C. (1961) 1 W.L.R. 425
C. 80 WN 801: 63 S.R. 492
DIST. 92 WN. 904 = 71 S.R. 79



FOLL at ff 294, 297, 300, 306. (1974) 1 NSW.LR. 622
REF TO at P. 297. (1975) 1 NSWLR. 62.
DIST at pp. 296/9. (1977) 2 NSWLR. 400.
DIST at p. 299. 53 ALJR. 588.
FOLL at p.p 294/5, 306, 312. (1980) 1. NSWLR. 548.
FOLL at pp. 299; (1980) 2 NSWLR 572.
FOLL 102 ALR 290.

[HIGH COURT OF AUSTRALIA.]

J. C. WILLIAMSON LIMITED . . . . APPELLANT;
DEFENDANT,

AND

LUKEY AND MULHOLLAND . . . . RESPONDENTS.
PLAINTIFFS,

H. C. OF A. 1931.

MELBOURNE, *Mar.* 2, 3; *April* 29.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

*Injunction—Part performance—Damages in lieu of specific performance or injunction—Licence—Revocation—Contract—Negative obligation—Licence to sell sweets in theatre for five years—Contract not to be performed within one year—Statute of Frauds—Supreme Court Act* 1928 (*Vict.*) (*No.* 3783), *sec.* 62 (4)—*Instruments Act* 1928 (*Vict.*) (*No.* 3706), *sec.* 128.

The lessees of a theatre agreed with a confectioner to give him an exclusive right to sell sweets and confectionery in the theatre and its precincts during the continuance of a lease of a shop which the confectioner took from the owner of the theatre for a period of more than one year. The agreement was not in writing, and there was no note or memorandum in writing thereof. The confectioner exercised his rights under the licence for some time, but subsequently the lessees of the theatre repudiated the agreement and revoked the licence. In an action by the confectioner for an injunction and damages the learned trial Judge awarded damages in lieu of granting an injunction. On appeal to the High Court,

*Held*, (1) that the contract could not be performed within one year from the making thereof; (2) that the contract was not one which equity would enforce by specific performance; (3) that an injunction could not have been granted on the ground of part performance to restrain revocation of the licence or the admission of others to sell sweets, and (4) that, therefore, damages could not be awarded for the breach thereof.

Circumstances in which a Court of equity will grant relief in the case of a contract of which there has been part performance, considered.

Decision of the Supreme Court of Victoria (*Lowe* J.): *Lukey* v. *Theatre Royal Pty. Ltd.*, (1931) V.L.R. 73, reversed.

Bonsil:-
52 (N.S.W) S.R. 143
69 W.N. 56
1953 (N.S.W) S.R. 6
53 (N.S.W) S.R. 105
Referred to:-
71 W.N. 100
Refd. 92. CLR. 348.

APPEAL from the Supreme Court of Victoria.

The plaintiffs, John Henry Lukey and William Gavin Mulholland, brought an action against the Theatre Royal Pty. Ltd., J. C. Williamson Ltd. and Ernest Hillier (Victoria) Pty. Ltd., for breach of an agreement, alleging that in October 1926 it was orally agreed between the plaintiffs and the defendant, the Theatre Royal Pty. Ltd. or J. C. Williamson Ltd., substantially, that the plaintiffs should, with the consent of one, Divoli, take over the lease of a sweets shop adjacent to the Theatre Royal in Bourke Street, Melbourne, for the residue of the term thereof, and that at the expiration of such term the defendant would let and the plaintiffs would take the said shop for a term of five years from 5th July 1927 at a rental of £40 per week, and that in consideration thereof the plaintiffs should have until the expiration of the lease for five years the exclusive right to sell sweets and confectionery in the Theatre Royal and the precincts thereof. The plaintiffs, in accordance with such agreement, took over the residue of the lease from Divoli and purchased the stock and fittings of the shop from him and entered into possession of the shop, and executed a lease of the shop for a term of five years from 5th July 1927 at the rental aforesaid, and purchased the stock and fittings of one Friend, who had previously exercised the right of selling sweets in the theatre and exercised their right of selling sweets and confectionery in the theatre and in the precincts thereof under their licence. On 1st September 1930 the defendant repudiated the right of the plaintiff exclusively to sell sweets in the theatre and in the precincts thereof. It was also alleged that in breach of the agreement made with the plaintiffs the Theatre Royal Pty. Ltd. or, alternatively, J. C. Williamson Ltd. had granted the exclusive right of selling sweets and confectionery in the theatre and the precincts thereof to the defendant Ernest Hillier (Victoria) Pty. Ltd. which, unless restrained, would exercise such right. The plaintiff claimed, in substance, (1) a declaration that the plaintiffs were entitled to the exclusive right of selling sweets and confectionery in the theatre and in the precincts thereof; (2) specific performance of the said agreement; (3) an injunction to restrain the defendant from preventing the plaintiffs from exercising the exclusive right aforesaid, and to restrain the defendant from granting such exclusive right to

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND.

the defendant Ernest Hillier (Victoria) Pty. Ltd. or to any other persons; (4) an injunction against Ernest Hillier (Victoria) Ltd.; (5) damages.

The defendant (*inter alia*), after denying the agreement alleged, pleaded that there was no note or memorandum in writing of the agreement alleged as required by sec. 128 of the *Instruments Act* 1928 (Vict.); and that it would be inequitable to grant the relief sought, on the ground that if the exclusive right alleged by the plaintiffs had been granted it was, in effect, subject to the defendant having the supervision of the attire and uniform worn by the employees of the defendant in the theatre and of the conduct of such employees in the theatre, and of the quality of the sweets and confectionery supplied by the plaintiffs in the theatre, and also subject to the terms that the plaintiffs would observe and conform to all the rules and regulations made by the defendant, and would, when required by the defendant, discharge any employee who was guilty of conduct prejudicial to the proper management of the theatre or who neglected to observe any of the rules in force for carrying on the theatre; and on the further ground that the plaintiffs had been guilty of laches and delay.

As to the plea of the *Statute of Frauds* (sec. 128 of the *Instruments Act* 1928 (Vict.)), the plaintiff's replied that the agreement had been partly performed.

The learned trial Judge, *Lowe* J., found that the agreement alleged by the plaintiffs had been made; that it was an "agreement that is not to be performed within the space of one year from the making thereof" within the meaning of sec. 128 of the *Instruments Act* 1928; but that there was part performance of the agreement, and his Honor awarded £2,250 damages to the plaintiffs in lieu of granting an injunction: *Lukey* v. *Theatre Royal Pty. Ltd.* (1).

From that decision the defendant J. C. Williamson Ltd. now appealed to the High Court.

*Hudson*, for the appellant. The point involved is whether the action is barred by reason of non-compliance with the *Statute of Frauds* (sec. 128 of the *Instruments Act* 1928). The agreement, by

(1) (1931) V.L.R. 73.

reason of the term of five years, came within sec. 128, and the only question is whether it was a contract to which the doctrine of part performance applies, and whether, if it is such a contract, there was sufficient part performance to enable the Court to grant the relief claimed. The damages were awarded under sec. 62 (4) of the *Supreme Court Act* 1928, which introduced *Lord Cairns' Act* into Victoria. The learned trial Judge held that it was a case for specific performance and awarded damages against the defendant in lieu thereof. There are two main propositions:—First, even accepting the Judge's analysis of this agreement as simply a licence and a contract not to revoke it for five years simpliciter, that is not such an agreement as a Court of equity would specifically enforce. The parties would be left to their strict legal rights, that of the defendant to revoke his licence at will and the right of the plaintiff to bring an action in a common law Court for breach of contract. Secondly, on the proper interpretation of this agreement the defendant's obligations were dependent upon performance by the plaintiffs of obligations to perform continuous acts throughout the term, namely, through themselves or their servants to provide for the supply of confectionery to patrons of the theatre, and this element brought it within the class of which a Court of equity would not decree relief in the nature of specific performance (*Lavery* v. *Pursell* (1) ). Specific performance is really the basis for the order for damages in this case. Damages could only be awarded in substitution for specific performance. In this case specific performance would not have been decreed, (1) because the defendant was not in a position to carry out the contract, and therefore to decree specific performance would be to decree something which J. C. Williamson Ltd. would not have power to carry out; (2) because the rights of third parties to whom the licence to sell sweets had subsequently been granted had intervened; and (3) even if the doctrine of part performance were applicable the acts relied upon in this case were not sufficient to constitute that part performance. As to the first proposition:—With the limited interpretation the learned trial Judge put upon this contract there was no equity created to attract the jurisdiction of a Court of

(1) (1888) 39 Ch. D. 508, at p. 518.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND.

chancery. There was no interest in property and nothing in the nature of a proprietary right which the Court could be called upon to protect. It was a licence revocable at the will of the defendant, and though the defendant would thereby render itself liable to damages in law, assuming that there was a memorandum in writing, there could be no ground for relief in equity by way of specific performance or injunction (*Frank Warr & Co.* v. *London County Council* (1)), unless such licence is coupled with an interest (*Frogley* v. *Lovelace* (2); *James Jones & Sons Ltd.* v. *Tankerville (Earl)* (3)). Unless there is some proprietary right to be protected the jurisdiction to grant specific performance is not attracted. The only subject matter of this contract is a licence to go on to the theatre premises or not to be excluded from those premises, and to call upon the owner to exclude everybody else from selling. *Frogley* v. *Lovelace* is distinguishable because there it was the right to shoot and take away game that was conferred by the licence. The same observation applies to *Ah Wye* v. *Lock* (4), which was a licence to mine. So in *James Jones & Sons Ltd.* v. *Tankerville*, which was a right to cut and carry away timber. This extends to a proprietary right known to the law that affords ground for the intervention of equity (*Rigby* v. *Connol* (5); *Young* v. *Ladies' Imperial Club Ltd.* (6); *Baird* v. *Wells* (7)). In *Kerrison* v. *Smith* (8) the true view was that the right of the person in the theatre was revocable at will but he had a right of action for damages. *Hurst* v. *Picture Theatres Ltd.* (9) is in conflict with *Wood* v. *Leadbitter* (10).

