[HIGH COURT OF AUSTRALIA.]

McBRIDE . . . . . APPELLANT;
PLAINTIFF,

AND

SANDLAND . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Contract—Formation—Promise and acceptance—Consideration—Equitable interest in land—Oral evidence—Statute of Frauds—Part performance.

Practice—Supreme Court (S.A.)—Declaratory action—Action by legal owner of land—Declaration against equitable ownership—Rules of Court 1913 (*S.A.*), *Order XXVI., r. 5.*

H. C. OF A. 1918.

MELBOURNE, *May* 27, 28, 29, 30, 31; *June* 13.

Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

A number of properties were about to be sold by auction in one lot. On the day before the sale at a conversation at which the plaintiff, his daughter, who was the defendant, and her husband were present, the defendant's husband told the plaintiff that he was going to bid for one of the properties, whereupon the plaintiff asked the defendant's husband to leave it to him and not to oppose him, and said that he intended to purchase all the properties and that the defendant's husband should have the particular property he wanted, that he, the plaintiff, would arrange that the defendant should have that property by paying 5 per cent. on whatever he, the plaintiff, should give for it, that the defendant should have the right to take the property at the plaintiff's death at what it cost him, and that the defendant's husband should have possession as soon as the purchase was completed. The defendant and her husband then thanked the plaintiff. The following day the plaintiff at the auction sale bought all the properties in one lot, and the defendant's husband went into possession of the particular property. In an action between the plaintiff and the defendant the defendant relied on that conversation as establishing a contract between the plaintiff, the defendant and her husband to the effect

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

that in the event of the plaintiff purchasing the property the defendant's husband and the defendant should enter into and retain possession of the same during the life of the plaintiff and should pay to the plaintiff rent at the rate of 5 per cent. per annum upon the amount of the purchase money which should be paid by the plaintiff in respect thereof, and that the defendant should within a reasonable time after the death of the plaintiff have the right to purchase the property upon paying to the personal representatives of the plaintiff the amount of such purchase money.

Held, by *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ., that the conversation did not establish the alleged contract or any contract.

Held, also, that if any such contract as that alleged were established, the evidence did not show any part performance which would take the case out of the *Statute of Frauds*.

Per Isaacs and *Rich* JJ. (*Higgins* and *Gavan Duffy* JJ. doubting): Under Order XXVI., r. 5, of the *Rules of Court* 1913 (S.A.), which permits the Court to make binding declarations of right whether any consequential relief is or could be claimed or not, a legal owner of land may bring an action seeking a declaration that the defendant is not entitled to the present or future equitable ownership of the land which the defendant asserts.

Decision of the Supreme Court of South Australia (*Buchanan* J.), reversed.

APPEAL from the Supreme Court of South Australia.

An action was brought in the Supreme Court by Robert James Martin McBride against his daughter Caroline Sandland, widow of John Chesters Sandland and the executrix of and universal legatee under his will, in which the statement of claim set out that the plaintiff was the owner of certain land containing about 537 acres; that by an agreement in writing dated 9th April 1913 the plaintiff let that land to the defendant for a term of three years from 1st January 1913, which term expired on 1st January 1916; that the defendant did not give up possession on the expiry of the agreement but held over and was then a tenant by the year; that the defendant claimed to be equitable owner of the land and to be entitled to the possession thereof not by virtue of the tenancy but under and by virtue of an alleged agreement made by the plaintiff with the defendant to sell the lands to her; and that the plaintiff never made any such agreement for sale as that alleged. The plaintiff claimed a declaration that he was entitled to an estate in fee simple in the land subject only to the defendant's tenancy by the year.

By her defence the defendant admitted that the plaintiff was registered proprietor of the lands, but said that his ownership was subject to her equitable right as thereinafter mentioned. She alleged that in 1895 "it was orally agreed between the plaintiff and the said John Chesters Sandland and the defendant that in the event of the plaintiff purchasing the said land the said John Chesters Sandland and the defendant should enter into and retain possession of the same during the life of the plaintiff and should pay to the plaintiff rent at the rate of 5 per centum per annum upon the amount of the purchase money which should be paid by the plaintiff in respect thereof and that the defendant should within a reasonable time after the death of the plaintiff have the right to purchase the said land upon paying to the personal representatives of the plaintiff the amount of such purchase money as aforesaid"; that the plaintiff on the following day purchased the land, and that the purchase money or cost price to the plaintiff of the land at which the plaintiff agreed that the defendant should have the right after his death to purchase the same was £4,167; and that the agreement of 1895 was partly performed by the defendant and her husband going into possession and remaining in possession until her husband's death and by her remaining in possession ever since, by the defendant from time to time indemnifying the plaintiff in respect of moneys paid by him for land tax on the land, and by the making of substantial and permanent improvements and buildings on the land. The defence further alleged that the plaintiff should not be allowed to set up the agreement of 9th April 1913, because (*inter alia*) the plaintiff procured the defendant to enter into it by representing that its purpose and effect were to provide a fund for enabling the defendant to purchase the land and by threatening to deprive the defendant of her interest in the land if she did not sign the agreement and representing that he was able to do so. She also alleged that by reason of the facts that permanent improvements had been made on the land and that the plaintiff had on 14th February 1910, by representing that the agreement of 1895 was valid, induced the defendant to pay to him £1,400, the plaintiff was estopped from denying the validity of the agreement of 1895.

By counterclaim the defendant claimed a declaration to the effect

H. C. OF A. 1918. McBRIDE v. SANDLAND.

(*a*) that the agreement of 1895 was valid and subsisting, and that she was entitled to possession of the land during the life of the plaintiff upon payment of the yearly rent of £231 and to complete the purchase of the land for the sum of £4,167 within a reasonable time after the death of the plaintiff; and (*b*) that for the purposes of such purchase the defendant should be credited with payments amounting to £1,200 (being four yearly payments of £300 made under the agreement of 9th April 1913 in addition to the rent of £231), and also with the difference between £208 (which was 5 per cent. on the sum of £4,167) and £231, the amount actually charged or paid for rents. Alternatively, the defendant claimed a declaration to the effect (*a*) that the plaintiff was a trustee for the defendant and one of her sons of the sum of £1,200 above referred to, and (*b*) that the defendant was entitled to repayment of moneys expended by her husband on effecting permanent improvements, the sum of £1,400 above referred to, and moneys expended by the defendant in indemnifying the plaintiff in respect of land tax.

At the hearing before *Buchanan* J. the defendant's evidence as to the making of the alleged agreement of 1895 was as follows:— "I remember the Killicoat sale in 1895. I saw the sale advertised. Whilst it was advertised I and my husband and my father had a talk about it on more than one occasion. The Flagstaff" (which was the land the subject of the action) "was one of the Killicoat properties advertised for sale. My husband said to my father on one of these occasions 'I intend to buy the Flagstaff property as I have not sufficient land to get a living for your daughter and our family.' My father said he intended to buy the whole of the property but had found out that they were going to be sold in one line. I remember on the evening before the sale my father came up to our house and the conversation turned on the sale of the Killicoat property on the morrow. Mr. Sandland repeated what he had said before that he intended to bid for the Flagstaff property. My father said 'Leave it to me, do not oppose me. I intend to purchase the whole of the property and you shall have the Flagstaff property. I will arrange that Carrie'" (the defendant) "'shall have that by paying 5 per cent. on whatever I give to-morrow she will have the right to take it at my death at what it cost me and you shall have

possession as soon as the purchase is complete and you can put your stock on it right away (meaning as soon as the sale had been completed).' My husband thanked him and said he did not wish to oppose him at the bidding but he must have more land to enable him to maintain his wife and family. I thanked him also. The sale took place the next day, and my father bought the whole lot, including the Flagstaff."

Other material facts are stated in the judgments hereunder.

