Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of James Wharton White v. *John Neaylon from the Supreme Court of South Australia; delivered February 9th*, 1886.

Present :

LORD BLACKBURN.
LORD MONKSWELL.
LORD HOBHOUSE.
SIR RICHARD COUCH.

IN this case the great mass of the facts are not disputed on appeal, because there have been concurrent Judgements upon them in the two Courts below, and they are of a nature which this tribunal is exceedingly unwilling to review when there have been such concurrent Judgements. Mr. Davey has taken proper notice of that rule, and has abstained from disputing the facts.

The material facts are these. John and Thomas Neaylon carried on business in partner ship. Their business was to get grants of land from the Crown, and then to sell the land to advantage. It was not a business for working the land, but for buying and selling it. They determined to apply for a grant of the property in dispute, which is called Natterannie, and the application was made by an agent named Wadham, in the name of Thomas Neaylon. The surveyor's certificate of a right to the grant was given to Thomas Neaylon. The actual grant or lease in pursuance of the certificate was made to Thomas Neaylon. The certificate and the lease were both registered in the name of Thomas, so that he became the

A 20773. 100.—2/86. Wt. 2708. E. & S. A

registered owner of the property. Being such registered owner, he sold and transferred to the Appellant, White. That transfer was registered, so that White became the registered owner. But White before he contracted to buy the property had express and full notice of the claims of John. Those claims were not his right as a partner, but a separate right to Natterannie in consequence of disputes which took place between the partners and were settled by an agreement that John should take Natterannie in lieu of his other claims. Further it was admitted, or not disputed, that John took possession of Natterannie, and that he executed certain works upon the land.

The question then being whether the subsequent registered title of the Appellant or the prior unregistered and equitable title of John should prevail, two objections are taken by the Appellant to John's title. The first objection is grounded on the Statute of Frauds, and it is admitted that there is no written contract to satisfy the Statute of Frauds. John makes answer that the work done by him upon the land is such a part performance of the contract as according to the law established in Courts of Equity will relieve his title from the defect created by the Statute of Frauds. That is the first question on this appeal. Their Lordships understand it to have been hardly argued at the bar, and if argued it certainly could not be maintained, that the works done by John would not be sufficient to take the case out of the Statute of Frauds if they are referable to the subsequent contract between John and Thomas, which made John the owner of the land. But it has been contended with great elaboration and ingenuity that the acts are referable to John's prior title as partner with his brother and not referable to his ownership.

Let us see what the acts are. This is the evidence of John, which has been accepted by the Courts below, and must be taken to give the whole account of the case. He says—"About "the beginning of 1878 I had an arrangement "with Tom about Natterannie. I was to have "it in place of my share of the purchase money "of Primrose Springs. Nothing had been done "to the country at that time. After that I put "down wells," then he states what the wells were—so many feet deep, and so much water. "I put up a stock yard—three yards, one large "and two small; a grass hut; a stone house "of three rooms; a blacksmith's shop. The "total expense was nearly 400*l*. I did all this "after I had taken it over from Tom. I went "there to live, and used the place for horses and "cattle. I have lived there up to the present "time, and have men there still. Tom went on "with his mail contract, and never interfered in "any way with Natterannie." On cross-examination that evidence was not shaken or modified except to this extent, that Tom came to stay with John at Natterannie while the works were going on, and that he worked at the stone house.

It must be remembered that the partnership was not a partnership for working the land. It was a partnership solely for buying and selling the land, and the acts done were works upon the land. If indeed there had been nothing done but the sinking of wells, it might be doubtful to which title such work was to be referred, because the getting of water was a condition precedent to the claim of a grant from the Crown. But there is a great deal more than the sinking of wells. There is the stockyard, the blacksmith's shop, the stone house to live in, and so forth. All those things are far beyond the partnership business, and their Lordships are of

opinion, coinciding therein with the Courts below, that they must be referred not to the partnership title, but to the ownership of John.

That being so, John has an equity enforceable, notwithstanding the Statute of Frauds, against Thomas; and, as the Appellant had full notice of all John's rights against Thomas, John has the same equity against the Appellant.

Then the question is whether, notwithstanding that equity, the Registration Act excludes John from enforcing it. Now, reading that Act shortly, and taking only the material words which refer to the present case, it runs thus: "That all contracts "in writing concerning any lands may, after the "commencement of this Act, be registered, and "every such contract shall be adjudged fraudulent "and void at law and in equity against any "subsequent purchaser unless registered, and that "although such subsequent purchaser had notice "of such prior contract before or at the time of "the making of such subsequent conveyance." It is quite clear under this enactment that a prior document of a registrable nature, unregistered, cannot convey a good title against a subsequent document of a registrable nature and registered; but there is nothing in the wording of the Act to exclude a claim upon an unwritten equity of which the subsequent registered purchaser has notice. It is said that the Legislature must have intended to exclude such equities, and it is said to be absurd that if John had taken a further precaution and had got a writing from Thomas acknowledging his title or contracting to give him a title, and had omitted to register it, he could not have enforced his title, but inasmuch as he got no such writing he can. It is no doubt difficult, if we were to speculate on the matter, to suppose that such was the deliberate intention of the Legislature. It may not have been so, but their Lordships have nothing whatever but

the words of the Act, and for aught they can tell there may have been something which induced the Legislature to leave the law in that state. They gather from the Judgements in the Court below that the law has been so accepted by conveyancers for forty years, and yet nothing has been done to alter it. It may have been that the framers of this Act supposed that the whole ground was covered between the Statute of Frauds and the Statute of Registration, forgetting that a claim might be enforceable notwithstanding the Statute of Frauds. If so there was a mistake, but it was a mistake which a court of law is powerless to remedy. Or it may have been a mere oversight so that this is a *casus omissus*, and if so a court of law is equally powerless to remedy it. If courts of law were now to assume the power of laying down a contrary rule on a guess as to the intentions of the Legislature, they might be defeating those very intentions; and they might also, and probably would, shake many titles which now stand quite secure. Their Lordships can do nothing but construe the Statute literally as it stands; and, construing it in that way it does not exclude the equity acquired by John Neaylon in this case.

The result is that their Lordships agree with the Judgement of the Court below; they think that this Appeal must be dismissed with costs, and they will humbly advise Her Majesty to that effect.