[HIGH COURT OF AUSTRALIA.

HENSLEY . . . . . APPELLANT;
DEFENDANT,

AND

RESCHKE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *May* 25, 26, 28, 30.

Barton, Isaacs and Rich JJ.

Landlord and Tenant—Perpetual lease from Crown—Sub-lease—Action for holding over—Damages—Compensation paid to purchaser for non-delivery of possession—Prohibition against transfer without permission—Crown Lands Amendment Act 1898 (*S.A.*) (*No.* 705), *sec.* 17.

The plaintiff was the holder of a perpetual lease from the Crown of certain land under the provisions of the *Crown Lands Amendment Act* 1898 (S.A.). One of the conditions of the lease was that the lessee should not transfer, sub-let, encumber or mortgage without the consent of the Commissioner of Crown Lands first had. The plaintiff sub-let the land with such permission to the defendant. At the termination of the sub-lease the plaintiff agreed to sell the land to G. for a certain sum to be paid on transfer, delivery of possession to be made on payment of a deposit of £100. The deposit was paid. In an action by the plaintiff against the defendant for wrongfully holding over, the plaintiff claimed as damages a sum paid by her to G. as compensation for the loss of the beneficial use of the land from the time when the deposit was paid until G. actually obtained possession.

Held, that to entitle the plaintiff to recover those damages she was bound to prove that during that period G. was continuously entitled to the possession of the land and, therefore, that he was ready and willing to pay the balance of the purchase money.

Held, also, that notwithstanding the provision in perpetual leases of Crown lands against transferring, &c., without the prior consent of the

Commissioner, the lessee may put a purchaser from him into possession of the land before such consent is given.

A failure to give a purchaser actual vacant possession by reason of the wrongful holding over by a tenant is not an inability to show a good title, and substantial damages may be recovered for such failure.

Bain v. *Fothergill*, L.R. 7 H.L., 158, distinguished.

Decision of the Supreme Court of South Australia reversed.

APPEAL from the Supreme Court of South Australia.

An action was brought by Emilie Pauline Reschke against John Alexander Hensley, in which the statement of the plaintiff's claim was as follows :—

" 1. The plaintiff is the wife of Robert Reschke of Wolseley in the State of South Australia farmer. The defendant is a grazier and resides at Cairnbank near Wolseley aforesaid.

" 2. By an agreement in writing dated 1st May 1909 made between the above-named plaintiff and the above-named defendant the plaintiff agreed to let to the defendant who agreed to rent the lands included in Crown Lease Perpetual No. 4668 (of which the plaintiff was then the registered owner) containing 4,320 acres or thereabouts and being Block C No. 3 situate in the County of Buckingham in the State of South Australia for the term of one year from the said 1st May 1909 at a rental of £2 per week payable quarterly in advance and upon the other terms more particularly set forth in the said agreement including (*inter alia*) a term that the defendant should have a right to purchase the said Crown Lease at the sum or price of £2,050 cash (for the goodwill of the said lease) on or before 1st May 1910.

" 3. The said agreement was subject to the approval of the Commissioner of Crown Lands for the said State of South Australia.

" 4. On or about 20th July 1909 the said Commissioner of Crown Lands approved of the sub-letting by the plaintiff to the defendant of the premises referred to in the agreement mentioned in par. 2 hereof conditionally upon the payment of certain rents which rents were subsequently paid and on or about 12th August 1909 the said Commissioner issued his formal approval of such sub-letting.

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"5. On or about the said 1st May 1909 the defendant entered into possession of the lands comprised in the said Crown Lease No. 4668 pursuant to the agreement referred to in par. 2 hereof.

"6. The defendant did not on or before 1st May 1910 exercise his right of purchasing the lands comprised in the said Crown Lease No. 4668 pursuant to the agreement referred to in par. 2 hereof nor did the defendant on the said 1st May 1910 deliver up possession of the said lands to the plaintiff.

"7. On or about 2nd May 1910 the plaintiff gave the defendant notice in writing to remove all stock and stop all operations on the said lands but the defendant did not comply with such notice.

"8. On or about 9th May 1910 the defendant purporting to exercise his right of purchase under the agreement referred to in par. 2 hereof by his agent one Walter John Thomson verbally notified the plaintiff of his intention to purchase the lands comprised in the said Crown Lease No. 4668 and the plaintiff thereupon concurred with the defendant in duly applying to the said Commissioner of Crown Lands for leave to transfer the said lease to the defendant for the sum of £2,050 and on 10th May 1910 the plaintiff duly made and caused to be forwarded to the Land Board a statutory declaration in support of such application.

"9. On 7th June 1910 the said Commissioner of Crown Lands on the recommendation of the Land Board declined to approve the said application to transfer the said lease to the defendant of which fact the defendant was notified.

"10. By an agreement in writing dated 13th June 1910 made between the plaintiff (by her agent the said Robert Reschke) and one William Joseph Gunson of Adelaide solicitor the plaintiff agreed to sell the said Crown Lease No. 4668 and certain chattels to the said William Joseph Gunson for the sum of £2,250 possession to be given on payment of a deposit of £100 and upon the other terms in the said agreement more particularly set forth. The sum apportioned as the consideration for the sale of the said lease under the said agreement was £2,150. On 16th June 1910 the said deposit of £100 was paid by the said William Joseph Gunson to one Digby R. Trew as agent for the plaintiff.

