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Constitutional Law—Due Process—Right to Counsel; Constitutional Law—Alien Discrimination Laws; Proximate Cause—Diseases of Unknown Etiology; Trusts—Resulting Trusts—Application of Between Parties Living in Meretricious Cohabitation; Criminal Law—Appeal—Jurisdictional Steps; Landlord and Tenant—Covenants—Continuing Breach—Waiver; Criminal Law—Evidence—Effect of Prior Dismissal on Admissibility of Subsequent Acts; Statute of Frauds—Partial Performance

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RECENT CASES

Constitutional Law—Due Process—Right to Counsel. *D*, a seventeen-year-old boy, pleaded guilty to four counts of burglary and was sentenced to a minimum of twenty years or a maximum of forty years cumulative in the state penitentiary. The court did not offer him the services of counsel nor did it advise him of his right to counsel. *D* brought a petition for a writ of *habeas corpus* which was dismissed by the state courts. *D* now petitions the United States Supreme Court for a writ of certiorari to review the Pennsylvania decision, contending that he has been deprived of liberty without due process of law in that the Pennsylvania authorities failed either to provide him with counsel or fully advise him of his right to counsel. On certiorari, *held*. Reversed for *D. Uveges v. Pennsylvania*, — U.S. — 69 S.Ct. 184 (1948).

The Supreme Court in a series of recent cases culminating in this decision has reconsidered the question of the right to counsel under the due process clause in noncapital cases. The result is a new clarification and, to a considerable extent, a crystallization of the rule. For many years the doctrine of *Powell v. Alabama*, 287 U.S. 45 (1932) as limited by *Betts v. Brady*, 316 U.S. 455 (1941) had been the law. The *Powell* case established the right to counsel as one of the fundamental rights protected by the due process clause. The *Betts* case limited the Federal constitutional right to have counsel offered to capital cases in absence of circumstances of unusual hardship. In three of the six recent cases the Court refused to overturn the judgment of the state court. *Gryger v. Burke*, 334 U.S. 728 (1948), *Bute v. Illinois*, 333 U.S. 134 (1947), *Foster v. Illinois*, 332 U.S. 134 (1947). The accused in each of these cases was fully mature, he did not ask the services of counsel, and there was no allegation that he failed to understand or that he lacked the ability to understand the proceedings and his rights; neither was there any claim that the accused persons were overreached by the court or the prosecuting officers. The lone peg on which they hung their claim of right to reversal was the failure either to provide counsel or expressly explain their right to counsel. Although there was no concurring opinion in the principal case, the majority opinion indicated that "some members of the Court" have taken the position that it is a denial of due process under the Fourteenth Amendment of the United States Constitution any time a "serious offense" is charged and the court fails to offer counsel. The members referred to by Justice Reed were undoubtdly Justices Douglas, Black Murphy, and Rutledge who dissented in all three of the above decisions, they being 5-4 decisions. The position of the four Justices seems to be as was indicated and has been pretty well crystallized. In the other three cases, one of which is the principal case, the Court reversed the state court's action taken on the hearings on *habeas corpus* proceedings. *Wade v. Mayo*, 334 U.S. 672 (1948), *Townsend v. Burke*, 334 U.S. 736 (1948). In the *Wade* case the accused was eighteen years old and was, according to the finding of the District Court, "an inexperienced youth unfamiliar with court procedure, and not capable of adequately representing himself." He had before trial requested counsel and had been expressly refused. In *Townsend v. Burke, supra* the accused was twenty-nine years old and apparently capable of understanding his rights. However, the state court in passing sentence considered prior crimes of which accused had been charged without giving him an opportunity to have them excluded on the ground that he had been acquitted on trial. The Supreme Court stated that "it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the

