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Griffith C.J.

which the first original part is divided before the time of distribution, *i.e.*, before the death of his widow, appears to assume that all the persons who could be entitled to share in the fund must be determined before that event, so that when it occurs the classes of persons to take are definitely closed.

Apart from these considerations I think that the *primâ facie* meaning of the words "to divide among Samuel Brownfield the widower of my sister Ann Brownfield and his sons who shall attain the age of twenty-five years or the survivors of them the said Samuel Brownfield and his sons," followed by words directing immediate payment on the death of the testator's widow, is to direct a division amongst designated living persons provided that they survive the widow and attain twenty-five. The other matters to which I have referred strengthen this view. On the whole, therefore, I am of opinion that the Brownfield gift is not a gift to a class, but a gift to designated living persons, and that in the events that have happened it is divisible amongst the five sons who survived the testator's widow.

The appeal should therefore be allowed.

BARTON J. As to the Brownfield bequest I agree in thinking that it is a gift to specified persons on a contingency as to survivorship and another as to age, and that, as Samuel Brownfield died while the testator's widow was alive, the seventh share of the first "original part" is to be divided among his five sons, the survivors at the time of distribution, who had attained the age of twenty-five. Samuel Brownfield is named as the "widower of" the testator's "sister Ann Brownfield;" if the possible sons of a second marriage were to be included, none such having been born at the testator's death, then the five sons by the first marriage, aged twenty-five years and upwards, would have had to wait another twenty-five years at least before they could receive anything, which does not accord with the testator's direction that each son was to be paid his share on attaining twenty-five. These circumstances, together with the language of the bequest itself, indicate in my view that the sons intended were the sons of the marriage with Ann Deane. There was a nexus of affinity between the testator and the sons of Samuel Brownfield by his

marriage with the testator's sister, but there is nothing to show that the testator knew or had ever seen Elizabeth Reeves, the second wife, whom Brownfield, it seems, married in England; or that he even knew of her existence.

In addition to *Stopford* v. *Chaworth* (1), there was cited the case of *In re Parrott* (2), which gives some assistance as to construction.

I may point out that if there is any obscurity or ambiguity in construction as to whether the gift is to a class some of whom may be outside the prescribed limit, or to designated persons, weight may be given to the consideration that "it is better to effectuate than to destroy the intention": See *per* Lord *Selborne* L.C. in *Pearks* v. *Moseley* (3).

I am of opinion that this appeal should be allowed. My answer to the question is that the five sons of Samuel Brownfield deceased, in the will mentioned, are entitled to the share mentioned.

The judgment of ISAACS and GAVAN DUFFY JJ. was read by

ISAACS J. The Brownfield bequest may, without obvious inaccuracy or straining of the primary meaning of the testator's words, be construed as extending to all the sons of Samuel Brownfield born or to be born, or as limited to all his sons born of Ann Brownfield.

The question is, of course, What do these words mean as written, not what did the testator intend to write?

On the whole we come to the conclusion that the more limited meaning is to be attributed to the words used. There is a class gift, and the connecting link constituting the class is the expressed relationship to the testator through his late sister Ann. Her children, and not children of Samuel Brownfield by a future wife, would be the natural objects of the testator's bounty. The description of Samuel as "widower of my late sister Ann Brownfield" may, and in our opinion does, indicate not merely a description of Samuel, but also the tie regarded by the testator as connecting the class.

(1) 8 Beav., 331. (2) 33 Ch. D., 274.
(3) 5 App. Cas., 714, at p. 719.

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Then, knowing as we do that Samuel's children were sons only, the impression is strengthened. In some capacity or character, Samuel is the nucleus, so to speak, of the class. If it were merely his personality that is to be regarded, one would expect the word to be "children," but if it be, as we think it is, that it is his status as widower of Ann that is the governing consideration, then the word "sons" means "sons" of that marriage. The difficulty as to the rule of perpetuities therefore does not arise as to this bequest.

