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At the Dawn of Part Performance: A Hypothesis

UMBERTO-IGOR A. STRAMIGNONI

THE MYSTERY

1. In 1975, Professor A.W.B. Simpson acknowledged that '[t]he equitable doctrine of part-performance is something of a mystery'.¹ The mystery is twofold. One question is when was it that the doctrine of part performance was first employed. A second question is why is it that the drafters of the Statute of Frauds did not mention the doctrine in Section 4 of the Statute. The two questions are related, but logically and historically the first is of a more fundamental nature – and it is the purpose of this paper to formulate a possible answer to that question.²

2. Professor Simpson's position is that the doctrine was probably employed for the first time by Lord Nottingham in the Court of Chancery. Proof of this is lacking. However, with typical perceptiveness the author noticed that '[a]lthough the first clear case applying the doctrine is *Butcher v Stapely* (1686) ... it is clear from *Hellis v Edwards* (1683) that the doctrine was by then in some form known...'.³ In brief, in *Thomas Butcher v. Stapely and Richard Butcher*,⁴ the Lord Chancellor Jeffreys ordered specific performance of a parol agreement for the sale of lands made between the plaintiff and Richard Butcher for the price of £700. Acting like a modern 'gazumper', Richard Butcher had first agreed by word of mouth and in (unsigned) writing to sell the lands to the plaintiff, and later come into contact with one Mr Stapely: upon the latter's promise to pay a higher price (£740), Richard Butcher changed his mind and resolved to sell the lands to Stapely rather than to the first promisee. Later, relying on the lack of his signature on the document to the agreement, the defendant *inter alia* insisted on the Statute of Frauds enacted nine years before.⁵

There is no need to provide here more details. Suffice it to say that the decision to order specific performance of the first agreement (the one between Richard Butcher and Thomas Butcher) was explained by the fact that Lord Jeffreys had felt that there had been 'contrivance' on the part of

This article is dedicated to the memory of Dr Umberto Stramignoni

the two defendants to escape liability – as it was shown by the circumstance that possession of the lands had been initially delivered to the plaintiff.

Thomas Butcher v. Stapely and Richard Butcher is the starting point from which for centuries much legal scholarship took the equitable doctrine of part performance to have begun to develop.⁶ To some extent, that belief must have been induced also by the recurrent citation of the case in disputes where the Statute was pleaded by a defendant who had already delivered possession to the buyer. At some point, the decision almost completely disappears from the Tables of Cases of the various treatments on Equity – to emerge from oblivion in more recent times, and mark the advent of part performance under the Statute of Frauds. However, if *Butcher* (1686) really was the earliest occasion after the enactment of the Statute of Frauds (1677) when the doctrine of part performance was applied (as suggested by many for so many years), then of course Lord Nottingham could not have heard the first case on part performance (as Professor Simpson suggests) – for His Lordship died in 1682.

3. But, quite rightly, Professor Simpson points to three cases suggesting that the doctrine of part performance must have been resorted to by the Lord Chancellor for the first time well before *Butcher* (1686). One is the decision in *Hollis v. Edwards* (1683)⁷ – where Lord Guildford had to decide upon the defendant's plea of the statute in bar of the plaintiff's claim. Thus, 'In discussion the Lord Keeper distinguished between necessary repairs and improvements, and money laid out merely at the fancy and humor of the plaintiff. No clear decision emerged, but plainly the basic ideas involved [i.e., part performance] are appreciated'.⁸

The other two cases pointed out by Professor Simpson are *Floyd v. Buckland* (1703) and *Oldham v. Litchford* (1705). In *Floyd v. Buckland*, Sir John Trevor decreed specific performance (with costs) of one parol agreement upon which the defendant had undertaken to grant plaintiff a lease of a piece of land adjoining the plaintiff's house 'for as long as he had in the house'.⁹ The Master of the Rolls explained that 'the statute was not made to encourage frauds and cheats', and noticed that the plaintiff had taken possession of the land and spent money on it 'in pursuance of the agreement'.¹⁰ In support of the latter observation, and after citing *Thomas Butcher v. Stapely and Richard Butcher*,¹¹ it was added and concluded as follows:

[A]nd likewise a case decreed by the Lord Nottingham, where a deed was sealed for security of money borrowed, and the deed being absolute, the defendant promised to seal the defeazance, and afterwards refusing, a bill was preferred to compel him, and though he insisted upon the statute of frauds and perjuries, he was decreed to seal a defeazance, though there was no agreement in writing for that purpose.¹²

So, we are told, at the time of Lord Nottingham a decree was issued to compel defendant to perform an oral agreement within the Statute of Frauds because plaintiff had acted in pursuance of it by sealing an absolute deed 'for security of money borrowed'. Defendant, refusing to seal the necessary defeasance, had attempted to escape liability by setting up the defence provided by the statute. Lord Nottingham saw the fraud, and rejected the defence.

Two years after *Floyd* (1703), another case made clear reference to a decision where specific performance had been ordered of a parol agreement within the Statute of Frauds upon which a mortgage deed had been sealed, and a defeasance had remained unsealed.

