Part Performance in Relation to Parol Contracts for the Sale of Lands

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Part II**

VARIATIONS IN THE FORM OF THE STATUTE OF FRAUDS IN VARIOUS STATES

While the courts have considered the State of Frauds as adopted in the various states to be reenactments of the English act, even a cursory reading discloses that the statute as a whole, and Section Four in particular has been stated in substantially different language in the majority of the American jurisdictions.

The point was minimized in our study of the historical development of the doctrine of part performance because it was not one of the factors that produced confusion in the law. Since the various statutes were interpreted to have the same meaning, inconsistencies in the cases must be charged to the judges construing the Act rather than to its draftsman. In fact the framers of the enactment, as the following paragraphs will reveal, attempted to

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**Part I of this discussion appearing in 35 Minn. L. Rev. 1 (1950), reviewed the historical development of the doctrine of part performance. Part II will deal with the law of part performance analytically, and will attempt to describe the present status of this segment of the law. The cases cited are representative only and are selected from over twelve hundred that were examined by the author.

1. Statute 29 Car. II, c. 3 (1677). Section Four states, "... And be it further enacted by the authority aforesaid that from and after the said four and twentieth day of June no action shall be brought ... (4) ... upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, ... 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 other person thereunto by him lawfully authorized."

2. 35 Minn. L. Rev. 1, 20 (1950).
eliminate entirely the doctrine of part performance in some of the states.\(^3\)

In only a third of the states has the legislature used without qualification substantially the same language adopted by the authors of the parent act. While eleven\(^4\) of the sixteen statutes, modeled after the original act, provide that no action shall be brought to charge any person upon such contracts, the other five\(^5\) varied the terminology of the Enactment by stating that there could be no action brought on the agreement unless the latter be in writing.

The adoption of the borrowed statute under modern rules of construction carries with it approval of the adjudication interpreting the parent act. All but three\(^6\) of this group felt bound to adopt part performance as a judicial refinement of the English act, although in more than one instance the court declared that the British decisions on the point were contradictory\(^7\) and irreconcilable.\(^8\)

A quartet\(^9\) of jurisdictions modified the phraseology so as to provide that all contracts to sell or convey land should be void or invalid unless in writing. In only one\(^10\) of these states was the statute strictly construed, and the doctrine of part performance rejected. The remaining three jurisdictions in this category have no basis upon which to justify part performance in view of the unambiguous language found in their act. It is not, however, seriously suggested that all the former decisions in these three states be overruled at this late date, even though erroneous in their inception.

It has been previously observed\(^11\) that the phrase "no action may be brought" as embodied in the original act refers to suits at law, but not to complaints or bills in equity. Based on the reasoning that the word action had such limited meaning in 1677, the

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\(^3\) See text to note 13 infra.


\(^6\) Kentucky, Mississippi and Tennessee. See 35 Minn. L. Rev. 1, 15 (1950).

\(^7\) Thornton v. Vaughan, 2 Scam. (3 Ill.) 299 (1840).

\(^8\) Hayden v. McIlwain, 4 Bibb. (7 Ky.) 57 (1815).


\(^10\) North Carolina. See cases cited 35 Minn. L. Rev. 1, 18 (1950).

proponents of the ideal claim that the distinction was recognized by the draftsman.\textsuperscript{12} To prevent misunderstanding on this score, six statutes\textsuperscript{13} provide that in relation to oral contracts for the sale of land, "no civil action shall be maintained," or "no contract shall be enforceable," unless it is in writing. These acts represent obvious attempts to exclude part performance since civil actions, or suits to enforce oral contracts include bills or complaints in equity.

Although in eighteen\textsuperscript{14} of the forty-eight states the statute is framed in one of the forms described above, it also contains a proviso expressly recognizing part performance. In a majority\textsuperscript{15} of the enactments of this type, reference is made only to the jurisdiction of the court specifically to enforce the oral contract if partly performed, although in a handful of states\textsuperscript{16} the statute sets out the nature of the acts constituting grounds for equitable relief.

These exceptions are important because they represent a recognition that the principle underlying part performance is sound and just. In more than one instance the exception was a legislative afterthought, the law-makers no doubt having been influenced by the construction accorded the statute by those courts which as a matter of policy either denied or restricted the application of the doctrine of part performance.

Maryland,\textsuperscript{17} New Mexico\textsuperscript{18} and Pennsylvania\textsuperscript{19} either have no provisions that correspond with Section Four of the British Act or else in the process of revising the statutes, that part of Section Four dealing with land contracts has been lost. Florida\textsuperscript{20} and

\begin{footnotes}
\item 16. Ala., Ga., Iowa and La. in part.
\item 17. Maryland has adopted some portions of the Statute of Frauds, but apparently not the provisions relating to contracts for the sale of lands.
\item 20. Fla. Stat. c. 689 (1941).
\end{footnotes}
Washington require all instruments which transfer an interest of freehold or term for more than one year to be by deed, and apparently do not have a separate provision for contracts as such.

**Requisites of Specific Performance Distinguished from Those of Part Performance**

Although the doctrine of part performance is occasionally discussed in other types of actions, the predominate number of cases involve suits for specific execution.

In analyzing particular cases, the judiciary commonly fall into the error of not distinguishing the elements comprising part performance from those relating to specific performance. This is demonstrated by statements purporting to establish standards for determining part performance in which it is declared that the contract proved must be the one pleaded, that the contract must be certain, that it must be free from ambiguity or doubt, and that it must be established by evidence that is clear, definite and unequivocal. Applied to actions involving written contracts as well as oral, the above standards go to the question of whether or not the chancellor should exercise his discretionary prerogative to grant equitable relief, a determination that should be considered separately from the question of whether or not part performance has taken place.

