



CSU
College of Law Library

Cleveland State Law Review

Volume 13
Issue 2 *Fraud and Deceit (A Symposium)*

Article

1964

Statute of Frauds and Land Transactions

Brendan F. Brown

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>



Part of the [Property Law and Real Estate Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Brendan F. Brown, Statute of Frauds and Land Transactions, 13 Clev.-Marshall L. Rev. 205 (1964)

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Statute of Frauds and Land Transactions

Brendan F. Brown*

I

It Was Inevitable That Land Interests Should Have Been Included Within the Scope of the Statute of Frauds.

The English Parliament enacted the Statute of Frauds in 1676 "for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury." It became effective the following year.¹ These practices had become common as a result of the confusion, turmoil, and lawlessness which had accompanied and followed the English Civil War and the Restoration. They were peculiarly common in those categories of transactions which were included within the formalism prescribed by the Statute.² Those categories related to land transactions, and to certain types of agreements involving personal property.

From the beginning of the English legal order in 1066, and even before that in the primitive period of Anglo-Saxon law, land was considered of unique importance because it was the basis of multiple sociological, political, and economic relationships.³ Not only was land the prime source of wealth, but it determined status in every sphere of social living.⁴

Accordingly, land came within the periphery of the English legal order long before personal property. Holdsworth has written that at the time of Bracton, who died in 1268, the law of personal property did not bulk large.⁵ Indeed rights in personal property were recognized only insofar as they related to land.⁶ Besides, at the time of Bracton, the ecclesiastical courts were important agencies of social control in certain matters pertaining to personal property.⁷

* Prof. of Law, Loyola Univ. School of Law (New Orleans).

¹ 29 Car. II, c. 3; see 6 Holdsworth, *A History of English Law* 379-383 (1927).

² Franklin, Marc A., *Contracts: Statute of Frauds: Law Reform (Enforcement of Contracts) Act, 1954, 2 and 3 Eliz. 2, c. 34, 40 Cornell L. Q.* 581, 582 (1955); also, see Scott, *Abridgment of the Law of Trusts* 96 (1960).

³ 2 Holdsworth, *op. cit. supra* n. 1 at 260 (1927).

⁴ *Id.* at 264.

⁵ *Id.* at 265.

⁶ *Id.* at 265-266.

⁷ *Id.* at 266.

Because of its uniqueness, some kind of formalism had always been a condition precedent for the recognition of land transactions in English law. Blackstone has shown how the transfer of title to land had always required form among "all well-governed nations."⁸

In the middle ages, formalism as to land included livery of seisin by which there was a "feudal investiture, or delivery of corporeal possession of the land or tenements."⁹ This was absolutely necessary to complete the transfer of the interest in land.¹⁰ As in all instances of legal formalism, the purpose was "the need of assurance of the existence of operative facts."¹¹

The Statute of Frauds was an important landmark in the evolution of land formalism. It added the requirement of signed writing for which a livery of seisin could not be substituted.¹² Three general categories of land transactions were included in the Statute, namely, first, certain transfers of important legal interests in land, either *inter vivos*¹³ or testamentary;¹⁴ secondly, declarations or assignments of equitable interests, i.e. express trusts of land;¹⁵ and thirdly, contracts or sales of any lands, tenements, or hereditaments or any interests in or concerning them.¹⁶

In the first category, it was enacted that all leases, estates, and interests in freehold, or terms of years, or any uncertain interest in land (other than leases not exceeding three years at a rent of two-thirds the full value) which are not put in writing and signed by the parties or agents, lawfully authorized by writing, will have the force only of estates at will.¹⁷ The same formalism was required in instances of assignments and surrenders of such interests.¹⁸ Besides, wills of real estate must be in writing, signed by the testator, or by some other person in his presence and by his direction, and attested in his presence by three or four

⁸ 2 Blackstone, Commentaries on the Laws of England 312 (1766).

⁹ *Id.* at 311.

