

December 1924

## Part Performance and the Statute of Frauds

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### Recommended Citation

A. P., *Part Performance and the Statute of Frauds*, 31 W. Va. L. Rev. (1924).

Available at: <https://researchrepository.wvu.edu/wvlr/vol31/iss1/7>

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## STUDENT NOTES AND RECENT CASES

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PART PERFORMANCE AND THE STATUTE OF FRAUDS.—The fourth section of the English Statute of Frauds is as follows: "No action shall be brought to charge any person upon any agreement made in consideration of marriage, or upon any contract for the sale of land, tenements, hereditaments, or any interest in or concerning them, or upon any agreement that is to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto lawfully authorized."<sup>1</sup>

The Statute was made for the purpose of preventing perjuries and frauds, yet courts "sometime yield to the appeal made to their sympathies by the exigencies of special circumstances, and in this way there has developed from this 'bulwark of jurisprudence', a parasite strangely coddled and nurtured by the judges who have allowed themselves from time to time to be carried off by prejudice of these special circumstances."<sup>2</sup> This so-called parasite is the doctrine of part performance and is found applicable in those cases where one of the parties to a contract has partly performed his or her part of the oral agreement, and by refusal of the other party to carry out the agreement, who relies on the words of the Statute, has been denied rights which he apparently thought was conferred on him upon the supposition that the contract was to be carried into execution, and has suffered unjust and unconscientious injuries. In cases of this sort, Courts of Equity will grant specific execution of the oral agreement, notwithstanding the Statute, if there be clear proof of a contract under which the party was acting, and if the character of the performance be in that class recognized by the court as sufficient.

Here occurs one of the anomalies of the law. The Statute of Limitations by the term it uses in its outset that "no *action* shall be brought" etc., has always been construed by the courts to have

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<sup>1</sup> Stat. 29 Chap. III, § 4, Statutes at Large 405.

<sup>2</sup> JESSE W. LILIENTHAL, "JUDICIAL REPEAL OF THE STATUTE OF FRAUDS." 9 HARV. L. REV. 455.

no application to *suits* in equity. Yet the Statute of Frauds in precisely the same words "no *action* shall be brought," has prevailed in suits of equity as well as actions at law. However by what has been termed "judicial legislation," the doctrine of part performance has been contrived. This doctrine has in a way circumscribed the harsh effects that would result by a strict application of the Statute of Frauds.

What is the true basis for the doctrine? One theory often found explaining its existence is found in the statement that part performance is a valid substitute for the requisite writing required by the Statute. This is clearly a violent assumption in the face of the Statute, which leaves no room for any substitute.<sup>3</sup> From this theory is derived the general rule that equity will enforce a parol agreement when there has been some unequivocal act referable, only, to the subject matter of controversy. The defendant here is really charged upon the equities that result from the acts done in the execution of the contract and not upon the contract itself. In the language of Lord Chancellor Selborne, "The matter has advanced beyond the stage of a contract and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. . . . It is not arbitrary or unreasonable to hold that when the Statute says that no action is to be brought to charge any person upon a contract concerning land it has in view the simple case in which the defendant is charged only upon the contract and not in which there are equities resulting from the *res gestae* subsequent to and arising out of the contract."<sup>4</sup> This may afford a reasonable explanation of the theory, but most courts have been accustomed to give relief on the sound principal of equity in preventing the perpetration of a fraud. Ordinarily the refusal of the court to give specific performance of a contract did not deprive the plaintiff of more than the benefit he anticipated from the execution of the contract. But where one party in reliance on an oral agreement has so far changed his position as to suffer irreparable injury if the other party is permitted to repudiate his agreement, equity will step in and take jurisdiction on the ground of constructive fraud, that sort of fraud which is cognizable in equity only.

Another theory advanced or, better, a theory doing away with those already discussed is that all acts of part performance lie in compensation.<sup>5</sup> Chancellor Kent says, "The tendency of modern

<sup>3</sup> 12 Col. L. Rev. 282.

<sup>4</sup> *Maddison v. Alderson*, L. R. 8 Appeal cases, 487 (1833).

