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MISSOURI LAW ON PERFORMANCE OF ORAL CONTRACTS AS A METHOD OF VALIDATION WHEN STATUTE OF FRAUDS IS INVOKED

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CLASSES OF CONTRACTS WITHIN THE STATUTE OF FRAUDS

By the Statute of Frauds in this article is meant those portions of the Revised Statutes of Missouri which derive directly from the fourth section and the seventeenth section of the original English Statute of Frauds, 29 Charles II, c. 3 (1677). Revised Statutes of Missouri, 1929, Sec. 2967 (Mo. St. Anno., Sec. 2967, p. 1835) contains all the essential provisions of the fourth section of the English statute, and also two additional provisions, one relating to leases for more than one year, and one relating to an agent's authority to sell real estate. No further reference will be made to these additional provisions. Revised Statutes of Missouri, 1929, Sec. 2968 (Mo. St. Anno., Sec. 2968, p. 1835) covers the essential provisions of the seventeenth section of the original English statute, except that "thirty dollars" is substituted for "ten pounds sterling."

By grouping together these two sections of the original English Statute of Frauds, as re-enacted in Missouri, we find that the legislative modification of the common law was intended to operate on six classes of contracts. These six classes are:

Class I. Contracts by an executor or an administrator to answer out of his own funds for a continuing debt of the estate.

Class II. Contracts by a guarantor with a creditor to answer out of his own funds for a continuing debt of the principal debtor.

Class III. Contracts in consideration of marriage.

Class IV. Contracts for the sale of an interest in land.

Class V. Contracts not to be performed within one year.

Class VI. Contracts for the sale of goods, wares, and merchandise for the price of thirty dollars or more.

All the contracts in these six classes are binding under the Statute of Frauds if evidenced by a signed note or memorandum. The kind of note or memorandum that will satisfy the Statute of Frauds in one class will ordinarily satisfy that statute in all the other classes. With reference to satisfying the Statute of Frauds by note or memorandum, generalized statements of law are common and useful. No further reference will be made in this article to the method of satisfying the Statute of Frauds by a note or memorandum.

SCOPE OF THIS ARTICLE

If an oral contract apparently falls within one or another of these six classes, and is performed, in whole or in part, by both parties or by one party, what are the legal rights of the parties under the Missouri Statute of Frauds? That is the question now to be considered. Really there are six questions, because the Statute of Frauds applies to six separate and distinctive classes of contracts, and the decisions show that what is true of one class, with reference to performance, is not necessarily true of another class. As to contracts in the sixth class, as above specified, the Statute of Frauds itself prescribes performance by buyer, in whole or in part, as one method of making the contract binding, even if oral.

GENERALIZED AND MISLEADING DICTA

Unfortunately, many lawyers and judges have been disposed to forget that there are varying classes of contracts specified under the Statute of Frauds, and when correctly applying a principle apposite to the particular type of contract under consideration, often have used broad, general language as if the principle were applicable to all classes of contracts described in the Statute of Frauds.

Johnson v. Reading (1889) 36 Mo. App. 306 is a valuable case involving a contract within Class V, as above set forth. Undoubtedly the case is correctly decided when judged by modern Missouri law, by the weight of American authority, and by the Amer-

ican Law Institute, Restatement, Contracts, Sec. 198. Unfortunately, the St. Louis Court of Appeals, when rendering the correct decision, in its official opinion formulated this dictum: "It is fairly deducible from all cases decided in this state touching contracts falling within the various sections of the Statute of Frauds, that where the contract has been fully performed on one side, and the other party had the benefit of such performance, recovery may be had even upon the contract itself." Of course, this is not true of a guaranty contract, as described in Class II above. Only seven months after the Johnson case was decided, the same appellate court decided an oral guaranty case. A brewing corporation, bound in writing to a lessor as guarantor of a lessee, requested the lessor to release the lessee and take another person as his substitute, and orally promised to guarantee payment of rent by the second lessee. The oral guarantor's offer was accepted, and the contract was performed by the lessor. When sued on the oral guaranty, the brewing company relied on the Statute of Frauds, and won. The principle of full performance on one side, properly adopted as a rule of decision in the Johnson case, where the contract was within Class V, as above set forth, was utterly beside the issues in the subsequent case involving a contract within Class II. The case just referred to is *Koenig v. Miller Brothers Brewing Co.* (1889) 38 Mo. App. 182. Even the attorney for the plaintiff (appellant) did not advance the rule of full performance. His chief effort was to argue that the contract was not a guaranty at all. To a student in a law school, the decision in the Koenig case would seem to be at variance with the generalized and dogmatic dictum in the Johnson case. A thorough study of the two cases from the same court in the same year, and the earlier authorities cited in the two cases, is a valuable exercise to teach an important lesson, namely, that in law, human experience is more important than logic.