"11. On or about 13th June 1910 by letter from the said

Digby R. Trew notice was given to the defendant of the purchase by the said Joseph William Gunson of the said Crown Lease.

"12. On 14th June 1910 the defendant by his manager one G. A. Rae verbally applied to the above-named Robert Reschke on behalf of the plaintiff to lease portion of the lands comprised in the said Crown Lease No. 4668 which application the said Robert Reschke refused on behalf of the plaintiff and then verbally informed the said G. A. Rae that the plaintiff had agreed to sell the lands comprised in the said lease to the said William Joseph Gunson.

"13. On 17th June 1910 the defendant claiming an estate or interest as purchaser by virtue of the agreement referred to in par. 2 hereof in all the estate and interest of the plaintiff in the lands comprised in the said Crown Lease No. 4668 wrongfully and without reasonable cause lodged a caveat under the *Real Property Act* 1886 forbidding the registration of any dealing with the estate or interest of the plaintiff in the said lands.

"14. On or about 21st June 1910 the plaintiff by notice in writing required the defendant to quit and deliver up possession of the lands comprised in the said Crown Lease No. 4668.

"15. The defendant did not deliver up possession of the lands comprised in the said Crown Lease No. 4668 to the plaintiff upon the determination of his underlease aforesaid but wrongfully refused to quit and deliver up possession of the said lands and wrongfully retained and continued in possession thereof from the determination of the said underlease until on or about 24th December 1910.

"16. On or about 27th March 1911 the caveat referred to in par. 13 hereof was withdrawn pursuant to an order of this Honourable Court made 12th December 1910.

"17. By reason of the lodging of the said caveat by the defendant as aforesaid and by reason of the defendant's wrongful refusal to quit and deliver possession and wrongful retention of possession of the said lands comprised in the said Crown Lease No. 4668 as aforesaid or alternatively by reason of the defendant's wrongful refusal to quit and deliver up possession and wrongful retention of possession of the lands comprised in the

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said Crown Lease No. 4668 as aforesaid the plaintiff was deprived of the possession of the said lands and of the rents and profits thereof from 1st May 1910 to 24th December 1910 and further was prevented from giving possession thereof to the said William Joseph Gunson pursuant to the contract with him referred to in par. 10 hereof until after the said 24th December 1910 and became liable to pay to the said William Joseph Gunson damages by reason of the breach of the plaintiff's said contract with him and the plaintiff has paid to the said William Joseph Gunson the sum of £250 for such damages.

"The plaintiff claims:

(*a*) £68 for mesne profits.

(*b*) £250 damages."

The defence was as follows:—

"1. The defendant denies each and every of the allegations contained in the plaintiff's claim.

"2. If as alleged the defendant lodged a caveat under the *Real Property Act* 1886 forbidding the registration of any dealing with the estate or interest of the plaintiff in the lands mentioned in the plaintiff's claim as alleged in par. 13 of the claim (which he does not admit) he did so *bonâ fide* and rightfully and for reasonable cause that is to say for the purpose of protecting his interest in the Crown Lease referred to in the plaintiff's claim.

"3. The defendant denies that he wrongfully refused to quit and deliver up possession of the said lands and wrongfully retained and continued in possession thereof as alleged in par. 15 of the plaintiff's claim but says that he the defendant upon the making of the order of the Supreme Court on 12th December 1910 forthwith peaceably and quietly gave up possession of the lands referred to in the said Crown Lease."

The material facts appear in the judgments hereunder.

The action was heard by *Homburg* J., who gave judgment for the plaintiff for £60 in respect of the claim for mesne profits and for the defendant in respect of the claim for damages. On appeal by the plaintiff the Full Court varied the judgment by ordering that judgment should be entered for the plaintiff for £250 in respect of the claim for damages.

From that decision the defendant now, by special leave, appealed to the High Court.

McLachlan (with him *Benny*), for the appellant. The question of what damages the plaintiff can recover from the defendant depends on what damages Gunson could have recovered from the plaintiff. Gunson could have recovered only the expenses he had incurred and no damages beyond that (*Bain* v. *Fothergill* (1); *Hyam* v. *Terry* (2); *Rowe* v. *School Board for London* (3); *Dart on Vendors and Purchasers*, 7th ed., vol. II., p. 997), for the plaintiff's inability to give possession was a defect of title. If the inability to give physical possession was not by itself a defect of title, the existence of the caveat was such a defect. The defendant had then an outstanding interest in the land, that is to say, he had possession and believed that although permission to transfer to him had been refused it would, on further representations being made, be granted. See *Rowe* v. *School Board for London* (4). The plaintiff was in default, for, having contracted to sell the land as her own, she cannot afterwards be heard to say that she has not the entirety: *Rudd* v. *Lascelles* (5); *Hopcraft* v. *Hopcraft* (6). [He referred to *Gedye* v. *Duke of Montrose* (7); *Jaques* v. *Millar* (8); *Royal Bristol Permanent Building Society* v. *Bomash* (9); *Jones* v. *Gardiner* (10).] The conditions of perpetual leases under the *Crown Lands Act* 1898 prohibit alienation except with the prior consent of the Commissioner of Crown Lands, and therefore a lessee cannot lawfully put another person into possession of the land. [He referred to *Crown Lands Amendment Act* 1898, sec. 17.] Gunson is not entitled to any damages in respect of the period before he became transferee of the lease.

