H. C. OF A. 1908.

WHITFELD v. McQUADE.

without prejudice to any proceedings that the plaintiffs may be advised to take to recover compensation for injury.

Respondents to pay the costs of the appeal.

Solicitor, for the appellant, *The Crown Solicitor for New South Wales.*

Solicitor, for the respondents, *C. A. Coghlan.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MAIDEN . . . . . APPELLANT;
DEFENDANT,

AND

MAIDEN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908-9.

SYDNEY, *Dec.* 11, 14, 15, 16, 18; *April* 5.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Appeal from Supreme Court—Point not taken below—Formal defect—Procedure in Supreme Court—Common law relief in equity suit—Recovery of possession of land—Separation of equitable and common law jurisdiction—Jurisdiction of Equity Court—Equity Act 1901 (*N.S.W.*), (*No.* 24 *of* 1901), *sec.* 8*—*Form of injunction as to possession of land.*

* Sec. 8 of the *Equity Act* 1901 is as follows :—"In any suit or proceeding in equity wherein it may be necessary to establish any legal title or right as a foundation for relief the Court shall itself determine such title or right without requiring the parties to proceed at law to establish the same, and whenever any question now cognizable only at law arises in the course of any proceeding before it the Court shall have cognizance thereof as completely as if the same had arisen in a Court of law, and shall exercise in relation to such title, right, or question all the powers of the Supreme Court in its common law jurisdiction, and no suit in equity shall be open to objection on the ground that the remedy or appropriate remedy is in some other jurisdiction.

H. C. OF A. 1908.

MAIDEN v. MAIDEN.

Specific performance—Contract for personal service—Costs.

In the Supreme Court of New South Wales the equitable and common law jurisdictions are exercised by separate branches of the Court, the practice on the common law side being regulated by the *Common Law Procedure Act* 1899 which is based on the old English practice, and that on the equity side by the *Equity Act* 1901.

In a suit brought in the Supreme Court in its equitable jurisdiction for an injunction to restrain the defendant from committing trespasses upon a farm belonging to the plaintiff, and from dealing with the stock and produce thereon, and for an account, the Court made a decree granting relief in the terms of the prayer. No objection was taken on the pleadings or at the hearing to the form of the suit. The defendant having appealed to the High Court on the ground, *inter alia*, that the suit was in substance an action of ejectment and therefore not cognizable by the Supreme Court in its equitable jurisdiction :

Held by *Griffith* C.J., *Barton* and *Isaacs* JJ., (*Higgins* J., dissenting), that as a suit in equity was the appropriate procedure for obtaining a substantial part of the relief claimed, and as the right to that relief involved the determination of the plaintiff's right to possession of the land, the Equity Court had power, under sec. 8 of the *Equity Act* 1901, to give all subsidiary relief to which on the facts of the case the plaintiff was entitled, including possession of the land.

Held, further, *per Griffith* C.J., *Barton* and *Isaacs* JJ , that apart altogether from sec. 8 of the *Equity Act* 1901, the subject matter of the suit was within the jurisdiction of the Supreme Court, and suing by means of a suit in equity instead of by an action of ejectment at com[illegible]ds a mere formal defect or irregularity which, not having been made a ground of objection in the Court of first instance, should be disregarded on appeal, in accordance with the rule laid down by the Privy Council in *Board of Orphans* v. *Kraegelius*, 9 Moo. P.C.C., 441, at p. 447, and applied by the High Court in *McLaughlin* v. *Fosbery*, 1 C.L.R., 546.

Semble, *per Griffith* C.J., that the effect of the concluding words of sec. 8 is to remove any objection that might formerly have been taken to the Court of Equity entertaining suits for relief ordinarily obtained in some other division of the Supreme Court.

Per Higgins J. The legislature of New South Wales having retained the system by which the various jurisdictions are kept distinct and vested in different divisions of the Supreme Court, the Chief Judge in Equity, sitting in the equity jurisdiction of that Court, has no power to order the possession of land to be given to a person claiming under a purely legal title. The question involved is not a question as to the extent of the jurisdiction of the Supreme Court, but as to the power and jurisdiction of the Chief Judge in Equity. Sec. 8 of the *Equity Act* 1901 is not intended to allow common law claims to be brought in equity nor to confer upon the Court of Equity power to grant common law relief if only some equity can be found in the pleadings as to

some other matter, but to empower the Court to decide common law questions incidentally arising in an equity suit. In order to direct accounts it was not necessary to order that possession of the land should be given, or even to decide to whom the land belonged. The objection of the appellant was, therefore, not merely to the procedure but to the jurisdiction of the Equity Court to entertain the claim for possession of the land, and, though not taken below, was clearly taken in the notice of appeal, and should be upheld.

The defendant counterclaimed for specific performance of a verbal agreement under which he alleged that he had been let into possession, by which the plaintiff, who was the mother of the defendant, agreed to sell to him the farm and stock, and that until payment he should account to the plaintiff for all moneys received by him in the working of the farm, which were to be applied in manner provided by the agreement.