record." In the instant case the decision was placed on the facts alone, the Court stating that each case must be decided on its merits. However, the Court did attempt to epitomize in the light of these recent cases the factors which should be considered in deciding each noncapital case. Those factors are. (1) the gravity of the offense charged, (2) the age and education of the defendant, (3) the conduct of the court or the prosecuting officials, and (4) the complicated nature of the offense charged and possible defenses. There was a dissent in all three of these cases, but in no case was the dissent stated to have been based on th question here presented. The dissent in the *Townsend* case however was made without opinion. The dissents in the *Wade* case and the principal case were on appellate procedural grounds. Thus, the five justices composing the majority of the court feel that for a reversal in noncapital cases there must be not merely the failure to provide counsel or advise the accused of his rights, but this factor plus some one or more of the aggravating circumstances set out in the principal case. Their position on this question has, the principal case indicates, also become crystallized.

The most recent case in which the Washington courts considered this problem is *State v. Cowan,* 25 W.(2d) 341, 170 P.(2d) 653 (1946). For a discussion of this case and the Washington law see 22 WASH. L. R. 61. This case would seem to indicate that the Washington law does not require that the accused be fully apprised of his right to counsel despite the fact that he is young and inexperienced. It is suggested that the Washington procedure as approved by the *Cowan* case may not in all cases constitute due process of law under the test set out in the principal case.

E.R.F

Constitutional Law—Alien Discrimination Laws. California brought suit to escheat a section of land taken in the name of *D* who, at the time of conveyance to him, was a minor. *D*'s father, an "alien ineligible for American citizenship," furnished the consideration for the conveyance. This action was commenced under California General Laws Act 261, commonly known as the Alien Land Law. It provides *inter alia* for the escheat of any land transferred with "intent to prevent or avoid" escheat as theretofore provided for, and that there is a *prima facie* presumption of intent to avoid or prevent escheat whenever a transfer is made for consideration furnished by an "alien ineligible for American citizenship." The California Supreme Court upheld the statute and the escheat of *D*'s land under it. On certiorari to the United States Supreme Court, *held* Reversed. The California statute denies to *D* the equal protection of the laws and is therefore unconstitutional under the Fourteenth Amendment to the United States Constitution. *Oyama v. California,* 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 257 (1948).

Chief Justice Vinson, who delivered the opinion for the Court, felt that the burden placed on *D* of proving a bona fide gift was a denial of equal protection since under similar circumstances where the person furnishing the consideration is not an ineligible alien, a gift is presumed because of the family relation. 3 SCOTT ON TRUSTS § 442. Justice Black, with whom Justice Douglas agreed, in a concurring opinion stated that he would have placed the decision on the broader ground that the Alien Land Law is unconstitutional in its entirety, primarily because it infringes on the exclusive power of Congress over immigration. He relied on *Truax v. Raich,* 239 U.S. 33 (1915) and *Hines v. Davidowitz,* 312 U.S. 52 (1940). Justice Murphy, who was joined by Justice Rutledge, also wrote a concurring opinion wherein he stated that he would reverse on the ground that the entire Alien Land Law was unconstitutional as a denial of equal protection of the law. Justices Reed, Jackson, and Burton dissented from the narrow decision, assuming the continued validity of the balance of the Alien Land Law, but

did not express any opinion as to what they would hold in a direct attack on the entire law.

The Washington Law on alien land ownership is similar to that of California. REM. REV. STAT. § 10581 *et seq.* [P P C. § 257]. It, however, prohibits any alien except one who has "in good faith declared his intention to become a citizen of the United States" from land ownership, whereas California prohibits only citizens ineligible for United States citizenship. The practical effect of these laws will be very similar since a Washington alien eligible to citizenship need only make a declaration of intention to escape the prohibition. Thus the only persons absolutely barred are those ineligible to citizenship. REM. REV. STAT. § 10582b [P P C. § 257-27] provides as follows: "If a minor child of an alien hold title to land either heretofore or hereafter acquired, it shall be presumed that he holds in trust for the alien." This section creates a presumption almost identical to the one created in the principal case. It does not limit the scope of the presumption to the case where the minor acquires the property from a person to whom his parent has paid consideration as the California statute does. There can be little doubt that under the holding of the principal case this section is unconstitutional.

