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to the value of the land as at the date that it was acquired without purchase by the owner—the taxpayer ; that is to say, in 1890.

Questions answered : (1) *No* ; (2) *At the date the lands were purchased by George Cumming.*

Solicitors for the appellant, *Blake & Riggall.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

Appl *Thwaites* v *Ryan* [1984] VR 65

Foll *Ratto* v *Trifid Pty Ltd* [1987] WAR 237

Foll *Wardle, Re* 22 FCR 290

Foll *Ratto* v *Trifid Pty Ltd* (1985) 56 LGRA 22

Foll *Australia & New Zealand Banking Group Ltd* v *Widin* (1990) 102 ALR 289

Disod *T A Dellaca Ltd* v *P D L Industries Ltd* [1992] 3 NZLR 88

Refd to *Halloran* v *Minister* (1999) 105 LGERA 405

[HIGH COURT OF AUSTRALIA.]

COONEY . . . . . APPELLANT ;
DEFENDANT,

AND

BURNS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 24, 27, 28; *Mar.* 1.

SYDNEY, *April* 24.

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

Contract—Specific performance—Part performance—Contract signed by agent—Authority of agent not in writing—Application of doctrine of part performance—What constitutes part performance—Sale of lease of hotel—Lease handed to purchaser's solicitor—Preparation of transfer—Instruments Act 1915 (*Vict.*) (*No.* 2672), *secs.* 228, 229—*Statute of Frauds* (29 *Car. II. c.* 3), *sec.* 4.

Sec. 228 of the *Instruments Act* 1915 (Vict.) re-enacts sec. 4 of the *Statute of Frauds.* Sec. 229 provides that "Notwithstanding anything in this Act contained no action shall be brought upon any contract or sale of lands tenements or hereditaments or any interest in or concerning them if the agreement or the memorandum or note thereof on which such action is brought is

signed by any person other than the party to be charged therewith unless such person so signing be thereunto lawfully authorized in writing signed by the party to be so charged."

Held, by *Knox* C.J., *Isaacs*, *Higgins* and *Starke* JJ., that acts of part performance which would be sufficient to entitle a plaintiff to succeed in an action brought on a contract which does not comply with sec. 228 are also sufficient to entitle him to succeed in an action brought upon a written contract signed by an agent not authorized in writing signed by the party to be charged as required by sec. 229.

By a contract in writing signed by the plaintiff and an agent for the defendant, the defendant agreed to sell to the plaintiff the ingoing, furniture and existing lease of a hotel of which the defendant was lessee. The agent was not authorized in writing signed by the defendant. After the contract was made the lease of the hotel was handed to the plaintiff's solicitors, under instructions from the defendant, for the purpose of having prepared an assignment of the lease and the notices of an application for a transfer of the licence, and the plaintiff's solicitors prepared an assignment of the lease and the notices of an application for a transfer of the lease. An inventory of the furniture included in the contract was also taken. In an action by the plaintiff for specific performance of the contract,

Held, by *Isaacs*, *Higgins*, *Gavan Duffy* and *Starke* JJ. (*Knox* C.J. dissenting), that there had not been part performance of the contract sufficient to take the case out of sec. 228.

Maddison v. *Alderson*, (1883) 8 App. Cas., 467, applied.

Child v. *Comber*, (1723) 3 Swans., 423 (n.), distinguished.

Decision of the Supreme Court of Victoria (*Mann* J.): *Burns* v. *Cooney*, (1921) V.L.R., 541; 43 A.L.T., 79, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by John Thomas Burns against Phillip Cooney in which the plaintiff alleged that the defendant was at all material times the licensee and lessee of the Limerick Castle Hotel in Bendigo, that by a contract in writing dated 21st January 1921 the defendant acknowledged that he had sold to the plaintiff the ingoing, the piano and furniture as inspected by the plaintiff and the existing lease of the hotel for the sum of £650, that £50 should be then paid by the plaintiff as a deposit on the sale (and such sum was in fact paid), that a further deposit of £350 should be paid within one month and before taking possession (which by agreement was fixed as 21st February 1921), and that

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the balance of £250 should be paid within six months from the date of the sale. The plaintiff claimed (*inter alia*) specific performance of the contract, and return of the sum of £50 paid as a deposit. The plaintiff, in answer to a request for further particulars as to the contract, stated that the contract was signed by John Francis Kelly as agent for the defendant. The defendant, by his defence, denied the making of a contract, denied that Kelly had authority on his behalf to make the contract, and relied on secs. 228 and 229 of the *Instruments Act* 1915 (Vict.), alleging that their provisions had not been complied with.

The action was heard before *Mann* J. and a jury. The learned Judge put certain questions to the jury which, with their answers thereto, are stated in the judgment of *Knox* C.J. hereunder, where other material facts are also set out. *Mann* J., being of opinion that the doctrine of part performance applied to sec. 229 of the *Instruments Act* 1915 as well as to sec. 228, and that certain acts relating to the handing of the lease of the hotel to the plaintiff's solicitors under instructions from the defendant, and the preparation by them of an assignment of the lease and notices of application for transfer of the licence, constituted a sufficient part performance of the contract to take it out of secs. 228 and 229, entered judgment for the plaintiff ordering specific performance of the contract: *Burns* v. *Cooney* (1).

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

C. Gavan Duffy, for the appellant. The handing over of the lease to the respondent's solicitor and the preparation by him of a transfer were not part performance of the contract. The finding of the jury is, at most, that the lease was lent to the solicitor temporarily, and it is no more than if a copy of the lease were handed over. That cannot be said to be an act done in performance of the terms of the contract, nor can it be said to be referable exclusively to the contract. The incurring liability by the respondent in respect of the preparation of the transfer does not carry the case any further. [Counsel referred to *Redding* v. *Wilkes* (2); *Whaley* v. *Bagnel* (3); *O'Reilly*

(1) (1921) V.L.R., 541; 43 A.L.T., 79.
(2) (1791) 3 Bro. C.C., 400.
(3) (1765) 1 Bro. Parl. Cas., 345, at p. 349.

v. *Thompson* (1); *Whitchurch* v. *Bevis* (2); *Cooke* v. *Tombs* (3); *Whitbread* v. *Brockhurst* (4); *Pain* v. *Coombs* (5); *Child* v. *Comber* (6); *Maddison* v. *Alderson* (7); *McBride* v. *Sandland* (8).]

[KNOX C.J. referred to *Nunn* v. *Fabian* (9).

[ISAACS J. referred to *Bond* v. *Hopkins* (10).

[HIGGINS J. referred to *Buckmaster* v. *Harrop* (11); *Ford* v. *Young* (12).

[STARKE J. referred to *Miller & Aldworth Ltd.* v. *Sharp* (13).]

The doctrine of part performance should not be applied to sec. 229 of the *Instruments Act* 1915. The Courts do not favour any extension of that doctrine. If sec. 228 had to be considered afresh by a modern Court, it would not feel itself at liberty to allow a party to proceed with an action where that section had not been complied with. Sec. 229 is modern legislation, and should be construed as it stands according to the ordinary rules of interpretation. In that view part performance will not take a case out of sec. 229.

