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The Statute of Frauds and Some Reasons for Taking an Oral Agreement Out of Its Operation

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NOTES

THE STATUTE OF FRAUDS AND SOME REASONS FOR TAKING AN ORAL AGREEMENT OUT OF ITS OPERATION

The original statute of frauds, passed in the reign of Charles II., 1676, enacts that: "No action shall be brought to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of land, etc., unless the agreement upon which such action 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 duly authorized."

The states of the United States that have passed statutes of frauds have followed substantially the original English statute both in its language and legal effect. Although the results have shown us that this is true it might have been otherwise due to different language used by a few of the states, namely, New York, Michigan, Nebraska, Alabama, Iowa, California, North Carolina, and Oregon, to the effect that, all contracts to sell or convey any lands, etc. or any interest therein, etc., shall be void, unless such contract, etc., shall be put in writing, signed by the party to be charged therewith, etc." The wording of the statute is similar in Minnesota to that of the above mentioned states except as to actions upon agreements for marriage in which it follows the English statute, saying, "no action shall be brought."

Regardless of the number of states that have so changed the wording of their statutes making the oral agreement void, the courts have ignored the fact and have construed such statutes on the same basis and legal effect as those following the original. The question is, how should we construe the statutes of those states that have seen fit, or have taken it upon themselves to change the wording in face of such a great amount of precedently and common-law background? Were such changes made only as a matter of form to be construed lightly or did the sponsors of those changes realize their connotation and contemplate a strict adherence to the provisions? If we are to follow
the latter line of reasoning and construe those statutes strictly, then the question of part performance of a void contract is of no consequence, being unenforceable either in law or equity.

This writer believes that a strict interpretation should be given in those states that have made the change in the wording of their statutes, due to the fact that he thinks that the sponsors of those changes knew what they wanted and that they saw the laxity of the enforcement of the original statute and wanted to insert a condition that would have a tendency to make a closer adherence to the meaning of the original statute as intended by the authors. But, since the weight of authority is against this view and practically all the cases have held contrary to this view, we must turn to the consideration of how some other provisions of the statute are construed.

There has been some controversy regarding the taking of cases out of the operation of the statute where there has been payment in whole or in part of the purchase price in sales of realty.

It is now well settled that payment, even of the whole amount of the purchase-money is not to be deemed part-performance so as to justify a court of equity in enforcing the contract.

The greatest reason for this conclusion is that the framers of the statute having expressly provided that “payment in whole or in part shall be sufficient to exempt from its operation a contract for the sale of goods, wares, or merchandise,” they must be presumed to have intended that it should not be sufficient in cases of contracts for the sale of lands; no such provision in favor of the latter occurring in the statute. Having thus briefly considered the construction of the statute of frauds and its different interpretation by the courts we now turn to the reasons for not applying the statute to oral contracts for the sale, lease, etc., of realty.

The reasons generally accepted for not applying the statute in cases of such oral contracts are: (I) To prevent fraud; (II) Where the purchaser would otherwise be a trespasser; (III) The livery of seisin idea, or where possession is delivered; (IV) Equitable estoppel; and (V) Equitable fraud.
Having considered the cases upholding these reasons we find that such reasons are not considered as separate and distinct grounds for the decisions but they are more or less coupled together as a basis for the holding in each case. However, this writer has attempted to cite cases bearing out the particular reason considered.

I. To Prevent Fraud

The purpose of the statute of frauds was to prevent frauds and perjuries, so to allow the enforcement of the statute itself to cause fraud upon one of the parties to an agreement within the scope of the statute would be to defeat its primary purpose.