<sup>5</sup> *Foster v. Hale* 3 Ves. 696 (1798); *Anthony v. Leitwich*, 3 Randolph 238. (Va. 1825).

cases is to prefer giving part compensation in damages instead of specific performance. Wherever damages will answer the purpose of the indemnity, this alternative is to be preferred as it will equally satisfy justice and will be in coincidence with the provisions and in support of the Statute of Frauds.'<sup>6</sup>

A few of our jurisdictions have carried this idea of Kent's beyond its logical conclusion and reject the doctrine in its entirety. In some of these states in order to prevent too great an injustice a party who goes into possession and makes valuable improvements on the faith of the oral agreement is allowed a lien for the value of such improvements.<sup>7</sup>

Courts of equity were originally given to grant relief where the whole or part of the purchase money was paid. One of the reasons for abandoning this view was found in the interpretation of the Statute itself. It expressly provided that the payment in whole or part of the purchase money shall exempt from its operation, a contract for the sale of wares, merchandise, etc. Thus part payment was recognized under the seventeenth section of the Statute as a substitute for the written memorandum. The fourth section of the Statute was noticeably silent on this provision. The presumption was then that the Statute would not regard part or whole payment alone a sufficient substitute for the memorandum.<sup>8</sup> A Delaware court, where the Statute of Frauds as it stood in that state did not present any such difference between the fourth and seventeenth section, has decreed the execution of a verbal contract where part of the purchase money had been paid.<sup>9</sup> There is a better and less technical reason for the abandonment of the idea that payment is sufficient to take the case out of the Statute: a party can always recover the amount paid under the oral agreement. Another reason given is that the fourth section of the Statute was originally interpreted as not applying to contracts partly executed. Therefore equity would, on the ground of part performance where the purchase money had been paid, decree specific execution of the contract. This interpretation of the Statute soon became obsolete and with it the insufficiency of the payment of the purchase price was discarded as an act of part performance.

Likewise, marriage has never been considered as a sufficient act of performance to take a case out of the Statute, contrary to the

<sup>6</sup> *Parkhurst v. Van Cortland*, 1 Johns Ch. Rep. 278 (N. Y. 1806).

<sup>7</sup> *Bullitt v. Eastern Land Co.* 99 Ky. 324, 36 S. W. 16 (1896); *Ridley v. McNairy*,

<sup>2</sup> *Humph.* 174 (Tenn. 1840).

<sup>8</sup> *Clinan v. Cooke*, 1 Sch. & L. 22 (1802).

<sup>9</sup> *Houston v. Townsend*, 1 Del Ch. 416 (1833).

rules which prevail in other cases of contract.<sup>10</sup> "In this respect," says Justice Story, "it is always treated as a peculiar case standing on its own grounds." The reason found for this is the notion that between the parties to the wedlock, the performance of the marriage is not such part performance as is generally looked upon as sufficient. The fallacy of this view becomes apparent when one considers the true basis of granting specific performance, where some acts have been done in reliance on the promise, as grounded on fraud. In a case where the defendant made an ante-nuptial agreement with his intended wife, that in consideration of their marriage and of his having charge of their infant son, the plaintiff, during his minority, he, the defendant, would devise to his son and any children born of this union all his property in equal shares, the marriage was held to be sufficient part performance to render the contract enforceable.<sup>12</sup> The court could have found other reasons on which to base their decision, namely the custody of the son. Yet it decided the question squarely on marriage alone. It repudiates in no uncertain terms the prevalent view on the insufficiency of marriage as an act of part performance. Marriage is a valuable consideration, to the court's sane notion, and its celebration in conformity to the oral promise puts the female contracting party in such a position that she cannot restore herself to her former status. This would work such a "heinous fraud upon her, as a court of conscience could not tolerate but, acting on principle rather than precedent, should decree the enforcement notwithstanding the Statute." The decision of the case has met with approval.<sup>13</sup> The lack of mutuality in such contracts, as the courts cannot compel a marriage, is found as the influential factor in determining the majority opinion that marriage is insufficient.

