1904.

EMPEROR v. ROBERT COMLEY.

That a single Judge has the power to make this transfer is decided by the case of *The Queen* v. *Ameer Khan*(1).

I, therefore, direct that the case of *Emperor* v. *Robert Comley and others* be transferred to this Court.

[The trial then proceeded.]

Attorney for the Crown:—*The Public Prosecutor.*

Attorneys for the accused :—Messrs. *Crawford, Brown and Co.*

R. R.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1904. *December* 12.

THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY (ORIGINAL DEFENDANTS), APPELLANTS, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), RESPONDENT.*

Landlord and tenant—Crown land—St. 22 and 23 Vic. c. 41—Specific Performance—Interests unknown to the law—Improvements—Equitable rights of tenant—Estoppel.

In 1865, the Government of Bombay decided to construct an Eastern Boulevard in the City of Bombay.

In accordance with this decision, a letter was addressed to the Municipal Commissioner, requesting him to remove certain fish and vegetable markets from the site of the proposed Boulevard.

On the 17th November, 1865, the Municipal Commissioner replied, that the markets were vested in the Corporation of Justices, but that he was willing to vacate certain Municipal stables, which occupied a portion of the proposed site, if the Government would rent other land, mentioned in his letter, to the Municipality, at a nominal rent, the Municipality undertaking to bear the expense of levelling the same.

The Municipal Commissioner by paragraph 8 of his letter requested permission to erect on such land "Stables of wood and iron with rubble foundations, to be removed at six months' notice, on other suitable ground being provided by Government."

The land referred to by the Municipal Commissioner was Crown land, which vested in Her late Majesty by the operation of the Statute 21 and 22 Vic. c. 106.

The Municipal Commissioner's application was referred to the Architectural Improvement Committee and on the 5th of December, 1865, the Secretary to that

(1) (1871) 7 Beng. L.R. 240.

* Suit No. 902 of 1901; Appeal No. 1338.

Committee wrote as follows:—"The Committee see no objection to the ground applied for being rented to the Municipal Commissioner, and suggest that the annual charge of one pie per square yard be levied in consideration of the expense of filling in the ground."

On the 9th of December, 1865, the Government of Bombay passed the following Resolution:—"Government are pleased to sanction the application of the Municipal Commissioner for a site for stabling as expressed in paragraph 8 of his letter, on the terms proposed by the Architectural Improvement Committee in paragraph 1 of their letter."

In 1866, the Municipal Commissioner entered into possession of the land; and stables, workshops and chawls were subsequently erected on the same, at considerable expense.

On the 5th September, 1890, a notice of the determination of the tenancy was served on the Municipal Commissioner, and he was requested to deliver up possession of the land within six months.

Negotiations thereupon ensued for the grant by Government to the Municipality of a lease for 99 years, at a higher rent, but no agreement was arrived at.

In 1897, rent was demanded from the Municipality, from the 1st April, 1895, to the 31st March, 1897, at the rate of Rs. 12,000 per annum, and the sum of Rs. 24,000 was at a subsequent date paid to Government under protest.

In 1898, the Municipal Commissioner declined to pay rent at a higher rate than one pie per square yard. On the 6th June, 1900, a further notice to quit was served on the Municipal Commissioner.

On the 20th December, 1901, the Secretary of State for India in Council filed a suit against the Municipal Corporation, praying, *inter alia*, for a declaration that the tenancy of the defendants created by the Government Resolution of the 9th December, 1865, had determined, and for an order that the defendents should pay to the plaintiff arrears of rent, at the rate of Rs. 12,000 per annum, from the 1st April, 1897.

The defendants counterclaimed in respect of the Rs. 24,000 paid for rent, under protest, in 1897.

The lower Court held, that the tenancy created by the Government Resolution of the 9th December, 1865, had been determined by the notice to quit, dated the 6th June, 1900, and ordered the defendants to pay to the plaintiff a sum, to be ascertained by the Special Commissioner, as compensation for holding over the land. The defendants' counterclaim was dismissed with costs.

The defendants appealed.

Held, that if the alleged disposition in 1865 purported to be a transfer of the right to enjoy the property neither for a certain time, nor in perpetuity, then it was an attempt to create, by lease, an interest unknown to the law and as such was bad.

A disposition in 1865 of Crown lands by the Governor in Council was dependent for its validity on an adherence to the forms prescribed in 22 and 23 Vic. c. 41, and therefore the Resolution was not a valid disposition of the property for the interest claimed.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

The claim for specific performance was open to similar objections. A Court would not have granted specific performance of a contract for an interest not recognized by the law, and the Resolution regarded as a contract was equally open to the objection, that the statutory formalities had not been observed.

Held, also, that the relief adequate to the requirements of the case lay in the direction of securing to the Municipality, on the one hand, an interest of considerable duration, and to the Government or the Crown, on the other, a reasonable rent.

The Municipality, having, under an expectation created and encouraged by the Government that a certain interest would be granted, taken possession of the land with the consent of Government, and upon the faith of such promise or expectation and with the knowledge of and without objection by Government, laid out money upon the land, had an equitable right to have such expectation realised, and the Crown came within the range of that equity.

Such equity differed essentially from the doctrine embodied in section 115 of the Indian Evidence Act, which is not a rule of equity, but is a rule of evidence formulated and applied in Courts of law.

It was not an objection to that equity, that the interest, the Municipality was to have in the land was not originally moulded in a form recognized by the law.

Held, also, that the defendants' counterclaim was well founded and should be allowed.

Ramsden v. *Dyson*(1) and *Plimmer* v. *The Mayor, &c., of Wellington*(2) followed.

APPEAL from Russell, J.

In 1865, the Government of Bombay decided to construct an Eastern Boulevard in the City of Bombay.

On the 30th October, 1865, a letter was addressed to the Municipal Commissioner, requesting him to remove certain fish and vegetable markets from the site of the proposed Boulevard.

On the 17th November, 1865, the Municipal Commissioner replied, that the markets referred to were vested in the Corporation of Justices, but that he was willing to remove certain Municipal stables which occupied a portion of the site, if the Government would rent to the Municipality other land, mentioned in his letter, at a nominal rent, on the condition that the Municipality levelled the same.

By his letter, the Municipal Commissioner requested permission to erect on such land—

"Moveable stables of wood and iron with rubble foundations to be removed at six months' notice, on other suitable ground being provided by Government, who are about to take up the present Municipal stables for public purposes."

(1) (1866) L. R. 1 H. L. 129 at p. 170. (2) (1884) 9 App. Cas. 699.

On the 5th December, 1865, the Architectural Improvement Committee, to whom this application was referred, wrote as follows:—

"The Committee see no objection to the ground applied for being rented to the Municipal Commissioner and suggest that the annual charge of one pie per square yard be levied in consideration of the expense of filling in the ground."

On the 9th December, 1865, the Government of Bombay passed the following Resolution:—

"Government are pleased to sanction the application of the Municipal Commissioner for a site for stabling as expressed in paragraph 8 of his letter on the terms proposed by the Architectural Improvement Committee in paragraph 1 of their letter."

In 1866, the Municipal Commissioner entered into possession of the land, and stables, workshops and chawls were erected by the Municipality on the same at a considerable expense.

On the 5th September, 1890, a notice of the determination of the tenancy was served on the Municipal Commissioner, and he was requested to deliver up possession of the land within six months.

Negotiations thereupon ensued for the grant by Government to the Municipality of a lease for 99 years, at a higher rent, but no agreement was arrived at.

In 1897, rent was demanded from the Municipality, from the 1st April, 1895, to the 31st March, 1897, at the rate of Rs 12,000 per annum, and the sum of Rs. 24,000 or thereabouts was paid to Government under protest.

In 1898, rent was demanded from the Municipality at the same rate, but the Municipal Commissioner declined to pay rent at a higher rate than one pie per square yard.

On the 6th June, 1900, a further notice to quit was served on the Municipal Commissioner.

On the 20th December, 1901, the Secretary of State for India in Council filed a suit against the Municipal Corporation praying, *inter alia*:—

(*a*) That it might be declared that the tenancy, if any, of the defendants, created by Government Resolution of the 9th of December, 1865, had been determined.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

(*b*) That the defendants might be decreed to quit and deliver up possession to the plaintiff of all the land then in their occupation, of which they claimed to retain possession by virtue of the said Government Resolution.

(*c*) That the defendants might be decreed to pay to the plaintiff the sum of Rs. 44,258-1-0 in respect of arrears of rent calculated at the rate of Rs. 12,000 per annum from the 1st of April, 1897, to the 8th of December, 1900.