Held, that the defendant was not entitled to specific performance because the agreement involved as part of the consideration for the sale the rendering of personal services by him ; and

That, on the evidence, the possession of the defendant was not referable unequivocally and exclusively to the agreement alleged, and, therefore, was not such part performance as would take the case out of the *Statute of Frauds*. Though as a general rule a Court of Appeal will not interfere with the discretion of the Court appealed from as to costs, yet if the Court of first instance has acted on an erroneous view of the legal bearing of the facts the exercise of its discretion may be reviewed.

Decision of *A. H.* [illegible] C.J. in Equity (18th June 1908), varied both as to the form of relief and as to costs.

Observations respecting the form of injunction as to the possession of land.

APPEAL from a decision of *A. H. Simpson* C.J. in Equity in a suit for an injunction and account, in the Supreme Court of New South Wales in its equitable jurisdiction.

This was a suit by the respondent Emma Maiden against the appellant Edwin J. Maiden, her son. The facts and pleadings and the questions involved sufficiently appear in the judgments hereunder. A decree having been made substantially in the terms of the prayer in the statement of claim, defendant appealed to the High Court, the main ground of the appeal being that the suit was in substance a common law action and not cognizable by the Supreme Court in its equitable jurisdiction. Other grounds taken were that the defendant was entitled to specific performance of a verbal agreement set up in his counterclaim, and that even if the plaintiff was entitled to relief it should have been

H. C. OF A. 1908.

MAIDEN v. MAIDEN.

subject to the plaintiff accounting to him for damages for breach of agreement. The case in the Supreme Court is shortly reported: *Maiden* v. *Maiden* (1), the main points argued on the appeal not having been taken at the hearing.

Cowan, for the appellant. As to the counterclaim, the Judge found that there was an agreement by which the appellant would ultimately be entitled to the land. It was not the agreement alleged in the statement of claim; the plaintiff was therefore not entitled to the relief claimed. The defendant should be placed in the position in which he would have been if the agreement proved had been carried out. The contract was not for personal service by the defendant. His management of the farm was merely a condition upon the performance of which he was entitled to call upon the plaintiff to carry out her part of the agreement. The contract was taken out of the *Statute of Frauds* by part performance. The defendant entered into possession and made improvements.

[GRIFFITH C.J.—You must show a change of possession distinctly and exclusively referable to the agreement you rely upon.]

The making of improvements shows that the possession was based upon the agreement for sale. Possession can never be unequivocal in itself. The whole of the circumstances must be regarded.

[GRIFFITH C.J.—You may infer from the facts a contract of some kind, but not necessarily a contract for sale of the land.

BARTON J.—You cannot choose your own contract. The Court can only presume *some* contract.

GRIFFITH C.J.—There is nothing in the circumstances inconsistent with the ordinary relation of mother and son. The foundation of the doctrine of part performance is that there has been some change in conditions which is inexplicable except upon the supposition of some sort of contract. If the parties were strangers there might be a presumption that there was an agreement that the defendant should be paid for his services.

ISAACS J.—It has been said that there is no part performance

(1) 25 N.S.W. W.N., 142.

unless there could be a trespass or some unjustifiable occupation in the absence of a contract.]

The mother and son are strangers in law.

[HIGGINS J.—The mere fact of continuance of possession by a tenant is not sufficient evidence of part performance.]

Even if the contract found by the Judge cannot be specifically enforced, a Court of Equity will not assist the plaintiff to put an end to it or break it. The parties should be left to their legal rights, and the defendant allowed to remain on the land under the agreement until ejected. The Equity Court cannot entertain what is in substance an action of ejectment: *Merrick* v. *Ridge* (1). The account ordered will not give the defendant all that he is entitled to under the agreement. There were practically no dealings in the period over which the account extends. Up to that time all had been accounted for. If the plaintiff will not carry out her part of the contract equity will not aid her in breaking it by putting the defendant out.

[HIGGINS J.—Would not the Court be in substance enforcing an unenforceable contract if it declined to put the defendant out?]

Possibly, but there is nothing inequitable in leaving the parties in the position in which they have deliberately placed themselves.

[ISAACS J. referred to *Frith* v. *Frith* (2).

HIGGINS J. referred to *Burdick* v. *Garrick* (3).]

Harvey and *Clive Teece*, for the respondent, were not called upon as to the counterclaim, but only as to the equity upon which the plaintiff relied. The plaintiff has an equity for an injunction to restrain the defendant from dealing with her personal property, the defendant having claimed to dispose of it as of right, and having threatened to do so. He actually did sell some of it. Sec. 8 of the *Equity Act* gives the Court power to give all the relief to which the plaintiff establishes a right whether at law or in equity provided that there he shows some equitable claim to relief. As long as the parties affected are before the Court, and

(1) 18 N.S.W.L.R. (Eq.), 29.
(2) (1906) A.C., 254.
(3) L.R. 5 Ch., 233, 453.

H. C. OF A. 1908.

MAIDEN v. MAIDEN.

there is some equity, the Court can give the whole relief that the plaintiff is entitled to. [They referred to *Horsley* v. *Ramsay* (1); *Want* v. *Moss* (2).] If the plaintiff had proceeded at common law for ejectment the defendant would have sought an injunction in equity and the plaintiff would have counterclaimed. Thus the whole matter would have had to come before the Equity Court just as it now has. The Equity Court has full jurisdiction to make an order which is substantially an order of ejectment provided that it is coupled with equitable relief in the same subject matter.

