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THE ENFORCEMENT OF ORAL PROMISES TO GIVE REAL ESTATE SECURITY

Theodore A. Smedley

Whenever a series of cases involves the use of a discretionary power by a court of conscience, the results of such cases and the reasoning advanced to support such results are certain to lack the quality of uniformity. As the discretion and the conscience of individual human beings differ, so differ the decisions in these cases. Nor can it ever be expected, even hoped, to be otherwise, because each slight variance in facts and circumstances of one case from another may and often should tip the balance of justice on one side or the other. The necessity of adhering to a uniform system could readily become an intolerable restraint on the efforts of the courts to obtain the proper solution to the problems raised in the litigation. However, freedom from the necessity of following a set standard of decision may also lead to interminable confusion. If no precedent is to be observed as binding, or even strongly persuasive, individuals have no means of ascertaining their rights and liabilities, attorneys have no bases for arguing their clients' claims in the courts, and the courts themselves have no guides to direct the course of their decisions. Non-uniformity becomes chaos, and litigation becomes pure gambling, turning on the flip of a court's conscience.

A better demonstration of the above truths could hardly be found than in the attempts of American courts to determine what effect should be given to oral promises to give real estate security for a loan or some similar obligation. The one point of general agreement in this question is that the giving of a legal mortgage on real estate involves such a transfer of an interest in land as to come within the scope of the Statute of Frauds. Thus, a purely oral promise to give a security interest in realty does not constitute a mortgage nor give any lien in the eyes of a court of law, no matter how solemn nor well-evidenced the oral promise may be. Since equity is known to be able in many circum-

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stances to remedy the shortcomings of legal relief, and since equity courts can be especially adept at side-stepping the obstacles of a statute-prescribing formalities,\textsuperscript{2} it is natural that the courts of equity are frequently asked to decree the enforcement of oral security promises. The number and variety of different views which have been expressed in answer to requests for such equitable relief are amazing.

Take as an example the cases arising with these somewhat oversimplified facts as a nucleus. Landowner makes an oral agreement with lender that if the latter will lend a stated sum of money on stated terms, landowner will give a mortgage on his property to secure the repayment of the loan. The money is advanced and accepted, but for some reason a formal mortgage is never executed. Landowner failing to repay the loan, lender seeks the aid of equity to declare and enforce his security in the land.\textsuperscript{3} Perhaps the leading case in the field is Sleeth \textit{v. Sampson}, decided by the New York Court of Appeals in 1923, ruling that the lender is not entitled to the lien sought.\textsuperscript{4} However, two earlier

\textsuperscript{2}Consider, for instance, the power of equity to grant specific performance of oral contracts to convey land absolutely, Clark, \textit{Principles of Equity} (1919) § 130; McClintock, \textit{Equity} (1936) § 55; and to declare a deed absolute in form to be a mortgage, Jones, \textit{Mortgages} (8th ed. 1928) § 340; Walsh, \textit{Mortgages} (1934) § 7; Oral Understandings At Variance With Absolute Deeds, \textit{(1939)} 34 Ill. L. Rev. 189.

\textsuperscript{3}In asking equity to give him the benefit of the promised security, the borrower may present his request in various forms. The bill may be for specific performance of an oral contract to give a mortgage; it may ask for the declaration and foreclosure of an equitable lien; or it may seek to impress a lien on land; or some other variation of one of these phrases may be employed.

It is to be understood that in case the rights of any bona fide purchaser of a legal interest from the landowner intervene, such rights will be superior to the claims of the borrower, who has merely an equitable interest. This discussion is intended to consider only the situation in which no such third parties are involved, so that the issue is simply as to the rights between lender and borrower. The authorities cited will go to this issue only, unless the contrary is expressly stated. However, this is not to say that persons in addition to the lender and borrower may not sometimes be involved. Creditors of the borrower are certainly interested, as are purchasers or incumbrancers who for some reason may not be classed as bona fide purchasers. No attempt will be made here to designate precisely what persons would stand prior to the lender in claiming an interest in the land. A few cases bearing on this point are: Farmers' State Bank \textit{v. St. Aubyn}, 120 Kan. 66, 242 Pac. 466 (1926); Fitzgerald \textit{v. Fitzgerald}, 97 Kan. 408, 155 Pac. 791 (1916); Lane \textit{v. Lloyd}, 83 Ky. L. 570, 110 S. W. 401 (1908); Penn Mutual Life Ins. Co. \textit{v. Kimble}, 192 Neb. 408, 272 N. W. 231 (1937); Herring \textit{v. Whitford}, 119 Neb. 725, 292 N. W. 581 (1930); Bloomfield State Bank \textit{v. Miller}, 55 Neb. 243, 75 N. W. 569 (1898); West \textit{v. First Baptist Church of Taft}, 123 Tex. Civ. App. 388, 71 S. W. (2d) 1090 (1934).

\textsuperscript{4}237 N. Y. 69, 142 N. E. 355 (1923). It has been said that this case was properly decided because the loan was not actually made, and therefore no basis for an equitable mortgage was present. Walsh, \textit{Mortgages} (1934) § 8, p. 48. However, Mr. Justice Cardozo, writing the opinion for the New York Court of Appeals said: "Some money
New York cases are the authorities most often cited for the proposition that the lender should be given the benefit of the security orally promised to him. In New Jersey, cases are on record from 1810 to 1937 upholding the propriety of equity's affording relief to the lender, but in 1938 the New Jersey Court of Errors and Appeals, in a 9-6 decision, reversed a lower court decision which had granted specific performance of the oral promise, apparently believing that the established rule of New Jersey was being invoked. The West Virginia Supreme Court of Appeals in 1925 decreed specific performance of the oral promise, even though counsel for the plaintiff did not think to argue his case on this theory. Yet eight years later the same court, with three of the same judges still on the bench, held that no such relief could be given, the court seemingly not remembering the existence of the earlier decision. In an old Maryland case, the court went out of its way to rule that the Statute of Frauds did not apply in such a case (the defendant had not contended that it did!), but within two decades the same court, reaching the opposite result in the same kind of a suit, took occasion to flay the former opinion unmercifully. In their "extreme generality" the earlier statements of the court would, "if adopted as rules of decision . . . operate as a judicial repeal of the statute of frauds."

The central bone of contention in most of these cases was whether or not the effect of the Statute of Frauds could be obviated by finding sufficient part performance by the lender-promisee to enable equity to decree that the landowner-promisor must specifically perform his part was then handed to the borrower, though exactly how much the witness who overheard the conversation was unable to state." 237 N. Y. 69, 71-2, 142 N. E. 355, 356 (1923).

Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000 (1894); Smith v. Smith, 125 N. Y. 224, 26 N. E. 259 (1891). In Sleeth v. Sampson, the New York Court of Appeals declared that the above cases were not authority contrary to the decision reached in Sleeth v. Sampson, and that only the dicta in those cases suggested a disagreement. 237 N. Y. 69 at 73, 142 N. E. 355 at 357 (1923).


Feldman v. Warshawsky, 125 N. J. Eq. 19, 4 A. (2d) 84 (1938).


Cole v. Cole, 41 Md. 301 (1875).

Washington Brewery Co. v. Carry, 24 Atl. 151 (Md. 1892).

Washington Brewery Co. v. Carry, 24 Atl. 151, 152 (Md. 1892).
of the oral agreement. Here, as in cases involving oral land sale contracts, a difference of opinion exists as to what constitutes sufficient part performance to take the case out of the operation of the Statute.\textsuperscript{14} It is to be noted in passing, that this disagreement in turn springs from a lack of consensus as to the basis and origin of the part performance doctrine itself.\textsuperscript{15} While these arguments rage, other authority contends that the issue is irrelevant entirely because the part performance doctrine of land sale cases is not applicable to oral security promise cases in any event,\textsuperscript{16} and some go so far as to cut the ground from under the whole basic issue of how equity can avoid the Statute of Frauds by declaring that the Statute was never intended to extend to cases calling for such special functions of equity powers.\textsuperscript{17} On the other extreme, there is an occasional refusal to recognize that equity courts even have jurisdiction in the cases under consideration, because the lender’s remedy at law is adequate.\textsuperscript{18}

Cases holding for or against the lender’s prayer for relief are frequently based on inadequate authority,\textsuperscript{19} and when confronted with


\textsuperscript{15}See Meach v. Stone and Perry, 1 D. Chip. 182 (Vt. 1814); Clark, Principles of Equity (1919) §§ 151-153; McClintock, Equity (1936) §§ 55-56; Walsh, Equity (1930) §§ 78-79.

\textsuperscript{16}Walsh, Equity (1930) §§ 62 and 85; Walsh Mortgages (1934) § 8.

\textsuperscript{17}Schram v. Burt, 111 F. (2d) 957 at 962 (C. C. A. 6th, 1940); Sprague v. Cochran, 144 N. Y. 103 at 113, 38 N. E. 1000 at 1002 (1894). See Costigan, Interpretation of the Statute of Frauds (1919) 14 Ill. L. Rev. 1. The last reference makes an argument that the original framers of the English Statute of Frauds specifically intended that it should apply only to law courts. The cases cited apparently derive their authority from the clause found in some modern Statutes of Frauds, to the effect that interests in land raised by operation of law are not within the mandate of the Statute. See note 42, infra.

\textsuperscript{18}Compare Newman v. Newman, 103 Ohio St. 230, 133 N. E. 70 at 75 (1921) and Spencer v. Williams, 113 W. Va. 687 at 688, 170 S. E. 179 at 180, 89 A. L. R. 1451 at 1453 (1933) with Hughes v. Mullaney, 92 Minn. 485, 100 N. W. 217 at 218 (1904) and Blake v. Blake, 98 W. Va. 346 at 350, 128 S. E. 139 at 141 (1925). Also Hicks v. Turck, 72 Mich. 311, 40 N. W. 339 (1888) and Irvine v. Armstrong, 31 Minn. 216, 17 N. W. 343 (1888) (written promise).

\textsuperscript{19}Brown v. Stapleton, 24 N. E. (2d) 909 at 911 (Ind. 1940) (ruling that oral promise is within Statute and therefore unenforceable is made in a subordinate clause, no authority cited); Brown v. Drew, 67 N. H. 569, 42 Atl. 177 (1894) (one paragraph opinion); Aaron Frank Clothing Co. v. Deegan, 204 S. W. 471 (Tex. Civ. App. 1918) (rules on Statute of Frauds issue in two sentences; one of two cases cited is a trust case, and several Texas cases to contrary are ignored); Williams v. Rice, 60 Mich. 102, 26 N. W. 846 (1886) (decision to enforce lien made in two sentences, no authority cited).
a precedent contrary to the result desired to be reached, courts have been known to distinguish the troublesome precedent with little more than a hollow oratorical flourish.\textsuperscript{20}

In this mass of irreconcilables, generalizations must be somewhat tenuous. Probably the numerical weight of authority is represented by cases enforcing the lender's lien on the land in one manner or another.\textsuperscript{21} But the opinion is here ventured that there has been at least a noticeable trend since about 1920 toward the decision that the lender can be given nothing on the basis of the oral promise of his debtor to give security. Thus, since the case of \textit{Sleeth v. Sampson} in 1923,\textsuperscript{22} New York has held to the rule that the oral promise will not be enforced, though the earlier decisions in that state were thought to hold to the contrary.\textsuperscript{23} As already stated, New Jersey reversed its field in 1938, in a positive, if not well-considered, decision in \textit{Feldman v. Warshawsky}.\textsuperscript{24} In 1921, Ohio joined the jurisdictions denying relief.\textsuperscript{25} Also already referred to is West Virginia's turn about between 1925 and 1933.\textsuperscript{26} Kansas, after having pursued an unusually intelligent course

\textsuperscript{20}For instance, \textit{Feldman v. Warshawsky}, 125 N. J. Eq. 19, 4 A. (2d) 84, 85 (1938). The chancery court had relied upon \textit{Dean v. Anderson}, 24 N. J. Eq. 496 (1810) which had been widely cited as authority in other cases. In reversing the chancery court decision, the Court of Errors and Appeals disposed of this old and venerable precedent with this observation: "In \textit{Dean v. Anderson} there was a complicated situation of exchange of properties, involving a mortgage. All the deeds were executed and delivered and all that remained was the delivery of one mortgage." The court did not take the trouble to explain just why these facts were significant as distinguishing factors. Actually they seem to have provided no sensible distinction.

\textsuperscript{21}Of some sixty-odd cases found which turn on this issue, or consider it directly, approximately forty favored an enforcement of the lien on one theory or another. It is not pretended that these cases make up an exclusive list of the litigation in the field, but it is believed that they include the most important decisions and are representative of the entire body of the case law on this point.


\textsuperscript{23}Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000 (1892); Smith v. Smith, 125 N. Y. 224, 26 N. E. 259 (1891). See note 5 supra.

\textsuperscript{24}125 N. J. Eq. 19, 4 A. (2d) 84 (1938).

\textsuperscript{25}Ohio St. 230, 133 N. E. 70 (1921).

