[HIGH COURT OF AUSTRALIA.]

FRANK JOSEPH LAPPEN MEASURES . APPELLANT;
DEFENDANT,

AND

MARY McFADYEN . . . . . RESPONDENT;
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 9, 12, 13, 16.

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

Real Property Act 1900 (*N.S.W.*) (*No.* 25), *secs.* 51, 52—*Landlord and tenant—Transfer of land—Breach of covenant by lessee—Right of transferee of land to sue lessee for breach of covenant in lease which is complete before transfer—Covenant to erect and complete alterations forthwith—Meaning of "forthwith."*

Practice—Pleading—Damages assessed generally upon good and bad counts—Trial de novo—Costs—Admission by party at trial—Defendant mistakenly admitting liability—Defect appearing upon the record—Appeal.

A right to sue for damages for a breach of covenant, not being a continuing breach, which is complete before transfer, does not pass to the transferee of land under secs. 51 and 52 of the *Real Property Act* 1900. The object of the Act was to transfer the estate or interest of the transferor in the land with all the rights incidental to present and future possession, but not mere choses in action in respect of past and completed breaches of covenant.

A lessee covenanted to erect and complete alterations and additions of the value of £500 upon the demised premises, and to execute perform and carry out such alterations and additions "forthwith."

Held, that the word "forthwith" in this covenant could not be extended to include a period of 21 months after the date of the lease.

Where damages have been assessed generally upon a good and bad count, the practice at common law is to direct a trial *de novo*, and not to give either party the costs of the first trial.

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Where the plaintiff's right to recover has been admitted at the trial, but by reason of a defect appearing on the record, which is incurable, it is shown that the plaintiff's claim is untenable, the defendant is not precluded from afterwards taking this objection by application to arrest judgment, or for a trial *de novo*.

Decision of the Supreme Court of New South Wales: *McFadyen* v. *Measures*, 10 S.R. (N.S.W.), 190, reversed.

APPEAL by the defendant by special leave from the decision of the Supreme Court discharging a rule *nisi* for a new trial upon the following grounds:—(1) That the verdict for the plaintiff was against evidence: (2) That the damages were excessive: (3) That the Judge at the trial should have directed a verdict for the defendant on the pleas of cross-action, or one of them: (4) That his Honor was in error in holding that the plaintiff was entitled to re-enter for non-payment of rent, notwithstanding the absence of a formal demand, and in directing a verdict for the plaintiff on the third count: (5) That his Honor should have held that the breach of the building covenant was not a continuing breach and was waived by the subsequent acceptance of rent: (6) That upon the facts proved the Court of Equity would grant an absolute and unconditional injunction to restrain an action or forfeiture for breach of the building covenant: (7) That no right of action for a past breach of the building covenant passed under sec. 52 of the *Real Property Act* 1900 to the plaintiff by virtue of the transfer to her: (8) That upon the foregoing grounds the Supreme Court should have made absolute the rule *nisi*: (9) That the Supreme Court was in error in holding that the power of re-entry for non-payment of rent implied under sec. 79 (b) of the *Real Property Act* may be exercised without any demand: (10) That the Supreme Court, having held that the plaintiff was not entitled to re-enter for breach of the building covenant in the absence of notice under the *Forfeiture of Leases Act* 1901, should have granted a new trial on the pleas of cross-action.

The facts are stated in the judgment of *Griffith* C.J.

Langer Owen K.C. and *Ferguson*, for the appellant. If the plaintiff relies on the breach of covenant to "forthwith" build, the breach must have occurred before the transfer to her, and she cannot sue for it. The transfer was 21 months after the lease,

and the right to insist on the performance by the defendant of his covenant to build "forthwith" must necessarily have accrued before the date of the transfer. When the right had accrued and was not fulfilled the breach was complete, and the right to sue did not pass to the transferee: *Woodfall on Landlord and Tenant*, 17th ed., p. 287; *Coward* v. *Gregory* (1); *Jacob* v. *Down* (2).

[ISAACS J. referred to *Cohen* v. *Tannar* (3).]

