Ethics and the Statute of Frauds

Robert S. Stevens

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation
Robert S. Stevens, Ethics and the Statute of Frauds, 37 Cornell L. Rev. 355 (1952)
Available at: http://scholarship.law.cornell.edu/clr/vol37/iss3/1

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
Ethics and the Statute of Frauds

Robert S. Stevens*

It is probably a prevailing practice automatically to plead the Statute of Limitations to a stale claim and the Statute of Frauds when there is known to be no writing signed by the defendant, or his agent, evidencing the contract sued upon. The statutes are there, they supply the defenses, and the attorney would not be giving full and competent service to his client if he did not advise him of them and advance them for him.

But there are occasions when the lawyer rebels at pleading the Statute of Limitations or when, if peculiar circumstances seem to require it, he resorts to the statute with explanations and apologies to his adversary. Conscious that the Statute of Limitations enacts a rule of procedure rather than of substantive law, that it is aimed at prohibiting the prosecution of alleged claims which can not be disproved because of the loss of witnesses or documentary evidence, and that, with this purpose in mind, the periods of limitation for various types of litigation have been rather arbitrarily classified and fixed, the lawyer may feel that it would be shabby to permit the client to plead the statute and thereby escape performance of a just obligation. Suppose, for example, that the suit is upon a promissory note. The client has received the benefit of the loan. The memories of the parties are clear as to the transaction. The existence of the debt could not be denied under oath. The documentary evidence of it is at hand. The six year limitation expired two days before suit was brought. The client, though now affluent, is prepared to take advantage of the indulgence extended him during his intervening hard times and hopes to defeat enforcement of a just obligation by pleading the statute. What lawyer wants to be or should be a party to such perversion of the spirit and purpose of the Statute of Limitations?

There is a similar problem of ethics in connection with the use of the Statute of Frauds as a defense. But here, the lawyer’s conscience may be in conflict, not merely with a custom of the profession habitually to plead the defense, as in the case of the Statute of Limitations, but with judge-made law, that is all but unanimously adopted, to the effect that

* See Contributors' Section, Masthead, p. 439, for biographical data.
the defendant can admit an honest obligation and yet defeat its enforce-
ment by pleading that the agreement was only oral and that there is no
written evidence of the obligation as required by the Statute of Frauds.
In the conflict between conscience and judicially approved practice, what
is the lawyer to do? Conscience tells him that the practice is wrong, but
the literature from insurance companies reminds him of liability for
malpractice.

The remedy seems to lie in changing the law so that it will conform
with conscience and morals. Justice Cardozo has reminded us that
"Hardly a rule of today but may be matched by its opposite of yester-
day."\(^1\) That statement has not only aptness, but cogent persuasiveness
in connection with our consideration of this conflict between morals and
law. For there was a time, and it is hoped that it may recur, when the
law was that if a defendant admitted the making of an oral agreement,
he could not escape that honorable obligation by pleading the Statute
of Frauds.

It seems strange that upon a point of law of such importance to both
the profession and the public, there should be so little published con-
sideration outside of judicial opinions. As lawyers, we are accustomed
to what we find in the latter. In the opinions of courts that are making
new law or changing old law, we find spirited discussions. But then there
may follow an age of lassitude, when an announced view is indifferently
perpetuated and a respect for a time-tested rule provides a substitute
for an inquiry into the origin of that rule or a consideration of the con-
tinuance of its workability and propriety. Such, it is submitted, has, on
the whole, been the history of the rule we are now considering. A very
few judicial voices have expressed dissent in the past few years from
the accepted rule: These will be emphasized presently. But first, let us
concentrate upon the overwhelmingly accepted view.

Browne on the Statute of Frauds states:

But by the unbroken course of more modern decisions, it is now well
settled that although the defendant admits the agreement, it cannot be
enforced without the production of a written memorandum, if he insist
upon the bar of the statute.\(^2\)

This, a quotation from Story's Equity Pleadings,\(^3\) and similar con-

---

conclusions as to the existing law found in cyclopedias are often cited without more, to support decisions continuing the rule. But, supplementing the repetition of these familiar generalizations as to what the law is, courts at times have advanced particular arguments or theories. It is profitable to examine some of these.

One theory is that, though the required memorandum does not have to be executed contemporaneously with the negotiations leading to the oral agreement, still a memorandum signed after action brought does not fulfill the statutory requirement. It will be recalled that the consequences of the absence of written evidence of the contract are differently stated in the several sections of the English statute. Thus, under Section 7, “all declarations or creations of trusts... shall be manifested and proved by some writing... or else they shall be void and of none effect.” Under Section 17, “no contract for the sale of any goods... shall be allowed to be good” unless the buyer shall accept delivery of part, make part payment or sign a memorandum. In contrast, Section 4 concerning contracts of guaranty, contracts in consideration of marriage, contracts for the sale of land, etc., reads “no action shall be brought” unless there shall be a signed agreement or memorandum thereof.

In 1841, in an action upon an oral contract for the sale of goods where the defendant had executed a memorandum of the agreement after action was brought, one English court held that the plaintiff could not recover in spite of the subsequent memorandum. Baron Parke said:

With regard to the point which has been made by Mr. Martin, that a memorandum in writing after action brought is sufficient, it is certainly quite a new point, but I am clearly of the opinion that it is untenable. There must, in order to sustain the action, be a good contract in existence at the time of action brought; and to make it a good contract under the statute, there must be one of the three requisites mentioned. I think, therefore, that a written memorandum, or part payment, after action brought is not sufficient to satisfy the statute.

To the same effect is Lucas v. Dixon, another suit upon an oral contract for the sale of goods in which, after action brought, the defendant had executed an affidavit which was sufficient to constitute a memorandum if admissible. It was held inadmissible. The court starts with

5 The American decisions will be found collected in the volumes cited in note 4 supra and in 49 L.R.A. (n.s.) 27 (1914) and 22 A.L.R. 723 (1922).
7 Id. at 40-41. Cf. Fricker v. Thomlinson, 1 Man. & G. 722 (1840), where the effect of acceptance of delivery in part after action brought was discussed but not decided.
8 L.R. 22 Q.B. 357 (1889).
the assumption that it has been settled that, in actions falling under Section 4, the memorandum must exist at the time the action is commenced. If that be true, the court found no reason why the rule should be different in an action under Section 17. It is interesting that both Lord Esher and Lord Bowen, in the process of construing Section 17, refer to the three requirements of the statute: 1) acceptance of delivery in part, 2) payment in part or 3) a signed memorandum, and conclude that it is so highly unlikely that a defendant disputing the contract would, after action brought, accept part of the goods or make part payment, that it must be supposed that the legislature intended that these acts and the signing of a memorandum must have preceded the commencement of the action.

The critical importance of the word "void" was insisted upon in a Wisconsin decision. The statute of that state, like those of some others, in the provision relating to contracts for the sale of real property, substitutes "void" for "no action shall be brought."

The court said:

A contract declared void by statute, is in all respects a nullity. It cannot for any purpose be considered as ever having had a being or existence. Excepting the single case reserved from its operation [part performance in equity], all verbal contracts for the sale of land or any interest in them, are under our statute, as if no words had ever been spoken concerning them, and no negotiations whatever had been had between the parties; and I confess my utter inability to perceive how, upon any acknowledged principle of jurisprudence, they can be treated for any purpose as ever having been made at all . . . In this view, it makes no difference whether the original bargain was for a clear title or only a warranty deed. It makes no difference whether the plaintiff acted in good faith or in bad faith in abandoning his first form of action, in which he insisted upon a conveyance, and in changing it, by amendment, into a suit to recover back the money which he had paid. Nor is the demand for such relief aided by the consideration that the parol contract is definitely stated and admitted in the pleadings of both parties, and the statute not urged as a bar; . . . All these and other like considerations, which might be very properly urged before a court sitting to adjudicate upon the rights of parties under a statute like the English, can be of no avail here. The simple answer to them is, that while under the English and other similar statutes, there is a legal contract—one which the party is morally and conscientiously bound to perform—under ours there is none—nothing which creates any right or imposes any obligation or duty whatever; and that all that the parties may say or do, short of reducing their agreement to writing, expressing the consideration, and causing it to be subscribed by the party making