H. I. Cohen K.C. (with him *Claude Robertson*), for the respondent. If the act which is done and the circumstances in which it is done show it to be an act done in pursuance of some contract, then parol evidence can be given of what the true contract is. The handing over the lease to the plaintiff's solicitors for the purpose of having the transfer prepared, the preparation of the transfer and the incurring of liability on the part of the plaintiff bring this case within the principles stated in *McBride* v. *Sandland* (8). It is sufficient that but for the existence of the contract the plaintiff would not have done the acts. It does not matter whether the handing over the lease was intended to have a permanent or temporary effect; whichever it was, it shows the existence of a contract of which the plaintiff could then give parol evidence. [Counsel referred to *Bagnall* v. *White* (14); *Maddison* v. *Alderson* (15); *McManus* v. *Cooke* (16); *Polleykett*

(1) (1791) 2 Cox, 271.
(2) (1789) 2 Bro. C.C., 559.
(3) (1794) 2 Anst., 420, at p. 425.
(4) (1784) 1 Bro. C.C., 404, at p. 412.
(5) (1857) 1 DeG. & J., 34.
(6) (1723) 3 Swans., 423 (n.).
(7) (1883) 8 App. Cas., 467.
(8) (1918) 25 C.L.R., 69, at p. 78.
(9) (1865) L.R. 1 Ch., 35.
(10) (1802) 1 Sch. & Lef., 413.
(11) (1802) 7 Ves., 341.
(12) (1882) 8 V.L.R. (Eq.), 93; 3 A.L.T., 85, 128.
(13) (1899) 1 Ch., 622, at p. 624.
(14) (1906) 4 C.L.R., 89, at p. 96.
(15) (1883) 8 App. Cas., at pp. 475, 484, 491.
(16) (1887) 35 Ch. D., 681, at p. 691.

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v. *Georgeson* (1); *Kaufman* v. *Michael* (2); *Williams* v. *Evans* (3); *Thynne* v. *Earl of Glengall* (4); *Dickinson* v. *Barrow* (5); *Daniels* v. *Trefusis* (6); *Hohler* v. *Aston* (7); *Hodson* v. *Heuland* (8); *Whitmore* v. *Farley* (9); *Biss* v. *Hygate* (10); *Mundy* v. *Jolliffe* (11); *McCormick* v. *Grogan* (12); *Ex parte Mountford* (13); *Britain* v. *Rossiter* (14).]

[KNOX C.J. referred to *Poole* v. *Hill* (15).

[ISAACS J. referred to *Surcome* v. *Pinniger* (16); *Savage* v. *Carroll* (17).

[HIGGINS J. referred to *Brough* v. *Nettleton* (18).

[STARKE J. referred to *Williams* v. *Morris* (19); *Riggles* v. *Erney* (20).]

The reasons for imposing an exception on sec. 228 in the case of contracts which have been partly performed are equally applicable to sec. 229. The latter section was enacted in similar language to that of sec. 228, and the Legislature, having the decisions on sec. 228 before it, must have intended that those decisions should also apply to sec. 229.

C. Gavan Duffy, in reply, referred to *Hawkins* v. *Holmes* (21); *Edge* v. *Worthington* (22).

Cur. adv. vult.

April 24. The following written judgments were delivered :—

KNOX C.J. This was an action for specific performance of an agreement for the sale by the defendant to the plaintiff of "the ingoing, the piano and furniture as inspected by the plaintiff and the existing lease" of an hotel. The defendant was the lessee and licensee of the hotel in question. The contract was in writing

(1) (1878) 4 V.L.R. (Eq.), 207.
(2) (1892) 18 V.L.R., 375; 13 A.L.T., 279.
(3) (1875) L.R. 19 Eq., 547.
(4) (1848) 2 H.L.C., 131, at p. 158.
(5) (1904) 2 Ch., 339, at p. 342.
(6) (1914) 1 Ch., 788.
(7) (1920) 2 Ch., 420.
(8) (1896) 2 Ch., 428.
(9) (1881) 45 L.T., 99.
(10) (1918) 2 K.B., 314.
(11) (1839) 5 My. & C., 167, at p. 177.
(12) (1869) L.R. 4 H.L., 82, at p. 97.
(13) (1808) 14 Ves., 606.
(14) (1879) 11 Q.B.D., 123.
(15) (1840) 6 M. & W., 835.
(16) (1853) 3 DeG. M. & G., 571.
(17) (1815) 2 Ball & B., 444.
(18) (1921) 2 Ch., 25.
(19) (1877) 95 U.S., 444, at p. 457.
(20) (1894) 154 U.S., 244, at p. 254.
(21) (1721) 1 P. Wms., 770.
(22) (1786) 1 Cox, 211.

signed by the plaintiff and by one J. F. Kelly therein described as agent for the defendant. The defendant set up by way of defence that Kelly was not authorized to make the contract on behalf of the defendant, and that the provisions of secs. 228 and 229 of the *Instruments Act* 1915 had not been complied with. The action was tried by *Mann* J. with a jury; and the questions put to them and their answers are as follows:—"(1) Did John Francis Kelly have authority to make on behalf of the defendant the contract mentioned in the statement of claim?—Yes. (2) Did the plaintiff go into occupation of the hotel and remain in occupation until 14th March in performance of the contract?—No. (3) Was the list "of the hotel furniture "(Ex. 1) taken in performance of the contract?—Yes. (4) Was the plaintiff instructed by the defendant as to the conduct of the hotel business?—Yes. (5) (*a*) Was the lease of the hotel handed to the plaintiff's solicitors under instructions from the defendant for the purpose of having prepared an assignment of the lease and an application for a transfer of the licence?—Yes. (*b*) Did the plaintiff's solicitors prepare an assignment of the lease and the notices of application for transfer of the licence?—Yes." On these findings *Mann* J. gave judgment for the plaintiff for specific performance of the contract, holding (1) that acts of part performance which would be sufficient to enable a plaintiff to succeed on a parol contract would also be sufficient to enable him to succeed on a contract signed by an agent not authorized by writing signed by the defendant, and (2) that the findings of the jury established acts of part performance sufficient to take the case out of the operation of the statute.

On the first point I need say no more than that I agree with the decision of the learned Judge for the reasons given by him.

The second point gives rise to more difficulty. The rules to be applied in determining whether a given act or series of acts amounts to such part performance as obviates the necessity for a memorandum in writing are reasonably clear; the difficulty lies in applying these rules to a particular state of facts. A careful consideration of a great number of authorities, and especially of the speech of Lord *Selborne* L.C. in *Maddison* v. *Alderson* (1), leads me to the

(1) (1883) 8 App. Cas., 467.

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conclusion that these rules may be summarized thus :—(1) The acts relied on must be unequivocally and in their own nature referable to some such agreement as that alleged (*Maddison* v. *Alderson* (1)). I think the meaning of this statement is most clearly expressed by *Wigram* V.C. in *Dale* v. *Hamilton* (2), where he says : " It is, in general, of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract." By the words " some such agreement as that alleged " I understand some agreement for the disposition of some estate or interest in the land in question. (2) The acts proved must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing (*Fry on Specific Performance*, 6th ed., sec. 580). It is, I think, involved in propositions 1 and 2 that the circumstances in which the acts relied on were done must be proved. (3) When acts fulfilling the conditions expressed above have been proved, evidence becomes admissible to prove a parol agreement (*Frame* v. *Dawson* (3)). " The previous question as to the sufficiency of the part performance must be settled before the construction and operation of the unwritten contract can be legitimately approached " (*Maddison* v. *Alderson*, per Lord *O'Hagan* (4)). (4) In order that the plaintiff may succeed he must establish by clear evidence the agreement alleged by him, and it must appear that the acts relied on as acts of part performance were done for the purpose and in the course of performing that agreement and with no other view or design than to perform it. (5) Another rule, but one not relevant to the question which arises in this case, is that the agreement sued on must be of such a nature that the Court would have jurisdiction to enforce it specifically if it had been in writing.