In the official edition of Revised Statutes of Missouri, 1929, on page 878, in notes to the Statute of Frauds, appears this comment: "*Estoppel*.—After performance of contract within the statute by one party, other cannot plead statute as bar. *Phelps v. McCaw*, 210 Mo. App. 514, 240 S. W. 845." The opinion in the case cited contains a generalized dictum that amply justifies the annotator's comment. But the case merely decided that an oral contract for the sale of land when partly performed by the

vendor will create against him an equitable estoppel to prevent his pleading the Statute of Frauds.

In Missouri Statutes Annotated, in notes to Sec. 2967, p. 1837, appears the following: "A parol contract completely performed by one of the parties is not within statute. *Self v. Cordell*, 45 Mo. 345; *Mitchell v. Branham*, 104 Mo. App. 480; 79 S. W. 739; *Marks v. Davis*, 72 Mo. App. 557; *Bless v. Jenkins*, 31 S. W. 938, 129 Mo. 647; *Hubbard v. K. C. Stained Glass Works*, 188 Mo. 18, 86 S. W. 82." A reading of this proposition would suggest that it applies to all classes of the Statute of Frauds. A reading of the cases referred to reveals that every case has to do with a contract within or alleged to be within Class V.

In *Jones v. Jones* (1933) 333 Mo. 478, 63 S. W. (2nd) 146, the court said: "Full or even part performance generally takes an oral contract out of the Statute of Frauds." The suit was by vendee for specific performance of an oral contract to sell land after full performance by the equitable vendee, who agreed to render services as consideration for the transfer of the land, and had done so. Plaintiff won the suit. When the writer of the court's opinion used the language quoted he probably was thinking only of cases within Class IV of the Statute of Frauds.

CONTRACTS FULLY PERFORMED ON BOTH SIDES

In legal thinking, a simple contract is regarded as an unperformed promise supported either (1) by an executed consideration, or (2) by a return promise which is unperformed. A bilateral agreement, after full performance on both sides, ceases to be a contract in the strict legal sense although as a matter of convenience the term "contract" is often applied to mutual promises even after full performance on both sides. Apart from constitutional law, criminal illegality, equitable grounds for rescission or reformation, and legal incapacity of parties, courts are not concerned with so-called contracts after they have been fully performed on both sides. The Statute of Frauds and thousands of judicial opinions construing that statute, are all in line as to the true nature of a contract. Since the Statute of Frauds applies to contracts, and since mutual promises fully performed on both sides are not contracts it is proper to say that an oral contract originally within the statute, and fully performed on both sides, cannot be disturbed simply because of the absence of a writing.

This is universal American and English law. Williston on Contracts, Sec. 528; Page on Contracts (2nd Ed.), Sec. 1363; American Law Institute, Restatement, Contracts, Sec. 219.

Missouri law reports contain many cases illustrating this principle. In *Welch v. Mann* (1906) 193 Mo. 304, 92 S. W. 98, it appeared that an oral antenuptial contract by a solvent man to convey property to his prospective wife in consideration of marriage was "obnoxious to the Statute of Frauds," but when carried into effect after marriage could not then be set aside by subsequent creditors, because the statute does not apply to a contract fully performed on both sides. In *Maupin v. Chicago, R. I. & P. Ry. Co.* (1902) 171 Mo. 187, 71 S. W. 334, there was an oral contract for an easement actually allowed in consideration of the actual building of a railroad along the easement. The transaction was held to be binding, the court saying: "When a contract which the law requires to be proven by writing has been clearly shown by oral testimony to have been made and to have been fully performed, the execution takes it out of the operation of the Statute of Frauds." Other cases holding that oral contracts are binding in spite of the Statute of Frauds when fully performed on both sides are: *Denny v. Brown* (Mo. Sup. 1917) 193 S. W. 552, sale and delivery of chattels in connection with settlement of accounts between partners; *Mueller v. Wiebracht* (1871) 47 Mo. 468, contract of guaranty after payments made by guarantor; *McBride Realty Co. v. Grace* (1928) 223 Mo. App. 588, 15 S. W. (2nd) 957, contract affecting land held binding on subsequent owner; *Cordia v. Connolly* (Mo. App. 1924) 261 S. W. 729, executed contract creating a partnership; *Poplin v. Brown* (1918) 200 Mo. App. 255, 205 S. W. 411, land traded for automobile; *Bauer v. Weber Implement Co.* (1910) 148 Mo. App. 652, 129 S. W. 59, land traded for machinery.