Probably the earliest case where an oral agreement was taken out of the statute of frauds based upon a prevention of fraud is cited in 5 Viner's Abridgment 523, and although no name is given the author there states: "Where the statute of frauds has been used to cover a fraud, the court has always relieved. The first case in Lord Nottingham's time, where there was an absolute conveyance and a defeasance, which the defendant would not execute, but insisted on the statute, it was overruled." The writer goes on to state that, "next after the reason of fraud for taking the agreement out of the statute, in Lord Jeffrey's time, is the putting one into possession under the oral agreement—coupled with expenditure of money on improvements. The bill was, to have a lease according to defendant's promise, the plaintiff having laid out money in the premises, and the defendant insists on the statute, there being no agreement in writing. Held, defendant must execute the lease, since he has stood by and allowed the plaintiff to spend his money while in possession." The last case, although holding possession plus making improvements is sufficient part performance to take the agreement out of the statute, seems to be more influenced by the idea of fraud upon the lessee than the doctrine of part performance, and so indicates that the early cases were based upon fraud more than they were upon the idea of possession or part performance, which is in accord with the writer's opinion as will be seen herein. The case of Foxcroft v. Lister, decided 1701, is probably the earliest case of full record.
giving fraud as the reason for taking the oral agreement out of the statute. There F and L agreed orally that F would execute to L a ninety-nine year lease, L to have the privilege of building a number of houses thereon. L entered and constructed the houses mostly at his own expense, and later F becoming ill, asked L to draw up a written lease. L did so, but the heirs-to-be of F prevented F from signing the lease, and now after F’s death bring action to oust L under claim of the statute of frauds. Here again we have the element of possession and furthermore expenditures in making improvements, which are held in some jurisdictions today sufficient part performance to take the agreement out of the statute, but this decision was not based upon such reasons. This case decided in 1701, was based upon the idea of prevention of a fraud. The action of the heirs-to-be of F in preventing the signing of the lease is a direct attempt to invoke the provisions of the statute in order that L may be deprived of his lease. This case is not only one of the outstanding cases based upon fraud (actual) but is cited as authority for the much extended doctrine of fraud today as reason for taking an oral agreement out of the statute of frauds.

In the words of Dean Pound,³ "all decisions on 'fraud' as a ground for taking cases out of the statute refer directly or indirectly to the case of Halfpenny v. Ballet." ³ In that case, on marriage to be had between plaintiff and the defendant’s daughter, an agreement that defendant would pay to plaintiff a portion was reduced to writing, signed by the plaintiff, and delivered to defendant to be signed by him. Defendant refused to sign and tore-up the agreement, saying he was not satisfied with it. It was found that his objections were not to any material parts and since defendant had consented to plaintiff marrying his daughter, there was fraud upon the plaintiff by failure of defendant to pay the portion as agreed. Although the above quotation of Dean Pound’s article may be correct in part it is not wholly correct in that it is not in every case where marriage is gained thru promises to be performed after the marriage and it cannot be shown that the promisor did not intend to perform, that such case always presents actual fraud. True, there is a change of position on part of the promisee, but

³ 33 Harv. Law Review 933, at 937.
³ 2 Vern. 372, Prec. Chan. 404 (1699).
is it not true also that such change of position is made wholly upon the faith of the word of honor of the one making the promise? We find in the well known case of Montacute v. Maxwell, a refusal to take an oral agreement out of the statute where it was given as an inducement for the marriage and the promisee relied upon the mere word of honor of the promisor. In this writer's opinion the case cited by Dean Pound, above, is more of a case of equitable estoppel or hardship than actual fraud. If we allow the doctrine of equitable estoppel to enter into marriage cases we would break down completely the purpose of the statute.

"There is nothing to indicate that the statute was not intended to apply in cases where its enforcement would place a great hardship upon one of the parties, either by reason of valuable improvements to the subject of agreed sale or where the position of the parties had been changed so he could not be restored to his former status. Exceptions have come about in order to enforce the policy of the statute. Equity in her delight to do justice, will act to prevent a fraud. The great difficulty in using it as a foundation for the doctrine of part performance is that there is in reality no fraud in most cases."

It is not the purpose of this paper to show the different acts required in the part-performance doctrine and how far such has been accepted, but we find after a careful study of the subject that in those jurisdictions accepting the doctrine of part performance that in the majority of cases there must have been sufficient acts or omissions on the part of both parties to constitute a fraud upon the one before relief is allowed as against enforcing the statute. This argument is supported by Clinan v. Cooke where it was held, "nothing is part performance that does not put the party into a situation that is fraud upon him if the agreement be not performed." Other cases in support of this contention.

