his own interests in the best way he could, operated necessarily as an estoppel, is a question that appears to me one of considerable difficulty. The learned Judge was of opinion that when the plaintiff had taken such complete possession the matter was so far concluded that he could not be heard to say that the lease was not then terminated. I apprehend that it is quite clear that mere abandonment by the lessee does not operate as a surrender of the term of a lease, because the concurrence of both parties is required in order to put an end to a contract; but if, after the lessee has abandoned the premises, the lessor re-enters, it will generally be presumed that he has by that act shown his intention to accept the proposal which is implied in the abandonment by the lessee. Where this re-entry is accompanied by an express protest that he is doing nothing of the kind, but is only going in to do the best that he can to prevent the destruction of the subject matter of the contract for the benefit of both parties, it is a question, I think, of considerable difficulty. In *Oastler* v. *Henderson* (1), the landlord had tried to let the house, but had not succeeded at the time when he resumed possession; and the Court held that his acts did not amount to an estoppel, as the landlord had done nothing but what he might reasonably be expected to do under the circumstances for the benefit of all parties. *Cockburn* C.J., having referred to the fact that the plaintiff's workmen used

(1) 2 Q.B.D., 575.

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two of the rooms, said (1) "I do not think that any jury ough to hold that to be equivalent to a taking of possession, for it is under the circumstances, quite consistent with an intention t hold the defendant to his lease." In the present case the plaintif did not formally give notice to the defendant, when he took possession, that he was doing so for the joint benefit of both parties: but he had been invited by the defendant to do so t protect his own interests, and it is not contested that he did an more than was absolutely necessary to keep the goodwill of th premises intact. It is suggested that he might have put in caretaker as nominal holder of the licence, and not hav carried on business at all. Whether that would have been reasonable thing to do under the circumstances is a matter do not think it necessary to determine. I have referred t these matters because they were the principal matters that wer discussed before the learned Judge in the Court below. I reserv my opinion as to whether, under such circumstances, the conduc of a landlord, the lessor of an hotel, in taking possession, whe not taking possession might destroy the licence, or the continuit of the licence, and perhaps destroy the goodwill of the business necessarily implies an acceptance of a proposal for the surrende of the lease, or whether it is even evidence from which a jur might properly find such an acceptance. I do so because, in th view I take of the case, it is not necessary to determine this ques tion, for it is quite clear that all this took place after the defend ant had abandoned the hotel. In this case he covenanted to carr it on for fifteen years, and on 30th June he not only left the plac but he did so under such circumstances that he could not carry i on, and he sold the furniture. That was as complete a breach of th covenant to carry on the business as it was possible for him t commit, and under these circumstances the plaintiff had at once complete cause of action against him. He was entitled to brin an action forthwith for the breach of that covenant, and he wa entitled to such damages as would properly flow from such breach of covenant. The surrender, therefore, if accepted at all took place after breach, and the defence is not proved. There is no other defence set up, and the plaintiff is therefore entitled t judgment, because the only defence set up has failed.

(1) 2 Q.B.D., 575, at p. 578.

Then the question arises—to what damages is he entitled? There is a covenant the performance of which will extend over a term of 15 years, and it is unequivocally broken. The natural damage is the loss likely to be sustained by the plaintiff during the period for which the covenant ought to be kept; just as in the case of a contract to engage a servant for a term of years, paying him monthly wages. If the contract is unequivocally broken by the employer, the servant can bring an action at once. He cannot, of course, recover anything in the form of wages; he recovers damages, which are assessed usually upon the basis of the wages that he would have received; but he must on the other hand give credit, and the jury must give the employer credit, for whatever the servant might reasonably be expected to have earned during the period for which the contract would have been in existence. *Primâ facie*, the damages, therefore, would be the value of the term to the lessor, that is, the difference between the benefit which he would have derived from the premises being kept as a going hotel for 15 years at the agreed rent, being kept in repair, and so on, and the value of the premises as they were thrown on his hands. The plaintiff found the premises thrown on his hands—it is not suggested that what he did was unreasonable, and it must be taken that it was reasonable—he carried on the premises, incurred necessary expenses, and he lost the rent for 12 months. In any direction that might have been given to the jury in reference to the breach of covenant, it would be necessary also to tell them that these were proper matters for them to take into consideration. They have found a specific sum, made up of proper items of damage, and I think it represents the loss which might be reasonably expected to flow from such a breach of covenant. I am, therefore, of opinion that the action must be treated as undefended, the only defence having failed; and, as to the damages found by the jury, I think they are such as naturally and reasonably followed from such a breach of covenant. I am of opinion, therefore, that the plaintiff is entitled to judgment, and that the appeal should be allowed with costs of the action and of the appeal.

