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STUDIES IN THE LAW OF THE STATUTE OF
FRAUDS.

(Concluded from p. 590.)

3. *The assignment, surrender, &c., of leases, and other interests under the Statute of Frauds.*

As to the surrender, or assignment of parol leases less than three years, see Browne on Statute of Frauds, § 46, where it is said that with the exception of Connecticut, perhaps, Pennsylvania stands alone in denying the English rule which holds such parol assignment invalid. As to the English law see the cases cited in *McKinney v. Reader*, 7 Watts 123, and see *Former v. Rogers*, 2 Wils. 26; *Beck v. Phillips*, 5 Burr. 2827; *Baxter v. Browne*, 2 Blackst. 973; *Goodtitle v. Way*, 1 Term Rep. 735; *Poule v. Bentley*, 12 East 167; *Morgan v. Bissell*, 3 Taunt. 5. See as to the Pennsylvania rule, *Greider's Appeal*, 5 Penna. St. 422; *Kline's Appeal*, 39 Id. 468; *Adams v. McKesson*, 53 Id. 83. In *McKinney v. Reader*, 7 Watts 123, the leading case, *Tate v. Reynolds*, 8 W. & S. 91, *Shoopstall v. Adams*, 2 Grant 209, it was held that, inasmuch as leases for less than three years were expressly excepted from the statute as to their creation, there was no reason for holding that as to their transfer the statute applied, and that therefore the assignment, or surrender of such leases, was good by parol; and that equitable estates though they could be created by parol (the seventh and eighth sections of 29 Car. II. not being in force) cannot under the first section be so transferred: *Murphy v. Hubert*, 7 Penna. St. 423;

see Sm. Lead. Cases (Am. ed.), p. *184; see *Briles v. Pace*, 13 Ired. 279, as favoring the Pennsylvania rule, except as to mining leases, which are specially provided for by statute: see also *Holliday v. Marshal*, 7 Johns. 211. "It is true," said the court in *Kline's Appeal*, 39 Penna. St. 468, *supra*, "that equitable interests in land are within the Statute of Frauds and are not assignable except by writing, but they may be waived by parol, so as to put it out of the power of the holder to obtain the interposition of a chancellor on his behalf, or they may be released: *Boyce v. McCullough*, 3 W. & S. 429; *Dayton v. Newman*, 19 Penna. St. 194." See also *Shoopstall v. Adams*, *supra*; *Lefevre v. Lefevre*, 4 S. & R. 241; *Espy v. Anderson*, 14 Penna. St. 308; *Cravener v. Bowser*, 4 Id. 259; *Bowser v. Cravener*, 56 Id. 132; *Renshaw v. Gans*, 7 Id. 118; *Goucher v. Martin*, 9 Watts 106. See, as to how far a parol waiver of rights under a writing required by the Statute of Frauds is good, and as supporting *Boyce v. McCullough*, *supra*, *Wentz v. DeHaven*, 1 S. & R. 317; *Raffensberger v. Cullison*, 28 Penna. St. 426; *Lauer v. Lee*, 42 Id. 170; *Jackson v. Litch*, 62 Id. 451. See upon the general subject of the discharge of written contracts by parol, the English cases cited in *Cummings v. Arnold*, 3 Metc. 486.

4. *Written authority to an agent to contract for the sale of land.*

In *Parrish v. Koons*, 1 Pars. Eq. 79, another departure from the English law was taken because of the omission of the fourth and seventeenth sections of 29 Car. II., and the English rule that while an agent to convey must be authorized in writing, an agent to contract need not be, was denied; the fourth and seventeenth sections requiring agents to be "lawfully authorized" being not in force in Pennsylvania, and in the third section which is in force, the words being "agents lawfully authorized by writing:" the court held that a written authority was necessary when the action was not for damages, but for the specific performance of a contract of sale of land effected by an agent. See this case for discussion of the English cases: and also, for the citation of Pennsylvania cases requiring a writing in the case of a vendor's agent and the argument that the rule should be the same in the case of the vendee.

