[HOUSE OF LORDS.]

ELIZABETH MADDISON . . . . . APPELLANT;

AND

JOHN ALDERSON . . . . . RESPONDENT.

H. L. (E.)
1883
June 4.

Contract, Parol relating to Interest in Land—Part Performance—Statute of Frauds s. 4.

An intestate induced a woman to serve him as his housekeeper without wages for many years and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the life estate :—

Held, that there was no contract, and that even if there had been and although the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its own nature referable to any contract, and was not such a part performance as to take the case out of the operation of the Statute of Frauds s. 4; and that she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land.

Loffus v. *Maw* (3 Giff. 592) disapproved.

APPEAL from an order of the Court of Appeal (Bramwell, Baggallay and Brett L.JJ.) reversing a decision of Stephen J. (1). The facts are stated in the report of the decision of Stephen J. (2) and in the judgment of the Lord Chancellor in this House.

April 17, 19, 20 and 23. *Rigby* Q.C. and *W. D. Rawlins* for the appellant :—

The decision of the Court of Appeal, explained in *Humphreys* v. *Green* (3), is wrong. The Statute of Frauds cannot be set up when to do so would be in fact a fraud, e.g., where the other party has been led to alter his position by a parol promise. There may be a part performance of such a contract by acts such as have been proved in this case, sufficient to take it out of the statute. *Loffus* v. *Maw* (4) is undistinguishable. In equity a part performance by

(1) 7 Q. B. D. 174.
(2) 5 Ex. D. 293.
(3) 10 Q. B. D. 148, 160.
(4) 3 Giff. 592.

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which the party to be charged is benefited will bind the conscience of him and of those claiming under him: per Lord Redesdale in *Clinan* v. *Cooke* (1) citing *Foxcraft* v. *Lister* (2), decided in 1701. The acceptance of the consideration operates as a waiver of the statute: *Watt* v. *Evans* (3). The only exceptions to this rule are marriage, and payment of purchase-money: *Nunn* v. *Fabian* (4). Here the relations of the parties have changed; if they had gone on as before there would have been no binding contract, but there is novus actus interveniens (*Lacon* v. *Mertins* (5); *Parker* v. *Smith* (6)) so as to bring it within the principle laid down in *Loffus* v. *Maw* (7). The part performance in this case began as soon as the appellant decided not to leave the intestate's service, and as the contract has been wholly performed on her part she is entitled to ask for specific performance on the other side: *Whaley* v. *Bagnel* (8); *Bond* v. *Hopkins* (9); *Podmore* v. *Gunning* (10); Fry on Specific Performance, pt. 3 ch. 20 p. 415, 2nd ed. citing Gilbert C.B. Lex Prætoria p. 241 and other authorities; Story Eq. Jur. s. 772. No doubt the act must be unequivocal in relation to the agreement, but all that is required is an act from which a contract may be inferred: *Buckmaster* v. *Harrop* (11); *Frame* v. *Dawson* (12); *Morphett* v. *Jones* (13); *Mundy* v. *Jolliffe* (14); *Wilson* v. *West Hartlepool Railway Company* (15). In some cases the mere delivery of possession has been treated as part performance in equity: *Ungley* v. *Ungley* (16); *Coles* v. *Pilkington* (17). A representation of an intention to leave by will may operate as a contract, so as to entitle the promisee to specific performance: *Walker* v. *Walker* (18); *Hammersley* v. *De Biel* (19); *Goylmer* v. *Paddiston* (20); *Goilmere* v. *Battison* (21);

(1) 1 Sch. & Lef. 22, at p. 41.
(2) 2 Vern. 456; Colles Par. Cas. 108.
(3) 4 Y. & C. Ex. 579, Appx.
(4) Law Rep. 1 Ch. 35.
(5) 3 Atk. 1.
(6) 1 Coll. 608.
(7) 3 Giff. 592.
(8) 1 Bro. P. C. 345.
(9) 1 Sch. & Lef. 413.
(10) 7 Sim. 644.
(11) 7 Ves. 341.
(12) 14 Ves. 386.
(13) 1 Sw. 172.
(14) 5 My. & Cr. 167, 177.
(15) 2 De G. J. & S. 475, 485.
(16) 5 Ch. D. 887.
(17) Law Rep. 19 Eq. 174.
(18) 2 Atk. 98.
(19) 12 Cl. & F. 45.
(20) 2 Vent. 353.
(21) 1 Vern. 48.

Maunsell v. *White* (1); *Needham* v. *Smith* (2); *Coverdale* v. *Eastwood* (3); *McCormick* v. *Grogan* (4), per Lord Westbury. If the intestate had become bankrupt his trustee would have taken the estate subject to the equities in favour of the appellant. This is the appellant's only remedy; the contract being in existence even if unenforceable, the appellant cannot sue for wages; *Britain* v *Rossiter* (5).