Although the decision in the principal case was narrow, the unequivocal position of the four concurring justices considered in the light of the cautious approach of the other justices casts considerable doubt on the continued constitutionality of the alien land laws.

E.R.F

Proximate Cause—Diseases of Unknown Etiology. *P* received compensation for an injury sustained in 1935, and in 1945 *P* filed an application to reopen the claim because of aggravation of condition, alleging that the injury resulted in the development of abdominal cancer. The application was denied by the supervisor, and on rehearing by the joint board the action of the supervisor was sustained. On appeal to the Superior Court the jury rendered a verdict in favor of *P*, but the trial court awarded a judgment notwithstanding the verdict in favor of *D*. *P* appeals. *Held*. Affirming judgment for *D*. Even if a physician had positively testified that the injury caused the cancer, the evidence would be insufficient as a matter of law, since "it is a fact universally known that the cause of cancer is unknown." *Tonkovich v. Department of Labor and Industries*, 131 Wash. Dec. 192, 195 P.(2d) 638 (1948).

While this may come as a distinct shock to many practicing attorneys and physicians, the position of the court is sustained by eminent medical authority. Without entering into an exhaustive discourse on the subject, it is generally considered among research experts that the possibilities arising from the complex variations of causative factors are so many and so esoteric that no man could say with certainty, or even in probability, that any one known possible factor was the cause of a discovered carcinoma or other cancerous condition. The significance of the decision to the attorney lies in the fact that this is the second disease of unknown etiology which the court has, in effect, held to be noncompensable in this jurisdiction. In *Boyer v. Department of Labor and Industries*, 160 Wash. 557, 295 Pac. 737 (1931), the court said, "The cause of lymphatic leukemia is not known to medical science, therefore it is not a natural inference that the disease was caused by the injury because the respondent was well and worked up to the time of the injury, and after the injury the disease developed."

Presumably this rule is not limited to cases arising under the Workman's Compensation Act, but will apply generally to tort actions where proximate cause must be shown. Taken together, the instant case and the *Boyer* case suggest interesting possi-

bilities to the defense lawyer in actions involving such diseases as cancer, leukemia, anemia, arteriosclerosis, and embryonic abnormalties.

C.C.K.

Trusts—Resulting Trusts—Application of Between Parties Living in Meretricious Cohabitation. *P* and *W* lived together as husband and wife for six years, both knowing they were not married. A substantial part of the money that *P* earned was invested in realty and bonds in *W*'s name. Subsequent to *W*'s death, *P*, in an action against the administrator of *W*'s estate, was awarded an undivided one-half interest in the property, the administrator receiving the other one-half interest. Both parties appealed. *Held* Reversed. Since the property was not community property, and inasmuch as neither party entered in good faith into the purported marriage so that a court of equity might protect the rights of the innocent party, it will be presumed as a matter of law that the parties intended to dispose of the property exactly as they did dispose of it. *Creasman v. Boyle,* 131 Wash. Dec. 317, 196 P.(2d) 835 (1948). Rehearing denied, 131 Wash. Dec. 494 (1948).