From the application of these rules to the varied circumstances of a great number of cases certain qualifications of a negative character may be deduced. It is settled that payment of part of the purchase-money is not of itself and apart from other circumstances

(1) (1883) 8 App. Cas., 467.
(2) (1846) 5 Ha., 369, at p. 381.
(3) (1807) 14 Ves., 386, at p. 387.
(4) (1883) 8 App. Cas., at p. 484.

—*e.g.*, delivery of possession—a sufficient act of part performance to take a case out of the statute (*Fry on Specific Performance*, sec. 613). The best explanation of this doctrine is said by Lord *Selborne* in *Maddison* v. *Alderson* (1) to be that the payment of money is an equivocal act and not in itself, until the connection is established by parol testimony, indicative of a contract concerning land. And it is said that acts subsequent to the contract and even in pursuance of it, if not strictly in performance of the contract as between the parties to it but preparatory to such performance, cannot be taken as part performances (*Fry on Specific Performance*, sec. 625). The cases illustrating this statement are difficult to reconcile either with one another or with the general rules propounded by Lord *Selborne*, but most, if not all, of them may be explained by the suggestion that "acts of this sort may be, and for the most part are, the mere acts of the party doing them: the other party is not necessarily cognizant of them, and consequently he is not so bound by them as to render it fraudulent in him subsequently to refuse to carry the contract into effect" (*Fry on Specific Performance*, sec. 625).

Turning to the relevant findings of the jury in this case, they may be stated thus: "The lease of the hotel was handed to the plaintiff's solicitors under instructions from the defendant for the purpose of having prepared an assignment of the lease and an application for a transfer of the licence and the plaintiff's solicitors prepared an assignment of the lease and the notices of application for transfer of licence." The lease remained in possession of plaintiff's solicitors, and was produced by them at the trial. I do not think the answers of the jury to questions 3 and 4 assist the plaintiff. The question then is whether the handing over of the lease, in the circumstances found by the jury, and the preparation of the assignment and notices resulting in the plaintiff expending money or incurring liability are such acts as would warrant the admission of evidence to prove that the agent was authorized verbally to make the agreement alleged.

In my opinion the act of handing to plaintiff's solicitors the original lease—an act done by the direction of the defendant, the lessee — is unequivocally and in its nature referable to some

(1) (1883) 8 App. Cas., at p. 479.

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agreement between the plaintiff and the defendant relating to the land demised by the lease. The finding of the jury established that the lease was handed to the plaintiff's solicitors on the instructions of the defendant. Leaving out of consideration the finding as to the purpose with which this act was done as possibly depending on evidence of conversations, the fact of the defendant causing his title-deed to be handed to solicitors acting for another person—a stranger—seems to me to be consistent only with the existence of some agreement between the defendant and that other person relating to the leasehold premises. It is, of course, possible that in some cases a title-deed may come into the possession of some person other than the owner in circumstances which would not necessarily imply an agreement for the disposition of any interest in the land by the owner to that person. For instance, the circumstances established by the evidence might show that the deed had been stolen or improperly obtained, or that it was handed to the owner's solicitor or banker for safe custody, or that it was lent by the owner to some person to serve as a precedent. So in the case of possession of land it might appear that possession was obtained wrongfully or that the person in possession was a gratuitous licensee. But the finding of the jury negatives the existence of any such circumstances in this case. The inevitable inference to be drawn from the possession by one person of the title-deeds of another, in the absence of explanatory circumstances, appears to me to be that some agreement relating to the land covered by the deeds has been made between those persons. This may be illustrated by reference to cases of equitable mortgage.

It is well settled that a verbal agreement to give a mortgage is valid, notwithstanding the *Statute of Frauds*, if the title-deeds are in the possession of the proposed mortgagee. According to Lord *Selborne* (*Maddison* v. *Alderson* (1)) the law of equitable mortgage by deposit of title-deeds depends on the same principles as the doctrine of part performance regarded as an answer to the defence of the *Statute of Frauds*. The decisions in cases relating to equitable mortgage establish: (1) that a valid equitable mortgage cannot be created by a mere parol agreement to give a legal mortgage if

(1) (1883) 8 App. Cas., at p. 480.

the deeds remain in the possession of the proposed mortgagor; (2) that a valid equitable mortgage can be created by a mere parol agreement to give a legal mortgage if deeds have been handed over to the proposed mortgagee where his possession of the deeds cannot be otherwise explained (*Russel* v. *Russel* (1); *James* v. *Rice* (2)). The importance of the possession of the title deeds in cases of agreement to give a security over land is therefore apparent.

I think it follows from the decisions that, if the agreement alleged by the plaintiff in the present case had been an agreement to assign the lease by way of mortgage, proof of the fact that the original lease had been handed over by the defendant, or by his instructions, to the plaintiff's solicitors for the purpose of preparing a legal mortgage, would have rendered admissible evidence of a verbal agreement to assign the lease by way of mortgage, if the circumstances were such as to render it a fraud in the defendant to take advantage of the fact that the contract was not in writing—*e.g.*, if money had been advanced or the creditor had forborne to press for payment. Does the fact that the agreement alleged is an agreement to assign the lease absolutely and not merely by way of mortgage make any difference? I think not, provided the other circumstances exist. In either case the assignor is bound by the agreement to hand over the original lease to the assignee on the completion of the contract, and the obligation to do so is no less binding than the obligation in the case of an absolute assignment to deliver possession of the premises. The fact that in either case the delivery of the lease takes place before completion does not make that act any the less a performance of a duty imposed on the assignor by the agreement. If possession of the land be given to a purchaser before completion, it is, as I understand, conceded that the giving of possession is an act of part performance sufficient to take the case out of the statute. I see no difference in principle in this respect between giving possession of the land and handing over the title-deeds. Each is an act which the vendor is bound by the contract to perform upon, and not until, completion of the contract. Applying the language of *Kay* J. in *McManus* v. *Cooke* (3), I am of opinion that this act—

(1) (1783) 1 Bro. C.C., 269.
(2) (1854) 5 DeG. M. & G., 461.
(3) (1887) 35 Ch. D., at p. 697.

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the handing over to the plaintiff's solicitors of the title-deeds by the defendant—could not have been done by the defendant in the circumstances of this case without some agreement with the plaintiff, and according to *Morphett* v. *Jones* (1) the Court is bound to inquire what that agreement was.

