

LOUNT, J.

FEBRUARY 4th, 1902.

TRIAL.

HOWARD v. QUIGLEY.

Specific Performance — Lease — Possession — Verbal Agreement for Purchase—Acts referable to Agreement.

Action to recover possession of land.

Counterclaim for specific performance of a verbal agreement to sell it.

G. Delahaye, Pembroke, for plaintiff.

W. R. Riddell, K.C., and J. H. Burritt (Pembroke), for adult defendant.

W. R. White, K.C., for infant defendant.

The facts appear in the judgment of

LOUNT, J.—George Howard, seized in fee, died in 1899, having devised to plaintiff the land in question for her life, with remainder to his son, the infant defendant by counterclaim. George Howard had, in 1887, leased to defendant for five years, 75 acres, which included the 50 acres of land in question. By a lease dated the 21st March, 1895, he leased to defendant for three years the 50 acres; and by indorsement on this lease, dated 12th May, 1898, an extension for one year from 1st May was granted.

The defendant went into possession of the 75 acres under the first lease, and remained in possession until March, 1890, when Howard took and remained in possession of 25 acres until his death on 28th August, 1899.

The defendant claims the 50 acres under an alleged verbal agreement for purchase made in 1890 with Howard. The plaintiff is entitled to judgment for possession unless defendant can shew that his possession from and after March, 1890, was that of a purchaser, and not that of a tenant; that the acts of part performance on which he relies are referable only to an agreement for purchase, and are not referable to any tenancy; and that such acts are unquestionably and in their own nature referable to the alleged agreement.

If the acts go as far as this, they are admissible as evidence of the agreement: see Fry on Specific Performance, 3rd ed., sec. 582; Magee v. Kane, 9 O. R., *per* BOYD, C., at p. 477; Humphreys v. Green, 10 Q. B. D., *per* BAGGALLAY, L. J., at p. 155; Nunn v. Fabian, L. R. 1 Ch. 35; and as to lay-