Except in states in which the rule has been abolished by statute, it is well settled that a resulting trust arises where a transfer of property is made to one person and the purchase price paid by another if there is no proof of a contrary intention. *In re Cunningham's Estate,* 19 Wn.(2d) 589, 143 P.(2d) 852 (1943), *Downs v. Mooney,* 339 Ill. 606, 171 N.E. 617 (1930), 3 SCOTT ON TRUSTS 2239 (1939). But when the grantee is related to the payor by blood or marriage in such a way that the former is the natural object of the latter's bounty, a gift instead of a resulting trust is presumed. 3 SCOTT ON TRUSTS 2256 (1939). This is true where a husband furnishes the consideration and takes the title in his wife's name. *Scott v. Currie,* 7 Wn.(2d) 301, 109 P.(2d) 526 (1941), *In re Cunningham's Estate, supra.* And the same is true where the person furnishing the consideration is the father or father-in-law of the one getting the legal title, or where the former otherwise stands in *loco parentis. Dines v. Hyland,* 180 Wash. 455, 40 P.(2d) 140 (1935), *Damel v. Sisnero et al.,* 109 Cal. App. 8, 292 Pac. 518 (1930) The courts are divided as to whether there is a presumption of a gift or of a resulting trust when a wife purchases the land and takes the title in her husband's name. Washington takes the view that there is a rebuttable presumption of gift. *Denny v. Schwabacher* 54 Wash. 689, 104 Pac. 137 (1909), *Plath v. Mullen,* 87 Wash. 403, 151 Pac. 811 (1915). But when a child purchases property in the name of his father or mother a resulting trust is presumed. *Oree v. Gage,* 38 Cal. App. 212, 175 Pac. 799 (1918), *Pinkinson v. Pinkinson,* 93 N.J.Eq. 583, 117 Atl. 48 (1922). Thus the guiding principle applied by the courts in determining which relationships raise an inference of an intention by the payor to make a gift and which do not, seems to be, not the closeness of the relationship, but rather whether the grantee is a natural object of bounty of the payor, whether he stands in such a relationship to the payor that it would be natural and probable for the payor to make provision for his advancement, or whether the payor is under a duty to support the grantee.

The facts of the principal case would seem to bring it under the general rule as stated by the Washington court in the *Scott* case and quoted in *Mouser v. Sullivan,* 22 Wn.(2d) 543, 156 P.(2d) 655 (1945) that "When property is taken in the name of the grantee other than the person who advanced the consideration for the purchase, *in the absence of other evidence of intent,* that grantee is prsumed to hold the legal title so acquired, subject to the equitable ownership of the person advancing the consideration." However, in the instant case the court said, "Under these circumstances and in the absence of any evidence to the contrary, it should be presumed as a matter of law that

the parties intended to disposed of the property exactly as they did dispose of it." This seems to be creating a presumption opposite to that which the court laid down in the *Mouser* and *Scott* cases, but on close analysis it may be possible to reconcile the two statements. It is true that in this type of situation where a woman lives in meretricious cohabitation with a man, the majority of courts refuse to hold that she is the natural object of his bounty and consequently raise a presumption of a resulting trust. *McDonald v. Carr et al.*, 150 Ill. 204, 37 N.E. 225 (1894), *Perales v. Flores*, 147 S.W.(2d) 974 (Texas, 1941), *Orth v. Wood*, 353 Pa. 121, 47 A.(2d) 140 (1946). But it may be that the Washington court felt, even though it did not expressly so state, that this situation was closely analagous to the husband-wife relationship, and consequently that it was probable that the man intended to make provision for the woman, in other words, that the woman was a natural object of the man's bounty. Under such an interpretation the presumption would be one of gift and not of a resulting trust. By such an approach the court could have justified its result without doing violence to the well-settled law of resulting trusts.

J.H.M.

Criminal Law—Appeal—Jurisdictional Steps. *D*, convicted of murder and sentenced to death, appeals. The statement of facts or bill of exceptions was never filed. Rule 12, RULES OF COURT, 18 Wn.(2d) 14-a [P P C. § 6-23] provides that the statement of facts or bill of exceptions shall be filed with the clerk of the court within ninety days after notice of appeal is given. Paragraph three of Rule 12 states that strict conformance is necessary and that no appeal shall be effectual unless these steps are taken. Nonetheless, the appeal was allowed. *State v. Bird*, 131 Wash. Dec. 725, 198 P.(2d) 978 (1948).

The court has repeatedly held compliance with Rule 12 to be jurisdictional. *State v. Nelson*, 6 Wn.(2d) 190, 107 P.(2d) 1113 (1940), *State v. Hampson*, 9 Wn.(2d) 278, 114 P.(2d) 992 (1941), *State v. Currie*, 200 Wash. 699, 94 P.(2d) 754 (1939).