BARTON J. The plaintiff appellant, owner of the Imperial

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Hotel, Townsville, which had been kept as a licensed hotel for many years, let it to the defendant respondent for 15 years from 1st February 1899, at a yearly rent of £480, payable at £40 per month. The lease contained covenants by the defendant that during the term he would pay rent, rates and taxes, keep and yield up in repair, carry on in the hotel throughout the term the business of a licensed victualler, and keep open and use the premises as an inn or public house for the reception accommodation and entertainment of travellers, guests or other persons resorting thereto or frequenting the same, that he would not do or suffer to be done anything whereby the licence might be or become liable to be forfeited or suspended, and that he would apply at the proper times for all licences necessary for carrying on the trade of the hotel, and paint the inside of the house once in every 3 years. All these covenants appellant alleged to have been broken. The defendant put the plaintiff to proof of the breaches, and set up that, before the alleged breaches, the premises and the unexpired residue of the term were surrendered by him to the plaintiff by act and operation of law, alleging by way of particulars that the surrender was made on 30th June 1904, by the defendant giving up and the plaintiff accepting possession, with the intention on both sides of putting an end to the term. It is well to observe at this point that if the defendant fails to prove affirmatively that the lease was surrendered, as an inference of law from the facts, and that such surrender happened before breach, then there is no defence if a breach is once proved. There is no question of express agreement arising in this case. The defendant held possession of the hotel premises from the beginning of the term until 30th June 1904, when, having sold at auction all the furniture, which was purchased by the plaintiff after the defendant had distinctly announced his intention to leave the hotel, he carried out that intention. The defendant had on 20th June verbally informed the plaintiff that he had lost money by the hotel and intended to give it up at the end of the month, and the plaintiff thereupon consulted his solicitor. A correspondence ensued; on the 25th June the defendant wrote to the plaintiff referring to that intention, and proceeded: "I now again give you notice that I intend to leave the Imperial Hotel on the 30th inst., and for your own protection I now request you

to make the necessary arrangements for the transfer of the licence and otherwise take any other steps you may consider desirable for the protection of your interests." To this the plaintiff replied on the 27th through his solicitors, that he could not acquiesce in the defendant's expressed intention to leave the hotel on the 30th; that the notice given of defendant's desire to cancel the lease was totally inadequate to enable the plaintiff to obtain a fresh tenant; and that he must hold the defendant to the terms of his contract. An offer of a rebate of rent for 12 months was made in this letter, but the defendant rejected it. The next day the plaintiff's solicitors offered on his behalf to accept a surrender and to release the defendant from the covenants on certain terms, failing the acceptance of which the plaintiff would institute proceedings for damages. The defendant declined this proposal by letter of the same day, 28th June, and from that point nothing was said or done before 30th June to alter the relationship of the parties. On 30th June the premises were abandoned by the defendant as already stated. At this time the liquor licence was in the name of McManus, a stepson of the defendant. On 30th June or the following day the plaintiff, in order as he alleges to prevent the licence from being forfeited, and to comply with the *Licensing Act*, and to take care of the hotel, put in an agent to occupy the hotel and keep it open. He took as soon as practicable a transfer of the licence to his agent from McManus, and afterwards put his daughter in occupation as licensee, and the hotel was kept open by the plaintiff under these circumstances till 30th June, 1905, when the plaintiff, who, having all this time a licensed house of his own, had been trying to relet the place, succeeded in doing so. It is for this period of 12 months that he claims his damages. At the trial before *Chubb* J., the jury found the following facts in answer to questions put to them by the Judge:—That there was no agreement between the plaintiff and defendant that the defendant should relinquish and the plaintiff should resume possession of the premises; that the defendant did not relinquish and the plaintiff resume possession of the premises in pursuance of any such agreement; that on 30th June 1904, the defendant relinquished possession of the premises; that the defendant did so with intent that the plaintiff should resume possession of the

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premises; that on 30th June the plaintiff resumed possession of the premises; and that the plaintiff did not do so with intent to determine the unexpired term of the lease; and then they assessed the damages. Each party moved for judgment on the findings, and after argument His Honor gave judgment for the defendant, holding that there had been a surrender accepted by operation of law. From that judgment the present appeal has been brought directly to this Court.