[DIXON J. referred to *Joel* v. *International Circus and Christmas Fair* (11).]

That case is stronger than the present because there there were particular spaces allotted. In *Zimbler* v. *Abrahams* (12) it was said that unless there was some interest in land the remedy is one of damages at common law. In *Hurst* v. *Picture Theatres Ltd.* (9) the decision of *Buckley* L.J. is open to the objection that a correct

(1) (1904) 1 K.B. 713, at p. 717.
(2) (1859) John. 333; 70 E.R. 450.
(3) (1909) 2 Ch. 440.
(4) (1872) 3 V.R. (Eq.) 112.
(5) (1880) 14 Ch. D. 482, at p. 487.
(6) (1920) 2 K.B. 523.
(7) (1890) 44 Ch. D. 661, at p. 675.
(8) (1897) 2 Q.B. 445.
(9) (1915) 1 K.B. 1.
(10) (1845) 13 M. & W. 838; 153 E.R. 351.
(11) (1921) 124 L.T. 459.
(12) (1903) 1 K.B. 577, at p. 580.

interpretation is not given to the word "grant" or "interest" in the expression "licence coupled with a grant or interest." The cases relied on by the learned trial Judge are distinguishable from the present case. As to the second proposition: this depends to some extent upon the evidence and to some extent upon the interpretation of the contract. There were obligations upon servants of the plaintiffs to conform to rules of the defendant and upon the plaintiffs to keep up the supply of sweets.

[STARKE J. referred to *Pollard* v. *Photographic Co.* (1).]

The only explanation of that case is on the basis of a proprietary right or on the inadequacy of common law relief. The doctrine of part performance is only applicable when the Court could grant specific performance in the true sense of the term. *Walsh* v. *Lonsdale* (2) does not create a substantive right and does not apply so as to render available in any Court an interest in property unless there is some interest created. The Courts will not intervene to decree the execution of a document (*Stocker* v. *Wedderburn* (3)). As to severability, *Maddison* v. *Alderson* (4) shows that unless a Court of equity could decree complete performance of the contract the doctrine of part performance could not be invoked. An injunction would be directed to restraining the defendants from excluding the plaintiffs and from admitting other people. The damages in lieu of such injunction would require to be calculated on this basis. An injunction to restrain the defendants from excluding the plaintiffs from the theatre for five years would not justify the damages awarded. A Court of equity finding an affirmative and a negative covenant would not intervene (*Ogden* v. *Fossick* (5)).

[DIXON J. referred to *Frith* v. *Frith* (6).]

In the present case equity could not grant relief either by injunction or by way of specific performance (*Fothergill* v. *Rowland* (7); *Pakenham Upper Fruit Co.* v. *Crosby* (8)). The defendant company did not have sufficient title to make a grant of a licence. Part

(1) (1888) 40 Ch. D. 345.
(2) (1882) 21 Ch. D. 9.
(3) (1857) 3 K. & J. 393; 69 E.R. 1162.
(4) (1883) 8 App. Cas. 467, at p. 476.
(5) (1862) 4 DeG. F. & J 426, at pp. 431, 434; 45 E.R. 1249, at pp. 1251, 1252.
(6) (1906) A.C. 254, at p. 261.
(7) (1873) L.R. 17 Eq. 132.
(8) (1924) 35 C.L.R. 386, at pp. 399, 400.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND.

performance is not applicable to a contract which is not to be performed within one year which is not in or evidenced by writing.

[EVATT J. referred to *Crowley* v. *O'Sullivan* (1).]

*Fullagar* (with him *Robert Menzies* K.C.), for the respondents. It is not necessary that part performance should be referable to a contract for more than a year. If it is referable to some such contract as that sought to be enforced, it is sufficient (*Maddison* v. *Alderson* (2); *McBride* v. *Sandland* [*No.* 1] (3); *Kewley* v. *Ball* (4)). The exercise of a licence for more than a year would be an act of part performance referable to a contract not to be performed within a year. The acts relied upon as part performance consist of entering into the theatre. The acts have to be looked at to see if they are referable to some such contract as that alleged. *Rawlinson* v. *Ames* (5) shows that all the facts have to be gone into and everything that was done examined. In the case of specific performance of a contract to lease land and part performance of the agreement, where one person is found in possession of land belonging to another, it may be inquired how the person came into possession, and if it is found that his possession is referable to some such contract as that alleged, it can then be shown what that contract was. Here the plaintiffs were doing certain acts in the theatre, and how, it is asked, came they there? The doctrine of part performance applies to all contracts concerning which equity would entertain a suit for its own particular relief (*Fry* on *Specific Performance*, 6th ed., pp. 283, 287-288, 293; Notes in *Smith's Leading Cases* to *Peter* v. *Compton* (6)). Injunctions are sometimes referred to as a species of specific performance (*James Jones & Sons Ltd.* v. *Tankerville* (7); *Sinclair* v. *Schildt* (8)). The doctrine of part performance applies where equity would grant relief by way of injunction. On that view the doctrine covers this case. It is necessary to keep entirely distinct, cases where equity is perfecting an imperfect grant and cases where equity is enforcing a contract as such; the former case would be illustrated by a lease void at law which equity treats

(1) (1900) 2 Ir. R. 478.
(2) (1883) 8 App. Cas. 467.
(3) (1918) 25 C.L.R. 69.
(4) (1913) V.L.R. 412; 35 A.L.T. 51.
(5) (1925) Ch. 96.
(6) (1694) 1 Sm. L.C., 13th ed., at pp. 356-357.
(7) (1909) 2 Ch. 440.
(8) (1914) 16 W.A.L.R. 100.

as an agreement to grant a lease. It may be that that doctrine is limited to grants and interests in land. In the latter case it would enjoin the person committing the breach though that may not relate to any proprietary right. Equity gave the widest possible meaning to the term " proprietary right " and would have granted an injunction in this case (*Frogley* v. *Lovelace* (1); *James Jones & Sons Ltd.* v. *Tankerville* (2) ). In both those cases the Court enjoins the person committing the breach and not perfecting an imperfect grant. Wherever equity finds a breach of a negative covenant it will grant an injunction to restrain a breach (*Tipping* v. *Eckersley* (3), approved in *Lord Manners* v. *Johnson* (4) ). *Doherty* v. *Allman* (5) does not qualify that principle, but there there was not a sufficiently definite negative covenant (*Hurst* v. *Picture Theatres Ltd.* (6); *Kerrison* v. *Smith* (7); *Holmes* v. *Eastern Counties Railway Co.* (8); *Catt* v. *Tourle* (9) ). The Court also interfered by injunction to enforce an exclusive right in the nature of a negative covenant in *Altman* v. *Royal Aquarium Society* (10). Those are all cases in which equity interfered simply to remedy a breach of contract without any reference to any question of property in the strict sense of that word. Equity will enjoin in respect of the exclusive right attaching to the supply of liquor to a tied house. This is a contract of which the Court would grant an injunction.

[McTIERNAN J. referred to *Wood* v. *Corrigan* (11).]

*Hudson*, in reply. In *Holmes* v. *Eastern Counties Railway Co.* (8) the agreement was for a fixed and immovable stall on railway premises. The material distinction from the present case is that there there was a proprietary right which would be protected, but where there is a mere licence to go on premises and do acts thereon, such right will not be protected in equity. In *Altman* v. *Royal Aquarium Society* (10) a lease or the right to the exclusive possession of some proprietary interest was granted between the parties. If

(1) (1859) John. 333; 70 E.R. 450.
(2) (1909) 2 Ch. 440.
(3) (1855) 2 K. & J. 264, at p. 270; 69 E.R. 779, at p. 782.
(4) (1875) 1 Ch. D. 673.
(5) (1878) 3 App. Cas. 709.
(6) (1915) 1 K.B. 1.
(7) (1897) 2 Q.B. 445.
(8) (1857) 3 K. & J. 375; 69 E.R. 1280.
(9) (1869) L.R. 4 Ch. 654, at pp. 661-662.
(10) (1876) 3 Ch. D. 228.
(11) (1928) 28 S.R. (N.S.W.) 492.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND.

you find some proprietary right granted whether by lease, agreement for a lease or profit *à prendre*, equity may interfere, but a mere licence to do acts will not attract jurisdiction to the Court and the Court will not interfere. *Wood* v. *Corrigan* (1) shows that the Court will not grant relief by injunction except on express negative covenants as distinguishable from implied (*Pakenham Upper Fruit Co.* v. *Crosby* (2) ). The acts here relied upon were not referable to some such contract as that alleged. Such a contract in reference to the present case means a contract not to be performed within a year.