¹⁰ *Ibid.*

¹¹ 4 Pound, Jurisprudence 431 (1959).

¹² 6 Holdsworth, *op. cit. supra* n. 1 at 397.

¹³ §§ 1-3.

¹⁴ §§ 5, 6.

¹⁵ § 7.

¹⁶ § 4(4).

¹⁷ § 1.

¹⁸ 6 Holdsworth, *op. cit. supra* n. 1 at 384-385.

credible witnesses.¹⁹ The same formalism was made applicable to the revocation of such wills.²⁰

In the second category, it was provided that all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be "manifested and proved" by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be "utterly void and of none effect."²¹ But the Statute did not apply to trusts which arose by operation of law, namely, resulting and constructive trusts.²²

In the third category, it was prescribed that no action shall be brought upon any agreement or sale of lands, tenements, or hereditaments, or any interest in or concerning them, 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.²³

Manifestly, the purpose of the formalism of the Statute was to promote the common good by protecting the social interest in the security of transactions and of acquisitions²⁴ against fraud and deception. In this connection, its purpose was analogous to that intended by the requirement of form as to precise words of negotiability in the domain of bills and notes.²⁵ The purpose sought by Parliament was through a formalism prescribed by the immediate authority of the will of the English political sovereign. But after the American Revolutionary War, this Statute, like other Parliamentary enactments, such as the Statute of Uses and the Statute of Limitations, became recognized as part of the Anglo-American common law.

The underlying principle of the Statute was accepted as resting upon the authority of right reason, and was accordingly given imperative form by the various legislatures in the United States. Indeed, the principal provisions of the Statute were enacted in substantially all English-speaking jurisdictions.²⁶ This was so

¹⁹ §§ 5, 6.

²⁰ *Ibid.*

²¹ § 7. See Scott, *op. cit. supra* n. 2 at 95, 96.

²² § 8.

²³ § 4(4).

²⁴ Pound, *op. cit. supra* n. 11 at 432.

²⁵ *Id.* at 435.

²⁶ *Ibid.*

even though each jurisdiction had its own distinctive statutory language, judicial interpretation, and procedural concepts.²⁷

II

The Common Law Courts, Dominated by the Analytical Legal Philosophy of Hobbes, Interpreted the Formalism of the Statute of Frauds so as to Make It Relate to the Essence of All Land Transactions.

Apparently, the framers of the Statute did not intend that the formalism prescribed therein for land transactions should extend to the essence or validity of *all* land transactions. The authors of the Statute knew the distinction between the concepts of unenforcibility and invalidity, as shown by the fact that they made any attempt to create a trust of land, without the prescribed formalism, "utterly void."²⁸ They did not expressly declare that an attempt to transfer a land interest, *inter vivos* or testamentary, without the required formalism was void, but regarded it only as an estate at will,²⁹ with the implication that the estate intended did not legally pass to the tenant. But they declared that an agreement for the future conveyance of land without the signed writing was simply unenforcible, so that no legal action might be brought.³⁰

The clash of concepts as to what should be the legal consequence of failure to comply with the formalism of the Statute is understandable through the fact that the Statute was enacted at the beginning of the maturity of English law. In this period, the idea of formalism, as it existed in the era of the amoral, strict law, up to the appearance of the Chancery Court at the end of the fourteenth century, and the concept of formalism which prevailed in the period of equity or natural law, up to the latter part of the seventeenth century, were competing. Those parts of the Statute, therefore, which made formalism relate to the juridical *essence* of the transaction were dictated by the amoral, atavistic, surviving concept of formalism of the strict law. The area of the Statute which made its formalism relate to the legal *enforcibility* of agreements, i.e. in regard to contracts involving land interests, was the product of such authors as

²⁷ Franklin, *op. cit. supra* n. 2 at 581.

²⁸ § 7.

²⁹ §§ 1-3.

³⁰ § 4(4).

Chancellor Lord Nottingham who had faith in a natural law theory.