Davey Q.C. and *Gainsford Bruce* for the respondent:—

There was no contract, nor any evidence of one: a promise is not a contract. The alleged part performance was not referable to or in pursuance of any contract concerning land, or any contract at all. The appellant was free to leave whenever she liked and no action for damages or to enforce the alleged contract could have lain against her. Till the intestate's death there could be no contract, and therefore till then there could be no part performance. But if there was a contract it was not such as equity would enforce, even if an action would lie for damages for breach of it. To entitle to specific performance the acts must be unequivocal, i.e. they must necessarily lead to the inference of a contract affecting the land. This is the only rule which underlies all the cases and which is consistent with principle, though there may be expressions in some cases going further. The only apparent exceptions are *Parker* v. *Smith* (6) (which is no authority for any contrary principle) and *Walker* v. *Walker* (7); at which time it was held that almost anything would do as part performance; e.g. payment of money: *Lacon* v. *Mertins* (8). No evidence can be given of the contract until some act is shewn which will lead the Court to assume there was such a contract. In every decided case possession of the land has been an ingredient; and the acts must have been unequivocal: *Gunter* v. *Halsey* (9); *Wills* v. *Stradling* (10); *Surcome* v. *Pinniger* (11);

(1) 4 H. L. C. 1039.
(2) 4 Russ. 318.
(3) Law Rep. 15 Eq. 121.
(4) Law Rep. 4 H. L. 97.
(5) 11 Q. B. D. 123.
(6) 1 Coll. 608.
(7) 2 Atk. 98.
(8) 3 Atk. 1.
(9) Ambl. 586.
(10) 3 Ves. 378.
(11) 3 D. M. & G. 571.

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Pain v. *Coombs* (1). *Loffus* v. *Maw* (2) is a solitary case founded on a confusion between contract and representation, and on a misunderstanding of *Hammersley* v. *De Biel* (3). Specific performance of a contract to devise land has never been decreed except in *Goilmere* v. *Battison* (4), where there was an option, and it was construed as a covenant to *settle* land (see extract from Register's Book). See also *Needham* v. *Smith* (5); and *Logan* v. *Wienholt* (6). There is no case where a covenant to leave land by will has ever been held to bind the land. A man cannot be decreed to make a will: the heir can only be disinherited according to the forms of the Statute of Wills. Here the land was not bound: there was no equitable conversion.

Rigby Q.C. in reply:—

The only thing necessary to turn the promise into a contract was that the appellant should stay, which she did. The Statute of Frauds may not be set up where there has been fraud or anything in the nature of fraud. The reason why part performance has generally had reference to the land is that most of the cases have related to land. In the case of exchange of two pieces, acts done on one piece have no reference to the other, yet they were held part performance: *Walker* v. *Walker* (7). *Gunter* v. *Halsey* (8) (mainly relied on by the respondent) was decided in 1739 by Lord Hardwicke, and *Walker* v. *Walker* (7) in 1740. The acts done must have been to the prejudice of the doer. In *Lacon* v. *Mertins* (9) (decided 1743) payment of money was held part performance.

The House took time for consideration.

June 4. EARL OF SELBORNE L.C.:—

My Lords, the appellant in this case lived for many years, as housekeeper, in the service of Thomas Alderson, who died on the 16th of December 1877. She originally entered his service in

(1) 1 D. & J. 34.
(2) 3 Giff. 592.
(3) 12 Cl. & F. 45.
(4) 1 Vern. 48; 2 Vent. 353.
(5) 4 Russ. 318.
(6) 1 Cl. & F. 611.
(7) 2 Atk. 98.
(8) Ambl. 586.
(9) 3 Atk. 1.

1845, and having become his housekeeper some years before 1860, continued to serve him in that capacity down to the time of his death. He was, when he died, the owner in fee simple of a freehold estate at Moulton, in Yorkshire, called the Manor House Farm, in extent about ninety-two acres, and in value about £137 per annum, which had been devised to him by the will of an uncle, who died in 1863. It is certain that he intended to leave the appellant (subject to a small annuity) a life interest in this estate, for he had a will prepared for that purpose in 1872, which he signed in 1874, and which only failed for want of due attestation.

The appellant having possessed herself of the title deeds, the heir-at-law, to whom the estate descended, brought the present action to recover them; and she by her statement of defence and counter-claim insisted that she was entitled to the same benefit which she would have taken under the will, if duly executed, by virtue of a parol agreement alleged to have been made with her by her master for sufficient consideration, and to have been on her part performed. I do not think it necessary to read the averments contained in the 3rd, 4th and 5th paragraphs of her pleading, because, so far as the facts are concerned, they must now be taken from the verdict of the jury, together with the Judge's notes of the evidence at the trial, if (as seems to have been assumed in both the Courts below) that evidence, as well as the verdict, may be regarded. Whether that assumption was correct or not is in my view immaterial, because in either view my own conclusion would be the same.

The question which (at the instance of the appellant's counsel, and without objection from the respondent) was left by Mr. Justice Stephen to the jury, was "whether the defendant was induced to serve Thomas Alderson as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a promise, made by him to her, to make a will, leaving her a life estate in Moulton Manor Farm, if and when it became his property?" That question the jury answered in the affirmative. The evidence on which the verdict proceeded was that of the appellant herself, without any corroboration other than the unattested will, which made no mention of any such

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inducement. I abstain from stating her evidence in detail, because, in the condensed form in which it appears upon the judge's notes, it certainly does not go beyond (if indeed it is sufficient to justify) the verdict. The material parts of it were to this effect:—That the appellant, having been long (as already stated) in Thomas Alderson's service, contemplated leaving him, and had some idea of being married, in May, 1860, and so informed him. She had ten years before "begun to leave wages in his hand;" the arrear went on from that time, owing to his straitened circumstances; and, in May, 1860, £23 7*s.* 6*d.* remained due to her. He told her of his expectations from his uncle, and that his uncle wished her to stay with him as long as he lived, and wished him to "make her all right" by leaving her the Moulton Manor Farm, which he promised to do if she lived with him. "And so therefore" (she said) "I took his advice, and I remained on by his promises;" (in another place, "I did not leave, because he advised me not"). She did not afterwards "press him" for wages; but, after his death, she brought an action against his administrator for them, which was dropped (as I understand) before or at the time when the present action was commenced. When he signed his will, he read it over to her and asked whether it was right, and "whether she was satisfied."

