in the condition in which it would come to her if the trustees had effected no repairs.

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AMOS v. FRASER.

O'Connor J.

Appeal allowed. Order appealed from discharged. Judgment of Madden C.J. restored with certain variations and omitting the order for taxation of the plaintiff's costs and payment thereof by the defendants. Liberty to apply. Money if any paid by defendants to plaintiff under judgment to be repaid. No order on motions to strike out appeal and to rescind special leave.

Solicitor, for appellant, *F. H. Tuthill*, Ballarat.

Solicitors, for respondents, *Pearson & Mann*, Ballarat.

B. L.

[HIGH COURT OF AUSTRALIA.]

BAGNALL . . . . . APPELLANT;
PLAINTIFF,

AND

WHITE . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1906.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Aug.* 21, 22, 30.

Statute of Frauds (29 *Car. II.*, *c.* 3), *secs.* 3, 4—*Agreement by tenant to surrender leasehold—Executed agreement—Surrender by operation of law—Admissibility of parol evidence—Special leave to appeal—Difficult question of law—Case involving small amount—Rescission of special leave.*

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

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The appellant brought an action in a District Court (which has no equitable jurisdiction) to recover a sum of money which he alleged that the respondent had agreed to pay him upon a contract for the surrender of a lease of land and goods held by the appellant from the respondent. The appellant's evidence established a case of surrender by operation of law, and, according to the appellant, there was also a verbal agreement by the respondent to pay the sum claimed in consideration of the surrender.

Objection being taken that the action could not be brought because the agreement alleged came within the words of the 4th section of the *Statute of Frauds*, and was not in writing :

Held, that the principle which allows evidence to be given of the terms of a verbal lease was not applicable to the case where a surrender might take effect without a writing under sec. 3 of the *Statute of Frauds* ; but

Quære whether the 4th section of the Statute does or does not apply to the case of an executed contract for the surrender of a lease.

The Supreme Court having held that, though the plaintiff might recover in a suit in Equity, he could not in an action at law, the High Court, having regard to the difficulty of the question arising under the *Statute of Frauds*, the fact that the immediate question for determination was one of procedure only, and the smallness of the amount involved, rescinded special leave to appeal.

Dalgarno v. *Hannah*, 1 C.L.R., 1, followed.

Special leave to appeal from the decision of the Supreme Court : *Bagnall* v. *White*, (1906) 6 S.R. (N.S.W.), 67, rescinded.

APPEAL from a decision of the Supreme Court of New South Wales.

The appellant was tenant of a dairy farm and stock of the respondent under a lease in writing for five years. According to the appellant's evidence, when nearly four years of the tenancy had expired, it was agreed between the appellant and the respondent that the appellant should give up possession to the respondent of the farm and stock, and that the tenancy should then be at an end, and that the respondent should pay to the appellant £30 as the consideration for the surrender. In pursuance of the agreement the appellant gave up and the respondent entered into possession. The respondent having refused to pay the £30, the appellant brought an action in the District Court to recover it, as the consideration agreed to be paid by the respondent for the rescission by the appellant of the contract subsisting between the parties, and for the surrender by the appellant to the respondent

of the land and goods in question. The respondent pleaded that the agreement sued upon was within sec. 4 of the *Statute of Frauds* and was not in writing. The appellant was nonsuited, the learned District Court Judge holding that the agreement, not being in writing as required by sec. 4 of the Statute, could not be proved.

The appellant appealed to the Supreme Court by way of special case stated under the *District Courts Act*, and the Supreme Court held that the nonsuit was right, and dismissed the appeal with costs: *Bagnall* v. *White* (1).

It was from this decision that the present appeal was brought by special leave.

Dr. Cullen K.C. (with him *Tighe*) moved to rescind the special leave on the ground that the amount involved was trivial, and the case was not otherwise of special importance.

The Court decided to hear the appeal, leaving the question of rescission to be dealt with later.