Equally misleading are the statements that classify the payment of consideration as an act of part performance. While originally payment of the consideration was regarded as sufficient justifi-
cation for the equitable enforcement of parol agreements,26 the cases have conclusively determined that in the absence of a statute,27 payment of the consideration is not an act of part performance.28 While the soundness of this holding may be questioned,28a it is nevertheless the law.

If the act of making full or part payment will not take a case out of the statute, will it in conjunction with other acts constitute part performance? It is submitted that the response to this inquiry is no. Payment no longer is relevant to the question of part performance, although it is pertinent in ascertaining whether or not the vendee is in default. The latter determination is made in all cases involving specific execution. Whether the agreement be written or oral, equitable assistance will be withheld from a defaulting vendee.

Scattered among the cases are statements that part payment when coupled with delivery of possession will take a case out of the operation of the statute.29 It is submitted that part or whole pay-

Clock, 53 Hun. 638, 7 N. Y. Supp. 21 (1889); Conkovich v. Conkovich, 144 Neb. 904, 15 N. W. 2d 66 (1944); Goff v. Kelsey, 78 Ore. 337, 153 Pac. 103 (1915); Boland v. Niklos, 77 Utah 205, 293 Pac. 7 (1930); Blanchard v. Mc Dougal, 6 Wis. 167, 70 Am. Dec. 458 (1857).

27. Iowa Code § 622.32 (1946).

28a. There is no sound reason why full payment of the purchase price, if accepted by the vendor should not take a case out of the statute. If there is any question as to whether or not the amount paid is for the payment of a debt rather than for the purchase of land, the vendor is now free to explain the transaction. The removal of the disqualification of the parties to testify takes away the only reason for the rule.

29. Webb v. Marlan, 83 Ark. 340, 104 S. W. 144 (1907); Arkadelphia Lumber Co. v. Thornton, 83 Ark. 403, 104 S. W. 169 (1907); Julten v. Deebale, 88 Colo. 201, 295 Pac. 496 (1931); Dickerson v. Chrisman, 28 Mo. 134
ment adds nothing to the vendee’s case of part performance and that he must rely entirely on the transfer of possession.

Those judges that have analyzed the problem agree that the vendee is not required to make payment in advance of the date fixed in the contract.\(^3\) While tendering payment makes out a better case for specific execution and creates greater equities it does not add to part performance. Usually the contract will call for part payment at the time possession is delivered. If the purchaser is not required however to make payment until some future date specific performance may be denied on the ground of hardship to the vendor, notwithstanding there has been part performance. It is reiterated that in these cases the subject of consideration is relevant only to the question of default by the vendee or hardship to the vendor, but not to the issue of part performance.

**IT IS THE PRINCIPLE NOT THE LAW OF PART PERFORMANCE THAT IS CONFUSED**

While the American states received the doctrine of part performance as promulgated by the British courts they failed to recognize that the doctrine involved two types of cases.

On the one hand the act of the vendor in delivering possession constituted part performance. On the other hand if the vendee was already in possession, it was necessary that he perform some other act in order to take the case out of the statute. Entirely different principles were involved in the two situations.\(^3\)\(^1\)

Overlooking the basic difference in the two lines of cases, the American tribunals did not understand the rationalization of the British adjudications. Ultimately they misapplied not only the principles promulgated by the English courts but also rules pronounced in their own adjudgments. As a result of this misunderstanding, and of this misapplication, the case law as late as 1850


\(^3\)\(^0\) Blunt v. Tomlin, 27 Ill. 93 (1862); Sprague v. Jessup, 48 Ore. 211, 83 Pac. 145, 4 L. R. A. (n.s.) 410 (1905).

\(^3\)\(^1\) The theories that have been proposed in explanation of the possession cases are stated in the text at Note 37, *infra*. The improvement cases are discussed in the text at Note 54, *infra*. 
PART PERFORMANCE was indeed perplexing. If however, all the opinions could be erased from the books and the decisions analyzed on their facts it is clear that the American courts have been remarkably consistent in their adjudication of these cases. Paradoxically, it is not the law but rather the doctrine of part performance that defies analysis.

In the great majority of jurisdictions the acts that will take an oral contract out of the statute of frauds have been judicially determined. While the reasons offered by a tribunal may fluctuate with the change of its personnel, once the court recognizes acts to be part performance the acts remain undisturbed by explanation or logic.

It follows that the facts, not reason, is the basis for stating the law of part performance, and it is in terms of facts that we offer an analysis of the segment of the law.

TRANSFER OF POSSESSION IS PART PERFORMANCE

When pursuant to the contract possession is delivered to the vendee by the vendor, or the vendee takes possession with the express or implied consent of the vendor, such acts are generally, although not universally considered to be an act of part performance.