In *Odham v. Litchford*, the defendant's brother had been willing to insert in his testament an annuity of £40 per annum in favour of the plaintiff, and yet was persuaded by the defendant not to insert such gratuity in the actual document upon assurance that 'as he was a Christian he would take care to see it [the gratuity] paid'.¹³ The defendant later refused to grant the promised annuity to the plaintiff, who then brought a bill in Equity.

One can safely assume that plaintiff knew or was advised that no court of Common Law would regard favourably a claim for damages grounded on a parol agreement within the Statute of Frauds. So, he went to Chancery. Before Sir Nathan Wright, the Lord Keeper, defendant relied on the Statute of Frauds, and lost the case.

But the Lord Keeper was of the opinion, and decreed, that the defendant should pay it, and the ground he went upon was, that this was a fraud upon the testator and the legatee; and that, notwithstanding the statute of frauds and perjuries, this court had relieved in case of a fraud, although there was nothing in writing to charge the party; *as in the case where a mortgage deed was sealed, and the mortgagee refused to seal the defeazance*.¹⁴

At about the same time as the latter two cases cited by Professor Simpson (*Floyd* and *Oldham*), another case worthy of note was decided. In *Skett v. Whitmore* (1705),¹⁵ a bill was brought for a discovery of assets. The facts are rather complicated, and largely irrelevant for our purposes. However, the core of the matter was that, in the end, 'it plainly appeared that John Whitmore [defendant] was only a trustee for William [deceased debtor of the plaintiff], and that the term [assigned to the defendant] was intended to attend the inheritance, but no declaration of trust in writing'.¹⁶

It does not appear from the report what the actual decision in this case eventually was, as we are told that the Lord Keeper (Sir Nathan Wright) 'took time to consider [the matter before him]'.¹⁷ However, the report notes that:

[I]t was said for the plaintiff that *this court had in several cases, where there was no writing, caused the execution of an agreement; as where an agreement was in part executed, as where a tenant had taken a lease, but no writing signed, and possession had been delivered, and the tenant had laid out his money in stock, or where he had laid out money in building, the court hath compelled the making of the lease; and so in the Lord Nottingham's time, where the purchase money was paid, and the deeds refused to be sealed, he decreed the sealing of them; and so if a mortgagee refuse to seal a defeazance, he hath been decreed to do it.* The reason in the first two cases is, because the agreement was in part executed, and in the two last cases there was apparent fraud.¹⁸

Summarising, Lord Guilford in *Hollis* (1683), Lord Jeffreys in *Butcher* (1686), Sir John Trevor in *Floyd* (1703), and Sir Nathan Wright in *Oldham* (1705) and *Skett* (1705), were all decreeing specific performance of parol agreements within the Statute of Frauds. In the latter four decisions, they were doing so (among other things) because they were aware that there had been an important precedent to that effect.¹⁹ According to *Floyd*, *Oldham*, and *Skett* – but also to further authority (based on a reporter of good repute),²⁰ as well as Charles Viner²¹ and Blackstone²² – that precedent was associated with a particularly respected judge – that is, Lord Nottingham. Lord Nottingham not only was regarded as a lawyer of formidable reputation (in Story's well known words, the 'Father of Equity'²³), but, also, and foremost, had been one of the framers of the Statute of Frauds.²⁴ As to the construction and interpretation of that statute, then, Lord Nottingham's practice may well have been felt by later judges to provide something very close (conceptually) to the civilian *interpretatio authentica*. Also, if the reports in argument are to be believed, the decree they refer to must be found among the cases heard by the Lord Chancellor of England between 25 June 1677 (the day after the Statute of Frauds came into effect) and sometime before he died, on Monday, 18 December 1682, at about 4 o'clock in the afternoon, at the age of 61.²⁵ However, we are told that His Lordship had long been ill from gout and 'his attacks from that disorder had become so frequent and severe, that he was for months together prevented from attending the House of Lords, the Court of Chancery, or the Council'.²⁶ This, accordingly, would seem to limit further the *spectrum* of time that should be investigated.

4. Towards the end of the seventeenth century, Equity was hardly any longer perceived only as a matter of conscience '*naturalis et interna*'.²⁷ Yet the Lord Chancellor would take part performance on one side as a clear signal that – as a matter of conscience '*civilis et politica*'²⁸ – performance should

be completed according to the terms of the agreement *de quo*. Similarly, the pleading in bar of the Statute of Frauds by him who, after having induced and accepted acts by the other party in reliance of the agreement, would not perform his own obligations, the Chancellors would take as a clear sign that the pleader would in fact endeavour to fraud him who had performed.²⁹ So, the Chancellor would order the specific performance of the agreement in question. In the words of Lord Hardwicke, 'to allow any other construction upon the statute of frauds and perjuries, would be to make it a guard and protection to fraud, instead of a security against it'.³⁰ Yet the connecting factor between the existing practice in Equity regarding unsealed covenants performed (in part or *in toto*) by one of the parties, and the practice in Equity regarding parol agreements within the Statute of Frauds (partly or totally) performed by one of the parties, can be definitely proved to rest on the Chancellorship of Lord Nottingham (as Professor Simpson, but also *Skett*, Viner and Blackstone seem to suggest) only if one can prove that Lord Nottingham actually ordered the execution of some parol agreement failing to comply with the Statute of Frauds.