5. *The application of the equitable doctrine of mutuality of remedy to questions arising under the Statute of Frauds.*

Premising that in view of the fact that the fourth section of 29 Car. II., c. 3, provided that the memorandum is to be signed by

the party to be charged, it has been held in England that the party so signing is bound, though the other party not signing might not be bound; and that as against the party signing the contract would be enforced notwithstanding the doctrine of mutuality of remedy which holds that equity will not interfere to enforce a contract against a defendant when for any reason the defendant could not have the contract enforced as against the plaintiff, we come to the case of *Wilson v. Clarke*, 1 W. & S. 555, in which, owing to the absence from the Pennsylvania act of the fourth section of 29 Car. II., c. 3, it is contended that no exception to the ordinary rule of mutuality is to be made in cases arising under the Statute of Frauds. This case is an interesting one, but the vigorous opinion of that eminent lawyer, Chief Justice GIBSON is, as he admits, dictum, inasmuch as there was in the case no memorandum signed by any one, and therefore the Statute of Frauds applied irrespective of the question of mutuality. Judge GIBSON, while holding that he was not bound by the English decisions, owing to the fourth section not being in force, yet thought that at any rate these decisions were mistaken, citing Lord REDESDALE and Chancellor KENT as following them reluctantly. In *Parrish v. Koons*, 1 Pars. Eq. Cas., Judge KING converted the dictum of GIBSON into decision, and held where the plaintiff, the owner of land, having signed a memorandum, agreeing to sell it and delivered the memorandum to the defendant, sued for the purchase-money, that he could not recover, inasmuch as the defendant had not signed; *Lowry v. Mehaffy*, *infra*, was distinguished as being a case of part-performance. In *Meason v. Kaine*, 67 Penna. St. 131, Judge AGNEW seemed to think that the doctrine of *Wilson v. Clarke* was law in Pennsylvania.

Before considering *Tripp v. Bishop*, *infra*, which expressly rules the contrary, we may take up some early cases, which with the exception of *Lowry v. Mehaffy*, remarked upon by Judge KING, have not been noticed in the discussion. In *Lowry v. Mehaffy*, 10 Watts 387, decided the year before *Wilson v. Clarke*, a plaintiff, the owner of land, having signed a memorandum sufficient within the Statute of Frauds to bind him to convey the land, sued for the purchase-money; it was held that the memorandum was sufficient and that he could recover, and that the fourth section not being in force made the case all the stronger in his favor; it is true that there was part-performance in this case but the decision was rested on the sufficiency of the memorandum. In *Colt v. Seldon*, 5 Watts

528, the action was ejection by a vendor against a vendee in possession and a memorandum, signed by the vendee agreeing to take the land and delivered to the vendor, seems to have been regarded as a sufficient memorandum under the Statute of Frauds, and judgment was given for the defendant. Here it will be seen that a vendee in possession of land could defend his title under a contract of sale by proof of a memorandum signed by himself alone (*query*, whether this case has any other sound basis than that of part-performance). In *McFarson's Appeal*, 11 Penna. St. 510, where a son sued the administrators of his father for specific performance of a contract made by the father to convey certain land to him and gave in evidence an unsealed writing, reciting the promise and the consideration thereof received from the son, which writing was signed by the father but not by the son, it was held that this was a sufficient compliance with the statute, and specific performance was decreed, English cases being cited. In *Van Horne v. Fricke*, 6 S. & R. 92, *semble*, that in a parol sale of land the vendor would be bound by a receipt given by him for the purchase-money. In *Trip v. Bishop*, 56 Penna. St. 426, said STRONG, J., "If a contract is not within the Statute of Frauds, or if the contracting parties have done all that the statutes requires, there is no reason why a purchaser should not be held to pay what he promised;" that under the Pennsylvania act, the vendor only need sign: *Lowry v. Mehaffy*, *supra*, being relied on, and *Wilson v. Clarke*, *supra*, being distinguished as a case where the vendor did not sign; that where the vendor has signed, the contract becomes mutually obligatory and nothing remains but to pay the purchase-money, and the promise to do that need not be in writing. See also *Johnston v. Cowan*, 59 Penna. St. 275, following *Lowry v. Mehaffy* to the effect that one party only need sign. It will be found, we think, that in all cases of guaranty arising since the Act of 22d April 1856, the sufficiency of a memorandum signed by the defendant only has been assumed. See as to *Wilson v. Clarke*, and the doctrine of mutuality, Browne on Statute of Frauds, § 366.