Possession will be recognized only if it is exclusive, visible and notorious. If any of these elements are lacking the plaintiff must seek another theory upon which to base his case. If, however, the

32. See Part I of this discussion printed in 35 Minn. L. Rev. 1, 20 (1950).
33. Pindell v. Trevor, 30 Ark. 249 (1883); Andrew v. Babcock, 63 Conn. 109, 26 Atl. 715 (1896); Pleasanton v. Raughley, 3 Del. Ch. 124 (1867); Dempo v. Hogan, 57 Fla. 60, 48 So. 998 (1899); Kindeerland v. Kirk, 131 Ga. 454, 62 S. E. 582 (1908); Charprot v. Sigerson, 25 Mo. 63 (1857); Wolf v. Eagleson, 29 Idaho 177, 159 Pac. 1122 (1916).
36. The question of exclusive possession arises when one co-tenant conveys his interest to another co-tenant. Neither tenant is in exclusive possession. The vendee must show fraud in the sense the word is used in this discussion before he is entitled to equitable relief. Obviously possession may not be transferred in such cases. For the discussion of the fraud cases see text at note 82, infra.
purchaser has succeeded in establishing delivery of possession, or if he has taken possession with the assent of the seller, under the alleged oral contract, he has made out his case of part performance.

Although various explanations have been offered for the fact that possession will take a case out of the statute, no single interpretation has survived all the critical examination to which it has been subjected from time to time. Proposed by the courts in the early cases was the theory that a vendee in possession would be a trespasser if the contract were not enforced. Time after time the fallacy of this reasoning has been exposed. Ample authority supports the proposition that if the vendor consents to the possession of the vendee the latter will be a licensee or tenant at will, but never a trespasser. Also offered as a reason for holding that delivery of possession is part performance is the concept that courts of equity recognized livery of seisin as a form of conveyance despite the fact that the statute eliminated it. This explanation neither appears in the cases nor may it be supported by the historical facts. The chancellor was interested in the oral agreement not in the form of the conveyance. If the vendee had been permitted to take possession by the vendor, the former was entitled to his conveyance. Prior to the statute, equity enforced conveyances which were defective because of a lack of livery of seisin. Insofar as equity was concerned the only difference resulting from the statute of frauds was that the recalcitrant vendor was now required to execute a conveyance where formerly he had only to make livery of seisin.

A popular explanation of the possession cases is the so-called unequivocal reference theory. Reasoning that possession would not have been delivered to the vendee in the absence of a contract to sell or lease, the fact of possession is considered unequivocally to point to an agreement. The fact of possession is a substitute for the contract required by the statute.

38. Pomeroy, Specific Performance of Contracts 284 (3d ed. 1926). This theory having appeared in the earlier editions of Pomeroy was frequently restated by courts.
40. Pound, supra note 37, at 939. Professor Pound does not propose to indorse this explanation. He merely furnishes it as one of the possible causes for equity's recognition of part performance.
41. It should be recalled that even prior to the Statute of Uses, equity enforced oral land contracts if there were consideration.
42. See cases cited 35 Minn. L. Rev. 1, 3 (1950).
43. Moreland, supra note 37, at 75.
Despite the wording of the act which in substance provides that the oral agreement may not be enforced, the act under this view is considered to be only evidential in character. Its effect is to exclude oral contracts as evidence. Was not the purpose of the statute to eliminate perjured testimony, the propounders of this theory may ask?

Generally the American Courts have not accepted the unequivocal reference theory in the above form as a reason for recognizing possession as part performance.

Succinctly stating his position on this score, one American jurist has said:

"Part performance takes such a case out of the statute of frauds not because it furnishes any greater proof of the contract, or makes the contract any stronger but because it would be intolerable in equity for the owner of a tract of land to knowingly suffer another to invest time, labor, and money on the lands, upon the faith of a contract which did not exist."

The requirement that possession must be unequivocally referable to the contract is not to be understood as meaning that it is evidence of the contract. Rather it necessitates the buyer to establish that his possession was taken pursuant to the contract. Unequivocal reference is a rule of exclusion applied negatively in the same manner as the tort rule of proximate cause.

If possession is taken because of reasons other than anticipation of the vendor's performance, the possession claimed is not referable to the contract. If the purchaser did not rely on the contract and did not take possession because of it, he was not injured by the owner's failure to perform. Unless the vendee acts in reliance on the vendor's performance his conduct is not referable to the contract, and hence there is no part performance.

Based on the legislative history of the Statute the explanation has been advanced that Section Four of the Statute of Frauds did not apply to courts of equity. Persuasive arguments may be offered in support of this theory. While speculation on this score is interesting, it serves no useful purpose. When once the chancellors de-

44. Maitland, Equity 305 (Brunyate ed. 1949).
47. This is demonstrated by statements appearing in the cases in which the courts explain the vendee's possession as not being referable to a contract of purchase. He is in possession, but the contract is not the producing cause responsible for the possession.
cided litigation on the basis that the statute did not apply to equity, the framers intention faded into the background.

In a handful of states there are adjudications to the effect that a transfer of possession is not of itself part performance. In a number of other jurisdictions the question has not been determined. In the latter instance writers assumed, because of language expressed in controversies involving other acts, that possession would not comply with the standards set by the court. Such argument overlooks the distinction between the possession and the fraud cases; moreover, it fails to account for the weight to be accorded to the English rule and to the majority holding in this country.

Though there may be a lack of popular explanation for the possession cases, it is nevertheless settled that a transfer of possession is such part performance that will take an oral contract out of the statute of frauds. In a proper case, where the vendee has performed and the contract is not unjust or harsh specific performance will be decreed on behalf of either the vendor or vendee.

If the purchaser makes valuable improvements after possession is delivered other equities arise in his favor. Normally, he will in all likelihood make betterments because it is a natural tendency to improve one's newly acquired property. His failure to do so will not, however, prejudice his case if possession has been delivered to him pursuant to the oral agreement.