9 For this, it seems to rely upon Wood v. Midgley, 5 De G. M. & G. 41 (1854), where it was held that defendant can raise the Statute of Frauds by demurrer. Inferentially, the admission implicit in the demurrer could not be availed of by plaintiff.
10 Brandeis v. Neustadt, 13 Wis. 158 (1862).
the sale, affords the court no solid ground, or colorable pretext even, for noticing it or knowing that any thing of the kind has ever transpired.\textsuperscript{11}

Continuing its distinction, the court suggests that under a statute containing the "no action" clause and intended to affect only the remedy or the evidence,

There is some plausibility in the argument that it is designed to guard against the frauds and perjuries occasioned by the free admission of parol evidence, and that where the contract is confessed in the answer or other pleading of the defendant or party to be charged, the danger is removed; that the confession dispenses with the necessity of parol or other proof, and takes away the temptation to commit either, and makes a case not within the mischief which the legislature intended to obviate . . . However sound this reasoning, which has met with strong disapprobation on the part of some of the greatest masters of the English and American equity system, may be conceded to be, it clearly has no application to a statute like ours.\textsuperscript{12}

The rule that defendant can, in his answer, admit the contract and plead the statute is consistent with a rule that any confession, to be admissible in evidence, must have antedated the commencement of action. But it is submitted that both rules make bad law and that neither reflects a true interpretation of legislative intent, whether the construction is of "void," "shall be allowed to be good" or "no action shall be brought." Each of these is conditioned by the purpose of Statutes of Frauds, as stated in the title and the preamble of the Statute of Charles II, "An Act for Prevention of Frauds and Perjuries"—"for the prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury."

Upon this point, it is significant to quote Browne on the Statute of Frauds which, as previously stated, adheres to the doctrine that a defendant's answer can both admit the agreement and plead the statute.

At the outset, we note the difference in phraseology between the fourth and the seventeenth sections, in this, that the former says 'no action shall be brought' upon the contract, and the latter says the contract shall not be 'allowed to be good.' There seems to be no reason to attribute to the latter phraseology any force, or to draw from it any inferences, different from those which attend the construction of the former. 'Allowed to be good' appears to mean, considered good for the purposes of recovery upon it;\textsuperscript{13} and the remaining portions of the two sections in question being very similar, and the policy of the two being very clearly the same, we should

\textsuperscript{11} Id. at 166-167.

\textsuperscript{12} Id. at 168. The rule that a defendant may admit the agreement and yet plead the statute is said, by way of dictum, to be particularly applicable and to carry out the intent of statutes using "void": Luckett v. Williamson, 37 Mo. 388 (1866); Thomas J. Baird Investment Co. v. Harris, 209 Fed. 291 (8th Cir. 1913).

\textsuperscript{13} The author cites Townsend v. Hargraves, 118 Mass. 325, 334 (1875).
not be justified in laying much stress upon the change of phrase. The whole statute is undeniably put together most irregularly and loosely...

The operation then, which the statute has upon a contract covered by it, is that no enforcement of the contract can be had, while the requirements of the statute remain unsatisfied, if the party against whom enforcement is sought chooses to insist upon this defense; the statute does not make the contract illegal; a contract which was legal and actionable before the statute is legal since and notwithstanding the statute, and is also actionable and enforceable if the making of the contract be followed by compliance with the requirements of the statute. Compliance with the requirements of the statute does not constitute the contract; the statute presupposes an existing lawful contract, the enforcement of which is suspended till the statute is satisfied.14

All lawyers are aware of the decisions interpreting Statutes of Frauds which are inconsistent with the literal meaning of "void" as used there. It would take too long to enumerate, document and discuss them. Many examples will be found in the chapter from Browne cited above.16 Contrary to what was said by the Wisconsin court in the quotation already given,16 it is universally settled that a defendant may waive the defense of the statute. If, as the Wisconsin court said, contracts within the statute cannot "be treated for any purpose as ever having been made at all," then, a memorandum subsequently signed would evidence something that is legally nothing. Yet, it is everywhere agreed that a memorandum executed after the agreement, and at least before action brought, does not create a contract, but only supplies evidence of one previously made orally.

Undeniably, the purpose of the statute was to give assured protection against the risk, which experience had shown to be real, of convincing proof through perjured testimony of an agreement that had never actually been entered into. The decisions and texts are replete with the statement that the statute was intended to be used as a shield, not a sword. Judicial construction of the statute prohibits its use as a defense where the defendant has fraudulently prevented an actual agreement from being reduced to writing or when acts of part performance unequivocally indicate the existence of a contract. Yet, judicial construction, starting more than one hundred years after the passage of the original act, reversed the pre-existing decisional law and sanctioned the use of the statute as a defense even though the defendant admitted the agreement in his answer. Is this not permitting the statute to be used as a sword? Perhaps, as Lord Esher and Lord Bowen said,17 it is highly

---

15 See note 14 supra.
16 See note 10 supra.
17 See note 8 supra.
unlikely that a defendant who genuinely disputes the making of an oral agreement would, after action brought, accept partial delivery, make part payment or sign a memorandum. But in *Bill v. Bament*\(^{18}\) and in *Lucas v. Dixon*,\(^{19}\) the unlikely happened—the defendant did execute a memorandum after action begun; and in *Fricker v. Thomlinson*,\(^{20}\) he did thereafter accept delivery in part. Under those circumstances, it is difficult to concede the genuineness of the defendant's dispute of the existence of the agreement or his need for protection against perjured proof of a non-existent agreement.

Most important and revealing in connection with our immediate problem as to why one may admit the making of an oral agreement and yet defeat its enforcement by pleading the statute, is the history of the evolution of the present-day majority rule to this effect. So often, the fact is overlooked that a rule was once just the opposite of what it is. Many times history could be turned back to advantage.

In *Leake v. Morris*,\(^{21}\) decided in 1682, the suit was upon a contract with an allegation in the bill that it was agreed that the agreement should be put into writing. The defendant "pleaded the statute of frauds and perjuries, for that, if any such agreement was made, it was by parol."\(^{22}\) It was ordered that the "defendant do answer so much of the plaintiff's bill only, as doth charge that the said agreement was to be put into writing."\(^{23}\) Other early pronouncements on our subject are found in *Croyston v. Baynes*\(^{24}\) in 1702 and, *Symondson v. Tweed*\(^{25}\) in 1713. In the first of these, it is reported:

> In this case the Master of the Rolls declared that if a bill be brought here for execution of a parol agreement, which is in no part executed, if the defendant does by answer confess the agreement without insisting upon the Statute of Frauds and Perjuries, the court will decree an execution of the agreement because when the defendant confesses it, there is no danger of perjury, which was the only thing the statute was intended to prevent.\(^{26}\)

True, this is an indecisive statement for it is concededly open to the inference that the defendant could confess and still claim the protection of the statute. But to allow him to confess and defend would be incon-

\(^{18}\) 9 M. & W. 36 (1841).
\(^{19}\) L.R. 22 Q.B. 357 (1889).
\(^{20}\) 1 Man. & G. 722 (1840).
\(^{21}\) 1 Dickens 14 (Ch. 1682).
\(^{22}\) *Id.* at 15.
\(^{23}\) *Ibid.*
\(^{24}\) Precedents in Chancery 208 (Ch. 1733).
\(^{25}\) *Id.* at 374.
\(^{26}\) See note 24 *supra*. 
sistent with the court's conception of the single purpose of the statute. Inconsistent with that single purpose and with any construction that may be put upon the court's language, are those more modern decisions already referred to, which hold that an oral contract may not be proved by a memorandum signed after action brought.