(*d*) That in the event of its being held that no tenancy at any time subsisted between the plaintiff and defendants, compensation might be awarded to the plaintiff for the use and occupation of the land by the defendants.

The defendants, by way of counterclaim, prayed for the following relief:—

That the plaintiff might be decreed to pay to the defendants such sum as represented the difference between the amount which would be payable as rent for the land, from 1st April, 1895, to 31st March, 1897, at the rate of one pie per square yard and Rs. 23,929-3-4, being the amount actually paid by the defendants to the plaintiff together with interest on the sum so ascertained at 6 per cent. per annum as to part thereof from the 17th day of June, 1897, on which date Rs. 11,929-3-4 being part of the above sum of Rs. 23,929-3-4 was paid and from 28th September, 1897, on which date the balance of Rs. 12,000 was paid, till payment.

Scott (Advocate General) with *Robertson* for plaintiff:—The land was Crown land and the provisions of St. 22 and 23, Vic. c. 41, have not been complied with. The disposition to be valid should have been made by deed, contract, or other instrument and the Secretary of State should have been named as a party. The defendants cannot set up an agreement, which was not in the form provided by statute. There are many instances, where Government has allowed land to be occupied for temporary purposes. The Government Resolution in 1865 only sanctioned a site for stabling, but the defendants erected chawls and workshops as well. An alleged agreement is now set up, as to the meaning of which, there is the utmost variance between the parties; for the effect of this see *Marshall* v. *Berridge*[1].

[RUSSELL, J.:—The application mentions "other suitable ground"; on what terms was the "other" land to be granted?]

That is another difficulty. Any formal lease on that basis would have led to endless negotiations. The defendants now

(1) (1881) 19 Ch. D. 233.

say, that suitable meant suitable to their future requirements, and that the lease of the other land was to be in perpetuity, but there was no stipulation to that effect.

The principle of part performance does not apply, for the agreement, in such cases, must be one which could be specifically enforced.

[RUSSELL, J.:—If I hold, that the agreement could not be specifically enforced, what is the effect?]

The result would be either a tenancy at will, under the Statute of Frauds,[1] or an implied yearly tenancy, or it would give rise to a claim for use and occupation.

The Government's claim for rent at the rate of Rs. 12,000 per annum is reasonable, taking into consideration the present value of the site. The doctrine of estoppel does not apply for no hardship is alleged and there was nothing in the action of the Government to mislead the Municipality, see *Pilling* v. *Armitage*[2].

Lowndes with *Inverarity* and *Jardine* for defendants:—There was an implied contract, that a tenancy would be created, and the correspondence shews, that a tenancy was in fact created. Whether the Government Resolution in 1865 was an acceptance of the Municipal Commissioner's offer, or a counter offer, is immaterial, for, in the latter event, the Municipality have, by their acts, accepted such offer, *Carlill* v. *Carbolic Smoke Ball Co.*[3]. The tenancy created under the agreement was not a disposition of the land within the meaning of St. 22 and 23, Vic. c. 41, and the rule of law followed in *Vaman Janardan Joshi* v. *The Collector of Thána*[4] does not apply, for that was a grant of Inám land.

The Statute of Frauds[5] does not apply for here there has been part performance. If plaintiff wished to rely on the statute, it should have been specifically pleaded, see *Bullen and Leake*[6] and the defendants should have been treated as trespassers, for no contract could then be inferred, *Britain* v. *Rossiter*[7].

(1) 29 Car. II c. 3.
(2) (1806) 12 Ves. 78 at p. 85.
(3) (1893) 1 Q. B. (C. A.) 256 at p. 269.
(4) (1869) 6 Bom. H. C. Rep. (A. C. J.) 191 at p. 192.
(5) 29 Car. II c. 3.
(6) Precedents of Pleadings.
(7) (1879) 11 Q. B. D. 123.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

Then as to the alleged determination of the lease; we received six months' notice on June 6th, but the terms of the contract were not complied with; the actual words are "on other suitable ground being provided".

[RUSSELL, J.:—Do you say the notice is bad, because other suitable ground was not offered?]

Yes, we do. Unless the contract has been varied, we are in the same position as in 1865. Other suitable land clearly means "other" than the piece of vacant ground about to be taken up.

We required the whole of this piece of ground for our stables then, and we require the whole of it now. We say that suitable means suitable in rent, situation, and extent.

If the Court holds, that there was an agreement, but that the agreement was invalid, the question of estoppel arises. The Government have stood by for 40 years, and have allowed the Municipality to spend money on the land.

They have induced the Municipality to give up their former site and a locality suitable for their requirements cannot now be procured; for the effect of this see Indian Evidence Act, section 115, and the case of *Ramsden* v. *Dyson*[1], where the doctrine is fully set forth.

RUSSELL, J. [after stating the facts]:—The letter dated 17th November, 1865, is undoubtedly a proposal on the part of the Municipal Commissioner. It is styled so and I have no doubt that officer intended the word "propose" in its legal sense. Then by their letter of the 5th December, 1865, the Architectural Committee suggest the rent, *viz.*, one pie per square yard. By their Resolution dated the 9th December, 1865, the Government are careful to recite what they take Mr. Crawford's proposal to be, and they accept the proposal on the terms proposed by the Architectural Committee's letter. In my opinion these documents constitute an agreement within the meaning of the Contract Act, and both the plaintiff and the defendants are bound by it as far as they can be as they undoubtedly intended themselves to be. The next question that arises is—is this agreement one

(1) (1866) L. R. 1 H. L. 129.

which this Court will specifically enforce? The Advocate General says it is not, inasmuch as no time is specified from which the agreement is to run, but it seems to me that the part performance by the defendants entering and continuing in possession of the premises does away with this objection. But a contract to be specifically enforced must be certain and definite, *Lord Walpole* v. *Lord Orford*(1), see section 21 (*c*) of the Specific Relief Act. This is an agreement for a lease, but no period is fixed for its continuance. This introduces indefiniteness, which I do not see the Court would cure, see *Clinan* v. *Cooke*(2). Again there is another ground, on which Courts of Equity refuse to enforce specific execution of agreements, that is, where from the circumstances it is doubtful whether the party meant to contract to the extent that he is sought to be charged, *Harnett* v. *Yeilding*(3). Now on reading the Municipal Commissioner's application and the Government Resolution, I am of opinion that it is clear that the Government as well as the Municipal Commissioner did not intend that the land in question should be used for other than more or less temporary stabling and storage purposes. That is obvious from the Municipal Commissioner's description of the ground; it was looked on as more or less waste ground. The rent was to be a "nominal" rent. Although strictly speaking it is not necessary for me to construe the expression, I should say that other suitable ground means other ground suitable for stabling. The context of these words seems to make this clear. I apprehend that if a contract is to be specifically performed, it must be so as of the date of its being entered into, the date when the two contracting minds are *ad idem*. If this be so then it is clear that the Government did not mean to contract to the extent to which the Municipality are now seeking to charge them. Again, consider the words "other suitable ground being provided by Government," and I agree with Mr. Lowndes' definition of "suitable" in his most excellent argument; it means suitable in rent, position and extent. But, in the first place, in whose opinion is that suitability to exist. What rent is to be a suitable rent. The letter does not mention any rent for

(1) (1797) 3 Ves. (Jun.) 402 at p. 420. (2) (1802) 1 Sch. and Lef. 22.
(3) (1807) 2 Sch. and Lef. 549 at p. 554; 9 R. R. 101.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

the other suitable ground; is it to be rent free? Again, as to position, is any place in the Island of Bombay to be suitable? Again, as to extent. Is the extent to be what it was in 1866-67 when the stabling was put up or in 1885-86, when the new stabling was erected? Supposing the Court is asked to pass a decree for specific performance, how would it be worded, so as to be executed? The above are some objections, which appear to me to exist in the way of this agreement being one which can be specifically performed. "Other suitable ground" somewhat closely resembles "the necessary land for making a Railway through the estate to *Prince Town*" in *Pearce* v. *Watts*(1), where Jessel, M. R., held that the contract could not be enforced by the purchaser, and see the cases cited at page 178 of Fry(2). I ought perhaps here to state that no evidence was given before me to show that the ground in question was filled in and levelled by the Municipality but I have no doubt but that it was done by that body and at their expense. As otherwise it is difficult to see how even temporary stables could have been put upon it.