The learned trial Judge made an order declaring (1) that the agreement as stated in the defence was made between the plaintiff and the defendant and was valid and subsisting, and that the defendant was entitled to an equitable right in the land and was entitled to purchase the same within a reasonable time after the plaintiff's death on paying the sum of £4,167 and in the meantime to retain possession of the land upon paying to the plaintiff the rent or sum of £208 7s., being interest at the rate of 5 per cent. per annum upon the £4,167 cost price of the land; (2) that the defendant was entitled to be repaid the difference between £208 7s. and £231, the amount actually paid by the defendant to the plaintiff from and including the year 1903 up to the commencement of the action; (3) that the agreement of 9th April 1913 was fraudulent and void; and (4) that the plaintiff's title was subject to the equitable rights of the plaintiff; and ordering that the sum mentioned in (2) should be repaid, that the agreement of 9th April 1913 should be set aside and cancelled, and that the sum of £1,200 should be repaid to the defendant with interest.

From that decision the plaintiff now appealed to the High Court.

Cleland K.C. (with him *F. Villeneuve Smith* and *Alderman*), for the appellant. The evidence in this case is such that this Court may judge for itself whether the evidence of the respondent is to be believed (*Cadd* v. *Cadd* (1)). The respondent's evidence of the conversation in 1895, even if it is believed, does not establish any contract, but at most a representation of an intention to benefit the respondent. See *Cadd* v. *Cadd* (2); *Wells* v. *Matthews* (3). If there was a promise by the appellant, there was no consideration and there

(1) 9 C.L.R., 171, at p. 188. (2) 9 C.L.R., at p. 192.
(3) 18 C.L.R., 440.

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

was no reciprocal promise at all. Nor was there any acceptance of the offer by the respondent. Assuming that there was a contract, there was no part performance to take the case out of the *Statute of Frauds*. The taking of possession by the respondent's husband was not part performance by the respondent. The possession was not unequivocally referable to the contract, but was equally referable to the existing tenancy. See *Frame* v. *Dawson* (1); *Thomas* v. *The Crown* (2); *Maddison* v. *Alderson* (3).

[RICH J. referred to *Gregory* v. *Mighell* (4); *Morphett* v. *Jones* (5).]

The money expended upon the improvements was that of the respondent's husband.

Sir Josiah Symon K.C. and *Napier* (with them *Stuart Bright*), for the respondent. The respondent's equity arises from the acts done in part performance (*Fry on Specific Performance*, 5th ed., pp. 291 *et seq.*). The acts done are referable to the entire contract. Where there has been part performance the Court will strain to give effect to the intention of the parties (*Fry on Specific Performance*, 5th ed., p. 165). The part performance consisted of possession, the making of improvements and the payment of land tax. The possession was that of the respondent as well as of her husband. Acts of part performance being proved, oral evidence is admitted as to what the promise really was. The whole of the evidence must be looked at in order to determine whether the arrangement was obligatory or not, and it is for the jury to settle what were the terms of the agreement (*Fry on Specific Performance*, 5th ed., pp. 293, 295; *Tomkinson* v. *Staight* (6); *Mundy* v. *Jolliffe* (7)). The permanent character of the improvements shows that they were referable to an agreement that the respondent should have the land at the appellant's death. All the acts of part performance are to be examined, and if there was only one agreement the acts are to be attributed to it (*Sharman* v. *Sharman* (8); *Dillwyn* v. *Llewellyn* (9)). The principle of equitable estoppel is applicable, and, the respondent having taken

(1) 14 Ves., 386.
(2) 2 C.L.R., 127.
(3) 8 App. Cas., 467.
(4) 18 Ves., 328.
(5) 1 Swans., 172.
(6) 17 C.B., 697, at p. 707.
(7) 5 My. & C., 167, at p. 177.
(8) 67 L.T., 834.
(9) 31 L.J. Ch., 658.

possession and having expended money on the faith of the promise, the Court will compel performance (*Plimmer* v. *Wellington Corporation* (1); *Laver* v. *Fielder* (2)). There was ample evidence of the agreement alleged. Less precision is to be expected in a family agreement than in others (*Williams* v. *Williams* (3)). Interpreted as *Buchanan* J. interpreted the conversation of 1895, it showed a binding contract, and this Court cannot now declare that it is impossible to so interpret it. Words of intention may be promissory for the purpose of constituting a contract such as that alleged here (*Surcome* v. *Pinniger* (4).

[HIGGINS J. referred to *In re Fickus*; *Farina* v. *Fickus* (5).]

Laver v. *Fielder* (2) is in contrast to that case. As to the transaction of April 1913, there was a duty *uberrimæ fidei* upon the appellant. [Counsel also referred to *Dickinson* v. *Barrow* (6).]

Cleland K.C., in reply.

Cur. adv. vult.

June 13.

The following judgments were read :—

ISAACS AND RICH JJ. The circumstances of this case are distressing, and make the appeal one where, to borrow the language of Lord *Eldon* in *Gordon* v. *Gordon* (7), it is "the duty of the Judge to make a covenant with himself not to suffer his feelings to influence his judgment." On the one hand, the defendant has suffered acutely from the refusal of her father to adhere to his original promise, and, on the other hand, the plaintiff, admittedly a generous father, has been charged by those representing his own daughter with deceit and perjury, and part of the decision he appeals from rests on a finding of fraud. In such circumstances the Court must naturally be very careful to ascertain and apply the standard which the law prescribes as the measure of the parties' rights, and to remember, as Lord *Macnaghten* said in *Blackburn* v. *Vigors* (8), that "it is not the function of a Court of Justice to enforce or give effect

(1) 9 App. Cas., 699, at p. 710.
(2) 32 Beav., 1.
(3) L.R. 2 Ch., 294, at p. 302.
(4) 22 L.J. Eq., 419.
(5) (1900) 1 Ch., 331.
(6) (1904) 2 Ch., 339, at p. 343.
(7) 3 Swans., 400, at p. 468.
(8) 12 App. Cas., 531, at p. 543.

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Isaacs J. Rich J.

to moral obligations which do not carry with them legal or equitable rights." The respondent relies fundamentally upon an oral agreement made in 1895. In her pleadings, which are by no means easy to follow in all their intricacies, she avers two later occasions when the appellant repeated his promise. One of these averments, relating to 1910, raises the question of contract, and must be dealt with as such. The other, relating to 1913, is put by way of estoppel only. Both will be dealt with later.

The learned primary Judge (*Buchanan* J.) has accepted the respondent's version of what was said on the evening of 22nd August 1895 as substantially correct. That version, as will be seen, is to some extent confused and indefinite. But on it the respondent relies, and must rely, to support the judgment appealed from, apart from the effect of the events of 14th February 1910. She asserted a present contractual right to have at her election a future interest in land (see *Woodall* v. *Clifton* (1)), that is, an option to have the land (Flagstaff) transferred to her on her father's death, if she so desired, for the sum of £4,167 ; and she also asserted a present interest in the land arising from contract, namely, to have and retain possession of it until his death at £208 7s. a year from 1895, any amount paid to him during that period above £208 7s. to be refunded to her. The appellant disputed this, and he instituted the suit seeking a declaration that the respondent has no such right as she claimed, and that there was no agreement such as she now avers. Her claim is not a mere assertion of title, but amounts to setting up an "act" on plaintiff's part which, if truly existing and supported as alleged, would obstruct his title. The South Australian rule of Court as to declaratory actions follows the form of the present English rule, and seems to justify such an action. See *Sheo Singh Rai* v. *Mussumut Dakho* (2), a case under the older form of rule. The parties in the present case have in their final pleadings raised no objection, and each side claims a declaration. But some discussion arose during the argument. We think there was jurisdiction to entertain the claim.