[GRIFFITH C.J.—As this is not the Supreme Court we need not concern ourselves with the question whether the particular division of the Court which was invoked was the proper one.]

The plaintiff is entitled to an account if the accounts are complicated or if the relationship between the plaintiff and defendant is fiduciary. Here there was a fiduciary relationship. The decree therefore was the proper one. [They referred to *Equity Act* 1901, sec. 39; *Equity Rules*, r. 210; *Makepeace* v. *Rogers* (3); *Standing Rules of* 1838, r. 27; *Foley* v. *Hill* (4).]

[ISAACS J. referred to *Laws of England*, vol. I., p. 188, par. 402.

HIGGINS J. referred to *Gledhill* v. *Hunter* (5); *Gray* v. *Johnston* (6).]

On the pleadings the title of the plaintiff at law was admitted. The only questions as to which there was any dispute were as to equitable rights. Moreover, the plaintiff made out a case for an injunction and a receiver as to personal property, and was therefore entitled to all relief including an account; *Merrick* v. *Ridge* (7); *Equity Act* 1901, sec. 16; *Equity Rules*, r. 116; *John* v. *John* (8). There is also an equity for removal of the caveat: *Greer* v. *Bevans* (unreported) *Cor. Street* J. November 21, 22, 1906; *Supreme Court Procedure Act* (No. 49 of 1900), sec. 6. It was not necessary to go into the accounts before the Judge; it was sufficient to lay a foundation for an order to take accounts.

[GRIFFITH C.J.—But if the accounts are trivial a serious ques-

(1) 10 N.S.W.L.R. (Eq.), 41.
(2) 12 N.S.W.L.R. (Eq.), 101, at p. 108.
(3) 34 L.J. Ch., 396; 4 D.J. & S., 649.
(4) 2 H.L.C., 28.
(5) 14 Ch. D., 492.
(6) L.R. 3 H.L., 1.
(7) 18 N.S.W.L.R. (Eq.), 29.
(8) (1898) 2 Ch., 573.

tion arises as to whether the plaintiff should have had the costs of suit.]

If the defendant had accepted the plaintiff's offer to give him his full legal rights there would have been no necessity for a suit. The Judge had absolute discretion as to the costs of suit. His order therefore should not be reviewed unless he has acted upon a wrong principle.

[ISAACS J. referred to *Turner* v. *Hancock* (4).

HIGGINS J. referred to *Common Law Procedure Act* 1899, sec. 228, as to costs in an ejectment action.]

The appeal if dismissed should be dismissed with costs. The main ground of appeal, as to the counterclaim, has failed.

[GRIFFITH C.J.—If a substantial variation is made in the decree costs are allowed. That is the rule that we follow.]

Cowan, in reply, referred to *The City of Manchester* (5); *Equity Act* 1901, sec. 81; *Eberlein* v. *Eberlein* (6).

Cur. adv. vult.

December 18.

Formal judgment delivered, reasons to be stated later.

April 5.

The following judgments were read :—

GRIFFITH C.J. Two points of some importance arise for decision in this unfortunate litigation between mother and son. The first, although in one view a point of form, raises serious questions as to the jurisdiction of the Supreme Court of New South Wales, and as to the functions of the High Court on appeal from that Court. The other point arises upon the facts of the particular case.

The suit was brought in the Supreme Court on its equity side for an injunction to restrain the defendant from residing or remaining on a farm of which the plaintiff is the registered proprietor, and from dealing with the stock and produce of the farm, and for an account of moneys received by the defendant as proceeds of sales of timber, stock, and produce, and of damages in

(1) 20 Ch. D., 303. (2) 5 P.D. 3, 221.
(3) 8 N.S.W.L.R. (Eq.), 1.

H. C. OF A. 1909.

MAIDEN v. MAIDEN.

Griffith C.J.

respect of matters which it is not necessary to particularize. The title set up was purely legal. The defendant denied the plaintiff's allegations except as to the title to the land, and counterclaimed for specific performance of a verbal agreement to sell the land and stock to him, under which he alleged that he had been let into possession. The learned Judge held that the agreement alleged was not proved, and made a decree substantially in the terms of the prayer of the statement of claim. No objection was taken in the Supreme Court to the competence of the Court to deal with the case on its equity side.

There is no doubt that the case was within the jurisdiction of the Supreme Court. But in New South Wales there is still a distinction made between the common law and the equitable jurisdictions, and it is contended that this distinction raises a fatal objection to the decree, so far at least as it relates to possession of the land. It is said that *quoad hoc* this is a suit for ejectment, and that the Court on its equity side has no jurisdiction to entertain such a suit if possession is claimed under a legal title.

The *Equity Act* 1901 contains a provision to the terms of which I will directly refer, and which in one view of its meaning is a complete answer to the objection. But I will first deal with the objection apart from this Act.