\textsuperscript{26}Blake v. Blake, 98 W. Va. 346, 128 S. E. 139 (1925) and Spencer v. Williams, 113 W. Va. 687, 170 S. E. 179, 89 A. L. R. 1451 (1933).
for several decades, in 1938 seems to have slipped into a rut of faulty reasoning in denying enforcement of an oral security promise. In other jurisdictions the decisions have been too uncertain or the cases too few to allow classification as to late tendencies.


Relief has been favored, mostly in older cases which are apparently unquestioned, in Arkansas: King v. Williams, 66 Ark. 333, 50 S. W. 695 (1899); Lowe v. Walker, 77 Ark. 109, 91 S. W. 22 (1905); Florida: Craven v. Hartley, 102 Fla. 282, 135 So. 899 (1931); Illinois: Grigalitis v. Gaidauskis, 214 Ill. App. 111 (1919); Iowa: Vigras v. Hewins, 184 Ia. 683, 189 N. W. 170 (1919); Oklahoma: Allender v. Evans-Smith Drug Co., 3 Ind. Terr. 628, 64 S. W. 558 (1901); see Nelson v. King, 92 Okla. 5, 217 Pac. 560 (1925); Oregon: see Tucker v. S. Ottenheimer Estate, 46 Ore. 585, 81 Pac. 560, 561-62 (1905); South Dakota: Baker v. Baker, 2 S. D. 261, 49 N. W. 1664 (1891); Hollister v. Sweet, 32 S. D. 211, 142 N. W. 255 (1913); Wisconsin: Poole v. Tannis, 137 Wis. 563, 118 N. W. 188 (1908); Ludvig v. Ludvig, 170 Wis. 41, 172 N. W. 726 (1919).


Opinion in Kentucky appears to be about evenly divided: see Keeton v. Owens, 228 Ky. 522, 15 S. W. (2d) 487, 488 (1929); Lane v. Lloyd, 33 Ky. L. 570, 110 S. W.
As to the reason for this apparent shift of opinion, one can only speculate. Perhaps the tendency against granting relief is traceable to the increasing popularity in these cases of the part performance doctrine, and to the narrowing of this doctrine generally, evidenced in the stiffening reluctance of courts to allow the Statute of Frauds to be circumvented except where the part performance will actually (not merely possibly) leave the promisee with irreparable losses unless specific performance is granted. Or perhaps the judiciary is becoming of the opinion that in these days of universal education and a plentiful supply of legal counsel there is no excuse for the failure to put business transactions in written form as required by statute. With this view the writer has no quarrel. If the aim of the courts is to force upon the business public a more orderly system of dealing, it seems hardly open to question that the goal is a desirable one. But as to the methods used to attain this purpose, there is strong need for more consideration. Nor is the need for clearer thinking confined to the decisions denying enforcement of the oral promise to give security, for courts granting the relief do so as often as not on inaccurate reasoning.

The difficulty experienced by the courts in making sound determinations in these cases springs from the seeming close parallel between the situations in which a landowner has promised orally to give security in the land, and that in which a landowner has promised orally to sell the land. The promise to convey the security interest is thought to be equivalent to the promise to convey the absolute title, and the return promise to lend money is presumed to stand in the same position as the vendee's promise to pay the purchase price for the land. Since the Statute of Frauds is held to cover both conveyances of an absolute title and of a security interest, the courts, having accepted the analogy between the two situations as being complete, naturally have reached the conclusion that the same manner of avoiding the effect of the Statute must apply identically whether the case involves an oral promise to sell land or an oral promise to give security in land.

401, 402 (1908); Sandy Hook Bank's Trustee v. Bear, 252 Ky. 609, 67 S. W. (2d) 972, 974 (1934).

In four jurisdictions, Kentucky, Mississippi, North Carolina, Tennessee, the part performance doctrine has been completely rejected: Clark, Principles of Equity (1919) § 134; McClintock, Equity (1936) § 55. That the stricter view of when specific performance will be given is increasing in favor: Walsh, Equity (1939) § 78.

For example: Sleeth v. Sampson, 237 N. Y. 69, 73, 142 N. E. 355, 356 (1923) "We see no distinction in this respect between a payment for an absolute conveyance and a payment for a mortgage"; Feldman v. Warshawsky, 125 N. J. Eq. 19, 4 A. (2d) 84, 85 (1938). In virtually every security promise case turning on the part performance
Further examination of the two transactions, however, quickly brings to light several significant differences. In the first place, the intention of the contracting parties with regard to the land is not the same. The prospective vendee has the essential aim and purpose of obtaining ownership of the land, presumably motivated by such considerations as an expectation of taking produce from the land, or selling the land for profit, or making a home on it, and so on. The lender, on the contrary, ordinarily has no direct designs on the land itself. He does not particularly care to possess the land and has no specific intention of becoming its owner, either immediately or in the future; his desire is to assure the repayment of the money being loaned to the landowner. He takes the borrower's promise that the land shall stand as security because the land seems to be the best assurance of repayment that the borrower can give. Had some personal property been available for as sound a security, or some obligation of personal suretyship, the lender would probably have been as well satisfied.

From this factual difference arises a difference in the relief needs of the vendee and the lender. Since the vendee wants the land, and since land is regarded as of such an unique character that the loss of land cannot be compensated for in money damages, the need of the vendee for equitable relief arises instantly upon the making of the oral promise to convey the land. Whether he has or has not paid any or all of the purchase price, he stands in need of the assistance of equity if he is to be made whole. In fact, the full payment of the purchase price adds not one ounce to the weight of his plea to the equity court, for he is always presumed to be able to recover back by a law action the money paid out in reliance on the landowner's unfulfilled promise to convey land.\(^1\) As has been pointed out, the lender's desire is the repayment of his loan. Thus, until that loan is made, until the money is actually advanced to the borrower, the lender is in no position to seek the aid of equity. The making of the promise to give security establishes no "equity" in the promisee, as does the making of the promise to sell. The promisee in the first situation needs no equitable aid at this time because he is thought to have a complete remedy at

