H. C. OF A. 1930.

STEPHEN v. FEDERAL COMMISSIONER OF LAND TAX.

of the lease within the meaning of sec. 27 (4) (*a*) consisting of the period from that date until 4th February 1941. (2) (*b*) Within the operation of sec. 27. (3) A fee simple unencumbered by the conditions of the Crown grant and the *Australian Jockey Club Act* 1873 and the lease. (4) To the first part, No; to the second, it does amount to or create "a similar interest."

Questions answered as set out at the end of the judgment of Isaacs C.J. Costs of and occasioned by case stated to be costs in appeal.

Solicitors for the appellant, *Macnamara & Smith.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.

REF. at 153 - 78 W.N. 428 : 61 S.R. 667
DIST 50 W.N. 290 : 63 S.R. 340
92 " 904 : 71 " 79

[HIGH COURT OF AUSTRALIA.]

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED AND ANOTHER . . . . . PLAINTIFFS, APPELLANTS;

Foll'd :- 52 (W.S.W.) S.R. 290
69 W.N. 326
Applied. 92. C.L.R. 349.

AND

RUSSELL . . . . . DEFENDANT, RESPONDENT.

Dist. at p. 143.
(1976) 2 N.S.W.L.R. 504.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1931.

MELBOURNE, *Feb.* 16.

SYDNEY, *April* 1.

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

Landlord and tenant—Parol demise—Option to purchase—Exercise of option—Parol agreement to purchase—Unenforceable by action—Possession by purchaser—Action to recover land by vendor's successor in title—Whether parol agreement to purchase could be relied upon by purchaser in possession—Instruments Act 1928 (*Vict.*) (*No.* 3706), *sec.* 128.

The plaintiffs' predecessor in title by parol demised certain land to the defendant for a term of three years and by parol gave an option to purchase the land to the defendant, which option the defendant exercised. The

defendant remained in possession, and the plaintiffs brought an action in the Supreme Court claiming a declaration that they were entitled to possession of the land. The defendant, relying upon his possession and the exercise of the option to purchase, contested the plaintiffs' claim, but also counterclaimed for specific performance of the option of purchase. The Supreme Court having dismissed the plaintiffs' claim, they appealed to the High Court from that decision. The counterclaim was also dismissed, but the defendant did not appeal against such decision.

Held, that the plaintiffs were entitled to the declaration sought.

By *Gavan Duffy* C.J., *Starke* and *McTiernan* JJ., and *semble* by *Evatt* J. :— The defendant could not give evidence of the agreement arising out of the option to purchase as it did not comply with the requirements of sec. 128 of the *Instruments Act* 1928 (Vict.). Neither at law nor in equity can a claim unenforceable by action because of the *Statute of Frauds* (sec. 128 of the *Instruments Act* 1928) be enforced by counterclaim or defence. A defendant, upon proof of legal title in the plaintiff, must show that he is in possession under some right enforceable at law or in equity, or else he makes no answer to the plaintiff's case.

By *Evatt* J. : A denial of the declaration sought was irreconcilable and inconsistent with the refusal of specific performance of the very same agreement as the defendant relied on by way of defence.

Dictum of *Hodges* J. in *Kewley* v. *Ball*, (1913) V.L.R. 412, at p. 416, disapproved.

Decision of the Supreme Court of Victoria (*Wasley* A.J. : *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Russell*, (1930) V.L.R. 350, reversed.

APPEAL from the Supreme Court of Victoria.

The Perpetual Executors and Trustees Association of Australia Limited and Eliza Ann Matthews brought an action in the Supreme Court against William Thomas Russell in which the plaintiff Company sued as the executor of the will and codicil of William Coldwell deceased, and Eliza Ann Matthews sued as life tenant under the will and codicil of the land in question. The statement of claim, in substance, alleged (*inter alia*) that up to the date of his death on 13th July 1919 the testator was registered as the proprietor of an estate in fee simple in a piece of land at Colac ; that the plaintiff Company was entitled as executor to be registered as proprietor of an estate in fee simple in such land ; and that as such executor the plaintiff Company was entitled to possession of the land or the plaintiff Eliza Ann Matthews as life tenant was entitled to such possession ; that the defendant denied the plaintiffs' title and right to possession, and claimed that he was entitled to an estate in

H. C. OF A. 1931.

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LTD. v. RUSSELL.

fee simple and to possession. The plaintiffs claimed a declaration that William Coldwell was at the time of his death entitled to an estate in fee simple in such land; a declaration that the plaintiff Company was as executor of the testator entitled to an estate in fee simple in the land, and a declaration that the plaintiff Company or the plaintiff Eliza Ann Matthews was entitled to immediate possession of the land.