Appeal allowed. Question answered as indicated. Costs of all parties, including costs of parties who have not appealed, to be paid out of the estate.

Solicitors, for the appellant, *Blake & Riggall.*

Solicitors, for the respondents, *Hedderwick, Fookes & Alston*; *J. M. Smith & Emmerton*; *Westley & Walker.*

B. L.

[HIGH COURT OF AUSTRALIA.]

HINDMARSH . . . . . APPELLANT;
DEFENDANT,

AND

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QUINN . . . . . RESPONDENT.
PLAINTIFF,

SYDNEY, *Dec.* 16, 17, 18; 1914, *April* 17.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Land—Action of ejectment—Defence—Profit à prendre.

Barton A.C.J., Isaacs, Gavan Duffy and Rich JJ.

An agreement which while negativing a tenancy confers a right to enter upon land and work and manage a dairy farm thereon, the profits to be

equally divided between the grantee and the owner of the legal estate who continues to reside on the land, does not give the grantee a right to the exclusive possession of the land as against the owner of the legal estate, and, therefore, does not afford an answer to an action of ejectment brought in the Supreme Court of New South Wales by the owner.

Decision of the Supreme Court of New South Wales affirmed.

APPEAL from the Supreme Court of New South Wales.

An action of ejectment was brought in the Supreme Court by Ann Quinn against Thomas Hindmarsh in respect of certain land alleged to be then in the possession of the defendant and to possession of which the plaintiff alleged that she was entitled.

At the trial certain admissions were made by the plaintiff and the defendant respectively.

The defendant admitted:—

"1. That Lawrence Quinn was on and before 27th March 1911 entitled in fee simple in possession of the lands described in the writ and to the immediate possession thereof.

"2. That the said Lawrence Quinn remained entitled to the immediate possession of the said lands thereafter until his death on 7th January 1912 (subject only to the terms of a certain agreement made by him with the defendant dated 27th March 1911).

"3. That the plaintiff is the widow of and administratrix of the estate of the said Lawrence Quinn and is aged 65 years.

"4. That Lawrence Quinn was 67 years of age on the date of his death.

"5. That the plaintiff has resided on the said lands from before 27th March 1911 until the present time.

"6. That the defendant entered upon the said lands on or about 28th March 1911 and remained there until the present day.

"7. That defendant claims to remain in possession under the said agreement dated 27th March 1911 and also by virtue of the payments made by him since the death of the said Lawrence Quinn to the plaintiff of the sum of £70 mentioned in the said agreement and not otherwise.

"8. That the value of the lands in question at the said date of 7th January 1912 was £1,040.

"9. That the defendant contests the relevance of the matters

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of age admitted in his admissions Nos. 3 and 4 above, and of value in No. 8 above."

The plaintiff admitted:—

"1. That defendant entered on the premises in question in this action in pursuance of the agreement made by him with Lawrence Quinn of 27th March 1911 and duly and faithfully carried out the terms thereof up to the death of the said Lawrence Quinn on 7th January 1912.

"2. That defendant has since the death of the said L. Quinn made quarterly payments of £17 10s. each to the plaintiff, and that two of the said payments of £17 10s. were made on 7th January 1913 and 7th April 1913 respectively and subsequently to the issue of the writ in this action. Defendant contends and has contended that the payments by him of the said sums and of the provisions of the said agreement of 27th March 1911 entitle him under the said agreement to remain in possession of the said lands up to the present time. The plaintiff contends and has contended that such payments and agreement do not. Plaintiff and defendant have entered into no agreement affecting the right to possession of the said lands.

"3. That since the death of the said L. Quinn the defendant has continued to work and manage the said dairy farm and to find the stock and plant required in connection with such working and management.

"4. That defendant has, since his entry on the said lands on or about 28th March 1911, made improvements thereon involving an expenditure in labour and material of about £180 and increasing the value of the said lands and premises by about £240.