In the case of *McLaughlin* v. *Fosbery* (1) this Court had occasion to deal with a very similar point. I said, delivering the judgment of my brother *Barton* and myself (2):—"The Supreme Court of New South Wales is one Court, having under its original constitution all the powers which the Courts of Chancery and the Common Law and the Ecclesiastical Courts had in England. Every Judge of the Court has the powers and authority of a Judge of the Court, and his powers are not in fact or in law impaired if he erroneously attributes the source of any particular power to the wrong Statute. Otherwise the result might follow that a Judge exercising a power actually vested in him by one Statute would be liable to an action for acting without jurisdiction, if by a mistake in the title of the proceedings it appeared that his authority was derived from another Statute. . . . .

(1) 1 C.L.R., 546.

(2) 1 C.L.R., 546, at pp. 568-9.

We think that this Court in dealing with appeals from the Supreme Court of a State should be guided by the doctrine expressed in the case of *The Board of Orphans* v. *Kraegelius* (1). 'Now it is a wholesome province of this Court to disregard points of mere form raised in an appeal when they do not in any manner affect the substance of the subject in controversy, and have not in any respect a tendency to mislead or prejudice the defendant in any way.'" And again:—"If, as was formerly the case in England, but was never the case in New South Wales, the general judicial power of the State were distributed among several different Courts, an order of one Court not within its province could not be supported by showing that it could have been made by another Court. But this argument is not applicable to a single Court in which all the judicial power of the State is vested."

I adhere to all that we then said. In my judgment, when an appeal is brought to this Court from a judgment of the Supreme Court of a State which that Court had jurisdiction to pronounce, and which was pronounced in a suit in which no objection was taken to the form of procedure, it is not within the proper province of this Court to entertain such an objection, whether it could or could not have been supported if taken in the Supreme Court. If the subject matter of the suit is within the jurisdiction of a Court the mode of exercise of jurisdiction is in truth a matter of procedure only. If a party against whom procedure is taken in an erroneous form chooses to lie by and take his chance of success, the Court will not afterwards give effect to an objection founded upon the irregularity. There is no provision in the constitution of the Supreme Court of New South Wales which says that a particular form of relief shall not be given except in a particular form of procedure, or except by a particular Judge.

For these reasons I think that this objection ought not to be entertained, even apart from the provisions of the *Equity Act* 1901 (sec. 8), which provides that: [His Honor read the section and continued.] It is contended that the last number of this enactment ought to be read in a restricted sense, and as applying only to cases in which some other relief which properly apper-

(1) 9 Moo. P.C.C., 441, at p. 447.

H. C. OF A. 1909.

MAIDEN v. MAIDEN.

Griffith C.J.

tains to the equitable jurisdiction is sought in the suit; and it has been so held by the Supreme Court. It is not necessary to decide the point in the present case, and it has not been fully argued. But I have heard nothing to induce me to incline to restrict the plain meaning of the words. The section is a remedial provision, intended on its face to remove one more of the anomalies which still linger in the administration of justice in New South Wales; and I think that it should be construed so as to effectuate and not to frustrate the plain intention of the legislature.

In the present case it is not in contest that the suit was properly brought on the equity side of the Court to obtain the injunction against working the land or disposing of the stock and crops. The right of the plaintiff to this relief involved a determination of her right to possession of the land, and I think that under the circumstances the Court, in the exercise of that jurisdiction, had power under sec. 8 to give the plaintiff all the other subsidiary relief to which she was entitled under the state of facts investigated and decided.

I pass now to the facts of the case itself.

The case made by the plaintiff in her statement of claim was that in December 1905 she entered into an agreement with the defendant under which he was to be employed by her to work and manage the farm under her directions on certain conditions (which did not include any provision for his remuneration), that he then came with his wife and family to reside on the farm and had since worked and managed it, but that he refused to obey her directions and claimed the farm and stock as his own. This was, in short, a suit against a manager who, having obtained possession of his employer's property by virtue of his employment, repudiates his employer's title, and is committing trespasses of such a character that they ought to be restrained by injunction.

The defendant by his defence denied the alleged agreement, and by way of counterclaim set up another, under which, as he alleged, it was agreed that the plaintiff should sell the farm and stock to him for £1,600 and that until payment he should account to the plaintiff for all moneys received by him from the produce of the farm and stock, which were to be applied by her in pay-

ment of the living expenses of herself, the defendant and his family, and in paying off a mortgage on the land, any balance to go in payment of the purchase money.

The plaintiff in her reply to the counterclaim denied that she ever agreed to sell the farm and stock for £1,600 or at all, and she claimed the benefit of the *Statute of Frauds*.

On these pleadings the case came on for trial.

The plaintiff offered no evidence in support of the agreement alleged, but relied on admissions, made at the hearing, of the other material allegations in the statement of claim. The defendant's counsel asked the learned Chief Judge to dismiss the suit, but he refused to do so, and the defendant thereupon adduced evidence in support of his counterclaim, and the plaintiff offered evidence in reply to it. She herself gave testimony, which, if believed, established an agreement by her for the sale of half the farm to the defendant on terms substantially as follows:—He was to come and live on the farm with his family, to manage it, and to account to her for all receipts, which were to be applied by her, first, in payment of the joint living expenses, and then in payment of interest and principal on the mortgage; and on performance of these conditions for eight years defendant was to have half the farm transferred to him, and was to be at liberty to buy the other half for £800. The learned Judge accepted the plaintiff's evidence on this point. The defendant accordingly came to reside on the land with his family on the terms of this agreement, and for some time it was carried out. On 23rd May plaintiff, in consequence of some disagreement, left the farm, and shortly afterwards demanded possession as from 30th September. It is not suggested that the defendant failed to account to her for the money received by him up to the time of her leaving.