The Common Law Courts, dominated by the amoral, legal philosophy of Hobbes, construed the Statute to relate the prescribed form to the validity of all land transactions. They fulfilled the intention of the framers of the Statute as to the clauses which rendered land transfers void, but departed from that intention in reference to the land contract clause. Lack of legal *enforcibility* postulates the existence of an agreement binding in the moral order. But the traditionally amoral legal philosophy of the Common Law Courts did not cognize moral rights.

At Common Law, enforcibility went to the essence of a contract. Enforcibility depended upon compliance with formalism, which necessarily related to essence. A legal right without enforcibility is a contradiction. Of course, a person might have a moral right which is not legally enforcible. In this case, the agreement remained morally valid and binding, but was legally invalid as a contract.

In the area of land contracts, the Common Law Courts construed the signed writing prescribed by the Statute of Frauds as an additional form of that of consideration.³¹ Lord Mansfield unsuccessfully sought to bring the philosophy of natural law into the judicial process. He had endeavored to make consideration only evidentiary, i.e. only one possible way, albeit the best way, to show the presence of the reason factor in any agreement.³²

Slade's case had been decided about seventy-five years before the enactment of the Statute of Frauds.³³ It initiated a Common Law doctrine of contract law, based on the formalism of consideration. Despite the efforts of Lord Mansfield, this formalism was held to be more than evidentiary in *Rann v. Hughes*.³⁴ Unless the form of consideration was present, adherence to the form of the Statute of Frauds was insufficient. Neither form was wholly instrumental, rather it was a matter of proving compliance with form as a condition precedent. Juridicity did not depend upon the legal recognition of an already

³¹ Franklin, *op. cit. supra* n. 2 at 582.

³² 8 Holdsworth, *op. cit. supra* n. 1 at 35, 36; also, see Brown, Brendan F., *The Natural Law Basis of Juridical Institutions in the Anglo-American Legal System*, 4 Catholic Univ. L. Rev. 81, at 82, 83 (1954).

³³ 4 Coke 92 b, 76 Eng. Rep. 1074 (1602).

³⁴ 7 T. R. 350, 101 Eng. Rep. 1014 (1778).

existing agreement which derived moral binding force from the wills of the parties acting according to right reason.

When the Courts talked of the unenforcibility of a land agreement under the Statute of Frauds, they meant that by a judicial fiction the agreement ceased to exist *de facto*. A similar thought was expressed by Jhering when he wrote that "Form is for a legal transaction what the stamp is for a coin."³⁵ The stamp makes the entity valuable, not its intrinsic worth. Of course, he was not referring to "legal" in the sense of "equitable."

III

Chancery, Adopting a Natural Law Philosophy, Did Not Relate the Formalism of the Statute to the Essence of Land Transactions, but Regarded It Only as Evidentiary.

Chancery was clearly bound by the letter of the law of the Statute of Frauds which made a signed writing essential for the transfer of *legal* interests of land, both *inter vivos* and testamentary. It was also bound by Section 4 which made certain types of agreements unenforcible at law without the required form, except in subsection 4 which dealt with contracts involving land interests. In regard to this subsection, Chancery was able to assume jurisdiction, and to apply equitable principles in its interpretation and evolution. This it was able to do by virtue of the consequences of the historical fiction of land's uniqueness. Nor was Chancery limited by the provisions which concerned express trusts.

This fiction enabled Chancery to obtain jurisdiction over land contracts. Since all land was irrebuttably presumed to be unique, money damages for breach of contract would not be sufficient remedy. Irreparable loss would result unless the contract was specifically performed. But only Chancery had the power to grant specific performance because of its natural law emphasis upon the moral duty of the defendant to fulfill the promise. Only Chancery could thus act *in personam*.

Although the Statute had declared that any attempt to create an express trust was "utterly void" unless it was manifested and proved by the prescribed formalism, Chancery interpreted "void" to mean "voidable."³⁶ It had authority to do

³⁵ II² Geist des Römischen Rechts 494 (8th ed. 1923) cited by Fuller in Consideration and Form, 41 Columbia L. Rev. 799, at 801 (1941).