The contention that fraud should be the only reason and the foundation on which the other so-called reasons should rest re-
garding the taking of oral agreements out of the operation of the statute of frauds, is very ably brought out by Browne, on The Statute of Fraud, sec. 448, at page 444.

"It is obvious that the mere circumstance that a verbal agreement has been in part performed, can afford no reason, such as to control the action of any court, whether of law or equity, for holding the parties bound to perform what remains executory. The doctrine of equity in such cases is, that where an agreement has been so far executed by one with the tacit encouragement of the other, and relying upon his fulfillment of it, that for the latter to repudiate it and shelter himself under the provisions of the statute, would amount to a fraud upon the former, that fraud will be defeated by compelling him to carry out the agreement." It has been universally accepted that, if actual fraud can be shown the courts will not hesitate to order specific performance of the parol contract.

The contention of this writer is further supported by both Mr. Justice Story and Mr. Pomeroy, in laying down the ground of equitable interference in cases of part performance: "The distinct ground upon which courts of equity interfere in cases of this sort is that otherwise one party would be able to practice a fraud upon the other, and it could never be that the intention of the statute was to enable any party to commit such a fraud with impunity."

II. WHERE THE PURCHASER, PROMISSEE, OR LESSEE, WOULD OTHERWISE BE A TRESPASSER.

If the purchaser goes into possession and rests upon that act his claim for the specific execution of the contract, the reason assigned for allowing the claim is, that if there be no agreement valid, in law or in equity, he is made a trespasser, and is liable as a trespasser, a position which would amount to a fraud practiced upon him by the vendor. It is argued that in order to defend himself against a charge as a trespasser in such case the evidence of a parol agreement would seem to be admissible for his protection, and if for such a purpose, there is no reason why it should not be admissible throughout.

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8Pomeroy Equity Jurisprudence, sec. 1293-4; Story's Equity Jurisprudence, sec. 754.
This writer believes that, since the reason for prevention of fraud as an element to take parol contracts out of the statute, has been extended so far, there is no longer any necessity of considering the fact of being a trespasser as one of the elements or reasons for nonenforcement of the statute. This reasoning is substantiated by the opinion of the court in Lodge v. Leverton,* "surely, if the court can, to prevent a fraud, decree the performance of the contract, notwithstanding the statute, it can protect the defendant on the same ground against the consequence of acts done under it, and at the instance of the plaintiff. Delivery of possession might with more propriety be treated as a license to enter and enjoy the rents and profits. And such license surely would protect the purchaser against an action for trespass or rents, when the contract of sale, through default of the vendor, has not been carried out, or by reason of the statute cannot be enforced." It is stated in Ham v. Goodrich,9 "the part performance required to take the case out of the operation of the statute of frauds must be such as to place the party seeking the specific performance in the situation to be held liable as a trespasser or wrong-doer, on account of acts done in part execution of the agreement, and against which liability he would be protected by its complete execution."

Sawyer, J., continues, "the ground thus distinctly presented for the proceedings of a court of equity in decreeing specific performance in such cases, is fraud; not merely of that nature which may be said to exist in every case for a refusal to fulfill an agreement after having received the consideration, but which consists in placing the other party in a situation to be held liable as a wrong-doer or in some other way of being made the victim of a fraud, or of an injury in the nature of a fraud." Another case based on the same reason.10

Although the element of "otherwise a trespasser" may be present in the early case of Foxcroft v. Lister, supra, the decision is based upon the desire of the court to prevent fraud to the lessee. So we see that although the element of "otherwise a trespasser or wrong-doer" may be present in the cases that it is used mostly as a basis for showing fraud upon the one party if the specific performance is not allowed.

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* 42 Texas Reports 18, at 32 (1875).
9 33 New Hampshire 32 (1856).
10 Underhill v. Williams, 7 Black. (Ind.) 125 at 126 (1844).
This line of reasoning is supported by the attitude of many American states in requiring more than the act of being put into possession (altho coupled with resulting hardships) to take the oral agreement out of operation of the statute.

