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Specific Performance: Statute of Frauds--Part Performance of Oral Land Contracts

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SPECIFIC PERFORMANCE: STATUTE OF FRAUDS—PART PERFORMANCE OF ORAL LAND CONTRACTS.—In the case of *Brewood* v. *Cook*,[1] the plaintiff, by a written contract, purchased a house and eight lots from the defendant. At the same time they agreed orally upon terms for the sale of two adjacent lots which the plaintiff wanted to insure the privacy of his newly-acquired home. These two lots were to be sold as soon as the defendant's wife became reconciled to parting with them. The plaintiff, anticipating the formal completion of the sale, moved into possession of the property He then rebuilt the trash incinerator and occupied the land for two years. The wife became reconciled, but the defendant insisted upon a higher price for the land. The plaintiff sued for specific performance of the original agreement. It was granted.

The defendant seeking a reversal contends that evidence to prove the existence of a contract was admitted in violation of the Parol Evidence Rule and that the contract, if proved, was unenforceable under the Statute of Frauds. The United States Court of Appeals affirmed the lower court's decision, Judge Prettyman dissenting on the enforceability of the contract.

The court in resolving the problem concerning the Parol Evidence Rule stated two reasons for the admission of evidence proving the contract. First it said that proof by parol evidence of a contemporaneous agreement in addition to and not inconsistent with a written agreement between the parties, is admissible.[2] This is known as the partial integration doctrine[3] and is applicable only in cases in which the parties have not adopted the written agreement as the complete statement of the agreement.[4] In addition to this rule it said that parol evidence is admissible to prove a contemporaneous agreement which was an inducement to the contract in writing.[5] As the trial court found that the contracts were collateral (contemporaneous and suplemental) and that the oral contract was a critical inducement to the one in writing, both rules of admissibility defeat the defendant's first contention. Therefore, the defendant's appeal had to stand or fall on the court's interpretation of the problem of enforceability of a parol contract for the conveyance of land.

Judge Fahy, in writing the majority opinion, relied upon the case of *Vogel* v *Shaw*[6] and the rule of law that one who induces another by a parol agreement to change his position so materially that unless the inducing agreement is enforced, a fraud results, is estopped to set up the Statute of Frauds to bar such enforcement.[7] By applying this rule to the case at hand he reasoned that because the plaintiff was induced to materially alter his position and because this change could not be rectified by rescission or an action at law, the contract was enforceable. Then stating that part performance is but a particular application of this broad rule of equitable estoppel,[8] he does not discuss the minor points of part performance upon which the trial court based its decree, but merely cites the case of *Whitney* v *Hay*[9] as supplemental support for the decree.

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[1]207 F.2d 439 (D.C. Cir. 1953)
[2]Bell, Rogers, & Zemurray Bros. v. Jenkins, 221 Ala. 652, 130 So. 396 (1930), Roof v. Jerd, 102 Vt. 129, 146 Atl. 250, 68 A.L.R. 235 (1929)
[3]3 WILLISTON, CONTRACTS § 636 (Rev. 1936)
[4]Seitz v. Brewers' Refrigerating Machinery Company, 141 U.S. 510 (1891).
[5]Stewart v. Meadows, 282 Fed. 861 (8th Cir. 1922), Blunk v. Kuyper, 241 Iowa 1138, 44 N.W.2d 651 (1950).
[6]42 Wyo. 333, 294 Pac. 687, 75 A.L.R. 639 (1930)
[7]3 POMEROY, EQUITY JURISPRUDENCE § 804 (5th ed. 1941)
[8]Brewood v. Cook, *supra* note 1 at 441 n.4.
[9]181 U.S. 77 (1899)

Judge Prettyman in his dissent agrees that the Parol Evidence Rule and the case of *Whitney* v. *Hay* are good law but differs from the rest of the majority opinion. In his discussion of part performance he emphasizes the need for the acts of part performance to be unequivocally referable to the contract[10] and the necessity that rescission of the contract work a fraud.[11] He states that the rebuilding of the incinerator, the building of a walk for access, the placing of a fence to screen the rubbish, and the extension of a water system as fire protection were all acts for the convenience of the plaintiff. Therefore, the acts of improvement were not unequivocally referable to the contract. Also as it is normal for a homeowner to use a vacant lot next door and normal for the lot owner to acquiesce in its casual use, these acts of possession were not solely referable to the contract. Furthermore he does not think that the expenditure of $306 entitles the plaintiff to specific performance on the basis of fraud for the money spent was well worth the accessory convenience. For these reasons he denies the application of the doctrine of part performance to this case. He disagrees that rescission would work a fraud upon the plaintiff, would refuse to apply the doctrine of equitable estoppel to this case and therefore determines that the contract should be unenforceable.