THE RECORD C33/256

5. All the above evidence points to *Potts v. Turvin*. *George Potts v. John Turvin* – a case heard during Hilary Term and Trinity Term, 1681 – is included in the most valuable collection of Lord Nottingham's own notes published in two volumes by the Selden Society between 1957 and 1961.³¹ The collection was edited by Mr D.E.C. Yale, who also wrote the related 'Introduction'. The case in question is reported in the collection's second volume, and classified under number 1074. Unfortunately, there is no commentary for this case in either of the two volumes.³² Yet, Lord Nottingham's notes are rather instructive:

[T]here was a parole agreement between the plaintiff and the defendant to transfer a mortgage, which the plaintiff did so far execute on his part [as] to seal the assignment, but the defendant refused to seal the defeasance. And to have this defeasance sealed was the end of the bill. The defendant pleaded the Statute 29 Car.2 of Frauds and Perjuries, but was overruled, because part of the agreement was executed in writing.

Three crucial pieces of information are given by Lord Nottingham in those notes. First, it appears that the transaction between P and D was really one of a transfer of a mortgage (like so many in the following years would indicate) by the former to the latter. Secondly, once summoned before the Lord Nottingham, D decided to plead the Statute of Frauds, and to do so on

the basis that the alleged agreement was one by word of mouth rather than in writing. Thirdly, D's plea was overruled 'because part of the agreement was executed in writing'. While the first part of Lord Nottingham's notes seems to legitimate the hypothesis that *Potts v. Turvin* is the first case on part performance after the Statute of Frauds was enacted, the last part of the notes is somewhat puzzling. In other words, that last part of Lord Nottingham's notes seems to suggest that the reason why the pleading of the Statute was overruled was because His Lordship found that, in fact, the evidentiary criteria set by Section 4 had been met.

Was *Potts v. Turvin* the case actually referred to by so many so often in the years following throughout the centuries? Ninety-six more cases are reported by the Selden Society's edition as having been heard by the Lord Nottingham before he died.³³ Of the 1,170 reported cases heard by the 'Father of Equity' during his mandate, 11 directly involving the Statute of Frauds appear to have been decided prior to *Potts v. Turvin*,³⁴ whereas two were decided afterwards.³⁵ But only one of them – *Potts v. Turvin*, of course – deals with the very matter of part performance of a parol agreement within the Statute of Frauds, and the mischievous pleading in bar of the statute's provisions by the non-performing body.³⁶

6. As usual, the bill entered before the High Court of Chancery, as well as the various stages of the proceeding, were annotated into the relevant Registrar's Book³⁷ (or 'Term Book' or 'Minute Book').³⁸ As the Registrar's Books were not easily accessible, it is likely that the legal community of the time would become informed of the decision reached by the Chancellor in *Potts v. Turvin* either by word of mouth, or by means of privately circulated notes.³⁹ Chronologically, the first annotation is dated Tuesday, 1 February 1681.⁴⁰

Fragment 1

Georgius Potts	Quærens
Johannes Turvin	Defendant

The matter upon the *plaintiff's* bill and the *defendant's* Demurrer and plea put in thereunto coming this present day to be argued before the Lord high Chancellor of England The end of the *plaintiff's* bill being to have a defeazance promised and agreed to by the *defendant* executed to him on the *plaintiff's* conveyance of an estate to the *defendant* This Court thereupon and upon hearing what could be alledged on either side doth order that the *said defendant's* Demurrer and plea be overruled and that the *defendant* doe answer whether he

did not promise and agree to make and execute such Defeazance as is charged in the bill and the *said defendant* is to answer the same without costs.⁴¹

From that annotation, we learn that at some point one George Potts (P) had conveyed an estate to one John Turvin (D) upon the understanding that the latter would provide the former with a defeasance. This dispels the doubts raised by the last part of Lord Nottingham's notes – as it tells us that Turvin's obligation to seal the defeasance arose on the 'conveyance [by Potts] of an estate to the defendant'. Lord Nottingham listens to the argument of both P and D, but overrules D's demurrer and plea – in fact, he asks D to answer to P's allegations. P's allegations were that D had promised and agreed to prepare and execute a defeasance in P's favour, but subsequently failed to do so. The next six annotations describe the various interlocutory stages of the proceeding happening before the Lord Chancellor, and little more (except that for some reason the defendant seemed unwilling or unable to co-operate).⁴² The last annotation available in the Registrar's Book (Fragment 8) reports of a hearing taking place only on Tuesday, 12 April 1681, when the defendant was finally put to his oath.⁴³

Fragment 8

Georgius Potts	<i>Quærens</i>
Johannes Turvin	<i>Defendant</i>

Upon the *plaintiff's* humble *petition* this day presented to the honorable *Master* of the Rolls [TORN] for the reasons therein contained It is ordered that the *plaintiff* or his *Counsel* in *Court* be present and have notice [TORN] the *defendant* will be sworne to his answer whereof notice is forthwith to be given to the *defendant's Counsel* in *Court*.