The report of *Symondson v. Tweed* is:

In this case the Court declared, and the Council agreed likewise, that if a man brings a bill for specific performance of a parol agreement, setting forth the substance of it in a bill, and the defendant by his answer confesses the agreement, that the Court may in such case decree an execution thereof, notwithstanding the Statute of Frauds and Perjuries, because the defendant confessing the agreement, there can be no danger of perjury from contrariety of evidence, which was the only mischief that statute intended to obviate.\(^{27}\)

This declaration, however, is dictum because the defendant had not by his answer admitted the alleged agreement. But that it represented the view then prevailing is reflected in a *Treatise of Equity* printed in 1737, where it is said:

If an Agreement be by Parol, and not signed by the Parties, or some Body lawfully authoriz'd by them, if such Agreement is not confess'd in the Answer, it cannot be carried into execution. But where in his Answer, he allows the bargain to be compleat, and does not insist on any Fraud, there can be no Danger of Perjury; because he himself had taken away the necessity of proving it.\(^{28}\)

The leading and most cited early case is *Child v. Godolphin*,\(^{29}\) decided by Lord Macclesfield in 1732. This was an action for specific performance of an agreement to assign a lease, the bill alleging a letter confirming the agreement signed by the defendant. The defendant, for his defense, pleaded the statute, insisting that neither she nor any agent of hers had ever signed any agreement or memorandum of an agreement to assign the lease to the plaintiff, nor did she remember that she or any agent of hers had ever signed any such memorandum except the letter mentioned in the bill, which she was induced to sign believing it to be a letter of recommendation. The defendant argued that the plea was sufficient without an answer, for otherwise the plaintiff might produce witnesses to prove the pretended agreement and the defendant would then be deprived of the benefit of the statute. From an order that the plea

\(^{27}\) Precedents in Chancery 374 (Ch. 1733).


\(^{29}\) I Dickens 39 (Ch. 1723).
should stand for an answer, defendant appealed. In affirming that order, it is reported that

His Lordship said, the plea insisting on the statute was proper, but then the defendant ought by answer to deny the agreement; for if she confessed the agreement, the Court would decree a performance notwithstanding the statute, for such confession would not be looked upon as perjury, or intended to be prevented by the statute.\(^{30}\) (Emphasis added.)

Again in 1726, a plea without an answer was held insufficient. The defendant, having been employed by the plaintiff to purchase certain property, took conveyance in his own name and then, to prevent the plaintiff from getting the property, reconveyed to the vendor. It was ordered that the plea stand for an answer.\(^{31}\)

The language of Lord Chancellor Hardwicke in *Cottington v. Fletcher*, decided in 1740, is unequivocal upon the effect to be given defendant's admission in his answer, notwithstanding his plea of the statute. Plaintiff sued for a conveyance of property which he had conveyed to defendant, alleging that the transfer was only in trust for himself. To this bill, the defendant pleaded the statute and said that there was no declaration of trust in writing. By his answer, he admitted the assignment for the purpose charged in the bill. The Lord Chancellor said:

I am of opinion that the plea ought to be overruled. Undoubtedly if the plea stood by itself, it might have been a sufficient plea; but coupled with the answer, which is a full admission of the facts, it must overrule the plea.\(^{33}\)

\(^{30}\) *Id.* at 42.

\(^{31}\) *Rastel v. Hutchinson*, 1 Dickens 44 (Ch. 1726).

\(^{32}\) *2 Atk. 156, 26 Eng. Rep. 498 (Ch. 1740).*

\(^{33}\) *Ibid.* The report states that defendant in his answer, after admitting the assignment, stated “that he never intended to take any benefit to himself, otherwise than in presenting the other defendant Mr. Loggin to the church upon the next avoidance, for that he was recommended by Mr. Loggin to the plaintiff as a proper person for a grantee, and that he did not know the plaintiff above a month before the grant.” *Ibid.* Lord Hardwicke adds to the opinion quoted above: “If the admission and confession by the answer amounts to an admission and confession of a trust for the defendant Loggin as to the first avoidance, the consequence of this is a resulting trust for the plaintiff after the presentment to Loggin is performed. And this is the case upon the statute of frauds and perjuries, where the admission of an express trust to one person is likewise the admission of a resulting trust to another.” *Ibid.* The decision, therefore, seems to be made dependent upon the admission in the defendant's answer. However, fifty-eight years later, Lord Chancellor Loughborough, in *Moore v. Edwards*, 4 Ves. 23 (Ch. 1798), in answer to counsel's argument that it had been settled that the statute cannot be insisted upon if defendant's answer admits the agreement, said “That is a matter of argument. I know it has been said in several cases. I do not take it to have been decided. I take it that position has often been controverted. There is a case in Atkyns that misleads people; where Lord Hardwicke is stated to have overruled the defense upon the statute merely
Nine years later, in *Attorney General v. Day*, Lord Hardwicke made statements which, though dicta, reaffirmed his views as to what the law then was:

Yet on all the questions on that statute in this court, the end and purport of making it has been considered, viz. to prevent frauds and perjuries: so that any agreement, in which there is no danger of either, the court has considered as out of the statute; upon which there have been many cases: as in a bill by purchaser of lands against the vendor, to carry into execution the agreement, though not in writing, nor so stated by the bill: the vendor puts in an answer admitting the agreement as stated in the bill; it takes it entirely out of the mischief; and there being no danger of perjury, the court would decree it... Then there are other cases, well known, taken out of the statute, not so much on the principle of no danger of perjury, as that the statute was not intended to create or protect fraud. As where agreements have been carried partly into execution: although a controversy might be afterward between the parties as to the terms, yet if made out satisfactorily to the court, it would be decreed, though variety of evidence might be in the case; in order that one side might not take advantage of the statute to be guilty of fraud, the court would hold his conscience bound thereby.

That the purpose of the statute was to prevent proof by perjured testimony and that the defendant’s admission removed the danger of perjury and took the case out of the statute is accepted in a dictum of Lord Mansfield in 1766.

In 1789, Lord Thurlow decided the case of *Whitchurch v. Bevis*.

To a bill alleging an oral contract and acts of part performance, the defendant pleaded the Statute of Frauds, but did not aver in his plea that there had been no parol agreement. His answer went only to the part performance, and did not deny the parol agreement. The sufficiency on the ground that the agreement was admitted, I had occasion to look into that; and, it is completely a misstatement. It appears by Lord Hardwicke’s own notes, that it was upon the agreement having been in fact executed that he determined that case. But in the case next cited, note 34 infra, Lord Hardwicke’s opinion, written only nine years after his decision in *Cottington v. Fletcher*, recognizes the propriety of enforcement both where the agreement has been executed and where the defendant’s answer confesses the oral agreement. See also *Lacon v. Mertins*, 2 Dickens 664 (Ch. 1743).

---

34 1 Ves. Sr. 218 (Ch. 1749).

35 Id. at 220.

36 Simon v. Metivier, 1 W. Bla. 599, 600 (1766). Here it was decided that an auction sale in which the auctioneer had taken down the buyer’s name was not within the statute. Lord Mansfield said: “The object of the legislature in that statute was a wise one; and what the Legislature meant is the rule both at law and equity; for, in this case, both are the same. The key to the construction of the act is the intent of the Legislature; and therefore many cases, though seemingly within the letter, have been let out of it; more instances have indeed occurred in Courts of equity than of law, but the rule is in both the same. For instance, where a man admits the contract to have been made, it is out of the statute; for there can be no perjury.”

37 2 Bro. C.C. 559 (Ch. 1789).
of the plea was three times argued before being held to be bad, but then, after final reargument, was held to be good, with, however, reservations which will be presently emphasized.

The case would seem to be immediately distinguishable as one where acts of part performance took the case out of the statute, and therefore, deprived the defendant of the benefit of the statute and left him only the opportunity to deny the making of the agreement and the alleged acts of part performance. But, as the following excerpt from the Lord Chancellor's first opinion\(^\text{38}\) shows, he considered the alleged acts insufficient to take the case out of the statute and, accordingly, treated the case as one where the defendant admitted the parol agreement but pleaded the statute.