ORAL CONTRACTS WITHIN CLASS I

An oral secondary promise of an executor or administrator to answer out of his own funds for a continuing debt of the decedent's estate is not enforceable as against the plea of the statute, even if the promisee has fully performed his part of the contract.

In *Bambrick v. Bambrick* (1900) 157 Mo. 423, 58 S. W. 8, the defendant (an administratrix) may have orally promised to pay

out of her own funds a debt of the estate in consideration of a delay in presenting plaintiff's claim against the estate, and plaintiff relied on full performance on his part. The defendant relied on the Statute of Frauds. Plaintiff's attorney in his brief stated this proposition: "The entire performance of a parol contract by one party takes the promise of the other out of the operation of the statute," and cited *Self v. Cordell* (1870) 45 Mo. 345; *Hoyle v. Bush* (1883) 14 Mo. App. 408; *Sugget's Admr. v. Cason's Admr.* (1858) 26 Mo. 221; *Simmons v. Headlee* (1887) 94 Mo. 482. The opinions in these cases seem to justify the broad dictum of the attorney, but in not one of the cases was it decided that the oral secondary promise of an administrator, even if supported by an executed consideration on the other side, would make the administrator personally liable. In the Bambrick case the court decided against personal liability of the administratrix. Earlier Missouri cases were not reviewed. The decision was based directly upon the language of the Statute of Frauds with reference to actions brought against executors and administrators to answer personally for their special promises. The court said: "If the statute just recited does not apply to a contract like this, then no case for its enforcement can ever be found."¹

In the following cases the principle underlying this portion of the Statute of Frauds was recognized and expounded but held not to apply because of the facts: *Gabbert v. Evans* (1914) 184 Mo. App. 283, 166 S. W. 635, original and not secondary promise; *Hedden v. Schneblin* (1907) 126 Mo. App. 478, 104 S. W. 887, original and not secondary promise. General American law is in accord. Page on Contracts (2nd Ed.) Sec. 215.

ORAL CONTRACTS WITHIN CLASS II

An oral promise by any person, other than the principal debtor, to a creditor, to answer for the principal debtor's continuing debt is not binding under the Statute of Frauds, even if the creditor has fully performed his part of the contract of guaranty in ex-

¹ If plaintiff could have proved what he alleged, namely, a contract to release the estate and full performance on his part, the defendant would have been bound on a new and original oral contract of novation not within the statute. The statute applies only when the estate remains liable. The same principle takes many alleged contracts of guaranty out of the statute. *Beall v. Board of Trade of Kansas City* (1912) 164 Mo. App. 186, 148 S. W. 386; *Williston on Contracts*, Sec. 477; Page on Contracts (2nd Ed.) Sec. 1244.

press reliance on the oral promise of the secondary promisor.²

In *Waggoner v. Davidson* (1915) 189 Mo. App. 345, 175 S. W. 232, defendant orally promised plaintiff to pay a principal debtor's debt to plaintiff if plaintiff would refrain from bringing an ancillary attachment suit against the principal debtor. In reliance on this oral promise the plaintiff refrained from bringing an attachment suit against the principal debtor. Defendant never paid the principal debtor's debt. Suit was brought by the creditor, whose attorney in his brief advanced this proposition: "Complete performance of contract by one contracting party forecloses his adversary from interposing the Statute of Frauds as his defense." In support of this proposition the following cases were cited: *Bless v. Jenkins* (1895) 129 Mo. 647, 31 S. W. 938; *Hedden v. Schneblin* (1907) 126 Mo. App. 478, 104 S. W. 887; *Chenoweth v. Pac. Exp. Co.* (1902) 93 Mo. App. 185. These cases contain dicta which seem to justify the lawyer's proposition, but in not one of the cases was it decided that the oral secondary promise of a guarantor made to a creditor is binding even if the creditor fully performs in reliance on the guarantor's promise. The Hedden case and the Chenoweth case involved promises not to be performed in less than a year. The Bless case involved an oral promise by an alleged guarantor made to the debtor and not to the creditor, a factual situation not covered by the Statute of Frauds at all.