POTTS V. TURVIN

7. In that distant time, facts – scanty as they are – went probably as follows.

(i) An oral agreement was made sometime after the enactment of the Statute of Frauds whereby one Mr Potts (P) should 'transfer a mortgage' to one Mr Turvin (D) – that is, an out-and-out transfer of a mortgage. This means that in all probability P in *Potts v. Turvin* was himself a mortgagee in a debtor–creditor relationship with a third party (the original borrower). While the latter would have thus redemption rights over the mortgaged property, P would nevertheless be in the legal position to dispose

temporarily of such property. We are also made to understand, however, that D was meant to seal a defeasance in P's favour. According to Blackstone,

[A] defeasance is a collateral deed, made at the same time with the feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law; and, therefore only, indulged; no subsequent secret conveyancing of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth.⁴⁴

P – relying on the agreement made with D – acts upon it, and executes (and, perhaps, even delivers) the deeds of assignment of the mortgaged property. Meanwhile, however, D has changed his mind, and refuses to seal the defeasance. P then goes to the Chancellor, and asks for an order *in specie* of D's promise to execute (seal) the defeasance.⁴⁵ D invokes the Statute of Frauds, and pleads that the agreement did not comply with it. The Chancellor overrules the pleading 'because part of the agreement was executed in writing'.

(ii) The presence of a defeasance – confirmed by the Record C33/256 – generates a dilemma as of the precise nature of the transaction. In short, the dilemma is that a mere 'transfer' of a mortgage would not require a deed of defeasance, whereas a mortgage would. Accordingly, if we take Lord Nottingham's expression 'agreement ... to transfer a mortgage' at its face value, it would be hard to explain the presence of a defeasance in the transaction in question.⁴⁶ At the time, a transfer of a mortgage would usually take place by means of a deed tripartite to which the original mortgagor, Potts, and Turvin, should all be parties. The joinder of the original mortgagor would ensure that Potts would not be called upon to reconvey the property when the former was ready to pay off the mortgage to the latter. Moreover, the joinder of the original mortgagor would ensure that Turvin could get the mortgage money from him. Yet again, this first scenario would take in due consideration the exact words used by Lord Nottingham (who, once again, speaks of 'transfer' of a mortgage), but would hardly explain why no mention was made (either in the Record C33/256 or in Nottingham's own notes) of the original mortgagor, nor – indeed – would explain the necessity for a defeasance.⁴⁷

(iii) A second scenario is that P did not simply transfer a mortgage but

assigned the mortgaged property and claim to D *as security to a second loan*. D, at this point, would be required to re-convey the property on repayment by P of the sum borrowed (plus interest). If this account is true and accurate, *Potts v. Turvin* would be about a parol agreement for a mortgage of a mortgage, and not for an out-and-out transfer of a mortgage. More importantly, this account would explain the need for a defeasance.

8. Although – according to what has been indicated above – the nature of the transaction remains partly unclear, the Record C33/256 and Lord Nottingham's own notes prove that the first case on the equitable doctrine of part performance referred to by so many throughout subsequent centuries was indeed *Potts v. Turvin*. The sequence of events is quite simple – almost uneventful: D had promised P to lend him moneys, so P decided to re-mortgage the mortgaged property to D in order to have access to the loan. Then, P executes the deeds of assignment, and probably delivers to D the relevant documentation.⁴⁸ At this point, in the eyes of the Chancellor D's fraudulent behaviour probably amounted to the following. First, D-mortgagee refuses to execute a deed (the defeasance) that, according to practice (pointed out by Blackstone), is understood that in a mortgage relationship must take place 'at the same time with the ... conveyance'.⁴⁹ Secondly, D refuses to do so despite the fact that he has invited P's performance by promising the moneys and asking the security, and also he has endorsed P's performance by accepting the mortgaged property and the conveyance papers. Thirdly, once called before the Chancellor, D attempts to escape liability by pleading the Statute of Frauds (probably, section 4.4 – land – or section 4.5 – agreements of over a year) – that is, he tries to maintain that no contract has been validly agreed upon by the parties (despite the fact that he had induced and then accepted P's performance of the agreement).⁵⁰

LAST WORDS

9. So, this is what I think is the solution for the mystery pointed out by Professor Simpson. It might be worth noticing that Turvin's counsels were not the first gentlemen in England to have the idea to set up the Statute of Frauds as an expedient to escape liability upon a promise or agreement from which their client had somehow already benefited. In *Ash v. Addy*, this had been apparently attempted already, but the demurrer by the defendant was overruled because the parol agreement had been reached before the Statute of Frauds was enacted – 'for the act was not to be construed with a retrospection and to bar agreements precedent, but did only look forward and provide for the future'.⁵¹

However, it is really *Potts v. Turvin* that marks the opening of what I would call the formative period of the equitable doctrine of part performance. In deciding that first case, Lord Nottingham had the important merit of identifying the undeserved hardship threatening Mr Potts – thus providing a *tabula in naufragio* apt to neutralise potential evil effects that lack of statutory formalities might cause in the matter of contracts. As I argue elsewhere,⁵² the trusting plaintiff did not stand a chance to have an informal promise or agreement within the Statute of Frauds enforced by a court of Common Law – despite the fact that the Statute of Frauds had itself been enacted for the entirely separate purpose of preventing fraudulent plaintiffs from bringing claims based on contracts never made.

