

Michigan Law Review

Volume 30 | Issue 2

1931

TRUSTS - STATUTE OF FRAUDS - PART PERFORMANCE OF ORAL TRUSTS

Mark H. Harrington
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Estates and Trusts Commons](#)

Recommended Citation

Mark H. Harrington, *TRUSTS - STATUTE OF FRAUDS - PART PERFORMANCE OF ORAL TRUSTS*, 30 MICH. L. REV. 289 (1931).

Available at: <https://repository.law.umich.edu/mlr/vol30/iss2/11>

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

TRUSTS — STATUTE OF FRAUDS — PART PERFORMANCE OF ORAL TRUSTS.—In some jurisdictions, where some equivalent to the seventh section of the English Statute of Frauds has not been enacted, an oral trust of land is enforceable.¹ In others, it is held that the provisions requiring a writing in the case of conveyances of and contracts concerning interests in land forbid oral trusts of land.² It is clear, however, that when the statute of frauds in force contains a provision requiring express trusts to be created or evidenced by writing, an oral agreement between grantor and grantee that the property conveyed should be held in trust can not be enforced as an express trust.³

The scope of this comment does not include any question of a constructive trust being raised due to actual fraud, or to a confidential relationship.⁴ It is limited to the question of what amounts to part performance so as to take an oral express trust out of the operation

¹ 5 MICH. L. REV. 145 (1906); for a collection of cases see 35 A. L. R. 275 (1924).

² SCOTT, CASES ON TRUSTS, 2d ed., 173 (1931).

³ 45 A. L. R. 851 (1926). The English statute merely requires the oral trust to be "proved" by a writing. In some states this phraseology has been followed, but in others the statutes provide that trusts of land must be "created or declared" in writing. However, these statutes are not given a literal interpretation. They have been held to require no more than does the English statute. PERRY ON TRUSTS, 7th ed., sec. 81 (1929). It should be noticed that oral trusts in personalty are unaffected by any statute of frauds. PERRY ON TRUSTS, 7th ed., sec. 86 (1929); 51 L. R. A. (N. S.) 1208 (note) (1913).

⁴ As to whether the mere breach of the oral promise to hold in trust will amount to such fraud as will raise a constructive trust, see 12 MICH. L. REV. 423, 515 (1914); 12 MINN. L. REV. 88 (1927); 20 HARV. L. REV. 549 (1907); 37 HARV. L. REV. 653 (1924); 35 A. L. R. 288 (1924).

of the statute. However, the fact situation is often such that it seems to call for the application of the so-called "purchase money" resulting trust. It may be that some of the cases could well have been decided on this ground. On the other hand, it should be remembered that in some states the presumption of trust arising from the fact of the purchase money having been paid by one person but with title taken in another has been abolished by statute.⁵ Furthermore, it is desirable to point out at the outset the close resemblance, and the difficulty of distinguishing, between an oral trust in land and an oral contract to convey land.⁶ The question at once presents itself — will part performance be the same in one case as in the other?

Whenever the trustee of an oral trust has fully executed the trust it is no longer affected by the statute.⁷ And if he has not, but desires to do so, he can not be prevented from performing his trust.⁸ Where the trustee refuses to perform, however, there is more difficulty. We proceed to an examination of the evidentiary facts which are relied upon as amounting to part performance. For convenience, the following method of subdivision has been adopted: delivery of the deed of conveyance, cases involving retention of possession, cases involving payment, cases involving the taking of possession, and miscellaneous cases.

1. *Delivery of the Deed to the Promisor*

The mere execution and delivery of a deed conveying the legal title to the oral trustee is not sufficient to amount to part performance.⁹ This seems to be correct in principle. To hold otherwise is merely to evade the statute by holding that the act which brings the

⁵ SCOTT, *CASES ON TRUSTS*, 2d ed., 422 (1931).

⁶ Indeed, in most of the cases that might be put, except perhaps for the purely gratuitous self-declaration of trust, the formal elements of a contract may be found or inferred. For example, A conveys to B on the latter's promise to convey to C. The conveyance by A will supply the consideration for B's promise to convey. The same is true if A is the beneficiary rather than C. Or, A and B agree that B shall purchase land from C, hold title until he is reimbursed for his expenditures, and then convey to A, or a third party. Consideration for B's promise is found in A's promise to repay him.