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\(^1\)This statement cannot of course be true in two jurisdictions which appear to hold that mere payment of the purchase price is sufficient part performance by the vendee—Iowa and Georgia. And in other jurisdictions, payment of the price may lend weight when accompanied by other acts of performance. But standing alone, the payment does not give any more of an "equity" than the vendee already had as a result of the making of the promise to convey.
law in the form of an action for damages for breach of contract. For unless the borrower will carry out his promise to give security, the lender is presumably justified in refusing to make the loan, and the total result is that the lender loses the prospective profits of the deal. These profits will be his damages awarded in a law action.\textsuperscript{32} Now when the loan is actually made on faith of the promise to secure, the lender's status changes. From the moment the money is advanced to the borrower, the lender needs equitable assistance, because unless the borrower gives the security as promised, the lender stands to be irreparably injured.\textsuperscript{33} That is, he will have to take his chances as an unsecured creditor—exactly the thing against which he sought to contract—and no judgment at law for damages can make him anything but an unsecured creditor as to past transactions.\textsuperscript{34} Although there has been some confusion on the point, it should be understood that no right of a lender to enforce a promise to give security should accrue until he has actually made the loan.\textsuperscript{35}

\textsuperscript{32} It may be argued that if there is not a written promise, the law courts will not recognize an action for damages. However, the action is for breach of the contract to accept a loan on certain conditions (including the giving of security in land), and is not for the breach of the contract to give a mortgage. Thus it is believed that a law court can grant damages for the loss of profits expected to be obtained through the loan transaction—i.e., interest charges. The oral promise to give security is not being enforced in such an action; rather it is only significant as being a condition of the loan which, when refused by the borrower, justified the lender in regarding the loan contract as breached.

At any rate, the absence of a legal right because of the absence of writing is not considered such a circumstance as to create an inadequate remedy at law. Failure to meet legal formalities, without more, obviously cannot be the basis of an equitable right.

\textsuperscript{33} Hicks v. Turck, 72 Mich. 311, 40 N. W. 339 (1888) (written promise); Irvine v. Armstrong, 31 Minn. 316, 17 N. W. 343 (1889); Dean v. Anderson, 34 N. J. Eq. 496 (1810); Blake v. Blake, 98 W. Va. 346, 128 S. E. 139 (1925); McClintock, Equity (1936) § 58, p. 97; Walsh, Equity (1930) § 85.

\textsuperscript{34} Of course, as a judgment creditor he may perfect a lien which will give him priority over general creditors of the borrower, and over subsequent lien creditors. But such a lien is not enough to save the lender, because other intervening lien creditors will be superior in right even though they may not be in the class of "bona fide purchasers" who would have priority over the equitable lien interest based on the oral promise to give security. Also, as some cases have mentioned, resorting to a damages action involves the loss of the intended investment: Hicks v. Turck, 72 Mich. 311, 40 N. W. 339 (1888) (written promise); Irvine v. Armstrong, 31 Minn. 316, 17 N. W. 343 (1889); Hughes v. Mullaney, 92 Minn. 485, 100 N. W. 217 (1904). Further, the judgment lien will ordinarily come too late to aid the lender, because the borrower will have become insolvent, and damages judgments will be uncollectable. Dean v. Anderson, 34 N. J. Eq. 496 (1810); McClintock, Equity (1936) § 58, P. 97.

\textsuperscript{35} Fred T. Ley and Co. v. Wheat, 64 F. (2d) 257 (C. C. A. 5th, 1933); Iowa Loan and Trust Co. v. Pleve, 202 Iowa 79, 200 N. W. 399 (1925); Milam v. Milam, 138 Tenn. 686, 200 S. W. 826 (1918); Walsh, Mortgages (1934) § 8.
Thus, the security and sale cases are in contrast both as to the point at which the need for equitable relief arises in the promisee, and as to the basis on which this need for equitable relief rests. This contrast is clearly demonstrated where the promises to sell or to give security are in writing, the Statute of Frauds problem thus being eliminated. When the written promise to sell land is made, the vendee is in position to seek specific performance of the contract, regardless of whether he has already paid the purchase price, because he wants to own the land, and cannot be compensated in money if he is deprived of this ownership. The lender, even under a written contract to give security, has no claim to equitable relief until he has advanced the money to the borrower, and then his need for relief springs not from the unique value of land but from the fact that only by being given security can he have a complete remedy for the borrower's breach of contract.

It was these factors upon which Professor Walsh based his categorical declaration that "these cases of equitable mortgages have nothing to do with the doctrine of part performance under the Statute of Frauds." Evidently this statement is intended to refer to the law as it should be, and not as it actually is, if many of the decisions are taken as an indication of how the law presently stands. For these decisions commonly argue not the issue whether the part performance doctrine is applicable, but rather merely whether there has been sufficient performance under the doctrine. The point of Professor Walsh's theory is passed by without even being noticed. This judicial snub results from a failure to realize the basis of the Walsh concept of the source of the lender's equity. The lender seems to be asking for a decree of specific performance, as does the vendee. From this it would seem to follow that his equity rests on his "right" to have equity grant the decree. And does not this "right" depend on the same considerations in the security as in the sale cases? The answer is no, but the fault in the courts' reasoning lies not only in the last step (though this is certainly open to criticism, as will be observed later); the basic fault is in the first and second steps—the assumption that the lender's equity depends on his right to a specific performance decree. His equitable right

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\(^{26}\)Walsh, Equity (1930) § 85, p. 414; Walsh, Mortgages (1934) § 8.

\(^{27}\)"Right" is technically a misnomer because the issuance of specific performance decree is said to be a discretionary power of equity. The remedy is a matter of grace, not of right. Miller v. Gardner, 198 So. 21 (Fla. 1940); Chesapeake and Ohio Ry Co. v. Douthat, 10 S. E. (2d) 881 (Va. 1940); McClintock, Equity (1936) § 52; Walsh, Equity (1930) § 19, p. 82-83.
springs from the fact that only by his being given the security intended can he be made whole. It is true that in cases where an oral promise to secure has been made by the borrower, equity in awarding the lender the benefit of the security is in effect granting specific performance of the promise. But this is only incidentally so, for it is admitted by all that the recognition of rights under the broad equitable liens concept includes the granting of a variety of types of relief in addition to ordering the specific performance of express promises.38 In granting such relief, equity acts under broader and more elastic powers than merely its ability to grant specific performance. Stated in most general terms, it is the power to work justice. Expressed in maxims, it is the power of equity "to regard that as done which should have been done" or "to prevent the Statute of Frauds from being made an instrument of fraud," and so on. The granting of specific performance of oral promises is only one example of the processes used by equity in executing its fundamental function of preventing injustice and of ordering fair dealing. In confining themselves to the use of this particular method in the security cases, the courts are mistaking an incident of their powers for a limitation upon those powers.