Secs. 51 and 52 of the *Real Property Act* 1900 do not confer on the transferee the right to sue in respect of breaches committed before the date of the transfer. If the plaintiff relies on a continuing breach since the transfer, she has waived the non-performance of the covenant. She accepted rent from the defendant up to October 1908, 2½ years after the lease began: *Hughes* v. *Metropolitan Railway Co.* (4); *McNaghten* v. *Paterson* (5).

The statement on the Judge's notes that counsel for the defendant at the trial "admitted that the defendant had broken the covenant to build, and that for this the plaintiff was entitled to nominal damages" does not preclude the defendant from now raising this defence. This was an admission of law and not an admission of fact. The declaration should be read as alleging a breach after transfer to the plaintiff, and the onus was on her to prove that. [As to the third count and the pleas of cross-action, they also contended that the lessor under sec. 1 of the *Forfeiture of Leases Act* 1901 (No. 66), was not entitled to re-enter or take other action for breaches of the lease without notice to the defendant, and that there must be a demand for rent before re-entry for non-payment of rent can properly be made, but the Court held that it was unnecessary to determine these points.]

Knox K.C. and *G. Martin*, for the respondent. The Court is asked to reverse the decision of the Supreme Court upon a ground not taken at the trial or on the motion for the rule *nisi*. Secs. 51 and 52 of the *Real Property Act* 1900 were referred to by counsel for the plaintiff in his opening. Subsequently it was admitted by the defendant that the plaintiff was entitled to

(1) L.R. 2 C.P., 153.
(2) (1900) 2 Ch., 156.
(3) (1900) 2 Q.B., 609.
(4) 2 App. Cas., 439, at p. 448.
(5) 6 C.L.R., 257.

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nominal damages for the breach by the defendant of his covenant to build. If the sections of the *Real Property Act* applied it was absolutely immaterial for the plaintiff to show when the breach took place. The defendant either knew of this defence at the trial and did not set it up, or it is a mere afterthought. No case has been made out for allowing a concession of this kind, when it is contrary to an admission made at the trial. "Forthwith" means with all convenient speed, and that would be a question for the jury. The Court will not assume that the plaintiff could not have defined the breach more accurately. But after the defendant's admission of liability it was unnecessary for the plaintiff to give any evidence on the point. When a point is not taken at the trial, and evidence could have then been adduced which would prevent the point from succeeding, it cannot be taken afterwards: *Ex parte Firth*; *In re Cowburn* (1); *Connecticut Fire Insurance Co.* v. *Kavanagh* (2); *The "Tasmania"* (3).

If the defendant is allowed to raise this point, secs. 51 and 52 of the *Real Property Act* fully answer it. "Instrument" in sec. 51 means the transfer or certificate of title: *Phillips* v. *McLachlan* (4). On the registration of the transfer the estate and interest of the transferor passes to the transferee with whatever went with it at law. Sec. 52 introduces a modification of the common law rule. It extinguishes the right of the transferor to sue for a breach of covenant prior to the transfer, and confers on the transferee all rights which the transferor previously had to receive damages in respect of the breach. Sec. 51 points to the time of vesting and conveys the estate. Then sec. 52 says if you have an instrument affecting land, and you transfer the land, you transfer all rights affecting that land. "Thereunder" in sec. 52 means under the instrument endorsed on the certificate. As to the plea of waiver, that question was for the jury, and special leave to appeal will not be granted on a question of fact. It was for the defendant to prove he was misled. In any event the defendant should pay the costs as he has caused the mistrial.

(1) 19 Ch. D., 419, at p. 429.
(2) [1892] A.C., 473, at p. 480.
(3) 15 App. Cas., 223.
(4) 5 N.S.W. L.R., 168.

Langer Owen K.C., in reply, referred to *Birmingham and District Land Co.* v. *London and North Western Railway Co.* (1).

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. In this case special leave to appeal was given on the ground that important points of law of general interest arising upon the construction of the *Real Property Act* were involved. In the course of the argument other questions have been raised and discussed, to some of which it will be necessary briefly to advert.