Isbister (with him *W. J. Gunson*), for the respondent. There is no prohibition in the Act against a lessee parting with the possession of the land, at any rate after the Commissioner has given his consent to the transfer, and that is sufficient for the

(1) L.R. 7 H.L., 158.
(2) 25 Sol. J., 371.
(3) 36 Ch. D., 619.
(4) 36 Ch. D., 619, at p. 621.
(5) (1900) Ch., 815, at p. 818.
(6) 76 L.T., 341, at p. 343.
(7) 26 Beav., 45.
(8) 6 Ch. D., 153, at p. 159.
(9) 35 Ch. D., 390.
(10) (1902) 1 Ch., 191.

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respondent in this case. The damages are recoverable either as special damages of which the defendant had notice or as the usual consequence of keeping a person out of possession of property of this kind. The rule in *Bain* v. *Fothergill* (1) does not apply here because there was no defect of title.

[ISAACS J. referred to *Ross* v. *Robinson* (2).

RICH J. referred to *Day* v. *Singleton* (3).]

The rule does not apply where the claim is for not giving possession (*Engell* v. *Fitch* (4)), that is, where the purchaser does not get that which under his contract he is entitled to get. Gunson was entitled to possession on paying the deposit, or at any rate on the consent of the Commissioner to the transfer being given. He was not bound to pay the balance of the purchase money until the transfer was tendered to him.

[ISAACS J. Ought he not to have been ready and willing to pay [that balance; and, if so, ought not the plaintiff to have proved that he was so ready and willing?]

The proper inference to be drawn from the facts is that Gunson was ready and willing to pay it when called upon to do so. At the end of the time in respect of which the damages are claimed Gunson was entitled to say that he had not got what he bargained for, and that he insisted on his bargain. The appellant is not now entitled to rely on the fact that it was not proved affirmatively that Gunson was ready and willing to pay the balance of the purchase money, for that point has never been contested: *Browne* v. *Dunn* (5). The amount paid by the respondent to Gunson is properly recoverable as damages: *Bramley* v. *Chesterton* (6); *Cole on Ejectment*, p. 829; *Jaques* v. *Millar* (7).

McLachlan, in reply, referred to *Real Property Act* 1886, secs. 57, 67, 93, 151, 152; *Broom and Hadley's Commentaries*, vol. II., p. 367; *Kent's Commentaries*, vol IV., p. 415; *Chitty's Blackstone*, vol. II., p. 199.

Cur. adv. vult.

(1) L.R. 7 H.L., 158.
(2) 12 V.L.R., 764, at p. 773.
(3) (1899) 2 Ch., 320.
(4) L.R. 3 Q.B., 314, at p. 333.
(5) 6 R., 67, at p. 76.
(6) 27 L.J.C.P., 23.
(7) 6 Ch. D., 153.

Isbister, for the respondent, moved that if the point as to readiness and willingness to pay the balance of the purchase money was thought to be material, the case should be remitted to the Supreme Court to take further evidence. The point is raised for the first time in this Court, and it is in the interest of justice that such evidence should be taken. [He referred to *Scott Fell* v. *Lloyd* (1).]

May 28.

[ISAACS J. Under the *Judiciary Act* I do not see that we have power to do what is asked.]

McLachlan, for the appellant, was not called upon.

BARTON J. Without giving any extended reasons at the present moment, although we may give them later on when we deliver our judgment on the appeal, the Court has no hesitation in refusing this motion with costs.

May 30.

BARTON J. read the following judgment:—The award of £60 damages made by *Homburg* J. at the trial was by way of compensation to the plaintiff, now respondent, for the tortious holding over by Mr. Hensley, a sub-lessee, of the demised premises. The measure upon which those damages were awarded was not questioned before the Full Court, nor is it questioned in this appeal. The Full Court has ordered the increase of the damages by £250 as representing the respondent's liability to her purchaser, Mr. Gunson. She had actually allowed that sum to Mr. Gunson by way of deduction from his balance of purchase money. The question now is whether she is or is not entitled to recover that sum from the appellant. Two questions are there involved. Was she liable to pay any damages to Gunson if he had paid her the full balance and sued her for failing to give possession as agreed? And was the sum allowed a loss incurred by her as the natural and probable consequence of the appellant's wrongful act in holding over? The case is in the same position as if Gunson had paid her the balance of £2,150 and sued her to recover the £250.

The legal position between the respondent as plaintiff and the

(1) 13 C.L.R., 230, at p. 234.

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appellant as defendant is not altered by the fact that she allowed the £250 to Gunson by way of deduction, if he could have recovered it from her, and if she had a right to recover it in turn from the appellant.