There is a difficulty in dealing with this case at this late stage, arising from the circumstances under which it was conducted. The real question, though necessary to a correct decision, was not fully developed until the case was argued before this Court. This is not an action for rent as reserved in the lease, but its gravamen is really in the breach of the covenant binding the defendant to carry on during the term upon these premises the trade for which they were let. It seems to have been assumed by the defendant that in such an action facts, which happen after a complete breach has been committed, can be relied on as facts from which a surrender before breach, and with it an abrogation of every covenant, would be implied by law. The plaintiff was not really under any obligation to meet the defendant's arguments on this assumption. The defendant, affirming a surrender in law before breach, was bound to prove it, and the consequence of failure to do so would be that, unless he could rebut the plaintiff's proof of a breach of the covenant, his defence would fail entirely. He did not set up surrender by express agreement, and consequently, the first and second findings of the jury are irrelevant. But in attempting to prove surrender by operation of law before breach, he relied on facts which were not available to him for that defence. On such facts as were shown, a jury should be directed that, occurring as they did after a complete breach, they go to the damages only, and are no bar to a verdict for the plaintiff upon the proved breach. Moreover, the personal covenants would in any case have held good: *Attorney-General* v. *Cox* (1). A breach gives a title to such damages as in the ordinary course of events might reasonably be expected as to its consequences, unless the legal effect of the breach can be shown to have been done away with by release

(1) 3 H.L.C., 240, at p. 275.

under seal or by an agreement between the parties, as by accord and satisfaction, or by waiver upon consideration. There is no attempt here to show any of these things. It must not be forgotten that a right of action had arisen on the termination of the correspondence on the 28th June, as the defendant had given distinct notice of his intention not to perform his covenant. There was at that time a renunciation which, at the plaintiff's option, amounted to a breach of the covenants that throughout the term he would carry on a licensed victualler's business upon the premises and keep them open and in use as an inn, &c., and of the covenant not to do anything which might entail forfeiture of the licence (*Licensing Act* 1885, sec. 101), as well as of the subsidiary covenants. The plaintiff was then entitled to claim in an immediate action, prospectively, such damages as would be caused by a breach at the appointed time, subject to any circumstances which might operate in mitigation of damages: *Leake on Contracts*, 4th ed., 617-618, and cases there cited, especially *Hochster* v. *Delatour* (1), and *Johnstone* v. *Milling* (2). But it is said that the conduct of the plaintiff in resuming possession under the circumstances estops him from suing upon the covenants. I must not be taken to hold that it has that effect as to the covenant to pay rent. But, however that may be, can it estop him as to the other covenants which relate to the keeping the premises as an inn throughout the term, and the doing of the other things necessary for that purpose? Conduct, to constitute an estoppel, must have caused another to believe in the existence of a certain state of things, and have induced him to act on that belief so as to alter his own position. How can that be said to be the effect of the plaintiff's conduct, when the act of the defendant, so far from having been induced by it, has preceded it? In my judgment the doctrine of estoppel cannot be applied against the plaintiff, and I am driven to the conclusion that the learned Judge who tried the case, and who held that the plaintiff was bound by estoppel, has based his judgment on facts which do not entitle a Court to apply that doctrine. As to damages, I am of opinion, with the Chief Justice, that for the year from 1st July 1904, to 30th June 1905, the damages found by the jury on the

(1) 2 E. & B., 678; 22 L.J.Q.B., 455. (2) 16 Q.B.D., 460.