Swarens v. Pfnisel (1930) 324 Mo. 1245, 26 S. W. (2nd) 951, is a useful case reviewing many earlier cases. Plaintiff, a physician, before treating a patient professionally, received an oral offer of guaranty from B and then treated the patient, who did not pay. After full performance by plaintiff defendant was sued and won because his oral promise was within Class II. Here the debt was not in existence at the time of the offer of guaranty and the consideration was the subsequent professional treatment of the patient, who was primarily liable. In the Waggoner case, above, the principal debt was in existence before the guarantor's oral contract with a new consideration came into existence.³ Gen-

² As a matter of convenience, no distinction is here made between guaranty and suretyship.

³ Although Missouri and other American courts have been hardboiled in resisting the full-performance-on-one-side theory as a mitigating principle when applied to Class II, nevertheless, the hunch for justice (in some but not all states) has brought into existence another and effective rationaliza-

eral American law is in accord. Williston on Contracts, Sec. 461 and 462; Page on Contracts (2nd Ed.) Sec. 1366 and 1394; American Law Institute, Restatement, Contracts, Sec. 180, Illustration 5.

ORAL CONTRACTS WITHIN CLASS III

Can an oral contract to confer or relinquish property rights in consideration of marriage, and nothing but marriage, be enforced as against the plea of the Statute of Frauds if the promisee has fully performed by getting married?

In Missouri the answer is *no*—except possibly in a case revealing strong evidence of a scheme to defraud by the oral promisor. In *Hafner v. Miller* (1923) 299 Mo. 214, 252 S. W. 722, there was an alleged antenuptial contract whereby a man orally promised to give up some of his rights as a husband to the woman's property, but after marriage and the woman's death, the oral contract was inadmissible as evidence because of the Statute of Frauds. This was the express holding. The court said: "If the Statute of Frauds can be ignored and disregarded on such testimony, as that relied on in this case, it should be abolished as being without benefit in the practical administration of the law." As to the possibility of enforcing the oral contract in case of an

tion for relaxing the statutory requirements as to Class II. This is called the main purpose rule. If the main purpose of the alleged guarantor's oral promise is for his own pecuniary advantage, he is bound in spite of the statute, even if the principal debtor is not discharged. Missouri, after fifty years of vacillation, finally adopted the main purpose rule when *Wahl v. Cunningham* (1928) 320 Mo. 57, 6 S. W. (2nd) 576, 67 A. L. R. 489, was decided by the court en banc. This case overruled or weakened many earlier and widely cited cases, especially *Gansey v. Orr* (1903) 173 Mo. 532, 73 S. W. 477; *Hurt v. Ford* (1898) 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823; *Bissig v. Britton* (1875) 59 Mo. 204, 21 Am. Rep. 379. The American Law Institute is in accord with Missouri on this important question. Restatement, Contracts, Sec. 184. Some influential states have rejected the main purpose rule and New York is one of them. *Richardson Press v. Albright* (1918) 224 N. Y. 497, 121 N. E. 362. The main purpose rule involves a question of local jurisdiction to be considered separately for each state in the union. See *Simpkins, The Main Purpose Rule and the Statute of Frauds as Applied to Promises to Answer for the Pre-existing Debt of Another*, 17 St. Louis L. Rev. 348; also Williston on Contracts, Sec. 472; Page on Contracts (2nd Ed.) Sec. 1224. This main purpose rule helps to solve the embarrassing problems that arise when there is an oral promise by No. 1 to indemnify No. 2, who is a guarantor, surety or bondsman, in writing for No. 3, who is principal debtor, to No. 4, who is principal creditor. Suppose No. 4 is the state and No. 3 is an accused petty criminal and No. 2 is a bondsman and No. 1 is No. 3's employer and No. 3's services are essential to No. 1's business. The main purpose of the oral contract to indemnify is probably to benefit the promisor—a question of fact. See *Quackenboss v. Harbaugh* (1923) 298 Mo. 240, 249 S. W. 940.

attempt to defraud there are well considered dicta indicating an affirmative answer in the Hafner case and also in *Nowack v. Berger* (1895) 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663. Apparently, there are no clear-cut decisions in Missouri on this point of fraud.

