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POSSESSION

AS SUFFICIENT PART PERFORMANCE TO RAISE THE STATUTE OF FRAUDS.

The fourth section of the Statute of Frauds¹ provides that no action shall be brought to charge any person upon, “. . . any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, . . . unless the agreement upon which 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.”

Ostensibly the purpose of the statute was to prevent perjuries and fraud and on its face would seem to be unequivocal, yet courts, “. . . sometimes yield to the appeal made to their sympathies by the exigencies of special circumstances and in this way there has gradually developed upon this “bulwark of jurisprudence” a parasite strangely coddled and nurtured by judges who have allowed themselves from time to time to be carried away by prejudice from these special circumstances.”² This parasite is the so-called doctrine of part performance, the development of which is an excellent example of judicial legislation.

Experience of centuries had shown the English people that in a great many cases men were deprived of their lawful property by the fraud of parties and the perjury of witnesses swearing to parol agreements and to livery of seisin which were contrary to the actual facts. Passed in the light of the circumstances then existing the clear and obvious purpose of the statute was to prevent fraud and perjury. But courts of equity soon saw that strict application of the statute might work great hardship on a people that for centuries had been accustomed to transferring land by livery of seisin only, especially when the majority could neither read nor write. Consequently less than ten years after the passage of the statute the court began to de-

¹ Statute 29 Charles II; 8 Statutes at Large, 405.

² “Judicial Repeal of the Statute of Frauds,” by Jessee W. Lillenthal, 9 Harvard Law Review 455.

velop the principle that certain acts of part performance by way of carrying out a parol contract for the sale of lands warrant a court of equity to decree specific performance notwithstanding the apparently unequivocal language of the Statute of Frauds.

The explanation³ of the doctrine of part performance that prevails today seems to be that expressed by Lord Westbury to the effect that, ". . . equity will not permit the statute, the purpose of which was to prevent fraud, to be used as an instrument to commit it,"⁴ and somewhat elaborated in *Brown v. Hoag*,⁵ ". . . 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." It is pointed out that ". . . the difficulty is in applying the principle to the facts of the particular case, and in determining whether a fraud will result unless the agreement be enforced," since, "Acts of part performance may be done which will not take the case out of the statute."⁶ The problem, then, is to determine in general, what acts of part performance have been deemed sufficient to raise the statute, with special emphasis upon the influence the delivery of possession has had upon the doctrine.

Four states while adopting almost in its entirety the English Statute of Frauds, have steadfastly refused to follow the practice of the English courts in allowing part performance to raise the statute, and in those states all contracts relating to the sale of land or to any interest therein require a writing to make them enforceable.⁷ It is interesting to note, however, that the pur-

³ Other explanations of the doctrine have been given; for instance, it was suggested that part performance is a valid substitute for the requisite writing required by the statute; but the rule was established by equity and only equitable remedies are available. It cannot therefore be said that the requirements are satisfied by part performance. It was also suggested by Mr. Costigan that the statute was never intended to apply to courts of equity, but the rule as laid down by the courts has been otherwise (14 Ill. Law Review 5).

⁴ *McCormick v. Grogan*, 4 L. R. (H. of L.) 82 (1869).

⁵ 35 Minnesota 373, 29 N. W. 135 (1886).

⁶ *Slingerland v. Slingerland*, 39 Minn. 197, 39 N. W. 146 (1888).

⁷ *Doty v. Doty*, 118 Ky. 204, 80 S. W. 303 (1904); *Goodlow v. Goodlow*, 116 Tenn. 252, 92 S. W. 767 (1906); *Washington v. Soria*, 73 Miss. 665, 19 So. 485 (1895); *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143 (1900).

chaser has been protected by giving him a lien to the extent of the improvements or the purchase money.⁸

Those acts of part performance which are usually relied upon to take the case out of the statute are: payment of all or part of the purchase price; permanent and valuable improvements; possession by the purchaser with the consent of the vendor, or combinations of the above acts. It is well settled both in England and the United States that mere payment of the purchase money is not a sufficient part performance.⁹ The doctrine that services rendered as payment in pursuance of an oral promise to convey an interest in land do not take the case out of the statute is followed generally.¹⁰ But in cases of severe hardship, where the purchaser has given up other occupation or has materially altered his position in life to such an extent that it would be a virtual fraud upon him to bar recovery because of the statute, services have been held to be sufficient part performance.¹¹ It is well settled that marriage is not sufficient part performance to raise the statute.¹² The making of valuable improvements and payment of purchase money taken together have been held sufficient.¹³

It is difficult to understand the principles of equity which underlie that group of cases known as the "possession cases" and efforts of the chancellors to support it rationally have been singularly unhappy. In truth some chancellors have come to

⁸ See *Usher v. Flood*, 83 Ky. 552, 17 S. W. 132 (1886).