The role played by Lord Nottingham during the formative period of the doctrine of part performance was thereby pivotal. Indeed, His Lordship can now be proved to be the *traite d'union* between Equity's conventional response to formal covenants that should be but were not sealed, and the mounting tide of the equitable doctrine of part performance. To that extent, *Potts v. Turvin* seems to confirm the proposition that no break in continuity took place between the practice in Chancery before and after the enactment of the Statute of Frauds with respect to the parol agreements concerned.⁵³

The historical significance of *Potts v. Turvin* showing that 1681 marked the beginning of Equity's intervention in the matter of unwritten transactions within the Statute of Frauds, is accompanied by its import in legal theory.

Namely, the case shows that the first occasion for the Lord Chancellor to take a position in the matter in argument, and lay down a precedent in that sense, occurred when an act of part performance of a parol agreement within the Statute of Frauds was seen to lie in the actual execution of the deeds of assignment of the mortgaged property. Therefore, the material sealing (and delivery) of the documentation required to give execution to an agreement by word of mouth falling within the Statute of Frauds was probably the first class of material acts that Equity would consider sufficient to take the agreement out of the statute itself. There is no hint in the Record C33/256 or in Lord Nottingham's own notes that the Lord Chancellor regarded the possession by D of the estate conveyed by P – suggested by Fragment 1 – as the reason to overrule D's plea, although this must have been a serious, concurring consideration. With very few initial exceptions,⁵⁴ the analysis applied in *Potts v. Turvin* was soon echoed in other cases,⁵⁵ and finally repeated in an increasing number of occasions.⁵⁶ Moreover, further decisions bearing, as it were, the matrix of *Potts v. Turvin*, extended to instances where part performance was found in the delivery of possession of real property,⁵⁷ or in the granting of a lease upon which the plaintiff had sustained expenses,⁵⁸ or again into an act of plain fraud by the defendant,⁵⁹

and so on.⁶⁰ In all those cases, the Chancery's sole concern was the prosaic (perhaps) but uncompromising task to defy the crooked pleader of the Statute of Fraud – that is, the general and yet essential aim to avoid 'fraud' (injustice) as a matter of conscience '*civilis et politica*'.⁶¹ In those early days, the restrictions placed upon the doctrine by eighteenth–nineteenth-century courts (such as, for example, preliminary acts cannot be regarded as acts of part performance;⁶² the act of part performance must be unequivocal;⁶³ the parol promise or agreement must be specifically enforceable;⁶⁴ and so on) were, as such, still to be formulated.

From *Potts v. Turvin* on, to insist on the application of the statute when the agreement had been part performed by the defendant, or acted upon by the plaintiff (invited to do so by the defendant who had induced or simply accepted such acts), would be regarded *ipso facto* to exact a sacrifice that should not be tolerated. The strict formalism introduced by the Statute of Frauds (laudably, in order to foster certainty in the law) would have to face the equally important reasons of Equity ('*unicuique suum*' – justice is Justice only if the attempt is to achieve it in each particular instance). '[T]he legal system ... has to strive for a *coincidentia oppositorum* on the highest attainable level',⁶⁵ and *Potts v. Turvin* shows that, in the matter in argument, the English began that difficult enterprise without delay.⁶⁶

NOTES

1. A.W.B. Simpson, *A History of the Common Law of Contract – The Rise and Fall of the Action of Assumpsit*, Oxford, Clarendon, 1975, repr. 1987, at 614.
2. The second question arises from the observation that whole idea to set part performance as a test against possible frauds was not in itself a novelty in the Court of Chancery when the Statute of Frauds was enacted. Thus: 'Even before the statute equity would not execute a mere parol agreement not in part performed; possession by the purchaser was an equivalent of a livery of seisin in the eye of equity, and the Statute of Frauds was never intended to touch such cases of part-performance' (D.E.C. Yale, *Lord Nottingham's Chancery Cases*, 73 SS, 1957, at ciii). Yet, again, there is no mention of part performance in Section 4 of the Statute of Frauds (though there is in Section 17). Indeed, in his 1674 treatise entitled *Prolegomena of Chancery and Equity* (that is, immediately before the enactment of the Statute of Frauds), Lord Nottingham had inserted a rule on the following tone: '3. But equity will never compel the performance of a parol agreement *in specie*, unless it have been in part executed on one side' (the date is suggested by Yale, *Lord Nottingham's Manual of Chancery Practice* and '*Prolegomena of Chancery and Equity*', 1965, at 76) This, of course, adds to the mystery. True, when writing that rule, Lord Nottingham must have been thinking of parol agreements that would normally need to be sealed in order to be enforced. However, by 1674 (that is, three years before the Statute of Frauds was enacted) the first of the four drafts of the Statute of Frauds had already been completed: that was finalised by 16 February 1673, and Lord Nottingham was admittedly behind it. So, it can be no leap of imagination to presume that after the 1677 Act it must have come naturally into His Lordship's mind to apply the same rule to parol agreements that the novel Statute of Frauds would require to be in writing, and signed by the party to be charged (but see M. Macnair, *The Law of Proof in Early Modern Equity*, D.Phil. thesis, Oxford, 1991, at 156 ff.). In other words, the Chancellorship of Lord

