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HUGHES v. STEEL.

Isaacs J.

Per Curiam. It is not the practice of the Court to grant costs of the appeal in such a case. It may be of great importance to the appellant to have the matter decided, but it is not of such importance to the other side.

Appeal allowed. Order appealed from discharged. Case remitted to the magistrate for determination. Respondent to pay the costs in the Supreme Court.

Solicitor, for the appellant, *The Crown Solicitor of New South Wales.*

Solicitor, for the respondent, *J. W. Abigail.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

SWAN AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

RAWSTHORNE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 24; *May* 12, 18.

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

Vendor and purchaser—Assignment of leasehold—Agreement by purchaser to allow vendor to retain portion under sub-lease—Agreement by vendor to erect improvements—Delay on part of vendor—Right of vendor to specific performance—Compensation—Action by purchaser against vendor for trespass—Injunction.

The holder of a Crown lease agreed in writing to assign the leasehold and stock thereon subject to a condition that he should be entitled to retain a portion of the area on lease from the purchaser, who was to give him a

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sub-lease at law of that portion. The purchase was to be completed by a day fixed, failing which the purchaser was to be entitled to take possession as tenant to the vendor pending completion, paying interest on the purchase money. Before the date fixed for completion it appeared that certain improvements necessary for the working of the property were situated on the portion to be retained by the vendor, and a further agreement was then entered into in writing that the sub-lease should not be executed until certain improvements were erected on the rest of the area by the vendor. According to the vendor there was also a verbal agreement, though this was disputed by the purchaser, that the purchaser should have the right in the meantime to use the improvements on the portion to be retained by the vendor. On the day fixed the purchase was completed by transfer of land and delivery of stock, but, the improvements not having been erected, the purchaser claimed the legal and equitable title to the whole area free from any obligation to grant the sub-lease. The vendor thereupon excluded the purchaser's stock from the use of the improvements on the portion in question. The purchaser brought an action at law against the vendor claiming damages for trespass to land and wrongful impounding of stock. The vendor brought a suit in equity, claiming an injunction to restrain the action at law and specific performance of the agreement to grant him a sub-lease. On an interlocutory application the purchaser was given liberty to sign judgment in the action at law, but was restrained by injunction until the hearing from proceeding to assessment of damages.

Held, that the delay in completion of the improvements did not go to the substance of the transaction, but was a matter for compensation, and the vendor, having completed the improvements before the hearing of the suit, was entitled to a decree for specific performance; but was not entitled to the injunction claimed.

Per Griffith C.J., *Barton* and *O'Connor* JJ.—The purchaser had never acquired a right to the exclusive possession of the portion to be retained by the vendor, and the vendor had, therefore, a good defence in law to the action for trespass to land, but, as the vendor had verbally agreed to the purchaser having the use of the improvements on that portion, and, as there had been part-performance of the main agreement to which that agreement was ancillary, he had no defence in equity, whether he had or had not at law, to the claim for damages for wrongful impounding, and, as the purchaser did not ask for an inquiry as to damages, but was content to rest on his judgment at law, it was not a case for the exercise by the Court of Equity of its discretionary power to grant an injunction for the purpose of doing complete justice between the parties.

Per Isaacs J.—The verbal agreement should not, in view of the issues raised at the trial and the conflict of evidence, be taken to have been proved, and upon the documentary evidence the legal title in the whole area passed to the purchaser by virtue of the transfer, and having entered into possession under the terms of the contract, and no sub-lease having been executed,

he was in possession of the whole area, and the vendor became a trespasser and had no defence in law or in equity to the action at law, and was, therefore, not entitled to an injunction.

Judgment of *A. H. Simpson* C.J. in Equity varied and affirmed as varied.

APPEAL from a decision of *A. H. Simpson* C.J. in Equity of the Supreme Court of New South Wales in a suit for specific performance and an injunction.

The following statement of the facts is taken from the judgment of *Griffith* C.J.:—

The plaintiff, respondent, who was the owner of a pastoral property of about 100,000 acres, of which the greater part was held under lease from the Crown, arranged to sell it with the stock to the defendant Swan, with the exception of 10,240 acres which he proposed to retain for himself. As a Crown lease cannot be assigned in part, it was arranged that the whole lease should be assigned to the defendant Swan, and that that defendant should execute a sub-lease of the 10,240 acres to the plaintiff at the same average rental as would be payable by that defendant on the whole lease. Accordingly on 24th October 1905 a written contract of sale was drawn up and signed by the parties. The 12th condition was as follows :—"As to the 10,240 acres . . . part of lands above referred to the vendor is to be entitled to retain same on lease at the same average rental as the whole lease subject to compliance by him with the provisions of the *Western Lands Act* in respect thereof and to the provisions of the Crown Lands Acts and the fences round the said 10,240 acres are to be put in order by the vendor. As the said 10,240 acres are included in the total area of the lease of 100,680 acres the purchaser shall give the vendor a lease of same at law." The 9th condition provided that the purchase should be completed on 1st December following, and that if for any reason the matter was not then ready for completion the purchaser should be entitled to take possession as tenant to the vendor at a nominal rent pending completion, paying interest on the purchase money at 5 per cent. until completion.