**Acts of Part Performance Where Delivery of Possession Is Impossible—Adding of Improvement**

As early as 1700 it was held by the British High Court that if a lessee in possession added valuable improvements in reliance on the lessor's oral promise to grant a new term, the contract was taken out of the Statute of Frauds. But if the lessee or vendee merely alleges a retention of possession without other acts, he fails to establish a change in his status by reason of the oral agreement, and is not entitled to equitable relief. Without exception, the cases have

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49. Bell v. Anderson, 220 Ill. 605, 127 N. E. 87 (1920); Bradley v. Owseley, 74 Tex. 69, 11 S. W. 1052 (1889). There is also persuasive dicta in the Mass. cases, although no holdings directly in point.
51. In view of the fact that under the English rule, transfer of possession with consent of the vendor is part performance, and in light of the fact that there are few adjudications directly on point denying that a transfer of possession is part performance in this country, it appears that a transfer of possession is part performance. The dicta in other types of cases must be discounted in view of the distinction in the various types of cases.
adjudicated that retention of possession will not in itself be considered an act of part performance.\textsuperscript{53}

While the reasoning behind these decisions has been stated in a variety of forms, in reality, only two basic concepts are involved. One notion is based on the premise that a statute designed to prevent fraud should not be used as an instrument to perpetrate fraud.\textsuperscript{54} The other theory is founded on the proposition that the vendor’s act in permitting the vendee to make expenditures raises a separate equity, independent of the statute, which ought to be protected.\textsuperscript{55}

Although a convincing argument can be urged that the money value of the improvements may be easily computed,\textsuperscript{56} it is to no avail for the cases have definitely settled the issue. Unquestionably the expenditure of money for repairs in anticipation of ownership by reason of the contract is part performance.\textsuperscript{57}


54. Arguello v. Edinger, 10 Cal. 150 (1858); Cannon v. Collins, 3 Del. Ch. 132 (1867); Pater v. Jones, 16 Fla. 216 (1877); Fall v. Hazelrigg, 45 Ind. 16 (1874); Arnold v. Stephenson, 79 Ind. 126 (1881); Corby v. Corbly, 280 Ill. 278, 117 N. E. 393 (1917); Soeblein v. Pumphrey, 183 Md. 334, 37 A. 2d 843 (1944); Despain v. Carter, 21 Mo. 331 (1855); Dickerson v. Chrisman, 28 Mo. 134 (1859); Johnson v. Bell, 58 N. H. 395 (1878); Nibert v. Baghurst, 47 N. J. Eq. (2 Dick.) 201, 20 Atl. 252 (Ch. 1900); Moril v. Cooper, 65 Barb. Ch. 512 (N.Y. 1873); Johnston v. Baddock, 83 Okla. 285, 201 Pac. 654 (1921); Wagonhurst v. Whitney, 12 Ore. 83, 6 Pac. 399 (1885); Minns v. Chandler, 21 S. C. 480 (1884); Stenson v. Eliman, 26 S. D. 134, 128 N. W. 588 (1910); Granquist v. McKeon, 29 Wash. 2d 440, 187 P. 2d 623 (1947); Fisher v. Moolick, 13 Wis. 321 (1861).


56. Specific execution being a much more accurate remedy than damages, is a desirable one. There is also a strong psychological fact present in many of these cases and that is the purchaser has undergone a change of status from that of a cropper to a freeholder. Today we play down the distinction although at an early day the difference had political as well as social implications.

The improvements must be valuable and permanent, although in determining their worth they may be considered in light of the value of the land. In the event the land is relatively worthless, alteration involving an expenditure of a small sum may satisfy this requisite.

While the term is not used by the courts it would seem that the improvements relied upon must involve capital expenditures as distinguished from repairs required for maintenance. Such differentiation may be implied from the decisions on the one hand holding that if the improvements are of the nature that only an owner would add, the oral contract is taken out of the Statute as distinguished from the cases on the other hand holding that the making of minor repairs or changes does not constitute part per-


formance. The word permanent which creeps into the opinions also suggests that the court is thinking in terms of capital outlay in evaluating improvements added by the vendee.

Expenditures must be made pursuant to and in reliance on the contract and not in anticipation that a contract will be executed at some future date. It is beyond dispute that steps taken by the vendee preparatory to entering into the contract are not acts of part performance.

That the prospective buyer who incurs expenses by reason of minor repairs, is not injured, is noted in the cases. It is observed in these cases that the value of the rental often exceeds the expense of maintenance so that there is no dollars and cents loss to the vendee.

If valuable improvements are made by the purchaser, the vendor may enforce the oral agreement on the theory that the character of the freehold has been changed. Although the property may be more valuable, it is stated that the seller should not be compelled to take back the property in its changed condition. As would be expected there are relatively few decisions on the point inasmuch as the purchaser will usually perform if he has in fact increased the value of the premises by reason of labor and money.

It is settled in this country except in Kentucky, Mississippi, North Carolina and Tennessee that valuable and permanent improvements added to the premises in reliance upon the contract and with the acquiescence of the seller is part performance.


66. See notes 54 and 55 supra.
The bulk of current litigation involving part performance arises from oral contracts for the performance of service in consideration of a promise to convey or devise the promisor's property to the promisee.

Because they have attempted to adjudicate this type of controversy in accordance with principles advanced in other part performance cases, courts have had a great deal of difficulty, as subsequent paragraphs will reveal, in finding a rational basis for the results.

In some jurisdictions the rendition of services, regardless of their nature, was considered to be only the payment of the consideration. Thus in line with the rule that payment of consideration is not part performance, these cases refused to enforce the oral agreement.