[DIXON J. referred to *Moffat* v. *Sheppard* (3).]

The Acts relied upon must be unequivocally referable to a contract not to be performed within a year, and the acts here relied on may be referable to a weekly holding as well as to a contract for the term alleged (*Chaproniere* v. *Lambert* (4) ). As to the doctrine of part performance applying wherever equity would grant an injunction, see *Reeve* v. *Jennings* (5).

*Cur. adv. vult.*

April 29, The following written judgments were delivered :—

GAVAN DUFFY C.J. I agree with the judgment of my brother *Dixon*.

STARKE J. In this case the learned trial Judge (*Lowe* J.) found that in or about October 1926 it was orally agreed between the appellant and the respondents to this appeal that the respondents should with the consent of one Divoli take over the lease of a certain shop (which was in fact used for selling sweets) for the residue of the term thereof, and that at the expiration of the term the Theatre Royal Pty. Ltd. would let and the respondents would take the shop for a term of five years from 5th July 1927 yielding and paying therefor the clear weekly rental of £40 and that in consideration of the respondents taking over the lease and entering into the further lease for the said term of five years the respondents should have until the expiration of the last-mentioned lease the exclusive

(1) (1928) 28 S.R. (N.S.W.) 492.
(2) (1924) 35 C.L.R., at p. 401.
(3) (1909) 9 C.L.R. 265, at p. 280.
(4) (1917) 2 Ch. 356, at p. 361.
(5) (1910) 2 K.B. 522.

right to sell sweets and confectionery in the Theatre Royal, Melbourne, and the precincts thereof. He further found that the respondents were to pay in respect of the "sweet rights" £14 a week when musical comedy was performed in the theatre and £12 a week when drama was performed. Originally, the sweet rights did not permit the respondents to have persons selling sweets in the dress circle and stalls of the theatre, but, as to the stalls at all events, the permission was afterwards conceded. The other obligations of the arrangement as to sweets were not the subject of stipulation, but the parties apparently understood that the "dress deportment and behaviour" of the respondents' employees selling sweets in the theatre were subject to the approval and control of the appellant.

The agreement, it will be noticed, provided for two separate things—one the taking over of an existing lease of the shop and entering into a further lease thereof for five years, and the other the right to sell sweets in the theatre. The respondents took over the existing lease, and by an indenture dated the 13th day of June the Theatre Royal Pty. Ltd. demised the shop to the respondents for a term of five years. Thus the first part of the agreement was duly carried out. But the lease contains no provisions as to the sweet rights in the theatre. And there is no note or memorandum relating to those rights. Clearly, the arrangement does not constitute any contract or sale of lands, tenements or hereditaments or any interest in or concerning them within the *Statute of Frauds*, but *Lowe* J. held, and in my opinion rightly, that the arrangement does constitute an agreement not to be performed within the space of one year, because upon its face the parties contemplated its performance would extend over a space greater than one year. The respondents, however, proceeded to sell sweets within the theatre, to maintain and add to show-cases, and to pay the appellant the weekly amount for the sweet rights as stipulated. *Lowe* J. (1) held that these acts, coupled with the taking over of the existing lease and the further lease of the shop, were "unequivocally, and in their own nature, referable to some such agreement as that alleged" by the respondents, or, in other words, that the acts were such as could not have been done with any other view or design than to perform

(1) (1931) V.L.R., at p. 82.

H. C. OF A. 1931.

J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND.

Starke J.

some such agreement (*Maddison* v. *Alderson* (1); *Gunter* v. *Halsey* (2)). To this conclusion I agree, and once the acts go as far as this "they are evidence of an unknown contract" but "the making known what that contract is must be the result of evidence which the acts in question are allowed to introduce." (See *Fry on Specific Performance*, 6th ed., p. 277, sec. 581.) It was on this basis that the learned Judge admitted parol evidence of the arrangement between the parties, and found as a fact the agreement already mentioned. It is clear enough, in the case of some oral contracts, that if they be partly performed by one of the parties, that may in equity preclude the other from denying the contract or relying upon the *Statute of Frauds*, and *Lowe* J. held that this doctrine applied to all contracts in which a Court of equity would entertain a suit if the alleged contract had been in writing (*Donnell* v. *Bennett* (3); *Metropolitan Electric Supply Co.* v. *Ginder* (4); *Fry on Specific Performance*, 6th ed., p. 283, sec. 593). This proposition goes beyond any decided case (see *McManus* v. *Cooke* (5)), but, as *Fry* J. said, the authorities are tending in that direction. However, I accept the proposition for the purposes of this case. Would then a Court of equity have entertained a suit upon the agreement found by the learned Judge? Courts of equity have, no doubt, exercised jurisdiction to enforce contracts specifically and to restrain the breach of contracts which such a Court would specifically enforce and to restrain the breach of negative stipulations in contracts whether in the particular case the Court would or would not specifically enforce the whole contract (*Doherty* v. *Allman* (6); *McEacharn* v. *Colton* (7); *Lumley* v. *Wagner* (8); *Whitwood Chemical Co.* v. *Hardman* (9); *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (10)). But over and over again it is asserted in the books that a Court of equity will not compel one party to perform his part of a contract unless justice can be done as regards the other party (*Kernot* v. *Potter* (11); *Stocker* v. *Wedderburn* (12); *Frith* v. *Frith* (13)). Nor will it as a rule enforce

Referred to:- 1954 (54) S.R. 293.

(1) (1883) 8 App. Cas. 467.
(2) (1739) Amb. 586; 27 E.R. 381.
(3) (1883) 22 Ch. D. 835.
(4) (1901) 2 Ch. 799, at p. 808.
(5) (1887) 35 Ch. D. 681.
(6) (1878) 3 A.C. 709.
(7) (1902) A.C. 104.
(8) (1852) 1 DeG. M. & G. 604; 42 E.R. 687.
(9) (1891) 2 Ch. 416.
(10) (1901) 2 Ch. 37.
(11) (1862) 3 DeG. F. & J. 447; 45 E.R. 951.
(12) (1857) 3 K. & J. 393; 69 E.R. 1162.
(13) (1906) A.C. 254.

contracts of personal service or any other contract the execution whereof would require continued superintendence by the Court (*Ryan* v. *Mutual Tontine Westminster Chambers Association* (1); *Mutual Reserve Fund Life Association* v. *New York Life Insurance Co.* (2); *South Wales Railway Co.* v. *Wythes* (3)).

The enforcement of the stipulations in the agreement found in the present case relating to the lease do not call for consideration: they have been carried out. The "sweet rights" stipulated for in the agreement are, therefore, all that need be considered. I pass by possible vagueness of the agreement in relation to these rights: how far the parties stipulated, if at all, for the control of such rights by the appellant. And I assume that it would have been enforceable by law if it, or a note or memorandum thereof, had been in writing. It is clear that the *Statute of Frauds* is a complete answer at law to any action for damages arising from breach of the agreement. Again, it is clear, on the principles already referred to, that no Court of equity would have enforced, specifically or by way of injunction, the right of the respondents to sell sweets in the theatre. Nor would any such Court have enforced the right of the appellant to supervise and control the right of selling sweets in the theatre. The enforcement of either right would have required a continued and effective superintendence of acts and services which would be impossible for any Court. So we limit our consideration to the stipulation that the respondents should have the exclusive right to sell sweets in the theatre. This positive stipulation imports the negative that no other person should be allowed the right of selling sweets in the theatre. Indeed, the substance of the stipulation is that no other person should be allowed to sell sweets in the theatre (*Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.* (4); *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (5); *Metropolitan Electric Supply Co. Ltd.* v. *Ginder* (6)). *Lowe* J. concluded that a Court of equity had authority to and would enforce such a stipulation, though it would not or could not otherwise enforce the agreement, specifically or by means of

(1) (1893) 1 Ch. 116.
(2) (1896) 75 L.T. 528.
(3) (1854) 5 DeG. M. & G. 880; 43 E.R. 1112.
(4) (1873) 16 Eq. 433.
(5) (1901) 2 Ch. 37.
(6) (1901) 2 Ch. 799.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. Starke J.

an injunction. But it is just at this point that I am unable to agree with the learned Judge. His view really means that one stipulation of the sweets agreement can be enforced whilst every other stipulation is unenforceable, both at law and in equity. If parts of an agreement are separable and distinct from the rest, I can understand that a Court of equity might in a proper case enforce those parts and leave the parties to their remedies at law as to the rest of the agreement, especially where those remedies would be adequate and just. But it is contrary to all equitable principles to enforce part of an agreement and leave the parties without any remedy whatever as to all other obligations of that agreement. It would result substantially in very different legal obligations, and great injustice to both parties. In the present case the respondents would have no redress if the appellant refused to allow them to sell sweets in the theatre, and the appellant could not recover the charges payable in respect of the sweet rights or have any redress if the respondents violated its directions as to the dress, deportment and behaviour of their employees. Indeed, I dissent entirely from the notion that this agreement can be divided into two parts, one enforceable and the other wholly unenforceable. Consequently, in my opinion, a Court of equity would, in the case before us, have had no jurisdiction or authority whatever to enforce the stipulation giving the respondents the exclusive right of selling sweets in the theatre by restraining the appellant from permitting or allowing any other person to sell them. The *Supreme Court Act* 1928, sec. 62 (4) (*Lord Cairns' Act*), gives power to the Court to award damages to a party injured in addition to or in substitution for an injunction restraining the breach of a contract. But under this section the respondents must make out that they are entitled to an equitable remedy before they can get damages (*Elmore* v. *Pirrie* (1) ). And damages at law for breach of the agreement they cannot have by reason of the *Statute of Frauds*. The result is that the judgment ought to be reversed, though I sympathize with the learned Judge in his anxiety to give legal effect to what, at least, was an honourable understanding between the parties, especially when its violation involved serious loss to the respondents.