The case, thus presented, was manifestly one of conduct on the part of the appellant (affecting her arrangements in life and pecuniary interests) induced by promises of her master to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract, for mutual considerations, made between herself and him at any particular time. There was certainly no contract on her part which she would have broken by voluntarily leaving his service at any time during his life; and I see no evidence of any agreement by her to serve without, or to release her claim to, wages. If there was a contract on his part, it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit; and which, if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity.

It was admitted, in the argument at the bar, that the appellant had endeavoured to bring her case within the supposed authority of *Loffus* v. *Maw* (1), decided by Vice-Chancellor Stuart (under circumstances not dissimilar) on the doctrine of representation; for which purpose the Vice-Chancellor relied upon some expressions used by Lord Cottenham in *Hammersley* v. *De Biel* (2), and considered himself at liberty to disregard the reasons assigned by Lord Cranworth and Lord Brougham for the later decision of this House in *Jorden* v. *Money* (3). Mr. Justice Stephen and the Court of Appeal (rightly in my opinion) took a different view. I have always understood it to have been decided in *Jorden* v. *Money* (3) that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts:—a distinction which is illustrated by such cases as *Prole* v. *Soady* (4), and *Piggott* v. *Stratton* (5). *Hammersley* v. *De Beil* (6) was a case of contract for valuable consideration, duly signed so as to fulfil the requirements of the Statute of Frauds, in the view both of Lords Langdale and Cottenham in Chancery, and of Lord Campbell in the House of Lords (7). Those decisions are consistent with each other; *Hammersley* v. *De Biel* (6) does not justify, and *Jorden* v. *Money* (3), is irreconcilable with, the reasons stated by the Vice-Chancellor for his judgment in *Loffus* v. *Maw* (1).

Mr. Justice Stephen and the Court of Appeal arrived at the conclusion that a contract was proved in this case (notwithstanding the character of the evidence and the form of the verdict), on which, but for the Statute of Frauds, the appellant might have been entitled to relief; but they differed on the question of part performance, Mr. Justice Stephen thinking that there was part performance sufficient to take the case out of the Statute of Frauds, the Court of Appeal thinking otherwise. This makes it

(1) 3 Giff. 592.
(2) 12 Cl. & F. 45, at p. 62 n.
(3) 5 H. L. C. 185.
(4) 2 Giff. 1.
(5) 1 D. F. & J. 33.
(6) 12 Cl. & F. 45.
(7) 12 Cl. & F. 63, 64 n. and 87; 3 Beav. 474–6.

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necessary for your Lordships now to examine the doctrine of equity as to part performance of parol contracts.

The cases upon this subject (which are very numerous) have all, or nearly all, arisen under those words of the 4th section of the Statute of Frauds, which provide that "no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." It has been recently decided by the Court of Appeal in *Britain* v. *Rossiter* (1) that the equity of part performance does not extend, and ought not to be extended, to contracts concerning any other subject matter than land; an opinion which seems to differ from that of Lord Cottenham (see *Hammersley* v. *De Biel* (2), and *Lassence* v. *Tierney* (3)). That equity has been stated by high authority to rest upon the principle of fraud: "Courts of Equity will not permit the statute to be made an instrument of fraud." By this it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it; and I agree with an observation made by Lord Justice Cotton, in *Britain* v. *Rossiter* (4), that this summary way of stating the principle (however true it may be when properly understood) is not an adequate explanation, either of the precise grounds, or of the established limits, of the equitable doctrine of part performance.

It has been determined at law (and, in this respect, there can be no difference between law and equity), that the 4th section of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced: *Crosby* v. *Wadsworth* (5); *Leroux* v. *Brown* (6); *Britain* v. *Rossiter* (7). *Crosby* v. *Wadsworth* (5) was an action of trespass brought by the purchaser against the vendor of a growing crop.

(1) 11 Q. B. D. 123.
(2) 12 Cl. & F. 64 n.
(3) 1 Mac. & G. 572.
(4) 11 Q. B. D. 130.
(5) 6 East, 602, 611.
(6) 12 C. B. 824.
(7) 11 Q. B. D. 123.

The contract was by parol, and it was held to be concerning an interest in land, within the 4th section of the statute. "But" (said Lord Ellenborough) "the statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting party, or his representatives, on the ground of such contract, and of some supposed breach thereof; which description of action does not properly apply to the one now brought, viz., a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise. But although the contract for this interest in or concerning land may not be in itself wholly void under the statute, merely on account of its being by parol (so that, if the same had been executed, the parties could have treated it as a nullity), yet, being executory, and as for the non-performance of it no action could have been, by the provisions of the 4th section, maintained, we think it might be discharged before anything was done under it which could amount to a part execution of it."

From the law thus stated the equitable consequences of the part performance of a parol contract concerning land seem to me naturally to result. 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. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his

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heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; 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. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but 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.

It is not in England only that such a doctrine prevails; a similar (perhaps even a larger) equity is also recognised in other countries, whose equitable jurisprudence is derived from the same original sources as our own. By the law of Scotland, "written contracts in strict technical language are those of which authentic written evidence is required, not merely in proof, but in solemnity; as obligations relative to land; or obligations agreed to be reduced to writing; *or those required by statute to be in writing.*" To constitute any such contract there must be a "final engagement;" and as a corollary to that rule a "locus penitentiæ" is given; i.e., "a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape." But to this, "rei interventus raises a personal exception, which excludes the plea of locus penitentiæ. It is inferred from any proceedings, not

unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable:" Bell's Principles, ss. 18, 25, 26.