Supposing you have laid a sufficient part performance in your bill, I cannot conceive the plea would have held, it would have been like Lord Aylesford's case, where the agreement was carried into execution, and the plea of the statute overruled. But the great point is, whether you can plead the Statute of Frauds, without supporting the plea by an answer, averring that there was no parol agreement. I put out of the case all the facts, charged in the bill as part performance, considering them as weak and trivial, and by no means amounting to a part performance; and my determination now goes upon the bill, as brought to enforce the performance of a parol agreement.\(^\text{39}\)

After commenting upon Lord Macclesfield's decision in Child v. Godolphin,\(^\text{40}\) Lord Thurlow's opinion continued:

Actions at law continue to be brought, as they used to be, upon a general statement of the agreement in the declaration, and the defendant introduces the statute by the plea. So in this Court; but this Court has laid down two exceptions, by which, if they are to be sustained, it amounts to the same thing as if the statute had made the exception of the two cases, that is where the agreement is confessed by the answer, or where there is a part performance. The consequence is that if the bill states a part performance, the defendant must answer to the agreement, as well as to the part performance, according to Lord Ayleworth's case, which is founded on extreme good sense. So, where the Court has laid it down as a clear exception from the statute, that the danger of fraud and perjury is avoided where the defendant admits the agreement, it is requisite that he should answer the agreement . . . But what will become of the statute? The bill will not be sustained unless the defendant confesses the agreement by his answer; you shall not prove it \textit{aliunde}. If the bill had only stated the parol agreement without the part performance, the plea would not have applied, the agreement must be answered. I am aware, that except the case determined by Lord Macclesfield, there is no other; the opinion I give is, that if nothing had been stated in the bill but a parol agreement, if

\(^{38}\) Id. at 566.

\(^{39}\) Ibid.

\(^{40}\) See note 29 supra.
the defendant pleads, he must support his plea by an answer, denying the parol agreement, the only effect of the statute being that it shall not be proved aliunde. If he answers and says there was no parol agreement, I think no evidence that can be given will sustain the suit. If this doctrine be not maintainable, the judgment I am giving is wrong.41

After reargument, the Lord Chancellor’s final opinion begins with this sentence: “In this case the agreement stands confessed in the answer.” But then, after analyzing the negotiations and the terms of the alleged agreement as stated in the bill and answer, he seems to have come to the conclusion that there were circumstances left to be defined and stated in a writing to be signed and that defendant withdrew before this was done.

... so that there is much more general matter than merely the agreement stated in the bill amounted to, or to which the statute of frauds might be intended to apply, and it must have been a case where the parties were proceeding with such preparations as were necessary for the final agreement of the contract. Immediately after the bargain was off, the bill was filed, stating the case, and a plea was put in coupled with an answer to all these particulars. The answer then does not overrule the plea, because perfectly distinct, and does not apply to a contract upon which the plea went; and therefore the plea ought to be allowed, and consequently the exception to it ought to be overruled.... I am prepared to say, if there be general instructions for an agreement, consisting of material circumstances, to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties but the party takes advantage of the locus penitentiae, he shall not be compelled to perform such an agreement as that when he insists upon the statute.42

There, we have the Lord Chancellor’s decision. However, his expressed reservation regarding the principle of admitting the agreement and pleading the statute is most significant in connection with our chronological review of the doctrine and indicates that he still adhered to it as a general proposition.

I mean to determine upon the ground of this particular case; because it may become to be more seriously considered what sort of a verbal agreement, notwithstanding the plea of the statute of frauds may be sustained, as being confessed by the answer, so as this Court will carry it into execution.43

41 2 Bro. C.C. 559, 566-567 (Ch. 1789).
42 Id. at 569.
43 Ibid. Whitbread v. Brockhurst, 1 Bro. C.C. 404 (Ch. 1784), had been decided by Lord Thurlow five years earlier. There the bill alleged a written agreement and acts of part performance. The defendant pleaded the statute and in the plea averred (1) that there was no contract in writing and (2) that there were no acts of part performance. It was held that the plea must stand for an answer because it did not present a single bar to the action but contained inconsistent averments; if there was no contract in writing then the plea would be good, but if there were acts of part performance taking the case out of the statute, then the plea of the statute would be bad. See discussion of
ETHICS AND STATUTE OF FRAUDS

Thus, for more than one hundred years after the passage of the Statute of Frauds, there continued to be expressions of belief in the principle that the statute was not intended to be used to defeat performance of an admitted oral agreement. It is true that the actual decisions to this effect are few, but the continuity of the dicta demonstrates the force of the principle and an inclination to adhere to it.

However, toward the close of the eighteenth century, conflicting notions began to creep in and these supplied the foundation for the ultimate reversal of the old rule and the establishment of the present-day majority rule.

Reference has already been made to the Treatise of Equity, printed in 1737.\(^4\) It was this same treatise that was republished in 1793 with the addition of marginal references and notes by John Fonblanque, Esq.\(^5\) To the section already quoted,\(^6\) Fonblanque appended a lengthy note, the opening paragraph of which is:

> If a defendant confess the agreement charged in the bill, there is certainly no danger of fraud or perjury in decreeing performance of such agreement. But it is of considerable importance to determine whether the defendant be bound to confess or deny a mere parol agreement not alleged to be in any part executed? or, if he do confess it, whether he may not insist on the statute, in bar of the performance of it?\(^7\)

The decisions, he says, are numerous and irreconcilable and he proceeds to "consider them in their principle rather than in detail." The conflict in views can be best stated in his own words. Upon the first point, he says:

> They who insist that the defendant is bound to confess or deny the agreement alleged, principally rely on the rule of equity, that the defendant is bound to confess or deny all facts which, if confessed, would give the plaintiff a claim or title to the relief prayed; and that as equity would decree a parol agreement, if confessed, the defendant must confess or deny it. It is certainly a general rule in equity, that the defendant shall discover

---

\(^4\) Note 28 supra.
\(^5\) FONBLANQUE's EQUITY (1793).
\(^6\) See page 362 supra.
\(^7\) FONBLANQUE's EQUITY, note 40, bk. I, c. III, § 8, 168, et seq. (1793).
whatever is material to the justice of the plaintiff's case; but in applying this rule to the case of a parol agreement, it is previously material to ascertain, whether the statute of frauds has not in such case relieved the defendant from his general obligation. The prevention of frauds and perjuries is the declared object of the statute; and the decreeing of a parol agreement when confessed by the defendant, and the statute not insisted on, is evidently consistent with such object. . . But if the defendant be bound to confess or deny the parol agreement, his answer must be liable to contradiction, or not liable to contradiction. If the defendant's answer be liable to contradiction by evidence aliunde, the evil arising from contradictory evidence, which the statute proposed to guard against, would necessarily result. If the defendant's answer be not liable to contradiction by evidence aliunde, the rule would furnish a temptation to perjury, by giving the defendant a certain interest in denying the agreement; since, if he confessed it, he would be bound to perform it. . . It would ill become me to pursue this point further; the difficulties which I have stated are probably sufficient to explain and justify the contrariety of opinion which has prevailed upon it.49

Upon the second point, whether a defendant having confessed the alleged agreement, can protect himself from performance by insisting upon the statute, he observes that:

This, which is also a vexatious question, is almost immediately dependent on the former point; for when Lord Macclesfield, in Child v. Godolphin, held that the defendant was bound to confess or deny the agreement, it seems to have been a necessary consequence that if the defendant confessed the agreement, he would not be allowed to avail himself of the statute, cui bono compel him to confess or deny the agreement? But if the defendant be not bound to confess or deny the agreement, it must be in respect to the statute affording him a good defence against the performance of it. . . 49

Such was the dilemma which the courts fashioned for themselves as the eighteenth century turned into the nineteenth. Having for one hundred years believed that the statute was intended to prevent fraud as well as perjury and that it would be against good conscience for defendant to defeat performance of a parol agreement, the making of which he could not deny, they came to the point where they would permit the defendant to perjure himself by denying the making of the agreement or, if he admitted it, would ignore the admission as a confession enforced by their own rules of pleading. This indeed sounds inconsistent with our present-day ideas that one must admit or deny, under oath, every material allegation in a verified complaint, and it must seem to us as foreign to the purposes both of eighteenth and nineteenth century rules of pleading and of the seventeenth century Statute of Frauds.

48 Ibid.
49 Id. at 170.
The contrariety of opinion, of which Fonblanque speaks, may have been generated by the confusion and vacillation exhibited by Lord Thurlow in his decisions and by the apparent conflict between courts of law and courts of equity.