All states apply the statute literally to Class III in the absence of fraud. Many states show a disposition to enforce the oral contract in equity to prevent fraud, although the doctrine seems largely to be based on dicta and analogy to land-sale contracts rather than on express decisions. Some states reject absolutely the exception as to fraud. Likewise, the American Law Institute rejects the exception as to fraud. Restatement, Contracts, Sec. 192. For general American law see Williston, Sec. 486 and 533; Page on Contracts (2nd Ed.), Sec. 1250.

If the oral promise to confer advantages is in consideration of marriage and also some additional consideration, which additional consideration is in no way obnoxious to the Statute of Frauds, can the oral promise be enforced as against the Statute of Frauds if marriage and the additional consideration have both been performed?

The American Law Institute has answered this question in the negative. Restatement, Contracts, Sec. 192. In the *Nowack* case, cited third paragraph above, a man orally promised a woman who had an illegitimate minor son that if she would marry him and turn over to him the custody of her minor son, the man would will property to his step-son as to his natural children. After breach by and death of promisor, the step-son brought suit for specific performance and recovered in spite of the Statute of Frauds. In a careful opinion reviewing many English and American authorities the court seems to indicate that the answer to the question last above stated should be in the affirmative and also that the equitable principles pertinent to land-sale contracts to prevent fraud should be applied. It may be observed that the result of this case would be the same if the American Law Institute's formulations should be accepted as law. The American Law Institute differentiates between a promise made in *consideration* of marriage and a promise made in *contemplation* of marriage. In the *Nowack* case the essential contract was an oral promise to will property in consideration of turning over the custody of a minor. This contract was made in contemplation of

marriage but not in consideration of marriage. The Statute of Frauds does not inhibit oral contracts in consideration of transferring the custody of minor children unless possibly the contract is within Class V.

ORAL CONTRACTS WITHIN CLASS IV

In equity an oral land-sale contract may be enforced against a defaulting promisor even if the latter invokes the Statute of Frauds, provided, there has been sufficient part performance under the oral contract to convince the chancellor that fraud will result from a literal application of the statute.

The Missouri theory of part performance as an equitable substitute for the Statute of Frauds was presented in the early case of *Chambers v. Lecompte* (1845) 9 Mo. 575, as follows: "It is now settled that payment of money is not part performance, because it may be repaid, and then the parties will be just as they were before, especially if repaid with interest. The principle upon which part performance takes a case out of the statute, is that it would otherwise make the statute a means of practising a fraud; and therefore nothing is now considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is performed. The ordinary illustration of the principle is the case of a vendee by a parol agreement put in possession. If the agreement be not valid in law or equity, he is a trespasser and liable to an action. As a matter of defense, it is held, that he can, under these circumstances, show the parol agreement by which he acquired possession, and the unwritten agreement being admissible for this purpose is admissible throughout. The case is still stronger where the vendee has not only taken possession, but expended money in valuable or permanent improvements."

An oral contract followed by a mere payment of money by a vendee without taking possession does not justify an equitable suit for specific performance because the remedy at law is adequate. *Townsend v. Hawkins* (1870) 45 Mo. 286; *Blew v. McClelland* (1860) 29 Mo. 304; *Wheeler v. Dake* (1908) 129 Mo. App. 547, 107 S. W. 1105. But if services are to be rendered instead of paying money and the services are fully performed, then the statute cannot be used to produce fraud. *Jones v. Jones* (1933) 333 Mo. 478, 63 S. W. (2nd) 146; *Hall v. Harris* (1898)

145 Mo. 614, 47 S. W. 506, as qualified by *Russell v. Sharp* (1905) 192 Mo. 270, 91 S. W. 134, 111 Am. St. Rep. 496. As to the mere payment of money, the American Law Institute is in accord with Missouri. Restatement, Contracts, Sec. 197. As to rendering services in lieu of paying money, apparently the American Law Institute is at variance with Missouri. Restatement, Contracts, Sec. 197, Illustration 5. General American law on these matters is in a state of confusion. Williston on Contracts, Sec. 494.