If then an agreement, which, however, cannot be specifically enforced, is established, what is the position of the parties? Before the Judicature Acts a tenant in possession under a void lease who paid rent was at law a tenant from year to year holding upon such terms of the agreement as are not inconsistent with a yearly tenancy, *e.g.* in *Lee* v. *Smith*(3), he was obliged to pay his rent in advance as stipulated in the invalid lease. Again although in the first instance the tenancy was only at will, this was converted by payment of rent into a tenancy from year to year upon such of the terms of the void lease as are not inconsistent with such a holding, *Martin* v. *Smith*(4). *Walsh* v. *Lonsdale*(5), however, shows that the Judicature Acts considerably modified this rule. There Sir G. Jessel says, "There is an agreement for a lease under which possession has been given. Now since the *Judicature Act* the possession is held under the agreement. There are not two estates, as there were formerly,

(1) (1875) L. R. 20 Eq. 492.
(2) Fry on Specific Performance, 3rd Edition, p. 178.
(3) (1854) 9 Ex. 662.
(4) (1874) L. R. 9 Ex. 50.
(5) (1882) 21 Ch. D. 9.

one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, *it being a case in which both parties admit that relief is capable of being given by specific performance.*" I have underlined the latter words from "it being". *Coatsworth* v. *Johnson* (1) brings further out the point I am dealing with. There the plaintiff entered into possession of a farm under an agreement for a lease of 21 years from the defendant. Before any rent was due or had been paid, the landlord gave the plaintiff notice to quit, and turned him out of possession, because he had done that which had amounted to a breach of a covenant contained in the agreement and intended to be inserted in the lease. The tenant brought an action for trespass. Held he was not entitled to recover that as he was in possession under an agreement for a lease and had paid no rent. He was only a tenant at will and his landlord was therefore entitled to determine that tenancy. The following passages of the judgment of the Court of Appeal show the applicability of that case to the present one:—There Lord Esher M. R. said "Now this agreement for the lease was not a lease, for it was not under seal, and being an agreement for 21 years it could not be valid as a lease for that period unless it were executed with the necessary legal formalities; so that the question is raised, whether there are any circumstances in this case which make it equivalent to a lease as between the plaintiff and the defendant. The tenant was undoubtedly in possession, and being in possession, no rent having been paid as yet, he was, as it appears to me, only a tenant at will. If rent had been paid and accepted on the terms of its being part of an annual rent, then the landlord would have been estopped from saying that the tenant was not an annual tenant on such terms of the agreement as were suitable to a tenancy from year to year: but until there has been payment of rent on the terms and in the manner to which I have referred, a tenant in the position of this plaintiff is only a tenant at will. This being so any

(1) (1886) 55 L. J. (Q. B.) 220 at p. 222.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

notice to quit to such tenant will suffice ..... But it is said, that the plaintiff is not a tenant at will, because a Court of Equity would have decreed specific performance of the agreement for a lease. If, however, a Court of Equity would not have made a decree of specific performance in favour of this tenant, then the tenant must be a tenant at will, for as there was no lease at law there would in such case be no lease at law or in equity."

In the case before me rent, as I shall show hereafter, has been paid by the defendants on the basis of its being an annual rent and therefore I am of opinion that a tenancy from year to year was created. Sections 106 and 107 of the Transfer of Property Act do not touch this question. As regards the 2nd point which arises on the plaint as first amended it is not necessary for me to express myself at length. Suffice it to say that in my opinion there is nothing in section 40 of 21 and 22 Vic., c. 106 or sections 1, 2, or 5 of 22 and 23 Vic., c. 41, which either prevented the agreement being made or nullified it if made. I can see nothing in these sections which compels me to hold that the Government Resolution of December 1865 was not effectual to create an agreement between the Government and the Municipality. As to the Statute of Frauds, it seems to me that the doctrine of part performance, which has been so often acted upon, takes this case out of the Statute of Frauds. When that statute says in effect that no action is to be brought to charge any person upon a contract concerning land, unless it is evidenced in the manner prescribed by the enactment, it has in view the simple case in which he is charged upon the contract only, and not that in which there are questions arising from *res gestae*, subsequent to and arising out of the contract see *Maddison* v. *Alderson* per Lord Selborne and among such acts have been held to be possession of land taken or even in some cases continued by one party, after the contract with the knowledge and acquiescence of the other party, *Morphett* v. *Jones* (2); *Hodson* v. *Heuland* (3), expenditure of money in

(1) (1883) 8 App. Cas. 467 at pp. 475, 476. (2) (1818) 1 Sw. 181.
(3) (1896) 2 Ch. 428, 434.

alterations and repairs of buildings by or by authority of the tenant in possession with the landlord's approval, *Williams* v. *Evans* (1), or, as it is expressed in *Clinan.* v. *Cooke* (2), nothing is considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed. Here it would be a fraud upon the Municipality, if they were to be considered as not being entered under a contract but as trespasser *ab initio.* Nor can I find anything in section 31 of Bombay Act II of 1865 which prevented the Municipal Commissioner from entering into the agreement I have found to be established.

Before I go on to deal with the 5th and following issues, it will be as well, as shortly as possible, to pursue the narration of events and course of correspondence. [His Lordship, after referring to the correspondence, continued] If I am right as to the true construction of the agreement, as above set forth, then it appears to me that the notice for the determination of the tenancy, on June 6th, 1900, was a good and valid notice; and it becomes obligatory on the defendants to vacate unless they choose to accept the terms offered by the Government. I cannot see anything in the correspondence which has passed between the parties which shows that the defendants have in any way varied or agreed to vary the agreement. Nor can I find that the defendants ever agreed to pay Rs. 12,000 as rent for the land. I do not think, taking the correspondence as a whole, that his first payment could be held to constitute such an agreement and his subsequent payments undoubtedly were without prejudice or under protest. As regards the question whether the plaintiff is entitled to the rent claimed by him in the plaint, or to any compensation for holding over as claimed in the plaint, I cannot say that the evidence as to value which was given before me can possibly assist me much in arriving at a correct conclusion as to the value of this land; and unless the defendants are prepared to accept the suggestion I make below, this must be referred to the Commissioner. But I cannot help thinking that the defendants would be well advised to accept the

(1) (1875) L. R. 19 Eq. 547. (2) (1802) 1 Sch. & Lef. 22 at p. 41.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

Collector's valuation in July 1895 and the terms contained in the letter from the Secretary to Government to the Municipal Commissioner on 27th August 1895. No one who has seen the position of the land but must be convinced that the Government are dealing most favourably with the Municipality in the terms proposed. If, therefore, the defendants are prepared to accept those terms they will have to pay a sum of Rs. 44,258-1-0 being the amount of rent due at Rs. 1,000 per month from 1st April 1897 to 10th December 1900 and the sum of Rs. — being the amount due for use and occupation at Rs. 1,000 per month from 11th December 1900 to the date of vacating the premises, and there will be a declaration that the plaintiff is entitled to be paid Rs. 24,000 per annum by the defendants from and after the expiration of 10 years from the 1st April 1906. The defendants' counter claim, it follows, must be dismissed with costs. There will therefore be a decree for the plaintiff in the above terms. I order that the costs of printing the book of Exhibits be divided equally between the parties. Except the above costs therefore and the costs of the amendments which have already been dealt with, the defendants will bear all the remaining costs of the suit.

The defendants appealed and the plaintiff filed cross-objections.

Lowndes with *Inverarity* and *Jardine* for the appellants (defendants):—We say the Government by their Resolution granted a lease until other suitable land was found. We are entitled to possession until that particular thing is done.

We contend, that the English law is only applicable, so far as it is suited to the circumstances of India, and modified in its application by those circumstances, see *Yeap Cheah Neo* v. *Ong Cheng Neo* (1), *Tarachand Biswas* v. *Ram Gobind Chowdhry* (2), *Ramloll Thakoorseydass* v. *Soojumnull Dhondmull* (3), *Mayor of Lyons* v. *East India Company* (4), *Naoroji Beramji* v. *Rogers* (5), *The Great Eastern Hotel Company* v. *The Collector of Allahabad* (6)

(1) (1875) L. R. 6 P. C. 381 at p. 393.
(2) (1879) 4 Cal. 778 at p. 781.
(3) (1848) 4 Moo. I. A. 339.
(4) (1836) 1 Moo. I. A. 175 at p. 288.
(5) (1867) 4 Bom. H. C. R. (O. C. J.) 1 at p. 37.
(6) (1867) 2 Agra H. C. R. (E. O. C. J.) 1.

and *Ram Gopal Mookerjea* v. *Masseyk* (1). Warden (2) shows, that as late as 1731, the intention of Government was to invite settlers, on the principle of granting land in perpetuity, at a low quit-rent, but there is no such thing as a perpetual lease in English law, see *Sevenoaks, Maidstone, and Tunbridge Railway Co.* v. *London Chatham, and Dover Railway Co.* (3). Most land in Bombay is now held on a tenure, enabling Government to resume the land for public purposes.