⁹ Lord Hardwicke stated a contrary opinion in *Lacon v. Martins*, 3 Atk. 1, but this opinion has been overruled. See *Frame v. Dawson*, 14 Vesey 386, where it is said, "Lord Redesdale, in a case before him, states his opinion that payment of money is not a part performance; yet there the act can hardly be said to be equivocal in its nature; as the payment of a price presupposes a sale; but the money may be repaid; and the parties restored to their former position." Also see *Britain v. Rossiter*, 11 Q. B. D. 123, where Cotton L. J. said, "It is well established and cannot be denied that the receipt of any sum under the contract, will not entitle the other to enforce a contract within the 4th section."

¹⁰ *Mills v. Joiner*, 20 Fla. 479 (household services of daughter); *Peters v. Dickinson*, 67 N. H. 389 (work and labor); *Ellis v. Cary*, 74 Wis. 73 (legal services).

¹¹ *Loyd v. Hollenback*, 98 Mich. 203; *Pflugar v. Puttz*, 43 N. J. Eq. 440.

¹² Lord Cranworth in *Caton v. Caton*, L. R. 1 Ch. App. 137 (1866), "That marriage is not part performance within the rule of equity is certain. Marriage is necessary in order to bring the case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity."

¹³ *Fulton v. Jansen*, 99 Cal. 587, 34 Pac. 331.

regard it as an anomaly in the law with nothing more to support it than history and precedent.¹⁴

Obviously in cases where there is actual fraud,¹⁵ the case can be taken out of the statute on purely equitable grounds supported by the reasoning that equity will not permit a statute the purpose of which was to prevent fraud, to be used as an instrument to effect it. But unless in equity it amounts to a fraud where the defendant pleads an unequivocal statute which requires a writing in all contracts where land is the subject matter, it is difficult to understand why possession of the land by the purchaser should be sufficient to raise the statute. A review of some of the reasons which have been given by the courts may be enlightening.

The English rule¹⁶ is that receipt of possession from one's vendor or lessor, or the taking of possession with the consent of the vendor or lessor, takes the case out of the Statute of Frauds. This view has been followed in some of the states.¹⁷ The prevailing English rule was adopted at a time when the courts had a manifestly hostile attitude toward Statutes passed by Parlia-

¹⁴ See the remarks of Lord Blackburn in *Maddison v. Alderson*, L. R. 8 Appeal Cases 467 (1883): "This is, I think, in effect to construe the fourth section of the Statute of Frauds as if it contained these words, 'or unless possession of the land shall be given and accepted.' Notwithstanding the very high authority of those who have decided those cases I should not hesitate if it was *res integra* in refusing to interpolate those words, or put such a construction on the statute. But it is not *res integra*, and I think that the cases are so numerous that this anomaly, if, as I think, it is an anomaly, must be taken as to some extent at least established. If it was originally an error it is now, I think, *communis error*, and so makes the law."

¹⁵ See *Fowcroft v. Lessler*, 1 English Reports 105 (1700), where the defendant kept back deeds from the dying man when he wished to execute them; also *Mullet v. Halfpenny*, 2 Vern. 373. See comments of Lord Hardwicke in *Welford v. Beazley*, 3 Atk. 503. Compare *Bawdes v. Amhurst*, 2 Pr. in Ch. 402.

¹⁶ *Dale v. Hamilton*, 5 Hare 369; *Clinan v. Cooke*, 1 Sch. & Lef. 22.