(1) (1887) 57 L.T. 533.

DIXON J. By sec. 62 (4) of the *Supreme Court Act* 1928 of Victoria it is enacted that in all cases in which the Court entertains an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, the Court may, if it thinks fit, award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court directs. This provision differs from sec. 2 of *Lord Cairns' Act* (21 & 22 Vict. c. 27) in the substitution of the expression "in all cases in which the Court entertains" for the words "in all cases in which the Court of chancery has jurisdiction to entertain." The change in the language may have been made because it was considered more appropriate, in the case of a Court exercising concurrently full jurisdiction at law and in equity, to speak of the application it entertains than of the application it has jurisdiction to entertain, or because the object of introducing the provision was to enable the Court to refuse altogether, or to modify, the injunction or the decree for specific performance to which the suitor would have been entitled and to give him damages in lieu of that remedy or in addition to the modified form of specific relief granted. The lack of such a power was referred to in *Beswicke* v. *Alner* (1). Whichever be the reason for the change in language, it does not operate to give to the Supreme Court of Victoria a wider power of substituting damages for equitable remedies than was conferred upon the Court of chancery by *Lord Cairns' Act*. That power is confined to cases in which there is a title to equitable relief, cases in which there are the ingredients that enable the Court, if it thought fit, to exercise its power of decreeing specific performance or of granting an injunction (*Ferguson* v. *Wilson* (2)).

By the judgment under appeal *Lowe* J. exercised the authority given by the enactment and awarded damages in lieu of an injunction for breach of an agreement. He held, rightly, I think, that the agreement in question was one that was not to be performed within the space of one year from the making thereof, but, notwithstanding

(1) (1926) V.L.R. 72; 47 A.L.T. 85. (2) (1866) 2 Ch. App. 77.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. Dixon J.

that the agreement was not in writing and there was no memorandum or note thereof, he considered that it might be enforced by injunction, because the plaintiff had acted in part performance of the agreement. The question upon this appeal is whether an injunction might have been granted to enforce the agreement upon the ground of part performance. The defendant Company, against which damages have been awarded in substitution for an injunction, was the lessee of a theatre where it conducted dramatic entertainments. Its directors were able to control the letting of a shop near by in which confectionery was sold. The Company entered into an oral agreement with the plaintiffs that, if they should take over an existing lease of this shop and take an extension of the lease for five years, the plaintiffs, during the term so extended in consideration of a weekly payment of £14 during the performance of musical comedy and of £12 during other performances, should have an exclusive right to sell confectionery, ice-cream and non-intoxicating drinks to members of the audience in the theatre. The conditions involved were not discussed, but they seem to have been understood by the parties, who were experienced in such matters and were aware of the manner in which the sale of confectionery had been conducted in the theatre. It appears from the evidence that implied in the agreement were terms to the effect that the plaintiffs should have a movable stand and show-case near the entrance to the stalls and another at the dress circle; that they should employ a sufficient number of boys to carry round supplies of confectionery and drinks in the gallery; that the boys should be appropriately and uniformly clad in a manner approved by the manager of the theatre; that their conduct and deportment should be under the control of the manager of the theatre; that the plaintiffs should maintain a sufficient supply of a kind and quality of confectionery usually sold in the different parts of such a theatre, and that upon compliance with these conditions the plaintiffs and their servants should be admitted to the theatre and its precincts from the time when the theatre opened for a performance until a reasonable time after the last interval. A variation of the agreement was afterwards made by which the plaintiffs were allowed to put boys in the dress circle and stalls as well as in the gallery. It was also agreed that the boys

employed by the plaintiffs should be clothed in a particular uniform. The plaintiffs entered upon the performance of the agreement, and, by their servants, sold confectionery from the stands and show-cases and in the auditory, and they duly made the weekly payments. But before the term of the agreement expired the Company purported to bring it to an end, contending that no fixed period had been agreed upon, and so renounced the contract. An action of damages could not but fail, because, when a common law remedy is sought, part performance never did and does not now afford an answer to the *Statute of Frauds*. Equitable relief is obtainable, notwithstanding the *Statute of Frauds*, by a party who in pursuance of his contract has done acts of performance consistent only with some such contract subsisting, but, if the doctrine is not confined to cases in which a decree might be made for the specific performance of the contract, it is at least true that the doctrine arose in the administration of that relief and has not been resorted to except for that purpose. It must be remembered that, although the remedy of specific performance is commonly applied in aid of a legal right, it extends to cases where, for one reason or another, there is no remedy at law, as well as to cases where the remedy at law is inadequate. See *Fry* on *Specific Performance*, 6th ed., secs. 49-60. But it is evident from a mere statement of the nature of the agreement in this case that it falls outside the scope of the remedy of specific performance. The parties meant their oral contract to be a final expression of obligation for the regulation of their future relations. It was not an agreement preliminary to a further transaction which, when carried out, should define their relative positions. Unlike a contract to assure property, it did not require the parties to adopt a formal instrument or to do some act in the law which should thereafter afford the measure of their rights and duties. Specific performance, in the proper sense, is a remedy to compel the execution in specie of a contract which requires some definite thing to be done before the transaction is complete and the parties rights are settled and defined in the manner intended. Moreover, the remedy is not available unless complete relief can be given, and the contract carried into full and final execution so that the parties are put in the relation contemplated by their agreement. Specific performance is inapplicable when the

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. Dixon J.

continued supervision of the Court is necessary in order to ensure the fulfilment of the contract. It is not a form of relief which can be granted if the contract involves the performance by one party of services to the other or requires their continual co-operation. The doctrine of the Court of chancery was against decreeing one party to perform specifically obligations which the contract imposed upon him, if it was unable to secure to him the performance by the other contracting party of the conditions upon which those obligations depended, and could only leave him to his action of damages at law in the event of the conditions being unperformed. In the present case the condition of the contract which entitles the plaintiffs and their servants to admission for the purpose of selling confectionery in the theatre is concurrent with the conditions governing the time, place and manner of supply, the character of the goods supplied, and the appearance, dress and behaviour of their servants. It would be contrary to principle to bind the Company by a decree to perform its obligations leaving it only a remedy sounding in damages in the event of a breach by the plaintiffs of the conditions to be observed by them. It would be equally contrary to principle for the Court to undertake the supervision of the specific fulfilment of these conditions. It, therefore, could not be contended that a decree of specific performance might be made, and it was recognized that if the plaintiffs are entitled to any equitable remedy, it must be by way of injunction. But the reason why specific performance of the contract could not be decreed ought not to be forgotten in considering whether an injunction might be granted upon the ground of part performance. An injunction is a remedy appropriate to restrain the violation of a provision or term of a contract which is the final expression of the parties' legal relations. But, in granting an injunction for this purpose, the Courts of equity acted in aid of a legal right. Before *Sir John Rolt's Act* (25 & 26 Vict. c. 42) a perpetual injunction was not granted restraining breaches of such an agreement until the right had been tried at law. The remedy of injunction was, of course, appropriate to and was and is freely used for the protection of equitable interests and rights, but in matters of contract, as in matters of tort, it does not appear to have been used except in aid of a legal right unless in a case falling within the

scope of the remedy of specific performance, e.g., *McManus* v. *Cooke* (1). "Where a Court of equity was asked to enforce a contract by injunction, it merely acted in furtherance of common law rights. Hence, it did not of itself determine except in the clearest cases (until it received statutory authority to do so) either the validity or construction of the contract, but referred these matters to a Court of common law. If the contract could not be enforced at common law by an action of damages, it could not be enforced in equity by an injunction. On the other hand, in cases of specific performance strictly so called, the Court of equity itself has for the last two hundred years decided on the validity and construction of the contract with which it had to deal; and it performs contracts for the breach of which an action of damages could never have been brought, e.g., contracts struck at by the *Statute of Frauds* but partly performed by the plaintiff" (*Ashburner, Principles of Equity*, p. 526). If, however, a clear legal duty is imposed by contract to refrain from some act, then, prima facie, an injunction should go to restrain the doing of that act. It appears to be of little importance now whether the duty is imposed by a term of the contract expressed in negative or affirmative language. It is said that the agreement in this case imposed upon the Company a duty not to revoke, during the term contracted for, the licence to the plaintiffs to go into the theatre to sell confectionery, and, during the term, to admit to the theatre no one else for the purpose of selling confectionery. To grant an injunction restraining the defendants from doing either of these things may appear an indirect way of compelling specific performance of the Company's part of the agreement. Probably the true rule is that an injunction should not be granted which compels, in substance, the defendant to perform his side of the agreement when the continuance of his obligation to do so depends upon the future conduct of the plaintiff in observing conditions to be fulfilled by him. If the contract is one the execution of which the Court cannot superintend, it does not seem to be in accordance with principle to bind one party to performance in specie leaving him to a remedy in damages only if the other fails to fulfil the conditions on his side to be observed. But, perhaps, if a clear and