Other tribunals applied the possession test, which was tantamount to denying relief in most of the cases. By the terms of the contract the parties usually contemplated that the grantor would remain in possession during his lifetime and that the promisee would not reap his reward until after the promisor's death.

When formalism gave way to equity in a number of states, some strange rules appeared. One such example was the line of decisions reasoning that continuation in possession by the promisee after the death of the promisor satisfied the requisite that the promisee be placed in possession. The fallacy of this approach is obvious when...
it is considered that the death of the promisor does not change the status of the claimant, although it probably produces the uncomfortable realization that the papers were never drawn. At the death of the offeror, nothing more can be done by the offeree in the matter of performance. The latter's rights must be determined as they existed when that event occurred.

Other judges have considered that the claimant by moving on the premises in accord with the agreement, has taken possession. While it was conceded that this was not exclusive possession it was proposed by the judiciary that this was the best possession possible under the circumstances. More formalistic in their view, other courts rejected outright this argument, holding that this type of possession did not satisfy the test of exclusiveness.

In defense of the former view that the promisee has satisfied the requisite of possession, it may be said that in many instances it is more in keeping with the actualities of the situation than the more strict view. Consider the fact that many of the lawsuits arose in the farming country of the middle west where not infrequently one of the sons supports his aging parents in anticipation of receiving the farm on the latter's death. Is the infirm and feeble father in possession or is it his son who is actively engaged in managing the entire farming operation? More than one justice has considered the son to be in possession. In other cases a judge might logically conclude that where the father was still vigorous the latter was actually as

of the world. But over and above this, after her father's death no one does or will deny that she was in open, notorious, visible and undisputed possession.


71. Cases cited at note 68 supra illustrate this proposition. However it should be kept in mind that if the land is not occupied by the promisor, the promisee may take immediate possession. Sometime a father will agree to convey a farm other than the home place to one of his children in consideration of personal services to be rendered to him. In the following cases the promisee did take exclusive possession subsequent to the contract. Stillings v. Stillings, 67 N. H. 584, 42 Atl. 271 (1894); Bohanan v. Bohanan, 96 Ill. 591 (1880); McDowell v. Lucas, 97 Ill. 489 (1881); Harlan v. Harlan, 273 Ill. 155, 112 N. E. 452 (1916); Mahannah v. Mahannah, 292 Ill. 133, 126 N. E. 573 (1920); Atkinson v. Jackson, 8 Ind. 31 (1856); States v. Hill, 10 Ind. 176 (1858); Law v. Henry, 39 Ind. 414 (1872); Cutsinger v. Ballard, 113 Ind. 93, 17 N. E. 206 (1888); Starkey v. Starkey, 136 Ind. 349, 36 N. E. 287 (1894); Fairfield v. Barbour, 51 Mich. 57 (1883).
well as nominally the head of the household. In such instance the father not the son is in possession.

Casting aside artificial results caused by the application of rules created for other types of situations, modern judges if unhampered by prior adjudication tend to group cases involving services into a separate class. The test is not whether possession has been delivered or whether valuable improvements have been added; for the parties themselves do not anticipate such acts. One of two standards is substituted for the traditional criteria in the more recent cases. If either the plaintiff changes the course of his life in reliance on the promise, 7


Remaining at home at a relative's request and in consideration of an agreement to devise the land, when other places seemed more inviting to the promisee, is another example of the type of change in position contemplated by the statute.\textsuperscript{75} Usually relate to caring for an invalid or aged relative\textsuperscript{76} or a close friend, on the promise of a reward. The services must be the consideration for the oral agreement which the plaintiff seeks to enforce.\textsuperscript{77}

No distinction is made between oral contracts to devise and oral contracts to convey when the consideration is either a change of position by the promisee or services rendered to the promisor. In the case of agreements to devise, some tribunals require that evidence be presented showing a contract arrived at in face to face negotiations,\textsuperscript{78} while others permit the agreement to be established by declarations of the agreement made to third parties.\textsuperscript{79}

\textsuperscript{75} Ozeas v. Scarcliff, 200 Iowa 1078, 205 N. W. 986 (1926); Smith v. Yocum, 110 Ill. 142 (1884); Moline v. Carlson, 92 Neb. 419, 138 N. W. 721 (1913); Fox v. Fox, 117 Okla. 46, 245 Pac. 641 (1926).