This must I think have been the principle on which the House of Lords proceeded in 1701 when it reversed the decree of Lord Somers in *Lester* v. *Foxcroft* (1). Lord Redesdale in *Clinan* v. *Cooke* (2) and *Bond* v. *Hopkins* (3) referred to that case as if it had been the earliest decision on the subject. But there were, in fact, two prior cases before Lord Guilford—*Hollis* v. *Edwards* (4) and *Butcher* v. *Stapely* (5) decided in 1683 and 1685, within the first ten years after the enactment of the Statute of Frauds, in the earlier of which the Lord Keeper had refused, and in the latter had granted, relief. *Butcher* v. *Stapely* (5) was a strong case upon its circumstances; for the relief was there granted to a purchaser in possession of land under an unsigned agreement, against a subsequent purchaser (with notice) of the same land from the vendor, the defendant having paid his purchase-money under a signed agreement and having obtained a conveyance of the legal estate. Lord Guilford "declared that inasmuch as possession was delivered according to the agreement *he took the bargain to be executed.*"

Among later cases I may refer to *Pengall* v. *Ross* (6), decided by Lord Cowper in 1709; *Lockey* v. *Lockey* (7), by Lord Macclesfield in 1719; and *Potter* v. *Potter* (8), by Strange, Master of the Rolls, in 1750. "There must be something," said Lord Cowper (9), "more than a bare payment of money on the one part to induce the Court to decree a specific performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part, as beginning to build, or letting the other into possession, &c.—in

(1) Colles Par. Cas. 108.
(2) 1 Sch. & Lef. 22.
(3) 1 Sch. & Lef. 433.
(4) 1 Vern. 159.
(5) 1 Vern. 363.
(6) 2 Eq. C. Ab. 46.
(7) Prec. Ch. 519.
(8) 1 Ves. Sen. 441.
(9) 2 Eq. C. Ab. 46.

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such case, where the agreement hath proceeded so far on one part, the statute never intended to restrain this Court from decreeing a performance of the other." Lord Macclesfield said (1) that an unwritten agreement "if executed on one part, had been always looked upon so far conclusive as to induce the Court to decree an execution on the other part, *not to destroy or avoid the agreement so far as it was already carried into execution.*" Sir John Strange (2) said, "If confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity."

The doctrine, however, so established has been confined by judges of the greatest authority within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress. The present case, resting entirely upon the parol evidence of one of the parties to the transaction, after the death of the other, forcibly illustrates the wisdom of the rule, which requires some evidentia rei to connect the alleged part performance with the alleged agreement. There is not otherwise enough in the situation in which the parties are found to raise questions which may not be solved without recourse to equity. It is not enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract.

Lord Hardwicke in *Gunter* v. *Halsey* (3) said: "As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement" ("the terms of which," he added, "must be certainly proved"). He thought it indeed consistent with that rule to treat the payment of purchase-money, in whole or in part, as a sufficient part performance: *Lacon* v. *Mertens* (4); *Owen* v. *Davies*, 1747 (5). This Lord Cowper in *Pengall* v. *Ross* (6), and Lord Macclesfield in *Seagood* v. *Meale* (7) had refused to do. On that point later authorities have overruled Lord Hardwicke's opinion; and it may be taken

(1) Prec. Ch. 519.
(2) 1 Ves. Sen. 441.
(3) Amb. 586.
(4) 3 Atk. 1.
(5) 1 Ves. Sen. 83.
(6) 2 Eq. C. Ab. 46.
(7) Prec. Ch. 561, A.D. 1721.

as now settled that part payment of purchase-money is not enough; and judges of high authority have said the same even of payment in full: *Clinan* v. *Cooke* (1); *Hughes* v. *Morris* (2); *Britain* v. *Rossiter* (3). Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged: *Cooth* v. *Jackson* (4); *Frame* v. *Dawson* (5); *Morphett* v. *Jones* (6). "The acknowledged possession" (said Sir T. Plumer in *Morphett* v. *Jones* (6)) "of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure."

"It is in general," said Sir James Wigram (*Dale* v. *Hamilton* (7)) of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract . . . . . But an act which though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the Statute of Frauds; as for example, the payment of a sum of money alleged to be purchase-money. The fraud, in a moral point of view, may be as great in the one case as in the other, but in the latter cases the Court does not in general give relief": (see also *Britain* v.

(1) 1 Sch. & Lef. 40.
(2) 2 D. M. & G. 356.
(3) 11 Q. B. D. 123.
(4) 6 Ves. 38.
(5) 14 Ves. 386.
(6) 1 Sw. 181.
(7) 5 Hare, 381.

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Rossiter (1), per Lord Justice Cotton.) The acts of part performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land. The law of equitable mortgage by deposit of title deeds depends upon the same principles.

Examples of circumstances which have been held insufficient for this purpose are found in 1. *Clerk* v. *Wright* (2) and *Whaley* v. *Bagenal* (3), where acts preparatory to the completion of a contract were held not to be part performance; 2. *Wills* v. *Stradling* (4), where the mere holding over by a tenant (unless qualified by the payment of a different rent) was held not to be enough "even to call for an answer;" 3. *Lamas* v. *Bayley* (5), where the plaintiff, being engaged in a treaty for the purchase of land, desisted in order that the defendant might buy it, on an agreement that he should have part of it when so bought at a proportionate price; but his "desisting from the prosecution of his purchase," was held to be no part performance; and 4. *O'Reilly* v. *Thompson* (6), where the agreement alleged was that upon the plaintiff obtaining from a third party a release of a right to a lease claimed by him, the defendant would grant to the plaintiff a lease of the same premises on certain terms. The plaintiff did obtain a release from the party in question of the right claimed by him for valuable consideration; but, nevertheless, a plea of the Statute of Frauds was allowed, Chief Baron Eyre saying, "These circumstances are not a sufficient part performance, but they are a condition annexed, and necessary to be fulfilled by the plaintiff to entitle him to call for an execution of the contract:" meaning, as I presume, that they were a condition precedent to the contract, as distinguished from acts done after a concluded contract, and in part performance of it.