After the contract was signed, the defendant Swan inspected the property, and found that the improvements, necessary for

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working so large an estate, were all situated in the 10,240 acres, and not, as he alleged to have been represented to him by the vendor, upon the other part of the estate. It is immaterial to inquire how far his complaint was justified, or what rights he had under the circumstances, for he elected to go on with the purchase subject to the terms of a further agreement dated 28th November, by which it was agreed that the lease to the vendor of the 10,240 acres should not be executed by the purchaser until the vendor should have erected certain improvements on specified parts of the other 90,000 acres. This agreement contained also a minor stipulation as to the rent to be paid by the vendor in respect of the 10,240 acres, but contained nothing to qualify the vendor's right to retain possession of that area on lease.

The plaintiff in his evidence said that it was agreed at the time of signing the agreement of 28th November that the purchaser was to have the right of using certain improvements on the 10,240 acres until the new improvements were completed. The purchase was completed in January 1906 by transfer of the land and delivery of the stock, plaintiff remaining in possession of the 10,240 acres. Some delay occurred in the erection of the improvements stipulated for by the agreement of 28th November. The purchaser became dissatisfied at this delay and claimed to fix a time for the completion of the improvements, at the expiration of which time he claimed to have not only the legal but the equitable title to the whole of the 100,000 acres, free from any obligation to grant a sub-lease of the 10,240 acres. The vendor thereupon interfered with the purchaser's stock, and excluded them from the use of the improvements upon the 10,240 acres. In respect of this interference the purchaser (with whom the other appellant, Wheatley, was then associated) brought an action against the vendor described in the statement of claim as an "action for trespass and for wrongful impounding." The plaintiff thereupon brought this suit, claiming specific performance of the agreement to grant him a lease of the 10,240 acres, and an injunction to restrain the action. On an interlocutory motion the Court ordered that the defendants should be at liberty to sign judgment in the action, but should be restrained from proceeding to assessment of damages. The defendants by their defence

denied the plaintiff's right to specific performance altogether, contending that he had lost it by delay in performing the agreement of 28th November. They further contended that the improvements stipulated for in that agreement were not completed, so that the suit was in any view premature. On the latter point the learned Judge of first instance found the facts against them, and his judgment on this point is not contested.

Upon the main point he was of opinion that in substance, though not in terms, the 10,240 acres were exempted from the sale, and that the plaintiff was entitled to retain possession of that area, and that any delay in the completion of the improvements stipulated for by the latter agreement did not go to the substance of the transaction and was no answer to the claim (see *Oxford* v. *Provand* (1).) He therefore decreed specific performance. He also granted a perpetual injunction against the action at law, thinking that the defendants had no right at all over the 10,240 acres, but without prejudice to any right of action that they might have against the plaintiff in respect of delay in completion of the improvements.

From this decision the present appeal was brought.

Dr. Cullen K.C. (*Brissenden* with him), for the appellants. The injunction was wrongly granted. The agreement gave the right of possession to the appellants, and the transfer put them in possession. The right to retain the 10,240 acres given by the agreement did not leave the vendor in possession of that area. The condition must be construed in the light of the rest of the agreement and the circumstances, and it will not be assumed that the parties intended to do what the law will not allow, *i.e.*, to divide the leasehold. The right of the vendor was a right to have a lease under certain circumstances, but in order to give a lease the appellants must be deemed to have possession. The second agreement postponed the vendor's right to have a lease and made it conditional upon improvements being erected. Those improvements were to be erected within a certain time, and time was of the essence of the contract, because the improvements were necessary for the working of the station. The words "lease shall not

(1) L.R. 2 P.C., 135.

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be executed" are ambiguous. They may refer either to the mere sealing and signing of a document or to the granting of the lease. Extrinsic evidence may be given to show what the parties meant: *Friary Holroyd and Healey's Breweries Ltd.* v. *Singleton* (1); *Tatham, Bromage & Co.* v. *Burr*; *The "Engineer"* (2); *Southland Frozen Meat and Produce Export Co.* v. *Nelson Bros. Ltd.* (3). The Judge excluded from consideration the circumstances under which the agreement was made, and looked at the documents alone. Even if under the first agreement the vendor was entitled to retain possession of the 10,240 acres, which the appellants do not admit, that agreement was displaced by the agreement of November, under which the vendor had no right to possession until he erected the improvements and obtained the sub-lease. The action was therefore rightly framed in trespass and the vendor had no defence in law; and had no defence in equity because he had not done that upon which his right to a lease depended. At the highest the vendor's right to the 10,240 acres would be that of a joint owner, which would not give him any right to interfere with the purchaser's use of the land. [He referred to *Roscoe, Nisi Prius Evidence*, 16th ed., p. 939.]

Having failed to erect the improvements in time the purchaser had disentitled himself to specific performance of the agreement for a sub-lease.

[GRIFFITH C.J.—We are all of opinion that the plaintiff is entitled to a lease of the 10,240 acres. The only question is whether any terms should be imposed on him.]