Reasoning similar to that of Fonblanque is found in the opinion of Lord Chief Justice Loughborough in *Rondeau v. Wyatt,* decided in 1792. This was an action for damages for breach of a contract to sell and deliver grain. Defendant pleaded the general issue. A trial resulted in a verdict for the plaintiff. The case was then argued on a rule to show cause why the verdict should not be set aside and a non-suit entered. In opposition to the rule, plaintiff argued that the case did not fall within the statute because the contract was executory and, secondly, if it did, it was taken out by defendant's confession of the oral agreement in a previous suit in equity. In granting the non-suit, Lord Loughborough decided that the contract was within the statute, though executory, and was not taken out by defendant's admission. Referring to cases in equity, he said:

> It is said in those cases, and has been adopted in the argument, that when the defendant confesses the agreement there is no danger of perjury, which is the only thing the statute intended to prevent. But this seems to be very bad reasoning, for the calling upon a party to answer a parol agreement certainly lays him under a great temptation to commit perjury. But though the preventing of perjury was one, yet it was not the sole object of the statute: another object was to lay down a clear and positive rule to determine whether the contract of sale should be complete...

It is not necessary in a court of law to inquire into the modes of proceeding by which courts of equity are guided; but it is observable, that the case of Whaley v. Bagenal in the House of Lords coincides with the present determination of the court.

In 1798, Lord Loughborough was now Lord Chancellor and had an opportunity to imprint his views in the equity reports. In an action for specific performance of an agreement to lease, the plaintiff had alleged the taking of possession and the making of improvements. To a request

---

60 Whitbread v. Brockhurst, 1 Bro. C.C. 404 (Ch. 1784); Whitchurch v. Bevis, 2 Bro. C.C. 559 (Ch. 1789); Rondeau v. Wyatt, 3 Bro. C.C. 154 (Ch. 1790); Bowers v. Cator, 4 Ves. 91 (Ch. 1798).
61 2 H. Blk. 63, 68 (1792).
62 Rondeau v. Wyatt, 3 Bro. C.C. 154 (Ch. 1790). Here the report states that plaintiff prayed a discovery of the facts in order to found an action at law. Defendant pleaded the statute and by averment, negatived the exceptions in the statute. The plea was supported by an answer, but the nature of the answer is not stated. Lord Thurlow said nothing about the effect of an admission in the answer, but, in overruling the plea, put his decision on the ground that he was bound by the decision at law that such executory contracts were not within the statute.
63 2 H. Blk. 63, 68 (1792). As to Whaley v. Bagenal, see note 43 supra.
for a discovery, defendant pleaded the statute, averring no writing signed by him or his agent, and in his answer he said that plaintiff entered only as tenant from year to year and that the other acts were not sufficient to take the case out of the statute. The Lord Chancellor held that the answer was argumentative and that the plea would have to stand for answer. To the defendant he said:

Insist upon the statute of frauds as a defense against performing the agreement. Your admitting the agreement does not prevent you from insisting upon the statute. Saving the benefit of the plea to the hearing gives you a right to insist upon the statute of frauds as a defense to this suit: but it does not exempt you from the discovery. If the agreement is proved by distinct evidence still you are entitled to the benefit of the statute.

Lord Eldon discussed the issue in two cases. In the first of these, Cooth v. Jackson, he found that the alleged acts of part performance were insufficient and that the agreement admitted by the answer was different from that set forth in the bill and from that established by testimony, but the ground for dismissing the bill was that the alleged agreement had been induced by the unethical conduct and misrepresentations of commissioners appointed in litigation between the parties which was intended to be compromised by the agreement. Therefore, his comments upon the necessity of an answer and the effect of an admission would seem to be dictum. However, in Rowe v. Teed, he treats his statement upon these points as his decision in the prior case.

... until it was settled here [Cooth v. Jackson] that the defendant might take advantage of the Statute by his answer, admitting the agreement. Until that was so settled, the answer admitting the agreement, it was immaterial whether the acts alleged to have been done in part performance, were denied or not; as the agreement, being admitted, must have been performed.

In between these two decisions, Sir William Grant, Master of the Rolls, said in Blagden v. Bradbear:

The plaintiff says the defendant admits the terms; but according to the modern, and I think the correct doctrine, it is immaterial what admissions are made by a defendant, insisting upon the benefit of the statute; for he throws it upon the plaintiff to show a complete written agreement; and it can no more be thrown upon the defendant to supply defects in the agreement than to supply the want of an agreement.

---

54 Moore v. Edwards, 4 Ves. Jr. 23, 24 (Ch. 1798).
55 Cooth v. Jackson, 6 Ves. Jr. 12 (Ch. 1801); Rowe v. Teed, 15 Ves. Jr. 372 (Ch. 1808).
56 15 Ves. Jr. 375 (Ch. 1808).
57 Cooth v. Jackson, note 55 supra, is cited.
58 12 Ves. Jr. 466, 471 (Ch. 1806). The suit was upon a sale at auction. The answer,
These excerpts from Fonblanque and from the opinions of Lord Loughborough, Lord Eldon and Sir William Grant reveal the evolution of the thinking leading to the change in attitude and in decisions. The rule that required the defendant to admit or deny, under oath, every material allegation in the complaint meant that if he confessed the agreement, it should be enforced because it was proved by his own admission and without the danger of the perjured testimony of others. But such a result supplied the defendant with an inducement to make a perjured denial of the agreement. It was considered better to remove the temptation than to hold the defendant to an agreement conscientiously admitted to have been entered into. The way to do that, it was thought, was to expect his answer to state the truth, but then to ignore the confession which the rules of pleading and his conscience required him to make, and to justify this under the pretext that the Statute of Frauds itself exhibited that legislative intent, a theory first evolved about a century and a quarter after the passage of that act.

The crystallization of this new theory is well stated by Vice Chancellor Page Wood in *Jackson v. Oglander* in 1865:

The defendant very candidly admits the whole of the agreement; but then he relies on the statute; and that makes it necessary for the Court to see whether there is any document to be found which would have been sufficient to prove the agreement, supposing that the defendant (for that is what I must consider him to have done), had denied the existence of the agreement and challenged the plaintiff to the proof of it. Then it is said, “the fact of the agreement is admitted as a fact by the answer; and then the letters and documents show sufficiently what the agreement was to take the case out of the statute”; but I do not think I can look at that portion of the answer which admits the agreement, seeing that the defendant insists on the statute of frauds. The defendant must answer, must swear to the truth of his answer, and must sign it: if I were to make any use of an admission so extorted, I should in effect repeal the statute.

"admitting the conditions of sale, denied that the auctioneer was authorized by the defendant to sign any memorandum. . . ."

60 In Cooth v. Jackson, 6 Ves. Jr. 12, 39-40 (Ch. 1801) Lord Eldon said, in drawing a distinction between proceedings at law and in equity,

It seems to have been forgotten in courts of law that here the testimony of witnesses is appreciated, not only by the intrinsic credit due to that testimony, but also by the consideration, what the defendant, against whom it is produced, has said by his answer. If the defendant denies that any parol agreement ever took place, a court of equity will not inquire into the truth of that denial. Then can the doctrine of a court of law and a court of equity with regard to partial performance be the same? In every case, where the parties go to issue, a court of law must understand that the defendant does deny it; and a single witness would according to that doctrine fix upon the defendant at law the whole effect of the equitable jurisdiction; whereas, if the plaintiff comes here, the moment the defendant in the form in which issue is here joined, by his answer says there was no agreement, the witness could not be heard; or, if he was heard, unless supported by special circumstances, giving his testimony greater weight than the denial by the answer, the court would not make the decree.