[JENKINS, C. J.:—That is like the English case of the *Cheshire Lines Committee* v. *Lewis & Co.* (4), where an agreement not to eject, until the premises were required for pulling down, was held to be bad.]

The Government have set up the custom in many cases in their favour.

[JENKINS, C. J.:—But would entry, under such a void lease, be adverse?]

If the plaintiff fails in his original contention that there was a yearly tenancy, he cannot claim compensation for use and occupation, see *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker* (5), *Surendra Narain Singh* v. *Bhai Lal Thakur* (6) and *Rachhea Singh* v. *Upendra Chandra Singh* (7).

The words of the Government Resolution are "sanction the application." This can only mean "accept the proposal" what followed; possession was given and the correspondence throughout treated the relation, between the parties, as a tenancy based on contract. Having led us to believe, that there was a contract, they are estopped, under section 115 of the Indian Evidence Act, from denying its existence.

[JENKINS, C. J.:—*Plimmer* v. *The Mayor, &c., of Wellington* (8) is an authority for the principle, that a subject is entitled to all equitable remedies against the Crown, but how far does section 115 of the Indian Evidence Act apply against the Crown?]

(1) (1860) 8 Moo. I. A. 239 at p. 258.
(2) Landed tenures of Bombay Sect. 78, p. 32.
(3) (1879) 11 Ch. D. 625 at p. 635.
(4) (1880) 50 L. J. (Q. B.) 121.
(5) (1874) 13 Beng. L. R. 243.
(6) (1895) 22 Cal. 752.
(7) (1899) 27 Cal. 239.
(8) (1884) 9 App. Cas. 699.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

The Crown is not excluded from the operation of a statute. See Maxwell [1], page 193, *In re Purmanandas Jeewandas* [2] and *Toolseemoney Dossee* v. *Maria Margery Cornelius* [3] where the Crown was estopped from asserting its claim to a bastard's estate.

With reference to the argument as to the statute 21 and 22 Vic., c. 106, and 22 and 23 Vic., c. 41, we are only concerned with the latter, and that Act merely provides that if it is desired to be formal, the name of the Secretary of State may be used. The word "contract" there means a formal contract in writing. In 22 and 23 Vic., c. 41, section 2 and in 33 and 34 Vic., c. 59, the expression "deed, contract or other instrument" is used, clearly indicating that only formal contracts are referred to. This is only an agreement, and the distinction can be seen in the phraseology of English law. In 3 and 4 Vic., c. 108, section 105 and in 6 and 7 W. IV, c. 100, contracts, covenants, and agreements are referred to, showing that there is a possible distinction between agreements enforceable at law and formal contracts.

We contend that the terms of 21 and 23 Vic., c. 41, are merely permissive, and do not limit the right of disposition. A written instrument would be required for a sale of Crown land, but not for a disposition. That could be effected by a grant, evidenced, as in the present case, by a Government Resolution.

Then as to estoppel, *Attorney General for Trinidad and Tobago* v. *Bourne* [4], as well as *Plimmer* v. *The Mayor, &c., of Wellington* [5] shows that in an action for ejectment, any equitable defence is open to the defendant against the Crown. In 1865 we gave up what was a convenient and permanent site for the new land. We were put in possession and allowed to erect what we liked. The presumption is we bore the expense of levelling the ground. We were led to expect that we would not be ejected, until other suitable land was provided, and there is now no available site suitable for our requirements. For the effect of this, see *Ramsden* v. *Dyson* [6].

(1) On the Interpretation of Statutes, 3rd Ed., p. 193.
(2) (1882) 7 Bom. 109 at p. 117.
(3) (1873) 11 Beng. L. R. 144.
(4) (1895) A. C. 83 at pp. 84, 85.
(5) (1884) 9 App. Cas. 699.
(6) (1866) L. R. 1 H. L. 129.

Apart from estoppel, we have a right to specific performance, based on part performance, *see* Fry [1], page 284, *Hart* v. *Hart* [2], where the principle is laid down, that a Court is bound to struggle to grant specific performance, although there may be considerable vagueness as to the terms of the agreement. See also *Wilson* v. *The West Hartlepool Railway Company* [3], *Crook* v. *Corporation of Seaford* [4], *Marshall* v. *Corporation of Queenborough* [5], *Mardell* v. *Curtis* [6], *Browne* v. *Warner* [7], *Duxbury* v. *Sandiford* [8], *Zimbler* v. *Abrahams* [9].

Then, with reference to the notice to quit. If the Government Resolution on the 9th December 1865 was not an acceptance of our proposal, it was a counter offer. The Municipality entered into possession on January 2nd, and the tenancy therefore commenced from that date. The notice of the determination of the tenancy was for December 10th, and is therefore bad. See *Sidebotham* v. *Holland* [10], Woodfall [11] and Platt [12].

Scott (Advocate General) with *Robertson* for the respondent (plaintiff):—The land was admittedly Crown land, therefore the statute 21 and 22 Vic., c. 106, sections 39 and 40, 22 and 23 Vic., c. 41, sections 1, 2 and 5, and 33 and 34 Vic., c. 59, apply. It follows that the Government Resolution in 1865 was not a contract or other instrument validly executed on behalf of Government.

The case of *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* [13] shows that where powers are expressly conferred they must either be regarded as superfluous, or as limiting the right conferred. For the effect of this see *Young & Co.* v. *The Mayor, &c., of Royal Leamington Spa.* [14]

With reference to the applicability of English law, the case of *Ram Gopal Mookerjea* v. *Masseyk* [15] was not really a case from Calcutta, but from Jessore, *i. e.*, the Mofussil, and the same objection applies to *The Great Eastern Hotel Company* v. *The*

(1) Fry on Specific Performance, 4th Ed., Sec. 648, p. 284.
(2) (1881) 18 Ch. D. 670 at p. 685.
(3) (1864) 2 De. G. J. and S. 475.
(4) (1870) L. R. 10 Eq. 678; (1871) 6 Ch. App. 551.
(5) (1823) 1 Sim and Stu. 520.
(6) (1899) W. N. 93.
(7) (1807) 14 Ves. (Jun.) 156.
(8) (1899) 80 L. T. N. S. 552.
(9) (1903) 1. K. B. 577.
(10) (1895) 1. Q. B. 378.
(11) Law of Landlord and Tenant, 17th Ed., p. 376.
(12) Platt on Lease, Vol. II, p. 60.
(13) (1892) 3 Ch. 242 at p. 251.
(14) (1883) 8 App. Cas. 517.
(15) (1860) 8 Moor I. A. 239.

1901.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

Collector of Allahabad (1). The argument comes to this: there are no perpetual leases in England; in India we have Fazandari leases; therefore the English law of landlord and tenant does not apply. But there is express authority that English law does apply to cases, other than the customary tenure. See *Doe Dem Antonia De Silveira* v. *Salvador Bernardo Texeira* (2), *Naoroji Beramji* v. *Rogers* (3) and *Hough* v. *Leckie* (4).

We contend that if there is an equity it must be one arising out of contract and founded on it. If the terms are so uncertain that specific performance could not be given, the defendants must fail. See *The Paris Chocolate Company* v. *The Crystal Palace Company* (5), *Coatsworth* v. *Johnson* (6), *Pearce* v. *Watts* (7), *Swain* v. *Ayres*. (8)

We do not desire to say that we adhere merely to rights at law; we are bound to submit to any equities which arise, but this is without prejudice to our right of appeal. The defendants in the Court below relied on *Ramsden* v. *Dyson* (9) and in reply we cited *Pilling* v. *Armitage* (10). See also *Young & Co.* v. *The Mayor, &c., of Royal Leamington Spa* (11), *United States* v. *Kirkpatrick* (12), Bigelow on Estoppel, page 637. We contend that if the statute 22 and 23 Vic., c. 41, forbids such a disposition, no estoppel can arise. If the plea were good, then the unauthorized acts of a Government servant could effect a transfer of property.

[JENKINS, C. J.—Does it not come under the head of fraud? Not that you have committed fraud, but if you insist on the strict law, you would, and so we will not let you?]