Taking possession under a new oral contract plus payment of part of purchase price will justify a suit for specific performance by either vendee or vendor even against a plea of the Statute of Frauds. See: *Green v. Ditsch* (1898) 143 Mo. 1, 44 S. W. 799, suit by vendor; *Walker v. Owen* (1883) 79 Mo. 563, suit by vendor, one dollar only of purchase price having been paid; *Reynolds v. Reynolds* (1891) 45 Mo. App. 622, suit by vendee. Making improvements in addition to taking possession under the oral contract is recognized as sufficient part performance. See *Ross v. Allyea* (Mo. Sup. 1917) 197 S. W. 268, vendee's suit to try title; *Hubbard v. Hubbard* (1897) 140 Mo. 300, 41 S. W. 749, donee's widow enforced contract against father-in-law; *Anderson v. Shockley* (1884) 82 Mo. 250, equitable defense to ejectment suit; *Westport Lumber Co. v. Harris* (1908) 131 Mo. App. 94, 110 S. W. 609, vendees sought to avoid oral sale but not allowed to do so. In the following cases the oral contracts were validated by the three equitable factors of possession taken, improvements made, and part of purchase price paid: *Congregation v. Arkey* (1929) 323 Mo. 776, 20 S. W. (2nd) 899, suit to quiet title met by equitable defense; *Hobbs v. Hicks* (1928) 320 Mo. 954, 8 S. W. (2nd) 966, suit by vendee; *Johnson v. Hurley* (1893) 115 Mo. 513, 22 S. W. 492, ejectment suit defeated by equitable defense.

Is mere taking possession under an oral contract without payment of any money on account of price, or the making of any improvements, sufficient to validate an oral land-sale contract? This question has never been decided in Missouri. Strong dicta in the affirmative have been uttered. See *Ross v. Allyea* (Mo. Sup. 1917) 197 S. W. 268; *Emmell v. Hayes* (1890) 102 Mo. 186, 14 S. W. 209, 11 L. R. A. 323, 22 Am. St. Rep. 769; *Young v. Montgomery* (1859) 28 Mo. 604; *White v. Watkins* (1856) 23 Mo. 423. The American Law Institute by implication answers

this question in the negative. Restatement, Contracts, Sec. 197.

A few states reject absolutely the doctrines of part performance. For a general survey of American law, see Williston on Contracts, Sec. 494 and Page on Contracts (2nd Ed.) Sec. 1374 et ff.

ORAL CONTRACTS WITHIN CLASS V

An oral contract not performable within a year, if and when fully performed on one side, can be enforced by the performing party without regard to the Statute of Frauds.

The exclusion of contracts that have been fully performed on one side has been announced clearly in Missouri. "It is true that the contract could not be wholly performed within one year; but it was entirely and completely executed by one of the contracting parties, and it is the established doctrine of this court, and the settled law of this state, that where agreement not in writing has been wholly performed on one side, the other party thereto cannot interpose the defense of the Statute of Frauds," in a case relating to contracts within Class V. *Self v. Cordell* (1870) 45 Mo. 345. To the same effect: *Schlitz Brewing Co. v. Mo. Poultry Co.* (1921) 287 Mo. 400, 229 S. W. 813, plaintiff sued for goods sold and fully delivered, but original oral contract was not to be performed within one year; *McGinnis v. McGinnis* (1918) 274 Mo. 285, 202 S. W. 1087, partnership contract fully performed on one side but original oral contract for more than one year; *Bless v. Jenkins* (1895) 129 Mo. 647, 31 S. W. 938, successful suit for rent on oral lease for fifteen months after occupancy for same period; *Bird v. Bilby* (1919) 202 Mo. App. 212, 215 S. W. 909, oral contract to pay plaintiff twenty dollars a month for seventeen years if plaintiff refrained from bringing suit and plaintiff so refrained until barred by Statute of Limitations; *Mitchell v. Branham* (1904) 104 Mo. App. 480, 79 S. W. 739, successful suit on oral contract involving defendant's promise to refrain for three years from certain activity and consideration fully performed by plaintiff who proved breach by defendant and damages to plaintiff; *Marks v. Davis* (1897) 72 Mo. App. 557, oral contract of employment for more than one year involving contingent right to bonus and successful suit by employee for bonus after contingency occurred and full performance by plaintiff.

