you are satisfied that there was a delivery and an acceptance of goods under the disputed order, and, unless you find that, the defendant is entitled to a verdict."

In our opinion the view of the majority of the Supreme Court cannot be maintained, and the appeal should be allowed.

Appeal allowed with costs. Judgment appealed from set aside and verdict of jury restored.

Solicitors for the appellant, *Mark Mitchell & Nelson.*

Solicitor for the respondent, *W. G. Forsyth.*

B. L.

[HIGH COURT OF AUSTRALIA.]

COHEN . . . . . APPELLANT;
DEFENDANT,

AND

LAPIN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Nov.* 20, 21; *Dec.* 15.

Knox C.J., Isaacs and Gavan Duffy JJ.

Landlord and Tenant—Lease—Construction—Provision for re-entry—Conviction for offence under Liquor Act—Action for ejectment—Effect of prior judgment—Estoppel—Practice—High Court—Appeal from Supreme Court of State—Ground of objection not taken until argument in High Court—Liquor Act 1912 (*N.S.W.*) (*No.* 42 *of* 1912), *secs.* 128, 129, 130—*Common Law Procedure Act* 1899 (*N.S.W.*) (*No.* 21 *of* 1899), *secs.* 222, 224, 249.

The appellant was the lessee from the respondent and the licensee of a certain hotel. The lease provided that, if the lessee should be convicted of any offence under the provisions of any Act then or thereafter in force, a conviction whereof might either alone or in conjunction with a conviction

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or convictions of any other offence or offences render the licence liable to cancellation or forfeiture or render the premises liable to disqualification, it should be lawful for the lessor to re-enter. The appellant was convicted of one of the offences, but was not at any time convicted of any other of the offences, mentioned in sec. 128 of the *Liquor Act* 1912 (N.S.W.), which provides that, if any licensee is convicted of one of certain specified offences "and if two previous convictions for any of such offences (whether of the same or different kinds) are proved to have been made against him within the three years next preceding, while licensee of the same premises, the Court shall cancel the licence of the premises, and may disqualify such premises from being licensed for a period of two years."

Held, that upon the conviction the respondent was entitled to re-enter under the lease.

After the conviction, by a writ issued upon the same day, the respondent brought an action for ejectment against the appellant in the Supreme Court of New South Wales, claiming to be entitled to possession on and since that day on the ground of a breach by the appellant of his covenant in the lease not to assign or sublet without the respondent's leave. In that action judgment was entered for the appellant. By a writ issued about a year after the issue of the writ in the first action, the respondent brought another action for ejectment against the appellant, claiming to be entitled to possession on and since the date of the conviction above referred to on the ground of that conviction.

Held, by *Knox* C.J. and *Gavan Duffy* J., that the respondent was not in the second action debarred from relying on the conviction by reason of the fact that in the first action he might have asserted the right of re-entry which it gave him.

Held, also, by *Knox* C.J. and *Gavan Duffy* J. (*Isaacs* J. dissenting), that the appellant should not be allowed to raise in argument before the High Court for the first time a contention that the respondent was debarred from bringing the second action because the judgment in the first action was conclusive as to the right to possession during the period in respect of which that judgment determined the right to possession.

Per Isaacs J.: The respondent was not estopped from bringing the second action by reason of the fact that the period during which the respondent claimed to be entitled to possession was the same as that in the first action.

Decision of the Supreme Court of New South Wales (Full Court): *Lapin* v. *Cohen*, (1924) 24 S.R. 373, affirmed.

APPEAL from the Supreme Court of New South Wales.

By a lease dated 27th March 1919 Mark Lapin leased the United Australia Hotel at Newtown to Edward Samuel Cohen, who was the licensee of the hotel, on a weekly tenancy. The lease contained a covenant by the lessee that he would not without leave assign or

ublet and a covenant by the lessor that he would not put an end o the tenancy before 23rd March 1926 if the lessee observed the ovenants in the lease. The lease also contained in clause 11 the ollowing provision: "Provided always and it is hereby expressly greed and these presents are upon this express condition that . . in case the lessee shall be convicted of any offence under he provisions of the *Liquor Act* 1912 or of any Acts repealing or mending the said Act or of knowingly committing any offence under he provisions of Part IX. of the *Public Health Act* 1902 or if the essee shall be convicted of any offence under the provisions of any ct now or hereafter in force a conviction whereof may either alone r in conjunction with a conviction or convictions of any other ffence or offences render the licence or licences for the said premises able to cancellation or forfeiture or render the said demised premises able to disqualification . . . it shall be lawful for the lessor . . at any time thereafter into and upon the said demised remises to re-enter" &c. On 30th August 1922 Cohen was onvicted of selling adulterated rum, which is an offence under ec. 10 of the *Pure Food Act* 1908 (N.S.W.).