Lingen (*Hammond* with him), for the respondent. The evidence shows that the appellants are entitled to little or nothing in the way of damages. If they were asking for an inquiry they would have to show that there was some damage. The respondent never surrendered possession of the 10,240 acres. The only right the appellants had to go upon that area was under a licence from the respondent. The property sold did not include that area, as appears from the word "retain" in the con-

(1) (1893) 2 Ch., 261. (2) (1898) A.C., 382.
(3) (1898) A.C., 442.

dition. In its natural meaning that word imports a continuing in possession. The physical possession was never changed. The second agreement did not cut down the respondent's rights in this connection. If it had been intended by that agreement to deprive the vendor of his rights of property as to the 10,240 acres it should have been clearly stated. The respondent was not bound to plead this defence at law. Having a contract enforceable only in equity, he was entitled to assert any legal rights he might have in the same suit. As the Court had to deal with the matter in part it should deal with the whole. The respondent was therefore entitled to an injunction restraining the action at law. [He referred to *Equity Act*, No. 24 of 1901, sec. 8; *Rich, Newham, and Harvey, Eq. Practice*, p. 6; *Birmingham Estates Co.* v. *Smith* (1); *Duke of Beaufort* v. *Glynn* (2).] Any right that the appellants might have to compensation or indemnity could be dealt with in the suit. [He referred to *Oxford* v. *Provand* (3).]

The question as to the injunction is only subsidiary to the question of the right to specific performance, and if the Court is against the respondent as to the injunction, the order as to costs should be in favour of the respondent, except so far as they have been increased by the unsuccessful issues: *Jenkins* v. *Jackson* (4).

Cullen K.C., in reply. If the respondent has a defence at law he should not have an injunction. The injunction was only granted on his admission that he had no defence at law.

There was no issue as to damages in the equity suit and consequently it was not necessary to prove any, except so far as to show how the respondent had treated the appellants.

As to costs, the matter most seriously contested was the question of injunction, and whoever succeeds on that should have the main costs of the appeal.

Cur. adv. vult.

The following judgments were read:—

GRIFFITH C.J. [Having stated the facts up to 24th October May 18.

(1) 13 Ch. D., 506.
(2) 3 Sm. & G., 213.
(3) L.R. 2 P.C., 135.
(4) (1891) 1 Ch., 89.

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1905 and referred to the 9th and 12th conditions of the agreement of that date, continued:] Under this agreement it was clearly the intention of the parties that the vendor should continue in possession of the 10,240 acres, although he would no longer be a tenant to the Crown, but a tenant to Swan. It was also their intention that the vendor should have a formal lease. These, in my opinion, were two distinct and independent stipulations, for breach of either of which an action could have been brought. Having regard to the nature of the property, the stipulation as to possession was obviously of much greater immediate importance to the vendor than that as to title, which was in one sense subsidiary only. It is, therefore, impossible to hold that the right to possession was dependent upon the execution of the sub-lease. [His Honor then stated the terms of the agreement of 28th November as already reported and continued:] Although Swan would not accept the plaintiff's version of the facts as to the verbal agreement of 28th November it must be taken upon the evidence that such an agreement was in fact made and was in fact partly performed. [His Honor then stated the rest of the facts, as already reported, and continued:]

So far as regards specific performance, I think that the learned Judge was clearly right. The only effect of the second agreement was to postpone the plaintiff's right to a formal title, but, as already said, it contained nothing to qualify his right to possession. Nor am I able to find on the face of it anything to qualify the nature of his possession.

But with respect to the injunction other questions arise. The contemporaneous verbal agreement qualified the nature of that possession to this extent—that the defendants were to be entitled to use certain improvements on the 10,240 acres until the new improvements were completed. An interesting question arises (which was not debated before us) whether this agreement was an agreement relating to an interest in land. (See the cases cited and commented on in *Harris* v. *The Sydney Glass and Tile Co.* (1).) A breach of that agreement, if it was valid at law, would give rise to an action, which might, perhaps, take the form of an action for trespass to the stock lawfully

(1) 2 C.L.R., 227, at pp. 237, 238.

using the land of which the plaintiff retained possession. But the agreement, whether valid at law or not, had been in part performed, and was incident to a contract of which the Court could grant specific performance. The Court could therefore give damages for breach of the agreement. It follows that, while the defendants could not maintain the action for trespass to the land—an action which is founded upon possession—they were entitled in some form of proceeding to claim damages for the unlawful impounding, either by an action at law, founded (whatever its form) upon acts done in contravention of an agreement valid at law, or by proceedings in equity founded upon breach of a verbal agreement which had been partly performed. In either view they ought not to be precluded from asserting that claim in appropriate proceedings. Now, the right to an injunction is founded either upon the ground that the plaintiff had no legal defence but had a good equitable defence to the action, or upon the ground that the Court of Equity, having assumed jurisdiction over the matter, would do complete justice between the parties: *Duke of Beaufort* v. *Glynn* (1).

In the present case, upon the facts as they appear in evidence, the plaintiff had a good defence at law to the action for trespass to land, and had no defence in equity, whether or not he had at law, to the claim for damages for wrongful impounding. The injunction, therefore, can only be justified on the second ground. The exercise of this jurisdiction is, however, discretionary. In the present case it might have been invoked by the defendants on the ground that a plaintiff seeking equity must do equity, and that they, perhaps, will not be entitled to recover in the action all that the Court of Equity would give them on an inquiry as to damages. The defendants, however, are content with their judgment, and do not desire to have an inquiry before the Master substituted for it. Under these circumstances I think that the decree must be varied by omitting the direction for an injunction. The order for costs should be varied by giving the plaintiff the costs of suit, except so far as they have been increased by the claim for an injunction.

(1) 3 Sm. & G., 213, at p. 226.