The law deducible from these authorities is, in my opinion, fatal to the appellant's case. Her mere continuance in Thomas Alderson's service, though without any actual payment of wages,

(1) 11 Q. B. D. at p. 130.
(2) 1 Atk. 13.
(3) 1 Bro. P. C. 345.
(4) 3 Ves. 381.
(5) 2 Vern. 627.
(6) 2 Cox, 271.

was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master's land. It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease. The relinquishment of any chance which she might have had of marriage was of no greater force than the relinquishment of the treaty for purchase in *Lamas* v. *Bayley* (1). The alleged acts of part performance preceded, and therefore could not be evidence of, any contract on her part; their performance was (as in *O'Reilly* v. *Thompson* (2)) a condition precedent, without the fulfilment of which the promise which the jury found to have been made by Thomas Alderson could not on his part become a binding contract.

Two cases, on which I think it well to add some remarks, were cited by the learned counsel for the appellant, as favourable to their argument, *Walker* v. *Walker* (3), and *Parker* v. *Smith* (4).

In *Walker* v. *Walker* (3) Lord Hardwicke did not execute any parol contract on the ground of part performance, or otherwise; all that he did was, to relieve the defendant from a liability which the plaintiff's conduct had made it inequitable to enforce. There had been a parol agreement between A. and B., that A. would surrender a copyhold belonging to him to C., charged with annuities in favour of B., if B. would surrender another copyhold of his own to C. A. surrendered his copyhold accordingly, charged with the annuities, and died; B. did not surrender; but he sought nevertheless by his bill to enforce payment of the annuities against C. Lord Hardwicke dismissed the bill, saying, that "*he was not clear*" that the agreement might not have been established by cross bill, upon the principle of part performance. To such a dictum, not even the authority of so great a judge can give much weight. It does not appear how, if there had been a binding agreement, C., who was no party to it, could have claimed specific performance. The true equity was that which was actually administered, viz., to relieve A.'s copyhold, in the hands of C., from the charge which B. unconscientiously sought to enforce.

Of the other case (*Parker* v. *Smith* (4), before Vice-Chancellor

(1) 2 Vern. 627.
(2) 2 Cox, 271.
(3) 2 Atk. 98.
(4) 1 Coll. 608.

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Knight Bruce), I think it enough to say, that it was dealt with in an extraordinary manner, and is difficult to reconcile with *Cooth* v. *Jackson* (1). The acts to which the Court gave the effect of part performance were done before any definite terms of agreement had been, even by parol, concluded between the parties. It might well have been held, that there was an agreement duly signed according to the Statute of Frauds on the 30th of November, 1842; but the supposed acts of part performance were done before that time; and, until then, everything, as to the terms of the intended new lease, remained unsettled. I cannot, therefore, regard *Parker* v. *Smith* (2) as a satisfactory authority.

I am sorry for the appellant's disappointment, through the ignorance of her late master as to the attestation requisite for a valid testamentary act. But the law cannot be strained for the purpose of relieving her from the consequences of that misfortune. It would, in my opinion, be much strained, and the equitable doctrine of part performance of parol contracts would be extended far beyond those salutary limits within which it has hitherto been confined, if your Lordships were to reverse the order of the Court of Appeal. I should have been glad if that Court had dealt differently with the costs; as she has lost, not only the estate intended for her, but also her wages; but costs were within their discretion, and their decree cannot be altered in that respect, being otherwise correct. This House has also to exercise a discretion as to the costs of this appeal; and I humbly venture to recommend to your Lordships that it should be dismissed without costs.

LORD O'HAGAN:—

My Lords, I have had the advantage of perusing the opinion which has just been delivered by the Lord Chancellor; and it has dealt so exhaustively with the case and with all the authorities which bear upon it, that, concurring as I do with the conclusions of my noble and learned friend and the reasons on which they are grounded, I do not feel justified in occupying time by any lengthened repetition of them. I shall briefly indicate the grounds of my concurrence.

(1) 6 Ves. 38. (2) 1 Coll. 608.

It seems to me impossible to hold that, without a dangerous extension of the principles on which the operation of the Statute of Frauds has been held to be avoided as to certain parol contracts, on the ground of part performance, your Lordships can refuse to affirm the unanimous judgment of the Court of Appeal.

There have been, I think, two errors in the conduct of the case, which have created difficulty and contradiction in the decision of it.

In the first place, the reliance of the plaintiff on the ruling of the Vice-Chancellor in *Loffus* v. *Maw* (1), and the consequent effort to shape the evidence so as to make that ruling applicable, tended to raise a false issue, and place her controversy on an untenable foundation. I quite agree that the authorities on which that ruling was based do not sufficiently sustain it. This case must be dealt with not on the ground of representation, but as one of contract, having relation to some binding engagement for future conduct, and not to a responsibility created by any misleading averment of existing facts. The result of the argument has made the mistake apparent, and it is now confessed.