Upon this state of facts it is clear that the defendant could not succeed upon his counterclaim, even if the learned Judge had accepted his version of the agreement. Such an agreement, involving the rendering of personal services by the defendant as consideration for the sale, was not one of which specific performance could be granted. Nor was there any such part performance as would take the case out of the *Statute of Frauds*, since the

H. C. OF A. 1909.

MAIDEN v. MAIDEN.

Griffith C.J.

defendant's possession was not referable unequivocally and exclusively to such an agreement as alleged.

What then was to be done? The plaintiff's case as made out in her statement of claim had failed. The counterclaim had also failed, but it appeared that upon the actual facts the plaintiff was legally entitled to possession of the land, and that there was no equitable ground for refusing it to her.

The learned Judge (as I understand from the meagre notes of his judgment which were read to us) gave her relief on the footing of the agreement which she herself deposed to.

But, in my opinion, she was not entitled to found any claim for relief upon that agreement, which she repudiated. If effect were given to that agreement the suit should have been dismissed, for it was proved that all the acts done by the defendant and complained of in the suit were done in accordance with it.

Since, then, the plaintiff cannot thus approbate and reprobate, her rights must be determined on the footing that from September 1907 defendant was a trespasser. The Court might in its discretion have refused to permit so radical a change in the nature of the case. But, all parties being before it and not objecting, and no application being apparently made for amendment, the learned Judge proceeded to give the relief to which he thought the plaintiff entitled. Substantially I agree with him as to the relief to be given. I think, however, that an injunction against residing or remaining on land is not the appropriate form of relief as regards possession. I think that there should be, instead, a substantive order for delivery of possession of the land and chattels. With regard to the accounts of receipts and expenditure, the plaintiff's formal right is to damages as for trespass, and the account can only be justified as a convenient mode of ascertaining them. The account of receipts, however, should begin from 23rd May, up to which time the defendant had, so far as appears, fully accounted. With regard to the inquiry as to the defendant's remuneration, he is entitled to say that it was never intended that his services should be gratuitous. When, therefore, the plaintiff repudiated the agreement by which the mode of his remuneration was to be determined, an implied obligation arose to pay on a *quantum meruit*. Strictly speaking,

this implication would only extend up to the demand of possession, but if a party seeks the intervention of the Court in equity he submits to do equity. The plaintiff indeed offered to admit such a claim. I think that it should be continued (regarded as an element in reduction of damages) for the same period as the account of receipts.

With regard to the costs of the suit and counterclaim, this Court does not (whether it can or not) interfere with the discretion of the Court appealed from when exercised upon a correct appreciation of the legal bearing of the facts. But if it appears that the Court acted on an erroneous view of the legal position this rule does not necessarily apply. As I have already pointed out, the learned Judge appears to have given the plaintiff relief on the basis of the agreement which she herself proved and repudiated. If she ought to have had any relief in this suit under such circumstances, it was not as a matter of right, but of grace. I do not think that the learned Judge considered the question of costs from this point of view. I therefore regard the matter of costs as at large, and so regarding it, and exercising my own judgment, I think that there should be no costs on either side, either in the Supreme Court or on this appeal.

BARTON J. The time having arrived for stating the reasons for the judgment of this Court pronounced in December last, I find myself prevented by ill-health from writing at length a statement of my own reasons for coming to the conclusion then announced. There is not, however, any necessity for delay on that account, for having read the statement of the Chief Justice, I am able to express my concurrence therein.

ISAACS J. Plaintiff's case was rested solely on the original agreement of December 1905. From first to last that was made the whole groundwork of the proceedings. The defendant was —said the plaintiff—her confidential agent, her manager carrying on a general agency, dealing with her land and chattels, buying, selling, receiving money, and for the purposes of her business in possession or custody of all her property. There were in consequence of this fiduciary relation, and in breach of it—arising entirely out of the express agreement—two causes of complaint:—

H. C. OF A. 1909.

MAIDEN v. MAIDEN.

Isaacs J.

(1) Non-accounting in respect of agency transactions.

(2) Disobedience of orders and breach of trust in not delivering up the property in accordance with the fiduciary duty. A third was added, viz. :—Lodging a caveat having no estate or interest in the lands.

There was no trace of any cause of action except as against an agent who violated his trust and kept and dealt with the principal's property, and in breach of the relation established tried to prevent the principal from dealing with it.

There was no suggestion of any agreement giving or purporting to give the defendant any interest in the property, or any colour of right for the conduct complained of.

Paragraph 7 of the statement of claim and paragraph 7 of the replication are wholly inconsistent with any agreement even in fact on the subject.

The learned Chief Judge in Equity found in favour of the plaintiff, and on the basis mentioned ordered :—

(1) Injunction against remaining on or intermeddling with the land and chattels.