To recover special damages from the respondent, Gunson would have had to aver and prove his right to the possession during the time of the accrual of such damage, and therefore that at the proper time he was and continued ready and willing to pay the balance of the purchase money beyond the £100 deposit, namely, £2,150. If he could prove that averment at the outset he was at liberty to prove the damages actually incurred, as she would clearly have had to admit her failure to perform her obligation to Gunson to turn the appellant out as soon as was reasonably practicable. Gunson contracted for possession as well as transfer.

In the present action it probably was not necessary for the respondent to aver against the appellant in her statement of claim the readiness and willingness of Gunson to pay. Assuming that in her favour, it was still necessary for her to prove it as an element of the legal liability to him which she claimed to have discharged, and upon which she founded her claim to recover over from the appellant.

It is necessary, therefore, to inquire whether the respondent has proved that condition precedent to her right to recover against the appellant. It is true that this requirement seems to have been overlooked at the trial, and it does not appear to have been brought to the notice of their Honors of the Full Court upon the appeal to them. It was a necessary condition to the establishment of the respondent's cause of action, and I do not think that the course of the case before the appeal to this Court can absolve us from the duty of dealing with it as a question inherent in the matter to be determined.

At the trial the appellant called no evidence. The question is simply whether the necessary proof appears upon the case for the respondent as plaintiff.

Three witnesses testified on her behalf: Mr. Gunson, Mr. Trew and Mr. Saxton. The evidence of the last named had no reference to this part of the case, and that of Mr. Trew but little,

though it was explicit as to Gunson's desire to make use of the land, and to obtain possession to that end. But evidence of that kind does not go to prove Gunson's readiness and willingness to pay.

What was the time at which the necessity for him to pay arose? The agreement with Gunson stipulated for complete payment on transfer, delivery to be made on the payment of £100 deposit. As soon as a transfer would pass the title he should have been ready with it and the purchase money. But the agreement was subject to the transfer to Hensley being refused. The Commissioner of Crown Lands refused consent as to Hensley on 7th June 1910, but the transfer to Gunson was subject to a condition imposed by the law. The property was a perpetual lease under the *Crown Lands Amendment Act* 1898 (No. 705). By sec. 17 of that Act perpetual leases were to be made in the form of the First Schedule in order to the proper vesting of the land leased, and subject to the covenants, conditions, &c., expressed in short form in that Schedule and in extended form in the Second Schedule; and the covenants, conditions, &c., in the extended form were to bind "the lessee and all persons for the time entitled to any benefit of the lease."

The third covenant by the lessee bound him not to "transfer, sub-let, encumber or mortgage without the written consent of the Commissioner of Crown Lands first had in each case." The third condition made the lease liable to forfeiture if the land should be transferred, sub-let or mortgaged without the Commissioner's written consent first had.

The Second Schedule gives an "extended meaning" of the conditions of forfeiture, maintaining the sense of the shorter terms I have stated. To transfer the lease before the grant of the Commissioner's consent was to incur liability to forfeiture. The parties must be taken to have contracted with reference to that positive law.

On 17th June, four days after the respondent contracted to sell to Gunson, the appellant lodged a caveat at the Land Titles Office. Gunson had on the previous day paid his deposit on the purchase. The Commissioner of Crown Lands approved of a transfer to Gunson on 28th July, adding these words: "The

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parties interested must now take the necessary steps to have the transaction registered" &c. No steps, however, were or could be taken for registration until 7th March 1911, when the actual instrument of transfer was executed and payment made. In the meantime, on 30th August 1910, the respondent had taken out a summons against the appellant for the removal of his caveat, and its removal had been ordered by the Court on 12th December 1910. On 24th December the appellant gave up possession and Mr. Gunson entered under his contract.

Throughout his evidence, which I have carefully considered, I find no trace of his readiness to pay the purchase money at any time before the actual signing of the transfer. On his own statement, made by Trew's letter to the appellant on 13th June, he took delivery on that date, and if that means that he was then given, and assumed, possession in law, it was for him to expel the intruder, and he had no cause of action against the respondent. But let that pass.

The title was clear on and from the 28th July, when the Commissioner gave his consent to the transfer. Gunson should have been ready with a prepared transfer and the balance of purchase money as soon as practicable after that date, and the preparation and tender of such a transfer involves but little time in transactions of this kind. It is plain upon his evidence that he was not thus ready. He preferred to negotiate about a deduction. He did not begin that negotiation till January, and he did not ask the respondent to complete until the negotiation was over. Upon his own showing, therefore, he did not perform a duty which was a condition precedent to his right to recover against the respondent. He had not therefore the right, which he asserted, to recover damages against her in respect of any time between the end of July 1910 and the 7th March 1911, or indeed between the end of July and the 24th December, when he obtained possession. He says the season was lost before he obtained possession. He had not secured to himself the right to recover against the respondent in respect of that loss of season on which is founded the claim for special damage, which was, I think, unnecessarily allowed by the respondent. I do not think, therefore, that the respondent can in this action recover such damage

against the appellant, since she was not under a legal liability to allow the £250 to Gunson.