"5. The plaintiff does not admit that the matters stated in her admissions Nos. 3 and 4 are material."

The agreement of 27th March 1911 referred to in the admissions was, omitting formal facts, as follows:—

"This indenture made 27th March 1911 between Lawrence Quinn of Brushy Hill near Scone in the State of New South Wales farmer of the one part and Thomas Hindmarsh of Rouchel near Scone aforesaid farmer of the other part Witnesseth that the said Lawrence Quinn and Thomas Hindmarsh do hereby mutually covenant and agree as follows:—

"1. The said Thomas Hindmarsh shall immediately on the execution of this agreement enter upon and work and manage as a dairy farm the land described in the schedule hereto which is owned by the said Lawrence Quinn and shall pay all working expenses in connection therewith.

"2. The said Thomas Hindmarsh shall at his own expense supply all cows to be used in connection with the dairy farm.

"3. The said Thomas Hindmarsh shall at his own expense supply all farming implements utensils and things and all horses and carts necessary for the proper conduct of the said dairy farm and shall also at his cost erect a new dairy cowyard and bails and shall keep the dairy all fences cowyards and bails in good repair.

"4. The net profits of the said dairy farm shall belong to the parties hereto in equal shares so long as the said Lawrence Quinn shall reside on the said dairy farm.

"5. In the event of the said Lawrence Quinn going to reside elsewhere the said Thomas Hindmarsh shall pay him the sum of seventy pounds per annum in equal quarterly payments and if the said Lawrence Quinn shall die leaving his present wife surviving him the said sum of seventy pounds per annum shall be paid to her.

"6. That if the said Thomas Hindmarsh shall during the life of the said Lawrence Quinn continue this agreement and faithfully carry out his part of the same then as soon as possible after the death of the said Lawrence Quinn his executors or administrators shall at the cost of the said Thomas Hindmarsh transfer and convey the land in the said schedule comprising the said dairy farm unto the said Thomas Hindmarsh in fee simple subject only to an estate for life in the said wife of the said Lawrence Quinn if she shall be then living.

"7. That the said Lawrence Quinn his executors or administrators will during the continuance of this agreement from time to time as the same respectively become due pay to the Treasurer of the said State Crown land agent or other Government officer authorized in that behalf all interest and instalments of purchase money to become due in respect of the said land herein referred to and will immediately thereafter and whenever required by the

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said Thomas Hindmarsh produce the receipt for every such payment and will not do or suffer to be done any act or thing whereby the said land shall be liable to forfeiture and will duly and properly observe and perform all unexpired conditions of residence and improvement and any other conditions and regulations necessary to obtain the deed or deeds of grant in respect of the said land.

"8. That in case default shall be made in paying such interest or instalments to the Government of the said State as aforesaid then it shall be lawful for the said Thomas Hindmarsh to pay the said interest and instalments and deduct the amount so paid from any money that may be due or become due to the said Lawrence Quinn or his said wife under this agreement.

"9. If the said Thomas Hindmarsh terminates this agreement the said Lawrence Quinn shall be at liberty to purchase any crops or the product thereof that may be on the said dairy farm at their market value.

"10. The said Thomas Hindmarsh shall not assign or sublet this contract or his interest therein without the consent of the said Lawrence Quinn.

"11. The said Thomas Hindmarsh may reside upon the said dairy farm but on such part thereof only as the said Lawrence Quinn directs during the continuance of this agreement and no licence or right of occupation hereby given to the said Thomas Hindmarsh in respect of the said dairy farm shall be construed to create a tenancy in the said Thomas Hindmarsh and the said Lawrence Quinn shall not be liable to any action for trespass or damage to the said crops or the product thereof by the stock of the said Lawrence Quinn or for damage by fire.