There has been one exception recognized. The requirements will be relaxed in cases where the death penalty has been imposed. *State v. Brown*, 26 Wn.(2d) 857, 176 P.(2d) 293 (1947) statement of facts filed late; *State* ex rel. *Bird v. Superior Court*, 130 Wash. Dec. 102, 190 P.(2d) 762 (1948) notice of appeal given one day late. In regard to certain other rules of court, non-compliance has not been excused even in capital cases. Errors assigned but not argued will not be considered. *State v. Hall*, 185 Wash. 685, 56 P.(2d) 715 (1936). A supplemental record must be filed within the time limit. *State v. Schafer*, 154 Wash. 322, 282 Pac. 55 (1929).

In the cases of *State v. Brown* and *State* ex rel. *Bird v. Superior Court* the non-compliance was attributable to acts of state officials, while in *State v. Bird* the court does not refer to any such mitigating circumstances. The majority opinion does not mention Rule 12. Where the delay is caused by state officials, justice seems to demand a relaxation of the rule; however, it would seem better policy to limit the relaxation to cases where public officers are responsible for the noncompliance and if further liberalization is required it should be accomplished by a change in the rule itself.

K.H.M.

Landlord and Tenant—Covenants—Continuing Breach—Waiver. *D*, a lessee, was in default of a covenant to repair and maintain and of a covenant to pay rent. The rent was payable monthly in advance. *P*, the lessor, served *D* with notice pursuant to REM. REV. STAT. § 812 (3) [P P C. § 55-5 (3)] to pay rent or vacate by midnight of a certain date. *D* paid a few hours before midnight on that date. The following morning

P gave notice of unlawful detainer under REM. REV. STAT. § 812 (4) [P P C. § 55-5 (4)] requiring the lessee to correct the breach of the covenant to repair and maintain within ten days or vacate the premises. The trial court dismissed the action brought when *D* did not comply. *P* appeals. *Held* (one judge dissenting) Affirmed. Although the breach was continuous in nature, the acceptance of rent waived the breach, since the acceptance and service of notice were so nearly simultaneous that it could not be said that the breach had continued past the payment of rent so as to constitute grounds for forfeiture. A concurring judge expressed the opinion that acceptance of the rent waived all breaches then known, including continuing ones. *Wilson v. Daniels,* 131 Wash. Dec. 371, 198 P.(2d) 496 (1948).

It is uniformly held that acceptance of accruing rent with knowledge of a past breach will constitute a waiver of that breach. *Batley v. Dewalt,* 56 Wash. 431, 105 Pac. 1029 (1909). See *e.g.,* cases cited 109 A. L. R. 1267 But where the breach is continuous in nature, the acceptance of rent waives only the past breach and does not waive a continuation of the same breach after the payment. *Shephard v. Dye,* 137 Wash. 180, 242 Pac. 381, 49 A. L. R. 824 (1926), *Granite Building Association v. Greene,* 25 R. I. 48, 54 Atl. 792 (1903). *London v. Tebo,* 246 Mass. 360, 141 N.E. 234 (1923). This is usually held to be so even though the rent is payable in advance, *Williams v. Behrend,* (D.C. Mun. Ct. of Appeals) 55 A.(2d) 138 (1947), *Matthew v. Digges,* 45 Cal. App. 561, 188 Pac. 283 (1920), although the concurring opinion in the instant case to the effect that acceptance of rent in advance waives all known breaches, even though continuous in nature, has found support in some cases. *Johnson v. Electric Park Amusement Co.,* 150 Iowa 717, 130 N.W 807 (1911), *Goldberg v. Pearl,* 306 Ill. 436, 138 N.E. 141 (1923). A breach of a covenant to repair, as in the instant case, is a continuing breach. *London v. Tebo, supra, Sherrill v. Harlan Theatre Co.,* 256 Ky. 150, 75 S.W.(2d) 775 (1934).