6. *Part performance by possession taken.*

In *Allen's Estate*, 1 W. & S. 386, it was said by Judge KENNEDY, that the doctrine that possession taken is sufficient part-performance of a parol contract relating to land, to take the case out of the Statute of Frauds, was adopted to prevent the vendee being sued as a trespasser; and that upon this ground principally, if not

solely, the English position was taken. Now, said the learned judge, this reason does not exist in Pennsylvania for adopting the English rule, because in the first place, the fourth section not being in force, and the first three, which are, providing that a parol conveyance shall pass an estate at will, the tenant at will could not be treated as a trespasser; and secondly, because, under the peculiar Pennsylvania rule (*supra*) such a vendee upon a vendor's refusing to properly convey could re-deliver possession and not only not be held as a trespasser, but could himself hold the vendor in damages. In *Pugh v. Good*, 3 W. & S. 57, it was said that the English decisions as to part-performance had been followed in Pennsylvania notwithstanding the omission of the fourth section, several earlier cases being cited, and *Todd v. Pfoutz*, 3 Yeates 179, being distinguished (see also *Reed v. Reed*, 12 Penna. St. 120; *Farley v. Stokes*, 1 Pars. Eq. 429); in *Pugh v. Good*, it was urged by counsel that inasmuch as owing to the omission of the fourth section compensation for part-performance could be obtained in an action of damages, there was less reason to decree specific execution;¹ to this GIBSON, C. J. (though he had admitted in *Parker v. Wells*, 6 Whart. 162 that this was a good argument in favor of greater strictness in allowing part-performance to take a case out of the statute) answered, first, that compensation as such could be as easily obtained in England in equity, notwithstanding the fourth section of the Statute of Frauds, as here, and therefore that the assumption that compensation could not be obtained, could not have been the reason why specific execution in cases of part-performance was allowed, and secondly, that the only opposition made to such specific execution was based upon the fourth section, and that therefore where the fourth section is not in force there is less reason to resist specific execution; as to *Pugh v. Good*, see Browne on Statute of Frauds, § 467.

The doctrine that possession taken of land contracted by parol to be sold will of itself remove the bar of the Statute of Frauds has been carried further probably in Pennsylvania than in most of the other United States or even than in England: *Reed v. Reed*, 12 Penna. St. 117; *Ackerman v. Fisher*, 57 Id. 457; *Wood v.*

¹ See *McKowen v. McDonald*, 43 Penna. St. 441, where specific performance was refused, it being stated that would be a sufficient compensation in damages for any part-performance that might have been made.

Farmar, 10 Watts 195; *Parrish v. Koons*, 1 Pars. Eq. 89; *Gilday v. Watson*, 2 S. & R. 407; *Pfeifer v. Landis*, 1 Watts 392; *McFarland v. Hall*, 3 Watts 37; *Christy v. Barnhart*, 14 Penna. St. 260; *Follmer v. Dale*, 9 Id. 83; *Reynolds v. Hewett*, 27 Penna. St. 176; *Sage v. McGuire*, 4 W. & S. 228; *Billington v. Welch*, 5 Binn. 129; *Moss v. Culver*, 64 Penna. St. 424; *Moore v. Small*, 19 Id. 461. These cases seem to go the length of holding that notoriety of possession is a sufficient substitute for the memorandum required by the statute.