"12. In every case in which any difference shall arise between the parties hereto touching (*a*) the true intent or construction of this agreement or (*b*) any of the incidents or consequences of this agreement (*c*) the market value of any crop or crops or the products thereof the same shall be referred to arbitration and this shall be deemed to be a submission to arbitration within the *Arbitration Act* 1902 or any statutory modification or re-enactment thereof for the time being in force the provisions whereof shall apply as far as applicable."

At the trial a verdict was, by consent, entered for the plaintiff, leave being reserved to the defendant to move the Full Court to enter a verdict for him. A motion was accordingly made to the Full Court, by the defendant, for an order that the verdict for the plaintiff should be set aside, and that judgment should be entered for the defendant.

The Full Court having dismissed the motion, the defendant now appealed to the High Court.

Ralston K.C. (with him *Cowan*), for the appellant. Under the agreement the appellant was entitled to remain in possession of the land until both the respondent and her husband were dead. The appellant had a licence or right of occupation coupled with an interest, because he had expended money on the land. That licence is irrevocable. See *Halsbury's Laws of England*, vol. XVIII., pp. 337 *et seq.* That being so, the instrument operates as a grant: *Muskett* v. *Hill* (1).

[ISAACS J. referred to *Wood* v. *Leadbitter* (2).]

Flannery, for the respondent. On a fair construction of the agreement the appellant, after the death of the respondent's husband, had an estate in remainder expectant on the death of the respondent. If the appellant had anything more, it was no greater right than he had during the life of the respondent's husband, and that was at best a licence, and that licence was revoked, or if not revoked is not an answer to an action for ejectment. No interest is coupled with the licence which would make it irrevocable. The right which the appellant has is not a *profit à prendre*.

[ISAACS J. referred to *Race* v. *Ward* (3); *Duke of Sutherland* v. *Heathcote* (4).]

[RICH J. referred to *Goddard on Easements*, 7th ed., p. 8; *Fitzgerald* v. *Firbank* (5); *Webber* v. *Lee* (6); *Wright* v. *Stavert* (7).]

Even if the right is a *profit à prendre* it is only an incorporeal

(1) 5 Bing. N.C., 694, at p. 707.
(2) 13 M. & W., 838, at p. 846.
(3) 4 El. & Bl., 702.
(4) (1892) 1 Ch., 475, at p. 484.
(5) (1897) 2 Ch., 96.
(6) 9 Q.B.D., 315.
(7) 2 El. & El., 721.

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heriditament, and is no answer to an action of ejectment: *Elphinstone, Norton & Clark on the Interpretation of Deeds*, p. 608; *Roscoe's Nisi Prius Evidence*, 17th ed., pp. 927-929.

Ralston K.C., in reply, referred to *James Jones & Sons Ltd.* v. *Earl of Tankerville* (1); *Bellinger* v. *Hughes* (2); *Llanelly Railway and Dock Co.* v. *London and North Western Railway Co.* (3).

[RICH J. referred to *Ex parte Foster* (4); *Ex parte Duggan* (5); *Lorenz* v. *Heffernan* (6); *Palmes* v. *King* (7).]

Cur. adv. vult.

April 17.

The following judgments were read:—

BARTON A.C.J. This is an action of ejectment, defended by the appellant on the ground that an agreement under seal between him and Lawrence Quinn, deceased intestate, conferred on the appellant a right sufficient to defeat such an action.

The agreement bears date 27th March 1911, and its main provisions will be stated presently. Lawrence Quinn died intestate on 7th January 1912. He was then owner in fee and entitled to the immediate possession, as the appellant admits, subject to the terms of the agreement mentioned. The respondent, who is the plaintiff, is the widow of the intestate, and administration of his estate and effects was granted to her before action. She therefore has the legal estate in the lands of which she claims possession.