The court in the instant case recognizes the rule announced in *Shephard v. Dye, supra,* and in *Schultz v. Cardwell,* 142 Wash. 489, 253 Pac. 822 (1927), that the acceptance of rent will not waive a continuation of a breach past the payment of rent. Having expressly accepted this rule, it would seem to have been incumbent upon the court to have given judgment for *P,* even though the breach had continued but a short time. This would seem especially true in view of the provisions of the unlawful detainer statute, REM. REV. STAT. § 812 (4) [P P C. § 55-5 (4)] which gives the lessee ten days after the service of the notice in which to repair the breach, and in light of the further fact that the lessee may, if he has equities in his favor, apply for a stay of judgment under REM. REV. STAT. § 830 [P P C. § 55-41] and relieve himself of the forfeiture.

The decision in the instant case has the effect of saying that no forfeiture or unlawful detainer action may be brought for a continuing breach until a substantial time has elapsed after the payment of rent, yet it does not say how long the time should be nor what the test should be to determine it.

E.H.M.

Criminal Law—Evidence—Effect of Prior Dismissal on Admissibility of Subsequent Acts. *D* was charged with first-degree murder arising out of a robbery. His participation in the crime consisted of furnishing and driving a car to the scene of the robbery where the other defendants struck the blow and robbed the victim. To rebut the contention of *D* that he was unaware of the purpose of the others to commit robbery and that he therefore did not have the requisite criminal intent, the state, over the objections of *D,* introduced evidence of another robbery involving the same parties and the

same car, committed some two hours subsequent to the acts which were the basis of the present charge. This evidence was admitted despite the fact that, in an action previously brought, a charge against *D* for participation in the second robbery had been dismissed at the close of the state's case. *State v. Rigas,* Superior Court of Franklin County (1945). *D,* convicted of first-degree murder with special verdict of the death penalty, appealed. *Held*. Affirmed. No error, since evidence was relevant to show various states of mind (plan, design, intent, or *modus operandi*) under recognized exceptions to the character rule. *State v. Brown,* 131 Wash. Dec. 440, 197 P.(2d) 590 (1948), *on rehearing affirmed,* 132 Wash. Dec. 475, 202 P.(2d) 461 (1949).

With indisputable correctness, the court pointed out that the intent of *D* as aider and abettor was the crux of the matter; but, with no discussion as to the logical or legal effect of his prior dismissal on the inferences, the court contented itself with numerous citations to cases and text writers to show exceptional admissibility of other *offenses.* No authority was cited in the opinion or briefs of counsel which holds that evidence of other offenses of which the defendant has been acquitted are relevant to show intent.

It is true that a dismissal at the close of the state's case is not strictly *autrefois acquit. State v. Brunn,* 22 Wn.(2d) 120, 154 P.(2d) 826 (1945), 22 WASH. L. R. 236 (1947). It may be appealed by the state under REM. REV. STAT. § 2183-1 (5), [P P C. § 5-3 (5)]. But like any other judgment of a court of competent jurisdiction, it is final until appealed, and is not subject to collateral attack. *Baskin v. Lyers,* 181 Wash. 370, 43 P.(2d) 42 (1945), *see Ex parte Gordon,* 19 Wn.(2d) 714, 718, 144 P.(2d) 238, 241, Restatement, Judgments § 48, comment *a,* § 69, comment *e* (1942). Therefore, the only valid inference that can be drawn from the dismissal of *D* on the charge for the subsequent robbery is that he simply did not commit the crime. Thus there was no subsequent offense from which intent could have been inferred. Yet evidence requiring such an inference went to the jury, which in effect allowed them to overturn the prior dismissal. Either *D* did not do the act at all, or, if he did the act, it was done without the requisite criminal intent. Using an act devoid of criminal intent on a subsequent occasion to infer the presence of criminal intent on a prior occasion would seem to be difficult to justify, for the validity of a retrospective inference of intent obviously depends on the existence of the intent at the subsequent time. There was no logical relation between the proposed evidence and the fact to be established.