But in *Farley v. Stokes*, *supra*, Judge KING, citing *Pugh v. Good*, *supra*, and saying that Chief Justice GIBSON asserts the doctrine which Sir THOMAS PLUMER seemed to have ruled (*Morphett v. Jones*, 1 Swanst. 172), viz., that delivery of possession alone is sufficient part-performance, added, "of course whether delivery of possession be an unequivocal act of part-performance must depend on the circumstances of the particular transaction." In *Bassler v. Niesly*, 2 S. & R. 352, TILGHMAN, C. J., said that possession alone would not always take a case out of the Statute of Frauds, but with others, as payment of the purchase-money, was a strong circumstance. In *Workman v. Guthrie*, 29 Penna. St. 495, Judge WOODWARD said, "whilst possession in pursuance of 'a parol contract is not of itself such part-performance as necessarily to take it out of the statute, &c.'" In *Van Loon v. Davenport*, 1 Weekly Notes (Phila.) (Supreme Court of Pennsylvania) 320, in a case where the purchase-money was paid and possession taken but no valuable improvements made, no part-performance was held to be made out; the terms of the contract, it is to be remarked, were not perfectly clear.

7. *Trusts.*

In *Wither's Appeal*, 14 S. & R. 185, there was a dictum of Judge DUNCAN'S to the effect that the omission in Pennsylvania of the seventh and eighth sections of 29 Car. II. was of no consequence, as by implication parol express trusts were prohibited by the first section, on the ground that as an express trust is an interest or estate in land, it cannot under the first section be created by parol. This dictum was overruled in *Murphy v. Hubert*, 7 Penna. St. 423, GIBSON, C. J., saying, that the only authorities to the effect that parol express trusts are not valid in Pennsylvania, are mere dicta; that the omission of the seventh and eighth sections was conclusive

on the point, the transcriber of the Pennsylvania statute having done his work in a masterly manner; that the arguments against parol express trusts will prove too much, and parol implied trusts would also have to be held invalid, inasmuch as the proviso in their favor is in the eighth section which is not in force (*query*, however, whether this proviso is not merely declaratory of the common law: *Hoxie v. Carr*, 1 Sumn. C. C. 173; Browne on Stat. of Frauds, § 84); and that misconceptions would arise if English decisions based on a different statute were too closely followed. *Freeman v. Freeman*, 2 Pars. Eq. 85, following *Murphy v. Hubert*, cites a large number of cases on the subject, and shows that many of the cases cited as denying parol express trusts were decided on the ground, not that the evidence was in parol, but because it was generally insufficient to establish a trust: see cases cited in *Freeman v. Freeman*, and see also *Randall v. Silverthorne*, 4 Penna. St. 173; *Swartz v. Swartz*, Id. 353; *Wetherel v. Hamilton*, 15 Id. 198; *Lloyd v. Carter*, 17 Id. 220; *Morey v. Herrick*, 18 Id. 128; *Tritt v. Croker*, 13 Id. 455. The Pennsylvania ruling prior to 1856 was the same as that of North Carolina: *Foy v. Foy*, 2 Hayw. 296; *Shelton v. Shelton*, 5 Jones Eq. 296; *Olcott v. Bynum*, 17 Wall. 44. Of Virginia: *Bank of United States v. Carrington*, 7 Leigh 566; *Walraven v. Locke*, 2 P. & H. 547. Of Texas: *James v. Fulerod* (citing as to the common law before the Statute of Frauds, *Foy v. Foy*, *supra*, 4 Kent 305, Wils. on Trust 46, 2 Story Eq., § 372; 2 Fonbl. Eq., Br. 2, ch. 2, sect. 4, n. 6), *Bailey v. Harris*, 19 Tex. 108; *Miller v. Thatcher*, 9 Id. 482. And in Mississippi, prior to the revised code, *Arding v. Davis*, 38 Miss. 574; see Browne on Stat. of Frauds, § 81, as to the Pennsylvania cases prior to 1856. In *Williard v. Williard*, 56 Penna. St. 124, cases being numerous cited, it was said that prior to April 22d 1856, parol express trusts were good, and that the fourth section of that act was substantially the same as the seventh and eighth sections of 29 Car. II., c. 3.