The first count of the declaration was for breach of covenant. It alleged that the plaintiff's husband Donald McFadyen, being the registered proprietor of land under the *Real Property Act*, demised the land with the houses and buildings thereon to the defendant for a term of five years from 1st May 1906 by a memorandum of lease duly registered, which contained a covenant that the " defendant should forthwith erect and complete on the said property certain alterations additions and improvements to the said premises up to the value of £500 at the least, which said alterations additions and improvements the defendant should execute perform and carry out forthwith and complete with all reasonable despatch such alterations additions and improvements to be in harmony with the existing buildings and to be of such construction and materials so as not to deteriorate the value of the said demised property and to be carried out in a workmanlike manner." The count then alleged that the defendant went into possession under the lease, that whilst he was in possession, to wit on 11th February 1908, D. McFadyen by a transfer registered under the Act transferred all his right title and interest in the land to the plaintiff, and that " all things happened and all times elapsed and all conditions were fulfilled necessary to entitle the said Donald McFadyen and after him the plaintiff to a performance by the defendant of the said provision yet the defendant has not performed the same."

The second count is not now material. The third was for

(1) 40 Ch. D., 268.

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breach of another covenant in the same lease, by which the defendant promised to keep the demised property in repair during the continuance of the lease and at the determination thereof to yield it up in good and tenantable repair.

The defendant by his pleas denied the lease, the transfer by Donald McFadyen to the plaintiff, and the breaches alleged, and as to the third count that the lease had been determined before action. He also pleaded by way of cross-action breach of an implied covenant by the plaintiff for quiet enjoyment.

At the trial an equitable plea to the first count was added, by leave, to the effect that by a course of dealings between the parties the defendant was led to believe that the covenant to build "forthwith" would not be strictly enforced, but would be held in abeyance, and that this state of things continued until the plaintiff, without any notice to the defendant, re-entered and evicted him from the land, so rendering the performance impossible.

On this plea the learned Judge (*Cohen* J.) told the jury that if the parties acquiesced in the postponement of the performance of the building provisions, and had not mutually understood that a definite day was fixed for erecting and giving effect to the provisions before 5th December 1909 (the date of re-entry), the defendant should have a verdict. As to this defence it is sufficient for present purposes to say that there was strong evidence to warrant a finding that a postponement had been mutually acquiesced in up to the time of the transfer from Donald McFadyen to the plaintiff in February 1909, that from that time till the following June the defendant was in occupation of the premises as tenant to the plaintiff, and that the subject was not again mentioned before the re-entry.

The jury found a general verdict for the plaintiff with £230 damages. The damages on the third count could not, upon the evidence, have exceeded £10 at the outside. The substantial damages were therefore given in respect of the breach of the building covenant.

A rule *nisi* for a new trial was granted on various grounds, which did not include the point that the breach of the building covenant was complete before the assignment to the plaintiff, and

that an action would not lie at her suit for such a breach. This point was, however, taken by counsel for the defendant on the motion to make the rule absolute, but the Supreme Court thought that it could not then be taken, as the defendant, they thought, had practically, except for the equitable plea, confessed judgment and consented to an assessment of damages. We have not, therefore, the advantage of their opinion on the point. Mr. *Knox* strenuously protested that it should not be allowed to be raised before us. The propriety of allowing the point to be raised under the objection that the verdict was against the evidence depends to some extent upon what took place at the trial, as to which there was some conflict, it being alleged on one side that the point of law was mentioned by the plaintiff's counsel himself, and on the other that the defendant's counsel admitted that he could not rely upon it. But this question is quite immaterial if the point appears on the record. The form of relief called arrest of judgment assumes that at the trial the plaintiff's right to recover has been admitted. And in my opinion the point is distinctly raised on the face of the first count.