By a writ issued later on the same day an action of ejectment as brought against Cohen and his wife by Lapin, claiming to ave been entitled to possession of the hotel "on and since 0th August 1922" on the ground of a breach by Cohen of his ovenant not to assign or sublet without leave. That action ame on for hearing on 7th June 1923, and by consent a ormal verdict was entered for the plaintiff. On appeal to the ull Court that verdict was set aside and judgment was entered or the defendant: *Lapin* v. *Cohen* (1). The material portion f that judgment, which was signed on 18th October 1923, was as ollows: "Afterwards . . . the said Court determined that the laintiff was not entitled to the possession of land and premises bove mentioned or any part thereof as in said writ alleged And urther determined that the said verdict for the plaintiff should e set aside and a verdict should be entered for the defendant. herefore it is considered that the said Mark Lapin take nothing by is said writ and that the said Edward Samuel Cohen do go there ithout delay &c."

(1) (1923) 23 S.R. (N.S.W.) 507.

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By a writ issued on 22nd August 1923 another action of ejectment was instituted against Cohen by Lapin, claiming to have been entitled to the possession of the hotel "on and since 30th August 1922." The ground of the claim in this action was based on a right of re-entry under the terms of the lease by reason of the conviction of 30th August 1922.

The action was heard before *Campbell* J. and a jury, when a formal verdict was by consent entered for the plaintiff.

The defendant moved before the Full Court for an order that the verdict be set aside and a new trial granted, or alternatively that a verdict be entered for the defendant, on the grounds: (1) that on the evidence the defendant was entitled to a verdict; (2) that on the relevant evidence in the case it should be determined that the plaintiff was not entitled at the commencement of the action to re-enter the premises the subject of the action by reason of any forfeiture for breach of covenant; (3) that there is no evidence of breach of any covenant entitling the plaintiff to re-enter at the commencement of the action; (4) that the plaintiff is estopped or otherwise prevented by the judgment of the Court in the case of *Lapin* v. *Cohen* of 18th October 1923 from claiming that he was at the commencement of the action entitled by virtue of the conviction dated 30th August 1922 to the possession of the aforesaid premises or to expel the defendant therefrom. The Full Court dismissed the motion: *Lapin* v. *Cohen* (1).

From the decision of the Full Court the defendant now appealed to the High Court on the same grounds as those of the appeal to the Full Court.

Flannery K.C. and *Corringham*, for the appellant. The offence referred to in clause 11 of the lease as being one a conviction whereof may in conjunction with convictions for other offences render the licence liable to cancellation means, in relation to the offences mentioned in sec. 128 of the *Liquor Act* 1912, that offence upon conviction whereof the section provides that the Court shall cancel the licence of the premises; that is, there must be three convictions before the clause can apply. Part IX. of the *Public Health Act*

(1) (1924) 24 S.R. (N.S.W.) 373.

1902 was repealed and substantially re-enacted by the *Pure Food Act* 1908, and the qualification in the lease that an offence under Part IX. of the *Public Health Act* must be "knowingly" committed should attach to offences under the *Pure Food Act* wherever they are referred to (see *Spyve* v. *Topham* (1); *Newington Local Board* v. *Cottingham Local Board* (2)). The judgment in the first action operates, either as matter of estoppel or on the principle *nemo debet bis vexari* &c., to prevent the respondent from recovering in the second action. The period in respect of which the respondent claimed to be entitled to possession was the same in both actions; so that the issue in both actions was the same, namely, was the respondent entitled to possession on 30th August 1922? That issue was concluded by the judgment in the first action both as to the ground then relied on and as to any other ground that could then have been set up, such as the conviction. [Counsel referred to the *Common Law Procedure Act* 1899, secs. 222, 249; *Aslin* v. *Parkin* (3); *Lennon* v. *Meegan* (4); *Doe d. Strode* v. *Seaton* (5); *Newington* v. *Levy* (6); *Re Hilton*; *Ex parte March* (7); *Smith's Leading Cases*, 11th ed., vol. II., pp. 770 et seqq.; *In re Defries*; *Norton* v. *Levy* (8); *Houstoun* v. *Marquis of Sligo* (9); *Cole on Ejectment*, pp. 2, 77, 95, 250, 641.]