Since April 22d 1856, express trusts cannot be proved by parol: *Barnet v. Dougherty*, 32 Penna. St. 371. In *Meason v. Kaine*, 63 Penna. St. 339, Judge SHARSWOOD said that the *Murphy v. Hubert* line of cases had, he believed, always met with the dissatisfaction of the profession, till the Act of 1856 did away with the effect of them. In *Church v. Ruland*, 64 Penna. St. 442, it was held, citing Eng-

lish and Pennsylvania cases, that trusts *ex maleficio* are not within the Act of 1856.

By the 6th section of the Act of 22d April 1856, see above, trusts excepted from the provisions of the statute must be asserted within a certain time. In *Clarke v. Trindle*, 52 Penna. St. 495, said THOMPSON, C. J., speaking of the section, "It will (when the verbiage, &c., is taken out) read '*That no right of entry shall accrue or action be maintained * * * to enforce any implied or resulting trust as to realty but within five years after * * * such equity or trust accrued with right of entry, unless such * * * trust shall have been acknowledged by writing to subsist by the party to be charged thereon within the same period.*' The words 'with right of entry,' at the end of the clause, I esteem as material to be considered in construing it. The expression evidently means, I think, if there be neither entry nor possession taken by the party in whose favor the trust results, within five years after it accrues, and no acknowledgment in writing, the trust cannot thereafter be asserted in law against the trustee;" see *Best v. Campbell*, 62 Penna. St. 478, for an application of this ruling. In *Williard v. Williard*, 56 Penna. St. 124, it was held where possession has been taken by the alleged *cestui que trust* under his title (the words of the act being " * * * unless * * * there has been in part a substantial performance"), that if the act had begun to run, possession taken would stop it; and if possession preceded the trust relation, the statute would not begin to run; citing *Clarke v. Trindle*, 52 Penna. St. 492 (*query*, whether, however, possession existing prior to a contract or trust can be regarded as part-performance to save the transaction from the operation of the statute); *Jones v. Peterman*, 3 S. & R. 542; *Farley v. Stokes*, 1 Pars. Eq. Cas. 422; *Cravener v. Bowser*, 4 Penna. St. 259; *Aitkin v. Young*, 12 Id. 15; *Christy v. Barnhart*, 14 Id. 260; *Greenlee v. Greenlee*, 22 Id. 237; *Myers v. Byerly*, 45 Id. 368; *Workman v. Guthrie*, 29 Id. 495; Browne on Statute of Frauds, § 477, *et seq.* See, however, as examples of cases where a prior possession continued after the contract made was held under the circumstances to be part-performance: *Aurand v. Wilt*, 9 Penna. St. 54, and *Moss v. Culver*, 64 Id. 424.

In *Church v. Ruland*, 64 Penna. St. 444, where A. received a devise of land for life, subject to the trust that she should leave the land to B. in her will, it was held that the limitation of the 6th

section of the Act of 1856, did not run against B. till A.'s death : *Price's Appeal*, 54 Penna. St. 472, being cited.

8. *Equitable mortgages by the deposit of title-deeds.*

These have never been recognised in Pennsylvania : *Rickert v. Madeira*, 1 Rawle 325 ; *Shitz v. Dffenbach*, 3 Penna. St. 233 ; *Bowers v. Oyster*, 3 Penna. R. (P. & W.) 239.