Next, assuming that the action must be considered maintainable, if at all, for the purpose of enforcing a parol contract, partly performed, the course of the argument appears to me to have been further erroneous in this, that, instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention. The Court was asked, from the findings of the jury and the testimony supporting them, to say there was a contract; and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain so previously ascertained. Too much attention was bestowed upon the proof of the contract and too little on the sufficiency of the performance, which was the more substantial part of the burden on the appellant in supporting her claim. The alleged agreement regarded an interest in lands and the statute nullified it for the purpose of the action. *Per se*, it was of no account and could have no value given to it unless, in the first instance, it was evidenced by acts to be accounted for only

(1) 3 Giff. 592.

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on the supposition of its existence. The allegation of it could not be made the subject of judicial consideration as founding any right of suit, in the absence of such acts, satisfactorily ascertained.

In this case, the learned judge who presided at the trial, and the judges of the Court of Appeal seem all to have thought that an unwritten contract capable of execution by a Court of Equity, on the fulfilment of the proper conditions, was established by the verdict and the reported testimony. In my view, it is not necessary to decide the point, though it was the subject of ingenious argument at the bar, on the one side and the other. For my own part, I have some hesitation in holding upon it with the appellant from the want of definiteness in the supposed arrangement and the obscurity of the proof as to some of its material elements. If at any time, as I conceive,—consistently with the proved agreement,—during the life of Thomas Alderson he might, at his will, have dismissed the appellant from his service, and if she reciprocally might have declined to serve him further and so have prevented the fulfilment of the alleged condition of his promise, which could only have had effect on the continuance of her service until he died, and if, as the Lord Chancellor has, in my opinion, correctly stated, there is no evidence to shew that she agreed to serve without the wages which she claimed and sued for after her master's death, I do not see that a bargain so obscure in its terms, so uncertain in its effect, and so doubtful in its intention, could have been properly enforced. I do not see that we have before us that "certain proof" of the agreement which the authorities appear to require.

But I do not deem it necessary to discuss further the grounds of the view adopted by the learned judge. The previous question as to the sufficiency of the part performance must be settled before the construction and operation of the unwritten contract can be legitimately approached. "The principle of the cases is," says Sir William Grant, "that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to shew what the agreement is." (1) Then, but not till then.

I confess I have found it hard to follow the reasoning of the

(1) *Frame* v. *Dawson*, 14 Ves. 387, 8.

judges in some of the cases to which the Lord Chancellor has referred—to reconcile the rulings, in others of them—and to regard as entirely satisfactory the state of the law in which the taking of possession or receipt of rent is dealt with as an act of part performance, and the giving and acceptance of any amount of purchase-money, confessedly in pursuance and affirmance of a contract of sale, is not. As to some of the judgments, prompted no doubt by a desire to defeat fraud and accomplish justice, I am inclined to concur with the present Master of the Rolls in *Britain* v. *Rossiter* (1), when he called them "bold decisions."

But there is no conflict of judicial opinion, and in my mind no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance, in one particular. It must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwicke's words (2), "as could be done with no other view or design than to perform that agreement." It must be sufficient of itself, and without any other information or evidence, to satisfy a Court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced.

The appellant's case fails in the fulfilment of this indispensable condition. It seems impossible to say, that the mere statement of the acts on which she insists of necessity implies the existence of the agreement which she is bound to establish. Those acts are manifestly capable of an explanation in no degree involving the assumption that such an agreement ever was made. Briefly summarised in the way suggested by Sir William Grant, and most favourably for the appellant's contention, they may be taken to represent her service in Alderson's house, her abandonment of a purpose, as she describes it, of "making a home of my own," and her continuance to serve from 1860 until the death of her master, without the wages she had theretofore claimed and partially received.

But, though her long service is consistent with her present case, it is not demonstrative of any contract to give her the life estate

(1) 11 Q. B. D. at p. 129. (2) Amb. 587.

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she claims. She might unquestionably have remained with her master, in the enjoyment of some present comforts and the expectation of some future provision, though no such contract had been ever dreamt of. There have not been wanting recorded cases in which time and care have been bestowed by one person upon another, even from a vague anticipation that the affection and gratitude so created would, in the long run, ensure some indefinite reward. And legal tribunals have refused in those cases to turn courtesy into contract and compel any payment although such service had been performed. In such circumstances, and even where there may have been a general undertaking to afford a suitable acknowledgment, there would be no ground for inferring a contract for the conveyance or devise of landed estate to the person rendering the service, however valuable it might have been, and however clear might be the right to remuneration for it in another way, the rendering of it not being necessarily referable to any such contract.

Then, as to her service without wages, I repeat that there is no proof of any engagement so to serve, or anything to shew that she might not have demanded and recovered them, at any time, in a Court of law. But, even if the appellant had made such an engagement, she might have done so from motives and with hopes such as those I have indicated, or others of a like kind, strong enough and persuasive enough to induce her, for the time, to labour gratuitously and without any agreement to give her in return an interest in land. The fact that her master designed and strove to give her such an interest, at the close of his life, cannot be taken to establish the existence of such an agreement a dozen years before.

As to her continuance in a state of celibacy the evidence does not shew that she ever had a real purpose to abandon it. She only "thought of" "making a home;" and that she failed to make it may have been attributable to very many reasons, having no relation whatever to the contract on which she would now rely. She may have taken other views of life, or found such a connection as she had "thought of" undesirable or impossible. Her case does not appear to me to be helped by the suggestion that, at one period, she contemplated an arrangement of the kind.

I have come, very reluctantly, to the conclusion that the judgment of the Court of Appeal was right and that the appeal must be dismissed.

LORD BLACKBURN :—

My Lords, I have great difficulty in understanding how Mr. Justice Stephen came to the conclusion that there was a contract between Thomas Alderson and the defendant to the effect alleged. It seems to me impossible to say that the jury found that there was such a contract by their answer to the question asked.

