

J., dismissing the action, which was brought by George Coulter and Maggie Coulter, his wife, for the specific performance of a parol agreement said to have been entered into between them and the defendants' testator, Thomas Elvin, since deceased, whereby the latter agreed to give his farm to Maggie Coulter upon his death. Thomas Elvin was a farmer living upon the farm in question. His wife died in October, 1907. Maggie Coulter was the wife's niece, and had lived with the Elvins from her childhood until her marriage. Her husband dying, she returned and again lived with them until her marriage with George Coulter, when she left them to live with her husband. George Coulter, in his testimony at the trial, said that Thomas Elvin, about a week after his wife's death, invited the witness and his wife to move up to the farm and take care of him (the deceased) for the remainder of his days. About Christmas, 1907, the deceased mentioned the matter again—"He wanted me to move up there and take care of him, and he said he would give me a good chance, he would give me the proceeds of the place, and he would give my wife the place after his death, if we would take care of him." The witness said he accepted the offer, told his wife, and she assented, and they moved over to Elvin's farm, and thereafter continued to live with Elvin until his death in 1909, and had since remained in possession. The plaintiff Maggie Coulter testified to words used by Elvin to her—"at the end the place was mine"—"the place is yours when I am dead." The plaintiffs relied on the taking of possession, as disclosed in the evidence, as part performance sufficient to take the case out of the statute. MULLOCK, C.J.Ex.D., delivering the judgment of a Divisional Court (composed of himself and SUTHERLAND, J.—MAGEE, J., the third member of the Court, having since the argument been appointed to the Court of Appeal), referred to *Maddison v. Alderson*, 8 App. Cas. 483, and said that the evidence of the plaintiffs shewed two contracts: one with George Coulter with reference to possession and the retention of possession by him, but determinable at the will of either party; and the other with George Coulter for his wife's benefit, but with reference only to the disposition of the property after Elvin's death; George Coulter was to be entitled to possession on his performing his part of the agreement; and, therefore, it was impossible to say that his possession or that of his wife, whose duty it was to live with her husband, had reference to some other agreement. The circumstance of the plaintiffs being in occupation of the property of the deceased was not unequivocally referable to such an agreement as that set up in this action, and, therefore, was not