(1) (1887) 35 Ch. D. 681.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. Dixon J.

negative duty is imposed even by such a contract, an injunction may be granted when the remedy at law is inadequate to the right, at least when, by dissolving the injunction in the event of the plaintiff's own subsequent breach of condition, the parties may be restored to the relative position they occupied before suit. But, assuming the agreement between the parties in this case should be interpreted in a way which would give rise to a negative duty of the required character either not to revoke the licence or not to admit a stranger to sell confectionery, yet that duty is not enforceable at law because the contract is not evidenced by writing. Thus no injunction can be granted in aid of a legal right to enforce the duty, and the injunction must be founded upon an equitable title to its performance. The agreement gives no equitable interest, and the equity must arise, if at all, from part performance. Moreover, it must not be forgotten that, by reason of the *Statute of Frauds*, the conditions of the contract to be observed on the part of the plaintiffs may be broken by them with impunity; for not even an action for damages upon the contract could lie at the suit of the Company. The plaintiffs must, therefore, rely upon acts of part performance to give them an equity to the independent enforcement of the negative duty incurred by the Company, although the remainder of the contract is entirely unenforceable on either side both at law and in equity.

In cases of specific performance, the party is said to be charged upon the equities arising out of the acts of part performance and not merely upon the contract. The acts of part performance must be such as to be consistent only with the existence of a contract between the parties, and to have been done in actual performance of that which in fact existed. But in such a case the equity which so arises is to have the entire contract carried into execution by both sides. Because the acts done upon the faith of the contract could not have taken place if it had not been made, and the contract is of a kind which it is considered equitable to enforce in specie, a party who has so acted in partial execution of the contract obtains an equity to its complete performance. But in a case like the present which, because of the nature of the agreement, lies outside the scope of the remedy of specific performance, no equity

can arise to have the contract carried into complete execution. No equity could be set up save to have a distinct negative duty separately enforced. It may well be that such an equity can never be found in agreement unless the agreement gives rise to an enforceable legal right. But, if it conceivably may arise from acts of part performance, those acts must be of such a nature as to make it right to enforce the negative duty separately, and they must do more than give rise to considerations in favour of requiring performance in specie of the entire contract. Acts which merely argue the existence of a contract which is outside the scope of equitable remedies cannot suffice. When breach of a negative stipulation is enjoined, that term of the contract is enforced irrespective of the remaining provisions. The equity to its enforcement is found in the nature of the negative stipulation itself considered as a separate obligation. If the party against whom an injunction is sought is to be charged not merely upon the negative contract, but upon the equities arising out of acts of part performance, surely to give rise to the equities the acts of part performance relied upon must directly relate to the negative duty. It may perhaps be true that, because of the negative character of the obligations to which an injunction is appropriate, acts of part performance can seldom, if ever, directly relate to such obligations. This may be the reason why no case has been found in which acts of part performance have been relied upon as affording a title to an injunction restraining breach of a negative agreement. But, however this may be, in this case there are no acts of part performance which are referable unequivocally to the existence of anything more than some contract enabling the plaintiffs to sell confectionery and the like in the theatre. There are no acts which directly relate to the existence of a duty not to revoke the licence, or of a duty not to admit a stranger to sell confectionery. It is, therefore, unnecessary to decide whether in such a case as the present anything but a legal right enforceable at law will support the injunction. It is enough to say that no acts of part performance have taken place from which a negative equitable obligation arises.

For these reasons I am of opinion that the case was not one in which the Court would entertain an application for an injunction, and that the judgment should be reversed.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. Dixon J.

The appeal should be allowed with costs and the action should be dismissed.

At the trial the defendants disputed the agreement alleged and upon this, which was the major issue, they failed. Instead of ordering a taxation of the costs of the action and of the issues upon which the defendants failed with a set off, the better course appears to be to allow the parties to abide their own costs in the Supreme Court, a course which probably will produce much the same result.

EVATT J. The plaintiffs alleged that, in the month of October 1926, a parol agreement was made between the defendant Company and themselves that, in consideration of the plaintiffs taking over an existing and entering into a new lease of certain premises, they (the plaintiffs) would have until July 8th, 1932, "the exclusive right to sell sweets and confectionery" in the Theatre Royal, Melbourne, and the precincts thereof. Evidence of this agreement, of its being partly carried out, and of its breach by the defendant was given, the learned Supreme Court Judge, *Lowe* J., finding the facts in favour of the plaintiff.

In the action the plaintiffs claimed specific performance of the agreement, an injunction restraining the defendant from preventing the plaintiffs' exercise of their exclusive right, and damages. *Lowe* J. held that the agreement was one to which sec. 4 of the *Statute of Frauds* (sec. 128 of the *Instruments Act* 1928) applied, as being an agreement not to be performed within the space of one year from the making thereof. This view was clearly right. Obligations were thrown by the agreement upon both parties, which were intended to last for upwards of five years.

The learned Judge also held that, had the agreement sued on been in writing, a Court of equity would have entertained jurisdiction in respect of the contract; that this being so, the equitable doctrine of part performance applied to take the case out of the *Statute of Frauds*; that part performance had been proved; that *Lord Cairns' Act* (*Supreme Court Act* 1928, sec. 62 (4)) enabled damages to be awarded in substitution for the remedies of injunction or specific performance; that damages could be awarded and should be assessed as for breach of contract at common law. The assessment was made

at £2,250, and judgment was entered for the plaintiffs for that sum with costs, no other order being made.

By these successive steps in the application of legal or equitable doctrines an interesting, if at the same time somewhat startling, conclusion was reached. Proceeding from the position that the Courts of common law could not award damages for breach of the agreement alleged, owing to the absence of the writing made requisite by the *Statute of Frauds*, the final decision reached is the award of those very damages, ascertained by precisely the same measure. The chain of reasoning involves a consideration of the various links which go to make it up. Mr. *Hudson's* argument has drawn pointed attention to the weaker links in the chain.

At the outset, it is necessary to ascertain what was the actual verbal agreement come to between the parties. Its general nature I have already referred to. The evidence sometimes speaks of "sweets' rights," and sometimes of "inside rights." The place in which the plaintiffs were to be permitted to sell their goods was a place of public entertainment controlled by the defendant. It was contemplated, no doubt, that, during the musical and dramatic performances provided for their patrons by the defendant, the plaintiffs should be allowed to exercise their trade to the exclusion of all others.

The question immediately arises as to whether the only obligation of the plaintiffs was to pay the price agreed upon for the licence. Was not the exercise of the "rights" subject to the requirement of the plaintiffs' performing certain duties? The learned Judge did not find it necessary to ascertain the conditions and limitations, if any, to which the agreement or the licence was subject. The plaintiffs themselves seem to have been quite aware of the existence of certain limitations. Mr. Mulholland, for instance, said:—

> "Only two or three boys were permitted in the house and those in the gallery. I understood that the servants attending to sweets must be decently attired to the satisfaction of the management. I knew that there were certain rules of conduct for theatre employees which would have to be complied with by my employees. During the time I have exercised inside rights I have been subjected to that control and have acquiesced in it. Arthur Tait said: 'Now that your boys are permitted to be in the theatre I do not want them to wear these white coats, you will have to have decent uniforms for them.' I submitted material and had suits made for the boys. This was after Hillier was

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. Evatt J.

given certain rights as to the Comedy Theatre. No design submitted by me has been rejected. If any of the boys were found objectionable to the defendants they were discharged."

The witness's co-plaintiff, Mr. Lukey, also said :—

"About 12 to 18 months ago we sought permission to introduce boys to sell in the stalls; that increased the turnover 33 per cent. One of the conditions was that we should not have boys in the dress circle or the stalls when we first took the rights; Major stipulated for this at the first interview when we discussed the rights—that was the first interview after seeing Tait. Friend's agreement was not produced on any occasion. Major never referred to the manner in which Friend was carrying on. Mr. John Tait does not agree that boys should be in the stalls or the dress circle. We did not argue the point. We wanted the sweets' rights. I did regard myself as bound to keep a sufficient supply for the requirements of the theatre. Dress, deportment and behaviour of the boys was a matter under the control of the theatre proporietors."

The previous holder of the sweets' rights held his licence under stringent conditions. Exhibit 5 shows the nature of the conditions. It provides for approved uniforms, approved quality of sweets and extensive rights of supervision and control, including the right to dismiss the employees of the licensee. Bad or careless management on the part of the holder of the rights would obviously cause distinct business embarrassment, inconvenience and loss to the defendant. It would seem to follow that some right of general control and general supervision was necessary in the interests of both parties. The appearance, demeanour, and behaviour of the servants of the licensee was a matter of vital importance. These servants would come into direct relationship with the patrons of the theatre.

In view, however, of the plaintiffs' understanding of the contract it is unnecessary to consider whether the law would not have implied certain terms in order to secure ultimate control of the position by the theatre proprietors. It must be assumed that the contract between the parties, if in writing, would have provided for—

(a) the exclusive right of the plaintiffs to sell sweets to the patrons of the defendants at certain intervals during theatrical performances;

(b) payment of the agreed rental by the plaintiffs, and enjoyment of the right through the agreed period; and

(c) control and supervision of the plaintiffs and their servants by the defendants to secure a reasonably efficient service, and a correlative duty on the part of the plaintiffs to render the service under such conditions.