H.F.F

Statute of Frauds—Partial Performance. *P* seeks specific performance of an alleged oral contract entered into with the deceased. Under this contract the parties purchased certain real property, agreeing that each would prepare a will leaving to the survivor any interest the deceased had in the property. Relying on this agreement, *P* found a home acceptable to the deceased, paid one half of the purchase price, surrendered her apartment, and moved into the home with the decedent. Shortly thereafter *P* made her will in accordance with the agreement. The decedent in turn paid one half of the purchase price and moved into the home. She did not, however, change her will in order to make it comply with the terms of the oral agreement. Existence and terms of the agreement were shown by testimony of disinterested witnesses. The court concluded there was such part performance as to satisfy the statute of frauds and therefore granted specific performance. This judgment was affirmed. *Forsberg v. Everett Trust and Savings Bank et al.,* 132 Wash. Dec. 1, 200 P.(2d) 499 (1948).

The requirements for part performance of an oral contrace to devise have been clearly defined in Washington. Improvements to the land performed in reliance on the

agreement, if permanent, substantial and valuable, are sufficient part performance. *Richardson v. Taylor Land and Livestock Co.*, 25 Wn.(2d) 518, 171 P.(2d) 703 (1946), Restatement, Contracts (1932) sec. 197 The same is true of personal services rendered pursuant to the agreement. *Velikanje v. Dickman*, 98 Wash. 584, 168 Pac. 465 (1917), *Ellis v. Wadleigh*, 27 Wn.(2d) 941, 182 P.(2d) 49 (1947). However, the present case does not include either of these elements. Execution of a will in compliance with the agreement, although persuasive as to *P's* good faith, is not such part performance as to take a contract out of the statute of frauds. *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041 (1913), *McClanahan v. McClanahan*, 77 Wash. 138, 137 Pac. 479 (1913), *Cavanaugh v. Cavanaugh*, 120 Wash. 487, 207 Pac. 657 (1922).

Part performance must, therefore, be based largely on possession and payment in the instant case. Taken alone, neither possession, *Roesch v. Gerst*, 18 Wn.(2d) 294, 138 P.(2d) 846 (1943), nor payment, *Thill v. Johnson*, 60 Wash. 393, 111 Pac. 225 (1910), *Richardson v. Taylor Land and Livestock Co.*, 25 Wn.(2d) 518, 171 P.(2d) 703 (1946), will satisfy the statute of frauds. Taken together, however, they have been held to amount to part performance. *Lee v. Wrixon*, 37 Wash. 47, 79 Pac. 489 (1905), *Mobley v. Harkins*, 14 Wn.(2d) 276, 128 P.(2d) 289, (1942). But in such cases there has been *exclusive* possession which pointed toward the existence of an agreement between the parties. *P's* possession was not exclusive. It is true the court has been liberal as to the degree of possession necessary in the personal service cases. *Slavin v. Ackman*, 119 Wash. 48, 204 Pac. 816 (1922). Here it would seem they are extending this same liberality to cases in which the other elements of part performance are missing.

To satisfy the purpose of the statute of frauds the performance should point toward the contract, and only after the contract has been so established should the terms of the parol agreement be introduced. *Kratzer v. Day*, 12 F.(2d) 724 (1926). If the acts relied on point to some other relationship, or may be accounted for on some other hypothesis, they are not sufficient. *Granquist v. McKean*, 29 Wn.(2d) 440, 187 P.(2d) 623 (1947). In the instant case, payment, for which *P received* a one half interest in the home, and possession, shared with a friend and co-owner, are not necessarily referable to the agreement in question. Such acts are consistent with a mere tenancy in common agreement, and in many courts, such as New York, *Burns v. McCormick*, 233 N.Y. 230, 135 N.E. 273 (1922) would not amount to part performance. The court seems to be looking first to the establishment of the oral contract by the testimony of disinterested witnesses. Once convinced by such witnesses that the contract was in fact made, the court is very liberal as to what conduct will satisfy the requirements of the statute of frauds.

S.R.K.