III. THE LIVERY OF SEISIN DOCTRINE, OR WHERE POSSESSION HAS BEEN PASSED PURSUANT TO THE ORAL AGREEMENT.

Putting the purchaser into possession was taken to be the substance of a common-law conveyance. As a result of the broadening of such a doctrine courts have allowed cases to be taken out of the statute of frauds: on possession alone being delivered to lessee or vendee; on possession coupled with improvements to the property; on possession when joined by circumstances of great hardship; where acts show a change in character of pre-existing possession (lease cases); and in cases where it is not possible to take possession but relief is given on theory of fraud or some irreparable injury. Although suggested by Dean Pound, that it is only in cases where there is no possibility of possession that equity is willing to rely wholly upon theories of "fraud," it seems to this writer that it is in those cases where possession is handed over that we find one of the strongest points for upholding the doctrines of "fraud" (actual) and "equitable fraud" as reasons for taking an oral agreement out of the statute.

Possession may increase the magnitude of the fraud, i.e. where one goes into possession of the land under an oral contract of sale or lease, the vendor or lessor should not only be estopped from claiming protection of the statute but it would be fraud upon the one in possession since land is unique as a general rule and the vendee cannot be made whole again. This illustration at first blush may seem to be an argument in favor of the livery of seisin idea, but by way of further explanation of the idea that possession increases the fraud or is merely an instrument of fraud: suppose C upon faith of B's possession of the land in question contracts to sell B the adjoining fifty acres of land which C owns, which is of little value taken by itself, but with that of which B has possession its value is greatly increased. Clearly damages would not be adequate compensation to B.

So we see that the most favorable reason we can find from the fact of possession, for taking the oral agreement out of the statute, is that the delivery of possession in itself constitutes a fraud upon not only the promisee but on others who rely upon the fact that the promisee is in possession.

Why should we follow the old doctrine of livery of seisin simply because some early cases may have been influenced by the common-law form of conveyancing?

True, we find the case of Butcher v. Stapley, and a very few others seemingly decided upon livery of seisin or possession idea, but this is not unusual considered in light of the circumstances of the time of passage of the statute and the fact that the form of conveyancing before the statute was by livery of seisin. The situation is nicely summed up in the language of Lowrie, J., in Poorman v. Kilgore,13 "The customs of the country can never be suddenly and entirely broken down, even by an act of Parliament. It was natural that many cases should arise founded on the old customs, where great injustice would be done unless the statute should receive an equitable interpretation. 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 customs of the country."

We might reasonably allow some fifty years for the idea of livery of seisin in the minds of the people to be replaced by the requirements of the statute, but the statute having been passed over two hundred and fifty years ago the custom of conveyancing of that time should no longer influence the courts in taking an oral agreement for transfer of land out of the statute.

It is found on review of some of the authorities given by Dean Pound in the above referred to article (see 11) as support his contentions on the "possession or livery of seisin idea," that most of those cases have been based upon other elements coupled with possession which authorize the decree.

We see in Rector v. Keatts,14 the decision is strengthened by the added facts of repairs and improvements being made by one going into possession. The court further states, "not to decree specific performance in such case would be to practice fraud
upon the one having gone into possession." We also see in another case cited by Dean Pound, Bennett v. Dyer,\(^1\) where one was induced to take possession of land under a written agreement which was not signed due to refusal of the attorney of plaintiff to say the title was good, as agreed. Possession alone was not here sufficient but the fact of estoppel being added made it sufficient.

In a great number of the states mere passage of possession is not sufficient to take an oral agreement out of the statute but relief is given upon basis of "fraud," "equitable fraud" or "équitable estoppel." This is seen in the case of Lodge v. Leverton,\(^2\) where Moore, J., said, "the mere naked transfer of possession of land can hardly be sufficient to justify a court of equity in enforcing the specific performance of an oral contract for purchase of a freehold."

IV. EQUITABLE ESTOPPEL.

Although the same results are reached in cases where "equitable fraud" and "equitable estoppel" are considered the basis of taking the oral agreement out of the operation of the statute of frauds, i.e., in either case a virtual fraud is worked upon the vendee or promisee due to failure of performance on part of the vendor or promisor. However, this writer will consider the two reasons separately in so far as possible.

