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Staute of Frauds—When a Verbal Sale Is Not Within the Statute

rect in early times when the population was small, is a proper subject for investigation and criticism today. The Missouri courts have uniformly adopted the common-law rule. Omission of or mistake in the middle letter between the Christian name and surname is immaterial. *Arme v. Shephard,* 6 Mo. 606; *King v. Clark,* 7 Mo. 267. Where Mary *Ann* Byers was described as Mary *E.* Byers in an order of publication, the court said, "She was properly notified, as the middle name is no part of her name in law." *Beckner v. McLenn,* 107 Mo. 277; also *Keaton v. Jorndt,* 22 Mo. 117. "Its insertion or absence does not affect the question of identity one way or the other." *Phillips v. Evans,* 64 Mo. 17. Writing initials of middle name *Mc* instead of *M* was no variance. *Campbell v. Wolf,* 33 Mo. 459; also 107 Mo. 277. In a criminal cause, it was immaterial that John *L.* Black, was indicted under the name of John *D.* Black. *Missouri v. Black,* 12 Mo. A. 531. The United States Supreme Court has adopted a similar view in civil cases. *Keene v. Meade,* 3 Pet. 1, 7 L. Ed. 581; *Games v. Stites,* 14 Pet. 322, 10 L. Ed. 476. For similar cases in other jurisdictions, see 19 R. C. L. 1328, 29 Cyc. 265, 6, 14 Encyc. of Pl. & Pr. 276 n. 1, 21 Am. Rep. 181, 132 A. L. R. 567, 14 L. R. A. 690.

A contrary view seems established in Mass., Minn., and Maine and is to be found in scattered cases in other jurisdictions. In *Com. v. Beechley,* 145 Mass. 181, an indictment for threatening Frank *E.* White was not sustained by proof that Frank *A.* White was the one threatened. Justice Holmes saying, "It is settled in this Commonwealth that a middle name or initial is part of the name, and a variance in regard to it is fatal." "It cannot be said as a matter of law, that *A,* and *E* are the same." Same rule in Minnesota. *D'Autremont v. Anderson Iron Co.,* 104 Minn. 165, 17 L. R. A. N. S. 216. *Dutton v. Simmons,* 65 Mo. 538. The Massachusetts doctrine seems more in accordance with the exigencies of modern society. No department store or post-office would consider two names with different initials as identifying the same person. Total omission of a middle name or initial is no variance. *State v. Ross,* 7 Mo. 464. Since the use of middle names and initials is common, and in view of the size of our population, a factor making numerous duplications in names, it would seem that the better rule would be that in the absence of evidence to the contrary the court cannot presume as a matter of law that two names with different middle initials identify one and the same individual. M. L. S. '27.

STATUTE OF FRAUDS—WHEN A VERBAL SALE IS NOT WITHIN THE STATUTE.—Defendant who is sued in trespass, purchased property by verbal contract, entered into possession, and made improvements using the premises as his home. *Held,* verbal sale of realty, taken possession of by vendee, improving same, and paying purchase price, is not with Statute of Frauds. *Hofheinz v. Wilson et al.,* (Texas) 286 S. W. 958.

The doctrine of part performance is purely equitable. *Aylor v. McTurf,* 184 Mo. App. 691, 171 S. W. 606. At law no amount of part performance except complete and full performance by at least one party thereto will take the case out of the Statute. *Sursa v. Cash,* 171 Mo. App. 396, 156 S. W. 779; *Shaklett v. Cummins,* 178 Mo. App. 309, 165 S. W. 1145. A law court may, however, give remedy on an implied promise as in *Hubbard v. Glass Works,* 188 Mo. 18, 86 S. W. 82, where the plaintiff upon entering possession made improvements. Improvements, however, as grounds for specific performance must have been made with the expectation that the contract would be fulfilled, and not after it was known that it would be. *Parke & Barron v. Leewright,* 20 Mo. 85. In *Carney v. Carney,* 95 Mo. 353, 8 S. W. 729, two sons by oral agreement took care of their parents in contemplation of receiving the property. They, having performed their part, the court carried out the contract on implied