The covenant was that the defendant would "forthwith" erect and complete alterations and additions of the value of £500, and execute, perform and carry out such alterations and additions "forthwith." The assignment to the plaintiff was made 21 months after the commencement of the lease. A promise to do an act forthwith does not mean that it is to be done instanter. Sometimes (as for instance in the case of the lease which was the subject of decision in the case of *Coward* v. *Gregory* (1)) the word may be treated as practically synonymous for some purposes (not purposes of construction but for the purpose of ascertaining whether there has been a breach) with "within a reasonable time." The question of what is reasonable depends in every case upon the facts. In cases in which the word "forthwith" may import an inquiry into facts, the only facts which are relevant, so far as regards construction, are those which were in existence and in the contemplation of the parties at the time of making the contract, and not facts which would be relevant to the performance of a subsequent agreement made between them.

(1) L.R. 2 C.P., 153.

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In the present case the question is the same as if an action for breach of the covenant had been brought by Donald McFadyen on 11th February 1909, the date of the assignment, and the defendant had pleaded that a reasonable time for performance had not elapsed before action. In my opinion such a plea would have been bad, because it would have admitted that the defendant had failed to perform the covenant for a period of 21 months, and would therefore have been in effect an argumentative plea that the word "forthwith" might, and under the circumstances did, mean a longer period than 21 months. In my judgment the word "forthwith," as used in the covenant in question, cannot bear that meaning. However liberal an interpretation is given to it, the limit of time must fall short of 21 months. Although it is sometimes difficult to draw an exact line between what is and what is not reasonable, it may be quite clear on which side of the line a particular case falls. The date of the transfer is stated in the first count under a *videlicet*, but when the matter stated under a *videlicet* is material and traversable the *videlicet* makes no difference (1 Chit. Pl., 350). In the present case the date of the transfer is material to the plaintiff's right to sue for the breach and is traversable.

It appears, therefore, on the face of the record that the plaintiff has sued for and has recovered in respect of a breach of covenant committed and complete before the transfer of the land to her. If she cannot do so the verdict cannot stand.

Her right depends upon the construction of secs. 51 and 52 of the *Real Property Act*, No. 25 of 1900.

Section 51 provides that :—

"Upon the registration of any transfer, the estate or interest of the transferor as set forth in such instrument, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee, and such transferee shall thereupon become subject and liable for all and every the same requirements and liabilities to which he would have been subject and liable if named in such instrument originally as mortgagee, encumbrancee or lessee of such land, estate, or interest."

Section 52 (1) is as follows :—

"By virtue of every such transfer, the right to sue upon any

memorandum of mortgage or other instrument and to recover any debt, sum of money, annuity, or damages thereunder (notwithstanding the same may be deemed or held to constitute a chose in action), and all interest in any such debt, sum of money, annuity, or damages shall be transferred so as to vest the same at law as well as in equity in the transferee thereof."

The question is whether the right to sue for damages for a breach of covenant, not being a continuing breach, which is complete before transfer passes by virtue of these provisions to the transferee. The term "transfer" in sec. 51 means the transference of estate resulting from registration, and the word "thereto" refers to the estate or interest transferred. The estate or interest transferred is one thing, and the personal right of action in respect of an antecedent completed breach of contract is another. In my opinion the words of this section are not sufficient to transfer the right to bring an action in respect of such a past breach.

The plaintiff, however, contends that the words "the right to sue upon any . . . instrument and to recover any . . . damages thereunder" in sec. 52 (1) are sufficient to transfer the right. The state of the law before the Act is shown by the case of *Coward* v. *Gregory* (1), and in my judgment these words are not sufficient to alter it. The purpose of the Act was to transfer the estate or interest of the transferor in the land with all the rights incidental to present and future possession, but I do not think that it was intended to transfer also mere choses in action in respect of past and completed breaches of covenant.

For these reasons I am of opinion that the first count is incurably bad in substance. The general award of damages is therefore bad, since it appears that they are much larger than the plaintiff could possibly in law be entitled to recover.

The third count, however, is good. The practice at common law when damages have been assessed generally upon a good and a bad count was, and in New South Wales still is, I suppose, not to arrest the judgment, but to direct a *venire de novo*, now called a trial *de novo*, (see *Lush Pr.*, 3rd ed., p. 643; *Lewin* v. *Edwards* (2); *Emblin* v. *Dartnell* (3)).

(1) L.R. 2 C.P., 153. (2) 9 M. & W., 720. (3) 12 M. & W., 830.