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BARTON J. As to the meaning of the two written contracts between the parties, I am entirely in accord with the Chief Judge in Equity. The agreement of 24th October 1905 does not purport to include what is called M. E. Rawsthorne's block in the sale, although it includes it in the mere transfer. But the respondent held the whole of "Dine Dine" under one lease from the Crown. Under the Statutes applicable, the leasehold itself could not be divided so as to exclude the Crown lease of Rawsthorne's block of 10,240 acres for the respondent. It was necessary, therefore, to put the legal estate in the appellant Swan as to the entire holding of 100,680 acres, and the only practical way of ensuring that the legal estate in Rawsthorne's block should in effect not pass from the respondent at all was to provide that he should have a sub-lease back from Swan, and that, simultaneously with the transfer of the whole to Swan, Rawsthorne was to retain, *i.e.*, keep, the block, but on lease, *i.e.*, sub-lease; in other words, he was not to lose possession of it, but was to have his title evidenced by a formal sub-lease from his purchaser. And there was no conceivable reason, at that stage, why the two formal evidences of title, Rawsthorne to Swan and Swan to Rawsthorne, should not be completed *uno ictu*, so that the execution of the sub-lease should immediately follow that of the assignment. That, in fact, was under the circumstances the natural way of giving effect to the two expressions, "retain," and "on lease." I may here observe that this agreement uses the word "retain" in precisely the same sense of keeping possession, in the only other place where it occurs—the schedule. Speaking of the cattle, it is there agreed that "the vendor may at his option *retain* these on allowing the purchaser £3 per head for same." Further illustrations of its use and meaning—if illustration be needed—are found in the contract of sale by the appellants to Rogers of August 1906, paragraph 18. I am not able, then, to adopt the view that the mere insertion of the words "on lease" alters the meaning of the phrase so as to take away the respondent's existing right of possession, (which, on the facts, I think he exercised continuously after as well as before the contracts), and vest it in his purchaser Swan until a lease should in fact be executed. But it is contended that some such effect is produced by the second agree-

ment, that of 28th November 1905. This document was executed as a settlement of differences between the parties to the first agreement. The appellant Swan charged the respondent with having before the sale represented certain improvements as being on the leasehold sold to him, the truth being that they were on Rawsthorne's block. We have not to determine who was in the right in this dispute, since it is common ground that the agreement of November 1905 was made in settlement of it. We are left to infer, however, that the respondent deemed it to his interest to make some concession to the appellant Swan, for he agrees with him that the sub-lease to the respondent of Rawsthorne's block shall not be executed by the purchaser (Swan) until the vendor shall have placed certain improvements on the freehold (transferred to Swan) surrounding a tank known as Mackenzie's, and these improvements are no doubt to be in substitution for those which were found to be on Rawsthorne's block, and which, therefore, had not passed to the appellant Swan. Upon this document the appellants contended that, read with the first agreement, as it of course must be, it postponed not only the respondent's right to claim the legal estate by way of the sub-lease until the completion of the agreed improvements, but also postponed his right of possession until that time. I am quite unable to agree with that contention. It does not appear to be supported by any part of the agreement of November. On the completion of the original contract and the execution of the transfer of the leasehold, the respondent, already in possession of the block he had retained, would have been entitled *eo instanti* to his sub-lease. There is no word in either agreement to interfere with his possession or his right to it, and I cannot see anything from which an intention to interfere with it should be inferred. He agreed to the postponement of the execution of his sub-lease as a security to Swan that he would make the improvements, and until their completion he was to submit to a very real detriment by suspending his claim to the evidence of his legal right. Upon the original sale and transfer, Swan, the purchaser of 90,440 acres of leasehold and other lands, became also trustee for Rawsthorne, the vendor of these lands, in respect of this block of 10,240 acres, included in the legal transfer, but not in the substantive sale. The creation

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of the trust did nothing in impairment of his possession or his beneficial ownership, and as for the legal estate, that was at his call, under the first agreement as soon as the assignment of "Dine Dine" should be executed, and under the second agreement, as soon as the improvements should be completed.

The learned Chief Judge has found that the improvements were completed before the institution of this suit, but whether within a reasonable time or not, he did not determine, nor was it necessary for him to do so. It appears to me that there is no answer to the respondent's claim to an order for specific performance of the agreement for a sub-lease, without prejudice to any right of the appellants to bring an action for damages for delay as to the improvements.

Now, as to the appellants' action for trespass to land and for wrongful impounding of their stock by the respondent. As the appellants never acquired a right to the exclusive possession of Rawsthorne's block, they cannot successfully sue the respondent for interfering with a possession which was not theirs, and an injunction was so far unnecessary. But as to the wrongful impounding, the case may be otherwise. The respondent in his evidence says:—"The day that I signed the last agreement" (28th November 1905) "the defendants were to have the right to use my yards in M. E. Rawsthorne's block until the new ones were made." Speaking of the same date, and of Wheatley's suggestion that he should remove the improvements from Rawsthorne's block to Mackenzie's freehold, he says:—"I agreed to remove them . . . I also agreed that he could have the use of the sheep-yards on M. E. Rawsthorne's portion." This verbal agreement was contemporaneous with the agreement of 28th November, and seems to have been received in evidence without objection. Although it is difficult to say that an agreement by the respondent to allow the appellants to use his yards, &c., pending the construction of the new improvements, is to be inferred from the writings, still the evidence quoted goes to show that the stock impounded were on the respondent's land by his own leave, so far at least as the user of his yards, &c., but not necessarily of his pasture, was concerned.