(2) Accounts from the beginning, with credits for expenditure.

(3) Inquiry to determine fair remuneration for the plaintiff's labour.

(4) Removal of caveat.

(5) Costs.

Further consideration and costs were reserved.

The plaintiff has successfully contended that the actual agreement she made, and which was found to have been made, affords no defence to the suit on the ground of equitable title because it is one of which specific performance cannot be decreed : *Frith* v. *Frith* (1). And, further, as it was not in writing, no remedy at law can be had. She is therefore free from any legal obligation to observe it. But there are two things she is not free from. In the first place, she is not free to set it up as an existing and binding contract, succeed on part of it against the defendant, and then disavow the rest and refuse to be bound by it. No doubt she could, as part of the history of the relations between herself and the defendant, show what had taken place, including the

(1) (1906) A.C., 254.

attempted agreement, and she might thereby establish that his possession was one of trust towards her. But it is quite a different matter when she relies on the agreement as a living, enforceable bargain upon which to invoke in her favour the jurisdiction of the Court of Equity by showing breaches of its terms and conditions and resting her case on these breaches and conditions of its specific provisions. She is by her conduct seeking equity in respect of an express contract, and refusing to do equity in respect of the self-same contract by repudiating its other stipulations. This, in my opinion, she cannot be allowed to do.

The next thing is that in fact the express bargain came to an end by mutual action in September 1907, and she cannot be permitted, after both parties have thrown it aside, to pick it up anew and treat it as if it had always been insisted upon by her.

And even while it was in existence there was a portion of the time, namely up to May 1907, during which she can have no right to an account. She was in actual possession of the property, receiving substantially current accounts from day to day, and it would be absurd to compel the defendant to give new accounts for that period. Between May 1907 and September 1907 the agreement subsisted, and she is entitled to the accounts, on the principle of *Foley* v. *Hill* (1), and the rules as to account stated by *Lindley* L.J., in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (2), but at the risk of having to pay the cost of taking them if they turn out unsubstantial.

From September 1907 there was no fiduciary relation, and there has not been shown to be any complication of accounts. She is entitled to know what the defendant, as a wrongdoer, did with her property, and strictly speaking she should by discovery or otherwise at the trial have proved the facts to the learned Judge. No objection, however, to the mode of inquiry was made, and the investigation may, in view of the extraordinary circumstances and without being regarded as a precedent, proceed as an account though in strictness it is not.

The variation in the period and nature of the relief as to accounting is not trivial. As to a portion of the case it is fundamental because the nature of the claim is different. With regard

(1) 2 H.L.C., 28. (2) (1892) 1 Ch., 120, at p. 140.

H. C. OF A. 1909.

MAIDEN v. MAIDEN.

Isaacs J.

to the caveat, and the accounting from May 1907 to September 1907, and as to the injunction relating to the chattels, and the use of the land in connection with farming operations and the chattels therein, the plaintiff rightfully succeeds.

So far it is a proper case for the interposition of equity. Then with respect to the mere possession of the land, without deciding anything further as to the effect of the concluding words of sec. 8 of the *Equity Act* 1901, No. 24, I am of opinion that the Court, being otherwise well seized of the suit, has by virtue of the section and the rest of the Act full power and authority to determine the right to possession, and is even bound to: See *Hurst* v. *Hurst* (1) and *Clanricarde* v. *Ryder* (2). The decree, however, should declare that the plaintiff is entitled to possession, and enjoin the defendant to deliver up possession to the plaintiff accordingly. The direct form is the proper form, and the injunction was so granted by *Hardwicke* L.C. as in *Stribley* v. *Hawkie* (3), and Lord *Eldon* in the celebrated case of *Huguenin* v. *Baseley* (4). This form lays the foundation for a writ of assistance if necessary, as is seen by the same cases. The direct mandatory form is now again the accepted form: *Jackson* v. *Normanby Brick Co.* (5).

As to costs, it is clear that the discretion of the primary tribunal cannot be interfered with so long as it is not caused by an erroneous view of the law or a misapprehension of the facts. In the present instance there was either one or the other, perhaps both. The order is materially varied, and the matter of costs is open to this Court.

The plaintiff is entitled to urge the inability of equity to enforce the bargain she in fact made with her son. She is also entitled to object that the Statute of Frauds affords her a technical opportunity of refusing to permit him to have the chance of obtaining the interest in the land she promised him. No Court can prevent her insisting on her legal right to take up this position.

But the matter is part and parcel of the one arrangement, and

(1) 21 Ch. D., 278, at p. 294.
(2) (1898) 1 I.R., 98, at p. 109.
(3) 3 Atk., 275.
(4) 15 Ves., 180.
(5) (1899) 1 Ch., 438.

the attitude of the plaintiff is such that on the whole, except as to the costs reserved by the order of the Court, I think neither party should have any costs of the cause or of the appeal.