The early case of *Pitcher v. Wilson* (1837) 5 Mo. 46, is *contra* to the holdings in the cases above referred to, but the *Pitcher Case* undoubtedly has been overruled. *Reigart v. Mfrs. Coal and Coke Co.* (1909) 217 Mo. 142, 117 S. W. 61, although soundly decided, contains an inaccurate comment to the effect that the *Self* case quoted from, above, was overruled by a certain case which did not involve full performance by a plaintiff but only partial performance.

Under this more-than-one-year provision of the Statute of Frauds the performance to take the contract out of the statute must be a performance *in toto* and not merely part performance. See *Nally v. Reading* (1891) 107 Mo. 350, 17 S. W. 978, a one-year performance of an oral four-year contract does not preclude reliance on Statute of Frauds; *Atwood's Admr. v. Fox* (1860) 30 Mo. 499, a one-year performance of an oral two-year contract; *Diamon v. Wells* (Mo. App. 1920) 226 S. W. 1016, tenant under oral lease for more than one year having partly performed failed in suit on the special contract when statute was invoked; *Shacklet v. Cummins* (1914) 178 Mo. App. 309, 165 S. W. 1145, successful ejectment suit in spite of oral contract for more than one year and part performance by tenant.⁴

Thoroughly in accord with developed Missouri law as to contracts within Class V, the American Law Institute emphasizes the simplicity of the rule of full, but not partial, performance by describing contracts in Class V as "bilateral contracts, so long as they are not fully performed by either party, which are not capable of performance within a year from their formation." For general English and American law on contracts within Class V, see Williston on Contracts, Sec. 504; Page on Contracts (2nd Ed.) Sec. 1367.

⁴ The apparent harshness of these holdings where a plaintiff has partially performed under an oral contract invalid by reason of the Statute of Frauds is mitigated by the doctrine of *quantum meruit* and *quantum valebant*. The Statute of Frauds applies only to express contracts, and not to implied or quasi-contracts. See *Interstate Hotel Co. v. Amusement Co.* (1903) 103 Mo. App. 198, 77 S. W. 114, where an express oral contract could not be performed in less than ten years and plaintiff after partial performance for the benefit of the defendant, being prevented from further performance by the defendant, brought suit not on the special contract but on the contract implied from the circumstances. Plaintiff won the suit with substantial damages and the only point raised by the defendant was the Statute of Frauds. See Williston on Contracts, Sec. 534.

ORAL CONTRACTS WITHIN CLASS VI

An oral sale of chattels for the price of thirty dollars or more is enforceable if the buyer accepts and receives all or part of the goods, or pays all or part of the price.

This is the only class of contracts as to which there is an express statutory rule for validating an oral contract by performance. The express rule is liberal and operates either in the case of full performance or part performance. When the statute is satisfied by part performance in the nature of action over the goods, there must be both acceptance and actual receipt. "It is generally ruled that the goods are received when delivered, what will constitute delivery will satisfy that feature of the statute. It is also generally ruled that, in addition to what is understood by delivery of the goods in the ordinary sense by the seller, there must be an acceptance of them, or some part thereof, by the buyer; but what will meet the requirements of the statute as to acceptance has not been so well defined. Any person negotiating for the purchase of goods may, of course, inspect them at his pleasure but it is not the inspection that binds him. It is the acceptance of the possession and dominion over the goods as owner under the contract that binds him." *Hoffman v. Wisconsin Lumber Co.* (1921) 207 Mo. App. 440, 229 S. W. 289. To the same effect: *Kirby v. Johnson* (1856) 22 Mo. 354; *Cunningham v. Ashbrook* (1855) 20 Mo. 553; *Hollrah-Dieckmann Ref. Co. v. St. Louis House & Window Cleaning Co.* (1914) 186 Mo. App. 207, 171 S. W. 576.