As far as we can now see, therefore, while the respondent is

not liable at all for trespass to land, yet probably he is without defence at law to the action for wrongful impounding, and he could not set up any defence at all in equity.

The appellants' counsel is satisfied to keep his judgment at common law, which he can only maintain as to the impounding, and does not wish an inquiry in equity as to damages on that score. He prefers a dissolution of the injunction.

In these circumstances, I agree that the variations proposed by the Chief Justice should be made in the decree both substantively and as to costs.

O'CONNOR J. As to that portion of the decree which directs specific performance of the original contract, I entirely concur in the view taken by the Chief Judge in Equity. As soon as the agreement of 28th November 1905 was performed the respondent was entitled to have a sub-lease of the 10,240 acres executed and handed over to him by the appellant Swan. The learned Judge, having found as a fact that before the commencement of the suit all the work contracted to be performed under the agreement had been completed, was bound to decree, as he did, specific performance of the original contract.

The portion of the decree, however, by which the appellants were restrained from further proceeding on their common law judgment, stands upon a different footing. We have before us no more particular information about the form of the common law action than that it was for trespass and wrongful impounding, but I gather from the pleadings and evidence in this suit that it claimed damages for trespass to land and also for the respondent's wrongful interference with the appellants' sheep. The learned Chief Judge treated the action as being for trespass to land, and founded that part of his decree on the view which he took of the respondent's right to possession of the 10,240 acres having regard to the terms of the original contract. In my opinion, the matter cannot be disposed of in that way. Apart altogether from his rights under the original contract, the verbal agreement made contemporaneously with the contract of the 28th November 1905, which I agree with my learned brother the Chief Justice must be taken to have been established in evidence, gave the appel-

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lants certain rights over the stock-yards, paddocks and other conveniences on the 10,240 acres necessary for the working of the station, and secured those rights to them until the improvements contracted to be made under the second agreement were completed.

Questions might have been raised under the *Statute of Frauds* as to whether we can give effect to the verbal agreement. No such questions have been raised, but if they had been, I agree that, having regard to the facts in this case, the Court would be entitled to treat the agreement as being good by reason of part performance. The alleged interference with the appellants' sheep in violation of that agreement would give the appellants a right of action for wrongful impounding and trespass to goods which appears to be unanswerable. As to that part of the action the respondent would seem to have no more defence in equity than at law, and I can therefore see no ground upon the documents or evidence which would justify the Court of Equity in preventing the appellants from proceeding for that cause of action. But apart from that aspect of the case, I am of opinion that the original contract and that of the 28th November, interpreted in the light of the circumstances which arose, gave the appellant Swan certain rights of possession over portion of the 10,240 acres, and that, in the events that happened, he was entitled to sue the respondent at law for a disturbance of those rights. Under the original agreement the whole 10,240 acres are included in the description of the property sold. Clause 9 expressly provides that "if from any cause the matter is not ready for completion on the date named the purchaser shall be entitled to take possession as tenant to the vendor at a nominal rent pending completion. And the purchaser from the date of taking possession shall pay interest to the vendor on the unpaid purchase money at the rate of five pounds per centum per annum." That clause, except so far as it may be modified by clause 12, applies as well to the 10,240 acres as to the rest of the lands purchased. Clause 12 in its opening words also treats the 10,240 acres as part of the lands sold, but stipulates that, in so far as that part is concerned, the vendor is to be entitled to retain the same on lease at a rental proportional to the average rental of the whole lease sub-

ject to compliance with certain provisions of the *Western Lands Act*. Later on it provides that the purchaser shall give the vendor a lease of the 10,240 acres at a rental proportionate to the rental of the whole government lease, and for the same term. It is also material to observe that the terms of payment are a cash deposit on signing the contract and the balance by cash on completion.

Following the ordinary rule of interpretation, effect must be given as far as possible to each clause of the contract. To my mind it is quite clear that the 12th clause gives the respondent a right to remain in actual possession of the 10,240 acres, and that his possession is not to be disturbed except in so far as may be necessary to give effect to the other portions of the contract. On the other hand, the provisions of the 9th clause cannot be ignored. They clearly give the purchaser a right of possession in the event of any delay in completion over the whole of the property, including the 10,240 acres. Effect can be given to both clauses by reading clause 9 as giving the purchaser a formal right of possession to the 10,240 acres on 1st December 1905 for the purposes of vesting a title by sub-lease to the vendor, such possession to be divested immediately on completion when the sub-lease was to be executed, and contemporaneously with taking possession handed over to the respondent.

But then arose a position which made it essential, if the purchase was to be gone on with, that both parties should be in possession of at least a portion of the 10,240 acres, because, without the use of the yard and other working conveniences on the 10,240 acres, it would be impossible for the appellants to carry on the property. Then the agreement of 28th November was entered into postponing the date for conferring title on the respondent until after he had carried out the work necessary to make the property workable as under the original contract. That agreement, in deferring the time for conferring title on the respondent by sub-lease, was intended by the parties, in my opinion, to extend the purchaser's merely formal legal possession into an actual and effective possession for the purposes referred to until the time arrived when the respondent by completion of the work was entitled to have the sub-lease handed over to him. Both parties, therefore, were entitled to a qualified possession at the

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same time, and to that extent the respondent's rights of possession were modified by the agreement of 28th November. The appellants therefore being entitled to the undisturbed possession of so much of the 10,240 acres as might be necessary for the working of the property purchased, they were entitled to claim damages in an action for the respondent's interference with that possession. And although the form of the action in trespass may not have been appropriate, I can see no ground on which the Court of Equity was justified in preventing the appellants from enforcing their claim at common law in some form for these damages. I agree that it would have been within the power of the Court, in the exercise of its discretion to decree specific performance, to make its order dependent upon the vendor's compensating the purchaser for any delay of which he might have been guilty in the carrying out of the second agreement. But the appellants could not be allowed to retain their judgment at common law and also to have the benefit of that condition.