The defence was, in substance, that in February or March 1919 William Coldwell let the land in question to the defendant for three years from 3rd February 1919, and it was a term of the agreement that the defendant should at any time during the said three years have the option to purchase the land for the sum of £600; that during the term of three years, namely, on 1st November 1921, the defendant gave notice in writing to the plaintiff Company that he desired to purchase the land on 2nd February 1922, and on that day tendered to the plaintiff Company the sum of £600 as purchase-money for the land, but the plaintiff refused to accept the same. The defendant also counterclaimed for relief based upon the allegations above set out, and claimed a declaration that he was entitled to an estate in fee simple in the land; a declaration that he was entitled to possession, and an order that the plaintiff Company should execute a transfer of the land to him.

It appeared that in April 1919 a lease of the land for three years from 3rd February 1919 containing an option to purchase for £600 was engrossed, and that it was signed by the defendant but not by William Coldwell. The following facts were agreed upon:—Eliza Ann Matthews was a life tenant; if admissible, the lease above referred to was entered into between William Coldwell deceased and the defendant on the terms set out in the document signed by the defendant; that William Coldwell deceased did not sign the lease or any memorandum thereof; that the defendant entered into possession of the land under a prior lease from William Coldwell deceased in September 1918 and remained continuously in possession afterwards; that on 1st November 1921 the defendant gave the plaintiff Company notice that he exercised the option; that on 2nd February 1922 the defendant tendered to the plaintiff Company the sum of £600 as purchase-money for the land; and the defendant

had since remained in possession of the land, claiming such possession as a purchaser pursuant to the exercise of the option in the lease. As a fact the plaintiff Company was registered as proprietor of the land as executor of William Coldwell deceased. It also appeared that there were no acts of part performance which would take the case out of the *Statute of Frauds* (*Instruments Act* 1928 (Vict.), sec. 128).

The case was heard by *Wasley* A.J., who, relying on the dictum of *Hodges* J. in *Kewley* v. *Ball* (1), dismissed the action and also dismissed the counterclaim: *Perpetual Executors and Trustees Association Ltd.* v. *Russell* (2).

From that part of the decision which dismissed their claim the plaintiffs now appealed to the High Court. There was no cross-appeal by the defendant from that part of the judgment of *Wasley* A.J. which dismissed the counterclaim.

Robert Menzies K.C. (with him *Hassett*), for the appellants. The defence was the lease for three years, the option of purchase and the tender of the money which had been refused. The defendant's position was that he was not challenging the appellants' title, but claimed to be in possession of the land under a parol agreement made with William Coldwell deceased. He claimed not only the right to be on the property but the right to purchase it. The plaintiffs replied that, if such agreement was made, it was one that required to be in writing by the *Statute of Frauds* (*Instruments Act* 1928, sec. 128), and there was no writing and no part performance. Before *Wasley* A.J. no evidence was given and the defendant conceded that the bargain required to be in writing and that there was no part performance that would take the case out of the Statute, because the only possession was that taken under the previous lease and there was no fresh fact that would take the matter out of the Statute. But the defendant contended that he was entitled to rely on the agreement by way of defence in answer to the plaintiffs' claim in ejectment: his contention was that the *Statute of Frauds* deals with actions and suits and does not have anything to say as to defences, and that he simply relied on his possession by way of defence. The case

(1) (1913) V.L.R. 412, at p. 416. (2) (1930) V.L.R. 350.

H. C. OF A. 1931.

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LTD. v. RUSSELL.

was argued before *Wasley* A.J. on the finding that an agreement had been made and turned merely on a question of law. The observations in *Kewley* v. *Ball* (1) were *obiter* and, if not, the case was wrongly decided. The action of ejectment was a common law action, and a defendant who sought to resist in a Court of common law had to rely on a common law right enforceable in a Court of common law; before the *Judicature Act* his only hope of relying on equity was by going to a Court of equity and invoking its aid to restrain the common law Court, and in the Court of equity the defendant in the Court of common law would be the plaintiff who would be seeking to rely upon the agreement not in writing and of which there was no part performance (*Foa* on *Landlord and Tenant*, 6th ed., pp. 13, 14; *Weakly* v. *Bucknell* (2); *Holdsworth's History of English Law*, vol. VII., pp. 19, 72). The appellants establish a prima facie title. The validity of the option to purchase was the issue which was selected by the parties.