The American Law Institute is in general accord with what has been just stated as the law of Missouri. Restatement, Contracts, Secs. 201, 202. However, the American Law Institute (following the Uniform Sales Act, now law in thirty-two states but not in Missouri) is more liberal than Missouri in the matter of proving what is an actual receipt of the goods. See Restatement, Contracts, Sec. 202, Sub-section (1-b), and compare with *Fine v. Hornsby* (1876) 2 Mo. App. 61.

As to the payment of all or part of the price, the payment may be in money or in an agreed substitute for money, provided the substitute for money is an absolute and not a conditional payment. In *Groomer v. McMillan* (1910) 143 Mo. App. 612, 128 S. W. 285, the court said: "The law is that a payment to be effective in avoidance of the Statute of Frauds, must be an abso-

lute payment. But it needs not be in money. The buyer's check for money will suffice if it is received by the seller and agreed that it is an absolute payment." The American Law Institute is in general accord. Restatement, Contracts, Sec. 205. However, there is one important feature of variance between the law of Missouri and the American Law Institute. As appears above in the Groomer case, in Missouri law the payment made by check must be an absolute and not a conditional payment. According to the American Law Institute, a payment by a check, even if conditional, is sufficient to satisfy the Statute of Frauds. See Restatement, Contracts, Sec. 205, Illustration 1. The rule of the American Law Institute, while perhaps desirable, is against the weight of authority. See Williston on Contracts, Sec. 565.

In the following cases non-money payments were sufficient: *Ostrander v. Messmer* (1926) 315 Mo. 1165, 289 S. W. 609, note in part payment of corporate stock; *Coffman v. Fleming* (1923) 301 Mo. 313, 256 S. W. 731, check accepted as absolute part payment; *Woodburn v. Cogdal* (1866) 39 Mo. 222, note of buyer; *Alexander v. Moore* (1853) 19 Mo. 143, deposit of money with third person; *Dieckman v. Young* (1901) 87 Mo. App. 530, credit on notes of seller held by buyer; *Logan v. Carroll* (1897) 72 Mo. App. 613, check given, accepted and afterwards countermanded.

The statute was not satisfied in *Jennings v. Dunham* (1895) 60 Mo. App. 635, where seller and buyer each put up \$50 as liquidated damages in case of default, the deposit by buyer not being a part payment of purchase price. This case also held that "something in earnest to bind the bargain" must be a part payment. And in *Groomer v. McMillan* (1910) 143 Mo. App. 612, 128 S. W. 285, the court said: "Whatever may have been the meaning of 'earnest', its statutory meaning is part payment."⁵

CONCLUSIONS

So-called contracts, after full performance on both sides, are not contracts within the meaning of the Statute of Frauds and can never be disturbed merely because they were obnoxious to the statute before they were fully performed on both sides.

The Statute of Frauds operates on six classes of contracts.

⁵ This is probably the law in other states. See *Howe v. Hayward* (1871) 108 Mass. 54. Historically the meaning was more magical, like the meaning attached to a seal. See 2 Blackstone's Com. 447; Holdsworth, *Hist. of Eng. Law*, vol. V, page 109.

With reference to possible validation by full performance on one side, or by partial performance on one side or both sides, of oral contracts within these six classes, each one of the six classes must be studied separately.

Class I. The statute is applied literally, and full performance by the promisee, or part performance by either promisee or promisor, of the oral contract, will not relax the statutory rule, so long as the contract is and continues to be a secondary contract.

Class II. If the oral contract of guaranty is truly a collateral or a secondary promise, and not a primary or original promise, or one for the business advantage of the promisor, then performance or part performance by the promisee, or part performance by the promisor, will not relax the Statute of Frauds.

Class III. Certainly in the absence of clear evidence of fraud, the oral promise in consideration of marriage cannot be enforced merely because the promise to marry has been fulfilled. To what extent equity might enforce the oral contract in order to prevent fraud is unsettled in Missouri, and is a confusing problem throughout the country.

Class IV. Extremely liberal rules have been developed in equity to prevent fraud that would result from a literal application of the Statute of Frauds to oral land-sale contracts which have been partly performed. The particular extent to which the liberal rules have been developed is a problem of local jurisprudence in each jurisdiction, and Missouri seems to be a liberal state.

Class V. Full performance, but not part performance, on one side has the practical effect of repealing the Statute of Frauds.

Class VI. The Statute of Frauds itself in clear language sets forth the law of performance as a method of validating an oral chattel-sale contract.