Bigelow (13) is clear and decisive on the point. There must be an act beyond mere silence. Where is this act? When did estoppel arise? In the case of *Ahmad Yar Khan* v. *Secretary of State* (14), the work proposed was permanent, the probable expense of construction indefinite, and an expectation of proprietary

(1) (1867) 2 Agra H. C. R. (E. O. C. J.) 1.
(2) 2 Morley's Dig. 247.
(3) (1867) 4 Bom. H. C. R. (O. C. J.) I. at pp. 73, 80, 94.
(4) (1848) P. C. Cases 489 at p. 496.
(5) (1855) 3 Smale and Giff 119.
(6) (1886) 55 L. J. (Q. B.) 220.
(7) (1875) L. R. 20 Eq. 492.
(8) (1888) 21 Q. B. D. 289.
(9) (1866) L. R. 1. H. L. 129.
(10) (1806) 12 Ves. 78.
(11) (1883) 8 App. Cas. 517 at p. 522.
(12) (1824) 9 Wheaton 720 at p. 734.
(13) Bigelow on Estoppel, p. 639.
(14) (1901) L. R. 28 I. A. 211 at p. 218.

rights was encouraged by Government; here only "rubble" stables removable at six months' notice were mentioned.

[JENKINS, C. J.—See *Ramsden* v. *Dyson* (1) and see, also, Viner's Abridgment. (2)]

There, there was a distinct promise, but in the present case no such expenditure was encouraged by Government. The Municipal Commissioner must have known the terms in 1867 and he deliberately took the risk of being turned out. See *Newfoundland Steam Whaling Company* v. *Government of Newfoundland*. (3)

Then as to the notice to quit, see *Hirst* v. *Horn* (4) and *Doe, d. Digby* v. *Steel* (5). If the agreement set up by the defendants is valid, the tenancy began from the date of the agreement; if bad, the tenant having entered and paid rent up to the 8th of December in each year, there is a yearly tenancy on the terms of the agreement and the tenancy commenced from December 9th. See *The Ecclesiastical Commissioners* v. *Merral* (6) and *Doe ex dem. Holcomb* v. *Johnson*. (7)

The judgment of the Court was delivered by

JENKINS, C. J.:—In 1865 the Government of Bombay had decided on the construction of what was then known as the Eastern Boulevard in the City of Bombay, and for the purpose of their project it was necessary that certain Municipal markets and stables should be removed.

The area occupied by the stables was 458 square yards.

On the 30th of October 1865 a letter was addressed from the Public Works Department to the Municipal Commissioner, requesting him to order the existing fish and vegetable markets, etc., to be removed, and on the 15th of November 1865, the Architectural Executive Engineer and Surveyor addressed the Municipal Commissioner again regarding the removal of the sheds, which, it was said, interfered with the construction of the new Eastern Boulevard.

(1) (1866) L. R. 1 H. L. 129.
(2) Viner's Abridgment, Vol. V, p. 523, par. 40.
(3) (1904) A. C. 399.
(4) (1840) 6 M. & W. 393.
(5) (1811) 3 Camp. 115.
(6) (1869) L. R. 4 Exch. 162.
(7) (1806) 6 Esp. 10.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

On the 17th of November 1865 a reply was sent to these letters, in which it was stated that the markets were vested in the Corporation of Justices, and could not be removed without the sanction of the Bench, and that the two long sheds on the west were Municipal stables, and the letter then proceeded as follows:—

"As to the stables the storage ground allotted to the Municipality near the Rifle Lines is particularly suitable and convenient, and I hope Government will sanction an application made to it this day for permission to erect the stables there. I should then be able to vacate half the ground you require within this year."

This application to Government was a letter containing several paragraphs, and in the 4th the Municipal Commissioner wrote:

"The two long buildings AA are the stables and these I will remove by the end of the current year if Government will accede to the following proposals."

Then after indicating in paragraphs 5, 6 and 7 a particular site, the Commissioner wrote in the 8th paragraph as follows:

"I propose therefore that Government shall rent the ground marked AAA to the Municipality at a nominal rent on condition of the Municipality levelling the whole of it which will be very expensive. That I be permitted to set back the palings on the west of the foot-path so as to permit two carts to move in the passage. That I be permitted to erect on the vacant ground moveable stables of wood and iron with rubble foundations to be removed at six months notice on other suitable ground being provided by Government, who are about to take up the present Municipal stables for public purposes.

"Mr. Khandas Mancharam, I may state, has visited the spot with me and has no objection to the above arrangement.

"I would add that it is proposed to abandon the Chinch Bandar siding directly the new arrangement at Bori Bandar and Byculla can be made.

"Both the Railway officials and the Municipality find it very inconvenient and unsuitable, and it was an intolerable nuisance to passengers by the trains and to the inhabitants of that densely populated locality even when only 260 carts of refuse were sent daily. We are now sending 450 carts and shall soon despatch 700 daily.

"I venture to solicit the very earliest reply to this communication."

This application was referred to the Architectural Improvement Committee, and on the 5th of December 1865, the Secretary to that Committee wrote to the Secretary to Government as follows:—

1904

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

"With reference to your memorandum No. 1446 C. W: 2584, dated 25th ultimo, I am directed to inform you that the Committee see no objection to the ground applied for being rented to the Municipal Commissioner, and suggest that the annual charge of one pie per square yard be levied in consideration of the expense of filling in the ground."

On the 9th of December 1865 a Resolution was passed by the Government of Bombay in the following terms:

"RESOLUTION.—Government are pleased to sanction the application of the Municipal Commissioner for a site for stabling as expressed in paragraph 8 of his letter, on the terms proposed by the Architectural Improvement Committee in paragraph 1 of their letter."

It was not, however, until the following January that possession was taken, and on the 4th of that month the Executive Engineer of the Municipality wrote to the Executive Engineer of the Presidency that the ground in question was formally taken over under instructions from the Municipal Commissioner on the 2nd from the Architectural Executive Engineer.

The area of the land thus taken over was about 30,000 square yards. The Municipality have ever since continued to be, and still are, in possession of a very considerable portion of this piece of land, and have paid for the same until a recent period the rent of one pie per square yard.

The present suit is brought by the Secretary of State for India in Council, nominally to eject the Municipality from the land and to recover a sum in respect of use and occupation, but it has been stated that the real purpose of the suit is not to eject the Municipality but to ascertain the rights of the parties, and that the plaintiff has no objection to the Municipality's remaining in possession, provided they pay such rent as may be agreed.

The plaint as originally framed proceeded on the theory of a tenancy created by the Government Resolution of the 9th of December 1865, and alleged that notices to quit and to deliver up the land on the 8th December 1900 were duly served upon the Municipal Corporation. The plaintiff also submitted that the defendants were until the expiration of the notices yearly tenants of the Government of Bombay, and that such tenancy expired on the 8th of December 1900. He further submitted

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

that for the reasons set forth in paragraph 23 of his plaint he was under no liability to take any further steps to provide suitable land for Municipal stables as they existed in December 1895. In paragraph 24 he submitted "that the tenancy created by the said Government Resolution of the 9th of December 1865 has now been determined and that he is entitled to possession of the said land."

To that plaint the defendants put in their written statement, and in the 11th paragraph they set forth their contention in respect of their interest in the land in the following terms:

> The defendants submit that they are not yearly tenants of the land the subject of the Government Resolution of the 9th December 1865 as in para. 22 of the plaint claimed. The defendants contend that under and by virtue of the Government Resolution last mentioned they became and still are entitled to occupy the said land at the rate of one pie per square yard per annum and are not liable to be ejected therefrom until after the expiration of six months from the date of receipt of notice to quit such notice to be given after (but not before) Government shall provide other suitable ground in lieu of the land which they desire to resume on the same terms as to rent and determination of occupancy, &c., as were created by the said Government Resolution of the 9th December 1865.

Issues were raised on the 15th of December 1903, when the plaintiff opened his case.

After an adjournment for the purpose of printing certain documents the case again came on for hearing on the 1st of February 1904, and the Advocate General, according to Mr. Justice Russell, then for the first time raised the point that by reason of the statute in that behalf no legal tenancy whatever had been created by the Government Resolution.

Leave to amend was given so that the plaint should cover this point. The only amendment made in the first instance was that in para. 21A, the plaintiff submitted that no valid legal obligation was imposed on him by the Resolution of the 9th December 1865, and by the insertion of the words "if any" after "tenancy" in prayer A to the plaint. A further amendment was later made by the insertion of paragraph 24A to the plaint and the prayer (*e* 1).

Thereupon new issues were settled.

The result of the hearing was that Mr. Justice Russell held that it was obligatory on the defendants to vacate and he referred it to the Commissioner to ascertain and report what sum should be paid by the defendants to the plaintiff as compensation for holding over the land. He further ordered that the defendants' counter-claim, whereby they sought to recover sums paid by them under protest to the Government in excess of the rent of one pie per square yard, should be dismissed with costs. From this decree the present appeal has been preferred by the Municipality, while the respondent has put in cross-objections.