³⁶ Scott, *op. cit. supra* n. 2 at 96; Bogert, Handbook of the Law of Trusts 61 (3rd ed. 1952). See also, generally, Oleck, Historical Nature of Equity Jurisprudence, 20 Fordham L. Rev. 23 (1951).

this because a trust was the creature of Chancery, which regarded all formalism as strictly evidentiary so that it did not affect the essence of the *de jure* transaction.

Even the framers of the Statute realized that the form prescribed by the Statute could not be made applicable to a trust resulting by implication or construction of law. While Parliament might have abolished resulting and constructive trusts, it could not manacle the power of Chancery to find or impose a trust relationship by a specific formalism. These trusts arose from the implicative and impository authority of the equitable judicial process. This authority was always exercised in the light of all possible relevant evidence, and upon the postulate of an objective order of "ought" outside the positive law.

Chancery construed the form required by the Statute as wholly evidentiary not only in reference to trusts, but also to contracts involving land. Various doctrines were developed in this connection. In the first place, the Statute served no purpose in preventing fraud, if the defendant confessed the existence of the agreement. Here there was no possibility of perjury. It was inescapable that the Common Law Courts under the domination of an amoral, legal philosophy should take the opposite position. Professor Stevens has traced the decline of natural law philosophy, even in the Chancery Court, under such Chancellors as Loughborough in the eighteenth century and Eldon in the nineteenth century.³⁷ They held that the defendant might invoke the law of the Statute even though he admitted the agreement.³⁸ Indeed, many of the newly established American courts unfortunately adopted the analytical philosophy of the later Chancellors.³⁹ Fortunately, but paradoxically, this is the only doctrinal area in which English Chancellors adopted such a philosophy in their interpretation of the Statute of Frauds.

Secondly, Chancery rejected the formalism of the Statute when the defendant had fraudulently prevented an agreement from being reduced to writing. Fraud existed when the plaintiff had been induced to forego a signed written instrument on the assurance that a parol understanding was sufficient. This could be done by positive false statement or by concealment.⁴⁰ Un-

³⁷ Stevens, Robert S., *Ethics and the Statute of Frauds*, 37 *Cornell L. Q.* 355, at 356-357 (1952).

³⁸ *Id.* at 369-372.

³⁹ *Id.* at 372-373.

⁴⁰ 3 Pomeroy, *A Treatise on Equity Jurisprudence* 429 and following (5th ed. 1941).

avoidable accident which has occasioned non-compliance with the Statute was similarly treated.⁴¹

Thirdly, Chancery worked out the celebrated Doctrine of Part Performance. This sprang from a natural law philosophy which made all depend for their essence upon the wills of the parties, acting as moral and reasonable persons. In the name of justice, other evidence than a signed writing should be admissible to show the factors of will and reason in an agreement, on the presupposition that it is a moral phenomenon. Of course, the positive law maker has the right to specify the best evidence.

Obviously, the Doctrine of Part Performance was misnamed because the acts claimed as part performance, so as "to take the case out of the Statute of Frauds" are not those dictated by the assumed obligations of the oral agreement. Perhaps a more explanatory title would have been the Doctrine of Judicial Implication from the Subsequent Acts of the Parties. Instead of looking at those acts which took place *prior* to the inception of the alleged agreement, and inferring that the parties had willed an implied contract, the court considers those acts which took place *after* the alleged agreement. It is not a question, therefore, of implying the existence of the necessary elements required in an agreement before the courts treat it as *de jure*, but rather the existence of the agreement itself.