Nottingham really appears to be of the utmost importance for the full understanding of the origins of the modern (equitable) doctrine of part performance as a rationalisation similar to the earlier mode of coping with covenants that would normally be required to be sealed, but had failed to be so executed. Yet, the question remains first of all whether Lord Nottingham ever applied the doctrine of part performance while sitting in the Court of Chancery after the enactment of the Statute of Frauds. If he did not, this might mean that the drafters of the Statute of Frauds (including Lord Nottingham) did not make any reference to the doctrine of part performance precisely because they thought that it should not apply to the transactions listed in Section 4. If, by contrast, it can be proved that Lord Nottingham did apply the doctrine even after the Statute of Frauds was enacted, that would mean (as proposed by Mr Yale) that the Statute was never meant to affect the equitable doctrine of part performance. But then why not mention it in Section 4?

3. Simpson, *Contract*, 614.
4. *Thomas Butcher v. Stapely and Richard Butcher* (1686) 1 Vern 363.
5. 29 Car. 2, 3. With notoriously unfortunate language, Section 4 of the Statute of Frauds provided thus: '[N]o action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of land, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.'
6. For example, J. Williams, *The Statute of Frauds – Section 4 in the Light of Judicial Interpretation*, Cambridge, 1932, at 231; G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, 2 vols., London, 1846–1849, vol. I, at 646, note (g).
7. *Hollis v. Edwards* (1683) 1 Vern 159.
8. Simpson, *Contract*, 614.
9. *Floyd v. Buckland* (1703) 2 Freeman 268.
10. *Ibid.*
11. *Ibid.*, at 269.
12. *Ibid.*
13. *Oldham v. Litchford* (1705) 2 Freeman 285.
14. *Ibid.*, at 285. Italics are mine.
15. *Skett v. Whitmore* (1705) 2 Freeman 280.
16. *Ibid.*
17. *Ibid.*, at 281. One might reckon that His Lordship was considering extending the equitable doctrine concerning agreements within the Statute of Frauds to declarations of trusts unsupported by written instruments.
18. *Ibid.*, 281. Italics are mine.
19. 'No doubt that until the time of Lord Nottingham the application of precedents was uncertain, owing largely to the scarcity of reliable reports; but successive Chancellors were zealous in following the practice of the court as closely as possible' – C.K. Allen, *Law in the Making*, 6th edn, Oxford, 1958, 1961, at 363.
20. *Sir George Maxwell v. Lady Mountcutie His Wife* (1719), Prec. in Chanc. (ed by Sir T. Finch), 526; and *Whitbread v. Brockhurst* (1784), 1 Bro.C.C. 404, at 408–9.
21. According to Charles Viner, the first attempt to use the Statute of Frauds to pursue what was in fact perceived to constitute a fraudulent enterprise occurred precisely during the times of Lord Nottingham. Viner gives no name or much other information as to the details of the case. His bare report of the first attempt to employ unduly the Statute of Frauds reads as follows: [T]here was an absolute conveyance and a defeasance, which defendant would not execute, but insisted on the Statute, and it was overruled' – *A General Abridgement of Law and Equity*, Aldershot, 174[1]–(51), folio, vol. V, at 523.
22. W. Blackstone, *Commentaries on the Laws of England*, 7th edn, Oxford, 1775, 111, at 157–8.
23. J. Story, *Commentaries on Equity Jurisprudence*, 1st edn, 1836; 3rd English edn, London,