¹⁷ Cases cited in 1 Ames, Cases in Equity Jurisdiction 279, note 1. Williston in the Restatement of the Law of Contracts, Sec. 194, lists thirteen states which either by decision or dicta have held possession alone sufficient, but also makes the statement that it is doubtful if this is the majority view in America today. He cites the following cases as apparently holding possession alone as enough: *Puterbaugh v. Puterbaugh*, 131 Ind. 280; *Anderson v. Simpson*, 21 Iowa 399 (by statute); *Wharton v. Stoutenburg*, 35 N. J. Eq. 266. Moreover possession alone has been specifically held not to be sufficient; see *Glass v. Hulbert*, 102 Mass. 32; *Corbly v. Corbly* (Ill.), 117 N. E. 393. It is submitted that while it is often said that possession alone is sufficient the cases which are cited to uphold this contention often contain other elements. See *Miller v. Lorentz*, 39 W. Va. 160.

ment which was coupled with a belief in a natural justice above the ordinary laws of man and an exaggerated sense of their ethical responsibility. It originally contemplated the taking of possession by the purchaser as in substance a common law conveyance by livery of seisin.¹⁸ Some states which have followed the English rule have supported it upon the livery of seisin concept, namely, that at the time the English statute was passed livery of seisin was the only method by which land was conveyed, and that it was entirely natural that cases would arise where injustice would be done unless the statute were to receive an equitable interpretation, and in view of the circumstances the presumption was that the statute was not passed for the purpose of violating the common law. Furthermore if the vendee was put in possession by the vendor this was certainly the best evidence of a previous livery of seisin and in view of the hardship inuring to the purchaser if the statute was rigidly enforced, there being no other method of conveying land, possession under these circumstances was held sufficient to avoid the statute.¹⁹ The fallacy of this reasoning is best illustrated by a quotation from *Poorman v. Kilgore*,²⁰ "But exceptions founded on this principle must naturally be but temporary expedients, which must die away when the new law itself has become part of the general law of the country. Now that common law form has worn out and delivery takes place without any form at all, almost always by a mere entry on a permission, expressed or implied, and thus the publicity and form of the delivery no longer avails as a check upon the mere invention of the sale."

It might be argued that the statute was passed in a direct attempt to abolish all forms at common law which were conducive to fraud, of which livery of seisin was one.

Another explanation which has been offered is, that if the vendee in possession is not allowed to show the existence of a contract by which he went into possession he lays himself open to an action of trespass, which would be a fraud of the worst character upon him. Then it is argued, that if the contract is

¹⁸ See the article by Roscoe Pound in 33 *Harvard Law Review* 952; "Progress of the Law—Equity."

¹⁹ For an excellent review of this doctrine see the opinion of Holt J., in *Miller v. Lorentz*, *supra*, note 17.

²⁰ 26 *Pennsylvania St. Rpts.* 365, 67 *Am. Dec.* 524.

admitted for the purpose of defense to the action of trespass it should be admitted throughout.²¹ It is impossible to estimate the influence of this reasoning upon the American courts, but there are many expressions of it to be found in cases in jurisdictions which adhere to the English rule.²² But, it is submitted, this reasoning admits of some errors, for admitting the truth of the premises the conclusion which is drawn does not necessarily follow. That is to say, while not contravening the statute to allow the contract to be offered in evidence as a defense to an action of trespass, yet it would be in the very teeth of the statute to allow a defendant to be charged on a contract under the circumstances of the vendee in possession. There being no fraud, since the vendee has an adequate defense to trespass, there is no necessity for lifting the statute, as to do otherwise would completely abrogate its provisions.²³

Lord Selborne has explained the anomaly upon truly equitable grounds. "In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract itself," which is equivalent to saying that when the plaintiff has established the act itself, the court can then direct its attention to the "equities" arising therefrom. His theory seems to predicate itself upon striking a nice balance between the parties, for he continues, "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. The choice is between undoing what has been done (which is not always possible, or if possible, just), and completing what has been left undone."²⁴ Here the major premise appears to be

²¹ This view is ably expressed by the Lord Chancellor in *Oltman v. Cooke*, 1 Sch. & Lef. 22; ". . . if upon a parol agreement a man is admitted into possession he is made a trespasser as if there be no agreement. For the purpose of defending himself such evidence (i. e. of the parol agreement), was admissible and if it was admissible for such purposes there is no reason why it is not admissible throughout. That, I apprehend, is the ground on which courts of equity have proceeded in permitting part performance of an agreement to be a ground for avoiding the statute."