Taking possession of the land, alone, has generally been considered a sufficient act of part performance in England and most of the American jurisdiction.<sup>14</sup> West Virginia has been credited with following this view. This was justified, sometimes on fraud in that the vendee would otherwise be liable as a trespasser. It was overlooked that the contract being merely unenforceable, not void, could be used as a defense to such an action. It is said, usually, that the taking of possession is an act of part performance and the only act unequivocally referable to the contract. The objection then arises that this act does not necessarily show the existence

<sup>10</sup> *Montacute v. Maxwell*, 1 *Pere Williams* 618 (1709).

<sup>11</sup> 2 *STORY'S EQUITY JURISPRUDENCE* (13th ed.) § 768.

<sup>12</sup> *Nowack v. Berger*, 133 *Mo.* 24, 34 *S. W.* 489 (1896).

<sup>13</sup> 10 *HARV. L. REV.* 60; *BROWNE, STATUTE OF FRAUDS* (14th ed.) § 459.

<sup>14</sup> *Miller v. Finley* 5 *L. T. Rep.* 510; *Keatts v. Rector*, 1 *Ark* 391 (1837); *McCarger*

of some contract in reference to the land. The entry may have been made under a parol license. Again no fraud is worked on the party taking possession. No irreparable harm or valuable improvements need be made where possession alone is sufficient. Going into possession operates not only in favor of the purchaser or lessee but also in favor of the vendor or lessor by application of the positive rule of mutuality. The possession must be taken with the consent of the vendor, or lessor; must be exclusive and notorious; mere continuance in possession is not enough although coupled with the payment of increased rental it is recognized as sufficient.<sup>15</sup>

A few jurisdictions have considered mere possession insufficient. They have coupled with it the payment of the whole or a substantial part of the purchase money.<sup>16</sup> It seems, as if in adopting the mere possession theory, they have realized its defects and seek to combine with it another element, the payment of money, which has been even more defective. It is difficult to see, if each element is so defective, how both together can be enough to take the case out of the Statute.

Some states have taken the view that valuable improvements made on the land coupled with possession are sufficient acts of part performance to take the case out of the operation of the Statute.<sup>17</sup> The improvements are considered acts unequivocally referring to and resulting from an agreement such as parties would not have done unless on account of that very agreement and with a direct view of its performance. The agreement set up must appear to be the same with the one partly performed. There must be no equivocation or uncertainty in the case. The improvements relied on must be of permanent, beneficial interest to the land. But equity will not inquire whether they have been judiciously made. To use the language of Lord Thurlow, "Whether the money has been ill or well laid out is indifferent, the fraud is the same."<sup>18</sup> It must appear that the losses of improvement would be a sacrifice to the purchaser. If, therefore he has gained more by the occasion and use of the land than he has lost by his improvements, they will not be available to him as a ground for specific

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*v. Rood*, 47 Cal. 138 (1873); *Van Epps v. Redfield*, 69 Conn. 104. (1893); *Felton v. Smith*, 84 Ind. 485 (1882); *Kelley v. Stansberry*, 13 Ohio 408 (1844); *Wood v. Stevenson*, 43 W. Va. 149, 27 S. E. 309 (1897); *Townsend v. Vanderwerker*, 160 U. S. 170 (1895).

<sup>15</sup> *Wills v. Stradling*, 3 Ves. 378 (1797); *Mundy v. Joffe*, 5 Mylne & Craig 167 (1834); *Nelson v. Shelby Mfg. Co.* 96 Ala. 515, 11 South. 695 (1892).

<sup>16</sup> *Frame v. Dawson*, 14 Ves. 386 (1807); *Bowman v. Walford*, 80 Va. 213 (1885).

<sup>17</sup> *Whitehead v. Brockhurst*, 1 Bro. C. C. 417 (1784).

<sup>18</sup> *Wack v. Sober*, 2 Whart. 387 (Pa. 1837).

performance.<sup>19</sup> The acts should be such that adequate compensation cannot be made except by conveyance of the land. This is true on the theory that fraud is the basis for giving the remedy. There would be no fraud if adequate compensation could be obtained. Possession coupled with improvements does not necessarily preclude the possibility of one recovering for the improvements made and the reason for granting relief fails.