As they prefer to rest on their judgment, it becomes unnecessary to further consider that aspect of the case.

In the result, therefore, I agree in the conclusion at which my learned brother the Chief Justice has arrived, that the decree must be varied in so far as it enjoins the appellants from further proceeding in their action at law, and also as to the costs as mentioned in his judgment.

ISAACS J. I agree in the conclusions stated by my learned brothers, but I arrive at them for somewhat different reasons. This case does not appear to me to present any serious difficulties either of construction or of law. Mr. Rawsthorne, the respondent, was the owner of a station called "Dine Dine" consisting of 960 acres of freehold and 100,680 acres of leasehold under a Western Lands lease issued to him under the Act of 1901, No. 70. The appellants, Messrs. Swan and Wheatley, were also pastoralists, and on 24th October 1905 entered into a written contract with the respondent for the sale and purchase of the station. The first question is as to the respective rights of the parties immediately that contract was signed. In view of the arguments of the respondent, I find it necessary to make one or two preliminary

observations. The first is, that the only intention of the parties which the Court can ever find and enforce is that embodied in the language which the parties themselves have used. The other is, that—though surrounding circumstances may be looked at in order to understand the subject matter of the contract and the situation of the parties so as, in the words of *Wigram* V.C., quoted by *Lindley* L.J. in *Dashwood* v. *Magniac* (1), to give to "the reader of any instrument the same light which the writer enjoyed," and so as to understand the application of the words used—yet they cannot be regarded for the purpose of altering the plain meaning and effect of ordinary unambiguous words which the parties have chosen to employ. There are few propositions which the Courts of highest authority have more strongly emphasized. See *per* Lord *Hatherley* and Lord *Blackburn* in *Inglis* v. *Buttery* (2); *per* Lord *Davey* for the Judicial Committee in *Bank of New Zealand* v. *Simpson* (3), and again by the same learned Lord in *Higgins* v. *Dawson* (4). With these guiding principles I turn to the contract itself.

There are no technical terms to be construed, and we know without any controversy the subject matter of the contract and the position of the parties. The contract is headed "Conditions and Terms of Sale for the undermentioned property." The property is described below as "Property known as Dine Dine . . . . area 960 acres freehold land 100,680 acres lease land under the *Western Crown Lands Act* of 1901. Also 7,800 sheep, 50 cattle, horse, dray and harness," &c. That is the property sold. When the 100,680 acres are mentioned, it does not, of course, mean the fee simple of those lands, but it means the whole Western Lands lease is to be bodily transferred by Rawsthorne to Swan without excepting any land whatever comprised in it. That is the first important point to bear in mind. Clause 9 of the contract has been substantially set forth by the learned Chief Justice. The meaning of that is not a matter of doubt. 1st December 1905 was the day fixed for completion, and time is stated to be of the essence of the contract. That might have had serious consequences in the event of any inability to complete by the day named

(1) (1891) 3 Ch., 306, at p. 355.
(2) 3 App. Cas., 552, at pp. 558, 576-7.
(3) (1900) A.C., 182, at pp. 187-8.
(4) (1902) A.C., 1, at p. 10.

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and so the clause went on to provide an interim status for a possible difficulty, viz., that if the matter were not ready for completion on the day fixed the purchaser should be admitted as tenant to the vendor *pending completion*, and the purchaser should from the time of admission pay interest on the unpaid purchase money at 5 per cent. This clause, though providing for a possible tenancy of purchaser to vendor, has no bearing on the present dispute, its effect not extending beyond the time of completion, nor extending beyond the portions of the land which the contract intended should be permanently in possession of the purchaser. Clause 12 is the field of controversy. Notwithstanding the complete change of ownership as Crown leaseholder of the whole 100,680 acres, this clause makes specific provision as to the 10,240 acres of Homestead lease, as it is called, that is M. E. Rawsthorne's block, and, as the fight has largely centred around the words of the clause, it is desirable, I think, to draw special attention to some of its very distinct terms. It states the bare fact in describing the 10,240 as "part of the lands above referred to," that is, part of the lands described as property known as "Dine Dine," and lower down it repeats that "the said 10,240 acres are included in the total area of the lease of 100,680 acres." I should have thought that no form of language could possibly make clearer the fact that the 10,240 acres were included in the property sold, and were not excepted from the sale, and that a conclusion that the 10,240 acres were excepted from sale was utterly inconsistent with the unambiguous words of the written agreement.

But because the 10,240 acres were by the terms of the contract sold by Rawsthorne, and as he evidently desired not to part with possession of that block, he agreed by the 12th clause that he, the vendor, should be entitled to "retain same on lease" at the same average rental as the whole lease. Even this was "subject to compliance" with the Act. The clause declares that "the purchaser shall give the vendor a lease of same at a rental," &c., "such lease to contain all the covenants," and so forth.