Turning now to the law of the United States, a South Carolina decision in 1794 reflects adherence to the view which had prevailed in England up to that time. In that case we find it said:

The court has no difficulty in decreeing the agreement to be specifically executed for the defendant, by his answer which he signed, having acknowledged the agreement, the court considers it such an assent in writing as overrules his plea of the statute of frauds. 61

However, the influence of the views of Lord Loughborough and of Fonblanque very promptly crossed the Atlantic, and we find the latter's treatise cited and his thoughts paraphrased by Cranch, C. J., in Thompson v. Jameson in 1806. 62 Here the defendant had pleaded the statute but admitted the oral agreement to answer for the debt of another. The reasoning used by the Chief Judge in dismissing the bill will, by now, sound familiar to us:

If the defendant is obliged to answer and confess a parol agreement, there is no possible case in which a parol agreement can be vacated by that statute; unless the defendant will commit perjury by denying it. Instead therefore of preventing frauds and perjuries, the statute would tend to increase them; for by preventing the plaintiff from proving a parol agreement by any other evidence than the defendant's own oath, it holds out to the defendant the strongest temptation to perjury, and at the same time gives him a perfect security against detection. If the defendant is bound to confess the parol agreement it must be because when confessed he could not avail himself of the statute. But it is settled that he may avail himself of the statute. Hence it seems to follow that he is not bound to confess; for this would be to compel him to confess an immaterial fact. 63

With a little different emphasis, he says:

The act evidently refers to the relief, and it is at least as strongly expressed as if it had said that no action shall be maintained upon a parol promise, even if proved in any manner whatever. The confession therefore of a parol promise is not a confession of any cause of action either at law or in equity. A court of equity cannot, more than a court of law, dispense with the positive and clear prohibition of a statute. 64

It seems not unnatural that, in the infancy of our national life, our

---

61 Smith v. Brailsford, 1 Dess. Eq. 350, 352 (S.C. 1794). The defendant had gone into possession, but the case was taken out of the statute by an admission in the answer rather than by the doctrine of part performance. The quoted statement was repeated with approval in Wallace v. Dowling, 86 S.C. 307, 310, 68 S.E. 571, 572 (1910), but it was also held that a contract for the sale of goods to be manufactured did not fall within the statute.


63 23 Fed. Cas. No. 13,760 at 1052 (1806).

64 Ibid.
newly established courts, struggling to apply their own replicas of the English Statute of Frauds, should have adopted the changed English viewpoint that became current at the close of the 18th century. That is the explanation of what we find as the majority view in this country today. But there has long been a minority viewpoint and there is evidence of increasing dissatisfaction with the majority rule.

In Iowa, the problem was removed from judicial interpretation a century ago. The Iowa legislature incorporated into its Statute of Frauds sections which made it clear that this legislation a) established only a rule of evidence prohibiting proof of an oral contract through the testimony of others, but b) precluded the use of the statute as a defense except where the defendant denied the making of the agreement, and c) made it possible for the plaintiff to prove the agreement through the testimony of the defendant himself. The defendant who could not deny and who must under oath admit the contract was not endangered by fraudulent proof through perjured testimony.

The same ethical standard has been enunciated through judicial decisions in Maryland, New Jersey and Pennsylvania. In a 1945 case, Sealock v. Hackley, the Court of Appeals of Maryland decided in favor of the plaintiff where he sought specific performance of an oral contract for the sale of land and the defendant, as a witness, had admitted the agreement. In the opinion, the court said:

It is an outstanding fact in this case that the oral agreement was ad-
mitted by Sealock in his own testimony. ... Therefore, the Statute of Frauds does not prevent enforcement of this agreement, after Sealock subsequently acquired the property from the heirs. As stated in Trossbach v. Trossbach, 184 Md. 47, 42 A. 2d 905, the admissions of a party in the form of testimony constitute sufficient "memoranda" or "writings" under the Statute of Frauds, for recorded testimony is regarded as equivalent to signed depositions. The purpose of the Statute of Frauds is to protect a party, not from temptation to commit perjury, but from perjured evidence against him. Admissions of a party in testifying, while evidence in form, are in essence not mere evidence, but make evidence against him unnecessary.67

In the same year, the Court of Appeals of Maryland held that a demurrer may be sustained where the complaint shows on its face that the contract sought to be enforced was an oral one and the facts alleged as part performance were insufficient to take it out of the statute.68 In answer to plaintiff's contention that a demurrer should not be sustained because, under the decision in Sealock v. Hackley,69 there was hope that the defendants might admit the agreement in their testimony, the court said: "Whatever the hopes of the appellants might be, they cannot take away from Max Lazarus & Sons the right to interpose a demurrer to this bill, and we have said that the demurrer thus interposed is good."70

Incidentally, it now seems settled in most jurisdictions that the Statute of Frauds may be raised by demurrer or motion to dismiss the complaint.71 Such a ruling is, of course, consistent with the majority position that an admission in an answer does not prevent the pleading of the statute. In fact, in that period of transition at the end of the eighteenth century, a reason assigned to support a change to the latter rule was that if the defendant might raise the statute by demurrer, he should be permitted to plead the statute while admitting the agreement in his answer.72 On the

67 Id. at 52, 45 A.2d at 746.
69 See note 66 supra.
71 BROWNE, STATUTE OF FRAUDS § 509 (5th ed. 1895).
72 This point is interestingly developed in Cornett v. Clere, 193 Ky. 590, 236 S. W. 1036, 22 A.L.R. 720 (1922). In an action for specific performance of a land contract, the answer admitted the oral contract and the receipt of several down payments from plaintiff purchaser but pleaded the statute. The trial court held that the admissions clarified the payments as unambiguous acts of part performance and gave judgment for the plaintiff. (See discussion below in the Missouri case of Jones v. Jones, note 84 infra). In reversing, it was reasoned that, since defendant might have demurred, an admission of the contract in the answer would put the defendant in no worse position. It was further said that if a pleading by which one asserts his defense were taken as a sufficient memorandum of the agreement, "one would never dare set forth the true facts in a pleading, where he desired to interpose the statute as a defense, and the real purpose of the statute would be largely if not entirely defeated." Cornett v. Clere, 193 Ky. 590, 593, 236 S. W. 1036, 1037
other hand, the conflict as to the propriety of a demurrer was generated by the converse reasoning that since a defendant who admitted the agreement could not avail himself of the statute, he should not be permitted to raise the issue by demurrer.\textsuperscript{73} It is not surprising, therefore, that Chancellor Walworth, after reviewing the English precedents up to 1830, concluded that the propriety of a demurrer had not by that date been decided in England.\textsuperscript{74} It is submitted that the ethical interpretation and application of the statute, for which we are here contending, should rule out the propriety of the demurrer. The plaintiff should, as in former times, be entitled to a sworn admission or denial of the making of the agreement, and a jurisdiction which holds to the view that a defendant who admits the agreement does not need the statutory shield against perjury should not allow him, by demurring, to use the statute as a sword.\textsuperscript{75}

In a New Jersey case in which the plaintiff was seeking to compel the defendant to perform his oral promise to release certain property from a mortgage, the defendant denied the agreement in his answer but ad-

\textsuperscript{73} BROWNE, \textit{Statute of Frauds} \S 510 (5th ed. 1895).

\textsuperscript{74} Cozine v. Graham, 2 Paige 177 (N.Y. 1830). Here the demurrer was overruled on the theory that an alleged agreement would be presumed to be enforceable unless the complaint showed it was not in writing. Wood v. Midgley, 5 De G. M. & G. 41 (1854), demurrer sustained when bill showed contract not signed by defendant.

\textsuperscript{75} In New York, a motion to dismiss the complaint has been substituted for the demurrer and Rules 106 and 107 of the Rules of Civil Practice make a distinction between motions which may be made on the complaint and motions which may be made on the basis of the complaint \textit{and affidavit}. It would support the reasoning and conclusions of this article if the New York courts were to construe these rules as requiring that a motion to dismiss on the ground of the Statute of Frauds can be made only on complaint and affidavit, Rule 107. It is to be noted that the Statute of Frauds as a ground for dismissal is specified in Rule 107, subdiv. 8, and is not mentioned in Rule 106. However, Rule 106 permits a motion to dismiss on the complaint, without affidavit, where the defect appears on the face of the complaint. Accordingly, it can be argued that a motion may be made under Rule 106 if the fact that the contract was oral is stated in the complaint. But it is not clear that this was intended by the Judicial Council which was responsible for the amendments of the Rules in 1944, for Rule 107 provides that "a motion specifying an objection set forth in subdivisions . . . 8 [Statute of Frauds] . . . may be made whether or not the defect appears on the face of the complaint." In spite of the use of the word "may", the Council seems to have intended that a motion based upon the objection of the Statute of Frauds should be taken under Rule 107, \textit{i.e.}, upon the complaint and affidavit. See \textit{Tenth Annual Report of the Judicial Council} 317-322 (1944). Piccione v. Schultz, 99 N.Y.S.2d 785 (Sup. Ct. Queens County 1950), holds that the motion may be made under Rule 107 and may not be made under Rule 106.
mitted it as a witness at the trial. In granting specific performance, the court said:

But whatever the rule should be in a case in which there is a denial of the making of an oral promise to release all or part of mortgaged premises from the lien of a mortgage, it is difficult to perceive why the statute should be a bar to compelling one to carry out an honest agreement into which he had entered with another and which he admits having made. The statute of frauds was designed to protect the innocent from fake claims that were made and enforcement of which was secured through perjury.\textsuperscript{76}

The Supreme Court of Pennsylvania, in 1946, was presented with the same question as to the effect to be given defendant’s testimony admitting the agreement, and it reached the same conclusion in the case of \textit{Zlotziver v. Zlotziver},\textsuperscript{77} stating its reasoning as follows:

The statute of frauds, however, does not absolutely invalidate an oral contract relating to land but is intended merely to guard against perjury on the part of one claiming under the alleged agreement. Accordingly, if the title holder admits, either in his pleadings or his testimony, that he did in fact enter into the contract, the purpose of the statute of frauds is served and the oral agreement will be enforced by the court.\textsuperscript{78} Here the defendant, in his testimony, admitted the making of the agreement as claimed by plaintiff.\textsuperscript{79}

In 1949, the same court, with identical membership, decided \textit{Haskell v. Heathcote et al.},\textsuperscript{80} and it may be considered that certain statements in the opinion in this case undermine the full force of the decision in the \textit{Zlotziver} case. To a bill requesting specific performance of an oral agreement, defendant had interposed preliminary objections raising the defense of the statute. Pending disposition of those objections, plaintiff moved for an order to take the deposition of the defendant, “averring, inter alia, that if Mrs. Heathcote were required to testify under oath, she would admit the alleged oral agreement.”\textsuperscript{81} Mrs. Heathcote filed a responsive answer specifically denying that she entered into the oral contract. Thereupon, the trial court denied the motion and entered a

\textsuperscript{76} Degher v. Carobine, 100 N.J. Eq. 493, 501, 135 Atl. 518, 522 (1927), noted 36 \textsc{Yale L.J.} 1188 (1927).
\textsuperscript{77} 355 Pa. 299, 49 A.2d 779 (1946), 15 A.L.R.2d 1349 (1948). In \textit{Mezza v. Belletti, 161 Pa. Super. 213, 52 A.2d 835 (1947)}, since defendant had admitted the contract in his answer and in his testimony, on the authority of the \textit{Zlotziver} case, the defense of the Statute of Frauds was not even considered.
\textsuperscript{79} 355 Pa. 299, 302, 49 A.2d 779, 781 (1949).
\textsuperscript{80} 363 Pa. 184, 69 A.2d 71 (1949).
\textsuperscript{81} \textit{Id.} at 186, 69 A.2d at 73.
decree dismissing the complaint. On appeal, it was held that the defense of the statute may be raised by preliminary objections and that the trial court had not erred in denying the motion to take defendant’s deposition. The court emphasized the fact that defendant denied the existence of the alleged oral contract “and there is no contrary admission by her of record in the proceedings to constitute a waiver.”

The court refers to the Zlotziver decision twice: once, as illustrative of equitable considerations making it impossible to do justice save by specific performance, and then, as illustrative of instances of waiving the statute “by admitting the contract in his pleadings or in his testimony in the proceedings without invoking its protection.”

If this is taken to mean that a defendant will not be held where he insists upon the defense of the statute even though he admits the oral contract, then Pennsylvania cannot be credited with an advance in the law or, what is the same, a reversion to what was the law prior to 1790. If it means only that equity will respect the oath of a defendant, as it always has, and that there can be no attack upon his sworn denial of the existence of an alleged contract, then these two decisions can be taken as sound interpretations of the purpose of the statute.

A case which illustrates the judicial process through which both progress and justice are achieved is the Missouri decision of Jones v. Jones. Here the complaint alleged an agreement to employ the plaintiff as attorney in a will contest and to deed him 118 acres of an 1100 acre tract if he were successful. There was also an allegation that the services had been successfully rendered. The defendant, in his answer, admitted the contract but pleaded the statute. The court reaffirmed its adherence to the majority rule which enables the defendant thus to defeat an admitted agreement, but, nevertheless found a way to justify the granting of specific performance. Though the rendering of services is usually held to be too equivocal to constitute a part performance sufficient to take a case out of the statute, yet here the court held that the defendant’s admission removed that ambiguity and definitely connected the services with the alleged contract to convey and as part performance of it, without the need for the testimony of others. It will probably be con-

---

82 Id. at 188-189, 69 A.2d at 73.
83 Ibid.
84 333 Mo. 478, 63 S.W.2d 146, 90 A.L.R. 219 (1933). Cf. Cornett v. Clere, note 72 supra, where the trial court's decision, consistent with Jones v. Jones, was reversed by the supreme court of Kentucky. Cf. Holste et al. v. Baker, et al., 223 Minn. 321, 26 N.W.2d 473 (1947), and Baker et al. v. Heavrin, 148 Neb. 766, 29 N.W.2d 373 (1947), in each of which cases the court found the acts of part performance insufficient and denied specific performance without attributing any effect to the defendant's admission of the agreement.
ceded that justice was done and that the purpose of the statute was supported rather than defeated.

On the moral plane, there is complete similarity between the three instances in which a defendant was, in the early history of the statute, denied the privilege of pleading it in order to escape performance of an honorable obligation: a) where his own fraud was responsible for the non-existence of the required signed memorandum,\(^85\) b) under the equitable doctrine of part performance,\(^86\) and c) where the defendant admits the contract. In each instance, it would be unconscionable for the defendant to escape liability on the technical ground that a formal memorandum was lacking. The three instances are thrown together as exceptions to the statute in *A Treatise of Equity*, published in 1737,\(^87\) and Lord Thurlow in *Whitchurch v. Bevis*, said:

... But this court has laid down two exceptions, by which, if they are to be sustained, it amounts to the same thing as if the statute had made the exception of the two cases, that is where the agreement is confessed by the answer, or where there is a part performance.\(^88\)

The statute was intended to prevent fraud as well as perjury and, therefore, the three exceptions were regarded as consistent with the statute’s purpose. Under the doctrine of part performance, it has been rightly held that the acts sufficient “to take the case out of the statute” must so unequivocally establish the existence of the contract alleged to have been made by the defendant that it would be fraudulent of him to take advantage of the statute; even though parol evidence might be needed to prove the precise terms of the agreement. This doctrine became so well established that, in many jurisdictions, it is a codified exception to the statute. The effect of the equitable doctrine of part performance is to raise an estoppel against the use of the statute as a defense. It is of more than passing significance that because of the recognized fairness of this equitable doctrine which prevents the defendant’s escape from an honorable obligation, there is a rising trend toward the adoption of the theory of estoppel in *actions at law* upon oral contracts that have been acted upon with defendant’s knowledge.\(^89\) This is another

---

85 Halfpenny v. Ballet, 1 Eq. Abr. 20, pl. 6, 2 Vern. 373 (1699), cited in *Precedents in Chancery* 404 as Mullet v. Halfpenny (1699).
86 Butcher v. Stapley, 1 Vern. 363 (Ch. 1685).
88 2 Brown C.C. 559, 566 (1789).
89 Wolfe v. Wallingford Bank & Trust Co., 124 Conn. 507, 1 A.2d 146, 117 A.L.R. 932 (1938), noted in 37 Mich. L. Rev. 673 (1939). This was a suit for damages for breach of an oral contract to reconvey land. It was held that plaintiff’s relief by estoppel, to prevent manifest imposition and injustice, was coextensive with the relief available to her...
illustration of the consciousness of modern courts of law that they have as much responsibility as courts of equity for preventing moral fraud.

Another lesson may be drawn from these developments. Because a lawyer may feel that it is his duty to his client to plead all available defenses, however technical and incompatible with justice, the law's cure for the situation is a limitation upon the available defenses. That is precisely what equity did with the Statute of Frauds in instances of fraud, part performance and an admitted agreement. That is what the law is now doing with the Statute of Frauds when the alleged facts lay the foundation for a just estoppel. There is considerable authority for estopping a defendant from pleading the statute of limitations. Significant also are the ancient equitable and modern legal attitudes toward representations and promises which have been acted upon to the extent that an estoppel is raised against pleading the defense of lack of consideration.