Perhaps the best and most logical rule is that one adopted by the Massachusetts courts. The rule in that jurisdiction requires acts which result in an irrevocable change of position or irreparable harm before specific execution will be given. West Virginia, in a comparatively recent decision, has followed along the lines expressed by the Massachusetts courts. The West Virginia case held that the acts done must be of such a nature as to work "an altered situation on the part of the vendee not compensative in money, and make non-completion of the contract on part of the vendor inequitable and fraudulent."<sup>20</sup> This is a step in the right direction, although a clear departure from rules laid down in earlier decisions of the state. These earlier cases hold that possession in an oral contract for the sale of land is sufficient to take the case out of the Statute.<sup>21</sup> However it appears that the West Virginia courts have not tied themselves fast to the Massachusetts rule. A later case that involved the sale of growing timber (realty) held that "if the possession is defective the building of valuable improvements may be held to take the case out of the Statute." This intimates that possession alone if exclusive, etc., would still be regarded as a sufficient act.<sup>22</sup> The latest decision on the question in West Virginia involves the specific execution of a lease. This case strikes the same note as that sounded in *Smith v. Peterson*, that the agreement "must have been so far executed that a refusal of relief would operate as a fraud upon the party and place him in a situation which does not lie in compensation."<sup>23</sup> It is to be hoped that the West Virginia courts will take cognizance of the value of the opinions in these cases in making their decision on this subject in the future.

Part performance has always been recognized in applying to oral promises for the gift of land where the party relying on the

<sup>19</sup> *Low v. Low*, 173 Mass. 580 (1899); Pennsylvania courts have stated the doctrine of part performance approaching the view of the Massachusetts theory. *Hart v. Carroll*, 85 Pa. 508, 510, (1877); *Dugan v. Colville*, 8 Tex. 126 (1852).

<sup>20</sup> *Smith v. Peterson*, 71 W. Va. 364, 76 S. E. 804 (1911).

<sup>21</sup> *Campbell v. Fetterman*, 20 W. Va. 398; *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391 (1894); *Lipscomb v. Lipscomb*, 66 W. Va. 85, 66 S. E. 8 (1908).

<sup>22</sup> *Gibson v. Stalnaker* 87 W. Va. 710, 106 S. E. 243 (1921).

<sup>23</sup> *Wegman v. Clark*, 94 W. Va. 364, 118 S. E. 517 (1923).

promise takes possession and erects valuable improvements thereon.<sup>24</sup> Possession alone, by the donee has never been considered a sufficient act to take the case out of the Statute. The donee must have made valuable improvements to obtain relief in these sort of cases. To refuse relief where irreparable acts have been performed would work fraud on the donee. The care and high quality of proof which must be exercised in cases of pure gifts is well illustrated by the experiences of Virginia, where the specific execution of parol gifts of land became such a "prolific source of fraud" that a statute was enacted prohibiting the enforcement of such gifts even when followed by possession and improvements of the land by the donee claiming it.<sup>25</sup> West Virginia follows the general rule. Yet it is careful to observe that valuable permanent improvements are made so that a rescission of the gift would result in hardship upon the donee.<sup>26</sup>

There is a strong majority view that refuses to recognize personal services alone as a sufficient act of part performance.<sup>27</sup> As a result great hardship has been worked on those who have rendered services for a great length of time on the strength of an oral promise to have land conveyed to them. The reason for this view is based on the grounds that personal service alone is an unequivocal act not necessarily referring to a contract for the conveyance of land; the connection of the *res gestae* with the alleged contract cannot be established by the *res gestae* themselves but depends on parol testimony. A minority view gives relief where personal services entails a change in life of the party rendering services. Here, the services are of such a peculiar character that it would be impossible to estimate their value "by any pecuniary standard even though possession of the land to be conveyed has never been in the vendee."<sup>28</sup> West Virginia follows this view where the nature of the services rendered is within the character just described.<sup>29</sup>

Whether the doctrine of part performance has application to any contract besides land has been seemingly settled in the negative.<sup>30</sup> The doctrine has received severe condemnation even in

<sup>24</sup> *Freeman v. Wakeman*, 43 N. Y. 34 (1870).