Flannery, for the appellant. The evidence discloses a legal obligation on the defendant to pay the plaintiff the £30 claimed. The Court of Equity could not give relief by specific performance or otherwise. There was a complete surrender by operation of law, that is to say, an executed agreement on the part of the tenant to abandon, and on the part of the landlord to accept possession of the premises: *Phené* v. *Popplewell* (2); *Johnstone* v. *Huddlestone* (3). The surrender by operation of law amounts to a conveyance of the interest in the land, and verbal evidence of the consideration may be given upon the principle which allows verbal evidence of the terms of a lease within the exceptions of sec. 3: *Lyon* v. *Reed* (4). The substance of the agreement having been shown by the executed surrender, the parties are entitled to give evidence of the whole of the agreement: *Lord Bolton* v. *Tomlin* (5); *Foa, Landlord and Tenant*, 1901 ed., p. 583. Sec. 4 is merely a rule of procedure: *Leroux* v. *Brown* (6). It has no effect on the efficacy of the surrender to change the relationship

(1) (1906) S.R. (N.S.W.), 67.
(2) 12 C.B.N.S., 334; 31 L.J. C.P., 235.
(3) 4 B. & C., 922.
(4) 13 M. & W., 285.
(5) 5 A. & E., 856.
(6) 12 C.B., 801.

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between the parties. The executed surrender takes the case out of the operation of sec. 4, otherwise the provisions of sec. 2 would be meaningless. It is unequivocal evidence of the intention of the parties, just as a deed of surrender would be if the possession had not been actually given up. Sec. 4 applies only to executory contracts. [He referred to *Fenner* v. *Blake* (1); *Doe d. Earl of Egremont* v. *Courtenay* (2); *Doe d. Biddulph* v. *Poole* (3); *Sugden on Vendor and Purchaser*, 1839 ed., vol. 1, pp. 134, 135, 136.] Even if it applies to executed contracts the exception in sec. 3 covers this case.

This is a very important principle of law, involving the construction of the *Statute of Frauds*, and therefore the case is a proper one for appeal to this Court. The special leave should not be rescinded.

Dr. Cullen K.C. (with him *Tighe*), for the respondent. The surrender of possession does not take this case out of the Statute: *Cocking* v. *Ward* (4); *Kelly* v. *Webster* (5); *Britain* v. *Rossiter* (6). The action was brought not on the contract to give up and accept possession, but on the parol agreement to pay money, and the Statute says that such a contract must be in writing. It makes no difference whether it is executed or not, as far as the giving up of possession is concerned. The surrender by operation of law is not the contract sued upon. The only cases in which there is a difference between contracts executed and those which are executory are those in which the whole consideration has been executed and the law implies a promise to give consideration: *Bullen and Leake, Precedents of Pleadings*, 3rd ed., p. 36. Then, if there is no writing, and the contract comes within the *Statute of Frauds*, the action must be brought, not on the original contract, but on the contract implied from what has been done. But the Statute has expressly prohibited an action on *any contract or sale* of an interest in land, thus precluding any action on an implied contract to pay. [He referred to *Bullen and Leake, Precedents of Pleadings*, 3rd ed., p. 240; *Hodgson* v. *Johnson* (7).]

(1) (1900) 1 Q B., 426.
(2) 11 Q.B., 702.
(3) 11 Q.B., 713.
(4) 1 C.B., 858; 15 L.J. C.P., 245.
(5) 12 C.B., 283; 21 L.J. C.P., 163.
(6) 11 Q.B.D., 123.
(7) E. B. & E., 685; 28 L.J.Q.B., 88.

[GRIFFITH C.J. referred to *Pulbrook* v. *Lawes* (1); *Snelling* v. *Lord Huntingfield* (2); *Griffith* v. *Young* (3).]

If there is a contract for the sale of land and for other things, not in writing, and one party has taken advantage of part, but refuses to carry out the whole, Equity will interfere and compel performance in full, but there is no remedy at law. Even in the case of a lease or contract for a lease within the exceptions, nothing can be sued for except rent and such things as belong to the contract in its nature of a lease. The only ground upon which the plaintiff can base a claim here is part performance, and that does not help him in an action at law.

[GRIFFITH C.J. referred to *Seaman* v. *Price* (4); *Souch* v. *Strawbridge* (5); *Green* v. *Saddington* (6); *Sanderson* v. *Graves* (7); *Collis* v. *Botthamley* (8.)

O'CONNOR J.—Do not the authorities show that the surrender by operation of law includes not only the giving up and acceptance of possession, but also the terms upon which this took place ?]