Whether the respondent has now any rights against Mr. Gunson, I do not attempt to lay down at this stage. There is no evidence that he saw the respondent at any time before he became the purchaser of her lease. After the contract he became her legal adviser, for when the appellant lodged the caveat he acted as solicitor for her, his vendor. That relation appears to have been a continuing one when she allowed him the deduction from the purchase money. Apparently he continued to act as her solicitor until in this appeal he becomes also her junior counsel; and he was the chief witness at the trial in the assertion of the supposed liability of the appellant. The deposit on Gunson's purchase was paid two days after the date of the receipt for it. The consideration for the transfer is expressed at £2,150, which was, upon Gunson's evidence, £150 more than the respondent received in all. I feel bound to mention these facts, but their complexion may be much modified by others which are not before us. Professional men sometimes drift into such positions without the slightest desire to do wrong, and I will not suppose that Mr. Gunson has any thought except that of doing right in the situation which has arisen.

I wish to add a few words as to an application made on behalf of the respondent, after the reservation of judgment, for an order to remit the case to the Supreme Court for the trial of a specific issue whether Gunson was or was not ready and willing to pay the balance of the purchase money. His readiness and willingness must, for the establishment of his right to special damage, have been at some time before the special damage (if any) was incurred. On his own evidence at the trial there was no readiness and willingness at any such time. The respondent had her opportunity to prove it at the trial, and she did not prove it. There is no reason why she should now be allowed to offer such proof. So much for the merits of the motion. But having regard to previous decisions of this Court (see, *e.g.*, *Ronald* v. *Harper* (1)) we could not admit fresh evidence on appeal as to issues determined below, the correctness of that determination

(1) 11 C.L.R., 63.

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being the question on appeal. Whether we could remit an issue involved but not specifically determined at the trial for further inquiry may be considered a doubtful question in view of the dictum of *Griffith* C.J. in *Scott Fell* v. *Lloyd* (1). My doubt on that subject is increased by consideration of the 36th and 37th sections of the *Judiciary Act*. But, even if we have such jurisdiction, the facts before us on this appeal convince me that this is not a fit occasion for its exercise.

I wish further to say that, apart from the question of readiness and willingness, the failure to prove which was not brought to the notice of their Honors of the Supreme Court, I must not be understood as impugning the correctness of their conclusions, of which the question now decided does not involve the discussion.

I am of opinion that the appeal must be allowed.

The judgment of ISAACS and RICH JJ. was read by

ISAACS J. The damages in controversy in this appeal are those which the plaintiff alleges she was *compellable* to pay and did pay to Gunson in respect of the breach by her of her specific promise to give him delivery on payment of his deposit. Those damages were claimed by Gunson not on account of any defect of title, but by reason of her failure to give him actual vacant possession of the land. *Bain* v. *Fothergill* (2) does not apply to such a case. See *Engell* v. *Fitch* (3). This is too clearly established to need extended consideration.

Laying that objection aside, the real question is what damages, if any, Gunson was entitled to, and could have recovered if he had brought an action against Mrs. Reschke for non-delivery of the land. That requires an examination of the facts.

His contract with her was dated 13th June 1910, and provided first for a consideration of £2,250 for land and winnower, payable on transfer of property, and next that "delivery" was to be made on payment of £100 deposit.

In the judgment appealed from it was held that Gunson, being entitled to possession from June to December, suffered damage through losing the benefit of the crops and of grass during that

(1) 13 C.L.R., 230, at p. 234. (2) L.R. 7 H.L., 158.
(3) L.R. 4 Q.B., 659.

period, and that £250 was a fair sum, no deduction being required in respect of interest on his unpaid purchase money.

The necessary assumption on which that result is based is that Gunson had established his right to receive possession in June and to retain it until after the season had expired, and, indeed, right through. The continuous right of retention is essential to the plaintiff's case, as it was shaped and determined. The substantial problem now is whether that assumption is correct.

The spirit of the provision in the Crown Lands Acts in respect of perpetual leases, forbidding transfers or assignments except upon prior permission in writing of the Commissioner, is opposed to the handing over of possession as owner until a permitted transfer has been registered. But the words used by the legislature govern the matter, and a Court is limited to the ascertainment of the intention of Parliament by a fair construction of what it has actually said.

In reaching that construction regard must be had to the judicial interpretation which for over a century has been placed on restrictions upon alienation couched in practically identical terms.

Covenants not to assign or sub-let are usual in leases, and have long been the subject of judicial consideration as to what constitutes a breach.

In *Church* v. *Brown* (1) Lord *Eldon* said:—"If the landlord has a covenant against both assigning and underletting, the tenant might by an agreement, neither assigning, nor underletting, put another person in possession of the premises; and parting with the possession in that manner would not be a breach of those covenants." *West* v. *Dobb* (2) is an illustration at common law. *Blackburn* J. said (3):—"The practice of letting a purchaser into possession before the legal estate is transferred is so common, that if it was intended to forbid such a change of possession, it ought to have been clearly expressed, and in the present case it is not." See also *Grove* v. *Portal* (4) to the same effect.