<sup>25</sup> CODE OF VA. 1887, §2413; *Wholford v. Wholford*, 121 Va. 699, 93 S. E. 629 (1917); *Brooks v. Clintsman*, 124 Va. 736, 98 S. E. 742 (1919).

<sup>26</sup> *Harrison v. Harrison* 36 W. Va. 320, 15 S. E. 417 (1892) *Stone v. Hill*, 52 W. Va. 63, 43 S. E. 92 (1902); *Holsberry v. Harris*, 56 W. Va. 320, 49 S. E. 404 (1904); *Moss v. Moss*, 88 W. Va. 135, 106 S. E. 429 (1921).

<sup>27</sup> *Maddison v. Alderson*, *supra*; *Edwards v. Estell*, 48 Cal. 194 (1874); *Miller v. Joiner*, 20 Fla. 479 (1884); *Crabill v. Marsh*, 38 Ohio St. 331 (1882); *Wright v. Puckett*, 22 Gratt. 370 (Va. 1872).

<sup>28</sup> *Watson v. Mahan* 20 Ind. 220 (1863); *Vreeland v. Vreeland*, 53 N. J. Eq. 387, (1895); *Britton v. Coff*, 8 Utah 480.

<sup>29</sup> *Bryson v. McShane* 48 W. Va. 127, 35 S. E. 348 (1901); *Atkins v. Sayre*, 121 S. E. 283 (1924).

<sup>30</sup> *Hammerly v. DeBiel*, 12 Cl. & Fin. 45 (1845); BROWN, STATUTE OF FRAUDS, Chap. 19, §460.



regard to contracts for the sale of land. It has once been expressed as a contrivance "to improve gentlemen out of their estates."<sup>31</sup> Had the Statute been rigorously enforced the result would have been different. "Few instances of parol agreements would have occurred, whereas it is manifest that the decisions on the subject have opened a new door to fraud." It is useless, however, to bewail the laxity that has prevailed in the enforcement of the Statute which has allowed the doctrine of part performance to spring up that has so firmly become rooted in the courts of equity. Our best way out is to require more rigid acts of part performance—acts that approach the irreparable. —A. P.

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HUSBAND AND WIFE, DOMICILE OF WIFE.—The question of when and under what circumstances a wife may acquire a domicile different from that of her husband is becoming more important in the courts of this country. With the so-called "rise of women's rights," noted in the enabling statutes passed in practically all jurisdictions, and in the present tendency towards more equality of treatment by the law, it seems that the conditions under which a wife can acquire a different domicile may be worth consideration.

It is the general principle of the common law that a married woman merges her legal entity in that of the husband, and upon marriage she acquires his domicile,<sup>1</sup> which changes with every alteration of his, regardless of the actual locality of her residence.<sup>2</sup> The common law theory was that the very being or legal existence of the wife was suspended during marriage,<sup>3</sup> that a person under authority of another has no right to choose a domicile.<sup>4</sup> This is the rule in England at the present time. The fact that a wife actually lives apart from her husband,<sup>5</sup> that they have separated by agreement,<sup>6</sup> that the husband may have been guilty of such misconduct as would furnish a defense to a suit by him for restoration of conjugal rights,<sup>7</sup> does not enable a wife to acquire a separate domi-

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<sup>31</sup> *Lindsay v. Lynch*, 2 Sch. & L. 5 (1804).

<sup>1</sup> MINOR, CONFL. LAWS, 46.

<sup>2</sup> *Cheeley v. Clayton*, 110 U. S. 706 (1883); *Watkins v. Watkins*, 135 Mass. 83, 85 (1883).

<sup>3</sup> 1 BL. COM. 442.

<sup>4</sup> STORY, CONFL. LAWS, 46.

<sup>5</sup> *Warrender v. Warrender*, 2 Cl. and F. 488 (1835).

<sup>6</sup> *Dolphin v. Robins*, 7 H. L. C. 390 (1859); in *re. Mackenzie*, (1911) 1 Cha. 578.

<sup>7</sup> *Yelverton v. Yelverton*, 1 Sw. and Tr. 574 (1859); *Dolphin v. Robins*; Note 6, *supra*.