[EVATT J. referred to *Miles* v. *New Zealand Alford Estate Co.* (3); *Anson* on *Contracts*, 17th ed., p. 79.]

No question of setting up an equitable defence arose. The *Statute of Frauds* imposes some restrictions on a person seeking to enforce a claim, by reason of the words "no action shall be brought." *Walsh* v. *Lonsdale* (4) shows that the test is whether the agreement could have been enforced in equity; and see *Manchester Brewery Co.* v. *Coombs* (5), which is entirely applicable to this case. This is palpably not a common law defence, but the defendant rests upon his equity to be there and says that he has a parol agreement, which is not one that a Court would have enforced.

J. H. Moore, for the respondent. Under the contract of sale that is admitted the defendant is entitled to keep possession. A contract was made under which he agreed to purchase the land. Though before the *Judicature Act* the defendant was forced into the position of becoming a plaintiff, he has a good, though unenforceable, contract, and there is nothing to say he is forced into the position of being plaintiff. A parol contract does create an equity (*Watson*

(1) (1913) V.L.R., at p. 416.
(2) (1776) 2 Cowp. 473, at p. 474; 98 E.R. 1193, at p. 1194.
(3) (1886) 32 Ch. D. 266.
(4) (1882) 21 Ch. D. 9, at pp. 14, 15.
(5) (1901) 2 Ch. 608, at p. 617.

v. *Royal Permanent Building Society* (1)). *Watson's Case* shows that an equity is created by a verbal and unenforceable contract of sale (and see *Miller & Aldworth Ltd.* v. *Sharp* (2)). The defendant is not doing anything to bring an action. This is a good agreement, and he is entitled to stay where he is: *Kewley* v. *Ball* (3) shows that he is entitled to rely upon a right under a good but unenforceable contract.

[EVATT J. referred to *Britain* v. *Rossiter* (4) and *Carrington* v. *Roots* (5).]

Wherever it is necessary to prove a parol contract as part of the plaintiff's case it cannot be relied upon.

Robert Menzies K.C., in reply.

Cur. adv. vult.

April 1.

The following written judgments were delivered:—

GAVAN DUFFY C.J., STARKE J. AND MCTIERNAN J. This was an action for a declaration of the plaintiff Company's title to certain land, and also for a declaration that the plaintiff Company, or Eliza Ann Matthews as the life tenant, was entitled to immediate possession of the land. The action might more properly have been framed as an action for the recovery of land. The plaintiff Company was registered as the proprietor of the land under the *Transfer of Land Act*, as the executor of William Coldwell deceased, though in the statement of claim it is alleged to be entitled to be so registered only. The plaintiff Eliza Ann Matthews was tenant for life under Coldwell's will. The legal title to the land was thus established in the plaintiff Company. But the defendant in his defence pleaded (*inter alia*) as follows:—(a) In or about February or March 1919 Coldwell agreed with the defendant to let to the defendant and did let to the defendant the said land to hold for a term of three years from 3rd February 1919, and it was a term of the agreement that the defendant should at any time during the said three years have the option to purchase the said land for the sum of £600.

(1) (1888) 14 V.L.R. 283.
(2) (1899) 1 Ch. 622.
(3) (1913) V.L.R. 412.
(4) (1879) 11 Q.B.D. 123, at p. 128.
(5) (1837) 2 M. & W. 248; 150 E.R. 748.

H. C. OF A. 1931.

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LTD. v. RUSSELL.

Gavan Duffy C.J. Starke J. McTiernan J.

(b) Alternatively, by an agreement partly in writing and partly verbal Coldwell demised to the defendant the said land to hold for the term of three years from 3rd February 1919, and it was a term of the agreement that in case the defendant should during the said term of three years give to Coldwell or to the reversioner for the time being immediately expectant upon the said term three calendar months' notice in writing of his desire to purchase the said land, Coldwell or the said reversioner should upon payment of the sum of £600 as purchase-money sell the land to the defendant absolutely. Then followed an allegation that during the term of three years, namely, on 1st November 1921, the defendant gave notice in writing to the plaintiff Company that he desired to purchase the said land on 2nd February 1922, and that on the said day he tendered the sum of £600 as purchase-money, which was refused.