In my opinion the agreement did not entitle the plaintiffs to exclusive possession of any portion of the theatre. What was conferred was merely a licence or privilege to use portions of the premises from time to time, the defendant retaining at all material times the legal possession of the whole of the theatre. No interest in land was granted, and the rights obtained were purely contractual and personal, and not of a proprietary nature (*Frank Warr & Co. Ltd.* v. *London County Council* (1); *Jackson* v. *Simons* (2)). This at once distinguishes the present case from that of *Joel* v. *International Circus and Christmas Fair* (3), and *James Jones & Sons Ltd.* v. *Tankerville* (4). In *Joel's Case* (5) on the true construction of the agreement between the parties the right to possession given was found to be exclusive. In *Jones's Case* Lord *Parker* (then *Parker* J.) said (6):

> "A licence to enter a man's property is prima facie revocable, but is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser, and the interest so conferred may be a purely chattel interest or an interest in realty."

The actual right enforced in the case by way of injunction was a right to cut and carry away timber on the defendant's land, the legal property in the timber being in the plaintiff as soon as the timber was cut.

But it might be said that a right to sell goods on another person's land is at least as far removed from a merely personal right, as the right to witness a theatrical entertainment, or a sporting fixture being held thereon; and in *Hurst* v. *Picture Theatres Ltd.* (7) the plaintiffs' right consisted merely in a licence to be upon the premises for a certain time, in order to witness a moving picture show, money having been paid for such right. The defendant in that case revoked the licence without notice during the performance, and the decision of the Court of Appeal is occasionally referred to, in order to justify the enforcement of similar contracts by way of specific performance or injunction. Some of the statements made and the suggestions founded upon *Hurst's Case* must be re-examined if it becomes necessary to determine whether equitable relief should be granted

(1) (1904) 1 K.B. 713.
(2) (1923) 1 Ch. 373, at p. 380.
(3) (1921) 124 L.T. 459; 65 Sol. Jo. 293.
(4) (1909) 2 Ch. 440.
(5) (1921) 124 L.T. 459.
(6) (1909) 2 Ch., at p. 442.
(7) (1915) 1 K.B. 1.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. Evatt J.

in analogous cases. The actual decision in *Hurst's Case* (1), however, merely rejected the plea of the defendant that the licence given to the plaintiff having been duly revoked, he was removed from the land as a trespasser. The action being one of assault, the case may conceivably be treated upon the footing that a Court of equity might have restrained the defendant from pleading such a justification, which was dishonest in view of the contract made (31 *Law Quarterly Review*, p. 219 n.). An injunction of such a character, however, is very different from the enforcement in equity of the contract itself.

For the plaintiffs to justify the retention of the judgment in their favour in the present case, the agreement being within sec. 4 of the *Statute of Frauds*, it is necessary for them to show that, had the contract been in writing, a Court of chancery would, in the circumstances, have decreed specific performance of the agreement, or, at least, have granted relief to the plaintiffs by way of injunction. For *Lord Cairns' Act* did not enable the Supreme Court of Victoria to award damages unless one or other of the two equitable remedies was appropriate to the circumstances of the case (*Lavery* v. *Pursell* (2) ). It was not seriously contended before us that the remedy of specific performance of the contract would have been granted in equity. The agreement involved repeated acts and might have required constant supervision (*Ryan* v. *Mutual Tontine Westminster Chambers Association* (3) ). Moreover, upon any breach or repudiation of the agreement by the plaintiffs, the defendant could not have obtained an order for specific performance.

It follows that the case for the plaintiffs is reduced to the following four contentions :—

(1) If the agreement had been written, an injunction would be granted against the defendant in a Court of equity.

(2) The equitable doctrine of part performance is not limited to cases directly relating to an interest in land nor to suits for specific performance of contracts relating to such interests, but should be extended to every case where a Court of equity would grant an injunction to restrain a breach of a contract within the *Statute of Frauds*.

(1) (1915) 1 K.B. 1. (2) (1888) 39 Ch. D. 508. (3) (1893) 1 Ch. 116.

(3) The evidence shows that the plaintiffs partly performed the contract within the meaning of the doctrine.

(4) The plaintiffs may therefore retain their judgment for damages in lieu of an injunction by virtue of *Lord Cairns' Act.*

The plaintiffs' claim to an injunction, as pleaded, was for an order restraining the defendants "from preventing the plaintiffs from exercising the exclusive right of selling sweets" in the theatre. Although this bears the form of an order of a negative character, in substance it is a request for specific performance of the agreement itself, and such remedy would have been refused for the reasons already given.

It was suggested on the hearing before us, therefore, that an injunction could be granted in the present case because the exclusive right of selling sweets at the theatre, although in itself positive, clearly implied that no other person should enjoy the right during the currency of the licence. The latter was a negative stipulation which a Court of equity would enforce by injunction, holding itself at liberty to dissolve the injunction upon any breach of the agreement by the plaintiffs, or perhaps insisting, as the price of the order, upon an undertaking from the plaintiffs that they would carry out the agreement on their part.

In my opinion, it is open to the gravest doubt whether any such injunction would be granted by a Court of equity in the present circumstances. As the Judicial Committee of the Privy Council has pointed out, the remedy of an injunction as granted in *James Jones & Sons Ltd.* v. *Tankerville* (1) "depends upon very special circumstances" (*Waimiha Sawmilling Co.* v. *Waione Timber Co.* (2) ). First of all, the exclusive right of the plaintiffs to sell sweets implies positive acts as well as forbearances on the part of the defendant. The positive aspect of the matter that the plaintiffs shall be allowed to sell, is as important as the negative correlative that no other person shall be allowed to sell. The negative requirement that the plaintiff shall not be prevented from selling, is coupled with the positive requirement that all other persons shall be prevented. To manufacture two negative stipulations out of this portion of the

(1) (1909) 2 Ch. 440.

(2) (1926) A.C. 101, at p. 104.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. Evatt J.

contract is to torture the ordinary grammatical statement of the arrangement.

Moreover, if I may say so, I entirely agree with the closely reasoned judgment of *Long Innes* J. in *Wood* v. *Corrigan* (1). In an injunction suit it is not sufficient to prove that a contract involves a substantial negative, where damages would be a complete remedy for the threatened breach and where the contract is of such a nature that it cannot be specifically enforced. This seems to be the principle which is gradually being evolved, and the result seems both just and convenient. I should add that, in this very case, counsel for the plaintiff stated at the trial that it was a matter of practical indifference to the plaintiffs whether relief was to be given to them specifically, or by way of damages.

I do not deem it necessary, however, to express a concluded opinion as to whether the remedy of injunction could have been obtained by the plaintiffs in the action, because I hold that the doctrine of part performance does not apply to cases where the only equitable remedy available is that of injunction, and the Court refuses to enforce the contract as a whole.

The equitable doctrine of part performance has had many champions. Its elasticity was most useful to the Chancellors during the great historical struggle with the Courts of law. The *Statute of Frauds* must not, it was claimed, be used as an instrument of fraud. The consequence was a substantial alteration of the *Statute of Frauds* itself which, as Lord *Blackburn* pointed out in *Maddison* v. *Alderson* (2) was interpreted by Courts of equity as if it contained a positive exception—" or unless possession of the land shall be given and accepted." The judicial gloss on the statute was regarded by him as an unjustified interpolation. Its justification was historical, not logical. Indeed, the speech of the Earl of *Selborne* in the same case, which puts forward the doctrine from the point of view of Courts of Equity in the most effective and plausible way, has running through it, I fancy, an undercurrent which admits the force of Lord *Blackburn's* criticism. " In a suit founded on such part performance," said the Lord Chancellor (3),

(1) (1928) 28 S.R. (N.S.W.) 492.
(2) (1883) 8 App. Cas., at p. 489.
(3) (1883) 8 App. Cas., at p. 475.

"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. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow." His Lordship went on to give an illustration from a case of possession of land, showing a very harsh result from the literal application of the statute.

None the less, there is no escape from the truth of the comment of *Brett* L.J. in *Britain* v. *Rossiter* (1), that the cases in the Court of chancery, applying the doctrine of part performance to suits concerning land, although the evidence required by the statute was lacking, were "bold decisions on the words of the statute."

The illustration already referred to in the speech of the Earl of *Selborne* was a case of great and prejudicial alteration of position as a result of part performance of the agreement. This gave rise, it was said, to a practical necessity to enforce "equities," the matter having passed beyond the stage of contract. In a proper case, however, where it is required to examine the acts of part performance, to ascertain the true contract between the parties, and enforce it so as to do justice, it is the whole contract and not part of it which is enforced.

> "The conduct of the parties may be such as to make it inequitable to refuse to complete a contract partly performed. Wherever that is the case, I agree that the contract may be enforced on the ground of an equity arising from the conduct of the party" (per Lord *Blackburn* (2)). "The matter has advanced beyond the stage of contract" (said the Earl of *Selborne*); "and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone" (3).

