

which the possession, (the act of performance relied upon,) was taken, or who can, or does, undertake to say, that it was taken in part performance of the agreement, which the plaintiff has charged in his bill. The answer, therefore, is uncontradicted upon this point by the evidence.

The Chancellor then referred to the extracts, from the testimony of H. N. Gambrill, and Neilson Poe, inserted above, to show that the possession was neither delivered, or received, in part performance of this contract; and in relation thereto, said: It seems to me, therefore, perfectly obvious, that the act relied upon here as a part performance of the contract charged in the bill, is not an act "unequivocally referring to, and resulting from that agreement," but is an act which it is apparent from the evidence, must be referred to a different agreement, and consequently it will not take the case out of the statute of frauds.

The Chancellor said, that insomuch as the plaintiff had not, as he thought, succeeded in proving the contract stated in his bill; or an act, in part performance of that particular contract; he deemed it unnecessary to consider the question, whether the title was such an one as would be forced upon a purchaser. With regard to the rent, which by the statement in the answer the defendants were to have paid, he said, the complainant was not even entitled to a decree to that extent, first, because he makes no such claim in his bill—and secondly, because he has adequate remedy at law in an action for use and occupation.

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[This case was affirmed on appeal.]