Every syllable appears to me to strengthen the view that, except for any rights the respondent was to have as lessee, he had no further interest in the 10,240 acres. He is styled the

vendor and the appellant Swan is called the purchaser of that portion no less than of any other; Rawsthorne was "entitled," but not bound, to retain it on lease; and if he for any reason chose not to accept it, who could doubt that the purchaser would retain it unfettered?

What then was the legal effect of this document immediately it was signed?

I diverge for a moment from the consideration of this contract to inquire as to the nature of the Western Lands lease. The lease itself is not in evidence, but the terms and conditions of the lease may be gathered generally from sec. 18 of the Act, and Schedule A. The law does not allow such a lease to be split up as between the Crown and the lessee, but the regulations 31 and following made under the Act permit of a complete transfer, which brings the transferee into direct relation with the Crown as to the whole land comprised in the lease, and entirely eliminates the original lessee. A simple transfer without condition would have destroyed every right of the respondent to and in respect of the land. And therefore assuming, as we must assume from the contract itself, that his desire and intention were still to remain in possession of the 10,240 acres, there was only one way known to the law which would enable him to effect his object. But that very method necessitated his parting absolutely and forever with his then existing title to the land, and ceasing to be the owner of the whole lease. He was forced to this by stress of circumstances it is true, but that fact does not alter the legal effect of what was done. Instead of his independent title to the land direct from the Crown, he agreed to surrender that title to Swan, and then to take a new and altogether different title to the land—namely, a lease, or properly speaking a sub-lease, from the purchaser, the new owner of the lease. That sub-lease was to be henceforth his only title to the land. He was to "retain" an interest in the land, because that is what I think is meant by retaining the land on lease; "retain on lease" being equivalent to "hold without interruption on lease." Nothing was said about the right of possession because that would follow the interest, and could not have been intended to exist independently of it. The respondent has argued on the basis—fallaciously

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as I think—that retaining on lease includes retention of possession independently of any interest. As the original contract stood he was safe enough. The transfer of his lease was to be synchronous with the giving of the sub-lease, so that there never would be an appreciable period of time when he would be without some sufficient title to remain; in other words, he would retain the land, but retain it on the only terms consistent with the contract, namely "on lease from the purchaser." The lease was to be immediate; and unless the purchaser was prepared to give it at once, the vendor would refuse to part with his full ownership. One feature may be specially adverted to at this juncture. His retention of the Homestead lease necessarily connoted exclusive possession, it was inconsistent with any joint possession, or any possession other than his own. Unless the subsequent agreement altered the nature of that possession, it must necessarily, so long as it lasted, preserve that exclusive character throughout. Had no subsequent friction arisen, the original arrangement would have worked out well enough.

Unfortunately, before 1st December, the date of completion, disputes arose, and as the learned primary Judge has found, the appellants threatened to rescind for alleged misrepresentations with respect to the improvements on the lands, and so on 28th November 1905 a second agreement was entered into which modified the first in relation to the 10,240 acres. That agreement has been read. I doubt extremely, but decide nothing as to whether Rawsthorne was bound to execute improvements any more than he was bound to take the lease; but he was no longer "*entitled*" to the sub-lease immediately on executing the transfer of the lease, nor until he had effected the stated improvements. He nevertheless insists that he had a right to *retain* the paddock of 10,240 acres. By what title? Not that of owner, for he had parted with it. Not that of lessee, because his right to it was postponed. He says, however, it was by reason of the contract alone, and notwithstanding he had then no title and no right to have a title. To enable him to stand in this anomalous situation he must needs divorce the words "on lease" from the word "retain," and then contend that to retain the land meant to retain, not an interest in it, but mere possession, and then

argue further that, although he might considerably delay the improvements, in other words delay making good his alleged representations, which nearly caused the rescission of the whole contract, he could, at least in the meantime, still retain the land, without a title and without a lease, without any obligation to pay rent, and without any implied duty to pay for use or occupation. Indeed, if the contention of learned counsel for the respondent be sound that the right to the lease was immaterial to the right to possession, the latter standing independently, I see no reason why his client would not be entitled to retain the land even though, by wilful and protracted delay, he had lost all right to specific performance of the agreement by the appellants to give a lease. In such case he would refrain from seeking specific performance and simply go on without a lease and enjoy possession of the land without a title. He could never be turned out if his contention be correct, because he had received an irrevocable licence to remain. The situation, if correct, is extraordinary. The appellants would, of course, in the meantime be bound to pay to the Crown the rent for the whole area, and be liable to all the conditions of the lease, and their only satisfaction, and perhaps their only remedy, would be to delay the actual signature of the sub-lease, which, to a man desiring, as the plaintiff's whole case assumes he desired, not to leave the place was of no serious moment, and some pecuniary gain. The contention seems to me unreasonable and unbusinesslike; but in addition it is, in my opinion, legally unsound. Without the lease Rawsthorne was for the time an utter stranger to the land, and with nothing more than a personal contract, entitling him in a certain event, and in that event only, to get an interest in the land. By the first agreement his occupation would have been continuous, because, giving full force to the word "retain," and to the words "on lease," he would have stepped instantly from one title to the other.

The new agreement however deferred the commencement of his leasehold title, leaving a gap between the old title and the new, and thus breaking the legal chain of right to have possession of the land. At law clearly he had no right to be there; equity could not relieve him because his contract unfulfilled debarred

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him claiming any legal title. If the consequences proved inconvenient to himself, his own conduct was the cause of it.