It is necessary in the first place to point out that eventually, as argued on the respondent's behalf, it was claimed only that she

(1) (1905) 2 Ch., 257, at p. 259.

(2) L.R. 5 Ind. App., 87.

had a " right to purchase," that is, an option, and not that she had already " purchased " by exercising the option so as to be presently entitled to the fee simple in equity subject to the appellant's life estate, but with a right of possession in the meantime. The difficulties of maintaining the latter position are too manifest. First, as to the alleged agreement of August 1895 the appellant is still alive, and, next, the respondent has not bound herself to pay the purchase money (*London and South-Western Railway Co.* v. *Gomm* (1)). The option, if maintainable as a contractual right, must be supported by a valuable consideration, and one is alleged in par. 3 of the defence. But by recollecting that it is an option only to become owner, and not a final election to become owner, we are better able to appraise the various alleged acts of part performance. For, of course, the doctrine of part performance is relied on in order to overcome the difficulty of the *Statute of Frauds*. In *Maddison* v. *Alderson* (2) Lord *Selborne* L.C., in a passage now classical, stated the result of the authorities to be that in a suit founded on part performance of a parol contract relating to land the defendant is really charged " upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute) upon the contract itself." It is clear from what the learned Lord Chancellor says, that in such a case the Court is not asked to give a better remedy in aid of a legal right, based on the contract, but is called upon to enforce an equity (independent of the Statute, as *Story* observes—*Equity Jurisprudence*, sec. 754) which has arisen by force of circumstances subsequent to the contract itself, namely, by acts of part performance sufficient to attract the equitable jurisdiction of the Court. Lord *O'Hagan*, in the same case, pursues the principle further by pointing out that the proper course in such proceeding is that of " seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms," and that the Court below had erred in reversing that order. No harm can arise from reversing the order as a matter of convenience in taking evidence, provided the necessary elements of part performance are borne in mind and properly applied to the circumstances when

(1) 20 Ch. D., 562, at p. 581. (2) 8 App. Cas., at p. 469.

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Isaacs J. Rich J.

the facts come under consideration. But if the terms of the oral bargain are first ascertained and then the alleged acts of part performance are judged of merely by their consistency with and applicability to that bargain, grievous error may result. Much of the argument of the respondent ran upon that erroneous line, and to some extent the judgment under appeal is affected by it.

It will conduce to precision in dealing with the voluminous and complicated circumstances detailed in the evidence to state, so far as material to the present case, certain elements of part performance essential to raise the equity :—

(1) The act relied on must be unequivocally and in its own nature referable to "some such agreement as that alleged." That is, it must be such as could be done with no other view than to perform such an agreement (*Maddison* v. *Alderson* (1); *Gunter* v. *Halsey* (2); *Ex parte Hooper* (3)).

(2) By "some such agreement as that alleged" is meant some contract of the general nature of that alleged (*Maddison* v. *Alderson* (4); *Savage* v. *Carroll* (5); *Fry on Specific Performance*, 5th ed., at p. 292)).

(3) The proved circumstances in which the "act" was done must be considered in order to judge whether it refers unequivocally to such an agreement as is alleged (*Savage* v. *Carroll* (5); *Hodson* v. *Heuland* (6)). Expressions are found in some cases which, if literally read, are to the effect that mere possession by a stranger is sufficient to let in parol evidence of any contract alleged. Those cases were prior to *Maddison* v. *Alderson* (7), and the expressions if literally read appear to be too wide, because, so read, they would conflict with the requirement that the act must unequivocally refer to some such contract as is alleged, and because bare possession does not necessarily connote trespass or, alternatively, a contract at all; indeed, some contracts would not justify the act done. Possession may be the result of mere permission. But if the circumstances under which the possession was given are proved, then the Court may judge whether the act indicates permission or contract, and, if

(1) 8 App. Cas., at p. 479.
(2) Amb., 586.
(3) 19 Ves., 477, at p. 479.
(4) 8 App. Cas., at p. 485.
(5) 1 Ball & B., 265, at p. 282.
(6) (1896) 2 Ch., 428.
(7) 8 App. Cas., 467.

contract, its general character. For instance, in *Frame* v. *Dawson* (1) the expression " some agreement " is used, we think, in contradistinction to the specific terms of the agreement, and not in the most general sense of any agreement whatever.

(4) It must have been in fact done by the party relying on it on the faith of the agreement, and further the other party must have permitted it to be done on that footing. Otherwise there would not be " fraud " in refusing to carry out the agreement, and fraud, that is moral turpitude, is the ground of jurisdiction (*Fry on Specific Performance*, 5th ed., par. 588; *McCormick* v. *Grogan* (2); *Whitbread* v. *Brockhurst* (3); *Phillips* v. *Alderton* (4)).

(5) It must be done by a party to the agreement (*Fry on Specific Performance*, par. 589).

These requirements must be satisfied before the actual terms of the alleged agreement are allowed to be deposed to.

Further, when those terms are established, it still remains to be shown :—

(6) That there was a completed agreement (*Thynne* v. *Glengall* (5)).

(7) That the act was done under the terms of that agreement by force of that agreement (*Thynne* v. *Glengall* (5)).

We now consider the three classes of alleged part performance in order. Before considering these in detail, it should be pointed out that, according to the fundamental bargain alleged in par. 3 of the defence, " improvements," other than those of an occupant who still left open the question of ultimately becoming the owner, could not fall within the consideration for the option, and therefore could not be part performance of the " option " contract. Much of the argument was founded on the assertion that such improvements would not have been conceivably made by anyone except as owner. The inefficacy of that argument is at once perceived when it is recollected that the contention so far is only for an option to become or not to become owner. The acts of part performance relied on are alleged to be : (*a*) possession taken by the respondent and her

(1) 14 Ves., at p. 388.
(2) L.R. 4 H.L., 82, at p. 97.
(3) 1 Bro. Ch., 404, at p. 417.
(4) 24 W.R., 8.
(5) 2 H.L.C., 131, at p. 158.

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Isaacs J. Rich J.

husband; (*b*) indemnity in respect of land tax; (*c*) improvements on the land. The possession taken in 1895 and held until 1906 was effected by Sandland on behalf of the appellant taking delivery from the auctioneers, and then shifting his own sheep from Stony Gap, and afterwards also from the Adelaide Road to the Flagstaff. The respondent says:—"After the purchase my husband moved his sheep from Stony Gap in due course into the Flagstaff, and from the Adelaide Road too he moved his sheep into Flagstaff. He had his sheep on the Flagstaff and worked it till the time of his death." Mrs. Sandland says she went out to the Flagstaff several times after her husband's sheep were put there, but she did not go to live there till 1906, and the sheep were not hers. Her visits were not as proprietor or tenant. The legal possession during the period 1895-1906 was that of her husband alone. During that period no interest was paid and no rent was paid, although "rent" at the rate of 5 per cent. on £2 5s. per acre on £4,167 was charged in appellant's books against John Sandland down to December 1901, and on 31st December 1902 rent at the rate of 5 per cent. on £4,630, that is, at £2 10s. per acre, was charged against both, and both were charged with 5 per cent. interest on the sum of £2,388 said to be balance due to date. But Mrs. Sandland, though so charged in the books, never made any agreement with reference to the charge transferred from her husband's own sole account. It may be said that various entries were made against her in the appellant's books as to which her assent was never given or her attention directed. They appear to have been mere entries kept by the appellant to indicate the position in which the respondent would stand in relation to the appellant if ever she got Flagstaff. It may also be observed that some of the folios in the ledger now contain pencil entries, evidently not part of the original entries, but the distinction is not shown in the transcript. In May 1906 a written agreement for a lease for five years, with tenant's option of renewal for another five years, was made between appellant and John Sandland and witnessed by Albert McBride. This is stated on behalf of respondent to have been entered into on account of the dissatisfaction of two of the appellant's sons (William and Robert) and his son-in-law Hawkes, because Sandland had not paid rent on the Flagstaff. But, however it came

into existence, it was treated as a reality, and rent was paid under it; it fixed during its continuance the legal relations of the parties to it, and the respondent was not a party either directly or indirectly. She only knew of it after she went to live there in pursuance of the express terms of that agreement requiring the family to do so. The possession of her husband and her own occupation with him and her family are distinctly referable to that agreement, and to that alone. At least they are not exclusively referable to the alleged oral agreement. That continued until 1909, when the husband died. She was his executrix and sole legatee, and her possession appears to have been in his right. In her statement to the Government for duty in her husband's estate, she included past rent as his debt, with no reference to her indemnifying his estate in whole or part. It is said the information for that came from her father, but she adopted it though advised by a solicitor.