\textsuperscript{76} Manning v. Franklin, 81 Cal. 205, 22 Pac. 550 (1889); Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 359 (1896); White v. Smith, 43 Idaho 354, 253 Pac. 849 (1927); Willis v. Zorger, 258 Ill. 574, 91 N. E. 963 (1913); Chambers v. Appel, 392 Ill. 294, 84 N. E. 2d 511 (1946); Mauck v. Melton, 64 Ind. 414 (1878); Franklin v. Tuckerman, 68 Iowa 572, 27 N. W. 759 (1886); Houlette v. Johnson, 205 Iowa 687, 216 N. W. 679 (1928); Bielch v. Oliver, 77 Kan. 696, 95 Pac. 396 (1908); Neal v. Hamilton, 159 Md. 447, 150 Atl. 867 (1930); Mannix v. Baumgardner, 184 Md. 600, 42 A. 2d 124 (1945); Felt v. Felt, 155 Mich. 237, 118 N. W. 953 (1908); Lamb v. Herman, 46 Mich. 112, 8 N. W. 709 (1881); Svenburg v. Fosseen, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490 (1899); Brasch v. Reeves, 124 Minn. 114, 144 N. W. 744 (1913); Roberson v. Corcoran, 125 Minn. 118, 145 N. W. 812 (1914); Gupton v. Gupton, 47 Mo. 37 (1870); Hratt v. Williams, 72 Mo. 214 (1880); Sportsman v. Halstead, 347 Mo. 286, 147 S. W. 2d 447 (1941); Johnson v. Risberg, 90 Neb. 217, 133 N. W. 183 (1911); Davis v. Murphy, 105 Neb. 839, 181 N. W. 36 (1919); Danvers v. Davison, 13 N. J. Eq. (2 Beas.) 246 (1861); Cooper v. Colson, 66 N. J. Eq. 328, 58 Atl. 337, 105 Am. St. Rep. 660 (Err. & App. 1904); Tothrop v. Marble, 12 S. D. 511, 81 N. W. 885 (1900); Hanson v. Fresler, 49 S. D. 442, 207 N. W. 449 (1926); Gassett v. Harris, 48 S. W. 2d 739 (Tex. Civ. App. 1932); Leverett v. Leverett, 59 S. W. 2d 252 (Tex. Civ. App. 1933); Milton v. Kite, 114 Va. 256, 76 S. E. 313 (1912); Cannon v. Cannon, 158 Va. 12, 163 S. E. 405 (1932); Worden v. Worden, 96 Wash. 592, 165 Pac. 501 (1917); Velikanje v. Dehan, 98 Wash. 584, 168 Pac. 465 (1917); Slavin v. Ackerman, 119 Wash. 48, 204 Pac. 816 (1922); Luther v. National Bank of Commerce, 2 Wash. 2d 470, 98 P. 2d 667 (1940).

\textsuperscript{76} Cook v. Ely, 116 N. W. 129 (Iowa 1908); Simmes v. Worthington, 38 Md. 298 (1873); Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525 (1948); Tucker v. Kirkpatrick, 86 Ore. 677, 169 Pac. 117 (1917); Clawson v. Brewer, 67 N. J. Eq. 201, 58 Atl. 598 (1904); Stark v. Wilder, 36 Vt. 572 (1864); Wright v. Puckett, 22 Gratt. (Va.) 370 (1872); Wright v. Dudley, 189 Va. 448, 53 S. E. 2d 29 (1949).

\textsuperscript{77} Ackerman v. Fisher, 57 Pa. St. (7 Smith P. F.) 457 (1868).

\textsuperscript{78} Mayo v. Mayo, 302 Ill. 584, 135 N. E. 90 (1922).
Adjudicating each case on its own facts, judges generally have been reluctant to impose a rigid formula to govern all litigation. When has a person changed the course of his life? What precisely are services that are incapable of pecuniary measurement? These obviously are matters that can be determined only in the light of the facts of each case. The court has the parties before it, and if there is any uncertainty as to whether or not the promisor agreed to devise his land, or if the claim is a pretended one, the withholding of specific performance is proper.

That an occasional case smacks of fraud or a judge is required to read a great many decisions involving similar cases, each of which is decided on its own facts, is no excuse for rejecting part performance in this type of case. A defrauding promisor should not be permitted to hide behind the statute if the promisee has sustained injury because of reliance on the oral agreement.

**Acts of Part Performance Where Delivery of Possession Is Impossible**—"Continued"—Fraud

Acts other than delivery of possession, adding of valuable improvements, or the furnishing of personal services are considered as part performance if the vendee is placed in such a position that a fraud will be perpetrated upon him if the contract is not enforced.

While in a sense all the various factual situations stated in the foregoing paragraphs may result in fraud if the statute is strictly applied, the emphasis is placed upon the nature of the act in determining whether part performance has taken the contract from the enactment’s purview.

Transfer of possession furnishes a ready example of the distinction. Because delivery of possession has been adjudged to be part performance, a purchaser is now required only to show that he has been placed in possession, not that a fraud will be perpetrated upon him. A comparable case arises when a purchaser makes capital expenditure in anticipation that property will be conveyed to him. Although the buyer may be defrauded he does not have to claim fraud to evoke equitable aid. Past cases have adjudicated that he has partly performed. The same may be said in respect to contracts to convey or devise when the consideration is personal services; for the rendition of the services is part performance. It is the fact that the service cannot be evaluated rather than the consequences that is determinative of the issue. The possibility of fraud

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may have been a reason for granting relief in the initial case. Now, the important point is the nature of the act.

There is, however, a miscellaneous category of acts which constitute part performance, not because of the nature of the incidents performed but because of the consequences that result from the vendor's failure to perform. In the various factual situations in this group the strict application of the Statute of Frauds would foster frauds.

Broad in scope, the category embraces acts of many varieties. The general principle applied to causes in the fraud group has been stated by Justice Story as follows:

"Nothing is better settled than that the true construction of this statute does not exclude the enforcement of parol agreements respecting the sale of lands in case of fraud; for as it has been very emphatically said, that would make a statute purposely made to prevent frauds, the veriest instrument of fraud."

Since the possibilities of fraud are confined only to the limits of man's imagination it is difficult to fashion a factual pattern for adjudging these cases.

However, the types of behavior that courts have deemed fraudulent may be gleaned from prior cases. Failure to keep a promise to convey to a mortgagor if he would refrain from bidding at the foreclosure sale; refusal to sell a house to a prospective purchaser who had obtained governmental priorities necessary for its construction; abrogation of an oral contract to transfer land to plaintiff in consideration of a conveyance of purchaser's prior interest to the promisor; repudiation of an agreement to divide an estate in return for the purchaser's promise to forbear filing a caveat to a will; refusal to perform a promise to convey after the vendee had released dower and homestead rights in accordance with the contract, are representative factual situations.