[KNOX C.J. referred to *Flitters* v. *Allfrey* (10).

[ISAACS J. referred to *Harris* v. *Mulkern* (11).

[GAVAN DUFFY J. referred to *Clerke* v. *Rowell* (12).]

Broomfield K.C. and *Collins* (with them *Maxwell*), for the respondent. A single conviction for one of the offences mentioned in sec. 128 of the *Liquor Act* is sufficient to give a right of re-entry under clause 11 of the lease. A judgment in ejectment is never final, and it is always open to the plaintiff or defendant to bring a new action and for the same cause of action. The judgment has no more effect than a nonsuit. The second action is covered by sec. 251 of the *Common Law Procedure Act*. That section applies

(1) (1802) 3 East 115.
(2) (1879) 12 Ch. D. 725.
(3) (1758) 2 Burr. 665.
(4) (1905) 2 I.R. 189, at p. 196.
(5) (1835) 2 Cr. M. & R. 728.
(6) (1870) L.R. 6 C.P. 180, at p. 187.
(7) (1892) 67 L.T. 594.
(8) (1883) 48 L.T. 703.
(9) (1885) 29 Ch. D. 448.
(10) (1874) L.R. 10 C.P. 29.
(11) (1875) 1 Ex. D. 31.
(12) (1669) 1 Mod. 10.

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to a second action for possession on the same day. The first action would only be an estoppel as to a subsequent action for mesne profits (*Lennon* v. *Meegan* (1)). The claim in the second action is to possession after the date as to which the right to possession was determined in the first action, namely, 30th August 1922; and, even if the respondent is not entitled to judgment as on that day, he is so entitled as on and from the next day. [Counsel also referred to *Earl of Bath* v. *Sherwin* (2); *Doe d. Davies* v. *Evans* (3); *Halsbury's Laws of England*, vol. XXIV., p. 329.]

Flannery K.C., in reply.

Cur. adv. vult.

Dec. 15. The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. This was an action of ejectment tried before *Campbell* J. without a jury, when, on certain admissions being made, a formal verdict was by consent entered for the plaintiff. It appeared that the plaintiff leased the United Australia Hotel at Newtown to the defendant on 27th March 1919, on a weekly tenancy, but he covenanted not to put an end to the tenancy before 23rd March 1926 if the lessee observed the covenants in the lease. Clause 11 of the lease provides, *inter alia*, that, "if the lessee shall be convicted of any offence under the provisions of any Act now or hereafter in force a conviction whereof may either alone or in conjunction with a conviction or convictions of any other offence or offences render the licence or licences for the said premises liable to cancellation or forfeiture or render the said demised premises liable to disqualification," it shall be lawful for the lessor to re-enter.

The defendant moved the Full Court to set aside the verdict for the plaintiff and to order a new trial, or in the alternative that a verdict should be entered for the defendant. On that motion only two questions were debated, which are thus set out in the grounds contained in the notice of motion :—"(3) That there is no evidence of breach of any covenant entitling the plaintiff to re-enter at the

(1) (1905) 2 I.R. 189.
(2) (1710) 10 Mod. 1.
(3) (1841) 9 M. & W. 48.

commencement of the action. (4) That the plaintiff is estopped or otherwise prevented by the judgment of the Court in the case of *Lapin* v. *Cohen* of 18th October 1923 from claiming that he was at the commencement of the action entitled by virtue of the conviction dated 30th August 1922 to the possession of the aforesaid premises or to expel the defendant therefrom."

The first of these questions turns on the construction of the words of clause 11 of the lease. *Street* A.C.J., in delivering the judgment of the Court, says (1) :—" Sec. 128 of the *Liquor Act* 1912 provides that if a licensee is convicted of any one of certain specified offences, and if two previous convictions for any of them are proved to have been made against him within the three years next preceding, while licensee of the same premises, the Licensing Court shall cancel the licence of the premises and may disqualify them from being licensed for a period of two years. An offence under the provisions of the *Pure Food Act* relating to adulterated liquor is one of the offences mentioned in the section. Clause 11 of the lease provides that if the lessee shall be convicted of an offence, a conviction for which may, either alone or in conjunction with a conviction for other offences, render the licence for the premises liable to cancellation or forfeiture, or render the premises liable to disqualification, it shall be lawful for the lessor to re-enter. It is admitted, and indeed it is manifest, that convictions for offences of the kind mentioned in sec. 128 of the Act are included in the offences to which the clause refers, but it is said that it is only the third conviction for one of such offences which is aimed at, as the premises are not in danger of disqualification until then." The second ground is thus paraphrased by the same learned Judge (2) : " The other ground is that, as the conviction of the defendant took place before the first action of ejectment was begun, and as the plaintiff might have asserted the right of re-entry which it gave him in that action, but did not do so, he is debarred from relying upon it in any subsequent proceedings as a ground for ejecting the defendant." The Court dealt with both these grounds and held that neither of them was established. No other question was discussed or determined.