In 1910 an interview took place at Elder's, when the respondent's son was financed in respect of purchasing a property called "Nackara" and belonging to his late father's estate. On that occasion, according to the evidence of Albert McBride, which is accepted by *Buchanan* J., the respondent paid some back rent, said to be about £2,000. The appellant said, with respect to the lease agreement of 1906, it was ended as regarded the respondent, and she relied on Albert's evidence, in which it is stated the appellant handed the deed to a Mr. Chapman (his own agent) to put among the papers belonging to his daughter the respondent. Albert's evidence is very uncertain as to this, because he says that Chapman said "I will send you a copy of this, Alf. I will put the *copy* amongst Mrs. Sandland's papers, and the father *can have the original*." There was nothing like a surrender of the document, and Chapman's understanding evidently was that he as the father's agent was to retain the original. This is substantiated by the fact that McBride was allowed to take, and did take, the original, and he produced it at the 1913 interview. But in any case Mrs. Sandland was not present when the statement was made and the deed handed to Chapman, and she was unaware of both circumstances, she made no agreement to cancel the deed, she never assented to its termination, and in law it remained in full force. The appellant on that occasion produced his will, in which

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Isaacs J. Rich J.

it was provided, by clause 15, as follows :—" I purchased the Flagstaff property for the sum of £4,167, with the intention of allowing my daughter Caroline Sandland to acquire the same at cost price Now I declare that she shall have the right (to be exercised within twelve months from the time of my death) of purchasing such property at the sum of £4,167, she also paying rent therefor at the rate of £231 5s. per annum as from the first day of January 1909 until the completion of such purchase less such of that rent as may hereafter be paid by her to me in my lifetime." She was not present when this was produced, and it was arranged by the appellant and Chapman and Albert that she should not be informed. The men present treated the provision as an arrangement dependent merely on the appellant's testamentary power, but according to Albert the appellant gave him and Chapman an assurance that the provision would not be altered. All that was said to Mrs. Sandland when she agreed to pay the £2,000 claimed for rent, was this :— Both Albert and Chapman said : " You know the father will treat you all right " ; and the appellant said : " You know what I am going to do is for your good, and do the best for you."

The only reasonable inference from Albert's evidence is that the appellant gave the assurance by way of representation to which Albert as the adviser of the respondent trusted, and on the faith of that complied with the appellant's wish not to tell the respondent the nature of the assurance, beyond saying she would be treated all right. It was not a contract, having on the one side a binding promise to give the option over the land or a promise at once to sell the land (for both views are open on par. 10 of the defence), and on the other side an assent to carry out the appellant's desire respecting the settlement of 14th February 1910, and a binding obligation to continue paying 5 per cent. on £4,167 during plaintiff's life, and the principal sum at his death. Besides, the judgment of *Buchanan* J., while accepting Albert's version, does not find there was a new contract in February 1910 standing on its own basis. On the contrary, he impliedly negatives that by resting his first declaration solely on the alleged agreement of August 1895. As a fact, within five months afterwards, the appellant made her a gift of £2,000 in common with the other children, and later he distributed

£77,000 among his children equally. Mr. *Cleland* says that made good the appellant's promise to treat the respondent "all right." However that may be, and whether the possession after 14th February 1910 be attributable to the still existing deed of 1906 or to the verbal or tacit permission to remain in expectation that the 15th clause of the will of 1909 would one day operate, it is clear that it cannot be said to be exclusively referable to the alleged oral agreement of 23rd August 1895. The terms as well as the authority are different. How upon her view of the transaction does she explain her continued payment of £231 5s. ? The only explanation she gives in cross-examination is that it was the same amount as her husband paid which makes it referable to the deed of 1906.

In April 1913 a further agreement in writing was made between the parties, cancelling the agreement of 1906 and making certain new provisions. It is said that agreement was procured by threats and by representation that the original promise would be kept—an unnecessary representation if either the 1895 arrangement or the 1910 settlement were considered binding ; but in any event the appellant insisted on it and obtained it, and it lasted for four years at least, and rent was admittedly paid under it and possession held under it, and sub-letting by the respondent took place under it, and even an assignment of Bertram's interest was taken under it. Even if it were rightfully set aside, that would not convert the acts professedly done under it, and undoubtedly accepted by the appellant on the basis of that specific agreement, into acts done and permitted on the faith of some other agreement, so as to satisfy the requirements of part performance. There might be some other remedy, but not that. Further, if set aside, as has been directed, because the representation was made and not kept, how can the appellant be further ordered to make good his representation ? In 1917 matters culminated in open breach, and this action commenced.

The facts as to possession may thus be summarized :—From 1895 to 1906 the respondent was not in possession. From 1906 to 1909 the respondent's husband was in possession under the terms of an express agreement of lease. From 1909 to 14th February 1910 the respondent continued that possession as her husband's executrix. *Buchanan* J. says "the only way in which she could" (that is, after

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Isaacs J. Rich J.

the settlement of February 1910) "be liable to him for such rent was by virtue of the oral agreement of 1895." This cannot be sustained in view of the effect of that settlement already stated. From 14th February 1910 to April 1913 she further continued that executorial possession, or as his legatee, unless, contrary to our view, she could be held to have continued under the expectation raised by clause 15 of the will—a representation of future intention, since a will speaks from death. Finally, from April 1913 to the institution of the action she held possession by virtue of the deed of that date. As to indemnity for land tax, that is not substantiated. The leases provide that the tenants shall pay.

Then as to improvements. In 1906, October or November, about £110 was expended by the husband in building three skillion rooms necessary for working the place and, as the respondent admits in her evidence, "for its better working." That was ten years after he had possession, and only shortly before the agreement of 1906. In any event that expenditure was not incurred by the respondent. From 1906 onwards the improvements were made while the several agreements of tenancy existed, though perhaps in the expectation of ultimately owning the property. But the respondent says distinctly:—"It was a term of the 1906 agreement that we should go and live on the Flagstaff. It was in order that we might be able to comply with that that these additions were made by my husband."

There is no evidence showing that anything was done or claimed to be done on the faith of the oral agreement relied on, and there is nothing in that alleged oral agreement requiring or permitting the erection of the improvements, or to which their erection can be referred as constituting part performance of its terms.

We are now in a position to test the value of the acts relied on as part performance by the requirements above stated. As to the first, second, third and fourth of those requirements, it appears that at no time had the respondent the necessary possession. And as to the fifth requirement, prior to 1906, the acts were not hers but her husband's. Until 1906 she had no possession in fact, and there is no evidence that appellant ever treated her as in possession. After 1906 her possession during such time as she had it, and her acts during that period, are referable to other authority than the

alleged oral agreement. The appellant always insisted on possession being held on such other authority. The words of Lord *Manners* L.C. in *Savage* v. *Carroll* (1) apply to this part of the case with great force. It must be remembered also that a tenant does not commit waste by erecting buildings which improve the land (*Jones* v. *Chappell* (2)). With regard to the sixth requirement of part performance, namely, that it must be in respect of a completed agreement, the matter depends on the meaning and effect of what transpired at the interview of 22nd August 1895, as narrated by the respondent and already quoted. This presupposes the other requirements are satisfied. They are not, but we assume for this purpose they are. She professes at one point in her evidence to remember accurately what her father said twenty-two years before she deposed to it. She does not appear, nor does any one appear, to have made any record of the conversation, and other portions of her testimony, as, for instance, in her account given in direct examination of the interview of 9th April 1913 and her statement in cross-examination as to the 1895 interview, may with advantage be read in connection with the earlier portion.