Familiar to Minnesota jurists are the cases of Brown v. Hoag and Slingerland v. Slingerland, both of which fall within this category.

In the former litigation, Hoag relinquished his claim to prop-

87. 35 Minn. 373, 29 N. W. 135 (1886).
88. 39 Minn. 197, 39 N. W. 146 (1889).
erty described in a certain deed in consideration of a quitclaim deed and bill of sale to be executed in favor of his wife.

The Slingerland controversy originated through a promise made by a father to his son, the former agreeing to convey if the latter would dismiss actions at law pending against the father, and in addition marry a certain young lady selected by the parent.

Both of the parol contracts were enforced on the ground that the vendor's failure to perform would result in injury to the vendee. Stated the court in the Hoag case:

“As already remarked, the doctrine of part performance rests on the ground of fraud. The underlying principle is that where one of the contracting parties has been induced or allowed to alter his situation on the faith of an oral agreement within the statute, to such an extent that it would be a fraud on the part of the other party to set up its invalidity, equity will make the case an exception to the statute.”

While applicable to the case at bar, the reasoning advanced by the court does not apply to all cases of part performance. Reading such meaning into the principles pronounced in the Hoag controversy, the same court in later cases stated fraud formed the only basis for the enforcement of oral contracts for the sale of lands. This error in so far as Minnesota is concerned was not corrected until five years ago in the case of Shaughnessy v. Eidsmo.

In 1946 the Minnesota Court, recognizing the distinction between the possession and the fraud cases, made clear that more than one type of act may constitute part performance. While Brown v. Hoag was expressly overruled, in so far as the possession cases were concerned, it was unnecessary to do so in order to decide the Shaughnessy litigation. The two controversies were based on different principles and facts.

The cases adjudicated on the fraud theory of part performance represent a catch-all in which the only element in common is the fraud of the vendor in not performing after he has induced the
vendee to relinquish a valuable right as consideration for the contract.

**Gifts and Part Performance**

While the law of gifts is not within the purview of this discussion, it is necessary because of the language used in some of the cases to distinguish a gratuitous transfer of land from a sale.

It is settled beyond dispute that a bare oral promise to make a gift will not be enforced in equity. There is a split of authority on the question of whether or not a promise to make a gift will be specifically executed if the prospective donee has been induced to improve the subject matter of the donation upon the promise that it will be his at some future date. Although there is no uniformity as to the principles underlying the rule, the majority of jurisdictions favor specific performance upon a showing that the donee has relied to his injury on the donor's offer to make a gift.

Stating that the adding of improvements furnishes consideration in equity, one line of cases holds that the promise will be specifically enforced in that forum. Other authorities suggest that it would be inequitable to refuse specific execution and find an equity has been raised if the voluntary promise has induced the donee to act to his detriment.

In adjudging cases of this nature, judges do not always realize that instead of a promise to make a future gift, the promisor may intend to enter into a contract, the word gift having been used in its broad sense to mean a grant of land in any form.

The distinction between a gratuitous transfer and one based

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94. Cases cited in footnotes 95 and 96 infra support this conclusion. The cases cited in the discussion of gifts are represented only. No attempt has been made to collect all or any considerable portion of the cases.

95. Gynn v. McCauley, 32 Ark. 97 (1877); White v. Ingram, 110 Mo. 474, 195 S. W. 827 (1892); Hubbard v. Hubbard, 140 Mo. 300, 41 S. W. 749 (1897).

on consideration is brought sharply into focus by Section 90 of the Restatement of the Law of Contracts. There it is stated:

"A promise which the promisee should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce some action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

The typical controversy originates from an informal offer whereby the promisor may state to his son or to one of his other relatives, "If you will clear the south forty and build a house, I'll deed it to you."

Reasoning that the performance of the agreement will not be beneficial to the offeror, courts treat the above offer as a promise to make a gift. Is not the loss to the promisee in terms of time, money and inconveniences sufficient consideration to support the agreement? Must it be beneficial to the promisor? Under the rule announced by the better authorities, detriment to the promisee incurred through performance of the agreement will constitute consideration. The example cited above if performed is a contract and not a gift.

The important point in determining the character of the agreement is whether or not performance was pursuant to, and in reliance on the promise. If this be established the agreement is a contract. If on the other hand the promise relates to acts already performed, the promise is gratuitous, and is subject to equitable principles relating to gifts, which have been described above.

Because gifts are not enforceable except in very special circumstances in some jurisdictions, it is wise to make the distinction between voluntary promises and contracts of sale in each instance, even though in some states the result would be the same in either type of case.

The Case for Repealing the Statute of Frauds

Writing a century ago, the biographer of Lord Nottingham recounted that the latter was the "author of the most important and
most beneficial piece of juridical legislation of which we can boast."\textsuperscript{101}

A number of years and several thousand cases later, a weary and perplexed judge likewise evaluated the same piece of legislation. But through the years the complexion of the Statute must have changed, for in this instance, the commentator declared, "I speak perhaps, with excusable warmth upon this subject because I have devoted a great deal of time, which might have been better employed, to this piece of morbid anatomy."\textsuperscript{102}

More temperate in his appraisal, the foremost legal historian of our century proposed that the Statute filled a need at the time of its adoption, but that it has not outlived its usefulness. However in fairness to Lord Nottingham, the critic of the Enactment pointed out that it was dealing with unknown problems which could not have been reasonably foreseen.\textsuperscript{103}

On the British side of the Atlantic, the growing dissatisfaction with the Statute has culminated in the recommendation that it be repealed.\textsuperscript{104} At least three factors have contributed to this move to abolish the Statute in its entirety.