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When a trial *de novo* is awarded, the practice is not to give the costs of the first trial to either party (*Lickbarrow* v. *Mason* (1); *Bird* v. *Appleton* (2); *Edwards* v. *Brown* (3).

Under these circumstances it is not necessary to determine the question whether the verdict of the jury upon the equitable plea could be successfully impeached. It is not, however, the practice of the Court to give special leave to appeal on mere questions of fact.

The question raised upon the third count and the plea of cross-action is of considerable importance, but the utmost sum involved does not exceed a few pounds, and I do not think that the Court would have been justified in giving special leave in this case in order to raise that question only. I think, therefore, that we should not express any opinion upon it.

In mercy to both parties they should have leave to amend as they may be advised.

O'CONNOR J. As I agree with the course proposed to be taken in this case by my learned brother the Chief Justice I shall confine my observations to the important questions of law which have arisen under the first count of the declaration. Leaving aside for the moment the meaning which ought to be attached to the word "forthwith," as used in the lease, it is clear that, when the time has arrived, whenever it may be, for the erection of the buildings, and they have not been erected, the covenant has been broken.

It is also clear that, in the case of a covenant to build, the breach is not a continuing breach. As Mr. Justice *Willes* says in *Coward* v. *Gregory* (4) that kind of covenant can only be broken once for all. It is well settled law that, apart from any statutory provision, the assignment of a reversion does not vest in the assignee a right of action for breach of covenant in the lease committed before the assignment. *Woodfall, Landlord and Tenant*, 17th ed., p. 279. The plaintiff, however, relied on secs. 51 and 52 of the *Real Property Act* as operating to vest in the assignee any cause of action which had accrued under the lease before the

(1) 6 T.R., 131.
(2) 1 East, 111.
(3) 1 Cr. & J., 354.
(4) L.R. 2 C.P., 153, at p. 171.

assignment of the reversion. If that contention is well founded, it is immaterial in an action by the assignee whether the breach occurred while the estate was vested in the assignor, or after it had become vested in the assignee. The interpretation of those sections is therefore the first matter to be disposed of. In my opinion the mere transfer of the freehold estate does not empower the transferee to sue for breaches of covenants in the lease committed by the lessee before the transfer. The words of sec. 52, referring to damages, relied on by the respondent's counsel, cannot, consistently with the other portions of the Act, material in this connection, be so interpreted. It therefore became incumbent on the plaintiff at the trial to show that the breach of the covenant took place after transfer. Appellant's counsel now contends that the breach was complete before the transfer, and that that is so plain that the jury could not legally have come to any other conclusion. Respondent's counsel objects to that point being now raised as it was not taken before the Judge of first instance, and because the trial was conducted on the assumption that there had been a breach of the covenant which would entitle the plaintiff to nominal damages on the first count. If it were necessary to decide the matter, I should have no hesitation in determining that the point was not taken until Mr. *Owen* took it on the argument of the rule absolute before the Supreme Court, and that the trial was conducted by both sides on the footing that there had been a breach of the covenant, as alleged in the first count, for which the plaintiff was entitled to sue. If the objection were such that it could have been met if taken at the trial by evidence or by a finding of the jury or by an amendment, it ought not to be allowed to be taken now. (See *Sir George Jessel's* judgment in *Ex parte Firth* (1)). But in my opinion the objection is incurable, and no evidence could have been given, and no finding or verdict of the jury could have been arrived at which could cure the objection as it stands on the face of the proceedings. It appears from the declaration that twenty-one months had elapsed from the date of the lease until the reversion became vested in the plaintiff by transfer. The term of the lease is alleged by the declaration to be five years. Allowing every

(1) 19 Ch. D., 419, at p. 429.

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possible margin for a generous interpretation of the word "forthwith," no Court could avoid holding as a matter of law that there had been a breach of the covenant to erect buildings "forthwith" when twenty-one months from the commencement of the lease had gone by without even a beginning to erect them.