The name "equitable estoppel" has been given to those cases where the vendor or lessor has by his own acts placed the vendee or lessee in such a position with regard to the oral agreement that there would be a fraud worked upon the vendee or lessee and the vendor or lessor is estopped from setting up the lack of written agreement and claiming the protection of the statute. The doctrine is said to have originated in England in 1837, in the case of Pickard v. Sears.\(^3\) The first case in America is supposed to be about the same time; Welland Canal Co. v. Hathway.\(^4\)

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\(^1\) 35 Atl. Rep. 1004 (1896).
\(^2\) 42 Texas 18 (1875).
\(^3\) 6 Ad. & E. 469, 112 Eng. Rep. 179 (1837). In sale of plaintiff's goods in possession of third party, to defendant; if plaintiff consented to sale will be estopped to claim statute.
\(^4\) 8 Wend. 480 (1838).
The doctrine as stated in *Gallagher v. Gallagher* \(^{19}\) lays down as one of the three elements that must be present before an oral agreement will be taken out of the operation of the statute, "the contract must have been so far executed that a refusal to complete it would operate as a fraud upon the purchaser and place him in a situation in which he could not be adequately compensated in damages." This requisite, though generally accepted, may be construed to mean that actual fraud is necessary, but it seems to this writer that the obvious meaning of such statement is that relief will be granted in cases of equitable fraud or equitable estoppel. Holt, J., in *Miller v. Lorentz* \(^{20}\) citing *Gallagher v. Gallagher*, says, "Judge Snyder has clearly and accurately summed up the doctrine, and placed it on its true foundation of *estoppel*, against the commission of a fraud by the vendor, such *estoppel* to be affirmatively enforced in a court of equity in favor of the vendee."

Holt, J., continues, "although the case *Butcher v. Stapely* \(^{21}\) has been cited by many writers and judges as based upon the theory of possession, the lord chancellor declared that, inasmuch as possession was delivered according to the agreement, he took the bargain to be executed, and the doctrine was rested upon the ground that the vendor was in such case *estopped* from the perpetration of a fraud under cover of the statute by conveying to another or refusing to complete the sale of the land."

The general doctrine would seem to rest upon estoppel against committing a fraud, where the part performance is such as makes a visible transfer of the ownership pointing unmistakably to some contract, as well as to the vital point of its execution in the transfer of possession of the land, the value of which usually consists in its use and enjoyment, and which puts the purchaser in a position of prima facie owner, and being notice of his claim to all subsequent purchasers.

In the case of *Malins v. Brown et al* \(^{22}\) we see a very good illustration of the equitable estoppel doctrine.

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\(^{19}\) 31 W. Va. 9: 5 S. E. 297 (1888).

\(^{20}\) 19 S. E. 391 at 395 (1894).

\(^{21}\) See (12) supra.

\(^{22}\) 4 N. Y. 403 (1850). The mortgagor agrees to sell; the mortgagee agrees to release, and upon these conditions the purchaser agrees to buy. The purchaser pays whole amount including mortgage and is let
The ground of relief in equity, said Chancellor Kent, in *Parkhurst v. Cortlandt*,\(^23\) "is the fraud permitting a parol agreement to be partly executed and in leading on a party to spend money in the amelioration of the estate and then to withdraw from performance of the contract."

The court in *Seymore v. Oelrichs*,\(^24\) in following the doctrine of equitable estoppel stated, "the doctrine that equity will hold one estopped from relying on the statute of frauds where to do so will amount to the practice of fraud, is not at all limited in its operation to any particular class of contracts but applies in every transaction where the statute is involved."

Roberts on Frauds, page 132, states, "there does not seem indeed to be any satisfactory foundation for the doctrine of part performance without the intermixture of fraud, and upon this ground where an owner has encouraged another to go on with his improvements on the estate under a false expectation of a conveyance, or lease, raised in him by the assurance of the party entitled, it is agreeable to the general course of equitable relief to disappoint the contrivance, by compelling the deceiver to realize the expectation he has created."