So it seems the majority issues justice for the instant, while the dissent by demanding a careful analysis of the factors of part performance and equitable estoppel issues justice for the future.

To grant specific performance the courts of equity have required that the general principles of equity jurisdiction and jurisprudence be met.[12] In addition to these primary considerations, the courts examine the problems which are peculiar to specific performance, such as the practicality and effectiveness of the decree,[13] any hardships involved,[14] and the mutuality,[15] certainty,[16] validity,[17] and enforceability[18] of the contract. Since the object of this suit is the specific performance of a contract to convey land, and as this relief is unique in equity, the primary requirements were satisfied. The secondary prerequisites are presumed to have been capably disposed of by the trial court, except the questions of the certainty, validity, and enforceability of the contract, which were before the court on appeal. The certainty and validity of the contract were established by the parol evidence, which was admissible. The main problem, the issue in dispute, was the enforceability of the contract. This could be settled by applying or rejecting the doctrines of part performance or equitable estoppel to determine the application of the Statute of Frauds in this case.[19]

Although the law of the majority of our jurisdictions is well settled that acts of part performance take an oral contract to convey land out of the statute,[20] it would be well to state the rationales and rationalizations of prior courts to assist in the clear interpretation of the established law, for recently there has been a tendency to merge

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[10]Burns v. McCormick, 233 N.Y. 230, 135 N.E. 273 (1922); see Annotation 101 A.L.R. 919 at 955 *et. seq.* (1935)

[11]Purcell v. Coleman, 4 Wall. 513, (U.S. 1867).

[12]1 POMEROY, *op. cit. supra* note 7, § § 129 *et. seq.*

[13]WALSH, EQUITY §§ 64 *et seq.* (1930).

[14]*Id.* § 104.

[15]*Id.* § 68 *et. seq.*; see Annotation, 101 A.L.R. 919 at 952 (1935).

[16]See Annotation, 101 A.L.R. 919 at 950 (1935).

[17]*Id.* at 949.

[18]WALSH, EQUITY c. XVI.

[19]Pound, *The Progress of the Law, 1918-1919,* 33 HARV.L.REV. 929, 936, 937 (1920).

[20]WALSH, EQUITY 397 n.6; see Annotation 101 A.L.R. 919 at 928 (1935)

part performance and fraud into the single doctrine of equitable fraud.[21] The courts of equity granted specific performance of oral contracts for the conveyance of land before the existence of the Statute of Frauds under the doctrine of part performance.[22] Within a decade of the passage of the statute the Chancellor took certain cases out of the statute because of part performance.[23] These cases were the result of the concept of livery of seisin, in which putting the purchaser in possession was the substance of a common-law conveyance.[24] Simply stated, the Chancellor, because of the kinship of part performance and the transfer of title to land by livery of seisin, took the case out of the statute. Years later the Chancellors were still inclined to give relief but many had forgotten the prior rationale and invented legal fictions to support their decisions.[25] Some rationalized that if there were no valid contract to convey, the possession of the purchaser was a trespass, and thus the agreement which led the purchaser into this liability would be a fraud if not enforced.[26] This argument has been rejected because the purchaser could be also either a tenant at will or a licensee and thus not liable as a trespasser.[27] Another theory was that the acts of part performance are a substitute for written evidence and this takes the parol agreement out of the Statute of Frauds.[28] While proof of the contract and the consistency and referability of the acts performed are prerequisites to specific performance, the weight of authority seems to regard these matters as incidental.[29] Today the majority of courts regard the basis of the doctrine to be equitable fraud and estoppel.[30]

The vitality of the original rationale of the Chancellors is shown by the fact that possession is the most important single act of part performance. In England, mere possession is sufficient to take the contract out of the statute,[31] while in the United States, although possession is necessary in the great majority of cases, to be effective it must be coupled with other acts such as payment of the consideration,[32] addition of improvements,[33] rendition of personal services,[34] or payment of taxes.[35] But before these acts are accepted as part performance it must be proved that they are referable to the contract[36] and that they were performed with the knowledge and consent or acquiescence of the party to be charged.[37] Finally, it must be shown that rescission of the contract would be a fraud upon the party who had performed. By fraud the courts mean an unconscionable or unjust act which would work a hardship not capable of being remedied at law.[38]

With this law in mind, even if it be conceded that the possession in the principal