It will be well, before stating the conclusions we arrive at as to the meaning of the plaintiff's words so established, to quote other parts of the respondent's evidence, which, of course, must be regarded as quite as reliable as her earlier ones. She says (1) that she understood from the conversation of 22nd August 1895 that she and her husband should stay at the Flagstaff "*as long as we liked*" during her father's lifetime—in other words, they were not bound to stay there; (2) that she did not understand they had to pay the interest year by year. In other words, payment of interest, if actually made, was not an obligatory term of any bargain made on that occasion. She adds that as late as 1910 she did not understand that rent was owing. She says:—"I knew that the amount was accumulating, but I did not think we would ever be asked to pay anything. Nothing was spoken about the rent being paid on the night before the sale." This evidence at once disproves the allegation in par. 3 of the defence—the root of her case—that they "should enter into

(1) 1 Ball & B., at pp. 282-283. (2) L.R. 20 Eq., 539, at p. 541.

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Isaacs J. Rich J.

and retain possession of the land during the life of the plaintiff and should pay the plaintiff rent at the rate of 5 per cent." &c.

There was thus in 1915 no consideration at all for the option to purchase at plaintiff's death.

She also admits that "there was no rent paid to my father before the 1906 agreement by cheque or cash." Taking her evidence as a whole, and interpreting the plaintiff's words as she deposes to them, having regard to the situation of the three persons concerned, we are clearly of opinion there was no contract, and no intention that the promises made by the appellant should ever assume the form of a contract. John Sandland was anxious to have a place to depasture his sheep; the appellant, knowing his difficulties, was willing to let him have the free use of Flagstaff for the purpose of maintaining his family. The appellant also intended so to leave the land at his death that Mrs. Sandland should *then* have the right, if she so desired, to take over from his estate the Flagstaff property at a single sum to be then ascertained by adding to the cost price (subsequently fixed at £4,167) interest at 5 per cent. per annum for the period from the purchase of the land by appellant to his death or to the election of the respondent to take the land. But the consideration for the land, if it were taken, was to be one sum ascertained as stated. The right was to be exercised *then*—if at all. There was no condition to be performed to entitle the respondent to exercise the right, and there was no consideration to be paid for the right. This shows that the seventh requirement of part performance, as above stated, was not complied with. The right was to be "arranged" by the appellant, and was to be a free gift. On the other hand, Sandland's needs were immediate, and he was permitted also as a free gift *at once* to enter and have possession of the land and put his stock upon it. If even he were required to pay rent during his possession, that consideration, since it did not move from her, would not enure to the benefit of the respondent in an action by her (*Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1)). The husband and the wife separately thanked appellant for his respective separate promises. It cannot reasonably be thought that the words "Thank you" meant a binding obligation on

(1) (1915) A.C., 847.

the part of either of the Sandland's to pay for an indefinite period 5 per cent. on whatever sum the appellant might next day choose to pay for Flagstaff, or whatever sum he might allocate to that property, and much less to pay the principal sum itself—if that is what she means by being "bound." At no time, either then or since, has the respondent either *paid* the stipulated consideration (indeed, it would be impossible, since the appellant still lives), or *bound herself* to pay it, even if the promise could be treated as an outstanding offer awaiting acceptance. At no time, if positions were reversed in litigation, could the appellant have shown that the respondent or her husband had become liable to pay any future sum representing interest, beyond any rent which by the terms of the agreements for lease he or she was bound to pay during the respective terms. There never was a contract.

One further observation may be made. Since the basis of the jurisdiction in this case is "fraud" and not simply "contract," it does not follow that, because a contract is in the result spelt out of the interview of 22nd August 1895, it is necessarily to be specifically performed. Even in ordinary cases of "contract," ambiguity is in certain circumstances a ground of refusal to exercise the jurisdiction, which is discretionary (*Stewart* v. *Kennedy* (1)). That is where it would be "highly unreasonable" to do so. But it would appear to follow that where there is room for honest difference of belief as to whether a binding agreement has been made, and that belief is not only entertained but enforced during a long period of years, it would seem at least "highly unreasonable" to hold a party guilty of fraud for refusing to carry out what on the whole the Court might think the legal result of the communings though the party himself did not.

Very much was said by learned counsel for the respondent about the representations made or said to be made by the appellant, and the expenditure of the respondent and her husband in reliance upon those representations. While it is quite true that representations may become the subject of contract, the question is, did they in this instance? This position is forcibly insisted on in *Maddison* v. *Alderson* (2) and has recently been again enunciated by the Privy

(2) 15 App. Cas., 75, at pp. 102 and 105. (2) 8 App. Cas., 467.

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Isaacs J. Rich J.

Council in an Indian appeal case (*Malraju Lakshmi Venkayyamma* v. *Venkata Narasimha Appa Rao* (1)). There, Lord *Shaw*, after referring to *Maddison* v. *Alderson* (2) and *Maunsell* v. *Hedges* (3), said:—"In both of these cases, as must be done in all cases of a similar character, the true issue must be disentangled from statements or representations *simpliciter*, or from mere announcements of intention; and that true issue is, is a contract proved?" That was practically reaffirming in a very practical form the law laid down in *Chadwick* v. *Manning* (4). Among other citations made approvingly by Lord *Shaw*, in the Indian case, is the passage from Lord *O'Hagan's* judgment already referred to as to the proper course of proceeding. In the case then in hand their Lordships found a contract because (1) there was originally a definite acceptance of a proposal and a promise to render the full consideration required, and (2) in any case the actings of the plaintiffs which completed the consideration stipulated for took place upon the footing of the proposal, and were then known by the offeror to be taking place on that basis. In either view there was a contract in that case. Tried by either test, the original arrangement as deposed to in this case, together with the alleged actings upon it, will not answer the description of a contract.

Did the events of 14th February 1910 or of 9th April 1913 or both those dates suffice to create a binding option in favour of the respondent? The circumstances of the 1910 interview as narrated above show no such bargain. As to those of April 1913 the respondent says respecting the written agreements of that date:—"My father told me to sign them and that he would see that everything would be all right and he would carry out his promise to me. I believed him. I should never have signed had I thought for one moment he would go back on his promise." A little later she is asked: "Would you have signed that document if you had known or been told it would injure or take away the right your father had promised you in Koonawarra?" Her answer is: "No." And further questions and answers to the same effect appear. This

(1) L.R. 43 Ind. App., 138, at p. 146.
(2) 8 App. Cas., 467.
(3) 4 H.L.C., 1039.
(4) (1896) A.C., 231.

is not the language of contract: it is that of trust in mere representations. There is nothing to suggest that the parties were proceeding on the basis not of trusting the appellant but of not trusting him—in other words, of making a definite contract, the promise being verbal to give an option at death and the consideration being the present signing of the deed of 9th April 1913. The appellant was demanding that deed, the alternative being that he would turn her off the place. To overcome her opposition he assured her that everything would be "all right." It is inconceivable that, while demanding this deed under severe threats for non-compliance and refusing point-blank to leave the matter in the position of the original promise, he should, in consideration for the signing of the deed, promise the very thing the deed was designed to alter and the very thing he refused to do. It is also inconceivable that the solicitor lent himself to such a scheme, and left Mrs. Sandland without a record of her rights.