9. *The liability of one who has irregularly endorsed a note, &c.*

An interesting question as to whether an irregular endorsement is a good memorandum under the Statute of Frauds to hold the endorser has been much considered in Pennsylvania. In *Jack v. Morrison*, 48 Penna. St. 113, Judge WOODWARD, commending the provisions of the Statute of Frauds as to guaranties, held that where under a parol contract of guaranty, the defendant, the alleged guarantor, endorsed a note (which had been drawn to the plaintiff's order and of which the plaintiff was first endorser), below the plaintiff's endorsement, he, the defendant, could not be held either under the law merchant as an endorser nor under the parol guaranty because of the Statute of Frauds, with which the endorsement did not comply as a proper memorandum. In *Schaefer v. Bank*, 59 Penna. St. 144, discussing the question and citing authorities, Judge SHARSWOOD said that the court, warned by the many exceptions which English decisions had made in the law of the Statute of Frauds, were determined to uphold the Pennsylvania Act strictly and therefore affirmed *Jack v. Morrison*. See *Barto v. Schenck*, 4 Casey 447, on this question. *Jack v. Morrison* was followed in *Slack v. King*, 67 Penna. St. 384, where the defendant had endorsed above the endorsement of the person to whose order the note was made ; and in *Wilson v. Martin*, 74 Penna. St. 159, a case of an endorsement on a non-negotiable note. See, in support of *Jack v. Morrison* and *Schaefer v. The Bank*, *Alter v. Longebartel*, 5 Phila. 151, *Murray v. McKee*, 60 Penna. St. 35. In *Gilbert v. Finkbeiner*, 68 Penna. St. 243, it was held that while *Jack v. Morrison* held that before 1855 an irregular endorsement could be shown by parol, cases being cited, to be intended to be a guaranty, so since 1855, the same end could be accomplished by writings properly signed so as to comply with the Statute of Frauds. See upon this subject *Martin v. Duffey*, 4 Phila. 75 ; *Robinson v. Rebel*, 1 Weekly Notes (Phila.) 9 ; *Fuller v. Scott*, 8 Kans. 32 ; *Underwood*

v. *Hossack*, 38 Ill. 214; *Hodgkins v. Bond*, 1 N. H. 284; *Furrell v. Morgan*, 7 Minn. 368.

10. *The statement in the memorandum under the Statute of Frauds of the consideration of a contract.*

As regards the great *Wain v. Walters* controversy it has been held in Pennsylvania that the consideration need not be set out in a memorandum under the Statute of Frauds; *Paul v. Stackhouse*, 38 Penna. St. 302; *Bowser v. Cravener*, 56 Id. 132.

11. *The effect of the nature of the consideration in taking a guaranty out of the Statute of Frauds.*

In the important discussion which has taken place upon the question raised by Chanc. KENT in *Leonard v. Vredenburg*, 8 Johns. 29, viz., how far a new affirmative consideration passing to the promisor will save a parol guaranty from the operation of the Statute of Frauds, the courts of Pennsylvania have taken a not unimportant part: see *Maule v. Buckwell*, 50 Penna. St. 39; Throop on Val. of Verb. Agreem., § 615 *et seq.*, 13 Am. Law Reg.; N. S., p. 593. The view of *Leonard v. Vredenburg*, taking the affirmative of the question, has certainly been denied; it is open, however, to question how far Pennsylvania authority will sanction the proposition which was built upon the ruins of Chancellor KENT's doctrine, to the effect that where the guarantor has a leading purpose in view in answering for the previous debt and does it for an object of his own, to the accomplishment of which the guaranty proper is a mere incident, his undertaking may, as a fact, be found to be an original one.

In conclusion, it may be added that in *McKinney v. Snyder*, 78 Penna. St. 49, Judge PAXSON said, "That the practical working of the recent Act of Assembly (1869) allowing the parties in a controversy to be examined as witnesses on their own behalf, admonishes us that it would be unwise to relax any of the rules of law arising under the Statutes of Limitations and of Frauds and Perjuries."

HENRY REED.