The learned Judge who tried the action found that the defendant was in possession of the land under a contract which it was admitted would have justified him in staying there if it had been in writing sufficient to comply with the *Statute of Frauds*. The term of three years has long since expired, and it is unnecessary to consider whether the agreement for a term of three years alleged by the defendant constituted a lease which fell within the provisions of sec. 2 of the *Statute of Frauds* (see *Landlord and Tenant Act* 1915, sec. 3; *Property Law Act* 1928, sec. 54); for the option to purchase is a superadded stipulation distinct and separate from the demise or agreement to let (*Hand* v. *Hall* (1); *Raffety* v. *Schofield* (2)). Upon the due exercise of that option, an agreement is thereby come to between the parties, and it is clear that such an agreement falls within sec. 4 of the *Statute of Frauds* (*Instruments Act* 1915, sec. 228; 1928, sec. 128), and must be in writing signed by the party to be charged or some other person thereunto by him lawfully authorized. (See also *Williams* on *Vendor and Purchaser*, 3rd ed., p. 509.) No such writing exists in the present case, and it was conceded at the Bar—and rightly conceded, we think—that there were no acts on the part of the defendant which could be relied upon as part performance of this agreement. The agreement is unenforceable by action both at law and in equity.

(1) (1877) 2 Ex. D. 355. (2) (1897) 1 Ch. 937.

But the learned primary Judge felt constrained by a decision of *Hodges* J., in *Kewley* v. *Ball* (1), to dismiss the action of the plaintiffs, whilst at the same time dismissing the defendant's counterclaim to enforce the purchase and give him possession of the land. *Hodges* J. said, quite truly, that the 4th section of the *Statute of Frauds* did not invalidate contracts but only stipulated that no action should be brought upon them. But in his next step, we think he was in error: If, said the Judge, the defendant "is not wanting to bring any action on the parol agreement" but "the plaintiff is wanting to bring an action in disregard of the parol agreement," then the defendant may say "'I am here, and these are the terms on which I am here, if you try to turn me out.'" There are many divergent dicta on the meaning and effect of sec. 4 of the *Statute of Frauds*, but in our opinion it may safely be said that neither at law nor in equity can a claim unenforceable by action because of the Statute be enforced by counterclaim or defence. The defendant here, upon proof of legal title in the plaintiff, must show that he is "there" under some right enforceable at law or in equity, or else he makes no answer to the plaintiff's case: it is no answer to say: "but there is an agreement, which gives me no right enforceable at law or in equity, to be in possession of the land."

In our opinion, then, the reasoning in *Kewley* v. *Ball* (2) cannot be supported, and consequently this appeal must be allowed and a declaration made of the title and right to possession of the plaintiff Company to the land in dispute.

EVATT J. This action was instituted by the appellant (which is the executor of the will of the late William Coldwell) against the respondent, who is in possession of certain land at Colac.

The appellant claimed a declaration that it was entitled as executor to immediate possession on the basis of an estate in fee simple in the land. The respondent in his pleadings expressly denied the title of the appellant, alleged that he was entitled to retain possession as owner by virtue of the exercise of an option to purchase given to him by the late William Coldwell.

(1) (1913) V.L.R. 412.

(2) (1913) V.L.R., at p. 416.

H. C. OF A. 1931.

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LTD. v. RUSSELL.

Evatt J.

The respondent was not content with a mere defence based on his claim to be the equitable owner in fee as purchaser, but filed a counterclaim. In this he asked for a declaration that he and not the plaintiff was entitled to possession of the land. This claim was based also upon the agreement to purchase from Coldwell and specific performance of this agreement was sought.

The learned Supreme Court Judge (*Wasley* A.J.) dismissed both the claim and the counterclaim. The plaintiff has appealed from so much of the order as dismissed the claim. The defendant has not appealed or filed any notice of cross-appeal. The defendant was adjudged to have failed in his counterclaim because the agreement he was seeking to enforce was one to which the terms of sec. 4 of the *Statute of Frauds* (sec. 128 of the Victorian *Instruments Act* 1928) applied, and there was no part performance of the agreement within the scope of the equitable doctrine of that name.

But the Supreme Court also decided against the plaintiff on the ground that sec. 4 of the *Statute of Frauds* did not prevent the defendant from relying upon the agreement in his capacity as defendant. The agreement was not void but a valid agreement. Sec. 4 forbade active enforcement of it without the production of written evidence. It did not prevent but allowed the role of passive resistance to be played by a defendant. Under those circumstances the latter is not bringing any action charging the plaintiff upon the agreement. He relies on the agreement no doubt, but it is an effective shield if a useless sword. Such was the argument which succeeded.