- 1920, vol. I, at 46. Sir Heneage became Lord Keeper in 1673 and Lord Chancellor in 1675.
24. C.D. Hening, *The Original Drafts of the Statute of Frauds (29 Car. c.3) and Their Authors*, in 61 *Univ. of Penn.L.R.*, 1913, 283–316, at 288.
 25. T. Vernon, *Cases Argued and Adjudged in the High Court of Chancery*, 1829, vol. I, at 115.
 26. J. Campbell, *The Lives of the Lord Chancellors and the Keepers of the Great Seal of England from the Earliest Times till the Reign of King George IV*, 1845, vol. III, at 413–14.
 27. *Gee v. Pritchard* (1676) 2 Swanst. 402, at 414. See Allen, *Law in the Making*, at 393.
 28. *Per* Lord Nottingham, in *Cook v. Fountain* (1676), 3 Swanst. 585, at 600. See J.H. Baker, *An Introduction to English Legal History*, 3rd edn, London, 1990, 127.
 29. E. Fry, *A Treatise on the Specific Performance of Contracts*, 6th edn by G.R. Northcote, 1985, at 269.
 30. *Walker v. Walker* (1740) 2 Atk. 98, at 100.
 31. *Lord Nottingham's Chancery Cases*, 73 S[elden]S[ociety] (1957) and 79 SS (1961).
 32. The decision does not appear in the collection's general Table of Cases, although it appears in the Index of Cases to the second volume. The decision, moreover, is not included in the Reports of Cases decided in the High Court of Chancery during the time of Sir Heneage Finch (1725). This is, of course, not surprising – given the relative quality of those Reports
 33. According to the Selden Society's edition, the last case was probably heard by Lord Nottingham in the early days of November 1682 – 79 SS, at 934–5 (no. 1170).
 34. *Ash v. Abdy* 79 SS, involving the matter whether the Statute of Frauds should be construed as retrospective; *Woodman v. Morren* in 79 SS, at 115–17, involving a trust not arisen by implication and construction of law; *The Lady Turner v. Sir Edward Turner* [1678] 1 Ch. C. 307, excluding the execution of 'lands whereof any are seized in trust for the wife of him against whom execution is sued'; *Domina Grey v. Colville* [1679] 2 Ch. Rep. 143, construing the Statute as making a trust of assets in law; *Alfary v. Sergeant* in 79 SS, at 761 (no. 966), rejecting a demurral based on the Statute; *Wingfield v. Hide* (1679) in 79 SS, at 762 (no. 968), dismissing a bill for failure to comply with the Statute of Frauds; *Combs v. Norrington* in 79 SS, at 793 (no. 998), again dismissing a bill for failure to comply with the Statute's requirements of form; *Venables v. Bland & Spencer et e contra* in 79 SS, at 795 (no. 1002), and *Webb v. Jefferson*, in 79 SS, at 825 (no. 1035) both involving the Statute only marginally; *Wason v. Syms*, in 79 SS, at 831 (no. 1038), concerned with the interpretation of section 12 of the Statute; and *Mowbray v. Bacon*, in 79 SS, at 852 (no. 1067), regarding an account *inter tenants* in common not decreed.
 35. *Tiffin v. Tiffin* (1681) 1 Vern. 1, refusing to enforce an informal will within the Statute of Frauds for 'if wills not good enough for the inheritance should be allowed to be good for the leases and to sever the attendancy, it were in effect to repeal the statute'; and *Gell, Chambers &c. v. Orme* [1681] 2 Ch. C. 54, concerning *inter alia* a parole declaration of trust held to be void under the Statute.
 36. The Selden Society's collection of Lord Nottingham's Chancery cases reports one more case (79 SS, at 886–887, no 1114) somewhat concerned with the possible fraud that – it was said – could arise if a bill grounded on the presumed designed of the party to make a severance, was allowed. But further details as to the precise identity of the case were not given.
 37. The Book is kept in the Public Record Office (Long Room) under the classification C33/256.
 38. The British Record Society, *The Records of the Nation*, ed by G.H. Martin and P. Spufford, The Boydell Press, 1990.
 39. Although some attempt of systematic reporting of Chancery decisions can be seen in the *Lambert's (Carey's) Cases* (1557–1604), the *Choyce Cases* (1557–1606), and the *Tothill's Digest* (1559–1646) – indeed, mere extracts from the Decree Books – on the whole there were no fully reliable and thorough Chancery reports until *Peere Williams* (1695–1736). See V.V. Veeder, *The English Reports 1537–1865*, in A.A.L.S. ed, *Select Essays in Anglo American Legal History*, vol. 2, at 148 ff.
 40. The annotations in the Registrar's Book are not in chronological order. So, for instance, the first hearing was annotated third.
 41. *Potts v. Turvin* C33/256 folio 224 v.
 42. The second fragment is annotated in C33/256 folio 196 (26 February 1681); the third fragment is annotated in C33/256 folio 208 (5 March 1681); the fourth fragment is annotated