(1) (1924) 24 S.R. (N.S.W.), at p. 377.

(2) (1924) 24 S.R. (N.S.W.), at p. 378.

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Knox C.J. Gavan Duffy J.

On appeal to this Court the grounds argued before the Supreme Court were again taken and argued before us, but in addition another argument was pressed upon us. It was said that, even if a plaintiff could bring ejectment on a title in respect of which he had already failed once or more than once against the same defendant, still a judgment in ejectment was conclusive between the parties as to the right to possession during the very period in respect of which that judgment determined the right to possession. In this case the writ in the first action of ejectment asserted a right to possession on 30th August 1922 and on that day alone, since the writ was issued on that day claiming possession on and since 30th August 1922, and the judgment declared that the plaintiff was not entitled to possession as in the writ alleged. In the present action the writ, which was issued on 21st August 1923, claimed the right to possession on and since 30th August 1922, that is to say, from 30th August 1922 till 21st August 1923. Now, it has long been established by competent authority that a judgment in an action of ejectment does not finally settle the question of title between the parties to the action, but merely the right to possession as between the parties at a given time; but we can find no authority, nor any reason grounded on principle, which prevents us from holding that the right to possession of land on a given date, once settled between parties in an action of ejectment, is finally settled as between them; and it would follow that the judgment in the first action of ejectment between the parties in the present action should be regarded as having finally determined between them the right to possession on 30th August 1922. We think, however, that it is unnecessary for us to consider whether the defendant in this action would gain any practical advantage if he were able to rely on the fact that the plaintiff is estopped from establishing a right to possession on the first day of the period during which he now claims that he is entitled to possession. His appeal to the Supreme Court and his argument there were not based on any such contention; indeed, the grounds of appeal both in the Supreme Court and here are expressly limited to the question of the plaintiff's right to possession at the commencement of the action, namely, 21st August 1923. In our opinion the judgment of the Supreme Court is correct in respect of all the points raised for

argument and argued before it. The former contention which has been raised before us was not raised in the grounds of appeal in the Supreme Court or argued before it nor was it raised in the grounds of appeal to this Court, and we do not think it should now be entertained.

For those reasons we think the appeal should be dismissed.

Knox C.J. Gavan Duffy J.

ISAACS J. Two grounds were argued in support of the appeal, namely, (1) that the conviction of 25th July 1922, under the *Pure Food Act* 1908, did not give a right of re-entry under clause 11 of the lease; and (2) that the judgment in the former action of ejectment estopped the respondent in respect of the issue in this action. Both points are questions of law upon construction of documents and upon facts admitted or proved beyond controversy, and, therefore, even if raised for the first time before us, we are bound to pronounce on them (*Yorkshire Insurance Co.* v. *Craine* (1)).

As to the first point, I am of opinion that it is not sustainable. One of the provisions of clause 11 of the lease is that, "if the lessee shall be convicted of any offence under the provisions of any Act now or hereafter in force a conviction whereof may either alone or in conjunction with a conviction or convictions of any other offence or offences render the licence or licences for the said premises liable to cancellation or forfeiture or render the said demised premises liable to disqualification," then it is to be lawful for the lessor to re-enter and to oust the lessee, &c. It is admitted that the conviction in June 1922 was a solitary conviction, and of itself would not have the effect stated. But whether it be a "conviction" which "may in conjunction with" other convictions, within the meaning of the contract, have such effect depends upon the effect under the *Liquor Act* 1912 of such a conviction. There are two sections of direct importance in that Act. Sec. 128 in sub-sec. 1 penalizes licensee and owner in certain cases. If the licensee is convicted of any offence therein described—which includes such an offence as that for which the conviction of June 1922 took place—then, provided the same licensee was within three years twice previously convicted,

(1) (1922) 2 A.C. 541, at pp. 554, 555; 31 C.L.R. 27, at p. 30.