I do not think that the course taken at the trial amounted to a reservation to the Judge of power to draw inferences of fact from the evidence, and if it had amounted to such a reservation I do not think that the evidence appearing on the notes would have justified such a finding. It is not merely that the sole witness is a person deeply interested, giving testimony as to what took place between herself and a person deceased, and that no judge sitting in equity and deciding both the law and fact would have acted on such evidence without confirmation; and that the causing of a draft will to be prepared in 1872 in favour of the defendant, cannot be considered as confirmation of a promise alleged to have been made at least twelve years earlier. I do not think there is any rule of law which prevents such unconfirmed evidence from being admissible, or that would prevent a jury from believing and acting on such evidence, though it ought to be strongly pointed out to them how dangerous it would be to do so. The risk of a jury coming to such a decision, and the consequent practical change in the doctrine of specific performance, is one of those which the Legislature, in amalgamating law and equity, did not perhaps sufficiently provide for.

But it seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury, if it had been explained to them that to make a contract there must be a bargain between both parties. I doubt, therefore, whether in any way the judgment in favour of the defendant could have stood, though perhaps it might have been necessary to have a new trial. I do not decide this, for it is quite clear that the contract alleged is a contract for an interest in lands; and it is not

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denied that there was no note or memorandum of the contract signed by Thomas Alderson.

And I have come to the conclusion that this is not a case in which part performance gives an equitable right to have the contract (assuming that there was one) specifically performed, though I speak with diffidence, as I have not been able to discover to my satisfaction what is the principle which is involved in the numerous cases in equity on the subject.

I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract. At first this was not universally accepted as the true construction. It was thought by many very high authorities that the statute did not apply when, from the nature of the proof, there could be no risk of perjury. Sales by auction and sales negotiated through brokers were by some thought, for this reason, not to be within the statute. Lord Mansfield intimates such an opinion in *Simon* v. *Motivos* (1). I do not think it can be said to have been finally settled that such sales were within the statute till *Schofield* v. *Kenworthy* (2), as late as 1824. And there are indications that great equity judges on a similar principle thought that whenever acts had been done which were such as to be consistent only with the existence of a contract, the case was taken out of the mischief of the statute and the only question was the sufficiency of the proof of what the contract was. I so understand some of Lord Hardwicke's remarks in *Gunter* v. *Halsey* (3) and *Lacon* v. *Mertins* (4). This principle would apply whether the unequivocal act was a giving possession of the land or paying the price in whole or in part.

As soon as it was established that the construction of the statute was not what had been supposed, and that a contract within the 4th section was not enforceable unless signed by or on behalf of the party to be charged, even though signed by the one party and accepted and kept by the other who was sought to be charged or otherwise unexceptionally proved, I think this class

(1) 1 W. Bl. 599.
(2) 2 B. & C. 945.
(3) Amb. 586.
(4) 3 Atk. 1.

of cases ought to have been considered overruled, but though I speak with diffidence as to the effect of decisions in equity it seems to me that to some extent at least they were not. Those which tended to shew that payment in whole or in part would take the case out of the statute are overruled by the authorities cited by the Lord Chancellor, but there are cases that for the purpose of enforcing a specific performance of a contract for the purchase of an interest in land, a delivery of possession of the land will take the case out of the statute. This is I think in effect to construe the 4th section of the Statute of Frauds as if it contained these words, "or unless possession of the land shall be given and accepted." Notwithstanding the very high authority of those who have decided those cases, I should not hesitate if it was res integra in refusing to interpolate such words, or put such a construction on the statute. But it is not res integra and I think that the cases are so numerous that this anomaly, if as I think it is an anomaly, must be taken as to some extent at least established. If it was originally an error it is now I think communis error and so makes the law.

There are many rules laid down as to what should guide a judge, determining for himself what the facts are, in thinking the proof of a contract sufficient. I see great difficulty, now that equity is to be administered by a Court which has the facts found by a jury, in applying these to a trial by jury, but that is a question not raised now. But I do not think this anomaly should be extended; and it is not a little remarkable that there is no case, at least none was cited, and I have found none, in which there has not been a change in the possession of the land, or, in the case where the purchaser was a tenant already in possession, a change in the nature of his tenure, which, rightly or wrongly, was held equivalent to a change in the possession.

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. The moral justice of the case was completely with the appellant in *Lester* v. *Foxcroft* (1), and as that case was decided more than

(1) Colles, Par. C. 108.

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180 years ago by this House it is too late now to inquire whether the decision there overruled was not more consistent with technical equity. If there was proof of the allegation that the heir-at-law kept back the deeds from the dying man when he wished to execute them, it would seem that the reversal was quite right. Lord Redesdale doubts whether the cases founded on it have been as well considered (1).

But the cases where this is given as the ground of decision are all cases in which there has been a change of possession, and I do not think that, as far as they are anomalous, they should be extended to a case where there has not been such a change. I do not doubt that, without any such change, actual fraud might give a ground for equitable relief. But Alderson, whether he only held out hopes that he would make a will in the defendant's favour, or actually contracted so to make his will, did mean to make it. There can be no fraud on his part, therefore, unless it is said that in equity it amounts to fraud not to complete a contract when the consideration is one that cannot be restored or compensated for. But this would go a great deal too far. Where a parol promise is in consideration of marriage, and the marriage actually takes place, the consideration can neither be restored nor compensated for; when a parol promise is to answer for the default of another and credit is given on the faith of such a parol guarantee to one who makes default, the consideration cannot be restored, and cannot be compensated for except by fulfilling the contract of guarantee. In those cases such a principle would render the statute a nullity, and it has been decided in *Britain* v. *Rossiter* (2), that this principle does not apply to contracts not to be performed within a year. And it would, I think, be a strange construction to apply this principle to one of the four cases in the same section of the statute where it cannot be applied to the three others. It has never been done, and it is impossible not to see that if there is any case in which the policy of the Statute of Frauds clearly applies, it is such a case as this, where the promise set up is one not to come into force till after the death of the person who is alleged to have made it.