No. This is not like the case of services rendered, which import consideration. A moral obligation is not sufficient at law, though Equity will relieve: *Mackreth* v. *Symmons* (9). *Phené* v. *Popplewell* (10) is only an authority for the proposition that a surrender by operation of law operates as a conveyance, and that all the facts necessary to constitute such a surrender may be proved, but it does not decide that the surrenderor may recover on a verbal contract to pay money for the surrender.

[GRIFFITH C.J.—Could not this contract be called collateral within the decision in *De Lassalle* v. *Guildford* (11) ?]

If it is, then the consideration for any contract may be called collateral. This is clearly within the fourth section of the Statute. The surrender itself may be without a writing under sec. 3, but the contract under which the surrender took place does not come within sec. 3, but within sec. 4. It was not contended before the Supreme Court that the action was upon the contract

(1) 1 Q.B.D., 284.
(2) 1 C. M. & R., 20.
(3) 12 East., 513.
(4) 1 Ry. & M., 195; 2 Bing., 437.
(5) 2 C.B., 808; 15 L.J. C.P., 170.
(6) 7 El. & Bl., 503.
(7) L.R. 10 Ex., 234.
(8) 7 W.R., 87.
(9) 2 Wh. & T. L.C., 7th ed., 926.
(10) 12 C.B.N.S., 334; 31 L.J. C.P. 235.
(11) (1901) 2 K.B., 215.

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implied by the executed surrender, nor was that point open on the special case.

Flannery in reply. The action was *indebitatus assumpsit*, based upon the obligation to pay resulting from the surrender of the term. Evidence of what the parties agreed upon may be given either to show what is a reasonable price, or as part of the transaction. Once the evidence is admitted, whatever the ground of admissibility, there is no rule restricting its effect.

Cur. adv. vult.

Aug. 30.

The judgment of the Court was delivered by

GRIFFITH C.J. In this case the Court gave special leave to appeal from a decision of the Supreme Court dismissing an appeal from the District Court, in an action brought by the plaintiff to recover a sum of money which he alleged that the defendant had agreed to pay him upon a contract for the surrender of a lease of land and goods which were held by the plaintiff from the defendant, the surrender being a surrender that took effect by operation of law. On the facts as proved before the District Court there was a surrender by operation of law, and, according to the plaintiff's version, there was also an agreement by the defendant to pay the sum claimed in the action in consideration of the surrender of the lease and of the goods included in the bargain. Objection was taken by the defendant that the action could not be brought because the agreement alleged came within the words of the 4th section of the *Statute of Frauds*, and was not in writing. Mr. *Flannery* who argued the case very well for the appellant, contended that the principle which allows evidence to be given of the terms of a verbal lease was equally applicable to the case where a surrender might take effect without a writing under the 3rd section of the Statute. The distinction taken by Dr. *Cullen* for the respondent, however, seems to be a sound one, that, though the 3rd section may operate to make the transaction good as a matter of conveyancing, it does not follow that the agreement can be proved for the purpose of founding an action upon it. That argument for the appellant, therefore, we think, fails. In the case of a lease

which is created by parol, the terms of that lease must necessarily be inquired into in order to ascertain the incidents of the estate created by it. But upon a surrender the estate is gone, and there are no incidents to be considered.

But the case was also put for the appellant on another ground, that the 4th section of the Statute does not apply to the case of an executed contract, which undoubtedly this was. In support of that argument very high authority was cited. In *Sugden on Vendors and Purchasers*, 14th ed., p. 126; 13th ed., p. 101, it is said:—"Although a parol agreement, which is within the fourth section, cannot be enforced before it is executed, yet if the agreement is executed by delivery and acceptance of the subject-matter of the sale, the seller may recover." As authority for that proposition the learned author cites *Teal* v. *Auty* (1), and two other cases to which I need not now refer. In that case the Court held that though the plaintiff could maintain his action, the agreement having been executed, he could only do so upon an account stated, and that there must therefore be a new trial to consider the question whether there had been an account stated. But in another case, *Seaman* v. *Price* (2), decided in the Court of Common Pleas in 1825, it was held that the plaintiff could recover under circumstances hardly distinguishable from those of the present case. In that case there was in effect an agreement to surrender an interest in land, the agreement having been made by the plaintiff with the defendant's tenant, and the Court held that the plaintiff could recover, but the decision was rested on other grounds. There are other *dicta* to the same effect by many eminent judges, for instance, in *Souch* v. *Strawbridge* (3) (1845) by *Tindal* C.J., in *Lavery* v. *Turley* (4) (1860) by *Pollock* C.B., though it was not absolutely necessary for the decision in that case, because the Court was dealing with an equitable plea. On the other hand, in *Earl of Falmouth* v. *Thomas* (5) (1832) in the Court of Exchequer, Lord *Lyndhurst* C.B. evidently thought the plaintiff could not recover on the special agreement, but that he could on a *quantum meruit*. In *Cocking* v. *Ward* (6) (1845) in