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the Court *shall* cancel the licence and *may* disqualify the premises for two years. The distinction between what the Court *shall* do in relation to the actual offender and what it *may* do in relation to the owner who is not the actual offender is all-important. In sub-sec. 2 it is provided that " where a licensee is convicted of *any* such offence the clerk of the Court before which the conviction was held shall give notice in writing thereof to the owner of the premises." It is clear that even for a solitary conviction—I do not say a first conviction, because there may be no subsequent conviction —the notice must be given to the owner. And why ? This will appear later. Then sec. 129 provides that, if there have been four convictions for any of the offences mentioned in sec. 128, and whether against the same licensee or successive licensees, the premises may be disqualified for two years. Of course, sub-sec. 2 of sec. 128 applies also to the convictions mentioned in sec. 129. It was argued that on the true construction of sec. 128 the only conviction rendering the licence subject to be cancelled and the premises liable to disqualification was the third. But that is not sustainable. So far as liability to the penalty is concerned the three convictions are on an equal footing—their conjunction is necessary, and that is all. The one distinction between them—and that is the effect of the special mention of the third conviction —is that the period of two years' disqualification is reckoned from the date of the last conviction because its happening creates the necessary conjunction.

Now, with reference to the difference between the penalty on the actual offender which *must* be inflicted and that on the owner which *may* be inflicted :—As stated, sub-sec. 2 of sec. 128 requires the owner to be notified of any conviction of the nature mentioned. The reason of that is found in sec. 130, which provides for an appeal by an owner whose premises have been disqualified and who was not the actual occupier. He may appeal, but only on certain grounds. He may show that sub-sec. 2 of sec. 128 was not followed, and, therefore, that he had no notice of such a conviction as that of June 1922. He may show that, because of the provisions of a lease, if made before 1st December 1905—that is, eight days before the passing of the *Liquor (Amendment) Act* 1905 (No. 40) containing the

disqualification provisions in sec. 30 of that Act—or because of some statute, he could not evict the tenant before the last offence, or he may show that with reasonable diligence he could not have evicted the tenant in the interval. The owner may succeed on any of those grounds. These provisions, read together, are in my view decisive that clause 11 of the lease must be held, for the purpose for which it is obviously directed, to include the conviction of June 1922. The first point therefore fails.

The second point raises the question of the effect of a judgment given in favour of the defendant in a prior action of ejectment where the same period is named in the two writs as the period during which the plaintiff claims to be entitled to possession. The action of ejectment has behind it a long history, during which the action has evolved by many stages which have successively more or less freed the proceeding from technicalities that social progress found unsuited to the proper administration of justice. The state in which it exists in New South Wales is that at which it had arrived in England over seventy years ago, and has there been replaced for nearly thirty years by modern procedure, bringing the action more into line with other forms of litigation—an example followed elsewhere in Australia.

We have had the benefit, both in the argument under appeal and in the argument at the Bar, of very instructive references to the earlier history of the action, and the effect of a prior judgment. Since the argument we have also been referred to some further authorities on the same subject.

Unfortunately authorities prior to 1853, while most valuable in some respects, are to be cautiously used on the point now under consideration. Before 1853 the plaintiff was first a real and then a fictional lessee, and his entry at first real and then fictional was necessary, and was effectual in giving the required possession only if he had title to enter (see per Lord *Blackburn* in *Bristow* v. *Cormican* (1)). But although the action of ejectment has preserved, and even under the *Judicature Act* still preserves, its cardinal character as a possessory action only, one essential change took place in 1853. It is true that under the New South Wales Act—as in England—

(1) (1878) 3 App. Cas. 641, at p. 661.

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Isaacs J.

the issue as to title to be tried is that stated in the writ (sec. 222), qualified only by the relaxation in sec. 224 where the title ceases before trial; yet for present purposes the governing change is the nature of the judgment. If for the plaintiff, it is that he "do recover possession of the land," not as formerly of "his said term yet to come of and in the tenements" (see *Adams on Ejectment*, at p. 406). If for the defendant, then, according to the statutory forms, it is that the defendant "be acquitted," that word having reference to the "supposed trespass and ejectment above laid to his charge" as it used to be pleaded (*Adams on Ejectment*, pp. 410, 412), or, according to practice forms, "that the plaintiff take nothing by his said writ and that the defendant do go without day" &c. The former judgment in the present case was in the latter form, and establishes no more than that the plaintiff in that action was not entitled to possession by reason of the entry made by issuing the writ. The position so far as a plaintiff's judgment is concerned is worked out quite clearly and with great precision in the case of *Harris* v. *Mulkern* (1). It is there plainly shown that, during the period immediately preceding the *Common Law Procedure Act*, a judgment in ejectment for the plaintiff was a judgment that he was entitled to the term laid in the declaration, and that bound both parties; and, further, that this was so whether the judgment was after verdict or by default of appearance. It was also explained that, though, subject to amendment, the issue in a trial would, even after the Act, have been whether the title as alleged in the writ was proved—and, if not, the plaintiff would fail—yet, even if he succeeded on that issue, the judgment he obtained was not a judgment establishing that title, but a judgment to recover possession, and, therefore, establishing his title at the time the action was brought. There is nothing, said the Court, in the judgment which can make it operate as an estoppel with reference to the duration of the plaintiff's title. As to how far it is evidence of that duration is, as there said, another question.