(1) *Bond* v. *Hopkins*, 1 Sch. & Lef. 433, 4.
(2) 11 Q. B. D. 123.

I have therefore come to the conclusion that the judgment below should be affirmed. The costs are entirely in the discretion of this House. I do not myself see any sufficient reason for departing from the usual rule as to costs; but if the rest of your Lordships are of a different opinion I will not contest the point.

LORD FITZGERALD:—

My Lords, I entirely concur in the judgment pronounced by the Lord Chancellor, affirming the judgment of the Court of Appeal.

The decision of your Lordships' House is to rest on the ground that there was nothing in the case to take the supposed agreement out of the operation of the 4th section of the Statute of Frauds. I have had the advantage of reading the judgment of the Lord Chancellor on this question, and I adopt his reasons. The Lord Chancellor has well laid down that the acts relied on as performance to take the case out of the statute must be unequivocally and in their own nature referable to some such agreement as that alleged, and I may add must necessarily relate to and affect the land the subject of that agreement. I quite agree that the doctrine, whatever may have been its foundation, has been too long established to be now questioned. We are bound to follow, but should rather confine than enlarge its limits. There was no part performance in the case before us such as has been defined as necessary, and I may add that the peculiar character of the alleged agreement does not admit of such a part performance by the defendant as could affect the operation of the statute.

If there was such an agreement as the defendant alleges, she had done all that was to be performed on her part, that is to say, she remained in the service of Alderson up to the time of his death, and there is no proof that she received any wages or was paid the arrears due to her in 1860. Mr. Justice Stephen thus deals with this part of the case: "As it was a contract relating to land it obviously falls within the 4th section of the Statute of Frauds. But as it is obvious that it was completely performed on the part of the defendant, it is equally clear that according to the well-known doctrine of equity the application of the statute

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is barred." But it is equally obvious that the acts of the defendant had no necessary reference to any contract such as is relied on, or indeed to any contract whatever, or to the land, and would be properly accounted for by some expectation of bounty from her master. At an early stage of the discussion I had satisfied my mind that there never had been any such agreement as that relied on, and that the jury did not find that there had been any such agreement.

The case made by the defendant at the trial would not probably have lasted many moments had it not been for the document called the will, which was supposed to afford confirmation of the defendant's story, but is not such in reality. There is not to be found in it any allusion to any agreement or promise or representation, nor is the intended devise for her benefit said to be as a reward for her services; and whilst she alleges a promise to leave her the manor farm, the will gives her a life estate in it, and in all other the intended testator's real estate and in all his personal estate. The intended will does indicate a desire to benefit the defendant very largely, but contains not a word that is referable to such an agreement as is alleged.

The agreement relied on by the defendant in her defence is thus put forward in the 3rd paragraph of her defence, "and it being inconvenient to him, or he being unable to pay the said arrears of her said wages, he, in order to induce her to continue so to serve him, proposed to the defendant, and represented to her that if she would not press him for payment of her wages, and would continue to serve him and remain with him whilst he lived, he would leave her a life estate in the property which he expected his uncle would leave him, and in any property of which he might die possessed;" and in the 4th paragraph, "that it was agreed between the said Thomas Alderson and the defendant, that in consideration of the defendant remaining and continuing so to serve him during his life, and of the defendant forbearing to press him for payment of the said arrears, and in lieu of wages for the future, the said Thomas Alderson would by his will leave to the defendant a life estate in his property to take effect at his death, and that he would duly secure to her the said life estate." It is obvious that these two paragraphs were taken from the

dispositions found in the intended will, and that there was no evidence to sustain either; but without intending to confine the defendant to the technical statement put forward by the pleader, and giving her the full benefit of her evidence, and of the verdict of the jury, it seems to me that the correct view is that although Alderson probably made representations to her of the benefits he intended to confer on her if she remained with him during his life, there never was any agreement binding on him to do so.

I concur in the observations which have been made in the course of the case as to the inexpediency of giving effect to an agreement of the character in question, alleged by the defendant to have been verbally entered into over twenty years since, not binding on her, and not to come into effect, so far as Alderson was concerned, until after his death, and resting on the unaided testimony of the defendant. If an instance was wanted to justify the wise provisions of the Statute of Frauds and of the Wills Act we find it in the case now before us.

On the question of costs I confess that I have some difficulty. My view at the commencement was that the costs should follow the event; but on reflection, considering that the defendant succeeded in obtaining the judgment in the primary Court, and that she has lost everything, not only the intended provision made for her by the imperfect will, and the benefits conferred upon her by it, but also her wages; and further, taking into account that the Court of Appeal has, in the exercise of its discretion, with which we cannot interfere, given against her the costs in the primary Court and in the Court of Appeal, I think that here we may, under these circumstances, exercise our discretion in favour of the defendant in the manner indicated by my noble and learned friend the Lord Chancellor.

Order appealed from affirmed; and appeal dismissed.

Lords' Journals 4th June 1883.

Solicitors for appellant: *Harvey, Oliver & Capron*, for *J. Proud*, Bishop Auckland.

Solicitors for respondent: *Ridsdale & Son*, for *W. W. & W. J. Watson*, Barnard Castle.