(1) 4 Mo., 542; 2 B. & B., 99.
(2) 1 Ry. & M., 195; 2 Bing., 437.
(3) 2 C.B., 808; 15 L.J.C.P., 170.
(4) 6 H. & N., 239; 30 L.J. Ex., 49.
(5) 1 C. & M., 89; 3 Tyrw., 26.
(6) 1 C.B., 858; 15 L.J.C.P., 245.

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the Court of Common Pleas, there was a count that is not distinguishable from that in the present case, and it was held that the plaintiff could not recover on the special contract, but might recover on an account stated. In *Kelly* v. *Webster* (1) (1852) the Court of Common Pleas, on an appeal from a County Court, simply followed *Cocking* v. *Ward* (2), by which they thought they were bound. In *Sanderson* v. *Graves* (3) (1875), in the Court of Exchequer, *Bramwell* B. pointed out that the *dictum* in *Souch* v. *Strawbridge* (4) could not be true of all cases within the 4th section, instancing guarantees and contracts in consideration of marriage. Finally in *Pulbrook* v. *Lawes* (5), decided in 1876, the cases *Cocking* v. *Ward* (2), *Kelly* v. *Webster* (1), and *Sanderson* v. *Graves* (3) were relied upon, and *Blackburn* J., commenting on *Cocking* v. *Ward* (2) expressed the opinion that it had been decided on a point of pleading, and said he thought that, if the point had arisen after the *Common Law Procedure Acts*, it would have been otherwise decided. Another case cited to us was *Powell* v. *Jessop* (6), in which it was held that in a case like the present the plaintiff was entitled to recover on a *quantum meruit* for the chattels included in the contract under consideration.

In the present case it is not disputed that, if the plaintiff is entitled to recover at all, he is entitled to recover the amount claimed. The learned Judges of the Supreme Court were of opinion that, according to the practice of this State, in which the several jurisdictions of the Court are kept distinct, the plaintiff could only recover by a suit in Equity.

I have referred to the conflicting decisions on the subject. Indeed it has been said that there is no decision on any point arising under the *Statute of Frauds* as to which it is not possible to find a contrary decision. It appears to us that the matter is one of very considerable difficulty, and possibly open to be decided either way. That the plaintiff is entitled, if his version of the facts is the true one, to recover his money by a proceeding in some form or other is clear. Then the question arises whether, as this is a matter in which, after all, the only question is as to the form of

(1) 12 C.B., 283; 21 L.J.C.P., 163.
(2) 1 C.B., 858; 15 L.J.C.P., 245.
(3) L.R. 10 Ex., 234.
(4) 2 C.B., 808; 15 L.J.C.P., 170.
(5) 1 Q.B.D., 284.
(6) 18 C.B., 336; 25 L.J.C.P., 199.

procedure to be adopted by the plaintiff in order to maintain his claim, it is a matter in which we should give special leave to appeal when the amount involved is less than £30. On the whole, having regard to the principle followed by this Court in *Dalgarno* v. *Hannah* (1) we have come to the conclusion that it would not be a proper thing for us to decide such a difficult matter in a case where so small an amount is involved as in this case. We think, therefore, that the proper order is to rescind the special leave.

Special leave rescinded. Appellant to pay the costs of the appeal.

Solicitors, for the appellant, *Logan & Carlton* by *Sly & Russell.*

Solicitors, for the respondent, *Baker & Mackenzie* by *Mackenzie & Mackenzie.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

BAUME . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Aug.* 14, 15, 16, 17, 20, 27.

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

Action against Commonwealth—Liability for tortious acts of servants—Independent officer—Collector of Customs—Ministerial duty—Nominal and small damages—Customs Act (*No.* 6 *of* 1901), *secs.* 30, 214, 215—*Judiciary Act* (*No.* 6 *of* 1903), *secs.* 56, 64.

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