The justification for intervention by the Court of chancery was, indeed, the vital necessity, in the interests of justice, of ordering completion of an agreement which had been performed by one party to such an extent that a substantial alteration of position had resulted. Both the speeches I have mentioned indicate that the object of equity was to compel "completion" of the agreement, and not merely to enforce a portion of such agreement.

(1) (1879) 11 Q.B.D. 123, at p. 129. (2) (1883) 8 App. Cas., at p. 489.
(3) (1883) 8 App. Cas., at p. 476.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. Evatt J.

But in the case of an application to a Court of equity for the prevention of the breach of some particular negative stipulation of a contract, the jurisdiction exercised expressly disclaims the right of acting *in personam* so as to secure completion. And the justification for the application of the doctrine of part performance ceases to exist if only a part of the contract within the Statute is enforced. The very name of the doctrine—"*part* performance"— indicates that the object is always to enlarge part performance into complete performance. If a negative stipulation in an agreement within sec. 4 of the Statute were of itself and by itself enforceable in equity, the result would be the procuring of an injunction by one party whilst the defendant in equity would not only *ex concessis* be unable there to enforce the rest of the agreement but would be unable because of the statute to enforce his rights at law. In addition, *Britain* v. *Rossiter* (1) is largely founded upon the desirability of not extending the doctrine of part performance to contracts which do not relate to land. The striking illustration of hardship given by the Earl of *Selborne* in *Maddison* v. *Alderson* (2) related to land; and indeed, where A has allowed B to enter into possession of his (A's) land, such fact at once suggests the existence of some agreement concerning the land. *Res ipsa loquitur.* Written evidence of the agreement there is none; but there is, in the facts themselves, some guarantee, at least, that the fraud and perjury which it was the object of the *Statute of Frauds* to prevent are not being perpetrated. (Cf. *In re a Bankruptcy Notice* (3).)

The evidentiary difficulty is much greater if one takes, by way of illustration, that part of sec. 4 of the *Statute of Frauds* which requires written evidence of an agreement not to be performed within the space of one year from the making thereof. Assume the existence of such an agreement, not followed by any change of possession of land. A case is furnished by an oral agreement of service for (say) five years including an undertaking by a party, to operate in reasonable restraint of trade at the termination of the period of service. (Cf. *Reeve* v. *Jennings* (4).) The agreement is within the

(1) (1879) 11 Q.B.D. 123.
(2) (1883) 8 App. Cas., at p. 481.
(3) (1924) 2 Ch. 76, at pp. 97-98, per *Atkin* L.J.
(4) (1910) 2 K.B. 522.

statute, and, in the absence of writing, no defendant can be charged at law upon it. Let it be assumed to be "partly performed" by the rendering of service and payment therefor over a period of (say) two years. Such "part performance" is consistent with an agreement of less than one year's duration, e.g., a mere weekly or monthly hiring which has been continued. A Court of equity would not, by reason of such "part performance" of the agreement, or the entire performance of it (save for the undertaking itself), enforce the restrictive undertaking.

The matter may well be considered from this evidentiary point of view, and a good deal of attention was devoted to the subject in *Maddison* v. *Alderson* (1). Many difficulties will arise and further embarrassment result if the doctrine of part performance is applied further than it has been. I do not deny that there is some support for its proposed application to suits for injunction to enforce a stipulation in a contract within the *Statute of Frauds*. Perhaps, equity having once opened the floodgates of oral testimony in analogous cases, the flood should be allowed to come through uncontrolled. For my own part, I am not prepared to be a party to any novel development of the doctrine.

In this case no specific performance of the contract is possible. The injunction suggested, if appropriate to a written contract embodying the oral arrangement, would not complete the contract. The subject matter of the agreement is not an interest in land nor any proprietary right. In dealing with that part of sec. 4 of the *Statute of Frauds*, referring to agreements extending for more than a year, many difficulties as to what is satisfactory and compelling evidence of part performance would at once arise.

I accordingly hold against the contention of the plaintiffs that the doctrine of part performance is applicable to the case. If it is desired to "extend" the doctrine, for that is the euphemistic word, I think the extension should be made on the responsibility of the Legislature, which has so recently re-enacted the *Statute of Frauds*, and not by the method of judicial legislation.

For these reasons I am of opinion the appeal should be allowed and judgment entered for the defendant.

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

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. McTiernan J.

McTIERNAN J. The terms and conditions of the contract which was made by and between the appellant and respondents are stated in the judgments of other members of the Court. I agree that the contract was one that was not to be performed within the space of one year; and, as it was an oral agreement, no action at law or in equity could be brought whereby to charge the appellant upon it. Notwithstanding, the learned Judge in the Court below gave judgment in favour of the respondents for the breach of the agreement, which he found to have been committed by the appellant. His Honor held that the equitable doctrine of part performance applied in the case of an application for an injunction, and that the acts which he found had been done by the respondent in carrying out the contract were acts of part performance within the meaning of that doctrine. The Court awarded damages to the respondents in substitution for the injunction against the breach of the agreement, to which the Court was of the opinion that the respondents were entitled. It acted under the provisions of sec. 62 (4) of the *Supreme Court Act* of Victoria, whereby it is enacted that "in all cases in which the Court entertains an application for an injunction against a breach of any covenant contract or agreement . . . or for the specific performance of any covenant contract or agreement the Court may if it thinks fit award damages to the party injured . . . in substitution for such injunction or specific performance and such damages may be assessed in such manner as the Court directs." As the agreement was struck at by sec. 128 of the *Instruments Act* 1928, the respondents were not entitled to succeed as on an action at law, in which their remedy would have been damages.

The question arises, therefore, whether the case was one to which equitable relief by way of specific performance or injunction was applicable.

As to Specific Performance.—The learned trial Judge, after referring to the statement made by respondents' counsel at the trial, that it was a matter of practical indifference whether relief were given to them specifically or by way of damages, said: "I am consequently relieved from considering whether the decree for specific performance should not be in the form of a direction to the

defendant, J. C. Williamson Ltd." (the present appellant), "to execute in a proper form a grant of the rights agreed to be given to the plaintiffs" (the present respondents). With deference to the learned Judge, I think that he misapprehended the nature of the contract into which the appellant and the respondents had entered. The view which I take of the contract is that the relative positions of the parties were finally determined and settled by the terms and conditions of that contract. In *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.* (1) Lord *Selborne* said:—"There is a class of suits in this Court, known as suits for specific performance of executory agreements, which agreements are not intended between the parties to be the final instruments regulating their mutual relations under their contracts. We call those executory contracts as distinct from executed contracts: and we call those contracts 'executed,' in which that has been already done which will finally determine and settle the relative positions of the parties, so that nothing else remains to be done for that particular purpose. The common expression 'specific performance,' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed. Of course if you pass from the technical to the etymological effect of the words, 'specific performance' might signify any direction given by the Court for the doing of anything whatever in specie; and I cannot help thinking that in this class of cases a little confusion has sometimes arisen from transferring considerations applicable to suits for specific performance, properly so called, to questions which have arisen as to the propriety of the Court requiring something or other to be done in specie." In my opinion, the contract which the parties entered into in the present case was an "executed" contract, in the sense in which that term is used by Lord *Selborne*. Continuing, his Lordship said:—"There is a considerable class of contracts, such as ordinary agreements for work and labour to be performed, hiring, and service, and things of that sort, out of which most of those

(1) (1873) L.R. 16 Eq., at p. 439.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. McTiernan J.

cases have arisen, which are not in the proper sense of the words cases for 'specific performance'; in other words, the nature of the contract is not one which requires the performance of some definite act such as this Court is in the habit of requiring to be performed by way of administering superior justice, rather than leave the parties to their rights and remedies at law. It is obvious that if the notion of specific performance were applied to ordinary contracts for work and labour, or for hiring and service, it would require a series of orders, and a general superintendence, which could not conveniently be undertaken by any Court of Justice; and therefore contracts of that sort have been ordinarily left to their operation at law."

Upon a consideration of the terms and conditions of this contract it will be apparent, I think, that the acts and services which the respondents are bound to perform are of such a nature that the performance of them could not be efficiently supervised by the Court, and that the contract as a whole is of such a nature that the Court would not, in the exercise of its equitable jurisdiction, enforce it by a decree for specific performance. "It is another rule that the Court will only interfere by way of compelling specific performance, where it can give specific performance of the contract as a whole; and that it will not interfere to compel specific performance of part of an entire contract" (*Ryan* v. *Mutual Tontine Westminster Chambers Association* (1)). Thus the judgment in the Court below cannot be supported on the ground that this is a case in which, as the language of sec. 62 (4) of the *Supreme Court Act* expresses it, the Court entertains an application for the specific performance of a contract.

As to Injunction.—The agreement did not, in my opinion, create any proprietary right at law or in equity. The relationship which it established between the appellant and the respondents was contractual. The respondents' remedy, if any, for the wrongful revocation of the licence which the appellant gave them was *ex contractu* (*Kerrison* v. *Smith* (2)). I am conceding in favour of the respondents that the contract contained a definite stipulation on the part of the appellant that it would not, during the period

(1) (1893) 1 Ch., at p. 125. (2) (1897) 2 Q.B. 445.

mentioned in the agreement, revoke the licence which the respondents obtained by the agreement to enter the theatre for the purpose of selling sweets and confectionery, and that it would not, during the same period, admit any person other than the respondents or either of them or their servants or agents to sell sweets and confectionery in the theatre. In my opinion, that stipulation does not contain an absolute or independent promise. I think that the obligation which it imposes on the appellant is correlative to the obligations imposed upon the respondents by the contract. The question arises whether the Court in its equitable jurisdiction would entertain an application for an injunction against the breach of that negative stipulation. It is part of an oral contract, the whole of which is struck at by sec. 128 of the *Instruments Act* 1928.