We are further enlightened as to the extent the courts have accepted the equitable estoppel doctrine in the case of *City of Chicago v. Gage*,\(^25\) also in *Morrison v. Herrick*,\(^26\) *Munday v. Joliffe*,\(^27\) is considered one of the earliest and most outstanding cases in support of the equitable estoppel doctrine. The Lord Chancellor Cottenham, at p. 338: "Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon ground of statute of frauds, after the other party

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\(^{23}\) 1 Johns. Chan. 273 (1814).
\(^{24}\) 156 Cal. 732, 106 Pac. 88 (1909).
\(^{25}\) "The ground of equitable relief in this class of cases is of a much broader character, more especially as it is applied in later years. It proceeds upon the broad ground of equitable estoppel or estoppel by conduct, as it is sometimes termed; a principle of modern growth which is being extended from year to year in the courts.

\(^{26}\) 27 Ill. App. 339 (1883).
to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement."

As is seen by the summary of authorities and cases on this aspect of the subject this writer contends that the element of estoppel should be considered in all cases possible, but that does not mean that he thinks that in every case where there is even a small amount of estoppel that the doctrine should apply. There should be enough acts or omissions on part of the one party to work a fraud on the other if statute is applied, and the amount will have to be determined in each case.

V. Equitable Fraud.

As has been said before there is not a great deal of difference between equitable fraud and equitable estoppel, both reaching the same result, i.e., a virtual fraud upon one party to the oral contract. But there is a difference that may be well worth considering. As seen in consideration of equitable estoppel, we looked for the acts of the vendor or lessor which would estop him from setting up the statute, but in our consideration of the equitable fraud idea, we must look for and ascertain the necessary acts of the vendee or lessee which, having been performed on his part, there would result a fraud upon him were the vendor or lessor to refuse to perform his part of the contract.

The whole law applicable to these cases was correctly laid down in *Morphett v. Jones.*

Pomeroy, referring to the statute of frauds, says, "designed to prevent fraud, it shall not be permitted to work a fraud. This principle lies at the basis of the doctrine concerning part performance, but it is also enforced wherever it is necessary to secure equitable results." However, the same writer further states, "mere denial of an oral agreement or a refusal to perform will not be sufficient to prove fraud."

The ground of equity intervention is well illustrated in the case of *Keatts v. Rector,* where the rule is, as stated by Lacy, J., "where the party seeking relief has been placed by the con-

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28 I Swan. 172, 36 Eng. Rep. 344 (1818). Where, on oral agreement for lease for years, the lessee entered, and before any lease given a subsequent agreement made by which part of land was given up, and lessee continued in possession of residue at a reduced rent. Bill prayed agreement be performed. After stating ground of relief as fraud, master of rolls says: "A party who has permitted another to perform acts on faith of an agreement shall not insist that the agreement was void."

29 I Ark. 391, at 419 (1839).
tract in such a situation that he cannot be put in status quo without injury, by reason of performing his part of the agree-
ment; and whenever that is the case courts of equity will inter-
fere for the purpose of preventing a fraud and decree specific 
execution. If this were not the case courts of equity would per-
mit the forms of law to be made instruments of injustice for 
the unconscientious purpose of committing a fraud upon a con-
fiding and innocent person."

Dean v. Izard,30 decided in 1683, is one of the earliest cases 
based on equitable fraud.

The doctrine of equitable fraud as a reason for taking an 
oral agreement out of the statute of frauds is further substan-
tiated in the application made by the statutes in America. As 
given by Paine, J., in Daniels v. Lewis 31 "equity enforces 
verbal agreements for the sale of lands where there has been 
such a part performance that it must necessarily produce a 
wrong and an injury to one of the parties, if the other is then 
allowed to repudiate it."

This power is expressly given by some of the statutes of the 
states, Wisconsin being one of those states that has reserved in 
its statute the power to prevent its operation where such will 
cause fraud upon one party.

We see to what extent the doctrine has been applied in the 
case of Barbour v. Barbour.32

In the final analysis the question may be asked, is there any 
actual distinction which may be supported between the doctrine 
"equitable estoppel" and "equitable fraud?"

30 1 Vern. 159, 23 Eng. Rep. 385 (1683). In confidence of agree-
ments for leases of houses plaintiffs expended great sums of money in 
and about the premises. Was held, this was a fraud upon plaintiff to 
refuse to execute the leases since he could not be made entirely whole 
again.

31 16 Wisc. 146 at 148 (1862).

32 49 N. J. Eq. 429 (1873).