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[21]Pound, *supra* note 19, at 937.
[22]SUGDEN, VENDORS AND PURCHASERS 152 note p (14th ed. 1862)
[23]Butcher v. Stapely, 1 Vern. 363, 23 Eng. Rep. 524 (1686), see Costigan, *The Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329; Pound *supra* note 19 at 939.
[24]Pound, *supra* note 19 at 939.
[25]*Id.* at 943.
[26]Foxcraft v. Lister, Colles, P.C., 108, 1 Eng. Rep. 205 (1700)
[27]WALSH, EQUITY 396 n.4.
[28]*Id.* § 79.
[29]See Annotation, 101 A.L.R. 919 at 944 (1935)
[30]*Ibid.*, Pound, *supra* note 19 at 937, 940.
[31]WALSH, EQUITY 397, see Annotation, 101 A.L.R. 919 at 1003 n.54 (1935)
[32]See cases collected in 101 A.L.R. 919 at 1053 n. 75 (1935)
[33]Bevington v. Bevington, 133 Iowa 351, 110 N.W 840, 9 L.R.A. (N.S.) 508.
[34]See cases collected in 101 A.L.R. 919 at 1095 (1935)
[35]*Id.* at 1109.
[36]See note 10 *supra.*
[37]See Annotation, 101 A.L.R. 919 at 965 (1935)
[38]See cases collected in 81 C.J.S. 443 n.60.

case is of the type—actual, notorious, and, continuous—which would qualify as an act of part performance, it does not appear the possession is referable to the contract. This point is aptly demonstrated by Judge Prettyman in his dissent. While the making of valuable improvements in some cases has been held sufficient to take a contract out out of the statute,[39] the present case also stumbles on the rule of referability. Finally, the acts of part performance are not substantial enough to work a hardship upon the plaintiff. This leaves the possibility that fraud will estop the use of the statute as a bar.

The cases holding that fraud would create an estoppel to set up the defense of the Statute of Frauds originated from the case of *Mullet* v. *Halfpenny*.[40] The Chancellor in that case decreed that one who fraudulently created the bar was estopped to use it. Soon another line of decisions was distinguished in which the Chancellor compelled the defendant to make good his representations upon which the plaintiff had acted.[41] This second type of case is the very heart of the modern doctrine of equitable estoppel. For as stated by Pomeroy, the essence of equitable estoppel is conduct amounting to a representation of a material fact upon which the plaintiff in reliance has changed his position for the worse.[42] Specifically the conduct may be shown by acts, language, or silence; the representations must be of a past or present fact; the truth of the facts must be known by or imputed to the knowledge of the defendant; and the conduct must be the inducement of the plaintiff's actions.

As there was no fraudulent creation of the bar in the principal case, the defendant had a right to rely upon the statute as a defense unless the plaintiff could show an equitable estoppel. The evidence shows that there was conduct that amounted to a representation, but not a representation of a past or present fact. The defendant stated only his intention to sell in the future. If the plaintiff relied upon anything, it was only a promise of future action. Furthermore, whether the change of position was for the worse is a debatable fact.

The court in its preoccupation with this latter question of fact did not discuss the element of representation of a past or present fact. Undoubtedly this was because of the similarity of the fact situation in *Vogel* v. *Shaw* and the unquestioning acceptance of that decision by some courts. The defendant in that case had made a representation of his intention. The court deemed that adequate for specific performance of the oral contract by mixing the rules of equitable estoppel and promissory estoppel.[43]

That court seems to have had no logical rationale for this conclusion.[44] The dissenting judge conceded that promissory estoppel could help establish a contract by showing consideration, but stated that the contract could only be taken out of the statute by other equitable means. With this in mind, it is clear that the plaintiff in *Brewood* v. *Cook* should not have been granted specific performance of his contract, unless we are going to recognize another exception to the Statute of Frauds.

The Statutes of Frauds, when it was originated, had many of its present defects, but these were small compared with the wrongs it cured.[45] Perhaps, if these factors are compared today the cures will weigh short, but this should not give the courts the right to remedy it.

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[39]49 AM. JUR., Statute of Frauds, § 449.
[40]Prec. Ch. 404 (1699); see Pound, *supra* note 19 at 937.
[41]Pound, *supra* note 19 at 937.
[42]3 POMEROY, *op. cit. supra* note 7, § 805.
[43]1 WILLISTON, CONTRACTS § 139 (Rev. 1936)
[44]29 MICH. L.REV. 1075 (1931); 44 HARV.L.REV. 1147 (1931).
[45]6 HOLDSWORTH, HISTORY ENGLISH LAW 387 (1927).