The principle upon which a Court of equity acts in enforcing a negative stipulation by injunction was explained by Lord *Cairns* L.C. in *Doherty* v. *Allman* (1). His Lordship said :—" My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a Court of equity would have no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of equity has to do is to say, by injunction, that which the parties have already said by way of covenant, that the thing shall not be done ; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."

If the contract in the present case had been in writing, the immediate question for decision would have been whether the respondents had an equity to have the appellant restrained by injunction from doing the thing that it said by way of a stipulation in the agreement should not be done by it. I have already stated my view, that the contract as a whole, of which this negative stipulation is a part, is beyond the scope of the equitable remedy of

(1) (1878) 3 App. Cas., at pp. 719, 720.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. McTiernan J.

specific performance. In *Fothergill* v. *Rowland* (1) Sir *George Jessel* M.R. said :—" It is difficult to follow the distinction, but I cannot find any distinct line laid down, or any distinct limit which I could seize upon and define as being the line dividing the two classes of cases—that is, the class of cases in which the Court, feeling that it has not the power to compel specific performance, grants an injunction to restrain the breach by the contracting party of one or more of the stipulations of the contract, and the class of cases in which it refuses to interfere. I have asked (and I am sure I should have obtained from one or more of the learned counsel engaged in the case every assistance) for a definition. I have not only not been able to obtain the answer, but I have obtained that which altogether commends my assent, namely, that there is no such distinct line to be found in the authorities. I am referred to vague and general propositions—that the rule is that the Court is to find out what it considers convenient, or what will be a case of sufficient importance to authorize the interference of the Court at all, or something of that kind." His Lordship continued: " That being so, and not being able to discover any definite principle on which the Court can act, I must follow what Lord *St. Leonards* says, in *Lumley* v. *Wagner* (2), is the proper conduct for a Judge, in not extending this jurisdiction."

The current of authority dealing with the question raised by Sir *George Jessel* was clearly traced by *Long Innes* J. in *Wood* v. *Corrigan* (3). In addition to cases cited by *Long Innes* J., see *Peperno* v. *Harmiston* (4) and *Paris Chocolate Co.* v. *Crystal Palace Co.* (5). In the latter case the agreement was similar in some respects to the agreement in the present case. But as the negative stipulation in the present case is not in writing and cannot be proved, on account of the application of sec. 128 of the *Instruments Act* 1928, the question arises whether the Statute is fatal to the action to charge the appellant upon that stipulation. The learned trial Judge held that it was not. In *McManus* v. *Cooke* (6) *Kay* J. said :—" The doctrine of part performance of a parol agreement,

(1) (1873) L.R. 17 Eq., at p. 141.
(2) (1852) 1 DeG. M. & G. 604; 42 E.R. 687.
(3) (1928) 28 S.R. (N.S.W.) 492.
(4) (1886) 31 Sol. Jo. 154.
(5) (1855) 3 Sm. & Gif. 119; 65 E.R. 588.
(6) (1887) 35 Ch. D., at p. 697.

which enables proof of it to be given notwithstanding the *Statute of Frauds*, though principally applied in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to those cases. . . . Probably it would be more accurate to say it applies to all cases in which a Court of equity would entertain a suit for specific performance if the alleged contract had been in writing." Commenting on this statement, the writer in *Fry* on *Specific Performance*, 6th ed., at p. 283, says: "It may be questioned whether this statement of the extent of the doctrine would not be made more accurate by omitting the words 'for specific performance.'" The learned trial Judge applied the principle contained in the latter quotation to the present case. After enumerating the acts which had been done by the respondents in performance of the agreement, he said (1): "These acts viewed as a whole are, in my opinion, 'unequivocally, and in their own nature, referable to some such agreement as that alleged,'—see per Lord *Selborne* in *Maddison* v. *Alderson* (2),—and consequently authorize me to inquire into the terms of the actual agreement."

It is conceded in favour of the respondents that a negative stipulation to the effect of that which has already been described was a term of the agreement. The learned Judge was of opinion that it was a case in which the Court would therefore grant an injunction against the breach of the agreement, or order that it be specifically performed. I have already referred to what his Honor said as to the form of decree for specific performance which he was contemplating.

When part performance is established in a suit for specific performance, and the Court makes a decree for the specific performance of a contract, the whole contract to which the part performance is referable is ordered to be performed. It would be a remarkable result if this contract, which is beyond the scope of the equitable jurisdiction of the Court to grant specific performance, could be indirectly enforced in its entirety in specie by way of injunction against its breach, upon proof that it had been partly performed. Although the basis of the judgment in the Court below is that damages were awarded in substitution for an injunction, a more

(1) (1931) V.L.R., at pp. 82, 83. (2) (1883) 8 App. Cas., at p. 479.

H. C. OF A. 1931. J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND. McTiernan J.

limited result than that which I have just described has in effect been brought about by the judgment which is the subject of this appeal. The Court enforced part only of the agreement, namely, the negative stipulation. It has already been stated that the conditions of the contract to be performed by the respondents are unenforceable in equity because of their nature and at law on account of the *Statute of Frauds*. If the doctrine of part performance applies so that the negative stipulation can be enforced against the respondents separately from the other parts of the contract, then, in my opinion, the acts which are relied upon as having been done in part performance of the contract should "unequivocally and in their own nature refer to some such agreement" as that negative stipulation. In the Court below the learned Judge said :—"The evidence establishes beyond question that the plaintiffs took an assignment from Divoli of the balance of his term, and executed a lease for five years from the defendant Theatre Royal Pty. Co. Ltd. that from 13th November 1926 to September 1930 they maintained stalls for the display of sweets in the Theatre Royal, that during the performances therein through their servants they and they alone offered for sale and sold in the theatre and its precincts sweets, and that throughout this period they made payments from time to time to the defendant J. C. Williamson Ltd. and received receipts therefor from that defendant." It does not appear to me that these acts are of themselves unambiguously and in their nature referable to any binding promise on the part of the appellant that it would not revoke the licence to the respondents to enter the theatre to sell sweets and confectionery or that it would not admit anyone else to the theatre to sell sweets and confectionery therein. Therefore, assuming the doctrine of part performance does extend to an application for an injunction against the breach of a negative stipulation, in my opinion the action should nevertheless have been dismissed.

When in a suit for specific performance the Court has found that there has been part performance, and then proceeds to decree specific performance of the contract, although there is no note or memorandum of it as provided by the Statute, the principle upon which the Court acts was described by Lord *Selborne* in *Maddison*

v. *Alderson* (1) in these words :—" In a suit founded on such 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. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow. . . . It is not arbitrary or unreasonable to hold that when the Statute says that no action is to be brought to charge any person upon a contract concerning land, it 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 principle, however, upon which the Court acts in enforcing a negative agreement by an injunction is contained in the statement which I have quoted from the judgment of Lord *Cairns* in *Doherty* v. *Allman* (2). In *Lumley* v. *Wagner* (3) Lord *St. Leonards*, speaking on the same subject, said :—" Wherever this Court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements ; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other ; and although the jurisdiction is not to be extended, yet a Judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity." It is

(1) (1883) 8 App. Cas., at p. 475.
(2) (1878) 3 App. Cas. 709.
(3) (1852) 1 DeG. M. & G., at p. 619 ; 42 E.R., at p. 693.

H. C. OF A. 1931.

J. C. WILLIAMSON LTD. v. LUKEY AND MULHOLLAND.

McTiernan J.

true that the rule enunciated in *Doherty* v. *Allman* (1) is not limited to the protection of a legal right arising *ex contractu*. The rule may also be applied where the plaintiff has an equitable right to the enforcement of a restrictive covenant (*Osborne* v. *Bradley* (2); *Elliston* v. *Reacher* (3); *Chatsworth Estates Co.* v. *Fewell* (4)).

However, in view of my opinion that the acts done by the respondents would not amount to part performance within the meaning of the equitable doctrine known by that name, I do not deem it necessary to say whether it would be consistent with the principle upon which the Court acts in enforcing a negative agreement, to charge the defendant "upon the equities resulting from the acts done in execution of the contract" alleged to have been made, "and not upon the contract itself," where the contract was orally made and was within the category of agreements mentioned in the 4th section of the *Statute of Frauds*.

I am of opinion that the action should have been dismissed, and that the appeal should be allowed.

*Appeal allowed. Judgment of Supreme Court discharged. Action dismissed. Respondent to pay costs of appeal. The parties to abide their own costs in Supreme Court.*

Solicitor for the appellant, *Henry M. Lee.*

Solicitors for the respondents, *Hedderwick, Fookes & Alston.*

(1) (1873) 3 App. Cas. 709.
(2) (1903) 2 Ch. 446.
(3) (1908) 2 Ch. 374, at p. 395; affd. 665.
(4) (1931) 1 Ch. 224, at p. 233.

H. D. W.