It must be noticed that not all courts have fallen into such error. Decisions are available which show a better understanding of the true situation. One of the best statements appears in the Kansas case

38Schram v. Burt, 111 F. (2d) 557 at 561-62 (C. C. A. 6th, 1940); Craven v. Hartley, 102 Fla. 282, 185 So. 899 at 901 (1941); Rutherford National Bank v. Bogle, 114 N. J. Eq. 571, 180 Atl. 182 (1939); Clark v. Armstrong and Murphy, 180 Okla. 514, 72 P. (2d) 362 at 365 (1937); Hollister v. Sweet, 32 S. D. 141, 142 N. W. 255 at 256 (1915); Walsh, Equity (1930) §§ 52, 85; Walsh, Mortgages (1934) § 8.

Common demonstrations of the power of equity to grant liens on land irrespective of the intention of the parties include: Equitable mortgages raised in absence of any promise to give security, see Conkling v. Conkling, 126 N. J. Eq. 142, 8 A. (2d) 298 (1919); Wright v. Buchanan, 287 Ill. 468, 123 N. E. 58, 57 (1919). Vendor’s and vendee’s liens on land granted, see Elterman v. Hyman, 192 N. Y. 113, 84 N. E. 937 (1908); Craft v. Latourett, 62 N. J. Eq. 206, 49 Atl. 711 (1901); Schram v. Burt, 111 F. (2d) 557 at 561-62 (C. C. A. 6th, 1940) (comparing vendor’s lien with lien based on oral security promise); Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000 at 1002 (1894) (same). “Equitable liens” granted, based on unfair or fraudulent conduct of the defendant, similar in nature to constructive trusts, see Ringo v. McFarland, County Judge, 232 Ky. 622, 34 S. W. (2d) 265 (1930) (presenting a situation appropriate for either constructive trust or equitable lien relief); Jones v. Carpenter, 90 Fla. 497, 106 So. 127 (1925). Constructive trusts, raised on the basis of “fraud,” which fraud in some jurisdictions may be no more than an unjust refusal to perform a promise made in good faith, see Becker v. Neurath, 149 Ky. 421, 149 S. W. 857 (1912); Edwards v. Culbertson, 111 N. C. 342, 16 S. E. 233 (1892).
of *Foster Lumber Co. v. Harlan County Bank,* which held that the lender had a lien of an equitable mortgage on the borrower's land, dating from the time of the making of the loan in reliance on the oral promise to give a mortgage. The oral character of the security agreement was declared not to affect the validity of the lender's lien, this because "the lien actually decreed results from the operation of the law upon the entire conduct of the parties, and hence is, in terms, excluded from the inhibition of the statute." There is some mention in the opinion of the power of equity to treat that as done which under the agreement ought to have been done, and the necessity of preventing the Statute of Frauds from becoming an engine of fraud. It must be admitted that some quoted reference is made to the fact that the agreement had been executed on one side and thus is removed from the application of the Statute. But that the Kansas court realized the proper ground for the enforcement of the lien is indicated by a later case which cites the *Foster Lumber Co.* case as authority for the proposition that "liens in the nature of equitable mortgages based upon oral agreements are not at all uncommon, and they are upheld and enforced where equity and good conscience so require."

The Florida
court in *Craven v. Hartley* held that the oral promise to give a real estate mortgage was not invalidated by the Statute of Frauds; it declared that "The doctrine of equitable liens does not depend on written instruments, but may arise from a variety of transactions to which equity will attach that character . . . not obnoxious to the statute of frauds because they arise by operation of law from the conduct of the parties." In other jurisdictions the courts have from time to time given clear and appropriate accounts of their powers to enforce equitable liens based on oral security promises.

Far more common of occurrence in cases in which enforcement of oral security promises is sought, are the decisions which turn on the issue of part performance. In *Sleeth v. Sampson*, already mentioned as a leading case, the court, after declaring that giving a mortgage is transferring an interest in land under the Statute of Frauds, found only one issue remaining in the case—"whether there have been acts of part performance sufficient to relieve from the production of a writing." The court ultimately denied that the oral promise could be enforced because it appeared that the lender's performance went no further than a payment of the loan to the borrower, while to be sufficient to overcome the absence of writing the part performance must be "'unintelligible or at least extraordinary' unless related to a contract to convey an interest in land." It was observed that in land sale contract cases, payment of the purchase price alone is not enough to meet this standard; there must also be such acts as taking possession of the land or making improvements thereon. And "we see no distinction in this

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The use of the phrase "operation of law" is apparently a reference to the exception incorporated in some Statutes of Frauds to the effect that there need be no writing to support the creating or granting of interests in land by operation of law. See Fla. Comp. Gen. Laws (Skillman, 1927), Tit. I, Ch. 1, § 5660; Kan. Gen. Stat. (Corrick, 1935) § 33-105. Such provisions are virtually legislative declarations of the validity of the powers which are exercised by equity courts without the aid of statutory authorization—i.e., powers to ignore the formal requirements of the Statute of Frauds when such procedure is necessary to reach a just result. No case should turn on the presence or absence of this exception in the Statute. These qualifications in the Statutes of Frauds have seemingly never been thought to refer to matters arising in courts of law; certainly they do not affect the rule that a legal mortgage must be in writing.

"Schram v. Burt, 111 F. (2d) 557 at 562 (C. C. A. 6th, 1940); Sandy Hook Bank's Trustee v. Bear, 252 Ky. 609, 67 S. W. (2d) 972 at 974 (1934) (court refused lien because of special circumstances); Sprague v. Cochran, 144 N. Y. 104 at 112, 38 N. E. 1000 at 1002 (1894); Poole v. Tannis, 137 Wis. 369, 118 N. W. 188 at 189 (1908).

"237 N. Y. 69, 142 N. E. 355 (1923).

"237 N. Y. 69, 73, 142 N. E. 355, 356 (1923).

"237 N. Y. 69, 73, 142 N. E. 355, 356 (1923).
respect between a payment for an absolute conveyance and a payment for a mortgage.\textsuperscript{47}