It is well known that if the plaintiff takes possession of the land in question and deals with it as his own, the English courts, and some of the American, will conclude that this "unequivocally" points to the existence of the agreement. But other courts require in addition the making of valuable improvements on the land so that if the agreement is not made *de jure* and enforced, irreparable injustice will result.⁴² Of course, all courts applying the Doctrine of Part Performance agree that if the plaintiff takes possession and also makes valuable improvements, this will be sufficient to warrant a conclusion on the agreement's existence.⁴³ The plaintiff acted in reliance on his right to expect the court to enforce it.⁴⁴

It may be noted that in all these different situations, discussed above, the Chancery Court does not purport to operate

⁴¹ *Id.* at 620, 621; also see McClintock, Handbook of the Principles of Equity 136-147 (2d ed. 1948).

⁴² McClintock, *op. cit. supra*, n. 41, at 141.

⁴³ *Id.* at 142, 143.

⁴⁴ *Ibid.*

on the *legal* interest in the property in question. Its jurisdiction extends only to the equitable property interest. Thus if an agreement between A and B has vested the *equitable* property in A, then Chancery has authority to order B to convey the *legal* interest under penalty of imprisonment for contempt if he fails to do so.

IV

Sections of the Statute of Frauds Dealing with Land Transactions Have Survived in England and Will Doubtless Continue to Do so There and in the United States.

In addition to the sections of the Statute dealing with land transactions, its anatomy also included a heterogeneous structure of non-land agreements. Thus in Section 4, it was declared that in addition to land agreements, certain other types were unenforceable in law unless they were evidenced by a writing signed by the party to be charged or his duly authorized agent. These included a special promise of an executor or administrator to answer damages out of his own estate, a promise to answer for the debt, default, or miscarriage of another, an agreement made in consideration of marriage, and an agreement not to be performed within a year from the making thereof. Section 17 provided that promises or agreements for the sale of goods, wares, and merchandise of £10 or upwards were not "allowed to be good" unless evidenced by either acceptance and actual receipt, or by a gift of something as earnest, or by part payment, or by a note or memorandum in writing signed by the parties to be charged.

Predictions made by great legal scholars confidently looked forward to the repeal of all or most of the non-land provisions.⁴⁵ These predictions were fulfilled in England in 1954, when the Law Reform (Enforcement of Contracts) Act, 2 and 3 Eliz. 2, c. 34 went into effect.⁴⁶ This Statute repealed Section 4 of the Statute except the subsections relating to contracts of land and promises to answer for the debt, default, or miscarriage of another.⁴⁷ Section 17 of the Statute of Frauds had been superseded by Section 4 of the Sale of Goods Act, 1893, 56 and 57 Vict., c. 71. The Act of 1954 repealed this section.

⁴⁵ 6 Holdsworth, *op. cit. supra* n. 1 at 396, The Sixth Interim Report.

⁴⁶ Franklin, *op. cit. supra* n. 2 at 518.

⁴⁷ *Ibid.*

The Sixth Interim Report of the 1937 English Law Revision Committee had previously listed various reasons why the non-land sections of the Statute should be repealed. Briefly, they were that modern jury and evidentiary procedure had eliminated a basic reason for the enactment of the Statute; that it defeated just claims more often than unjust ones, encouraging evasion of obligations; that there was no fundamental reason why only these particular classes of agreements should be included and not others; and finally, that these provisions were no longer responsive to contemporary business practices. The first report of the 1953 English Law Reform Committee reiterated these reasons.⁴⁸

If it were not for the difference in the status of the jury system in England and the United States, the non-land provisions of the Statute might well be in a precarious position in this country. One of the most important reasons for the passage of the Statute was to establish a required formalism which would facilitate the task of the jury as a fact finder.⁴⁹ But now in England, unlike the United States, the right of trial by jury in civil cases has practically been eliminated.⁵⁰

A different historical evaluation has been given to the land sections of the Statute. These sections were re-enacted in England in the Law of Property Act, 1925, 15 Geo. 5, c. 20, after first having been repealed. But these sections remained substantially as they were originally in 1677.⁵¹ It is true that much of the satisfaction with the parts of the Statute concerning land and contracts involving land interests has been due to the relatively great "importance, longevity, and technicality of land transactions."⁵² Certainly the nature of real estate, its fixity, and its permanence will always enjoy a unique category in the field of property. The same is true in regard to the Roman law and the legal systems which have been derived from it. But this satis-

⁴⁸ See 15 Canadian B. Rev. 585 (1937) which contains The Sixth Interim Report; cited by Franklin, *op. cit. supra* n. 2 at 585, footnote 36; see Recent Statute, 68 Harv. L. Rev. 383 (1954).