On 28th March 1911 the appellant entered on the lands under the agreement, and has resided upon them until the present time. He carried out its terms until the death of the intestate. Since that event he has made payment to the respondent of several quarterly instalments of the £70 per annum made payable to her by the agreement. Two of such payments were made after the issue of the writ. He has also since Quinn's death continued to work and manage the dairy farm upon the

(1) (1909) 2 Ch., 440.
(2) 11 S.R. (N.S.W.), 419.
(3) L.R., 7 H.L., 550.
(4) 3 S.R. (N.S.W.), 645.
(5) 19 W.N. (N.S.W.), 260.
(6) 3 V.L.R. (L.), 129.
(7) 26 N.Z.L.R., 510.

lands claimed and to find the stock and plant in connection with these operations. He appears to retain the whole of the profits of the farming operations, and has spent about £180 in labour and material upon the lands, increasing their value by about £240. Their value is about £1,040.

The agreement of 27th March 1911 provided that the appellant should enter upon, and work as a dairy farm, the land "owned by the said Lawrence Quinn," of which the possession is claimed, should pay all working expenses, supply all dairy cows, and all farming implements, horses, and vehicles necessary for the proper conduct of the said dairy farm, erect at his own cost a new dairy, cowyard and bails, and keep them and all fences in repair. The net profits were to belong to the parties in equal shares as long as Quinn should reside on the farm. If he went to reside elsewhere the appellant was to pay him £70 a year, and if he died leaving his wife surviving him the same annual sum should be paid to her annually. The payments were to be quarterly. If the appellant continued the agreement and faithfully carried it out during Quinn's life, the executors or administrators of the latter were, at the appellant's cost, to transfer and convey the land to him in fee "subject only to an estate for life in" the widow. There was a provision that Quinn or his representatives should "during the continuance of this agreement" pay the Government all interest and instalments due from time to time and perform all unexpired conditions of residence and improvement under the Land Acts. The property consisted of three conditional purchases. In case of default by Quinn the appellant was to pay interest and instalments, "and deduct the amount so paid from any money that" might "be due or become due to the said Lawrence Quinn or his said wife under this agreement." If the appellant terminated the agreement, Quinn was to be at liberty to buy any crops or the products thereof on the farm at market value. It was provided that the appellant should "not assign or sublet this contract or his interest therein without the consent of the said Lawrence Quinn." The 11th clause is in the following words:—"The said Thomas Hindmarsh may reside upon the said dairy farm but on such part thereof only as the said Lawrence Quinn directs during the continuance of this agree-

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ment, and no licence or right of occupation hereby given to the said Thomas Hindmarsh in respect of the said dairy farm shall be construed to create a tenancy in the said Thomas Hindmarsh, and the said Lawrence Quinn shall not be liable to any action for trespass or damage to the said crops or the product thereof by the stock of the said Lawrence Quinn or for damage by fire."

The rights of the parties in the present action do not depend, as their Honors of the Supreme Court seem to have thought, upon the 6th clause of the agreement. Until the assurances mentioned in that clause are executed the rights with which it deals are not cognizable in this action.

The action is possessory only; that is, it is based on the right of actual possession in the admitted owner (clause 1) which has passed to the respondent as his administratrix. The defence disputes this right of possession. It is plain that the respondent and the appellant cannot both have possession at the same time, not being joint tenants, or tenants in common, or co-parceners. The possession is *primâ facie* in the respondent as admininistratrix of Quinn, and she is entitled as plaintiff to a verdict unless some defence be established. It is contended that a defence is afforded by the agreement under seal. The appellant, therefore, must be taken to assert a right to exclude the respondent. To have this effect, the agreement must operate as a grant of some right which either carries *per se* a right to possession, or has such a right as a necessary incident to its exercise. It was contended for the respondent that the agreement operated as a grant, and that the thing granted was a *profit à prendre*. Assuming these two contentions, for present purposes, to be correct, *primâ facie* a grant of a *profit à prendre* does not *per se* give a possession exclusive of the owner. In *Duke of Sutherland* v. *Heathcote* (1) *Lindley* L.J., delivering the judgment of the Court of Appeal (*Lindley*, *Bowen* and *Fry* L.JJ.) said (2):—"A *profit à prendre* is a right to take something off another person's land; such a right does not prevent the owner from taking the same sort of thing from off his own land; the first right may limit but does not exclude, the second. An exclusive right to all the profit of a particular kind can, no doubt, be granted; but such

(1) (1892) 1 Ch., 475.