The next question is whether on the facts found by the jury it would be a fraud in the defendant to take advantage of the contract not being in writing. The jury found (1) that the lease was handed to the plaintiff's solicitors under instructions from the defendant for the purpose of having prepared an assignment of the lease and an application for a transfer of the licence. It was the duty of the plaintiff as purchaser to prepare these documents, and their preparation must necessarily involve the plaintiff in expense, and the jury has found that the documents were in fact prepared. I agree with *Mann* J. in thinking that these findings show an expenditure of money by the plaintiff in the carrying out of the agreement, and that they show that the expenditure was made (or the liability incurred) with the knowledge and consent, and indeed with the assistance, of the defendant. In my opinion the fact that this expenditure was made or liability incurred with the knowledge and consent and assistance of the defendant is sufficient to render it a fraud in him to take advantage of the contract not being in writing. I do not think the fact that the expenditure or liability was small in amount affects the position. The plain fact is that the defendant by his conduct induced the plaintiff to incur a liability on the footing that the contract for sale of the property to him was a valid contract, and I see no reason to doubt that the conduct of the defendant in attempting subsequently to dispute the validity of the contract was dishonest, and therefore fraudulent. The requirements of the 1st and 2nd rules stated above having been complied with, evidence of the verbal authority given to Kelly became admissible. On the evidence the jury found that Kelly had authority to make the contract sued on, and as that contract was in writing no difficulty existed as to the proof of its terms. I think it follows necessarily from the findings of the jury that the acts relied on as acts of part

(1) (1818) 1 Swans., 172.

performance were done for the purpose and in the course of performing the agreement alleged and with no other view or design than to perform it. It is plain that by force of the contract it became the duty of the plaintiff to prepare and tender for execution by the defendant an assignment of the lease (*Poole* v. *Hill* (1)), and failure to do so would amount to a breach of contract on his part. But it was argued that the preparation of a conveyance is not in itself such an act of part performance as will suffice to take a case out of the statute. The answer to this argument appears to me to be that it is not on that act alone the plaintiff relies, but on that act coupled with the conduct of the defendant in handing over the lease —for the very purpose of having the assignment prepared. The preparation of the assignment of itself proves nothing more than that the plaintiff acted in the manner in which the defendant invited him to act for the purpose of performing the contract. The important act is the delivery of the original lease. It is this act which furnishes the *evidentia rei* referred to by Lord *Selborne* in *Maddison* v. *Alderson* (2) as requisite to connect the alleged part performance with the alleged agreement. And in the same speech Lord *Selborne* said (3) :—" It " (the statute) " has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement."

The *res gestæ* in this case are the delivery of the lease to the plaintiff's solicitors and the preparation by them of the assignment. The parol evidence as to the purpose for which the lease was handed over is important mainly, if not solely, to negative any suggestion or inference that the lease might have been handed over with some other view or design than to perform the agreement.

(1) (1840) 6 M. & W., 835. (2) (1883) 8 App. Cas., at p. 478.
(3) (1883) 8 App. Cas., at p. 476.

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On the whole, I am of opinion that the facts found by the jury bring this case within the rules governing the application of the doctrine of part performance, and that there is no decision which makes it incumbent on me to hold that the plaintiff is not entitled to succeed. The decision in *Edge* v. *Worthington* (1) appears to me to support the conclusion at which I have arrived. The plaintiff in that case alleged a verbal agreement to execute a legal mortgage and a subsequent delivery of the deeds to the solicitor for the purpose of enabling him to prepare a mortgage. This delivery was held a sufficient act of part performance to avoid the operation of the statute, and a declaration was made that the verbal agreement amounted to a valid agreement to execute a mortgage. It is true that the deposit of the deeds gave the creditor a lien on them, but it is clear that, apart from the verbal agreement to give a mortgage, the creditor would not have been entitled to obtain a decree for foreclosure—and that was the decree that was made. The fact that the deposit constituted a lien was not put forward by the Master of the Rolls as supporting the decree *for foreclosure*, nor could it do so.

ISAACS J. Two questions of considerable importance have arisen in this appeal. The first is whether the equitable jurisdiction to order specific performance on the ground of part performance exists where sec. 229 of the *Instruments Act* 1915 applies, and the other is what constitutes the necessary part performance to attract that jurisdiction.

The objection raised to the jurisdiction in this case is based on the argument that sec. 229 is a modern statute and must be left to its full operation, unqualified by any equitable jurisdiction on the ground of fraud. Passing by the fact that the whole *Instruments Act* is modern, one sufficient answer is that in reality sec. 229 is only an addendum to, or extension of, sec. 228, and creates an additional case of the same nature as one finds in the earlier section. Its opening words, "Notwithstanding anything in this Act contained," are connective, and in a sense are also limiting. To accord with the objection the opening words should read "Notwithstanding

(1) (1786) 1 Cox, 211.

anything in this Act contained or any doctrine of equity." The Legislature must be taken to have been fully aware of the equitable jurisdiction then exercised as stated generally by Lord *Westbury* in *McCormick* v. *Grogan* (1), acted on by the House of Lords in *French* v. *French* (see per Lord *Davey* (2)), a jurisdiction constantly applied to contracts for the sale of land, notwithstanding the principals or their agents had not signed the contract itself or a memorandum of it. The nature of the jurisdiction I have, in collaboration with my learned brother *Rich*, stated in *McBride* v. *Sandland* (3); and to that statement I refer. No reason can be assigned for attributing to the language of the section the intention of Parliament to exclude the jurisdiction where the principals had not written their authority to their agents to make the contract. The fraud is as great in the one case as in the other. I therefore reject the contention.

With respect to the second question, I am equally unable to accept the invitation on the part of the respondent to give a wider scope to the jurisdiction than we already find established in the cases. The suggestion was that the modern tendency was to broaden the Court's repression of fraud. That may be so in some classes of cases where the Court is not confronted with specific legislation. But here there has been distinct legislation, and, while it has left unimpaired the principle as it then stood, it would, in my opinion, be wholly improper, in face of the declared policy of Parliament, for any Court to enlarge the principle, because that would be really narrowing the intended operation of the enactment. Whatever circumstances, however varied or novel, fairly fall within the ambit of the equitable doctrine as we find it already established are, of course, subject to its influence; but beyond that we cannot legitimately go.

The principle enunciated by Lord *Westbury* in the passage above referred to must be qualified by the consideration stated by Lord *Selborne* L.C. in *Maddison* v. *Alderson* (4). Indeed, as to this, Lord *Cranworth* L.C. in *Nunn* v. *Fabian* (5) said: "I should

(1) (1869) L.R. 4 H.L., at p. 97.
(2) (1902) 1 I.R., 172, at pp. 230-232.
(3) (1918) 25 C.L.R., at p. 77.
(4) (1883) 8 App. Cas., at p. 474.
(5) (1865) L.R. 1 Ch., at p. 39.

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yield to no Judge of a Court of equity in my desire to refrain from extending the cases in which the Court gets over the *Statute of Frauds*; but there being an established rule on this subject, a Judge ought not to depart from it." This followed the view of Lord *Redesdale* in *Lindsay* v. *Lynch* (1). Lord *Selborne* in *Maddison* v. *Alderson* (2), eighty years after Lord *Redesdale*, also inculcates the propriety of observing limits.

The concrete problem for us is whether in this case certain "acts" constitute, either severally or in conjunction, sufficient part performance of the contract so as to support a decree for specific performance. Those acts are: (1) the taking of the inventory; (2) the appellant's handing his lease to the respondent's solicitor; and (3) the respondent's incurring expense relative to the preparation of the assignment and of the application for transfer of the licence.

For the respondent it was argued that the performance of any obligation arising out of the contract, as, for instance, showing a good title, is "part performance" in the required sense of the term, if proved to be done with the assent of the other party and on the faith of the bargain being binding. It was even argued that any act whatever, if prejudicial to the plaintiff, would equally suffice, if shown to be done with defendant's assent on the faith of the agreement being obligatory. It is not, in my opinion, necessary to say more as to these broad contentions than that they confuse ratification with part performance and have no countenance from any of the cases, and, further, are opposed to the reasons and citations of the learned Lords in *Maddison* v. *Alderson* (3), as, for instance, per Lord *Selborne* (4), and are directly contrary to the statement of *Bowen* L.J. in *Ex parte Broderick*; *In re Beetham* (5). There may, of course, be cases where a party estops himself from asserting some fact, but that depends on ordinary rules of estoppel, and, if properly pleaded and proved, would be effectual. But that is quite outside the present subject, and no such question can arise here, for it appears by unchallenged evidence that the respondent

(1) (1804) 2 Sch. & Lef., 1, at p. 5.
(2) (1883) 8 App. Cas., at p. 478.
(3) (1883) 8 App. Cas., 467.
(4) (1883) 8 App. Cas., at p. 480.
(5) (1887) 18 Q.B.D., 766, at p. 770.

expressly admitted at the trial the fact that no written instructions were given by the appellant to his agent.