I agree with the learned Chief Justice that the Supreme Court of New South Wales is, under the State Constitution, one Court —and that the questions which formerly arose in England with regard to the exclusive jurisdiction of the Court of Chancery, basing its interposition on personal conscientious obligation, as distinguished from ordinary adjudication by the Common Law Courts upon legal rights, are not applicable to the Supreme Court of the State. It is one Court having every kind of jurisdiction, and it is a mere matter of internal arrangement as to the exercise of it. Parliament may regulate that exercise, but with respect to jurisdiction, with which we are here alone concerned, I see no ground for doubting the power of the Supreme Court to make in a suit like the present the orders now directed.

HIGGINS J. I concur in the main with the view of this unfortunate family dispute which the Chief Justice has expressed. My difficulty is with regard to the order for ejectment; for the order restraining the defendant from residing or remaining on the land is, in effect, an order for ejectment. I cannot find any power conferred on the Chief Judge in Equity, sitting in the equity jurisdiction of the Supreme Court, to order the possession of land to be given to the holder of the legal title. The legislature of New South Wales has deliberately retained the system which has been discarded in England, and in most of the British Possessions; and, as we are told, a suitor may still get in one room of the Supreme Court an injunction from the Chief Judge in Equity restraining his opponent from proceeding in the adjoining room to eject him on the strength of a legal title. It is not enough to point to the absurdity of such a system. It is for us to obey the New South Wales law in a New South Wales case. There would have been at least two proceedings under the old practice in England also, an action at law for ejectment, and a suit in equity for accounts; and the question is, has any New South Wales Act made the two proceedings unnecessary? By the English Act of 9 Geo. IV. c. 83, sec. 11, it was provided that the Supreme Court

H. C. OF A. 1909.

MAIDEN v. MAIDEN.

Higgins J.

of New South Wales shall be a Court of Equity, and shall have power and authority "to administer justice, and to do, exercise, and perform all such acts, matters, and things necessary for the due execution of such equitable jurisdiction, as the Lord High Chancellor of Great Britain can or lawfully may within the realm of England, and all such acts, matters, and things as can or may be done by the said Lord High Chancellor within the realm of England, in the exercise of the common law jurisdiction to him belonging." It would be interesting to watch the face of Lord Chief Justice *Coke* if he heard of the Lord Chancellor giving judgment in ejectment. By the New South Wales Act (4 Vict. No. 22), sec. 20, this power to sit, hear and determine all causes and matters depending in the Supreme Court in equity was vested in a Supreme Court Judge nominated by the Governor in Council. It is true that there is but one Supreme Court, and that this Court has all jurisdictions; but the common law Judges cannot exercise the jurisdiction of the Chief Judge in Equity; and the Chief Judge in Equity cannot exercise the jurisdiction of the common law Judges. The question is not as to the jurisdiction of the Supreme Court, but as to the jurisdiction and power of the Chief Judge in Equity. The legislature has thought fit to give part of the Supreme Court jurisdiction to one Judge, and the rest to other Judges (with juries in common law cases). The Supreme Court has two (or more) arms; the Chief Judge in Equity, who is one of the Supreme Court Judges, can use only one. This appeal is not from the Supreme Court exercising all its jurisdiction — divorce, probate, common law, &c.—(if such exercise is possible); but from the Chief Judge in Equity, who cannot, as such, exercise any but the equitable jurisdiction. On an appeal from the Chief Judge in Equity it is our duty to make such an order as he could and should have made—not to make such an order as a Court which has no distinction between its different kinds of jurisdiction could and should have made. The case of *Board of Orphans* v. *Kraegelius* (1), merely shows that the Judicial Committee, as a Court of Appeal, will not be fettered in its action by matters of mere form. But the power of the Judge below is not a matter of mere form. An *ultra vires* order

(1) 9 Moo. P.C.C., 441, at p. 447.

cannot be treated as an irregularity. If the defendant did not take this point of *ultra vires* below, he has taken it by his notice of appeal; and it is our duty to give effect to the point whenever it arises. There is at present a special Act prescribing a distinct code of procedure for common law—the *Common Law Procedure Act* 1899; and there is a special Act prescribing a distinct code of procedure for equity—the *Equity Act* 1901. By this latter Act, sec. 3, "the Court" means the Supreme Court in equity holden before the Chief Judge in Equity, or any other Judge lawfully exercising the jurisdiction of that Judge. By sec. 4 (2) the Supreme Court shall be holden by that Judge "for the determination of all proceedings in equity, and the disposal of motions and matters in relation thereto." Not only is common law kept separate from equity, but even among common law actions ejectment has its own special and peculiar procedure (Part XXI., *Common Law Procedure Act* 1899). An ejectment action has to be commenced by a writ of special character. There are special provisions for defence, and the writ has to be addressed not only to persons in possession, but to all persons entitled to defend the possession (see *Common Law Procedure Act* 1899, secs. 209, 210). As in other common law actions, a jury has to be impanelled (secs. 113, 222, 226, &c.); and in ejectment, the plaintiff, if he establishes his title, is entitled to his costs as of right (sec. 228). They are not in the discretion of the Judge as in equity. But reliance is placed on the words of sec. 8 of the *Equity Act* 1901 as enabling the Chief Judge in Equity to ignore the special procedure prescribed for ejectment, and to make an order for ejectment in a decree in which he forbids (for instance) infringement of a patent. Sec. 8 is as follows: [His Honor read the section.].