⁴⁹ 6 Holdsworth, *op. cit. supra* n. 1 at 388.

⁵⁰ Franklin, *op. cit. supra* n. 2 at 588.

⁵¹ See 68 Harv. L. Rev. 383 (1954). The land transfer sections, both *inter vivos* and testamentary, of the Statute of Frauds, and also the trust Sections of that Statute were reenacted in Sections 53 and 54 of the Law of Property Act, 1925, and Subsection 4(4) of the Statute of Frauds, dealing with land contracts, in Section 40 of the 1925 Act.

⁵² *Id.* at 384.

faction would not have been possible without the intervention of the natural law philosophy of the Chancery Court in making the Statute achieve its proclaimed purpose of preventing fraud. Without that intervention, the historical evaluation might well have been that not only the non-land parts of the Statute, but also its land sections, have been predominantly a sword of injustice.

V

The Best Assurance of the Survival of What Remains of the Statute of Frauds Is the Extension of the Natural Law Interpretation into Newly Arising Fields of Litigation.

It is recommended that judges rely on a natural law interpretation of the Statute in ruling upon the admissibility of parol evidence; otherwise public opinion may demand the enactment of remedial legislation. Popular dissatisfaction with judicial decisions which reflect an amoral approach will certainly be greatest when they uphold a legislative form as an end in itself.

Within the past year, an interesting and relevant case, namely, *Hayes et al. v. Muller*, was decided by the Supreme Court of Louisiana on the question of the admissibility of evidence under legislative provisions analogous to those of the Statute of Frauds.⁵³ The facts were that A, B, and C entered into an oral agreement of joint adventure. Each contributed an equal sum of money for the purchase of oil, gas, and mineral leases. These were to be bought and sold for the benefit of A, B, and C. Pursuant to this *oral* agreement, a particular oil and gas lease was obtained by C in his name only, in reliance upon confidential information received from A and B. Six years later, C sold this lease to D for \$900,000 at an enormous profit. The basic legal question which was certified to the Louisiana Supreme Court by the Court of Appeal was whether A and B were permitted to use

⁵³ 158 So. 2d 191 (1963). Civil Code, Art. 2275. Every transfer of immovable property must be in writing, but if a verbal sale, or other disposition of such property be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, provided actual delivery has been made of the immovable.

Civil Code, Art. 2276. Neither shall parol evidence be admitted against or beyond what is contained in the acts

Revised Statutes, 9:1105. Oil, gas, and other mineral leases, and contracts applying to and affecting these leases . . . are classified as real rights and incorporeal immovable property. They may be asserted, protected, and defended in the same manner as may be the ownership or possession of other immovable property

parol evidence to prove this original agreement wherein no claim was made against the title held by D.

A and B had alleged fraud and bad faith on the part of C on the grounds that he had induced them to forego their formal demand until after the transfer of the title of the property to D. They claimed the right to specific performance of the agreement of joint adventure for an equal division of the profits, or in the alternative for an accounting. C's defense was that there was no cause of action because the joint adventure agreement was only verbal. He contended that parol evidence was inadmissible according to the legislative provisions analogous to those of the Statute of Frauds, because this alleged agreement involved oil, gas, and mineral leases, which by statute were incorporeal immovable property, i.e. the equivalent of land in the civil law.