I do not think the problem a very difficult one, if we have regard to the landmarks of undoubted authority that we find erected along the road that has run for two centuries in this region of the law. I do not mean to say there have not been some deviations from the path. Various Judges, as, for instance, Lord *Redesdale* in *Clinan* v. *Cooke* (1), have recognized that there have been deviations, but no case brought under the notice of the Court has gone so far as we are invited to go in this case.

No argument was addressed to us on the effect of conjunction, to show its significance in this case. The combination of several acts of true part performance might create the *importance* of the part performance relied on, which equity requires in such a case. But I am quite unable to see how the mere multiplicity of distinct acts, none of which separately answers the necessary description, can change the essential *nature* of any of them. And it is the essential nature of the acts referred to which we have to determine, no question being raised as to the sufficiency of their importance.

We are then brought face to face with the broad question: What is meant by "part performance" of a contract for the sale and purchase of land? What are the limits of the equitable doctrine; or, in other words, what test should be applied to any given case in order to determine whether a suggested "act" is one of "part performance"?

In *McBride* v. *Sandland* (2) an attempt was made to formulate some of the elements that are required to raise the necessary equity. It was not necessary there to consider the one important point we have to deal with here, but some of the propositions there stated are essential steps. Two of them, Nos. 3 and 7, were examined, though questioned, and as to these, and particularly as to No. 7, I may at once say my opinion then expressed has been confirmed. But in that case it was not necessary, as it is here, to go on and ascertain what class of acts are understood in equity as "part performance" because possession of and improvements in the land were admitted. Here that question presents itself sharply. There is nothing occult

(1) (1802) 1 Sch. & Lef., 22.

(2) (1918) 25 C.L.R., at pp. 78-79.

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about the term " part performance." It means on its face partial, but not complete, performance of the contract between the vendor to sell and the purchaser to purchase the land. What is the " sale " and the " purchase " of the land ? It is not the contract for the sale and purchase—though that is colloquially referred to as if it were. From the standpoint of law the sale and purchase of land does not occur until the property is transferred. " Sale " connotes transfer of ownership. The contract for sale does not transfer the ownership. Sometimes it is assumed that it does so in equity. So it does, provided the circumstances are such that a Court of equity would decree specific performance, but not otherwise (*Central Trust and Safe Deposit Co.* v. *Snider* (1)—see also *Plimmer* v. *Mayor &c. of City of Wellington* (2) and per *Jessel* M.R. in *Walsh* v. *Lonsdale* (3)).

A suit for specific performance is essentially a suit for enforcing a stipulated obligation relating to property. The word " contract " itself primarily means a transaction which creates personal obligations; but it may, though less exactly, refer to transactions which create real rights (per Lord *Buckmaster* for the Privy Council in *Maharaja Ranjit Singh* v. *Maharaj Bahadur Singh* (4)). If the personal obligations are such that according to the rules of equity operating on the conscience of the defendant it is right specifically to enforce the performance of the contract, then, and then only, does equity regard the purchaser as owner of the property. The question then is what is the test which equity applies to such a case as the present ? It is not the same as in other cases where the law recognizes an enforceable contract but gives only a limited remedy. There the right is purely contractual and equity interposes, if at all, only with a remedy which law does not afford. In the present class of cases the right, if any, is not contractual, and at law none exists. Equity searches first for the right, and then, and then only, applies a remedy. And in searching for the right a special test is applied. It is not simply " fraud " (see per *Wigram* V.C. in *Dale* v. *Hamilton* (5), cited by Lord *Selborne* in *Maddison* v. *Alderson* (6)). It is

(1) (1916) 1 A.C., 266, at p. 272.
(2) (1884) 9 App. Cas., 699.
(3) (1882) 21 Ch. D., 9, at pp. 14-15.
(4) (1918) L.R. 45 Ind. App., 162, at p. 167.
(5) (1846) 5 Ha., at p. 381.
(6) (1883) 8 App. Cas., at p. 479.

fraud of a special kind. It is fraud arising from "part performance" of the contract, or, in other words, part execution of the agreement. And the jurisdiction to compel performance of an agreement struck at by the statute does not arise unless the bargain in fact made, though devoid of an enforceability either at law or in equity, has been so acted upon by *partly performing it* that for the defendant to recede from it at that stage would be a fraud on the plaintiff.

The essential nature of the acts constituting part performance may be gathered from cases of commanding authority. In *Lester* v. *Foxcroft* (1) it is stated that, "in performance of the agreement, appellant entered into" the land; and that was Lord *Redesdale's* view of it in *Bond* v. *Hopkins* (2). In *Hawkins* v. *Holmes* (3) Lord *Macclesfield* speaks of "an execution of the contract by entering upon and improving the premises." In *Pembroke* v. *Thorpe* (4) Lord *Hardwicke* says: "As to the admeasurements, I do not look upon that as a performance of any part of the agreement;" and he calls it "only a step towards the performance" (5). And then he adds, to show exactly what he means: "Here ought to have been *a parting with the interest in some measure*, otherwise the Court cannot decree a performance." Therefore the Lord Chancellor refused a decree as to the contract of exchange. But as to the building agreement he granted a decree, because the defendant pulled down a house and took away the materials and used them, and that was part performance. In *Whitbread* v. *Brockhurst* (6) Lord *Thurlow* says: "I do not recollect any case where an act merely introductory or ancillary to the agreement, though attended with expense, has been held a part performance." To this Mr. *Madocks* replied: "I believe there is not any such case." And at p. 417 the Lord Chancellor says: "I always thought the Court considered it as fraudulent in the party to make the contract, and to lead on the other party to lay out his money in the melioration of the estate, and then to withdraw from the performance of the contract." In *Cooke* v. *Tombs* (7) *Macdonald* C.B. says: "To take the case out of the

(1) (1700) Colles, 108.
(2) 1802) 1 Sch. & Lef., at p. 433.
(3) (1721) 1 P. Wms., at p. 772.
(4) (1740) 3 Swans., 437 (n.), at p. 441.
(5) (1740) 3 Swans., at p. 443 (n.).
(6) (1784) 1 Bro. C.C., at p. 412.
(7) (1794) 2 Anst., at p. 425.