It may be said that the fault in this case and in a number of others which are decided in the same manner,\textsuperscript{48} lies with the lender’s counsel who shaped his prayer for relief along specific performance lines, and so argued his case in the courts. However, in other situations the procedure in courts of equity has proved to be sufficiently flexible to allow the courts to give relief when a meritorious case is presented, even though it be presented in unfortunate terminology.\textsuperscript{49} And in fact we can be sure that it is not the form of the request which governs the answer, because equally respectable courts have refused relief on the same reasoning where the plea was that the court should “impress a lien,” or “foreclose an equitable lien” on the land, or where some other slight variation of this phraseology was used. \textit{Newman v. Newman}\textsuperscript{50} was an action “to subject lands to a lien.” After disposing of the lender’s argument that a constructive trust should be declared, the Ohio court suggested the possibility of giving relief in the form of an equitable mortgage; but this theory too was held unavailing because mere payment of the consideration is not sufficient to relieve an oral agreement to convey an interest in real estate from the operation of the Statute of Frauds. In the \textit{Feldman} case the New Jersey Court of Chancery granted the prayer in an action to have an equitable lien or mortgage impressed on land. Though the promise to give the mortgage

\begin{footnotes}
\footnotetext[47]{237 N. Y. 69, 73, 142 N. E. 255, 256 (1923).}
\footnotetext[48]{Washington Brewing Co. v. Carry, 24 Atl. 151 (Md. 1893); Brown v. Drew, 67 N. H. 569, 42 Atl. 177 (1894); Bernheimer v. Verdon, 63 N. J. Eq. 312, 49 Atl. 732 (1901); Meach v. Stone and Perry, 1 D. Chip. 182 (Vt. 1814).}
\footnotetext[49]{See McClintock, \textit{Equity} (1936) §§ 13, 28 and 50; Walsh, \textit{Equity} (1930) § 22. See as examples of the adaptability of equity courts in this respect: Jones v. Gainer, 157 Ala. 218, 47 So. 142, 143 (1908) (though specific performance decree is denied because plaintiff fails to prove the contract as alleged, equity will declare a lien on the land for money expended by the plaintiff in improving the land, even though plaintiff did not seek such relief); Bourke v. Hefter, 202 Ill. 321, 66 N. E. 1084 (1906) (equity granted personal judgment against defendant, though this type of remedy was not asked for in the complaint); Sanitary District of Chicago v. Martin, 227 Ill. 260, 81 N. E. 417 (1907) (specific performance denied on ground of unreasonable hardship to defendant, but equity assessed damages for the default, though damages were not sought in plaintiff’s complaint); Jackson v. Stevenson, 156 Mass. 495, 31 N. E. 691 (1892) (injunction against violation of building restriction denied because enforcement would be inequitable, but damages were assessed for breach of restriction, though not sought by complaint); 25 R. C. L. 345 (though specific performance decree cannot be given because defendant can not convey good title, damages will be awarded for breach of contract to convey, though not sought in complaint).}
\footnotetext[50]{103 Ohio St. 290, 133 N. E. 70 (1921).}
\end{footnotes}
as security for a loan actually made was oral, the court, finding that
the evidence clearly indicated that the oral promise had been made as
the lender declared, granted specific performance with the statement
that the fact of the agreement being verbal was immaterial "since
equity looks to its purpose and intent rather than to its form."51 Cling-
ing ever to the part performance theory, it was decided that in New
Jersey payment of the consideration in reliance on the oral promise
was sufficient part performance to remove the case from the bar of the
Statute of Frauds. This last proved to be more than the Court of Errors
and Appeals could accept. That court reversed the decision of the
Chancery Court, on the ground that a case of part performance was
not made out merely by the payment of money.52 In *Spencer v. Wil-
liams*,53 the West Virginia court was asked to *impress a lien on land*,
on the basis of an oral promise by the owner to give a mortgage on
the realty as security for the repayment of a loan. The court replied
that it could not grant *specific performance* of the promise because in
that jurisdiction such remedy was available only where the agreement
was so far executed that a fraud would be worked on the petitioning
party unless specific performance were decreed. It is interesting to note
that this court went on to observe that no fraud would result here be-
cause the lender had a full remedy at law in the form of an action to
recover back the money loaned. In fact, the lender showed that, rely-
ning on the oral security promise, he had waited so long to seek repay-
ment from his borrower that now the Statute of Limitations barred
any right of action at law—therefore not even a theoretical remedy at
law existed. In this encounter, however, the court turned the lender's
own weapon upon him by concluding that to give equitable relief in
such circumstances would be to "put a premium on his delay."54

It is hardly understandable how the West Virginia court could
reach this decision when only a few years before it had decided a very
similar case exactly in the contrary manner.55 The opinion in this
case of *Blake v. Blake* stands as almost a point to point refutation of
the law as announced in the *Spencer* decision. First the opinion points
out that the lender has no adequate remedy at law, because an action
at law would force the lender to rely only on the personal liability of
his borrower, which was exactly the eventuality intended to be avoided.
Only equity has the power to give him what he must have to be made

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52 Feldman v. Warshawsky, 125 N. J. Eq. 19, 4 A. (2d) 84 (1938).
whole—the security as promised. Then the court inquired of itself whether specific performance could be granted when that type of relief was not expressly asked for. This question was answered affirmatively on the basis of the general prayer for relief included in the plaintiff's bill, for under a general prayer, the plaintiff is entitled to any relief justified by the evidence. On the issue of the significance of the parol form of the borrower's promise, the court concluded that in this type of case the acts of the lender in advancing the money so that nothing remained to be done to complete the transaction except the execution of the mortgage, constitute sufficient performance to take the oral contract out of the Statute of Frauds. And equity will decree the relief because the borrower's refusal to execute the security instrument works a fraud on the lender. Finally, it was denied that the long delay in seeking judicial enforcement of the agreement could be said to make the lender guilty of laches, because the lender at no time had shown any disposition to abandon his claim, and because the delay had benefitted, rather than injured the borrower.

Indicative of the temper of the courts is the fact that even when relief is to be granted to the lender, the specific performance remedy and the part performance doctrine bob up to plague the argument. Of course this is in no sense an error in itself, for admittedly the granting of specific performance of an oral promise on the basis of the part performance doctrine is one process which equity may invoke to give the lender his needed security. The danger springs from the demonstrated tendency of courts to go one step further and conclude that this is the only method open to them in such cases. It is that conclusion which brings forth such decisions as those discussed above. One suspects from the language used in the opinion of Blake v. Blake that even there the court felt that its choice was to give specific performance or nothing—else why the particular effort to establish sufficient acts of part performance. In this respect it in nowise stands alone. For example, in Rutherford National Bk. v. Bogle the court

56Of course it cannot be said absolutely that the courts in the following cases would not have granted relief on some other theory had the part performance doctrine not been available; but that impression lingers after a reading of the opinions. See Cole v. Cole, 41 Ind. 301 (1875); Hecht v. Anthony, 204 Minn. 432, 283 N. W. 753 (1933); Rutherford National Bank v. Bogle, 114 N. J. Eq. 571, 169 Atl. 180 (1933); Clark v. Van Cleef, 75 N. J. Eq. 152, 71 Atl. 260 (1908) (relief denied because claim was barred by limitations); Dean v. Anderson, 34 N. J. Eq. 496 (1810); Tucker v. S. Ottenheimer Estate, 46 Ore. 585, 81 Pac. 360 (1905) (relief denied because of special circumstances); Baker v. Baker, 2 S. D. 261, 49 N. W. 1064 (1891).