At first, the Louisiana Supreme Court, treating the case as a direct appeal, decided for the plaintiffs. But upon a rehearing, they stated, "It is our opinion now that we were in error in holding originally that the plaintiffs had stated a cause of action for an accounting of the profits realized from the alleged joint adventure."⁵⁴

The judges actually adjudicated the case as Common Law Judges rather than as Chancellors, a role which they had assumed prior to the rehearing. In their previous role as Chancellors, they had followed a natural law theory of legal formalism by allowing the plaintiffs to establish a joint adventure agreement, even though in some way it related to immovables. The plaintiffs were seeking not a legal interest in an immovable, but only in the profits from the sale of an immovable.

It was manifest from the facts that the appropriate evidence would have been acts or activity, which if established would have had unequivocal reference to the existence of the alleged oral agreement. These acts might have been the confidential communication of secret information as to oil and gas locations, the contribution of specific sums of money by the parties for the common purpose, the actual buying of the leases and royalties and the like. The evidence would have been much more than mere sworn statements of witnesses. Such statements might well have been the product of perjury. In this case the parol evidence was not intended to prove that legal title to an immovable was in

⁵⁴ *Id.* at 197.

some one other than the person in whom a signed writing showed it to be.

In their original role as Chancellors, the members of the Court assumed an equitable attitude toward the formalism analogous to that of the Statute of Frauds. They seemed mindful of the fraud which resulted from C's deceiving his associates into believing that he was using the confidential information for all parties. Apparently, the Court gave proper weight to the fiduciary character of the relationship, which invited a high degree of trust and reliance.

After the rehearing they abandoned a natural law philosophy in favor of a strict, analytical, and inequitable approach. In consequence of this, they held in effect that the absence of a signed writing raised an irrebuttable presumption of the *de jure* non-existence of any agreement of joint adventure.

Law and equity were separated because the Court no longer gave any juridical effect to the bad faith and violation of a highly fiduciary relationship. Indeed, it seems that no weight was attached to the allegation that it was the practice and custom in the oil and gas industry for joint adventurers to deal with each other verbally, and that it was not material in whose name royalties and leases were held since "the interest of all parties would in due time be properly assigned."⁵⁵

The Common Law role of the Judges after the rehearing was further manifested by a heavy reliance upon *stare decisis*. The case of *Emerson v. Shirley*⁵⁶ was said not to be relevant as precedent to the case at bar. Rejecting the broad legal philosophy of that case upon which it relied *before* the rehearing, the Court focused on the facts to reject it because the case only involved the annulment of a sale of a fractional royalty interest.

One dissenting Judge stressed: "If the joint adventure doctrine is a part of our law, it is so because it supplies a device to do equity when equity is clearly due. This is a question which the legislature has not governed by any enactment which has been brought to my attention."⁵⁷

Article 21 of the Civil Code of Louisiana states that, "In all civil matters, where there is no express law, the judge is bound

⁵⁵ *Id.* at 193.

⁵⁶ 188 La. 196, 175 So. 909 (1937).

⁵⁷ 158 So. 2d. 191 at 202 (1963). Constructive Trust unavailable, see La. R. S. § 1791, 1792 (16).

to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." Implicit in the opinion of the dissenting Judge was the concept that this Article did not forbid recourse to equity and natural law for the purpose of interpreting civil positive law.

In the above discussion of *Hayes et al. v. Muller*, it has been assumed that the Court was correct in interpreting Louisiana Revised Statutes 9:1105 to mean that verbal agreements applying to and affecting oil, gas, and mineral leases were in the same category as those involving immovables in the sense that such agreements were not admissible. Of course, if this interpretation is not correct, and the legislative formalism was not intended to relate to cases of this kind, then clearly the larger issues of the case would not have arisen, and it would have been decided for the plaintiff.

Conclusion

To the extent that the Chancellor's role is abandoned in favor of that of the Common Law Judge with respect to the interpretation of the Statute of Frauds, the likelihood of legislative intervention will grow. The method of remedial legislation would be unfortunate and undesirable since equity has always better been applied internally in a legal system through the judicial process, rather than externally by the authority of legislation. But legislative intervention would be the lesser of two evils. The greater judicial evil would be a return to the period of the strict law when legal forms were used as monopolistic mechanisms for the determining of legal consequences.