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statute, there must be a part execution of the substance of the agreement itself." In *Clinan* v. *Cooke* (1) Lord *Redesdale* says that entering into possession " in pursuance of an agreement " is part performance, and, unless complete performance followed, it would be a fraud on the man admitted into possession as exposing him to an action for trespass. In *Kine* v. *Balfe* (2) Lord *Manners* L.C., referring to possession taken, and rent paid pursuant to the terms of the contract, asks : " Is not this then an act substantially in part performance of the contract?" In *Nunn* v. *Fabian* (3) Lord *Cranworth* L.C. held (1) that the plaintiff's alteration of his shop-front at a cost of more than £100 at the defendant's request, was not part performance, the parol agreement being silent as to this, and (2) that payment of the new rent, the plaintiff continuing in possession, was part performance. In *Caton* v. *Caton* (4) the same learned Lord says : " The right to relief . . . rests not merely on the contract, but on what has been *done in pursuance of the contract.*" What his Lordship means by that is shown on p. 148, where he adds : " When one of two contracting parties has been *induced, or allowed* by the other, to alter *his position* on the faith of the contract, as for instance by *taking possession of* land, and *expending money in building or other like acts*, there it would be a fraud," &c. Finally on this point I cite a passage from Lord *Selborne's* speech in *Maddison* v. *Alderson* (5) :—" The acts of part performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land. The law of equitable mortgage by deposit of title-deeds depends upon the same principles." It is convenient for brevity to quote a passage in note (1) to *Hawkins* v. *Holmes* (6), as follows : " Where one party has been permitted by the other to act upon a parol agreement, it is considered as a species of fraud in the latter to insist upon the statute as a bar to a specific performance of the whole agreement " ; and the cases are there cited. In *Caton* v. *Caton* (7) Lord *Cranworth* says : " If I agree with A, by parol, without writing, that I will build a house on my land, and

(1) (1802) 1 Sch. & Lef., at p. 41.
(2) (1813) 2 Ball & B., 343, at p. 348.
(3) (1865) L.R. 1 Ch., at p. 40.
(4) (1866) L.R. 1 Ch., 137, at p. 147.
(5) (1883) 8 App. Cas., at p. 480.
(6) (1721) 1 P. Wms., at p. 772.
(7) (1866) L.R. 1 Ch., at p. 148.

then will sell it to him at a stipulated price, and in *pursuance of that agreement* I build a house, this may afford me ground for compelling A to complete the purchase, but it certainly would afford no foundation for a claim by A to compel me to sell on the ground that I had partly performed the contract." On the other hand, possession given to the purchaser on the faith of an agreement to sell may operate so as to make it a fraud on either party if the other repudiates (*Wilson* v. *West Hartlepool Railway Co.* (1)). Other cases quoted in *Maddison* v. *Alderson* (2) I need not further mention, but in that case itself is found an important passage in Lord *Selborne's* judgment (3), as follows: "It is not enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such *a part execution as to change their relative positions as to the subject matter of the contract.*"

These authorities show that the Court in order to found its jurisdiction inquires whether with the concurrence of the plaintiff, and on the basis that the agreement would be carried on to completion by legal conveyance, the defendant has gone so far, if purchaser, in directly or indirectly exercising, or, if vendor, in permitting the purchaser directly or indirectly to exercise, *rights of ownership* over the property which the sale, if formally effected, would connote, that it would be a fraud on the plaintiff unless the ownership were completely transferred by formal sale upon the terms in fact agreed to. Crystallizing that statement, for present purposes, there is always in part performance *the actual transfer by enjoyment, directly or indirectly, of some right of ownership which the legal title would confer. Maitland on Equity*, at p. 242, brings the position to very much the same point.

In the early case of *Butcher* v. *Stapely* (4), referred to by Lord *Selborne* in *Maddison* v. *Alderson* (5), there are some suggestive words of the then Lord Chancellor quoted by Lord *Selborne*. Those words are: "that in as much as possession was delivered according to the agreement, *he took the bargain to be executed.*" Whether the suggestion that the equitable doctrine of part performance originated in the then well known, and up to a comparatively

(1) (1865) 2 DeG. J. & S., 475, at p. 493.
(2) (1883) 8 App. Cas., 467.
(3) (1883) 8 App. Cas., at p. 478.
(4) (1685) 1 Vern., 363.
(5) (1883) 8 App. Cas., at p. 477.

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late date common, method of conveying land by parol and livery of seisin (see *Challis*, 3rd ed., p. 47) is correct or not, the words in question are consistent with that suggestion, and the suggestion is not improbable. And equally consistent is the way in which the principal authorities I have referred to have confined the operation of the doctrine, so as to create the test I have mentioned.

How then do the "acts" proved in this case answer the test? (1) The taking of the inventory was not a part of the agreement, either expressly or impliedly. As a convenient or as a prudent act, nothing can be said against it; but it is weaker than the shop-front alteration in *Nunn* v. *Fabian* (1), above referred to. Besides, it had nothing to do with any right of ownership. It is clearly outside the pale of part performance. (2) The handing over of the lease:—Reading the finding, by its own words, it is not sufficient to show that the lease was handed over as the property henceforth of the purchaser. Read by the light of the uncontroverted testimony and the judgment under appeal, it is clear that the document was handed over merely for inspection, and for the limited purpose of preparing an assignment and transfer of licence and then to be handed back to the defendant. By the terms of the contract, there was no right to an assignment except upon payment of the full price—that is, £600 beyond the preliminary deposit of £50. The final instalment of £250 was not payable for some months after the lease was handed for inspection, and there is nothing in the assignment as prepared or anywhere else to show that the respondent was prepared or was proposing to pay earlier. Indeed, in the statement of claim he avers no willingness to pay £600, but only £350, the second instalment, which was to be contemporaneous with possession and transfer of licence, and not with transfer of lease. In short, the handing over of the lease for the purpose mentioned was no more than the ordinary production for inspection of title. That was what Lord *Hardwicke*, in *Pembroke* v. *Thorpe* (2), called "a step towards the performance," and what Lord *Thurlow* called, in *Whitbread* v. *Brockhurst* (3), "an act merely ancillary to the agreement," and though attended with expense is not part performance. Had the lease been

(1) (1865) L.R. 1 Ch., 35.
(2) (1740) 3 Swans., at p. 443 (n.).
(3) (1784) 1 Bro. C.C., at p. 412.

handed over to be kept by the respondent permanently as owner, I am disposed to think it would have been a sufficient act of part performance. It would have been an act which a person parting with ownership by legal forms would do, and to which the new owner would be entitled. In *In re Williams and Duchess of Newcastle's Contract* (1) *North* J. said, "the owner of land is entitled to the custody of the title-deeds relating to it, and can maintain an action for them, even though the conveyance to him contains no express grant of the deeds." In *In re Duthy and Jesson's Contract* (2) *Romer* J. marks the distinction to which I have adverted. He says: "The purchaser is not asking to have these deeds produced for the verification of or for information as to the title, but is calling upon the vendors to fulfil the ordinary obligation they are under of handing over on completion all title-deeds in their possession or power." The analogy of equitable mortgages referred to by Lord *Selborne* is in point. The judgment of *Cave* J. in *In re Beetham*; *Ex parte Broderick* (3), is a clear statement on this point, and on appeal this decision was upheld (4). An early case on that subject contains a very useful passage. In *Birch* v. *Ellames* (5) *Macdonald* C.B. says: "The deposit of title-deeds as security for a debt, is now settled to be evidence of an agreement to make a mortgage, and that agreement is to be carried into execution by the Court" &c. (3) The third "act" relied on as sufficient part performance was the incurring of legal expenses in respect of the assignment and transfer of the licence. The authorities quoted above are quite opposed to this being so considered. But *Mann* J. thought *Child* v. *Comber* (6) supported it; and in the interests of good faith took that case as a foundation, having avowedly great doubt as to its power to sustain the burden. His Honor's doubt was more than justified. In *Child* v. *Comber* the bill was in fact dismissed on the hearing (7). And the decision relied on was a confirmation of the order of the Master of the Rolls, who ordered the plea "to stand for an answer with liberty to except, and the benefit of it

(1) (1897) 2 Ch., 144, at p. 148.
(2) (1898) 1 Ch., 419, at p. 422.
(3) (1886) 18 Q.B.D., 380, at pp. 382-383.
(4) (1887) 18 Q.B.D., 766.
(5) (1794) 2 Anst., 427, at p. 431.
(6) (1723) 3 Swans., 423 (n.).
(7) (1724) 3 Swans., at p. 427 (n.).