The points in contest have been limited to the questions whether the defendants are liable to be ejected, and if so, what is payable by them for use and occupation, and whether the defendants are entitled to recover the amounts paid by them by way of protest. Strenuous objection has been made to the amendment allowed by Russell, J., and in one aspect of the case it has far reaching consequences imposing on the defendants' difficulties not involved in the plaint as originally framed.

The case was launched, as I have already said, on the basis of a tenancy created by the Resolution of the 8th of December 1865. This, however, was repudiated by the amendment, and it then became the plaintiff's case that the Resolution created no tenancy, because the requirements of the statute 22 and 23, Vict. c. 41 were not observed.

The Municipality's case in the first instance was that they were not yearly tenants, but that they had a right to occupy until this right was determined in the manner provided in the Government Resolution of the 8th December 1865.

The amendment of the plaint however led to the further contentions, that if a tenancy was not created, still the Municipality are entitled to specific performance of the agreement embodied in the Resolution, and further that the plaintiff's claim is effectually barred in the events that have happened.

These contentions are not embodied in the pleadings, but as they are the result of the plaintiff's late amendment no objection is taken on that score, and the case has been argued before us on the basis that the several contentions, with which I will later

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

deal, were justified by the pleadings, the object being to arrive at a determination of the true rights of the parties.

I will then first consider whether any such right to the land, as the Municipality contend, was in fact created.

This right is thus described by the Municipality in paragraph 11 of their written statement, which I have read.

Two questions arise: Could such an interest as is there described be created? And has such an interest been in fact created?

In the first instance I propose to consider these questions apart from the circumstances, on which the Municipality rely as creating an equity in their favour: in other words, as though this were a suit commenced in January 1866 before anything had been done on the faith of the Resolution.

Could then such an interest as is described in paragraph 11 of the written statement be created?

Now it is to be noticed that the idea of the Municipality being tenants from year to year is repudiated by them; and this necessarily is so because it is an essential incident of a tenancy from year to year that it should be capable of determination by simple notice, without more, given at and for the proper time. And thus it is that the Municipality are forced to set up the right they describe.

But is that right an interest known to the law? This is a question that must be asked and answered, because it is a principle of general application that it is not within the power of a person to create whatever interests he may please in land; he is limited to such interests as are recognized by the system of jurisprudence governing his disposition.

Now no one suggests that here there was originally an absolute grant: if any interest was created by the Resolution, it was in the nature of a tenancy, so that the disposition (if any) must have been a lease.

But could a lease on the terms set forth in paragraph 11 of the written statement be created in 1865 in the Island of Bombay?

The Transfer of Property Act recognizes only two kinds of leases, (1) a transfer of the right to enjoy property for a certain time express or implied, and (2) a transfer of such right in perpetuity.

The Transfer of Property Act, it is true, did not apply in 1865, but I am not aware, nor do I believe it to be the case, that the Act in any way cut down the rights of leasing property, which previously existed, so that we must see how far the alleged lease complies with the requirements of the law formulated in section 105.

In the first place then it is clear that the Resolution is not a transfer for a certain time: it is until an uncertain event, until suitable ground (whatever that may mean) is provided and six months' notice is given.

It appears to me equally clear that the alleged disposition was not a transfer of the right to enjoy the property in perpetuity, assuming for the sake of argument that such a transfer in perpetuity was in 1865 a permissible lease in the Island of Bombay.

It is not pleaded as being a transfer in perpetuity, and reasonably so, because the terms the Municipality claim are opposed to the idea of a lease in perpetuity: paragraph 11 of the written statement does not contend even for the certainty of duration which belongs to a tenancy from year to year, and concedes that the Municipality on the performance of the conditions indicated would be bound to quit at any period of the year.

If then the alleged disposition purports to be a transfer of the right to enjoy the property neither for a certain time, nor in perpetuity, then it is an attempt to create by lease an interest not known to the law, and as such is bad.

But it is further objected that apart from this there has been such disposition as binds the plaintiff in this suit, inasmuch as there has been a failure to observe the provisions of 22 and 23 Vic., c. 41.

It is not disputed that at the date of the Resolution the land in suit was vested in the Crown, and the disposition set up is not by the Crown itself, but by the Government, and this has been treated throughout as the equivalent of the Governor in Council.

The Governor in Council, however, could not dispose of the land by virtue of any estate vested in him, but only in exercise of a power bestowed on him for that purpose. We, therefore, have to see whether the provisions clothing him with that power have been observed.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

The land in question became vested in Her late Majesty by the operation of 21 and 22 Vic., c. 106; and the 41st section of that Act vests in the Secretary of State in Council power to dispose of real estate so vested in the manner therein described.

In 22 and 23 Vic., c. 41, it is recited:

Whereas an Act was passed in the Session holden in the Twenty-first and Twenty-second years of the Reign of Her present Majesty, intituled *An Act for the better Government of* India: And whereas it has been considered that, under the Enactment in the Fortieth section of the said Act, the local Governments in *India* and Officers intrusted with the charge of Provinces or Districts there respectively cannot enter into and execute such Contracts and Assurances in *India* on behalf of the Secretary of State in Council as before the commencement of the said Act they were respectively competent to enter into and execute on behalf of the *East India* Company, and it is expedient to give them such Powers: And whereas Doubts have arisen as to the proper Mode of the Execution of contracts entered into by the Secretary of State in Council pursuant to the Provision of the said Fortieth section of the said Act, and it is expedient that such Doubts should be removed: And whereas it is expedient to alter so much of the Enactment in the Forty-third section of the said Act as relates to the Mode of signing and countersigning the Drafts or Orders therein mentioned, &c., &c.

The Act then goes on to provide as follows:—

1. The Governor General of India in Council, the Governor in Council of Fort St. George, the Governor in Council of Bombay, the Lieutenant-Governor of the North-Western Provinces now under the Presidency of Fort William in Bengal, respectively, or any officer for the time being intrusted with the Government, charge, or care of any presidency, province, or district in India, subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting, shall from time to time prescribe, are hereby respectively empowered to sell and dispose of all real and personal estate whatsoever in India for the time being vested in Her Majesty under the said Act, within the limits of their respective governments, provinces, or districts, or to raise money on any such real estate by way of mortgage, and to make proper assurances for that purpose, and to purchase and acquire any land or hereditaments, or any interest therein, stores, goods, chattels, and other property in India, within the said respective limits, and to enter into any contracts whatsoever, within the said respective limits, for the purposes of the said Act;

and all property so acquired shall vest in Her Majesty for the service of the Government of India.

2. The Secretary of State in Council may be named as a party to such deed, contract, or other instrument;

and it shall be sufficient to use the designation of Secretary of State in Council in such deed, contract, or other instrument;

and the same may be expressed to be executed on behalf of the Secretary of State in Council by or by order of the Governor General in Council, Governor in Council, Lieutenant-Governor of the North-Western Provinces or other officer intrusted as aforesaid, but may be executed in other respects in like manner as other instruments executed by or on behalf of him or them respectively in his or their official capacity, and may be enforced by or against the Secretary of State in Council for the time being;

and neither the Secretary of State nor any member of the Council nor any person executing such deed, contract, or other instrument, shall be personally liable in respect thereof; and all liabilities, costs, and damages in respect thereof shall be satisfied and paid out of the revenues of India.

It is clear that the provisions of these sections have not been observed, and that, so far as the Resolution purports to be a disposition, it does not conform with the prescribed requirements.

But are the provisions of the Act imperative so far as they provide for the use of certain forms?

We have a clue, for what it may be worth, to the view of the Legislature in the statutes 32 and 33 Vic., c. 29, and 33 and 34 Vic., c. 59, wherein an apprehension is expressed that certain title-deeds might under the operation of those Acts be invalid by reason of the failure to observe the formalities thereby prescribed.

Though we are not bound to accept this apprehension as a correct view of the law, an examination of the Acts leads me to the conclusion that the apprehension was well founded. I think that a disposition in 1865 of Crown lands by the Governor in Council was dependent for its validity on an adherence to the forms prescribed, and that therefore the Resolution was not a valid disposition of the property for the interest claimed.

I have not in coming to this conclusion overlooked the argument derived from the fact that there is said to be no title-deed for the site on which the Municipal markets were erected at a very great cost, beyond the Resolution, Exhibit S, set out at page 107 of the printed book; but that can make no difference in the law, though it may invite the comment that those who deal with the Government should see that their engagements are secured in a form that is binding, and that the Government, to whom the necessity for due formality must be well-known, should not permit those with whom they deal to rest content with documents open to the defence, with which I am now concerned.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

But then it is argued that, if the Resolution was ineffective as a disposition, it was good as a contract; that specific performance could have been successfully demanded, and that therefore the Municipality are in as good a position as if specific performance had been granted.