promise. Such part performance as would warrant a decree for specific performance in equity is sufficient defense in law for ejectment. In *Johnson et al. v. Hurley*, 115 Mo. 513, 22 S. W. 492, the defendant who was led by a land owner to believe an agent had authority to sell particular land was sued in ejectment, but specific performance of the contract was decreed. Similarly, held in *Hubbard v. Hubbard*, 140 Mo. 300, 41 S. W. 749. In no instances, however, is mere part payment of the purchase price sufficient to entitle a party to specific performance of contract to convey land. *Parke & Barron v. Leewright*, 20 Mo. 85. If an oral agreement is followed by possession, the taking of possession is sufficient performance to take the case out of the Statute. *Young v. Montgomery*, 28 Mo. 604. Even an equitable interest may be sold verbally if possession is taken by the vendee, *Rosenberger v. Jones et al.*, 118 Mo. 559, 24 S. W. 203. Entry into possession with consent of the vendor is sufficient part performance in favor of vendor. *Tatum v. Brooker*, 51 Mo. 148; *Luckett v. Williamson*, 37 Mo. 388, *contra*. The vendee in possession may enforce specific performance of contract against vendor. *Adair v. Adair*, 78 Mo. 63; *Emmel et al. v Hayes et al.*, 102 Mo. 186, 14 S. W. 209. The possession must, however, be under contract and not a mere tenancy. *Price v. Hart*, 29 Mo. 171. In *White v Watkins*, 23 Mo. 423, the court held abandoned possession insufficient to take case out of the Statute of Frauds. Nor is mere continuance in possession considered sufficient to take case out of the Statute of Frauds. Nor is mere continuance in possession considered sufficient part performance. *Emmel et al. v. Hayes et al., supra*, overruling *Simmons v. Headler*, 94 Mo. 482, 7 S. W. 20. In Missouri an oral promise to convey an interest in land by way of compensation is not within the Statute of Frauds, *Teats v. Flanders*, 118 Mo. 660, 24 S. W. 126; *Gupton v. Gupton*, 47 Mo. 37. In the latter case the court held great patience with the grantees' infirmities required in addition to good temper, forbearance, honest effort to please, good food, medicine, and clothing.

E. C. F. '27.

WEAPONS—CONCEALMENT IN AUTOMOBILE.—Defendant prosecuted for carrying pistol in pocket of left front door of automobile. *Held*, carrying pistol in pocket of automobile door, flap of pocket being down, is not carrying weapon "concealed or on person." *State v. Brunson*, 162 La. 162, 111 So. 321.

This case is clearly against weight of authority. In *Lewallen v. State*, 148 Tenn. 326, 255 S. W. 373, the defendant when caught operating a still, reached over a nearby log, secured a pistol and presented it in a threatening manner, court held this sufficient carrying of a pistol for purpose of being armed. The carrying of a pistol in a grip, satchel, or handbag was held to be a violation of statute against carrying concealed weapons in *State v. Blazovitch*, 88 W. Va. 612, 107 S. E. 291. Similarly carrying of pistol in basket in one's hand is carrying on and about the person. *Johnson v. State* 51 Tex. Cr. App. 648, 104 S. W. 902. In Missouri courts have held that the concealment need not be on the person, as the offense is made out if the concealed weapon is in such proximity to accused as to be within reach and convenient control. *State v. Conley*, 280 Mo. 21, 217 S. W. 29. Same rule was applied in *State v. Mulconry*, 270 S. W. 375 (Mo.) where the pistol was behind the driver's body, on seat of the automobile. In this case, however, the court further instructed the jury, that there would be no concealment if the weapon were in plain view. In *State v. Renard*, (Mo.) 273 S. W. 1058, an officer making an arrest by feeling with hand, found a loaded revolver on floor of automobile, at defendant's feet; the night being so dark that the pistol could not be seen, the offense was held a concealment of the weapon. In *State v. Scanlan*, 308 Mo. 683, three revolvers were found on floor of automobile, and three pistols were found on rear seat after six men were ordered out of the car by officers. The men were seen, seemingly taking some-