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saved to the hearing" (1). In *Mitford on Pleadings*, 5th ed., p. 355, the rule is stated as follows: "If a plea be ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers, unless by the order liberty is given to except." In *Sellon* v. *Lewen* (2) Lord *Talbot* L.C. relied on the distinction, and, because no express liberty to except was given, the plea was taken to be a sufficient answer. *Child* v. *Comber* (3), therefore, cannot be regarded as even a decision in favour of the respondent.

In my opinion the appeal should be allowed. As the appellant was the defendant, and resisting on grounds the law permits, and openly placed his legal defence on the record, I see no reason for depriving him of the general costs of the action; but he should pay any costs exclusively caused by the issues on which he failed. As to the costs of the appeal, I think he is entitled to them.

HIGGINS J. I see no reason to doubt that an act of part performance which would take a case out of the operation of sec. 228 of the *Instruments Act* 1915 of Victoria (sec. 4 of the *Statute of Frauds*) would be effective to take the case out of the operation of sec. 228 as qualified or supplemented by sec. 229. Sec. 228 provides that no action shall be brought unless a memorandum of the contract be signed by the party to be charged therewith or by some other person by him lawfully authorized; and sec. 229, following substantially the language of sec. 228, provides the further condition that no action shall be brought unless the other person be lawfully authorized "*in writing* signed by the party to be . . . charged." The Courts of equity have for very many years treated sec. 4 of the *Statute of Frauds*, notwithstanding the absolute character of its negative words, as being subject to an exception in the case of a contract having been partly performed; and there is nothing in the nature of sec. 229—nothing in the nature of the requirement that any agent shall be not only authorized but authorized in writing signed &c.—to warrant us in refusing to treat sec. 229 as being subject to the same exception. The exception which is to be implied to the rigid requirements of sec. 228 must, in my opinion, be implied with

(1) (1723) 3 Swans., at pp. 424-425 (n.). (2) (1733) 3 P. Wms., 239.
(3) (1723) 3 Swans., 423 (n.).

equal or more reason to the still more rigid requirements of sec. 229.

The second question is more difficult: Has the jury found in the special verdict a sufficient act of part performance? The Courts have wavered considerably in their application of the doctrine; and in their desire to do justice against a defaulting defendant they seem often to have treated acts as being sufficient part performance which ought not to be so treated. The cases on the subject cannot be all reconciled. Lord *Selborne* made an heroic effort in 1883, in the case of *Maddison* v. *Alderson* (1), to bring order to the chaos, to give system to the unsystematic; and perhaps for practical purposes, it would be well to treat that case as being, at all events *primâ facie*, a complete exposition of the law. Lord *Selborne* said (2):—"The acts of part performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land. The law of equitable mortgage by deposit of title-deeds depends upon the same principles." According to this statement, it would appear that the act alleged to be an act of part performance of a contract for land cannot be so treated unless it affect the subject matter—the land—itself. In the present case the plaintiff has relied principally on the jury's answers to questions 5 (*a*) and (*b*). According to these answers, the lease of the hotel was "handed to plaintiff's solicitors under instructions from defendant for the purpose of having prepared an assignment of the lease and an application for a transfer of the licence; and the plaintiff's solicitors prepared an assignment of the lease and the notices of application for transfer of the licence." Personally, I should doubt whether these findings involve the proposition that the handing of the lease and the preparation of the assignment and notices took place under the instructions or with the cognizance of the plaintiff. The fault in the language of the question is not the fault of the learned Judge, for he followed the language of the pleading (reply, par. 2 (*d*)). But I shall assume that the plaintiff was privy to these acts, and that he became liable to pay his solicitors for their work: Do these acts constitute a sufficient part performance?

(1) (1883) 8 App. Cas., 467. (2) (1883) 8 App. Cas., at p. 480.

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Now, no case has been cited to us in which the handing over of title-deeds for the preparation of a conveyance and the preparation itself have been held to be a sufficient part performance. On the contrary, in *Cooke* v. *Tombs* (1) it was held that the joint instructing of a solicitor to draw the conveyance, and his doing so, and the approval of both parties to the conveyance are no part performance, no "part execution of the substance of the agreement itself." In the case of *Hawkins* v. *Holmes* (2) a solicitor was employed by the consent of both parties to make a draft conveyance, and he made a draft which the defendant altered and delivered to the solicitor to engross; yet it was held to be no part performance. The same principle was affirmed in *Whitbread* v. *Brockhurst* (3), where in pursuance of the agreement certain timber was valued by an appraiser at considerable expense. The Lord Chancellor said (4): "I do not recollect any case where an act merely introductory or ancillary to the agreement, though attended with expense, has been held a part performance." By the word "introductory" I understand introductory to the *performance* of the contract. An act introductory to the *making* of a contract would be an act done before there is an contract, before there are any rights created in pursuance of which the plaintiff acts. This is the only meaning consistent with the expressions of the Master of the Rolls in *Phillips* v. *Edwards* (5) that "part performance . . . means, the parties on both sides acting as if the agreement had been carried into execution." The words "part performance of a contract" are clear in themselves; they do not mean part performance of an expected contract. As Lord *Selborne* puts it in *Maddison* v. *Alderson* (6), "in a suit founded on . . . part performance, 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." But the drawing of a conveyance, as was pointed out in *Cooke* v. *Tombs* (7), is no "part execution of the *substance* of the agreement itself." The *substance* of the agreement is the transfer of the possession and use of the land with the

(1) (1794) 2 Anst., at p. 425.
(2) (1721) 1 P. Wms., 770.
(3) (1784) 1 Bro. C.C., 404.
(4) (1784) 1 Bro. C.C., at p. 412.
(5) (1864) 33 Beav., 440, at p. 444.
(6) (1883) 8 App. Cas., at p. 475.
(7) (1794) 2 Anst., 420.

title thereto; and there has been no performance in part of that substance. Indeed, Lord *Blackburn* failed to discover any case of part performance established "in which there has not been a change in the possession of the land, or, in the case where the purchaser was a tenant already in possession, a change in the nature of his tenure" (1). In *Whitchurch* v. *Bevis* (2) it was held that neither the delivery of the deeds nor the appointing of an appraiser was sufficient part performance; and see *Redding* v. *Wilkes* (3); *Clerk* v. *Wright* (4). In the case of *O'Reilly* v. *Thompson* (5) the principal ground of decision was that though the plaintiff had procured the release of some claim of a third party, the procuring of the release was merely a condition annexed to the existence of any contract: but it is noteworthy that the delivery of the original lease by the vendor and the tender of the sublease drafted by the plaintiff were not treated as a part performance. As I infer the position, the acts of part performance must be such as would involve a fraud on the party performing unless the agreement be fully performed (*Gunter* v. *Halsey* (6); *Clinan* v. *Cooke* (7); *Buckmaster* v. *Harrop* (8)). The doctrine in many respects closely resembles the doctrine of estoppel by representation; but in the estoppel by representation the party relying on estoppel is not confined to acts done in furtherance of a contract as he is in the case of part performance; and the representation must be of an existing fact, not a promise (*Jorden* v. *Money* (9)). This doctrine is applied to such acts as the taking possession of the land, or the erecting of a limekiln, or the digging of foundations for a house, or the preparing of materials (*Savage* v. *Carroll* (10)); but the doctrine is not treated as being applicable to acts done which are either preparatory or ancillary to performance, even though they involve some expense to the plaintiff.