Still looking at matters as they stood in January 1866, the claim for specific performance was open to similar objections: the Court would not have granted specific performance of a contract for an interest not recognized by the law, and the Resolution regarded as a contract was equally open to the objection that the statutory formalities had not been observed.

But since December 1865 much has happened, and I now will consider the legal effect of these after-events. The pleadings, no doubt, are silent on the point, but this may be due to the form in which the plaint was originally framed. The 11th issue, however, is in these terms:—

"If issue 2 is found in favour of the plaintiff whether the plaintiff is now estopped from contending that the agreement in the 1st issue referred to is not binding."

The second issue raised the question of the effect of 21 and 22 Vic., c. 106, and 22 and 23 Vic., c. 41. It seems too that Mr. Lowndes, who represented the Municipality in the original Court, there said that he would rely on the principle enunciated by Lord Kingsdown in *Ramsden* v. *Dyson* [1]. This is conceded, though the learned Judge has not dealt with this aspect of the case.

Before us the plea has been more precisely and amply formulated by Mr. Lowndes, and the Advocate General makes no objection to our dealing with this part of the case in every aspect of which it is capable.

Though it has been argued before us that section 115 of the Evidence Act, or the principle it embodies, cures the informality, the substantial plea apppears to me to be that the after events have created in favour of the Municipality equities, which afford an answer to the Secretary of State's claim to eject the Municipality. Unfortunately we are without the assistance of

(1) (1866) L. R. 1 H. L., p. 170.

Mr. Justice Russell's opinion on this point, as his judgment does not deal with it.

The doctrine involved in this phase of the case is often treated as one of estoppel, but I doubt whether this is a correct, though it may be a convenient name to apply.

It differs essentially from the doctrine embodied in section 115 of the Evidence Act, which is not a rule of equity, but is a rule of evidence that was formulated and applied in Courts of law: while the doctrine, with which I am now dealing, takes its origin from the jurisdiction assumed by Courts of Equity to intervene in the case of, or to prevent, fraud. The doctrine in relation to the circumstances of this case is thus formulated by Lord Kingsdown in *Ramsden* v. *Dyson*[1]:

"If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have acerta in interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

That the Crown comes within the range of this equity is apparent from *Plimmer* v. *Mayor, &c., of Wellington*[2] and *Ahmad Yar Khan* v. *Secretary of State for India in Council*[3].

The question then is whether the facts of the case invite an application of the principle, and to determine this calls for a detailed examination of those facts.

I have already stated, and need not now repeat, how it was that the Municipality went into possession of the land, and I will now proceed to narrate briefly what they subsequently did.

In the first place the Municipality at the instance of the Government gave up to them their old quarters, and moved to the land they now occupy.

What this involved as a surrender of acquired rights, we do not know, as the terms on which the Municipality possessed their old stables does not appear; it is not even shown whether

(1) (1866) L. R. 1 H. L. at p. 170.

(2) (1884) 9 App. Cas. 699.

(3) (1901) L R. 28 I. A. 211; 3 Bom. L. R. 505.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

the Government was acting in the exercise of any powers of compulsory acquisition.

All we do know is that in his letter of the 15th of November 1865 the Municipal Commissioner promised to remove the existing stables by the end of the current year, *if* Government would accede to the proposal, to which assent was substantially expressed by the Government Resolution of the 8th of December.

Next we have the fact that it was a part of the Municipal Commissioner's proposal that the Municipality should undertake the levelling of the whole of the piece of ground, and this he says in his proposal "will be very expensive."

At this lapse of time it is difficult to procure, and one cannot expect, definite evidence as to what was done in this connection or what the cost was. But certain facts stand undisputed: the Architectural Improvement Committee, to whom the matter was referred, regarded the "expense of filling in the ground" as an adequate consideration for the very low rent charged, and their recommendation to that effect was adopted by Government: and the ground is now level.

Though there is no direct evidence that the Municipality did this work of "filling in the ground," the inference that they did is irresistible: and though there is no record of the actual cost—possibly because it was not a separate and defined undertaking, but work done by the Municipality itself—we have the fact that it was regarded as of sufficient moment to influence the terms on which the letting was made.

Then we know that stables were erected at the time.

Mr. Jamsetji Dadabhoy Nadirsha says that stables and chawls were erected in 1866 and Rs. 27,609-9-0 were spent; but how much was spent on the stables and how much on the chawls does not appear. These chawls are described as bigarries' chawls, and it is contended, not without reason, that they were a necessary adjunct of the stables.

In 1870, he says, Rs. 1,19,595 were spent on workshops, and the Municipal Report for 1871 shows that Rs. 1,49,080 had been spent on workshops and Rs. 84,823 for plant. Subsequently the original stables were in 1885 replaced by a permanent masonry structure, and, having regard to the area covered, the cost must have been considerable.

These facts are founded on Municipal documents, to whose relevancy as adequate proof no exception has been taken.

Next we have to see how the Municipality came to act and expend their moneys in this manner.

It must have been in the faith that they were entitled at least to an enjoyment of the land for the period indicated in the arrangement made by their Commissioner with the Government.

Then what was the representation made in that arrangement? It was that the Municipality's enjoyment of this land would continue until the expiration of "six months notice on other suitable ground being provided by Government."

The argument for the Municipality, however, does not rest there: it is argued that it cannot be supposed the Municipality incurred the great expenditure they did except in the expectation that their occupation of the ground would never be disturbed, and this expectation, it is claimed, was the result of encouragement proceeding to them from the Government.

But I think this is not made out: the extent of the enjoyment in which a belief was encouraged is (in my opinion) limited to the representation embodied in the original arrangement: it may be that the Municipality (if consideration ever was given to the matter) never anticipated a disturbance of their enjoyment, but that is not enough: with the distinct notice they possessed of the Government's representation, they cannot on the facts disclosed attribute to the Government any representation such as carries with it the right they now set up to a permanent and unconditional right of enjoyment of the land at the rent originally stipulated.

Even the plea in paragraph 11 of the written statement does not set up a permanent tenancy or suggest a right of enjoyment beyond that to be spelt out of the original arrangement, and this is in harmony with the attitude disclosed by the correspondence.

In coming to this conclusion I have not overlooked the argument sought to be derived from the information furnished by the annual Municipal Reports, copies of which were furnished to the Government.

So it only now remains for me to estimate the consequences of the representation contained in the original arrangement.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

Mr. Lowndes has argued that the promise of other suitable ground involved an undertaking that it should be suitable in position, in area, and in rent, and that as a consequence the rent should be at the same rate as that originally stipulated.

So far as his argument relates to position and area it appears to me to be forcible; but when it is contended that there was to be fixity of rent I think the argument goes too far.

Looking at all the circumstances, I cannot believe that the Government intended to forego in perpetuity the benefit of such increase of rent as might be expected to accrue from land of a similar area in the locality.

Under these circumstances has any equity arisen in favour of the Municipality, and, if so, what is it?

It is (in my opinion) the reasonable, and the only reasonable inference that the Municipality gave up the old stables, levelled the ground, and erected the moveable stables in 1866 in the belief that they had against the Government an absolute right not to be turned out until not only the expiration of six months notice, but also other suitable ground was furnished: that this belief is referable to an expectation created by the Government that their enjoyment of the land would be in accordance with this belief: and that the Government knew that the Municipality were acting in this belief so created.

We have, therefore, in the case the conditions which create an equity entitling the Municipality to appeal to the Court for its aid in assisting them to resist the Secretary of State's claim that they shall be ejected from the ground; for (in my opinion) it is not in the circumstances of this case destructive of the equity, which thus arose in 1866 to point to the fact that the moveable stables were in 1885 converted to stables of permanent masonry, and that workshops and other buildings have been erected.

The utmost that can be said is that an increased burden was not thereby imposed on the Crown.

In the view I take the equity in the Municipality came into existence in 1866, and it has not been established that it has since been lost.

I do not think it is any objection to that equity that the interest the Municipality was to have in the land was not origin-

ally moulded in a form recognized by the law: that does not prevent us from now imposing such terms as will prevent that which a Court of Equity would regard as a fraud, and this, as I have already said, is the foundation of the jurisdiction invoked.