In view of the conduct of the trial and the appeal two aspects of the dispute may be put on one side. No reliance was placed upon the fact that the parol agreement being for three years only might have operated as a valid demise upon the adducing of evidence that the rent reserved was two-thirds at least of the annual improved value. The onus as to this fact would rest upon the defendant (*Larke Hoskins & Co.* v. *Icher* (1)). Had this evidence been forthcoming, a further difficulty would have arisen, that the parol lease had expired at the time of the institution of the action, that Coldwell had died, and that the option of purchase was outside the terms regulating the relationship of landlord and tenant (*Batchelor*

(1) (1929) 29 S.R. (N.S.W.) 142.

v. *Murphy* (1); *In re Leeds & Batley Breweries Ltd. and Bradbury's Lease*; *Bradbury* v. *Grimble & Co.* (2)).

Secondly, the defendant did not set up that he was entitled to remain in possession of the land by virtue of any estate therein as tenant. He relied solely upon the view that the parol agreement gave him an option to purchase which he exercised, and that he was entitled to possession upon that footing. By this attitude the defendant has completely "disclaimed any relationship of landlord and tenant between the plaintiff and himself" (*Neall* v. *Beadle* (3)). He cannot claim to be treated as a tenant if he fails in the defence upon which he has relied.

If the judgment under review stands the legal situation created is an extraordinary one. There are two contestants for the ownership in fee of the land in question and two only, the plaintiff and the defendant. No *jus tertii* is involved. Neither is able to enforce his rights against the other. The defendant is able to retain possession of the land without paying compensation for it. The plaintiff cannot eject him. The profits may be enjoyed indefinitely by the defendant. The defendant has been denied specific performance. But the same agreement which he is unable to enforce protects him as defendant in possession. The defendant has the advantage of a decree for specific performance without the disadvantage of having to carry out any part of the bargain on his part. The parties remain between two worlds—one dead, the other powerless to be born.

The dismissal of the counterclaim was clearly right. The defendant in such counterclaim was directly attempting to enforce the agreement by action, charging the plaintiff thereon. It was admitted throughout that there was no act of part performance sufficient to attract the equitable doctrine. Nothing here depends upon the question whether a counterclaim is portion of the same action as that which includes the claim. Even if the counterclaim is to be treated as a separate action heard at the same time as the claim, it is clear that the *Statute of Frauds* makes the counterclaim fail. This was expressly recognized by *North* J. in *Miles* v. *New Zealand Alford Estate Co.* (4): "If this were a case," he said, "in which the

(1) (1925) Ch. 220; (1926) A.C. 63.
(2) (1920) 2 Ch. 548.
(3) (1912) 107 L.T. 646, at p. 651.
(4) (1886) 32 Ch. D. 266.

H. C. OF A. 1931.

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LTD. v. RUSSELL.

Evatt J.

defendant had by a counterclaim set up a charge of his, and sought to enforce that, I should have considered that was equivalent to a separate action, and that the plaintiff might in answer to the counterclaim, beyond all question, set up the *Statute of Frauds*" (1).

Claim and counterclaim having been heard and determined together and the counterclaim having been rightly dismissed, it follows, in my opinion, that the defendant cannot be allowed to retain a possession based upon the agreement which he has unsuccessfully attempted to enforce before the same Court and at the same time. In the circumstances of this case the dismissal by the learned Judge of the plaintiff's claim is irreconcilable with the dismissal of the defendant's counterclaim. There are only two possible claimants. The defendant deliberately put his claim in suit. His claim was rejected, and to avoid absurdity and inconsistency the plaintiff's claim necessarily succeeds.

It does not become essential therefore to express a concluded view upon the legal situation which would have arisen had the defendant, relying merely on the doctrine that the plaintiff must succeed by virtue of the strength of his own title, defended without counterclaiming. The judgment appealed from takes the view that the case of *Kewley* v. *Ball* (2) is an authority for the opinion that the defendant should succeed under the circumstances postulated.

In the latter case *Hodges* J. determined that a verbal lease had been created by the parties although it was to commence *in futuro*. The validity of the lease as such was the only point as to which an order nisi to review had been granted. But *Hodges* J. certainly seems to have entertained an opinion, quite unnecessary for his decision, that a defendant who is in possession of land under a parol agreement for a lease, not amounting to a valid demise, may at law rely upon the agreement notwithstanding sec. 4 of the *Statute of Frauds*.