To this part of the case, as well as to the original oral agreement, the words of Lord *Hardwicke* L.C. in *Gunter* v. *Halsey* (1), words quoted approvingly by Lord *Selborne* L.C. in *Maddison* v. *Alderson* (2), apply with special force. There it is said the terms of the parol agreement must be "certainly proved." (See also *Phillips* v. *Alderton* (3).)

This case well exemplifies the danger of trusting to parol evidence, where the events cover so many years and are so intermingled, and where in order to give effect to the parol testimony it is necessary to override solemn deeds executed at different times, with the help of solicitors, and to override them either as nullities or as frauds, or as subservient to accompanying parol undertakings. *Buchanan* J. has not found that a new bargain was made at that stage. On the contrary, he has found that the deed of April 1913 was "fraudulently procured," and has made a declaration that it was fraudulent and void, and has ordered it to be set aside and delivered up to be cancelled. The respondent's pleadings did not allege fraud in the making of that deed (see per Lord *Watson* in *Lawrance* v. *Norreys* (4)), nor

(1) Amb., 586.
(2) 8 App. Cas., at p. 478.
(3) 24 W.R., at p. 9.
(4) 15 App. Cas., 210, at p. 221.

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Isaacs J. Rich J.

undue influence, which latter is one of the reasons stated by him for impeaching the deed. No evidence of undue influence was pointed out, and as the respondent was fully " emancipated " and free from all parental influence except that resting on " filial piety " (see per *Farwell* J. in *Powell* v. *Powell* (1)) it is difficult to see what induced her to sign the deed except the fear of not receiving the option as a voluntary gift, unless it were in consideration of a binding promise, to give it a conclusion at which neither *Buchanan* J. nor we can arrive. At all events we cannot agree that there was any fraud. It may well be that even if a concluded bargain were made on the two occasions of 1910 and 1913, the *Statute of Frauds* would apply if pleaded, but we cannot find that is pleaded to these two alleged bargains.

For those reasons, the respondent, in our opinion, failed in her defence, and in her main counterclaim that the oral agreement should stand and be enforced.

Other matters were counterclaimed by her. First, she counterclaimed to be credited by way of overpayment with the difference between £208, the amount of interest based on the oral agreement, and £231, the amount paid under the deeds of 1906 and 1913. Next, and alternatively, she as assignee of her son Bertram claimed to be entitled to a declaration that the plaintiff is a trustee for her and her son Morton in respect of the four sums of £300 paid to him under his agreement of 9th April 1913. She did not claim repayment to her of these sums. Finally, also as an alternative, she claimed repayment of moneys paid by way of land tax and the sum of £1,400 paid by her at the settlement at Elder's in February 1910.

As to these various counterclaims, the £231 rent was paid under an agreement in 1906, which is not sought to be set aside and as to which no grounds have been established to set it aside. It was terminated only by the agreement of April 1913. No order was made as to the £1,400 ; no argument was addressed to us upon it ; and in any event there would be no ground for such an order. No order was made as to the land tax, and none could validly be made. But with regard to the £1,200, that is, the total amount of the four sums of £300 paid to appellant to be held in trust for the two sons of the

(1) (1900) 1 Ch., 243, at p. 246.

respondent, the learned Judge, notwithstanding the absence of one of the sons, Morton, from the suit, has ordered the money to be repaid. This apparently was on the footing of setting aside the deed of April 1913, under which it was paid; but *non constat* Morton is agreeable. He is not bound by it, and as he is interested, not merely in a moiety, but in the whole as a joint fund for a specific purpose, the order to repay the £1,200 cannot in any event stand. Indeed, if the agreement be set aside as far as the respondent is concerned, it cannot be regarded as void *ab initio*, otherwise respondent could not be Bertram's assignee under it, and his presence also would be necessary. And if it be good until set aside, things done under it cannot be referred to some other contract.

In our opinion, the appeal should be allowed, and the appellant should have a declaration as firstly claimed by him. The second declaration claimed is not supported by any facts. The appellant is also entitled to judgment on the counterclaim.

HIGGINS J. This unhappy family dispute between a father and his daughter has occupied the primary Court for some twenty-eight days —a much longer time than is usual, even with such disputes. In my opinion, it should be decided on the single ground that there was no contract between the plaintiff and the defendant. The contract is alleged in par. 3 of the amended defence; and the defendant does not pretend to rest her case on any substantive ground apart from this contract in August 1895. If there was no such contract, the case fails.

The learned Judge has had the advantage of seeing and hearing the parties and their witnesses, and has rejected the story of the plaintiff. I do not propose to criticize the reasons for the finding, but to accept it. The evidence of the defendant is that the father, on the eve of the sale of the several Killicoat properties, in August 1895, said to Sandland, his son-in-law, in the presence of his daughter (the defendant) that he would purchase all the properties when sold in one lot subject to annuities: "I will arrange that Carrie" (the daughter) "shall have that" (the Flagstaff property) "by paying 5 per cent. on whatever I give to-morrow she will have the right to take it at my death at what it cost me and you shall

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Higgins J.

have possession as soon as the purchase is complete, and you can put your stock on it right away . . . . " Then, says the defendant :—" My husband thanked him and said he did not wish to oppose him at the bidding, but he must have more land to enable him to maintain his wife and family. I thanked him also. The sale took place the next day, and my father bought the whole lot, including the Flagstaff. After the purchase my husband moved his sheep from Stony Gap in due course into the Flagstaff, and from the Adelaide Road too he moved his sheep into the Flagstaff. He had his sheep on the Flagstaff and worked it till the time of his death." The husband died in 1909, leaving his wife his sole legatee.

Now, unless in this conversation a contract is to be found, there is no contract as alleged. The learned Judge finds in the conversation all the elements necessary to constitute a valid contract: *consensus ad idem*, a definite subject, a fixed price, a time for payment of the purchase money, 5 per cent. interest in the meantime, and a purchaser—the defendant. But there is still lacking one essential at the least—an intention to create a legal bond. It is one thing to settle the terms of an agreement, if it should be made ; it is quite another thing to make the agreement (*Barrier Wharfs Ltd.* v. *W. Scott Fell & Co.* (1) ; and see *Walpole* v. *Orford* (2)). There is a promise in the words used, not an agreement. The promise is to " arrange " for possession (Sandland or his wife or both paying 5 per cent. on the cost), and for a " right " or option exercisable by Carrie at the father's death. Perhaps the father had a vague notion of putting the option in his will. There was this promise by the father, but there was no counter-promise or other consideration given on the part of the daughter or of her husband. If the husband or wife—or both—refused to take possession, they would not break any promise ; if, having taken possession, they should leave the property, the father could not complain of any breach of contract. If the property should decrease in value from £4,000 to £400, the daughter was free to refuse to exercise the option on the father's death ; and there was no consideration for the grant of the option which would make the option legally enforceable. Under the common law of England, which is our law, there can be no promise enforceable by

(1) 5 C.L.R., 647. (2) 3 Ves., 402, at p. 419.

the Courts unless there be a consideration for the promise—a consideration moving from the person to whom the promise is made (*McGruther* v. *Pitcher* (1); *Price* v. *Easton* (2)); and no such consideration appears here. Mrs. Sandland, as well as her husband, "thanked" the father. The words of the father were actually addressed to Sandland, the daughter being spoken of in the third person though she was present; and if the (alleged) contract was made with Sandland, Mrs. Sandland could not enforce it, though it was for her benefit (*In re Empress Engineering Co.* (3)). But even if the words of the father may be taken as addressed to her, she did not make any promise or enter into any obligation.