This is aptly illustrated by a case cited in Viner's Abridgment, Contract and Agreement (pl. 40), where the facts are thus stated:

> The bill here was to have a lease according to the defendant's promise, plaintiff having laid out money in the premises, and the defendant insists on the Statute, there being no agreement in writing, nor any certain terms agreed upon, and says what plaintiff laid out was on lasting improvements, but admits plaintiff built a stable which cost him about £10. It was proved, that the defendant told the plaintiff his word was as good as his bond, and promised the plaintiff a lease when he should have renewed his own from his landlord. Lord Chancellor said that the defendant is guilty of a fraud, and ought to be punished for it, and so decreed a lease to the plaintiff, though the terms were uncertain, it is in the plaintiff's election for what time he will hold it and he doth elect to hold during the defendant's term, at the old rent, and plaintiff to pay costs.

This case shows that at that time the jurisdiction was based on fraud, and that it was no objection to its exercise that the terms at the date of the expenditure—which was not great—were uncertain.

The next question is in what shape should effect be given to this equity. It is pointed out by Lord Kingsdown in *Ramsden* v. *Dyson*[1] that there is a difference of opinion as to the nature of the relief to be granted; but he goes on to state, that he did not understand any doubt to have been entertained "that either in the form of a specific interest in the land or in the shape of compensation for the expenditure a Court of Equity would give relief and protect in the meantime the possession of the tenant."

It was said by Lord Campbell in *Dillwyn* v. *Llewelyn*[2] that "the equity of the donee and the estate to be claimed by virtue of it depend on the transaction, that is, on the acts done, and not on the language of the memorandum, except as that shows the purpose and intent of the gift."

In conformity with this reasoning we find that the Privy Council in *Plimmer v. The Mayor, &c. of Wellington*[3] and *Ahmad*

(1) (1866) L. R. 1 H. L. 129 at p. 170. (2) (1862) 4 D. F. J. 517 at p. 522.
(3) (1884) 9 App. Cas. 699.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

Yar Khan v. *Secretary of State for India*[1] considered effect should be given to the equity there arising by securing to him, who claimed it, an interest in the land.

In this case conditions have changed so completely since the equity in the Municipality's favour first arose, that it is a matter of no small difficulty to determine the measure of interference and relief adequate to the requirements of the case, but on a consideration of all the circumstances, I think that it lies in the direction of securing to the Municipality on the one hand an interest of considerable duration, and to the Government or the Crown on the other a reasonable rent.

And I think the Secretary of State's claim to eject should only succeed, if the Municipality decline to accept such terms.

The materials before us do not permit of our now defining with precision the terms and details of this tenure, and it may be necessary to direct an enquiry on the point unless the litigants can come to some agreement, without prejudice of course to any right to appeal from this Court's decree, which may otherwise exist.

There should be no great difficulty in arriving at a satisfactory solution of this matter, and by way of suggestion I may point to Mr. Little's letter as furnishing a fair basis for discussion.

And in this connection I would remind all concerned that the relations of the Government and the Municipality are not without some bearing. Both bodies are created and exist for the public welfare, the one being in a sense an offshoot of the other, entrusted with the administration of a limited local area. The antagonism therefore should not be acute; for it is not as though any private interests were served by this suit, which after all is little more than a contest between the rates and the taxes at the cost of the public.

There thus appear to me to be strong reasons for urging that the difficulties in the way of arriving at a fair and reasonable settlement should be adjusted by arrangement rather than by recourse to a hostile and probably costly enquiry.

This brings me to the plaintiff's claim for enhanced rent, in respect of which he prays that the defendants may be decreed to

(1) (1901) 28 I. A. 211; 3 Bom. L. R. 505.

pay the plaintiff the sum of Rs. 44,258-1 for arrears of rent calculated at the rate of Rs. 12,000 per annum from the 1st of April 1897 to the 8th of December 1900.

This claim originates with the notice to quit, Ex. A 54, dated the 5th of September 1890, which is in these terms:

"Under instructions of the Government I hereby give you notice of the intention of the Government to determine the tenancy under which you hold of the Government the undermentioned premises with their appurtenances and require you to quit and deliver up possession of the same at the expiration of the year of your tenancy which shall expire next after the end of one-half year from the service of this notice.

"I am further directed to demand from you payment of all arrears of rent due in respect of the said premises to Government from the 9th December 1868."

That was followed by the correspondence between the representative of the Government and the representative of the Municipality contained in Exs. A 55, A 56, A 77, A 78, A 79, A 81, A 82, A 83, A 84, A 85, A 86, A 87, A 88, A 89, A 90, A 91, A 92, A 93, A 94, A 95, A 96, and A 104.

I have already referred to this correspondence and need not again go over the same ground; it will be enough at this point to state my conclusions on it.

The notice to quit given on behalf of the Government on the 5th of September treats the Municipality as yearly tenants, whose tenancy ran from December to December.

On that hypothesis the tenancy would have expired in December 1892. But in fact the Municipality did not quit: they remained in possession as before. By the Collector's letter of the 6th of January 1897, A 95, rent at the original rate was demanded, and the inference suggested by this letter and that of the 3rd of April 1897, Ex. A 96, is that rent at the original rate was paid and accepted regularly after the expiration of the notice in December 1892.

Under these circumstances it appears to me impossible to treat the alleged yearly tenancy as having been determined in December 1892.

As the plaintiff's case rests on the terms contained in the Government's letter of the 29th of January 1895 and those which follow, it is important to see what the matter under discussion was.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

It was as to the rent at which a lease of the land for a long term would be granted, and the rent of Rs. 24,000 for 30,000 square yards was in respect of a lease for any term not exceeding 99 years with one renewal.

Nothing was said as to the rent of a yearly tenancy, and that is the tenancy under which according to the plaintiff the land was held by the Municipality during the period covered by this claim.

Under the circumstances it appears to me that accepting for this purpose the plaintiff's theory of the character of the tenancy, the Municipality from and after December 1892 held on the old terms, and there is no room for the application of the doctrine which prevailed in *Ahearn* v. *Bellman* (1).

At the same time it is perfectly clear that the Municipality never expressly agreed to pay the enhanced rent.

It is true they did pay a sum of Rs. 23,929-3-4 in respect of enhanced rent, but this payment was made under protest, and it is conceded by the Advocate General that no inference adverse to the Municipality can be drawn from such payment.

In fact the Municipality now counterclaim for the difference between the amount paid and what was payable according to the original rate with interest, and, in my opinion, this demand is well founded and should be allowed.

Having thus discussed and determined the several points urged before us in argument it only remains for me to indicate the lines on which our decree should proceed.

There should in the first place be a declaration securing to the Municipality an option to take a lease of the ground in suit for a term of years and at a rent and on conditions to be determined as herein provided.

And in case the Municipality shall in exercise of this option elect to take such a lease, then there should be a declaration that the plaintiff is not entitled to eject them: but should the Municipality elect not to take a lease, then there will be a decree for recovery of the land.

There must be an enquiry as to the length, terms and conditions of the lease and as to what would be a fair and reasonable rent of

(1) (1879) 4 Ex. D. 201.

1904.

MUNICIPAL CORPORATION OF BOMBAY v. SECRETARY OF STATE.

the land unless the parties can (without prejudice to any right of appeal) agree as to the same the lease to run from the 8th of December 1900 and the rent thereby reserved to run from that date; and there must be an undertaking by the Municipality to pay the rent that has accrued in the interim.

In case the Municipality elect not to take a lease as above provided, then there must be a decree for a sum to be hereafter determined for use and occupation from the 8th of December 1900 subject to the set-off hereinafter mentioned.

And there must be a decree in favour of the Municipality for the amount paid by them in excess of their obligations up to the 8th of December 1900, and this amount will be set off against the rent or amount payable for use and occupation as the case may be. I have on the score of convenience taken the 8th of December as the appropriate date having regard to what evidently was the understanding of the parties.

We will deal with the costs and possibly other details in the decree when we learn whether the Municipality intends to avail themselves of the declaration we have made in their favour.

Decree varied.

Attorneys for appellants:—*Messrs. Crawford, Brown & Co.*
Attorney for respondent:—*E. F. Nicholson, Esquire, Solicitor to Government.*

A. H. S. A.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1905.
March 16.

ATMARAM GANOJI NAIK NALVADE (ORIGINAL PLAINTIFF), APPELLANT, *v.* BALKRISHNA MAHADJI PARULEKAR (ORIGINAL DEFENDANT), RESPONDENT.*

Decree—Execution—Fraud upon the Court.

B (defendant) obtained two decrees against R, one for Rs. 150 and the other for Rs. 750, the latter amount being payable by yearly instalments of Rs. 250 each. About the same time, K obtained a decree against R for Rs. 47. B presented a

* Second Appeal No. 462 of 1903.