

mortgagor can recover the land. When that right is barred by the statute, only one result can follow and that is that the mortgagor has lost the land."

A similar view was expressed by Gavan Duffy and Dean JJ. at p. 265. But, on the analogy of the application of the Statute of Limitations to personal property, it does not follow that because the right of action is barred the title is also lost.<sup>7</sup> This statement appears to overlook the possibility that the right of action may be revived by subsequent acknowledgment of title. In the second place, the decision produces the curious result that the words "in the meantime" are interpreted differently in s. 300 and s. 304, although the context in which they are used is almost identical in these sections. For these reasons it may still be argued that s. 300 does not extinguish title. These difficulties create uncertainty as to the position in a branch of the law where certainty is essential.

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<sup>7</sup> See Paton, *Jurisprudence* (1946) at p. 442.

#### EQUITY—STATUTE OF FRAUDS—PART PERFORMANCE

In *Nunn v. Fabian* [1865] L. R. 1 Ch. 35, Lord Cranworth L.C., although expressing a distaste for the cases in which equity "gets over the Statute of Frauds", held that payment of rent at an increased rate under a verbal agreement for a lease at an increased rent, constituted a sufficient part performance of the agreement to take the case out of the Statute of Frauds. *Nunn v. Fabian* formed the basis of the decision of Sholl J. in *Strachan & Co. Ltd. v. Lyall & Sons Pty. Ltd.* [1953] V.L.R. 81.

In that case, the tenant of certain premises entered into an agreement for a new lease upon the same terms as those of the former lease except that the tenant was to pay an increased rental and assumed a new obligation to pay rates. It was held that, although the agreement was partly verbal, continuance in possession and an increased payment of rent amounted to part performance and enabled specific performance to be decreed.

Sholl J. emphasized that the acts of payment plus continuance in possession were sufficient part performance, yet either payment or possession by itself would not be unequivocally referable to the contract in question and would not constitute sufficient part performance.

In *Humphreys v. Green* (1882) 10 Q.B.D. 148 Baggallay L.J. said that the fact of being in possession would not be sufficient part performance to take such a case out of the Statute and in *Miller &*

*Aldworth Ltd. v. Sharp* [1899] 1 Ch. 622 Byrne J. agreed that mere possession was ambiguous.

It was not, however, so clearly determined that payment at a new rate would, by itself, not constitute sufficient part performance. However in both those cases the tenants were in possession as well as paying the rent and it is submitted that Sholl J. is correct in his view that increased payment is not enough. He buttresses his opinion by stating that if the increased payment by itself were sufficient "it may be necessary to treat it as an exception to the requirement that an act of part performance must be something which affects the position of the parties in relation to the possession, use or tenure of the land."

In any event, the tenant was in possession in this case, and it was carefully pointed out that the cases were not definite upon the point of increased payment of rental alone and that the opinion expressed in relation to that point was *obiter dicta*.

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### CONSTITUTIONAL LAW—SHIELD OF THE CROWN

It was shown by Latham C.J. in his judgment in *Grain Elevators Board v. Shire of Dunmunkle* that in determining whether an incorporated public authority is entitled to "the shield of the crown" a Court should consider five essential factors, incorporation, financial autonomy, independent discretion, the crown right to appoint members of the authority and the extent to which it engages in governmental or non-governmental functions. The emphasis in different cases has been on various of these grounds but in general there has been agreement to the extent that none of these tests alone gives a conclusive answer.

The recent High Court decision of *Commonwealth v. Bogle*<sup>1</sup> is the latest in this line of cases and is of particular interest because of the stress laid upon the fact of incorporation in the leading judgments and the view that once incorporated the tendency is that such a corporation is created to be a separate legal entity subject to the ordinary law.

The Commonwealth Government had established hostels to accommodate immigrants and subsequently formed a company under Victorian law (Commonwealth Hostels Limited) to control them under the direction of the Minister of Labour and National Service. The lease of the Brooklyn Hostel (Victoria) over which this litiga-

<sup>1</sup> [1953] A.L.R. 229.