It is true that Sandland had intended to bid for the Flagstaff property, and that the father said "Leave it to me." As *Buchanan* J. points out, "the opportunity of bidding for the Flagstaff as a separate property never presented itself, and there is nothing to show that Sandland ever had in contemplation the purchase of a very miscellaneous lot of scattered properties charged as a whole with payment of a number of annuities, of the particulars of which he would appear to have known nothing"; and Sandland knew at the time of the conversation that the properties were to be put up for sale in one lot. In any case, if there was a consideration for the promise, it was a consideration moving from Sandland, not from the defendant. The alleged contract was wanting in mutuality. The "thanks" with which both Sandland and his wife received the intimation of McBride's intentions as to the Flagstaff confirm the view that the transaction was regarded as being essentially a benefaction and not a bargain. If the father had said, "I shall buy Flagstaff, and you can use it during my life and Carrie may buy it at cost on my death," without saying anything as to interest on the cost, how could it be contended that there was a contract? It would be a case, at most, of imperfect gift, not to be completed by any Court of equity. The father was a wealthy man, who was very liberal to his children; and he was now intending to find the money for a property on which his son-in-law—who was an expert station manager and wool-classer—could, by his labours, adequately

(1) (1904) 2 Ch., 306. (2) 4 B. & Ad., 433.
(3) 16 Ch. D., 125.

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Higgins J.

maintain his wife and children. In dealing with conversations between near relatives great care has to be taken lest words of unguarded speech should be construed as creating legal obligations. They should be scrutinized most closely before the conclusion is drawn that the parties intended to bind themselves in conversation by legal bonds. The words used here, taken with their surroundings, seem to me to involve a mere intention to benefit the Sandlands, not a contract with them (see *Maunsell* v. *White* (1); *Jorden* v. *Money* (2)). The words attributed to the father are not very clear; and an ingenious argument has been addressed by Mr. *Napier* as to the true punctuation—that practically a new sentence begins with the words "by paying 5 per cent." I have not been convinced that this is the true meaning; and I do not understand the learned primary Judge as having accepted that meaning. The version of the promise as stated by the father to Albert, the defendant's brother, on the same evening, and deposed to by Albert as the defendant's witness, differs from the version as stated by Mrs. Sandland; and when we compare the two versions it is by no means clear who was to pay the 5 per cent. and who was to have the right to purchase. If the precise words used or their meaning cannot be satisfactorily determined, there is considerable authority for saying that the Court may, for that reason alone, refuse specific performance (*Fry on Specific Performance*, 4th ed., p. 164, and cases cited; *Maddison* v. *Alderson* (3)).

But I prefer to rest my decision on the point that there is no contract at all—no intention to create a legal bond, and no consideration moving from the defendant for any promise made to her or with regard to her. A mere statement of intention or promise does not become a contract enforceable by our law because of the fact that the person promised has, in reliance on the promise, adopted an altered course of living or conduct (*Maddison* v. *Alderson* (4)). "To make a contract there must be a bargain between both parties" (per Lord *Blackburn*, *Maddison* v. *Alderson* (5)). As was said by *Pearson* J. during the argument in *In re Hudson* (6): "If A

(1) 4 H.L.C., 1039.
(2) 5 H.L.C., 185.
(3) 8 App. Cas., 467, at p. 484.
(4) 8 App. Cas., 467.
(5) 8 App. Cas., at p. 487.
(6) 54 L.J. Ch., 811.

says 'I will give you, B, £1,000,' and B in reliance on that promise spends £1,000 in buying a house, B cannot recover the £1,000 from A." In this case, the defendant relies on part performance to take the alleged contract out of the *Statute of Frauds*. But no acts of part performance— no taking of possession, no making of improvements—can avail if there is no contract; and there is no case raised here of estoppel by conduct, such as was raised in *Ramsden* v. *Dyson* (1). But I may say that, in my opinion, any of the acts alleged as being acts of part performance could equally well be attributed to the position of Sandland (or his wife), first as objects of the father's bounty, then as occupants of the property having the expectation that the wife would probably be allowed to buy the property at cost on the father's death.

It is argued that the defendant is not to be confined, in attempting to prove the alleged contract of August 1895, to the words then actually used, and that the subsequent words and conduct of the parties may be called in aid to explain the words. I accept this argument; but after careful examination of the confusing evidence, I find rather confirmation of the opposite view. It is, to my mind, significant that the actual documents produced, when lifted out of their disputed surroundings, tell against the view put forward for the defendant. It is true that the plaintiff alleged, but failed to prove, a lease to Sandland of 1895 or 1896; but entries in the plaintiff's ledgers, made by Sandland himself during 1898 and subsequently, debit Sandland, and not his wife, with £207 8s. per annum as "rent" (not interest) due by him. Further, there is an agreement for a lease to Sandland of May 1906. By this document, McBride agreed to grant a lease for five years from 1st January 1906, at the rent of 5 per cent. on a sum higher than the actual purchase money, and agreed to grant a renewal for another five years. This agreement is inconsistent with the agreement alleged by the defendant in her defence; for it is in favour of Sandland alone, and is for a limited term (not for the life of the plaintiff); and it is for a higher rent—£231 instead of £207. Why did Sandland sign this agreement, if under an existing agreement he and his wife were entitled to possession during the plaintiff's life? Why did he enter into the special covenant to pay

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

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Higgins J.

all landlord's taxes, &c. ? Again, there is an agreement for a lease of 9th April 1913, signed by the defendant. No doubt, this agreement is alleged to have been procured by threats and misrepresentations as to its effect ; nevertheless, it was actually signed by the defendant, and contains a recital that the defendant held the land under the agreement of 17th May 1906 at a rent of £231. This new agreement contains some extraordinary provisions, and in particular a provision for an increased rent of £531, of which the sum of £300 per annum was to be held in trust for two of the defendant's sons " for the purpose of assisting them to purchase the fee simple " when the land should be sold by McBride or his executors. This document, until set aside in a competent proceeding directed to that end, is inconsistent with the defendant's case, and is consistent with the plaintiff's view that his promise to give Mrs. Sandland a right to purchase after his death rested in intention only, not in contract. But the revoked will of 11th May 1909, put in evidence by the defendant, is even stronger. Par. 15 refers to the property :— " I purchased the Flagstaff property for the sum of £4,167 with the intention of allowing my daughter Caroline Sandland to acquire the same at cost price Now I declare that she shall have the right (to be exercised within twelve months from the time of my death) of purchasing such property at the sum of £4,167 she also paying rent therefor at the rate of £231 5s. per annum as from the first day of January 1909 until the completion of such purchase less such of that rent as may hereafter be paid by her to me in my lifetime." Now, this clause was put in at the suggestion of Albert McBride, who took the part of the daughter against the father, " so as to make Carrie's position for the purchase of the Flagstaff clear." The father (the testator) showed the will to Albert, who read it, and says :—" I was perfectly satisfied. I considered clause 15 properly represented her position then with regard to the Flagstaff as I knew it." Mrs. Sandland herself says, on reading the will in the box : " As far as my knowledge goes that accurately represents what was arranged the night before the sale." Yet the words of the will do not even suggest any contract ; they only refer to an " intention," which legally was revocable.

I concur, therefore, in the view that this appeal should be allowed.

The rest of the judgment must follow the fate of the declaration that a contract was made on 22nd August 1895. The difference between £208 7s. and £231 paid was not improperly paid if the plaintiff had not contracted as alleged; and the four sums of £300 paid under the agreement of 9th April 1913 were properly paid, unless that agreement be set aside. I have felt some difficulty in relation to that agreement. The learned Judge has ordered that it be set aside; but there was no claim to that end. It is true that in par. 11 of the defence it is stated that the plaintiff "ought not to be admitted to set up" that agreement, for certain reasons; but that is all. If there had been a claim to set aside the agreement, the plaintiff would have had an opportunity to allege, and perhaps to prove, that the parties could not be remitted to their previous position. But even if this averment could be treated as a basis for an order setting aside the agreement, the grounds are unsatisfactory. The first is a misrepresentation as to the effect of the agreement; but I cannot find any evidence of any such misrepresentation. The second is that the plaintiff threatened to deprive the defendant of her interest in the land unless she signed the agreement; but the threat to sell the place and turn her out was within the right of the plaintiff, unless we are to assume that Mrs. Sandland was the equitable owner; and that, for reasons I have stated, is not to be assumed. *Buchanan* J. probably felt the inadequacy of the grounds stated; for in his judgment he relies on "undue influence" —which was not alleged—and on certain representations and promises which were not alleged in the defence as grounds. The judgment should, I think, be set aside, and there should be a declaration that the plaintiff is entitled to an estate in fee simple subject to the rights of the defendant as tenant from year to year.