²² See *Mowery v. Davis*, 12 Ind. App. 681 *Calanchini v. Branstetter*, 84 Cal. 249; *McNeil v. Jones*, 21 Ark. 277; *Edwards v. Fry*, 9 Kans. 417; *Goney v. Timmons*, 16 S. C. 378.

²³ See *Ann Berta Lodge v. Leverton*, 43 Texas 18.

²⁴ *Maddison v. Alderson*, *supra*, note 14.

erroneous, for it is the contract which the court is enforcing not the equities. This is expressed rather strongly in *Brown v. Pittinger*,²⁵ "Part performance will take the case out of the statute and support the suit on the *agreement*."

Another line of decisions has explained the doctrine on the ground that coupled with fraud the act done as part performance must be done in reference to a contract, before the statute is raised, thus putting the jurisdiction not merely on the ground of fraud but upon evidence.²⁶ This view considers the Statute as evidential, and as possession has been said to be inexplicable other than pointing to a contract, the natural presumption is that possession is sufficient evidence to satisfy the statute. But granting that the statute is evidential, it provides in no uncertain terms what evidence shall be sufficient, namely, a writing, and admission of any evidence other than a writing would seem to be a direct contravention of its terms. On the other hand if the statute is considered as substantive, under the facts, there would be no contract. It might well be pointed out that as this theory is not predicated upon fraud but upon the fact that the plaintiff's act affords strong circumstantial evidence of some contract; an act, in itself trivial, might amount to part performance sufficient to raise the statute, if it clearly indicates a contract.²⁷ On the other hand, acts not complying with this rule have no effect, notwithstanding great hardship which might be worked on the plaintiff.²⁸ Then too, the taking of possession with the vendor's permission is not unequivocally referable to a contract, as possession might have been taken under a parol license.

Many states while not willing to follow the English rule strictly have followed it in spirit, but in so doing they have sought to limit the arbitrary exceptions to the statute by providing that the possession must have certain required characteristics, or be accompanied by certain other acts. The following

²⁵ 81 N. J. Eq. 229.

²⁶ "The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract and as sufficient to authorize an inquiry into the terms, the court regarding what has been done as a consequence of contract or tenure." Sir T. Plumer in *Morphett v. Jones*, 1 Swanson 173 at 181; 36 Eng. R. 344.

²⁷ *Dickinson v. Barrow*, 73 L. J. Ch. 701.

²⁸ *Maddison v. Alderson*, *supra*.—Note 14.

are typical examples: Where possession is sufficient it is usually required to be exclusive;²⁹ it must be taken in pursuance of the contract;³⁰ it is also generally held that a mere continuance in possession is not sufficient since it does not necessarily point to a new contract, but might have been continued under a previous right or title;³¹ and it has also been said that there has been no change of position on the plaintiff's part which could work a fraud upon him on refusal of specific performance.³² In addition it is almost universally held that the possession must be taken with the consent of the vendor,³³ since in the absence of such consent there would be no fraud upon the plaintiff.³⁴ Several jurisdictions, while holding that possession alone is not sufficient, say that it is necessary.³⁵ Taking possession in pursuance of a contract plus payment of purchase price in whole or in part is usually held to be sufficient;³⁶ as is also possession plus the making of improvements;³⁷ but this doctrine is limited

²⁹ *Cronk v. Trumble*, 66 Ill. 428; *Johns v. Johns*, 67 Ind. 440. It is usually held that the possession of a son with his father is not enough, inasmuch as the possession may be explained on other grounds rather than on a contract. But see *Taylor v. Taylor*, 99 Pac. Reporter 814 (1908), where an oral promise by B. that if his son A. would support B. and B.'s wife during their lives, that A. should have the property. A. went into possession with B. and performed the required services. The court held that the possession "was as exclusive as the terms of the contract and the circumstances would permit. . . ."

³⁰ See *Frame v. Dawson*, 14 Vesey 386; "It is necessary therefore to show a part performance; that is, an act, unequivocally referring to, and resulting from, the agreement. . . ." See also *Brennan v. Bolton*, 2 Dr. & War. 349; where it was held that "Any act which may be referred to a title distinct from the verbal agreement of which specific performance is sought cannot be considered as a part performance thereof. . . ." The same position was taken where the purchaser had the power of eminent domain, it being said that "the possession might be referred to the exercise of that power. *Haisten v. Savannah, etc., R. Co.*, 51 Georgia 77. For other illustrations see 36 Cyc. at page 660, note 77.

