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*Nov. 21, 22.
*Dec. 31.

ALEXANDER McNEIL (DEFENDANT) . APPELLANT;

AND

PATRICK E. CORBETT (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to land—Trust—Interest in mining areas—Sale by trustee—Recovery of proceeds of sale—Agreement in writing—Statute of Frauds—R.S.N.S. (1900), *c.* 141, *ss.* 4 *and* 7—*Part performance —Acts referable to contract—Evidence—Pleading.*

M. transferred to C. a portion of an interest in mining areas which he claimed was held in trust for him by the defendant. In an action by C. claiming a share in the proceeds of the sale thereof, no deed or note in writing of the assignment was produced as required by the fourth section of the Nova Scotia Statute of Frauds, and there was no evidence that, prior to the assignment, there had been such a conversion of the interest as would take away its character as real estate.

Held, that the subject of the alleged assignment was an interest in lands within the meaning of the Statute of Frauds and not merely an interest in the proceeds of the sale as distinguished from an interest in the areas themselves, and, consequently, that the plaintiff could not recover on account of failure to comply with that statute.

It was shewn that, on settling with interested parties, the defendant had given M. a bond for $500, as his share of what he had received on the sale of the areas.

Held, that, as this act was not unequivocally and in its own nature referable to some dealing with the mining areas alleged to have been the subject of the agreement, it could not have the effect of taking the case out of the operation of the Statute of Frauds. *Maddison* v. *Alderson* (8 App. Cas. 467) referred to.

Judgment appealed from (41 N.S. Rep. 110) reversed.

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*PRESENT:—Sir Charles Fitzpatrick C.J., and Girouard, Davies, Idington and Duff JJ.

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APPEAL from the judgment of the Supreme Court of Nova Scotia(1), affirming the judgment at the trial, by which the plaintiff's action was maintained. with costs.

The plaintiff brought his action against the appellant and one McDonald claiming an interest in the proceeds of the sale of certain mining areas sold by the defendant, McNeil, to the Port Hood Coal Company. It was alleged that the interest so claimed had been assigned to the plaintiff by McDonald in whose favour the trial judge found that the defendant had made a declaration of trust in respect of the areas, but no written note of the assignment was produced. At the trial, oral testimony was admitted to shew that the alleged assignment was in the form of a receipt from McDonald to the plaintiff for $300, stating that the money had been paid for one-fourth of McDonald's interest in the areas and purporting to be signed by the assignor, but his signature to the lost receipt was not proved.

The appeal was from the judgment of the Supreme Court of Nova Scotia, affirming the judgment by Russell J., at the trial, by which it was ordered that the plaintiff should recover against the defendant, McNeil, the sum of $668.56, with costs.

Bell for the appellant. As to contract for benefit of a third party not being enforceable at law see *Burris* v. *Rhind* (2). The contract cannot be supported on the ground of voluntary trust. *Antrobus* v. *Smith*(3). We refer also to Underhill on Torts, (8 ed.), page 54; *Maddison* v. *Alderson*(4).

(1) 41 N.S. Rep. 110.
(2) 29 Can. S.C.R. 498.
(3) 12 Ves. 39; 8 Rev. Rep. 278.
(4) 8 App. Cas. 467.

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Mellish K.C. for the respondent. The agreement was ratified: *Phosphate of Lime Co.* v. *Green* (1), per Willes J. at pages 56, 57. The Statute of Frauds is not pleaded and, in any event, is satisfied by the receipt from McDonald to Corbett stating that the money had been paid and accepted for the interest in question; see Warren on Choses in Action, p. 352. The other grounds raised by the appellant have been already disposed of in the case of *McNeill* v. *Fultz* (2) which had reference to the same areas and transactions between the parties.

The judgment of the court was delivered by

DUFF J.—The plaintiff fails, I think, for non-compliance with the Statute of Frauds.

The agreement which he alleges in his statement of claim is an agreement with the defendant McDonald for the purchase of an interest in certain coal mining licenses—admittedly an interest in lands within the meaning of that statute.

I am unable to agree with the court below that, upon the evidence, the plaintiff can succeed as upon an agreement for the purchase of an interest in the proceeds of the sale of the licenses as distinguished from an interest in the licenses themselves. The oral agreement proved was an agreement for the purchase of an interest in the licenses. And there is no sufficient evidence that prior to the agreement there had been such a conversion of that interest as would take away its character as real estate.

No memorandum in writing was produced. As regards the lost receipt referred to, there was no

(1) L.R. 7 C.P. 43.

(2) 38 Can. S.C.R. 198.

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finding of the learned trial judge regarding the nature of its contents; and, considering the unsatisfactory character of the evidence and the evident hesitation of the court below upon the point, I think one ought to give effect to one's view that the contents of and McDonald's signature to the document have not been sufficiently proved.

With great respect, moreover, I must disagree with the view of the court below that the plaintiff has made out a case enabling him to take advantage of the doctrine known as the doctrine of part performance. A condition of the application of that doctrine is thus stated by Lord Selborne, in *Maddison* v. *Alderson*(1), at page 479:

> All the authorities shew that the acts relied upon must be unequivocally, and in their own nature, referable to some such agreement as that alleged;

i.e. to an agreement respecting the lands themselves; and, as further explained in that case, a plaintiff who relies upon acts of part performance to excuse the non-production of a note or memorandum under the Statute of Frauds, should first prove the acts relied upon; it is only after such acts unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued upon have been proved that evidence of the oral agreement becomes admissible for the purpose of explaining those acts. It is for this reason that a payment of purchase money alone can never be a sufficient act of performance within the rule.

Here there is nothing in the nature of the acts proved which bears any necessary relation to the interest in land said to have been the subject of the

(1) 8 App. Cas. 467.

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agreement in question. A sale and purchase of the stock and bonds actually transferred would suffice to explain them.

A further point remains to be noticed. It is said that McNeil cannot avail himself of the statute. I do not see why.

The fourth section of the Nova Scotia Statute of Frauds provides that

> no interest in land shall be assigned * * * except by deed or note in writing signed by the party assigning * * * the same or by his agent thereunto authorized by writing or by operation of law.

It is not suggested that there was any deed or note in writing in compliance with this enactment; the plaintiff was, therefore, compelled to base his action and did in fact base it upon the allegation of an agreement by McDonald to sell to him the interest referred to. But section seven of the statute provides that no action shall be brought upon a contract of sale of land or any interest therein unless the contract or some memorandum or note thereof is in writing signed by the person sought to be charged. Such a contract in the absence of such a note or memorandum or acts of part performance, being non-enforceable, could not, it seems to me clear, be held to vest by its own operation in the purchaser such an interest in the subject matter of the agreement as would entitle him to maintain an action in respect of it. If the purchaser were entitled to maintain an action to compel the execution of an assignment of the subject matter of the agreement he would in equity be treated as having such an assignment; but I know of no principle under which a purchaser of an interest in land under an oral agreement for sale non-enforceable by reason of non-compliance with the Statute of Frauds can be held by virtue of the non-enforceable agreement

alone to have vested in him any interest in the subject matter of it.

It is true the statute was not pleaded originally; but I think that, having regard to the course taken at the trial respecting the defendant's application for leave to amend and in the actual conduct of the trial itself, the respondents could not now resist such an application.

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Appeal allowed with costs.

Solicitor for the appellant: *James Terrell.*

Solicitor for the respondent: *W. H. Fulton.*