I agree with Dr. *Cullen* that, not only had the respondent no exclusive right of possession, but that he had no concurrent right. In my opinion, one or other of the parties had the right to be in possession of the land, but not both. Either the appellants could remain by reason of their legal title, unaffected by any equity giving Rawsthorne the right to immediately enter and exclude them; or else Rawsthorne had his old right to retain the land unimpaired, having only to wait for his former legal title in the shape of a lease, and this original right was, as I have said, clearly exclusive. There cannot, as I apprehend the matter, be any *via media*. Neither party apparently thought there was. There is nothing in the second agreement to alter the original meaning of the word "retain." The respondent's own argument is that the postponement of the execution of the lease did not affect the question of possession, and if so, it left that matter just where it was under the first agreement. In other words, the possession remained exclusive. If, however, it did alter the question of possession, why did it alter it? Only because title or no title made all the difference, and that simply affirms the appellants' view. To give an intermediate effect to the transaction might be very reasonable or unreasonable—I do not know—but it would, in my opinion, be making a new bargain for the parties, and not interpreting the one they made for themselves.

Possession in fact was given generally to Swan in January 1906—after transfer and payment—though Rawsthorne kept some stock in the disputed paddock all the time. But in August 1906 and some time later, but before Rawsthorne by completing the improvements had become entitled to his sub-lease, he asserted a right to exclusive occupation by turning the appellants' cattle out and threatening the servant in charge of them.

For this the appellants brought an action of trespass. Their right to do so must be judged of as at the moment the acts complained of were committed, and at that instant Rawsthorne had no title at law or in equity to possession. Where two rival claimants for possession are on the land together, actual possession is considered in law to vest in him who has the legal title. The

other is a trespasser. (Per *Maule* J. in *Jones* v. *Chapman* (1); per Lord *Selborne* in *Lows* v. *Telford* (2)). This is, of course, subject to any contractual variation, and if he had had an immediate right to a lease equity would treat him as being in upon the terms of it: *Walsh* v. *Lonsdale* (3). But only in that case. Here, as I have endeavoured to point out, the essence of both the old and the new contract is to make possession depend on title.

I am, therefore, of opinion, looking at the written contracts, that the respondent had no right whatever to stay the action at law for damages. There are some passages in the evidence which, independently of the documentary agreements, might appear to expose the plaintiff to an action—not for trespass to land, but either for trespass to sheep, or for breach of agreement to allow the sheep to remain on M. E. Rawsthorne's block. The main passage is that in the plaintiff's own evidence in which he alleges that on the day he signed the last contract the defendants were to have the right to use his yards in M. E. Rawsthorne's block until the new ones were made. If that were all, and if it were clear that the sheep were impounded because they were put into the yards referred to and nothing beyond, some action would undoubtedly lie on the plaintiff's own admission, and quite apart from any difficulty either as to the construction of the written contract, or as to staying the action at law because of the matter of title to land being submitted to a Court of Equity.

But the parties did not refer to this phase of the case, and I do not feel safe in basing any judgment upon it for the following reasons:—First, the defendant Swan in his evidence point-blank denies it. He says "It is not true that the day the contract was signed it was agreed that we were to have the right to use the plaintiff's yards on M. E. Rawsthorne's block until the new ones were made." After that he could scarcely be allowed to set up such a contract. Next the plaintiff says that after the verbal agreement as to the use of the yards, Wheatley asked his son to "draw up an agreement to that effect," and he continues "Leslie Wheatley then left the room and returned with the contract.

(1) 2 Ex., 802, at p. 821.
(2) 1 App. Cas., 414, at p. 426.
(3) 21 Ch. D., 9.

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Leslie Wheatley read it over and I signed it and then Swan signed it."

It seems to me, therefore, that everything merged in the written document, and the conversation as to the use of the yards must, in the absence of any claim to rectify the document, be treated as mere negotiation. But, further, the block consisted of three paddocks—Tallebung, the Well paddock and Bald Hill paddock. It is not at all clear to me where the sheep were impounded from, whether because they used the yards or because they were using the Well paddock apart from the yards. Reading Collett's evidence and Leslie Swan's evidence in addition to that of the plaintiff's, I incline to think they were impounded because of the defendants' insistence upon using the Well paddock. I do not know sufficient of the facts to say definitely, because the parties were not contesting that with a view to elucidate the precise features of the alleged trespass. They were only incidental to the suit, and I rest my judgment on the meaning and effect of the documents.

With regard to specific performance I think that, having effected the improvements under the circumstances related in the evidence and found by the learned primary Judge, the respondent is entitled to get his sub-lease: see *Oxford* v. *Provand* (1). Though that right came too late to justify his trespass, he has it now, and it should be given effect to. The Court of Equity can do complete justice with regard to loss occasioned by delay, and can adjust the rights of the parties by means of compensation and otherwise so as to place them in as good a position relatively as if the contract had been properly carried out, according to its very terms; but the trespass already spoken of is quite outside this sphere of consideration, and cannot, as I think, be dealt with in the suit for specific performance.

Decree varied.

Solicitors, for the appellants, *Houston & Moses.*

Solicitors, for the respondent, *Whelan & Gilcreest* by *Russell & Russell.*

C. A. W.

(1) L.R. 2 P.C., 135.