No doubt the expression "forthwith" in such a covenant does not mean "immediately," and may be read as equivalent to "as soon as reasonably possible:" *Kenney* v. *Hutchinson* (1). But the circumstances to be brought into the consideration of what was reasonably possible are such as existed when the covenant was made, or as must be taken to have been then within the contemplation of the parties having regard to the subject matter. In this case there are no circumstances of that kind which could possibly have made the delay of twenty-one months reasonable. The circumstances relied on by the appellant as showing the reasonableness of the delay are no other than those proved in support of the ninth plea. They were not existing when the covenant was made but are new circumstances and new agreements created by the acts of the parties giving perhaps new remedies on those agreements but in no way admissible to affect the interpretation of the covenant.

I am therefore of opinion that the objection is incurable, and as it appears on the face of the proceedings it may be taken now by the appellant in support of an application to arrest judgment, or for a trial *de novo*. If the award of damages had been on the first count only, arrest of judgment would have been the proper remedy, but on the state of the record that is not possible. The jury awarded the damages on two counts, the first and the third, and this Court has no way of ascertaining the amount to be apportioned to each count. The proper remedy is therefore an order for a trial *de novo*. The same question as to the choice between these two courses arose in *Howard* v. *Williams* (2) and it was decided by the Court on the principle I have stated. The other cases cited by my learned brother the Chief Justice support the view that an award of a trial *de novo* is the form of order most appropriate in this case.

(1) 6 M. & W., 134.

(2) 9 M. & W., 725.

I therefore agree in all respects with the order proposed in the judgment of my learned brother the Chief Justice.

ISAACS J. It is necessary to remember that the first count of the declaration is based on the original covenant to "forthwith erect and complete" the alterations, additions and improvements.

The appellant objects that on the face of the pleadings it appears that he is not liable to the respondent, because the breach alleged took place before the transfer of the reversion to her: *Cohen* v. *Tannar* (1). Two answers have been given to that. The first is that liability was admitted at the trial, the only question being the quantum of damages. *Sir George Jessel* M.R. said in *Chilton* v. *Corporation of London* (2), a case where the general legal right asserted by the plaintiff was admitted on the pleadings:— "If the right by itself is one which cannot be supported in law, it cannot entitle the plaintiff to judgment merely because the defendant does not deny the right. The Court is bound to give judgment according to law."

If a defendant has mistakenly admitted liability where the law denies it, he ought not to be shut out from correcting his error before final judgment, always compensating the plaintiff for any loss occasioned by it without any fault imputable to the plaintiff. The other answer is of a more serious nature, and was given effect to by the Supreme Court. It was this, that the breach might have occurred in fact after the transfer, and the defendant's admission consequently dispensed with the necessary evidence on the part of the plaintiff. If this were so, the principle of *The "Tasmania"* (3) would apply. That principle was adhered to and *The "Tasmania"* (3) followed by the Privy Council in *Karunaratne* v. *Ferdinandus* (4), and it would be unjust to depart from the rule. But this case is outside that principle. The transfer of the reversion to the plaintiff took place over one year and nine months after the date of the lease. The lease contemplated immediate possession, it contains no provision deferring the operation of the covenant, and consequently the

(1) (1900) 2 Q.B., 609.
(2) 7 Ch. D., 735, at p. 740.
(3) 15 App. Cas., 223.
(4) (1902) A.C., 405, at p. 409.

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initial point of time for its operation is the date of the lease, May 1906. So much would be *primâ facie* presumed from the declaration itself, and reference to the lease itself confirms the presumption. "Forthwith" has been defined in several cases, and they are not altogether uniform, but the greater number and the most authoritative afford a clear idea of the meaning. In *Ex parte Lamb*; *In re Southam* (1) *Jessel* M.R. and *Lush* L.J. pointed out that its meaning depends to a great degree upon the circumstances in which it is used. It is evident that a contract to forthwith deliver a ton of flour demands much more prompt performance than to forthwith construct an ironclad, and so the word cannot be said to have an invariable meaning, irrespective of the subject matter in connection with which it is used.