- in C33/256 folio 230 (16 March 1681); the fifth fragment is annotated in C33/256 folio 234 v (date is unclear); the sixth fragment is annotated in C33/256 folio 234 v (date is unclear); the seventh fragment is annotated in C33/256 folio 225 v (11 April 1681).
43. C33/256 folio 230 bis v.
 44. Blackstone, *Commentaries*, at 327. See also S. Carter, *Lex Vadorum*, 1706, at 5–7; J.J. Powell, *A Treatise upon the Law of Mortgages*, London, 1785, at 3–4; and E. Coke Wilmot, *A Succinct View of the Law of Mortgages With the Appendix Containing a Variety of Scientific Precedents of Mortgages*, London, 1798, at 2–4.
 45. We do not know for a fact whether, by that time, P had reached a point of no return: that is, whether by then he had already (if imprudently) delivered the deeds of assignment executed in favour of his counterparty. But we may safely assume that the papers had been executed and delivered.
 46. Unless, that is, the original mortgagor had been unable or unwilling to join in the transfer of the mortgage to Turvin.
 47. Although in the seventeenth century the whole transaction would be usually included within one single indenture tripartite, it appears that in *Potts v. Turvin* there were *two separate deeds*. This was rather unusual, but not unheard of: an out-and-out conveyance from Potts to Turvin, and a defeasance by Turvin in favour of the original mortgagor (to be activated when so required by Potts). This would probably not be the safest option for Potts as the third mortgagor could always bring an action for redemption against him. The choice, however, might have been suggested by the relationship between the third party and Potts (which we do not know but could well be one of close friendship or trust or even greater familiarity), as well as financial considerations. Potts, at any rate, could still get Turvin joined as a party to the action by virtue of the defeasance that he had (or should have had) in his hands. For a deed of defeasance similar to what was intended, *mutatis mutandis*, see Wood's *Complete Body of Conveyancing*, 1791, II, at 618.
 48. This suggestion seems supported *inter alia* by 1 Eq. Ca. Abr. 20, according to which 'the Mortgagee had got the Deed of Conveyance' – *A General Abridgement of Cases in Equity, Argued, and Adjudged in the High Court of Chancery etc.* [1667–1744]. Italics are mine.
 49. This would be the case only if, as above suggested, the plaintiff had already conveyed.
 50. It might be worth mentioning that the line of reasoning adopted in *Potts v. Turvin* was supposedly taken up again in *Hollis v. Whiteing* (1682), whereby plaintiff had filed an action for specific performance of a parole agreement for a lease of a house, relying on the circumstance that important expenses had been incurred by him in reliance of the transaction. Although in that case the court allowed the defendant's plea of non-compliance with the Statute of Frauds, we are told that '[t]he Lord Keeper was of the opinion, that if the plaintiff had laid in his bill, that it was part of the agreement, that the agreement should be put into writing, it would alter the case, and possibly require an answer' – *Hollis v. Whiteing* (1682) 1 Vern. 151.
 51. *Ash v. Abdy* 79 SS, at 664.
 52. This paper is an excerpt from the author's doctoral thesis at the University of Oxford – entitled 'Form in Contract Law – A Silent Revolution'.
 53. Costigan, Jr, 'The Date and Authorship of the Statute of Frauds', in 26 *Harvard L.R.*, 1912–13, 329–46, at 343; Yale, *Introduction*, 73 SS etc, at ciii; Simpson, *Contract*, at 615–16, and Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford, 1979, at 207.
 54. *Lamas v. Bayly* (1708) 2 Vern. 627. In *Lamas v. Bayly* the plaintiff had agreed with the defendant to desist from the purchase of a house upon condition that the latter would retransfer to the former 'at a proportionable price the Slip of Ground he desired for a Convenience to his House, and to prevent the Stopping up of his Lights'. The appeal against the decree of the Master of the Rolls that had acknowledged part performance, and fraud, was successful, and the decree reversed. We are not told why the first decision had been reversed. However, the instances where the equitable doctrine of part performance would not be applied were, in similar contexts, doomed to become exceptional, and, in the event, completely disappear.
 55. For example, in *Hollis v. Whiteing* (1682) 1 Vern. 151.
 56. For example, in *Wankford v. Fotherley* (1684) 2 Vern. 322. In *Wankford v. Fotherley*

defendant had promised to give his daughter £3,000 in case of marriage, and was decreed to pay that money to the deceased daughter's husband on the ground that upon that promise the defendant had written a letter stating the promise – admittedly, as a kind of encouragement for the plaintiff to marry his daughter. Again, the decision seems based on the idea that the agreement in question had to be performed because partly executed in writing. As reported, the House of Lords later affirmed upon appeal the decree granted by the Court of Chancery against the father of the bride.

57. *Thomas Butcher v. Stapely and Richard Butcher*.

58. *Floyd v. Buckland*.

59. *Oldham v. Litchford*.

60. The vast majority of the reports of the early cases on part performance would employ the expression 'part performance' quite broadly. This would include instances whereby the plaintiff had actually begun performance by paying a deposit – for example, *Lacon v. Mertins* (1743) 3 Atk. 1 – as well as instances whereby plaintiff had simply acted in reliance of the parol agreement reached with the defendant, or instances whereby the defendant had begun to perform, and then refused to complete the agreement.

61. The nature of this fraud was very interesting, and I hope to return to it in due course.

62. *Clerk v. Wright* (1737) 1 Atk. 12.

63. *Gunter v. Halsey* (1739) Amb. 586; *Maddison v. Alderson* (1883) 8 A.C. 467.

64. *McManus v. Cooke* (1887), 35 Ch D 681.

65. R. Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition*, Cape Town, 1990, at 88.

66. The author is particularly indebted to Professor J.H. Baker and Mr J. Kaye for help in understanding an event that took place more than 300 years ago.