It is impossible to ignore the judicial construction of a common

(1) 15 Ves., 258, at p. 265.
(2) L.R. 4 Q.B., 634, affirmed L.R. 5 Q.B., 460.
(3) L.R. 4 Q.B., 634, at p. 638.
(4) (1902) 1 Ch., 727, at p. 731.

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stipulation which has been introduced into the Schedule as a covenant in the lease, and which, being so introduced, must be considered as having its recognized effect. An equitable assignment does not fall within the restriction: *Gentle* v. *Faulkner* (1).

The stipulation that on payment of the deposit the purchaser would be given possession, if "delivery" means possession, should therefore, as Mr. *Isbister* contended, be regarded as valid as the law now stands, and the rights of the parties must accordingly be determined on that basis.

So regarding it, Gunson was entitled to possession on 14th June if the receipt signed by Trew be correct, or on 16th June if Gunson's own evidence as to the date of payment of the £100 be accurate.

But is it to be assumed, as the respondent's contention necessarily assumes, that Gunson had a right to retain that possession until December, that is, after the full benefits of the crop and the grass had accrued to him, and, indeed, for ever? If not, if as between him and Mrs. Reschke he had not in the circumstances the right to retain possession and crop the land and graze his sheep long enough to obtain those benefits, neither had his share-farming contractors any right to remain, and the assessment of damages is clearly wrong.

Gunson had that right, however, if he were ready and willing to keep his contract by paying the balance of the purchase money on transfer as agreed. No specific time is mentioned for those concurrent acts, and by virtue of sub-sec. VII. of sec. 6 of the *Supreme Court Act* 1878, the time would in this case mean in a reasonable time, not earlier than the written permission of the Commissioner.

A vendor acting under independent advice, unless a transfer were tendered and the money paid directly after the permission, would in such a case give notice making time of the essence of the contract.

The period from June to December is such as to require proof of readiness and willingness to pay the balance within a reasonable time supposing no obstruction to completion had existed.

(1) (1900) 2 Q.B., 267.

For it must never be forgotten that readiness and willingness in this sense means readiness and willingness in the event of the vendor being able to carry out the contract as the purchaser insists by his action it should have been carried out, and claims damages on that basis. See *Howe* v. *Smith* (1); *Laird* v. *Pim* (2); *Poole* v. *Hill* (3), and *Bullen and Leake*, 6th ed., p. 288.

It is necessary to observe that this question arises not as part of the plaintiff's cause of action—which is the wrongful retention of possession of the land and is wholly independent of any breach of Gunson's contract—but as part of the proof of her damages for such retention.

The rules of Court draw a clear line of distinction as to pleadings to the cause of action, and to damages. Order XX., rule 16, and Order XXII., rule 4, are explicit. If Gunson were suing Mrs. Reschke for damages an averment of his readiness and willingness to pay his purchase money would under Order XX., rule 13, be implied, and her denial would have to be explicit. But that would be so because the condition would go to the cause of action. In the present case it is immaterial to the cause of action, which exists independently of Gunson's readiness and willingness, and in respect of which mesne profits were recoverable and recovered. Gunson's readiness and willingness is relevant only to that allegation in par. 17 of the statement of claim, concerned only with damages, that the plaintiff "became liable to pay to . . . Gunson damages by reason of the breach of the plaintiff's said contract."

That would not be proper pleading if it were a statement of the cause of action. It would be an attempt to gulp the facts and law in a mouthful. As an allegation of compulsory damage, it is correct. But it is also explicitly denied *inter alia* by par. 1 of the defence, and so all the facts in par. 17 of the statement of claim are doubly put in issue, first by par. 1 of the defence, and next by virtue of Order XXII., rule 4. If this were not so, the last-mentioned rule would be a trap.

Unless, then, Gunson were ready and willing to pay the balance supposing no default on the vendor's part occurred, he

(1) 27 Ch. D., 89, at p. 103. (2) 7 M. & W., 474.
(3) 6 M. & W., 835.

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would have no right to claim damages from her and might even in a proper case be deprived of possession (See *Williams on Vendor and Purchaser*, p. 1063). If she chose to pay damages voluntarily and to waive her rights in any way, or to incapacitate herself from carrying out her bargain, she would do so at her own risk and would have no right to demand reimbursement by Hensley, who is only liable for her *enforceable* outlay caused by his wrongful retention of the land.

The burden of establishing the compulsory payment to Gunson resting on the plaintiff, how has she satisfied it? There is no direct evidence that Gunson was ready and willing to pay at any time before the date of actual payment, 11th March 1911. There is evidence from which the inference could be drawn that he was ready and willing to pay in December after he got possession—and after the damage sued for had accrued—but none pointing to any earlier period.