(2) (1892) 1 Ch., 475, at p. 484.

a right cannot be inferred from language which is not clear and explicit." His Lordship then reviewed the authorities, fully describing *Lord Mountjoy's Case* (1), and taking the same view of that case as of the case then in question—a view taken in the subsequent cases of *Chetham* v. *Williamson* (2) and *Doe* v. *Wood* (3). "*Lord Mountjoy's Case*," his Lordship said (4), "has always been regarded as a leading authority for the proposition that a grant in fee of liberty to dig ores does not confer on the grantee an exclusive right to dig them, even if the grant is in terms without any interruption by the grantor." The same principle applies to a grant of a *profit à prendre* in pasturage or crops, and therefore, as I take it, to a grant of a right to use land for dairying on half profits, the only difference being that in the cases cited the right granted applied to minerals below the surface, while in the present case it applies to the surface only, and does not affect the subjacent lands. No doubt, in either case there is a grant of an interest in land within the Statute of Frauds: See *Webber* v. *Lee* (5). That was a case of a *profit à prendre*, a right to shoot over land and to take away part of the game killed, but in such a case the right in question, although had it been properly conferred it would necessarily have carried with it a right to go on the land to shoot and take away the game, was of course compatible with the exclusive possession of the grantor at law. And it seems to me that rights of the kind, being incorporeal, although there may be incident to them a liberty to enter the land for the purpose of enjoying the right, are nevertheless not exclusive of the right of the owner of the soil to possession. It would be monstrous to say that they empower the grantee to exclude the owner, and I do not think the appellant here can succeed unless he goes to that length.

The grant, then, does not in my mind connote such a possession on the most favourable interpretation. Such a possession is not involved in the right conferred, and it is not a necessary incident thereto.

I have dealt with the matter hitherto on the basis of a grant,

(1) 1 And., 307; 4 Leon., 147.
(2) 4 East, 469.
(3) 2 Barn. & Ald., 724.
(4) (1892) 1 Ch., 475, at p. 485.
(5) 9 Q.B.D., 315.

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if there is a grant, of a bare *profit à prendre*. But it is still to be considered whether (1) a *profit à prendre* has been conferred with an express right to exclusive possession and (2) whether the agreement confers a right greater than a *profit à prendre*, and of such a nature as to exclude the possession of the freeholder.

To determine these matters we must look closely at the agreement. Having examined it, I cannot find an express right to exclusive possession in the grantee, but, on the contrary, I find that the owner's possession is expressly reserved, for it is difficult to see that any other interpretation can be placed upon the concluding passage of clause 11, which expressly confers on the owner an immunity from actions for trespass or damage to the crops or their product by his stock. Does the agreement, then, confer a right, greater than a *profit à prendre*, of such a nature as to exclude the respondent's possession? I am not speaking of any right enforceable in equity, but purely of common law rights and interests such as are cognisable in New South Wales in an action of ejectment. That there is no tenancy is made clear by clause 11, in the stipulation that no licence or right of occupation given to the appellant should be construed to create a tenancy in him. Even apart from this there are no words in this deed apt to create a tenancy. In *Ex parte Foster* (1) the owner, by a share-farming agreement, demised land to the applicant, who agreed to work the land and to pay the owner a half of all profits of the produce grown on the land. Here a tenancy was held to have been created, I think by the operation of the word "demise." In *Ex parte Duggan* (2), which was the case of an information by an owner under the *Landlord and Tenant Act* for the recovery of land held by the applicant on the shares system, the applicant agreed "to cultivate all those portions . . . . . granted to him by" the respondent for that purpose, for a year; and the respondent agreed to allow the applicant 23 acres "for growing corn and other crops, reserving the right of depasturing cattle as soon as the crops are off." The Supreme Court held that a tenancy was not created by the agreement. And *Stephen* A.C.J., said, "I cannot see that there was a divesting of the respondent's possession and exclusive possession given to the applicant." In *Bellinger*

(1) 3 S.R. (N.S.W.), 645.