⁷ *Straw v. Mower*, 99 Vt. 56, 130 Atl. 687 (1925); *Bailey v. Wood*, 211 Mass. 37, 97 N.E. 902 (1912); *Prentis v. Prentis*, 189 Mich. 1, 155 N.W. 473 (1915).

⁸ *Arnston v. First Nat. Bank*, 39 N. D. 408, 167 N.W. 760 (1918); *Lake v. Weaver*, 76 N. J. Eq. 280, 74 Atl. 451 (1909). See also, *Ferguson v. Winchester Trust Co.*, 267 Mass. 397, 166 N.E. 709 (1929).

⁹ *McCartney v. Fletcher*, 11 App. D. C. 1 (1897); *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984 (1889). See also, *Verzier v. Convard*, 75 Conn. 1, 52 Atl. 255 (1902); *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98 (1849).

case within the operation of the statute also operates to satisfy the statute. The opposite result has been reached in a number of cases.¹⁰

2. *Cases Involving Retention of Possession*

The retention of possession by the cestui of the oral trust does not constitute part performance.¹¹ The same is true of the settlor remaining in possession.¹² An even stronger case is where the grantor, for whom the grantee holds under an oral trust, remains in possession and expends money in repairs and improvements. This has been held not to amount to part performance.¹³ The theory seems to be that the acts showing part performance must be such as the grantor would not have done, unless on account of the very agreement and with a direct view to its performance, and that the acts in question were not due to the agreement but were a result of the original possession. In one case, however, where the promisee remained in possession, spent time and money in making improvements, and paid taxes and insurance, specific performance of the oral trust was decreed.¹⁴ And in another case where the plaintiff advanced the purchase price, took title in her name and orally agreed to convey to the defendant on being reimbursed for her expenditures, it was held that, although continuing in possession would not of itself amount to part performance, yet that fact together with the fact that the defendant improved the property, paid interest to the plaintiff, and purchased adjoining property, made out a case of part performance.¹⁵ The decision is due to the fact that the acts were done in pursuance of the oral agreement, and would not have been done otherwise. Particularly was this true of the purchase of the adjoining property.

In *Spies v. Price*,¹⁶ a purchaser who had made partial payments and was unable to complete them procured a conveyance from the vendor to a lender who advanced the remainder of the purchase price and orally agreed to convey to the purchaser on repayment of the

¹⁰ *Rundell v. McDonald*, 62 Cal. App. 721, 217 Pac. 1082 (1923); *Hayden v. Denslow*, 27 Conn. 335 (1858); *Gallagher v. Northrup*, 215 Ill. 563, 74 N.E. 711 (1905); *Chantland v. Sherman*, 148 Iowa 352, 125 N.W. 871 (1910); *Wood v. Perkins*, 57 Fed. 258 (1893).

¹¹ *Spaulding v. Collins*, 51 Wash. 488, 99 Pac. 306 (1909); *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305 (1904); *Rucker v. Steelman*, 73 Ind. 396 (1881).

¹² *Bolin v. Kregel*, 116 Kan. 459, 227 Pac. 266 (1924).

¹³ *Wentworth v. Wentworth*, 2 Minn. 277 (2 Gil. 238), 72 Am. Dec. 97 (1858); *Pillsbury-Washburn Flour Mills Co. v. Kistler*, 53 Minn. 123, 54 N.W. 1063 (1893); and see *McCoy v. Hughes*, 1 G. Greene (Iowa) 370 (1848).

¹⁴ *Thierry v. Thierry*, 298 Mo. 25, 249 S.W. 946 (1923).

¹⁵ *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305 (1904).

¹⁶ 91 Ala. 166, 8 So. 405 (1890).

amount loaned. The cestui remained in possession and repaid the loan. The court held that this took the case out of the statute.

*Eldredge v. Jenkins*¹⁷ has a similar fact situation, with the additional fact that the cestui executed a release of his own claim at the time he procured a conveyance to his lender. The court held that this amounted to part performance in that the release would not have been executed but upon the faith that the property was to be held in trust for his benefit. It has been held in other cases that, where the promisee has refrained from exercising a valuable right in reliance upon the oral promise of another to convey, the case is taken out of the statute's operation.¹⁸

3. Cases Involving Payment

Payment in cash or by the contribution of personal services has been held not to amount to part performance.¹⁹ In a slightly different case the grantee was to fix up the property conveyed in consideration of the receipt of the income from the property until fully reimbursed, and then reconvey. The grantee subsequently acted under this agreement and also made admissions that the legal title was so held. The court enforced the agreement.²⁰

In *Oberlender v. Butcher*,²¹ a son orally agreed to select and purchase a site for a home for his mother. He paid for the property and took title in his own name. Relying on his promise that the property was to be hers, his mother forwarded the money to him, and subsequently she took possession. The court held that it was a case of part performance. Besides payment, the element of entry into possession was present here.