The wife had brought an action for divorce and the husband had 
confessed the alleged adultery. The latter went to the wife who had 
gone to her mother, and he promised her that if she would drop the 
action and come back to him that he would convey to her the house 
they had lived in. The wife consented and withdrew the action and 
got back to him, but the husband did not convey so now the wife 
sues for specific performance. Decree in favor of wife on grounds of 
fraud upon the wife in that she could not be put in same position as 
before the agreement.
As pointed out p. 14 supra, the name "equitable estoppel" has been given to those cases where the vendor has by his own acts placed the vendee in such a position with regard to the oral agreement that a fraud would result upon the vendee if the agreement is not carried out. It has also been pointed out p. 18 supra, we find the example of "equitable fraud," (see note 29 supra) "where the party seeking relief has been placed by the contract in such a position that he cannot be put in status quo without injury, by reason of performance of his part of the agreement, equity will intervene for the purpose of preventing fraud."

The argument is presented by Joyce Cox, that there must exist an estoppel against the defendant before equity will intervene. That writer immediately softens the force of his statement, saying, "the defendant must be held in some way morally responsible for the hardship of plaintiff's situation before equity will intervene." Quoting further, p. 56, ".... denial of the contract's validity would work a material hardship upon him, and in such a manner that the other party knew, or ought to have known, that the parol agreement was being relied upon with such result." It is herein that the distinction, as this writer sees it, exists. By way of illustration: A agrees orally to convey Blackacre to B and B goes into possession. Soon afterwards A goes to Europe and remains six months. While he is away B, without the knowledge of A, builds a twelve-room house on the land and when A returns B demands a deed, but A refuses and insists upon the statute of frauds. Can we contend A's refusal to give the deed is not a fraud upon B? If the fraud exists, are there sufficient acts on part of A upon which B has relied that we can hold A estopped from insisting on the statute? We readily see that A has not knowingly stood by and allowed B to build the house so we do not have sufficient ground to hold A estopped by his own acts from the insistence upon the statute. Nevertheless the fraud is still there if the agreement is not carried out, so we are confronted with the type of case where the vendee has so changed his position in performance of his part of the agreement without the knowledge of the vendor, that if the agreement is not

32 6 Texas Law Review at page 55.
enforced a material hardship or virtual fraud is worked upon the vendee.

It is this line of cases that fall within the "equitable fraud" doctrine, and altho we cannot hold A estopped from setting up the statute it may be presumed that he should have reasonably anticipated that B would change his position in some similar manner in reliance upon the agreement, the results of which would cause exceedingly great hardship on him if the agreement were not enforced.

Having considered the various acts of part performance as elements constituting the fraud, we are able to see the fraud more plainly in the cases falling within the "equitable fraud" doctrine.

The effect and feasibility of such extension in taking oral agreements out of operation of the statute of frauds is considered by Brown, thus: "It is the decided inclination of the judicial mind to be against extending, beyond those limits to which it has been carried by clear authority, the doctrine of enforcing oral agreements in equity upon the ground of part performance."

Lord Redesdale remarks, "The statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practising in courts of equity than that the relaxation of that statute has been a ground of much perjury and much fraud." Brown continues: "It is therefore absolutely necessary for courts of equity to make a stand and not carry the decisions farther."

As has been seen throughout this paper, it is the view of this writer that parol agreements as under consideration should only be taken out of operation of the statute in cases of actual fraud and the more palpable cases of equitable estoppel and equitable fraud. The theory of part performance by way of possession through livery of seisin, by payment of purchase price and the valuable improvements, should all be considered as elements going to make up the presence of the fraud.

As suggested in the consideration of equitable estoppel, the

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34 Brown on Statute of Frauds, p. 492.
35 Roberts on Frauds, p. 131: "There is no satisfactory foundation for the doctrine of part performance, without the intermixture of fraud."
amount of fraud in such cases as well as in those of equitable fraud must be determined from the particular facts in each case.

Taking the extension of the exemptions from the operation of the statute in general, this writer would suggest a more strict adherence to the word of the statute, since the spirit and intention, in so far as a prevention of fraud is concerned, has been carried far enough, and in some cases possibly too far.

A. Joe Asher.