The first cause was legislation enacted by Parliament in 1851\textsuperscript{105} which removed the disqualification of the parties in civil actions. Prior to that date, the defendant could not testify in his own behalf,\textsuperscript{106} creating a real likelihood that he might be perjured out of his estate. Once the disqualification was removed, the defendant could completely explain the transaction and no greater danger existed in respect to contracts for the sale of lands than in other types of transactions.

The second factor which tended to destroy the utility of the Statute was the great body of case law that came into being by reason of litigation on poorly drafter sections of the Act. This problem was highlighted by Lord Wright in a review of Williston's Treatise on Contracts.

Stated the reviewer with respect to the discussion on Sections Four and Seventeen of the Statute, "It is to be observed that the discussion of these two sections which consist of perhaps 200 or

\textsuperscript{101}2 Campbell, The Lives of the Lord Chancellors and Keepers of the Seal 421 (1846).
\textsuperscript{102}Justice Stephens cited in Note, 43 L. Q. Rev. 1, 2 (1927).
\textsuperscript{103}6 Holdsworth, History of the English Law 396 (1924).
\textsuperscript{104}The Lord Chancellors' Committee on Law Revision, Sixth Interim Report (Cmd 5 449) 4-12 (1937).
\textsuperscript{105}Statute 14 & 15 Vict. c. 99 (1851).
\textsuperscript{106}2 Wigmore, Evidence 683 (3d ed. '1940).
300 words in all occupies just over 400 pages of the book. How many thousands of cases are cited I do not know.

Disagreement by the judiciary with the policy of the statute is the third cause that has contributed to its disfavor. Why should this particular type of agreement be reduced to writing when thousands of other contracts involving large financial transactions may be enforced solely on parol testimony of oral agreements? Summing up this objection one jurist has declared:

"I have sometimes in more formal moods said to myself that no contract should be enforceable unless it is a written contract, in other words, that the valid formation of the contract should be conditioned by its being reduced to writing. But a little reflection has also told me that not only every day bargains but many more important contracts are made and done by word of mouth."

Judges have constantly found that a strict application of the Statute as written would produce more frauds than it would prevent, and they have therefore not hesitated to find grounds for exceptions in the interest of justice when the exigencies of the case so demands.

Unquestionably, conflict of policies created by the Statute causes it to be a perpetual source of litigation. If all facts are considered it is doubtful if Section Four of the Statute serves a useful purpose in the time in which we live.

**Conclusion**

Judges and text writers have generally believed that the principles underlying the doctrine of part performance have been fairly worked out, but that the cases are irreconcilable and that the whole law on this subject is in a state of confusion.

The converse may be true for it is the doctrine of part performance that is in a state of confusion and not the law. This has happened despite the fact that the courts have misconstrued statutes, disregarded precedents, and fabricated their own reasons for reaching desired results. Perhaps the causes for the consistent results generally achieved is so simple that judges have stumbled over it while looking for some complicated formula. Could it be that the fundamental idea which has guided the development of part per-

108. *Id.* at 204.
formance is only that the "statute must not be made a cloak for fraud," in the sense that fraud implies dishonest conduct.

In any event in the great majority of jurisdictions any one of the following factual situations are considered to be acts of part performance and will take a parol contract out of the Statute of Frauds.

1. Delivery of possession to the vendee, or the vendor's assent to the former's act of taking possession.

2. Capital improvements made pursuant to and in reliance on an oral agreement if they are made with the assent of the vendor.

3. Change of position or the rendition of personal services incapable of pecuniary evaluation when performed in consideration of a promise to devise or convey real property.

4. Probability of a perpetration of a fraud by the vendor where the vendee has performed a promise to relinquish a valuable right in accordance with the terms of the agreement.

Once part performance has been determined, whether or not specific performance will be decreed will depend on the equities in the case and whether the vendee has performed.

While there are deviations in respect to minor points the major facts that constitute part performance have been judicially determined in most of the states. But however refined may be the classification of the principles and the factual situations of the law of part performance, there will always be a tremendous amount of litigation so long as the Statute remains on the books. Each combination of facts presents a new case. Each set of circumstances raises afresh the conflict between the basic policy of the Statute and the equities inherent in acts of part performance. Each judge feels constrained to determine the equities in accordance with his own notion of the place of the statute in our system of jurisprudence.

In conclusion it may be stated that the bulk of the case law is so great that its usefulness as precedent is impaired. After examining cases from all American jurisdictions covering a period of 150 years we heartily endorse the recommendations of a distinguished equity scholar, who, after experiencing the same difficulties, declared:

109. 6 Holdsworth, op. cit. supra note 103, at 659. Holdsworth states, "On the other hand, the fact that the grant of this relief was discretionary made it possible for equity to look closely at the conduct of the parties, and to insist that it should be fair and reasonable. It was partly the insistence
"But the more extensively one gives consideration to the reported record of the struggle between a statutory policy of 1677 and the human feeling of the judiciary from then to now, the more the thought comes that there is much in the proposal of the Lord Chancellor's Committee on Law Revision that the Statute of Frauds be repealed in its entirety."\textsuperscript{110}