4. Cases Involving the Taking of Possession

If, instead of a retention of possession by the cestui, we have him going into possession and expending labor and money in improve-

¹⁷ 3 Story 181 (1844).

¹⁸ *Janochosky v. Kurr*, 120 Minn. 471, 139 N.W. 944 (1913); *Sheriff v. Neal*, 6 Watts (Pa.) 534 (1837); *Cutler v. Babcock*, 81 Wis. 195, 51 N.W. 420 (1892). *Contra*, *Ducie v. Ford*, 138 U. S. 587, 11 Sup. Ct. 417 (1891).

¹⁹ *Partridge v. Cummings*, 99 N. J. Eq. 14, 131 Atl. 683 (1926); *Bonner v. Kimball-Lacy Lumber Co.*, 114 Ark. 42, 169 S.W. 242 (1914). *Contra*, *Chastain v. Smith*, 30 Ga. 96 (1860); *Havlick v. Davidson*, 15 Idaho 787, 100 Pac. 91 (1909). See also, *Cooley v. Lobdell*, 153 N. Y. 596, 47 N.E. 783 (1897).

²⁰ *Neilly v. Hennessey*, 208 Iowa 1338, 220 N.W. 47 (1928). See also, *Greenly v. Shelmidine*, 83 App. Div. 559, 82 N. Y. S. 176 (1903).

²¹ 67 Neb. 410, 93 N.W. 764 (1903).

ments, we have an unquestionable case of part performance.²² The following are certain specific situations.

In *Goff v. Goff*,²³ the plaintiff was induced, at considerable expense, to return from another state by the grantee's promise that he should have the land in accordance with his oral promise to reconvey. The plaintiff was placed in possession, and made valuable improvements.

In *Jeremiah v. Pitcher*,²⁴ a real estate dealer purchased property in the name of his daughter on her promise to reconvey as he directed. His wife's insanity rendered her incompetent to release her dower, and this fact hindered him in his business. He paid the purchase price, entered into possession, discharged the purchase money mortgages, received the income, and made use of the property in his business as a dealer in real estate.

In *McKinley v. Hessen*,²⁵ the defendant promised to reconvey as the plaintiff directed. The latter took possession, paid the purchase price, taxes, interest on the mortgage, insurance, and made repairs. Further, as to one parcel the defendant had already performed by conveying at the direction of the plaintiff and turning the receipts over to him.

In *Foreman v. Foreman*,²⁶ the property was purchased by a husband who desired to keep it separate from that used in his business, and accordingly title was taken in the name of his wife who orally agreed to convey as he should direct. He paid the purchase price, taxes, insurance, interest on the mortgages, the cost of improvements and repairs, and collected the rents. She died intestate, leaving an infant son as sole heir. An action was brought to compel a conveyance in fulfillment of the oral trust. In New York a confidential relation exists between husband and wife so as to raise a constructive trust, but the court said it could base its decision on either that ground or that of part performance.

In *Waters v. Hall*,²⁷ title was taken in the name of the defendant

²² *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 634 (1906); *Kennedy v. Anderson*, 49 Wash. 14, 94 Pac. 661 (1908); *Guynn v. McCauley*, 32 Ark. 97 (1877); *Haines v. Haines*, 4 Md. Ch. 133 (1853); *Dunn v. Berkshire*, 175 Ill. 243, 51 N.E. 770 (1898); *Wylie v. Charlton*, 43 Neb. 840, 62 N.W. 220 (1895); *Frame v. Frame*, 32 W. Va. 463, 9 S.E. 901 (1889); *Partridge v. Cummings*, 99 N. J. Eq. 14, 131 Atl. 683 (1926); *Church v. Sterling*, 16 Conn. 388 (1844).

²³ 98 Kan. 201, 158 Pac. 26 (1916); 98 Kan. 700, 158 Pac. 662 (1916).

²⁴ 26 App. Div. 402, 49 N. Y. S. 788; aff'd. 163 N. Y. 574, 57 N.E. 1113 (1900).