³¹ *Dunckel v. Dunckel*, 8 N. Y. Sup. 888; *Barnes v. Boston, etc., R. Co.*, 130 Mass. 38.

³² *Ackerman v. Fisher*, 57 Pa. St. 457.

³³ *Czermak v. Wetzel*, 114 N. Y. App. Div. 816, 100 N. Y. Sup. 167 (1906).

³⁴ *Moore v. Higbee*, 45 Ind. 487.

³⁵ *Woods v. Stevenson*, 43 W. Va. 149; *Weeks v. Lund*, 69 N. H. 78. "It is the notoriety of change of possession in execution of a parol contract, that more than anything else takes a case out of the statute." *Ackerman v. Fisher*, *supra*, Note 32.

³⁶ *Humbert v. Brisbane*, 25 S. C. 506; *Frede v. Pflugradt*, 85 Wis. 119.

³⁷ *Harman v. Harman*, 70 Fed. 894; *Andrew v. Babcock*, 63 Conn. 715.

in some states which hold that possession, plus improvements plus payment is not sufficient unless referable to a contract and with the consent of the vendor.³⁸ In dealing with these cases one might naturally be prompted to inquire why it is that payment of purchase money, or possession, or the making of valuable improvements, which in themselves are not enough to raise the statute, still, when taken together, have that particular force. Courts of equity have been extremely reticent in supporting this apparent "anomaly upon an anomaly," and it is manifestly for a good reason, as it is very difficult to understand, (speaking abstractly by way of illustration), how nothing plus nothing can be woven into something which will have the force necessary to raise a statute which appears unequivocal on its face.

There is apparent in many jurisdictions a healthy tendency on the part of the courts of equity, while not repudiating the doctrine of part performance, to substantiate it upon purely equitable grounds, thus steering clear of arbitrary holdings and ambiguous reasoning, which have proved to be so unsatisfactory in the past to both bench and bar.³⁹ Lord Cottenham has usually been given credit for originating the theory of "irreparable injury" when he said in the classic case of *Mundy v. Jolliffe*,⁴⁰ "Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract, has upon the faith of such engagement, expended his

³⁸ See *Black v. Black*, 15 Ga. 445; *Van Epps v. Redfield*, 69 Conn. 104, 36 At. 1102 (1897).

³⁹ For instance in the earliest case where possession alone was held to be sufficient the judge said: ". . . inasmuch as possession was delivered according to the agreement, he took the bargain to be executed" (*Butcher v. Stapley*, 1 Vernon 363), which is equivalent to giving no reason at all, unless it be that a contract executed on one side is not within the statute, a dogma that cannot seriously be maintained. Also see *Ungley v. Ungley*, Law Reports, 5 Ch. Div. 387, where the court said: "The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the court to admit evidence of the terms of the contract in order that justice might be done between the parties." One might be led to remark in this connection that the very purpose of the statute was that justice might be done between the parties."

⁴⁰ 5 Mylne & Craig, 167.

money or otherwise acted in execution of the agreement. Under such circumstances the court will struggle to prevent such injustice from being effected; and with that object, it has, at the hearing, when the plaintiff failed to establish the precise terms of the agreement, endeavored to collect, if it can, what the terms of it really were." Some courts have seized upon the general principles of the doctrine thus stated and have confined the principle of part performance, where sufficient to raise the statute, to those cases where damages at law would be inadequate and the complainant would suffer irreparable injury if the relief of specific performance were not given. This appears to be a step in the right direction.⁴¹ While admitting the force of the argument that no act of part performance should avoid an unequivocal statute,⁴² still it must be admitted that the fundamental purpose of a court of equity is to give relief where the