So far as the precedents are known to me, so far as I have traversed "the wilderness of single instances," I should have no hesitation in saying that there is no ground for applying the principle of part

(1) (1883) 8 App. Cas., at p. 489.
(2) (1789) 2 Bro. C.C., 559.
(3) (1791) 3 Bro. C.C., 400.
(4) (1737) 1 Atk., 12.
(5) (1791) 2 Cox, 271.
(6) (1739) Amb., 586.
(7) (1802) 1 Sch. & Lef., at p. 41.
(8) (1802) 7 Ves., 341; (1807) 13 Ves., 456.
(9) (1854) 5 H.L.C., 185.
(10) (1810) 1 Ball & B., 265, at p. 282.

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performance to a contract for land where the only things done are (*a*) the handing over of the title to the plaintiff's solicitor to prepare the conveyance and (*b*) his preparation thereof. The case of *Child* v. *Comber* (1), on which reliance was placed for the plaintiff below, is not, as my brother *Isaacs* pointed out, an authority for the plaintiff. The plea of the *Statute of Frauds* was merely ordered "to stand for an answer with liberty to except, and the benefit of it saved to the hearing," until the answer should admit or deny the agreement; and the bill was in fact dismissed at the hearing. The Lord Chancellor, it is true, said that "the fees paid to the counsel, the drawing of the drafts, and engrossing them, and the plaintiff providing his purchase-money, are as much an execution of it" (the agreement) "on his part, as the laying out money on the buildings was in the other case"; but there is no decision that such acts, though in execution of the contract, are sufficient to prevent the application of the statute.

The only matter that causes me to hesitate in the present case is the comparison with the doctrine of equitable mortgage by deposit of title-deeds. Even *Selborne* L.C. (2), when saying that the acts of part performance treated as sufficient have related to the possession, use or tenure of the land, adds that "the law of equitable mortgage by deposit of title-deeds depends upon the same principles." In *Ex parte Broderick*; *In re Beetham* (3), *Cave* and *Wills* JJ. say practically the same thing; and their decision (though not this dictum) was affirmed on appeal (4). But, though the same principles apply, it does not follow that the acts which would be sufficient part performance in the case of equitable deposit as security for money advanced would be sufficient in the case of purchase or lease of land. Where land is purchased or leased, the subject matter is land, its possession or use; where money is lent, the subject matter is a debt to be repaid. Something in the nature of change of possession or use or tenure of the land is involved in the one contract; it is not involved in the other. Moreover, in the case of equitable mortgage by deposit, a valid lien on the title-deeds, for value received, and until repayment, is created; in the case of sale or lease, the

(1) (1723) 3 Swans., 423 (n.).
(2) (1883) 8 App. Cas., at p. 480.
(3) (1886) 18 Q.B.D., 380.
(4) (1887) 18 Q.B.D., 766.

deeds are handed over to the purchaser for the mere temporary purpose of preparing the conveyance.

At all events, in the present state of the authorities it would be impossible for me to hold that the acts found here constitute a sufficient part performance of the contract of sale to take this case out of the *Statute of Frauds*; and our proper course is to obey the statute unless the facts of the case bring it within the exception recognized by the Courts, leaving it to the Legislature to amend the law if and so far as it thinks fit.

In my opinion, the appeal has to be allowed.

GAVAN DUFFY J. In this case two points were argued for the appellant: first, it was said that the respondent had not established any part performance of the contract, and, secondly, that part performance could not cure non-compliance with the provisions of sec. 229 of the *Instruments Act* 1915. I agree with the judgment of my brother *Higgins* on the first point, and it is therefore unnecessary to express any opinion on the second.

STARKE J. This action was tried before a jury, which found that the lease of an hotel was handed over to the plaintiff's solicitors under instructions from the defendant for the purpose of having prepared an assignment of the lease and an application for a transfer of the licence of the hotel, and that the solicitor accordingly prepared the assignment and notices of application for a transfer. *Mann* J. held that these facts constituted such part performance of the contract alleged in the statement of claim and found by the jury as was sufficient to take the contract out of the *Statute of Frauds* (*Instruments Act* 1915 (Vict.), sec. 228). The question to be decided by this Court is whether he was right in so holding.

Numerous cases have been cited to us, but the principle which governs the present case is stated in the following propositions contained in the speech of *Selborne* L.C. in the House of Lords, in the well-known case of *Maddison* v. *Alderson* (1):—(1) "The acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged" in the

(1) (1883) 8 App. Cas., 467.

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case (1). (2) "It is not enough that an act done should be a condition of, or good consideration for, a contract, *unless it is, as between the parties, such a part execution as to change their relative positions as to the subject matter of the contract*" (2). If the relative positions of the parties are changed as to the subject matter of the contract, then 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" (3). (3) "Acts relative to the possession, use, or tenure of the land" are the type of acts which establish a change in the relative positions of the parties as to the subject matter of the contract (4). The Lord Chancellor did not say that acts of this character were the only acts that could establish a change in the relative positions of the parties as to the subject matter of the contract, but he added that the decided cases were "almost, if not quite, universally" of the above type.

The act found by the jury in this case is, I think, unequivocally and of its own nature referable to some such agreement as is alleged by the plaintiff, but it does not change the relative positions of the parties as to the subject matter of the contract, namely, the land. The delivery of the lease for the purpose of preparing an assignment did not alter the title in the land, it did not affect the possession or the right to possession of the land, and it did not affect the use of the land or touch or concern the land in any way whatever. A deposit of title-deeds by way of security affects the title to the land, and therefore alters the position of the parties as to the land itself. So, again, the laying out of money in improvements on the land changes the position of the parties in relation to the use of the land. On the contrary, any acts preparatory to the completion—not the formation—of the contract do not alter the position of the parties in relation to the land. Examples of this latter class of case may be found in *Maddison* v. *Alderson* (4), and, in my opinion, the present case falls within the same category. The finding that an inventory of furniture was taken in performance of the contract stands in no different position.

(1) (1883) 8 App. Cas., at p. 479.
(2) (1883) 8 App. Cas., at p. 478.
(3) (1883) 8 App. Cas., at p. 475.
(4) (1883) 8 App. Cas., at p. 480.

The error in the judgment below resides partly in the view that once a claim for equitable relief of some kind is established by the plaintiff, then the Court will examine the whole circumstances existing between the parties and give complete relief, and partly in the assertion that the main act in question here may rightly be said to be one relative to the possession or to the use or tenure of the land. The first proposition is much too broadly stated; and the second is unconvincing, for it does not demonstrate the relation between the act and the possession, use or tenure of the land. *Child* v. *Comber* (1) is, as my brothers *Isaacs* and *Higgins* have shown, no authority for the decision of *Mann* J.

As to the other argument urged before us, that the doctrine of part performance has no application to cases involving sec. 229 of the *Instruments Act* 1915, I agree that *Mann* J. was right in rejecting it, and I concur in the opinions of my brothers *Isaacs* and *Higgins* on this point.

Appeal allowed. Order appealed from set aside. Judgment entered for the defendant except as to the claim for return of £50 deposit. Defendant to have costs of action less any costs occasioned by the issue of the authority of the agent in fact. Respondent to pay costs of appeal. Liberty to apply to Supreme Court as to £50 deposit.

Solicitors for the appellant, *Quick & Luke Murphy*, Bendigo, by *Brayshay & Luke Murphy.*

Solicitors for the respondent, *Macoboy & Taylor.*

B. L.

(1) (1723) 3 Swans., 423 (n.).