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assumption that plaintiff was entitled to recover rent, are such as might reasonably be expected to flow from the abandonment in clear breach of the covenants as to the keeping and maintenance of the premises as an inn. It would be waste of time and money to send the case down for re-assessment of damages on the issues so arising, and I understand the defendant has no desire for any such unnecessary formality. In the result I am of opinion that the verdict should stand for the plaintiff (the appellant) for the whole amount of the damages assessed by the jury.

O'CONNOR J. I am of the same opinion. It is unnecessary, after the full statements of the facts that have been made by both my learned brethren, to refer very much to the circumstances under which the action has arisen. I shall merely deal shortly with the rights of the parties. Under the lease the obligations of the defendant were to keep the hotel open as a licensed public house for 15 years, to pay rates and taxes for 15 years, to keep the place in proper repair for 15 years, and during the whole of that period to pay a certain rental to the plaintiff. It was possible to get rid of these obligations by rescission of the contract in proper form, or by surrender of the lease in such a way as to extinguish the lease by operation of law. That surrender by operation of law might take place without any express agreement, and merely from the relinquishing of possession by the tenant and the acceptance of possession by the landlord. In any of these ways, before any breach took place, the obligations of the defendant under this lease might have been got rid of. I am of opinion upon the findings of the jury, that the defendant did not before the breach of covenant for which the action has been brought, get rid of any of these obligations, and that therefore he has failed to establish the defence set up. The defence is that before breach the contract was determined by surrender by operation of law. It is clear, from the correspondence and the findings of the jury, that before the abandonment of possession by the defendant there was no agreement arrived at between the landlord and the tenant as to giving up possession by the latter and acceptance of possession by the former. In fact the whole of the correspondence shows that the

andlord refused to accept possession, and refused to give up any of his rights under the lease, and that while things were in that position between them, the tenant gave up possession in such a way as to indicate plainly that he intended, regardless of the andlord's views, to abandon possession and put an end to the ontract as far as he was concerned. Now, all that took place efore the landlord, the plaintiff, entered into possession, and, herefore, before he had entered into possession the breach of he contract for which he is now suing, was complete. What vas that breach? It was no less than a repudiation and bandonment of the whole contract. The landlord's rights upon hat breach were to get such compensation and damages as the ury might think that he was entitled to for the loss of the enefit of the 15 years' contract. That claim, having once arisen, ould only be put an end to in one of two ways; it might have een put an end to by release under seal, or it might have been ut an end to by accord and satisfaction. Nothing which the andlord did after the breach could put an end to his right to ecover under the contract, unless he released the cause of action nder seal, or made and acted on an agreement that amounted o accord and satisfaction. It is manifest that there is no vidence of any such determination of the contract, and that the ccurrences which took place after the abandonment of the ontract by the defendant, and after the plaintiff's cause of ction was thus complete, are absolutely immaterial as an answer. But it has been contended that there was some evidence before the jury that the landlord's taking possession was an acceptance of possession in pursuance of negotiations going on before the defendant abandoned possession. I am unable to see any evidence of any such agreement, and such an inference from the facts is entirely against the findings of the jury. The fact which the jury found, and upon which His Honor Mr. Justice *Chubb* based his judgment, is this: That after the defendant had abandoned possession the landlord resumed possession. Now, there is no doubt that the acceptance of possession in such a way as to bring about a surrender by operation of law may be evidenced by the mere relinquishment of possession on the part of the tenant and the acceptance of possession on the part of

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the landlord. Whether the inference can be drawn in any particular case is entirely a question of fact. There are cases, no doubt, in which it would be a very reasonable inference, from the acceptance of possession by the landlord after an abandonment by the tenant, that there was an acceptance of possession in such a way as to put an end to the contract. In the case of a dwelling-house, for instance, if the tenant goes out and the landlord takes possession or in any other way assumes rights of ownership over the property, it may be a very fair inference that he has accepted possession in such a way as to put an end to the contract. But where you are dealing with a property of this kind—where it is vital to the existence of the property that someone should be in possession, that it should be kept up as a public house, that certain duties under the *Licensing Act* should be continually performed by someone—where in short it is essential, when the house has been abandoned, that the landlord should take some action to preserve his property in its existing condition, it does not at all follow that a resumption of possession amounts to an acceptance such as would establish a surrender by operation of law. If it were not so the landlord would be put in this position, that he must either stand by and see the value of his property destroyed, or he must take possession in such a way as to put an end to his rights under the contract. The law does not put a party to a contract in that position. It will be a matter to be considered, whether he has done more in taking possession under the circumstances than was necessary. The jury have found, in answer to a question put by the learned Judge who tried the case, that the plaintiff resumed possession, but not with the intention of putting an end to the lease. The mere fact of resumption of possession is not of itself sufficient; on the other hand, the intention with which he resumes possession, so long as it remains in his own breast, is immaterial. In that I quite agree with the learned Judge. The real question for the jury on that part of the case was whether in resuming possession he had done anything more than was necessary for the purpose of preserving the subject matter of the contract for both parties. It was open to the landlord to take possession, to enter into the hotel, to do everything that was necessary for carrying on the