57114 N. J. Eq. 571, 169 Atl. 180 (1933).
was apparently off to a perfect start in exercising its equitable powers to enforce a lien. It stated that “the whole doctrine of equitable liens or mortgages is founded upon that cardinal maxim of equity which regards as done that which has been agreed to be, and ought to have been, done.” And “the form which an agreement shall take in order to create and equitable lien or mortgage is quite immaterial, for equity looks at the final intent and purpose, rather than at the form.”58 But following these pronouncements, the court seemed to lose some of its enthusiastic confidence in the power of equity to drive straight to the goal of justice, for it soberly observed that since a mortgage involves a transfer of an interest in land, it must meet the dictates of the Statute of Frauds. And “an agreement to give a mortgage upon land is likewise within the inhibitions of the statute and unenforceable if not in writing unless there has been sufficient part performance to remove it from the bar of the statute.”59 Hence the vital issue here was whether there had been sufficient acts of part performance. The court eventually decided that there had been these required acts, and a happy ending was reached. But the whole decision shows disturbing confusion in the court’s mind regarding its authority to grant relief to lenders in search of promised security. Four years later the same court, in the person of the same Vice-Chancellor, redeemed itself admirably by pointing out that the power to grant specific performance on the basis of part performance by the promisee is “aside from and in addition to”60 the powers of equity to declare a lien under various other doctrines, expressed in such declarations as “treat that as done which ought to have been done,” “prevent the perpetration of a fraud,” and “give effect to purpose and intent rather than to form.” Other courts would better serve the interests of equity and good conscience, justice and fair dealing if they would better understand the source and foundation of their power to enforce the borrower’s promise to give security.

This discussion is not to be understood as a plea for the unquestioned enforcement of every assertion made by lenders that their borrowers have orally promised to give security. Beyond any doubt, such action would result in an unending procession of frauds, for every lender anxious about the chances of enforcing the personal liability of his debtor would have but to raise the claim that an oral promise to

58 114 N. J. Eq. 571, 169 Atl. 180, 182 (1933).
59 114 N. J. Eq. 571, 169 Atl. 180, 183 (1933).
60 Feldman v. Warshawsky, 122 N. J. Eq. 596, 196 Atl. 205, 208 (1937). Ironically enough, the Feldman decision was reversed, 125 N. J. Eq. 19, 4 A. (2d) 84 (1938), while the Rutherford decision stands unimpeached.
give security had been made, whereupon a lien on the borrower's land might be established. Before any court ventures to impress a lien on land in these cases, it must use every means to make sure that the oral promise was actually made as contended and that the lender is not asserting a false right. To this end, courts should and often do require that the lender assume the burden of proving his case and of offering evidence of clear and convincing nature. With strict standards of proof applied, very few fraudulent claims would prove successful.

Even conceding that an occasional lender might obtain the benefit of unwarranted security, can it be said that any particularly lamentable injustice has resulted? What the lender obtains is no more than just payment of a perfectly honest debt. The borrower has simply been forced to satisfy a valid obligation. The only parties possibly standing to be unjustly deprived of anything are creditors of the borrower, whose claims might have been satisfied out of the debtor's property had the other lien not been enforced against it. But the total assets of the debtor have been at one time, at least, augmented by the moneys advanced by the lender, and why should other creditors be entitled to benefit exclusively from this increase in the debtor's resources? On the other hand, observe the unfortunate consequences of refusing a valid security claim of the lender. In the usual case the debtor's personal liability will be no more valuable than the lender has esteemed it to be, and thus the lender will be unable to collect his debt, or at least all of it, even though he thought he had provided against the very contingency which has arisen. Other creditors will profit by the enrichment of the debtor's estate resulting from the advancement of the loan.

In this consideration lies another distinguishing feature between security cases and land sale cases. The enforcement of a fraudulent claim that an oral promise to convey land was made, results in the landowner being deprived of his land when there has been no intent on his part to risk his ownership in any way. Of course he receives the consideration which the purported vendee admits in order to make his claim enforceable, but the very fact that the owner resists the action indicates that he was unwilling to part with his land for that price. The claimant is correspondingly unjustly enriched by receiving the land for the price paid. The failure of the court to recognize a valid

and true claim in land sale cases prevents the vendee from making expected profits from the purchase of the land. If the vendee has paid part or all of the purchase price in advance, he stands to lose at least part of this if the vendor is insolvent and cannot satisfy a judgment at law for the return of the price paid. The vendor merely remains in the position formerly occupied—owner of the land.

It thus appears that the consequences of refusing to enforce an honest claim that an oral security promise was made are more unfortunate than those resulting from the inability of a vendee to obtain specific performance; that the wrong done the landowner when a fraudulent security claim is enforced is not so harsh as where a false sale claim is enforced; that therefore, the courts should be quicker to enforce an alleged oral security promise than an alleged oral sale promise; that the standards built up to control the sale cases should thus not be applied blindly in the security cases. In rebuttal of the above comparisons, it may be argued that there is no difference in the possible prejudice to the vendee and lender where an honest claim is rejected because the lender loses money which would represent a payment of the debt while the vendee loses money which would represent the return of the purchase price advanced—this in case of the inability of the landowner to satisfy personal liabilities. In fact, however, looking at the problem from the standpoint of what the usual circumstances will be, there is a distinction. For while the vendee may or may not have paid the purchase price in advance, the lender always will have made the loan. The making of the loan is the essence of his need for relief, whereas the vendee's need for relief arises with the promise to convey. Thus, in every case in which a lender needs the equitable relief, the result of a refusal to grant his request will lead to a loss of the entire amount loaned—assuming an insolvent debtor; but in only some of the cases in which a vendee needs equitable relief will a denial of equitable aid result in a loss of the purchase price.