"'Forthwith' of course means," says *Bowen* L.J. "'at once,' having regard to the circumstances of the case": *Lowe* v. *Fox* (2). *Sir James Hannen* thought it meant "with as little delay as possible": *Furber* v. *Cobb* (3), and similarly in *Roberts* v. *Brett* (4) Lord *Chelmsford* considered it meant "without delay or loss of time." In the *Queen* v. *Berkshire Justices* (5) *Cockburn* C.J. said:—"The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time,' and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case."

But where on the facts only one answer can reasonably be given, it becomes in one sense a question of law: *Watkins* v. *Rymill* (6). And no conceivable evidence could, in my opinion, so overcome the effect of the lapse of so much time with reference to the thing to be done under this lease, that a jury could reasonably find that completion after the transfer was completion "forthwith." The work consisted of alterations, additions and improvements up to the value of £500. The practical choice of order, style, material and method was left to the defendant, and nothing has been suggested which could, if the work were promptly begun, possibly prolong it beyond the date of the trans-

(1) 19 Ch. D., 169, at pp. 172 and 173.
(2) 15 Q.B.D., 667, at p. 679.
(3) 18 Q.B.D., 494, at p. 504.
(4) 11 H.L.C., 337, at p. 355.
(5) 4 Q.B.D., 469, at p. 471.
(6) 10 Q.B.D., 178, at p. 190.

fer—even allowing for the temporary occupation of the premises by the McFadyens, if indeed that were an allowable interruption of the covenant.

The suggested acquiescence in delay has no bearing on this question. That cannot affect the construction of the covenant, which, as already stated, is the contract sued upon. The circumstances in this case mean the time the obligation began to operate, the condition of the premises, and the nature and extent of the work to be done.

Consequently, the breach, not being a continuing one, must be taken to have been complete before the assignment.

Then it was urged by Mr. *Knox*, that even so, sec. 52 of the *Real Property Act* passed the right to the damages for the breach to the plaintiff. But the object of the section is only to perfect the transaction effected by the statutory transfer. With respect to personal obligations the Act primarily concerns itself with their security upon land for their fulfilment, and having provided a statutory transfer of the benefits of the obligation as between the transferor and the transferee, proceeds in this section to completely effectuate the transfer by affecting the third person, the obligor also. To this end it transfers the right to sue and recover whatever debt, sum of money, annuity or damages (that is, right to damages) has been *thereunder* transferred.

But whether a right to damages has been transferred depends not on that section, but on the terms of the transfer and other sections of the Act. The real key to the section is contained in the words "notwithstanding the same may be deemed or held to constitute a chose in action." The general non-assignability of choses in action at common law was well known. So too was the vagueness of the meaning of the term, making it very uncertain in many cases whether a given claim fell within that designation. And to transfer a debt at common law required, as a rule, the assent of the debtor—really a novation.

Sec. 52 was intended to put an end to all this, and to perfect, even in regard to legal procedure, the simplicity and directness which otherwise characterise the Statute.

It was not intended to extend, and its language is not sufficient to extend to so radical and unexpected a change, and probably so

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unfair a change, as bodily transferring all accrued rights to damages, limited only by the *Statutes of Limitation* and existing independently of the continuance of the obligation under which they arose, and of the land upon which they were originally secured.

I am therefore of opinion there is no answer to the appellant's contention upon the first count.

For the rest I quite agree with what has been said by the learned Chief Justice.

Appeal allowed.

Solicitor, for appellant, *F. H. King.*

Solicitor, for respondent, *Marshall & Marks.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . PLAINTIFF;

AND

THE ASSOCIATED NORTHERN COLLIERIES AND OTHERS . . DEFENDANTS.

H. C. OF A. 1910.

SYDNEY, *Oct.* 19, 20, *Nov.* 7.

Isaacs J.

Practice—Particulars—Object of granting—Order against Crown—Discovery—Civil action for penalties—Action by Crown—Discovery of documents by defendant.

In any civil action to which the Crown is a party it is bound to the same extent as any other litigant to give particulars.

The object of granting particulars is that the opposite party shall always be fairly apprised of the nature of the case he is called upon to meet, and to guard against "surprise." But a party is not entitled to be told the mode by which the case is to be proved against him.