(2) 19 W.N. (N.S.W.), 260.

v. *Hughes* (1), which was another case of a "halves" agreement, it was held that the terms of the document constituted it a licence coupled with such an interest as rendered it irrevocable; but the Court did not suggest that there was a tenancy, and a mere irrevocable licence not conferring exclusive possession would not be a defence to an action of ejectment by the grantor of the licence.

If, then, the agreement confers a right greater than a *profit à prendre* or other incorporeal hereditament, but short of a tenancy, I think the appellant is in no better plight, because such a right is not an interest known to the common law so far as it is neither the one nor the other; and to defeat this action it seems to me that the presumptive possession of the respondent can only be met and defeated by a better possessory right in the appellant. A *profit à prendre* may be a greater right than an easement, but they are both incorporeal hereditaments, and neither of them can of itself defeat the owner's right of possession, nor can such a right to go on the land as is necessary to the enjoyment of either of them so alter the quality of the incorporeal right as to exclude the respondent's possession. Unless the incorporeal interest carries with it the right of actual possession exclusive of the grantor, it is no defence against evidence of seisin in possession. If it does carry such a right the owner is, of course, out of possession altogether in fact and in law, and that is a conclusion which I cannot come to in view of the terms of the agreement, especially of clause 11.

On the contention that the action must fail because there was in this case a licence coupled with an interest and therefore irrevocable, *Wood* v. *Leadbitter* (2) and other cases on that subject were fully considered. It is enough to say that a licence is not, merely because it is irrevocable, a bar to the freeholder's possession, because its irrevocability does not turn an incorporeal interest into a corporeal one.

Two further remarks are applicable to the arguments advanced for the appellant. If the appellant has an interest which can defeat the respondent's possession, it must as against that possession be a right upon which he could bring ejectment against

(1) 11 S.R. (N.S.W.), 419. (2) 13 M. & W., 838.

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the respondent. Now, his interest is an incorporeal hereditament if it is more than a contractual right, and ejectment cannot be brought in respect of an incorporeal hereditament except as appendant or appurtenant to something corporeal. Here the incorporeal right is clearly in gross, and could not be the foundation of an ejectment. The next remark is that it is no objection to the recovery of land under a writ of *habere facias* that there is an incorporeal right over it, for the sheriff may deliver possession of the land, subject and without prejudice thereto. (See *Cole on Ejectment*, 1st ed., p. 347.) The judgment does not authorize the respondent to infringe the appellant's true rights under the agreement.

It is necessary to make it clear that in dealing with this appeal the Court is not adjudicating upon the respective rights of the appellant and of the estate represented by the respondent, further than is necessary for determining the question of possession at common law. Apart from this I do not discuss either the common law or the equitable rights or remedies of either party. The question whether the interest of the appellant amounts even to a *profit à prendre*, or whether it is greater, is, unless it gives him a better possessory right than the respondent, beside the present controversy. There is evidently a conflict between these parties which would require the intervention of equity before their rights could be finally adjusted. The law of this State prevents the determination of equitable rights in an action for recovery of possession. As the property is of no great value I venture to repeat the suggestion made from the Bench, that the parties should settle their differences before the amount of costs becomes ominous either to the appellant or to the estate.

I am of opinion that the appeal ought to be dismissed with costs.

ISAACS J. Unless the agreement which is under seal passes an interest in the land, the defendant, of course, is out of Court in any case.