North J., in *Miles's Case* (3), had expressed a somewhat similar view. "As regards the defendants," he said (1), "I do not see anything to prevent their setting up their agreement, or to entitle the plaintiff to resist it by setting up the *Statute of Frauds* in reply. It seems to

(1) (1886) 32 Ch. D., at p. 279. (2) (1913) V.L.R. 412.
(3) (1886) 32 Ch. D. 266.

me the case is not one to which this section applies. It is not an action brought whereby to charge the plaintiff with the agreement in favour of the defendants."

The case of *Clarke* v. *Grant* (1), on which apparently *North* J. partly relied for the conclusion set out, merely decided that, in the "remarkable circumstances" of that case, a defendant to a suit for specific performance based upon a written agreement might set up by parol, in answer to the suit, an omission in or a correction of the written agreement (*Dear* v. *Verity* (2)). Vice-Chancellor *Stuart*, in the last-mentioned case, treated the recognition of the parol agreement in *Clarke* v. *Grant* as being merely the application of the doctrine of part performance by possession under the parol agreement. (Cf. *United States* v. *Motor Trucks Limited* (3).) It is apparent that the opinion of *North* J. finds little support in *Clarke* v. *Grant*.

If sec. 4 of the *Statute of Frauds* has no application to a defendant who fails to counterclaim, the mischief which the Statute was designed to avoid still continues. Parol evidence must be adduced in order to satisfy the tribunal of the existence of an agreement of the kind described in sec. 4.

The *Statute of Frauds* has been made the target of many an attack. Some of these attacks are unjustified. Its clear object was to reject oral testimony in certain cases deemed to be of public importance. Times have changed, but, in spite of the criticisms, modern legislatures show a strong disinclination to remove the safeguards of the Statute. If a defendant can set up by parol an agreement within the mischief aimed at, a door is open for further evasion of the Statute. Unless compelled by authority I am strongly disinclined to be a party to the creation of such an anomalous position.

Of course, it is well settled that a parol agreement within sec. 4 is not invalid and the statement in *Carrington* v. *Roots* (4) to the contrary is no longer law. But in pointing this out in *Britain* v. *Rossiter* (5), *Brett* L.J. (as he then was) seemed to support the actual decision in *Carrington* v. *Roots* upon the following reasoning:—"For it being clear that no action can be brought on

(1) (1807) 14 Ves. 519; 33 E.R. 620.
(2) (1869) 17 W.R. 567, at p. 569.
(3) (1924) A.C. 196, at p. 201.
(4) (1837) 2 M. & W. 248; 150 E.R. 748.
(5) (1879) 11 Q.B.D., at p. 128.

H. C. OF A. 1931.

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LTD. v. RUSSELL.

Evatt J.

the verbal contract itself, it is also clear that neither party can be held liable upon it indirectly in any action, which necessitates the admission of the existence of the contract."

I do not wish to place too great emphasis on the words quoted, the matter having arisen only incidentally. "It would be a different case," said Lord *Abinger* C.B., in *Carrington* v. *Roots* (1), "if the plaintiff had been sued by the defendant in trespass; he might have pleaded a licence; but though a licence might be part of a contract, a contract is more than a licence. The agreement might have been available in answer to a trespass, by setting up a licence; not setting up the contract itself as a contract, but only showing matter of excuse for the trespass. That appears to me the whole extent to which the plaintiff could avail himself of the contract."

If this distinction were adopted, a defendant at law setting up a parol agreement referable to his possession of land would be unable to do what the defendant in this case was allowed by the Supreme Court to do. And the result would follow that on the facts and pleadings in this case the plaintiff would be entitled to succeed in his claim upon this ground also.

The appeal should be allowed.

Appeal allowed. Judgment of Supreme Court dated 5th August 1930 *set aside and in lieu thereof*:—(1) *Declare that the plaintiff Company is as executor of William Coldwell deceased entitled to an estate in fee simple in the land in the statement of claim mentioned.* (2) *Declare that the plaintiff Company as such executor as aforesaid is entitled to immediate possession of the said land.* (3) *Counterclaim dismissed.* (4) *Order that the defendant Russell do pay to the plaintiff Company its costs of action and counterclaim (including costs of pleadings and discovery) and of this appeal.*

Solicitors for the appellants, *Cunningham & O'Keefe.*
Solicitors for the respondent, *Sewell & Sewell.*

H. D. W.

(1) (1837) 2 M. & W., at p. 255; 150 E.R., at p. 751.