So far, the section seems to be based on the provisions of 15 & 16 Vict. c. 86, secs. 61, 62, and of 25 & 26 Vict. c. 42, sec. 1, which usefully relaxed the extreme rigidity of the boundary between equity and common law. It enables, for instance, the Equity Court to decide, in a suit for waste or trespass, a question as to the operation of a legal devise of a will, if the question has to be decided before the equitable relief is granted. In former times the Court of Chancery had to submit the question to a Common Law Court.

H. C. OF A. 1909.

MAIDEN v. MAIDEN.

Higgins J.

So far the section clearly does not justify this judgment for possession of the land; for in order to direct accounts it is not necessary to direct possession of the land to be given. But the section proceeds, "and no suit in equity shall be open to objection on the ground that the remedy or appropriate remedy is in some other jurisdiction."

These words cannot mean that a proceeding for ejectment or for libel or for divorce may be brought before the Chief Judge in Equity. They appear at the end of carefully guarded provisions—provisions which would be useless if the last words have the far reaching effect which is alleged. I take it that they really relate to the provisions already made, as a negative corollary thereto—as if they ran "and *in the cases mentioned* no suit in equity shall be open for objection on the ground that the remedy or appropriate remedy is in some other jurisdiction." If it were meant to allow common law claims to be brought in equity, one would have expected a correlative provision to the effect that equitable claims may be brought at law; but we have not been referred to any such provision either in the *Common Law Procedure Act* or elsewhere. Mr. Justice *A. H. Simpson* decided expressly in *Merrick* v. *Ridge* (1) that an ejectment claim cannot be entertained in equity, notwithstanding sec. 4 of the *Equity Act* 1880, which is in the same words as sec. 8 of the present Act; and he mentioned in his judgment that his predecessor, *Owen* J., had repeatedly held that the Court of Equity was not made a Court of Law by that section, but was only empowered to decide common law questions incidentally arising in an equity suit. This seems to me to be the true view.

I understand, indeed, that a practice has been growing up lately of treating this section as giving the Chief Judge in Equity power to grant an ejectment order in favour of a legal owner, if any other equity on some other subject (say in respect of patents), can be found in the statement of claim. But this construction has to my mind even less semblance of reason than the other; for the words of sec. 8 are "*the* remedy" not "one of the remedies." Whatever is the meaning of the concluding words of the section, it is clear that they do not allow a claim for divorce to be put in

(1) 18 N.S.W. L.R. (Eq.), 29.

the same suit with a claim for specific performance, or a claim for ejectment from land to be included in a suit for infringement of patent.

I might add that, if either of the constructions of sec. 8 suggested for the plaintiff were intended, one would have expected some repeal or amendment of the *Common Law Procedure Act* 1899—especially of secs. 209, &c., which deal with ejectment writs, and of the sections which make a jury necessary, and of sec. 228 which gives a right of costs. But there is no reference to these sections—nor any provision that sec. 8 should take effect "notwithstanding" anything contained in these sections. Every way that I consider the section, I can come to no other conclusion than that there is no power conferred on the Chief Judge in Equity to make the order for ejectment.

I concur in the view that under the circumstances the plaintiff has a right to an injunction against further sales of the stock, and to an account; and it is only fair to allow to the defendant remuneration for his labour, and any expenditure which he may have incurred on behalf of the plaintiff. The order as to the caveat may be taken as incidental to the order for possession of the land, and to be right if that order is right; but not otherwise. We reach this adjustment only by ignoring to a great extent the allegations in the pleadings, and by treating amendments as made to meet the real issues between the parties. The plaintiff has acted unfairly to her son, in promising to sell to him, in getting him to come and work her land, and in then changing her mind about the sale, because (as I should infer) the value of the land has risen. I am, therefore, glad that my learned colleagues see their way to deprive the plaintiff of her costs of the action awarded to her by the primary Judge; although if the matter were left to me, and if the order for ejectment is to stand, I fear that I should not feel justified in interfering with the exercise of his discretion or with the right of a successful plaintiff in ejectment to costs.

Decree varied accordingly. For order as to costs of suit and counterclaim substitute statement that the Court does not

H. C. OF A. 1909.

MAIDEN v. MAIDEN.

think fit to make any order as to costs of suit or counterclaim, nor as to costs of appeal. Caveat to be removed absolutely.

Solicitor, for the appellant, *D. Cowan*, Taree, by *F. C. Petrie.*
Solicitor, for the respondent, *W. H. Drew.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

BAYNE . . . . . APPELLANT;
DEFENDANT,

AND

LOVE . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909.

MELBOURNE, *March* 4.

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

Landlord and tenant—Evidence of tenancy—Payment of rent—Notice to quit—Monthly tenancy—Length of notice.

A. had been in possession of land as a monthly tenant, but there was no evidence as to who was then the owner. Subsequently B. became the owner, and A. continued in possession, and, on rent being demanded from her, promised B. to pay it and asked for time.

Held, that there was evidence of a tenancy between A. and B.

One month before one of the monthly periods a notice in writing was given by B. to A. demanding payment of rent then alleged to be due, and, in default of payment, that A. should immediately quit, and stating that, in