²⁵ 202 N. Y. 24, 95 N.E. 32 (1911).

²⁶ 251 N. Y. 237, 167 N.E. 428, (1929), reversing 223 App. Div. 783, 227 N. Y. S. 807 (1929).

²⁷ 218 App. Div. 149, 218 N. Y. S. 31 (1926).

who agreed to hold it for the benefit of the plaintiff. The property was to be used for the erection of a theatre but the plan fell through due to the fact that under the provisions of the Building Zone Resolution the site could not be used for a theatre. "The defendant thus obtained title for a lawful purpose under an agreement which was partly performed but could not be completely performed for the reason stated." The plaintiff had paid the purchase price, taxes, interest and carrying charges, and for improvements.

In *Canda v. Totten*,²⁸ the defendant bought land in his own name under an oral agreement to buy it for and convey it to another on being repaid the purchase price. The promisee took possession, paid the defendant the amount paid out by him, paid the taxes, insurance, interest on the mortgages, and made repairs.

In *Thomas v. Robbert*,²⁹ the purchase was made jointly by the plaintiff and defendant, title being taken in the name of the latter who orally agreed to convey a one-half interest as the plaintiff should direct. Both of them paid the purchase price, took possession, and made improvements.

In *Harman v. Fisher*,³⁰ a mother conveyed to a son for his benefit and that of his brother. The brothers worked the farm together and made valuable and lasting improvements. Both claimed ownership, and the grantee conceded during a ten-year period that his brother owned half. The heirs of the grantee were made to execute the oral trust on the theory that there had been a past performance.

5. *Miscellaneous Cases*

The signing of an undelivered deed by the grantee,³¹ the committing to writing twenty-two years later of what the parties could remember of their oral agreement,³² and the fact that the promisee owned shares in a hopelessly bankrupt company from which the land was purchased³³ have all been held insufficient to avoid the statute.

Conclusion

It is easily seen from the foregoing that each case must depend in a large measure upon its particular facts. Generalizations are difficult, if not impossible, to make. This much may be said — the underlying theory on which an oral trust is enforced because of a part

²⁸ 157 N. Y. 281, 51 N.E. 989 (1898).

²⁹ 123 Mis. 76, 204 N. Y. S. 217 (1924).

³⁰ 90 Neb. 688, 134 N.W. 246 (1912).

³¹ *Bolin v. Krengel*, 116 Kan. 459, 227 Pac. 266 (1924).

³² *Quinton v. Kendall*, 122 Kan. 814, 253 Pac. 600 (1927).

³³ *Farrell v. Mentzer*, 102 Wash. 629, 174 Pac. 482 (1918).

performance seems to be that the party asking enforcement has done certain acts which would not have been done except in reliance upon the oral agreement, and which will be to his injury if the trustee is not compelled to perform; and that thus the latter would be enabled to practice a fraud upon him by making a statute, intended to prevent fraud, operate in furtherance of one.³⁴

Briefly, a mere continuance in possession is not enough, although it may be when aided by other circumstances; payment, in part or in whole, in cash or in personal services, is ordinarily not enough; and the taking of possession plus payment or plus the making of improvements is enough to take a case out of the operation of the statute. Thus, it appears that the theory on which an oral trust is enforced due to part performance and what will amount to such part performance follows closely, if not exactly, the analogous situation of an oral contract for the sale of lands.³⁵

MARK H. HARRINGTON

³⁴ 78 U. OF PA. L. REV. 51 (1929).

The doctrine of part performance has been rejected in some states. 5 POMEROY, EQ. JUR., 4th ed., sec. 2245 (1919). Where land is conveyed on an oral trust and the trustee agrees to sell the land and hold the proceeds in trust, or where there is no express agreement to sell but the trustee agrees that if the land is sold by him he will hold the proceeds in trust, the cases are divided on whether the part of the oral agreement relating to the proceeds is separate from the part relating to the realty, and may be enforced as a valid oral trust in personalty. See SCOTT, CASES ON TRUSTS, 1st ed., 199 (1919); 31 HARV. L. REV. 806 (1918); 20 L. R. A. (N. S.) 298 (note) (1908).

On the execution of a parol trust in realty through the destruction, by the trustee, of the deed creating it, see 10 COL. L. REV. 151 (1910).

³⁵ 5 POMEROY, EQ. JUR., 4th ed., ch. XL (1919).