

RECENT ENGLISH DECISIONS.

Courts of Equity will not permit the statute to be made an instrument of fraud. Lord Blackburn, indeed, says (p. 488) that he had not been able to discover to his satisfaction what is the principle which is involved in the numerous cases in equity on the subject, but the rest of their Lordships concur in the exposition of the law given by the Lord Chancellor, (p. 475), which is as follows;—"In a suit founded on part performance of a parol contract, concerning land, the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. 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 conveyances; 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 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 cases, a conveyance were refused, and an action of ejectment brought by the vendor, or his 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 otherwise interposes an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement."

In the light of the above it is easy to understand the remark of Lord O'Hagan, at p. 483, that an erroneous course had been taken in the argument in the case, inasmuch as "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," or, in other words, as said by the Chancellor in our recent case of *Campbell v. McKerricher*, the proper order of marshalling the evidence is first to prove the part performance in order to let in parol evidence of the agreement which is sought to be enforced.

PRACTICE—PETITION FOR SPECIAL LEAVE TO APPEAL.

Lastly must be noticed the case of *Canada Central R. Co. v. Murray*, where leave was sought to appeal from the judgment of the Supreme Court of Canada, of May 17, 1883, and leave to appeal was refused on the ground that the questions raised in the cases involved no issue except an issue of fact. Their Lordships also lay down the rule in this case that a petition for leave to appeal to the Privy Council must state fully, but succinctly, the grounds upon which it is based.

A. H. F. I.