The settlement of the matter as between Gunson and the plaintiff was entirely behind the back of Hensley. The parties were not bound in law to consult him, or to permit him to take part in the arrangement; but not only would it have been prudent from the plaintiff's standpoint, it would have been on the face of it a fair thing, to let the man whom it was intended to make ultimately responsible have something to say about it; and as between Gunson and Mrs. Reschke it would have been equally fair on the face of it for her protection to introduce Hensley into the negotiation at that stage. However hard it may be on Mrs. Reschke, she must be bound by what Gunson and she did, and cannot throw her burden of misfortune on to Hensley's shoulders. The circumstances are such as, in our opinion, to lead the Court away from any effort to strain the facts in favour of Gunson's readiness and willingness to pay the balance of the purchase money before December. Hensley, of course, knew nothing on the point, called no evidence, and had to rest content with meeting whatever was proved against him relative to the settlement.

The learned primary Judge decided against the plaintiff on this part of the case, and though he did so for different reasons, it must be remembered that the general rule is, as *Cotton* L.J.

said in *Hyam* v. *Terry* (1), judgments and not reasons are appealable. The plaintiff chose to appeal against that judgment knowing exactly what had been proved, and how far the evidence entitled her to succeed, and the defendant had and has a right to retain it on any available ground. He did not admit anything; he was at arm's length all through; and he is not to be concluded by any legal argument made or omitted—that being matter for costs only, because no other prejudice could ensue to the plaintiff after she had once closed her case at the trial. To sustain her case the plaintiff is bound to make out (1) that Gunson was not bound to take delivery unless he could get vacant possession, (2) that in fact he did not get such delivery, (3) that he was entitled to claim damages, and (4) that the damages paid were reasonable.

The first and fourth points may be passed by, because "delivery" has been assumed to be equivalent to possession and the reasonableness of the sum of £250 cannot, we think, be successfully contested.

As to the second, namely, whether in fact he did get delivery and accept it such as it could then be given, there is very strong reason indeed to believe he did. After the making of the contract Gunson says he acted for Mrs. Reschke as her solicitor. By his contract of 13th June he had made a bargain with Mrs. Reschke, upon which *Homburg* J. made the following observations in his judgment:—"It is quite clear from the evidence that Mrs. Reschke was quite blameless in this transaction. She was led into the contract she made with Mr. Gunson at his request, he knowing that Hensley was in possession as tenant with an option to purchase which he was endeavouring to exercise." And then, a little further on, his Honor said:—"As payment of the deposit was made by Mr. Gunson three days after the date of the contract, it meant turning Mr. Hensley out within three days, and this Mr. Gunson must have known Mrs. Reschke was incapable of doing." We would add to that, that if Trew's receipt of 14th June is not a sham the "three days" should be "one day."

Gunson as adverse contractor was entitled to demand of Mrs.

(1) 25 Sol. J., 371.

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Reschke to be given delivery, that is, as it has been assumed, to be put into possession at once, and failing that, was entitled to look to her for damages—as he ultimately did—for her failure to give him that possession. Now, there is no trace of any demand by him upon Mrs. Reschke to give him possession, and the absence of such a demand would be in the highest degree remarkable unless in fact he got "delivery," as it is called in the contract, so far as she could give it, leaving him to use her name for the purpose of ousting Hensley. If he got that, it would entirely obliterate any possible claim in respect of not getting delivery under the contract, and leave Hensley liable only for the ordinary mesne profits of the land.

There is very cogent evidence that Gunson did accept delivery such as he could get. If he did, that would make the observations of *Homburg* J. quite compatible with just and fair dealing. And at first, according to the correspondence, Gunson did take that course.

Hensley, while still *bonâ fide* endeavouring to secure the Commissioner's consent, was suddenly informed by Trew's letter of 13th June—Trew being Gunson's agent—that Gunson had purchased and *had taken delivery that day*, and *had given instructions to impound everything on the place.* Now, that was a distinct intimation that Gunson and not Mrs. Reschke was the person to whom Hensley was bound to yield up possession, and that Gunson demanded it in his own right. Hensley's solicitor on the 16th acknowledged the letter, noted the statement that Gunson had taken delivery, and stated that Hensley stood on his rights. On 20th June Gunson himself by letter demands possession in his own right and declares he holds Hensley responsible, that is, to him for damage. Mrs. Reschke's relation to Hensley appears to have ceased. On the same day Benny, for Hensley, refuses and tells Gunson to look to Mrs. Reschke for possession. On 20th June Gunson again reiterates his personal claim and Benny refuses. On or about 17th June Hensley had lodged a caveat, and apparently notice of that had not reached Gunson when his letter of 20th June was written. On 21st June—Gunson being then Mrs. Reschke's solicitor—a formal letter was sent to Hensley demanding possession on her behalf. This is not

inconsistent with Gunson having accepted delivery from Mrs. Reschke, absolving her from all responsibility for not giving him possession which he knew, at the time he contracted, he might not get, but it was possibly a use of her name as the legal owner, Gunson as yet not being an approved transferee and no actual transfer being executed.

There is at this juncture of time a practical fact of importance in this regard. Not only were arrangements made with farmers to work the land, but tons of manure and bags of seed wheat were bought, and 1,000 wethers were purchased and actually started to be put on the land. No one in Gunson's position would have done that without either an assurance from Mrs. Reschke that she could and would fulfil her undertaking, or an assumption of delivery on the anticipation of Hensley leaving upon request. As soon as the caveat was notified, the sheep were stopped on the way and sold. This occurred apparently just before the letter of 21st June.