"The evolution of the doctrine with this final result can easily be traced in several jurisdictions. For instance, an early case in West Virginia held that possession alone was a sufficient part performance (*Campbell v. Fetterman*, 20 W. Va. 398; also *Lipscomb v. Lipscomb*, 66 W. Va. 55); but the recent case of *Smith v. Peterson*, 71 W. Va. 364 (1911), held that acts done to be sufficient part performance must make "an altered situation on the part of the vendee not compensative in money, and make non-compliance on the part of the court to decree specific performance on petition of the vendor, inequitable and fraudulent." See also for a holding in harmony with this opinion, *Wegman v. Clark*, 97 W. Va. 364 (1923). In the early case of *Pugh v. Good* (Pa.), 57 Am. Dec. 3, the Pennsylvania court took the position that possession alone was enough, but this has been repudiated by *Hart v. Carroll*, 85 Pa. 508. Woodward J. speaking for the court said: "The evidence must establish the fact that possession was taken in pursuance of the contract, and at or immediately after the time it was made, the fact that the possession was notorious and the fact that it has been exclusively continuous and maintained. And it must show performance or part performance by the vendee which could not be compensated in damages, and such as would make rescission inequitable and unjust." Also compare the decision in *Rhodes v. Rhodes*, 3 Sand. Ch. 279 (N. Y.), with the opinion of Judge Cardozo in *Burns v. McCormick*, 233 N. Y. 230 (1922). The general rule as above stated also apparently prevails in the Federal courts, *Purcell v. Minor*, 4 Wall. 513, and is undoubtedly the rule in Texas, *Dugan v. Colville*, 8 Tex. 126; *Ann Berta Lodge v. Leverton*, 42 Tex. 18. For an excellent statement see *Burns v. Daggett*, 141 Mass. 368.

"See the opinion of Judge Bibb, in *Grant's Heirs v. Craigmiles*, 4 Ky. 203, at 207, "Some judges have thought that another kind of evidence was equipollent with written evidence . . . deemed part performance. The same fraud and perjury which can conceive and prove the agreement by parol can also prove the performance in part, in a group of cases clearly coming within the mischiefs intended to be provided against by the statute. So far as these decisions enliven and convince the understanding and judgment, they will be respected, but we are opposed to adopting the construction of the statute of the English Chancellors."

remedy at law is inadequate. This position is best illustrated by the rule of the Massachusetts courts which is laid down by Wells, J., in *Glass v. Hulbert*,⁴³ "That the purchaser has been let into possession, in pursuance of a parol agreement, has been very generally recognized as sufficient to take it out of the statute. The reasoning by which this result was reached is far from satisfactory; and even where the rule prevails, there are frequent intimations that it is regarded as trenching too closely upon the spirit as well as the letter of the statute. If it were now open to settle the rule anew, we cannot doubt that it would be limited to possession accompanied with or followed by such change of position of the purchaser as would subject him to loss for which he would not otherwise have adequate compensation or other redress; and that mere change of possession would not be held to take a case out of the statute. However, it may be elsewhere, we are disposed to hold the rule to be so in Massachusetts . . ."

Thus under the fraud theory, pure and simple, possession alone would not necessarily be a sufficient act of part performance as the party to whom possession had been given might be put back where he was before the contract, and no real loss inure to him as a result. Possession plus improvements does not necessarily preclude the possibility of one recovering for the improvements made, unless the acts were such that adequate compensation could not be had except by conveyance of the land, or that the party had so changed his position that irreparable injury would result and it would be a virtual fraud upon him unless specific performance were granted. This, it is submitted, is an explanation of the doctrine which is truly flavored with equitable principles.

In conclusion it might be said that it is a futile thing to bewail the laxity prevailing in the enforcement of the statute which has permitted the doctrine of part performance to become so firmly rooted in the law, and while it may be true that, "if the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred,"⁴⁴ still as pointed out by Lord Blackburn,⁴⁵

⁴³ 102 Mass. 32, 3 Am. Rpt. 418.

⁴⁴ Lord Redesdale in *Lindsay v. Lunch*, 2 Sch. & Lef. 1, 5.

⁴⁵ *Madison v. Alderson*, *supra*, note 14.

“ . . . if the doctrine was originally an error it is now, I think, *cummunis error*, and so makes the Law.” In view of these circumstances it seems that the best thing to do is to limit the application of the doctrine, that part performance will take the case out of the Statute of Frauds, to cases where there is actual fraud, and to where the injury to the plaintiff is irreparable and the remedy at law is inadequate, which is in equity—virtual fraud.

GAYLE A. MOHNEY.