It is interesting to note that under French procedure, the French counterpart of the Statute of Frauds may not be used as a defense unless under the doctrine of partial performance in equity. Wikiosco, Inc. v. Proller, 276 App. Div. 239, 94 N.Y.S.2d 645 (3d Dept 1949), plaintiff sought damages for breach of an oral agreement to form the plaintiff corporation, to subscribe to its shares and to pay for them in part by the transfer of certain realty. At pp. 240-241 the court said, in affirming an order to dismiss the complaint,

That statute [N.Y. REAL PROPERTY LAW § 259] does not render the oral contract absolutely void. Its function is to bar a remedy. It may be effectively waived or one may be estopped from its effective assertion. It is a defense, affirmative in nature and in given instances unavailable unless pleaded and proven. . . . Here facts capable of constituting the estoppel are pleaded and may be regarded as an element of the cause of action. It was permissible to plead them to preclude the defense and in many jurisdictions it has been held that to serve that end it is necessary to do so.

Union Packing Co. v. Cariboo Land & Cattle Co. Ltd., 191 F.2d 814 (9th Cir. 1951); cert. denied, 72 Sup. Cl. 303 (1952), petition for rehearing denied, 72 Sup. Cl. 376 (1952); Holton v. Reed et al., 193 F.2d 390 (10th Cir. 1951), estoppel against asserting Statute of Frauds as a defense to a counterclaim for specific performance of oral contract for the sale of corporate shares; Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88 (1909); Flint v. Giguiere, 50 Cal. App. 314, 195 Pac. 85 (1920); Fleming v. Dawson, 82 Cal. Dec. 656, 5 P.2d 776 (1931), noted in 20 CALIF. L. REV. 663 (1932); Wilk v. Vencill, 30 Cal. 2d 104, 180 P.2d 351 (1947), noted 36 CALIF. L. REV. 138 (1948); Lacey v. Wozencraft, 188 Okla. 19, 105 P.2d 781 (1940), noted 11 OKLA. B. A. J. 1319. See Summers, The Doctrine of Estoppel as Applied to the Statute of Frauds, 79 U. PA. L. REV. 440 (1931). Cf. Schwartz v. Greenberg, 108 N.Y.S.2d 421 (2d Dep't 1951), holding that where the proof established that there was a contract, "failure to deliver a signed [by defendant] copy of the writing setting forth the terms of that agreement cannot defeat its enforcement." The action was for damage for breach of contract.

Decisions are collected in notes in 77 A.L.R. 1044 (1931) and 130 A.L.R. 8 (1939).

E.g., Seavey v. Drake, 6 N.H. 393 (1882), specific performance was granted to plaintiff who had acted upon an oral representation of a gift of land to him. For promissory estoppel, see RESTATEMENT, CONTRACTS § 90 (1932).
the defendant, if called upon, is willing to take an oath that he did not make the contract. His unwillingness to take such an oath is regarded as an admission of the agreement and results automatically in a judgment for the plaintiff.\footnote{92}

In conclusion, the interpretation as well as the present day need for a Statute of Frauds should be viewed from the standpoint of the state of the law in 1677. Contract law was then still embryonic; trial by jury, as we know it, was not perfected, and the power of the court to set aside a verdict as contrary to the weight of evidence was not established; rules of evidence were undeveloped and neither the parties themselves nor any persons who had an interest in the outcome of the litigation were competent witnesses.\footnote{93} The need for protection against perjured

\footnote{92} The author’s learned colleague, Professor R. B. Schlesinger, has furnished the following comment upon our problem as it arises under the French Statute of Frauds:

Subject to certain exceptions, the French Civil Code provides sweepingly that consensual transactions involving more than 5,000 Francs (about $15.00) can be proved only by written evidence. See Code Civ. Arts. 1341 ff. A translation of these provisions of the French Code, with some annotations, appears in \textit{Schlesinger, Comparative Law—Cases and Materials} 211-213 (1950).

The rule is phrased in terms which could easily be construed as an absolute, substantive requirement of a writing. As to all matters exceeding the sum of 5,000 Francs, a writing “must be executed” (Il doit être passé acte). Nevertheless, the highest French court has held that an oral contract will be enforced if its existence and its terms are admitted in court. Cass. Civ. July 3, 1889, D.P. 90.1.249. See also \textit{Dalloz, Répertoire Pratique}, Vol. IX, p. 473-4 (Preuve No. 1365) (1922).

Moreover, with respect to a fact determinative of the outcome of the lawsuit a party may defer an oath to the other party. See Code Civ. Arts. 1357 ff. (reprinted, in translation, by \textit{Schlesinger, op. cit., supra} pp. 215-217). If the court finds that the case is a proper one for the demand of such an oath, and that the party demanding it has properly formulated its tenor, then the next step is up to the other party. The latter may in certain cases “refer” the oath, i.e., demand that the oath (its tenor being reversed) be taken by the party originally demanding it. Finally, the party to whom the oath has been “deferred” or “referred,” will either swear it, in which event he automatically wins the lawsuit, or fail to swear it within the time fixed by the court, in which event he automatically loses.

May this device of the “decisive oath” as it is called (Code Civ. Art. 1357), be used to prove the existence of an oral contract under which the rule of Art. 1341 could not be proved by ordinary testimony of witnesses? The answer is clearly in the affirmative. Cass. Civ. Nov. 7, 1893, D.P. 94.1.15; Cour d’Appel Limoges, Feb. 6, 1845, D.P. 46.4.458; \textit{Dalioz, Répertoire Pratique}, Vol. IX, p. 487 (Preuve No. 1550-1552) (1922). This does not defeat the policy of Art. 1341. The defendant to whom an oath concerning the existence of an oral contract has been deferred, may have a right at his election, to “refer” the oath back to the plaintiff; but he does not have to “refer.” He always has the right, again at his election, to swear the oath himself. Thus he can be defeated only if he, of his own free will, by “referring” the oath or by refusing to swear it, shows his unwillingness or inability to stand by his denial of the existence of the contract. Whether or not the defendant “refers” the oath, it is in the last analysis his own unwillingness to take the oath, rather than any sworn statement by the plaintiff, which establishes the fact against the defendant.

proof of a non-existent contract was greater than now. Equity courts found ways of preventing the statute from being used to perpetrate a fraud in the three instances mentioned above, in each of which there was proof to the court's satisfaction that a contract had existed. Of the three, the most convincing, the one with no attendant risk of perjured proof of a non-existent contract, was the class of cases in which the defendant confessed the contract. It is astonishing, therefore; that this is the only one of the three exceptional instances that has not been universally perpetuated, and it is more astonishing that the removal of the temptation to the defendant to perjure himself by denying the making of an agreement should have been employed as a device for permitting him unethically to escape an honest obligation.

The Iowa legislature and the courts of some states deserve applause for the correctness of their attitudes. The law of the United States ought in all jurisdictions be what it was believed to have been in the seventeenth and eighteenth centuries. Effect should be given to the defendant's admission of the making of an oral contract. The statute should not be recognized as a defense except where the defendant can and does deny the contracting. It should not be permissible to raise the defense of the statute by demurrer, or by a motion to dismiss the complaint except where the motion is supported by an affidavit denying the making of the contract. Greater use should be made, in appropriate cases, of the principle of estoppel. As the illustrations already given show, much of this could be accomplished by judicial decision. In jurisdictions where the contrary views are too firmly buttressed by the doctrine of stare decisis, there should be corrective legislation. Lord Thurlow's question can be repeated: "But what will become of the statute?" And his own answer: "If he [defendant] pleads, he must support his plea by an answer, denying the parol agreement, the only effect of the statute being that it shall not be proved aliunde. If he answers and says there was no parol agreement, I think no evidence that can be given will sustain the suit."

As Dean Roscoe Pound has said: "Legal concepts sometimes are, and perhaps sometimes must be, at variance with the requirements of morals. Yet such a condition is not something of which the jurist is to be proud. It is not a virtue in the law to have it so."

---

94 Whitchurch v. Bevis, 2 Bro. C.C. 559, 566, 567 (Ch. 1789).
95 POUND, LAW AND MORALS 41 (1924).