We do not, however, judicially determine the question of whether Gunson actually took delivery. That question was not argued, and its prominence only arose upon careful comparison and consideration of the evidence since the argument. We refer to it so precisely because, had a conclusion favourable to the respondent been arrived at on the point of readiness and willingness, we should have felt it necessary to hear argument on this point before dismissing this appeal.

Gunson's position towards Mrs. Reschke was a delicate one, in view of his dual situation. On the one hand he was her legal adviser, with a duty to guide her both as against Hensley and as against any possible claim he himself might have to make against her; on the other hand he was an adverse contractor with his own interest tending to her prejudice, by making her responsible to him under the contract for all he could get. He says he did not advise her to get independent advice before she paid him the damages. Apparently he did not tell her that he had already written to Hensley saying that he had assumed "delivery," and though he was a solicitor, and her solicitor, accepted from her a transfer of the land in March 1911 with a distinct written acknowledgment by her that she had received from him £2,150

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—the full price of the land (the other £100 being for the winnower)—and thereby in the absence of explanation negativing any deduction for damages. Gunson himself swears he only paid £1,900 for the land, but the document itself would on inspection lead Hensley to think no deduction had been made, and *primâ facie* tends to support the view that he had taken delivery.

It would certainly be consistent with his having accepted in a just spirit such delivery as he knew she could or might give—and not the less just because, as Mr. Trew says, the land purchased for £2,150 was then worth £4,500. If delivery was thus in fact taken, its abandonment afterwards was voluntary, and Hensley would not be liable in this action for more than such mesne profits as Mrs. Reschke probably would have made in the circumstances, not what she could have made under any conceivable circumstances.

It is only fair, however, to Gunson to say that all the apparent difficulties might disappear on full explanation; but we can only, for the purposes of this case, regard the circumstances as they appear upon the evidence.

But, assuming delivery not to have been taken, is there any evidence, or any evidence which satisfies the Court, that Gunson was ready and willing to pay as mentioned?

There is no direct evidence whatever on the point, nor is there any which satisfies us indirectly; and, as this is an appeal, we have come to an independent conclusion on the fact in favour of the appellant. Gunson explains to some extent why payment was delayed from December to March; but in December all the damage was done, and more than a reasonable time had elapsed from 16th June, which is the proper time to reckon for this purpose, or even from 28th July, if that were taken as the starting point.

The caveat came to an end on 12th December. Benny rang up Gunson and told him he could have possession. He took it. He does not appear to have consulted Mrs. Reschke as to taking possession, which would be natural if he had already received delivery; otherwise one would have expected him to have arranged it with her, whether as vendor or as client. Up to

that time he does not appear, so far as the evidence shows, to have said anything to her of her continuing responsibility to him. But some time after he took possession—that is, in January—he made a verbal claim upon her for £250. She offered £150; he insisted on £250. He went into no figures as to his loss—a remarkable omission considering their relations. He thinks he told her that if the Court did not think it reasonable she could not get it from Hensley. Trew says that Gunson did go into figures with the Reschkes in January, but that is not consistent with Gunson's evidence. The parties could not agree as to compensation; and at last, as Gunson states, on 7th March 1911 he would not pay the purchase money unless she agreed to deduct £250. She did so agree, and the balance was paid. He says he paid £2,000 in all—that is, £1,900 for the land and £100 for the winnower. But, as already mentioned, the transfer signed by Mrs. Reschke states that she received for the land £2,150. She herself gave no evidence, and so left all these difficulties unexplained.

On the whole, then, we are unable to conclude judicially on the materials before the Court that Gunson was ready and willing to pay as the contract required, and accordingly find this issue against the plaintiff.

The facts are adverted to at some length not only to deal directly with the issue of readiness and willingness to pay within a reasonable time assuming no obstacle existed, but also partly to explain why we are indiposed to strain any powers of inference to supply the want of direct testimony on the point, the matter being one peculiarly within the knowledge of Gunson; and partly to indicate the reasons why we considered on the recent application that, if there were the power to do so, this is not a proper case, particularly after the full discussion as to the nature and importance of the missing evidence had closed, to exercise the power of remitting the cause for rehearing on the point of necessary readiness and willingness to pay.

A still further question presents itself. The respondent obtained £60 for mesne profits in her own original right—calculated on her loss of interest on the unpaid purchase money.

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That assumes she was paid at the proper time, which is quite right, if she is willing to take that as her damage.

But if it be assumed against Hensley for that purpose that Gunson was bound to pay her before he did, it clearly cannot also at the same time be assumed against Hensley that Gunson was entitled to retain the money and pocket the income. Gunson on the first assumption was bound to set off or deduct from the damages claimed the interest in question. Admittedly he did not; and so, as the judgment stands, Hensley has to pay that interest twice over. If all else failed in the appeal the judgment should be reduced by £60.

Appeal allowed. Order appealed from discharged. Judgment of Homburg J. restored. Respondent to pay costs of the appeal.

Solicitor, for the appellant, *B. Benny.*

Solicitors, for the respondent, *W. & G. Gunson.*

B. L.