It is clear that a licence, coupled with a grant of a *profit à prendre*, creates an incorporeal hereditament, and therefore an interest in the land (*Wood* v. *Leadbitter* (1)).

(1) 13 M. & W., 838.

Further, "it is undoubted law," says Lord *Wensleydale* in *Rowbotham* v. *Wilson* (1), "that no particular words are necessary to a grant; and any words which clearly show an intention to give an easement, which is by law grantable, are sufficient to effect that purpose." So *per* Lord *Kenyon* C.J. in *Shove* v. *Pincke* (2). And see *Webber* v. *Lee* (3); *James Jones & Sons Ltd.* v. *Earl of Tankerville* (4); and *Bellinger* v. *Hughes* (5).

If, however, upon the true construction of the deed in question here, a *profit à prendre* was created as an incorporeal hereditament, and if the operation of the agreement as a whole still continues—the latter a matter now left wholly undecided—the question still arises whether the licence, coupled with that grant, would afford an answer to the plaintiff's claim as owner of the land to exclusive possession of the land itself, and whether the rights of the grantee of the *profit à prendre* can in New South Wales be tested in an action of ejectment brought by the legal owner of the land itself.

There are two reasons why, I think, the defendant must fail in this action. The first is, because I would answer the question I have just formulated in the negative. *Blackstone* (*Commentaries*, book II., p. 20) says:—"Corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them."

Now it is evident when the respective natures of these two classes of hereditaments are borne in mind, the right to the idealistic and abstract hereditaments cannot affect the right of the owner of the corporeal subject to its full and exclusive posses-

(1) 8 H.L.C., 348, at p. 362.
(2) 5 T.R., 124, at p. 129.
(3) 9 Q.B.D., 315, at p. 319.
(4) (1909) 2 Ch., 440, at pp. 444, 445.
(5) 11 S.R. (N.S.W.), 419, 424.

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sion, as a corporeal thing. What use and occupancy he while in possession may be bound to allow the grantee of the incorporeal hereditament to enjoy is another question. The latter has undoubtedly a possessory action if disturbed, but that means an action for disturbance of his possession of his property, namely, the incorporeal hereditament and its products, and whatever of his other property he uses in connection with the incorporeal hereditament. As to this, see *per Lindley* L.J. in *Hindson* v. *Ashby* (1), and the authorities cited by him.

One of those authorities is so apposite as to deserve special reference.

In *Smith* v. *Kemp* (2) *Holt* C.J. referred to the second class of fishing rights as follows:—" Where the right of fishing is granted to the grantee, and such a grantee hath a property in the fish, and may bring a possessory action for them without making any title"—that is, to the land.

See for instance *per Parke* B. in *Northam* v. *Bowden* (3). There is no case which says that the grantee of an incorporeal hereditament may bring ejectment. Even if we were to suppose the grant exclusive (see *Sutherland* v. *Heathcote* (4)), that would not enable the grantee to sue in ejectment. In *Cole on Ejectment* (1857), at p. 91, there is this passage:—" Ejectment does not lie for any incorporeal hereditaments, 2 *Arch. N. P.*, 303; except as appendant or appurtenant to something corporeal, and together with it."

In other words, an interest in the land, even a legal interest, is not equivalent to a legal title to possession of the land. The second answer is that paragraph 11, especially when read with paragraph 9, is in itself fatal to the defendant's case. It stipulates that " no licence or right of occupation hereby given to the said Thomas Hindmarsh in respect of the said dairy farm shall be construed to create a tenancy in the said Thomas Hindmarsh," &c.

Now, it is manifest that if the parties agreed that nothing so high as a tenancy should be created, it was their intention not to create any interest in the land itself, but to leave the bargain to

(1) (1896) 2 Ch., 1, at p. 10.
(2) 2 Salk., 637.
(3) 11 Ex., 70, at p. 72.
(4) (1892) 1 Ch., 475, at p. 484.