The meaning of sec. 249 of the *Common Law Procedure Act* 1899, read by the light of that case, is that the judgment had, as before, the effect of establishing a possessory right to the land, but, so far

(1) (1875) 1 Ex. D. 31.

as estoppel is concerned, that must be determined by what the judgment itself actually declares. In the very recent case of *Elliott* v. *Boynton* (1) *Pollock* M.R. says: "The judgment in an action of ejectment—now an action for the recovery of land—does not, *per se*, relate back to the date when the plaintiff's title was laid or arose, and particularly where the defendant—the lessee—was not originally a trespasser or wrongdoer, and some act was necessary to found the plaintiff's right of action." The former judgment then cannot operate here as an estoppel. The same recent decision (2), however, emphasizes the point that in such a case as this the plaintiff's right of possession is not complete—because his title to have it is not complete—until re-entry for breach of condition. The former writ is useless for that purpose now, because of the judgment for the present appellant. The only entry available for the present action is the new writ, and, therefore, the respondent's title dates from that day, 21st August 1923. The judgment in *Harris* v. *Mulkern* (3) shows that in the absence of amendment the respondent must fail, because the issue is not proved. *Cleasby* B. says (4): "In our proceedings, if the case went to trial upon such a writ as the present" (that is, stating the beginning of the plaintiff's title), "the question would be, whether the plaintiff was entitled at that time, and the plaintiff would fail unless he proved that title, subject of course to an amendment of the writ: sec. 180 of the *Common Law Procedure Act* 1852." Secs. 116, 259 and 260 of the New South Wales Act give the most ample powers of amendment if necessary. But here I do not think it is necessary. There being no estoppel, the truth of the matter as to the respondent's title to possession was open. Whatever be the technical position as to the former judgment being admissible as evidence, it cannot compete with the proof of the actual right, namely, the happening of the event prescribed by clause 11 of the lease and the entry by the issue of the writ. That establishes the truth of the issue in the action.

I would add that in my opinion the first point is well within grounds 1, 2 and 3, and the second point within grounds 1 and 4, of the notices of appeal to the Supreme Court and this Court. A

(1) (1924) 1 Ch. 236, at p. 248.
(2) (1924) 1 Ch., at p. 246.
(3) (1875) 1 Ex. D. 31.
(4) (1875) 1 Ex. D., at p. 35.

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new legal argument in support of a ground taken is, in my opinion, always admissible and quite as much as a new legal ground for an appellate decision of the Court.

The judgment should be affirmed and this appeal dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *E. R. Abigail.*

Solicitor for the respondent, *B. T. Heavener.*

B. L.

Dist *Aust Industrial Relations Commission, Re* 65 ALJR 58

Dist *Aust Industrial Relations Commission, Re* 96 ALR 513

Dist *Aust Industrial Relations Comm; Ex p. ATOF* (1990) 171 CLR 216

Refd to *North Western Health Care Network v Health Services Un* (1999) 164 ALR 147

[HIGH COURT OF AUSTRALIA.]

HILLMAN . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1924.

SYDNEY, *Aug.* 21, 22, 28.

Starke J.

Nov. 24, 25; *Dec.* 17.

Knox C.J., Isaacs and Gavan Duffy JJ.

Industrial Arbitration—Award—Award made binding on agency of Commonwealth—How far binding on Commonwealth—Transfer of activity to another agency—Successor—Commonwealth Conciliation and Arbitration Act 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *sec.* 29.

By an award of the Commonwealth Court of Conciliation and Arbitration it was provided that the award should be binding on the Naval Board, the Minister for Navy and the Minister for Defence.

Held, that the award was not binding upon the Commonwealth, either as an original party to the award or by virtue of sec. 29 (*ba*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, in respect of employment in the same activities subsequently carried on by the Commonwealth through other representatives than those named.

Decision of *Starke* J. affirmed.