The form of the action is very unusual, and but for the recent Rules of Court it would be the clear duty of the Court to dismiss the action altogether. Formerly, if the legal owner of land, holding a clear certificate of title, found that someone claimed to be the equitable owner by virtue of some alleged agreement, he could not ask the Court to declare against the equitable ownership—especially a future equitable ownership. In such cases it was usual for the legal owner to attempt some lease, conveyance or other dealing

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Higgins J.

inconsistent with the alleged equitable interest, and thus force the alleged equitable owner to take steps to assert his claim. But neither in the defence, with counterclaim as finally amended, nor in the argument, has objection been taken that the action will not lie; and counsel on both sides desire us to decide the case on the merits. In view of the difference of opinion among eminent English Judges as to the effect of Order XXV., r. 5 (we are informed that the rule has been adopted in South Australia), I am not prepared, without argument, to hold that the action will not lie, as a matter of jurisdiction (see *Williams* v. *North's Navigation Collieries* (1889) *Ltd.* (1); *Guaranty Trust Co. of New York* v. *Hannay* (2)). As the case has been fought on the merits, and as both sides assume that the action lies, I am prepared to act on that assumption. If the action lies, we state what we think would be the proper judgment.

GAVAN DUFFY J. I concur in the judgment of my brother *Higgins*.

POWERS J. I have read the judgments just delivered by my learned brothers, and I concur in holding that the appeal should be allowed. I do so with regret, because, as my brothers *Isaacs* and *Rich* have said in their judgment, "the defendant has suffered acutely from the refusal of her father to adhere to his original promise"— the intention he expressed in 1895 on which the defence to the claim is based; but, as Lord *Macnaghten* in *Blackburn* v. *Vigors* (3) said, "it is not the function of a Court of Justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights." In this case I am of opinion the respondent has not proved any legal or equitable rights.

The law as to parol contracts relating to interests in land and part performance of parol contracts, so as to take the case out of the operation of the *Statute of Frauds*, is set out in the judgments in the case of *Maddison* v. *Alderson* (4). In that case it was proved that John Alderson induced a woman to serve him as a housekeeper without wages for many years, and to give up other prospects of

(1) (1904) 2 K.B., 44, at p. 49.
(2) (1915) 2 K.B., 536.
(3) 12 App. Cas., at p. 543.
(4) 8 App. Cas., 467.

establishment in life, by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will not duly attested, by which he left her the life estate. It was held "that there was no contract, and that even if there had been and although the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its own nature referable to any contract, and was not such a part performance as to take the case out of the operation of the *Statute of Frauds*, sec. 4; and that she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land" (1). The actual finding in *Maddison's Case*, "that the acts relied upon by the appellant as acts of part performance were not relative to the possession, use or tenure of the land," does not affect this case, if the respondent had proved possession under the contract, and improvements made on the faith of it, but the first ground, "that there was no contract," is the one most relied on by the appellant.

The words on which the respondent relies to prove a contract in this case have been quoted in full in the judgments just delivered. I agree, for the reasons mentioned by my learned brothers, (1) that the words the respondent says were the words used in August 1895, even if the subsequent words and conduct of the parties are used in aid to explain the words, do not amount to an enforceable contract; (2) that the acts relied on as part performance are not unequivocally referable to some such agreement as that alleged; and (3) that the acts done were not in fact done on the faith of any contract but only on the faith that the appellant would carry out the intention he said he had in August 1895, and in any case, if they were done on the faith of any contract, the appellant did not permit them to be done on that footing.

I do not see any necessity or advantage in repeating the many reasons in law and on the facts, to which my learned brothers have so fully referred, why the appeal should be allowed, but I think it right to add something to what has been said about three of the contentions urged by the respondent's counsel.

(1) 8 App. Cas., at p. 467.

H. C. OF A. 1918.

McBRIDE v. SANDLAND.

Powers J.

I was impressed for some time with the contention that the payment of the rent after the death of the husband of the respondent—namely, in 1910—could only be referable to some binding condition by the respondent to pay 5 per cent. on the purchase money during the lifetime of the appellant, because the only arrangement made by her, if any, with the appellant up to that time was in August 1895. Appellant's counsel, however, pointed out that the payment was clearly made by her in satisfaction of a debt due by her late husband to the appellant for rent under the 1906 agreement. That debt appeared as a debt due to the appellant in the estate papers signed by her as executrix of her husband's will. Further, as the respondent stated in her evidence that the interest or rent was not to be paid by her year by year under the 1895 arrangement, that payment could only be referable to the debt for rent due by her late husband as rent of the Flagstaff property. The payment was also quite inconsistent with the contract by which she alleged she was to have the right to purchase the property by payment of the cost price and interest at 5 per cent. on the cost after her father's death, and after she exercised her right of purchase. That would only mean a statement of an intention to arrange for an option to purchase land after the appellant's death of which there could not be part performance until after his death. The payments of rent made after 1910 were made under the agreements of 1906 and 1913 or under the arrangement of 1910, and the rent paid was not £208 7s. but £231 a year.

The respondent's counsel urged that the large sum expended on improvements on the land—over £3,000—was unequivocally referable to the alleged contract, and to that only. It was, however, proved that a large portion of the improvements were made, and paid for, by the husband of the respondent, and not by her, and the rest of the important improvements by her sons under the 1913 agreement. It was also admitted by the respondent that it was necessary to enlarge the house to enable her and the family to live in it, and that many of the other improvements made by her husband were necessary to enable the business her husband was engaged in to be properly carried on.

The late husband of the respondent had the right to remain in

possession for ten years under the agreement of 1906, and he may have felt justified in making the improvements because of that, but in any case I agree with my brother *Higgins* that " any of the acts alleged as being acts of part performance could equally well be attributed to the position of Sandland (or his wife), first as objects of the father's bounty, then as occupants of the property having the expectation that the wife would probably be allowed to buy the property at cost on the father's death."

Personally, I would not feel justified in coming to any conclusion to the prejudice of the respondent merely because she signed the agreement of April 1913 under the circumstances proved at the hearing; but the fact remains that she continued, without making any objection or protest, to accept the conditions of that agreement for the full term thereof—although it was different from the contract alleged to have been made in 1895,—and she did not object to continue under the terms of that agreement after its expiration until the appellant in 1917 insisted upon selling part of the Flagstaff property, which sale, if made, would prevent the agreement of 1913 being carried into effect, and also prevent him carrying out the intention he had in 1895. Her consent to a sale of any part of the land was necessary in 1917, because of the tenancy she held from year to year after the expiration of the 1913 agreement.

I also agree that in this action, for the reasons given by my learned brothers, the appeal against the order for the payment of £1,200 paid under the agreement of 9th April 1913 should be allowed.

Appeal allowed. Judgment of the Supreme Court discharged. Judgment for the plaintiff on claim in respect of first declaration sought. Judgment for the plaintiff on the defendant's counterclaim.

Solicitor for the appellant, *H. G. Alderman*, Adelaide.
Solicitors for the respondent, *Bright & Bright*, Adelaide.

B. L.