A further advantage will often stand with the vendee as contrasted with the lender, where both have actually advanced money to the landowner. In the normal case the vendee learns within a relatively short time after paying the purchase price that the vendor is refusing to carry out his oral promise to convey. The vendee then is warned to take steps to recover his money promptly, lest the landowner become insolvent. On the other hand, the lender in the normal case may continue for a considerable time in reliance on the borrower's oral promise, and not find out until the debt has matured that the borrower intends
to repudiate his security agreement. In the lapse of time between the making of the loan and the discovery that no security exists, the borrower has often in fact become bankrupt and unable to pay his debts. A remedy at law which was perfectly adequate had it been recognized as necessary to pursue, becomes as a practical matter no remedy at all.\(^6\)

One further practical distinction appears in any comparison of sale and security cases when the part performance doctrine is under consideration. In a very large majority of the American states the courts have decided that mere payment of the purchase price by the vendee is not sufficient part performance upon which to decree the specific performance of an oral promise to convey land.\(^6\) The reasoning advanced to support this rule takes two different forms, depending on the particular court's conception of the basis of equity's power to obviate the Statute of Frauds by application of the part performance doctrine. One view is that equity will enforce the oral promise where the acts of part performance have put the vendee in such a position that it is impossible except by granting specific performance to place him back in as good a situation as he stood before the oral contract was made. To refuse enforcement is said to countenance a

\(^6\)See Dean v. Anderson, 34 N. J. Eq. 496 (1810). Some cases stress the lender's loss of his "investment" as an irreparable injury which would result from a denial of equitable relief. The idea advanced is that even if money damages can be recovered, such an award falls short of the redress required to make the lender whole. Irvine v. Armstrong, 51 Minn. 316, 17 N. W. 343 (1883); Hicks v. Turck, 72 Mich. 311, 40 N. W. 339 (1888) (written agreement). It has been said that the remedy at law is not adequate even where the borrower is solvent and there is a written agreement, because only nominal damages will be given for the breach until such time as an enforcement of the security is needed. McClintock, Equity (1936) § 58, p. 97.

A further question as to the adequacy of a damages remedy must remain unanswered for lack of authority. It is: Does the refusal of the borrower to give the security entitle the lender to declare the loan agreement rescinded and sue immediately to recover back the money advanced? The discussion in the text presumes an affirmative answer. If this is not correct, the lender is in a still worse position than that already described, because then the repayment of the principal of the loan can not be compelled until the agreed maturity date, and the lender's hands are thus tied during the interval in which the borrower may be becoming insolvent and judgment-proof. It is arguable that since the security promise is merely an incident to the loan transaction, the default on the promise is not sufficient to abrogate the essential purpose of the parties to make and receive a loan. If it is true, as McClintock states, that only nominal damages for the breach of a security promise could be obtained even where the promise is in writing, this may mean that the lender could not recover back the loan until the regular maturity date.

\(^6\)Clark, Principles of Equity (1919) § 131; McClintock, Equity (1936) § 56; Walsh, Equity (1930) § 78.
fraud on the vendee, or to subject him to irreparable injury. A different view is that equity will enforce the oral promise where the acts of part performance are such as to evidence clearly that an oral promise to convey was actually made by the lender. Here it is said that the acts must be "unequivocally referable" to a contract to convey, or "unexplainable except as related" to such a contract. Though a stricter standard of performance is probably applied by the courts following the first theory, it is agreed that mere payment of money is not enough under either view, because the vendee can be made whole (theoretically, at least) by an action at law to recover the money back, or because the payment of money refers as much to other possible transactions as to a conveyance of land. Added acts required are commonly the vendee's taking of possession of the land or his making valuable improvements on the land.

Though it is open to serious question whether such additional actions in fact do make the performance "unequivocally referable" to a contract or subject the vendee to irreparable injury, nevertheless they are the forms of conduct which in most of the cases have persuaded the courts to decree specific performance. Conversely, the absence of such conduct is most frequently the reason for the courts denying that relief.

Consider then, the chances of a lender to show sufficient part performance in the great majority of our American courts. A prospective purchaser of land may commonly take possession of land and make improvements before title is actually transferred to him. How often does a lender who has loaned on the security of his borrower's land enter into possession of the land or make improvements on it? The answer is very, very seldom. In fact, only two cases have been found in which this procedure occurred. And in both of them there existed a family relationship between lender and borrower, so that the taking of possession was actually to be explained on the basis of the kinship of the parties rather than on their lender-borrower status. In applying sale promise rules to security promise situations, the courts are virtually denying that a remedy of specific performance exists in the latter cases. If a part performance doctrine is to be used in security

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64 Clark, Principles of Equity (1919) §§ 132-134; McClintock, Equity (1936) § 56; Walsh, Equity (1930) § 78.

65 Charpie v. Stout, 88 Kan. 318, 128 Pac. 396 (1912) (lender was a sister of the borrower, and the latter stated that he put his sister in possession of the land "so as to give her something to live upon."); Smith v. Smith, 125 N. Y. 224, 26 N. E. 259 (1891) (lender was husband of borrower; former owned the land then conveyed it to his wife, the two of them living on the land with the husband managing it; husband spent substantial sums in improving the land after its conveyance to wife).
cases, it must be a different doctrine, designed to take cognizance of the facts which normally exist in security cases.

By way of summary, the writer ventures to outline a correct process of reasoning in the decision of such a case as is presented by the simple hypothetical fact situation posed early in this discussion. First, it is to be conceded that a defence of the Statute of Frauds must be met, because a contract to give security in realty is a contract to transfer an interest in land and therefore is required to be in writing to be enforceable. But while courts of law have been strictly ruled by the dictates of the Statute, equity has often declared its power to ignore the formal requirements if only by such measures may justice be served. Equity has jurisdiction to act because in the usual circumstances attending these cases, the lender has no adequate remedy at law; only by the processes of equity can he be given the relief necessary to save him for an irreparable injury, for only equity can decree him a secured creditor. That equity should act is argued by the same fact—a just and equitable conclusion to the whole transaction can be attained only by the lender being given the benefit of security in the land. Without this relief, a deceitful borrower will have perpetrated a plain fraud on the lender, will escape his obligation to pay an honest debt, and will leave to other creditors the unearned privilege of sharing assets contributed by the lender. All this assumes the ability of the court, by applying strict requirements of proof, to make sure that the borrower actually made the oral promise as contended by the lender. No reference to “specific performance” and no mention of “part performance” need be made; nor should they be made, lest the issue be confused by the use of oft-confusing terminology. The remedy should be given under the broadest and most fundamental function of equity, and not under one of the small segments of that function. And whatever the form of the prayer for relief, such relief as the facts call for should be given, without question of whether a just remedy can be applied if not requested precisely in the proper words.

If this be treason in the form of a judicial repeal of the Statute of Frauds, let the powers of equity make the most of it. And if the considered opinion of the lawmakers is that the interests of orderly and careful business methods demand that in no case shall lenders be given the benefit of security in land unless there has been a written agreement for security, then let the legislature speak with a definite command directed to the courts of equity.66

66An indication of precisely the opposite legislative sentiment may be thought to exist in the “except by operation of law” qualifications found in several Statutes of Frauds. See notes 17 and 42, supra.
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