business and conforming to the law so as to preserve his rights under the lease and his remedies, and to preserve the rights of the defendant also. The jury were not asked, and did not find, whether the landlord in taking possession did more than was necessary for their purposes. But, however they had found on the question, their finding would have been immaterial in this case because all these things had taken place after breach, and it is immaterial in what way you regard the taking of possession by the plaintiff. In my opinion it would be impossible that any more complete possession could be taken of the premises than was taken by the plaintiff, and you may regard his taking possession in either of two ways: Either that he elected to accept the abandonment of the contract, and to treat it as at an end; or that, having determined to rely upon his right to damages, he elected to treat the contract as existing only for the purposes of an action for damages. In either case he would, of course, resume possession. Assuming that he elected to preserve the contract for the purpose of suing on it, his damages would be any expense that he had been put to in having the place on his hands until he let it to another tenant. Those expenses would include his loss in carrying on the business. Because if he had made any profit in carrying on the business, it would have to come off his claim against the defendant; on the other hand, if he made a loss in carrying it on, that would be damages which the defendant would have to pay. In addition to those damages, during that year he was entitled to the rent of the premises, £480, which the jury have found for him. If he had let the premises before the expiration of the year, there would have been so much the less for the defendant to pay in the way of damages for rent. If he had not let it when he did defendant might have had to pay damages for two or three or four or five years' rent, according to the time during which the premises remained unoccupied. But, whichever way you regard the damages which the jury have found, they are properly recoverable for the defendant's breach of contract. I am therefore of opinion that the appeal must be allowed, and judgment entered for the plaintiff for the £899 4s. 11d.

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Appeal allowed. Judgment appealed from reversed. Judgment to be entered for plaintiff for £899 4s. 11d. and costs of the action. Respondent to pay the costs of the appeal.

Solicitor, for appellant, *W. S. Buchanan*, Townsville.

Solicitors, for respondent, *Roberts, Leu & Barnett*, Townsville.

N. G. P.

[HIGH COURT OF AUSTRALIA.]

EX PARTE GORDON.

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MELBOURNE, *March* 29.

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

Judiciary Act 1903 (*No.* 6 *of* 1903), *sec.* 39 (2) (*b*)—*Rules of High Court*, 22*nd August*, 1904, *Part II.*, *sec.* III., *rule* 1—*Justices Act* 1902 (*N.S.W.*) (*No.* 27 *of* 1902), *sec.* 112—*Practice—Appeal to High Court from Court of State exercising federal jurisdiction—Statutory prohibition—Decision primâ facie wrong.*

The Court will construe sec. 39 (2) (*b*) of the *Judiciary Act* liberally in favour of a party desiring to appeal.

Therefore, where a rule *nisi* for a prohibition was sought in respect of a decision of an inferior Court of New South Wales exercising federal jurisdiction, that being the mode provided by sec. 112 of the *Justices Act* 1902 (N.S.W.), for appeal to the Supreme Court from a decision of such an inferior Court, the High Court will not necessarily require to be satisfied that the decision was *primâ facie* wrong, although it is the practice in New South Wales for the Supreme Court to insist on being so satisfied under similar circumstances.

APPLICATION for rule *nisi* for a prohibition.

Ernest Gordon, master of the steamship "Moldavia," was at the Police Court, Sydney, on 9th March 1906, convicted of the offence