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Specific Performance of Oral Contract to Devise Real Property - Rendition of Personal Services as Part Performance - Shives v. Borgman

SPECIFIC PERFORMANCE OF ORAL CONTRACT TO DEVISE REAL PROPERTY — RENDITION OF PERSONAL SERVICES AS PART PERFORMANCE

Shives v. Borgman[1]

A bill was brought for specific performance of an alleged oral contract to convey real and personal property. Plaintiff was the former housekeeper of the decedent, while the defendant was his administrator and heir at law. Plaintiff claimed that from 1931 until 1936 she, with her son, lived at the home of the decedent, keeping house for him, and performing services for which she received compensation; that she then left the employment of the decedent; that in 1946 she and her husband visited decedent, at his request, and that in the course of the conversation decedent promised plaintiff that if she would return and care for him until his death, he would leave her all his property, real and personal; that plaintiff accepted this offer and with her husband and son did return and care for the decedent until his death, without receiving any compensation whatever. Decedent died intestate a year and four months after the plaintiff had resumed her employment with him.

The lower court held that the plaintiff and decedent, "entered into a valid and enforceable contract by which the decedent agreed to will his entire estate to complainant", and as such the administrator was ordered to distribute the personal estate to her and a trustee was appointed to convey the real estate to her.

[1] 69 A. 2d 802 (Md. 1949).

The Court of Appeals affirmed, saying:

> "We recognize that a court of equity should never be anxious to save an oral contract, especially a contract of this particular kind, from the operation of the Statute of Frauds where there is any equivocation or uncertainty in the evidence. The terms of the contract must be clear and definite and must be affirmatively established by strong and convincing evidence. The acts performed by the complainant should also be clear and definite and solely with a view to the performance of the alleged contract."

But, the Court said:

> "It is also well established that a court of equity will specifically enforce an oral agreement to devise real estate, although the agreement is within the Statute of Frauds where the promisee has fully performed his part of the agreement by rendering services whose value cannot be estimated in terms of money, and a monetary award will not place the parties in statu quo or adequately compensate the promisee."

The doctrine of part performance is almost as old as the Statute of Frauds itself, the first case to apply it having been decided within ten years after the enactment of the statute.[2] It presents an anomaly, in that it permits what

[2] Butcher v. Stapely, 1 Vern. 363, 23 Eng. Rep. 524 (1685). There has been much conflict, especially in academic circles, regarding the basic theory of the doctrine of part performance. It has been argued persuasively that the Statute of Frauds was not intended to be applicable to proceedings in equity. Costigan, *Judicial Legislation in the Interpretation of the Statute of Frauds* (1919), 14 Ill. L. Rev. 1, pointing out that prior to the enactment of the Statute, equity had required either writing or part performance by delivery of possession before granting specific performance of a contract to convey land. This conclusion is criticized in Pound, *Progress of the Law*, 33 Harv. L. Rev. 929, 933, *et seq.* (1920), where it is contended that shortly after the Statute of Frauds equity allowed specific performance of an oral contract, if possession were shown, on the theory that this constituted livery of seisin as a common law conveyance. Dean Pound calls the doctrine a "historical anomaly, only to be understood by reference to 17th and 18th century legal institutions and modes of thought in equity. . . . (It) defies logically satisfactory analytical treatment."

In Maddison v. Alderson, 8 App. Cas. 467, 475 (1883), Lord Selborne reasoned:

> ". . . the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow."

Dean Pound terms this:

> "*ex post facto* rationalization of what had gone on in equity for historical reasons. . . . The courts have not enforced and do not enforce

the statute in terms prohibits; but it is based upon equitable estoppel and fraud, on the theory that the promisor, having permitted the promisee partially to perform and so alter his position, should not be permitted to use the statute as a defense and thereby perpetrate a fraud. The majority of courts in this country and in England accept and apply the doctrine.[3]

In view of the fact that equity is acting in the face of a statute which expressly prohibits such court action, strict rules as to the acts of part performance relied upon have been developed in order to insure that there is adherence to the spirit, if not the letter, of the statute. It is generally held that the plaintiff must show that in reliance upon the contract he has so moved to his detriment, that he cannot be restored to his original position, this being necessary to furnish the justification for equity's disregard of the statute. In addition, he must also show that his acts are such that they can be reasonably explained only by the existence of the alleged contract, since only so can the underlying policy of the statute be served. As stated by Cardozo, J. in a leading case:

> "Equity, in assuming what is in substance a dispensing power, does not treat the statute as irrelevant, nor ignore the warning altogether. It declines to act on words, though the legal remedy is imperfect, unless

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the equitable claims of the plaintiff arising from fraud or part performance as such, but rather the contract itself."

Progress of the Law, 33 Harv. L. Rev. 929, 936 (1920).

See also Kepner, *Part Performance in Relation to Parol Contracts for the Sale of Land*, 35 Minn. L. Rev. 1 (1950).

In a note dealing with the Doctrine of Part Performance in Suits for Specific Performance of Parol Contracts to Convey Real Property, 101 A. L. R. 923, 935, it is stated:

> "The true basis of the doctrine of part performance, according to the overwhelming weight of authority, lies in principles of equitable estoppel and fraud; it would be a fraud upon the plaintiff if the defendant were permitted to escape performance of his part of the oral agreement after he has permitted the plaintiff to perform in reliance upon the agreement."

Maryland has followed this theory. So, e.g., in Semmes v. Worthington, 38 Md. 298, 327 (1873), it is stated:

> "The acts done must be of a substantial nature, and such, that the party would suffer an injury amounting to a *fraud* by the refusal to execute the agreement. . . . This is the ground upon which Courts of Equity interpose their aid, in cases of clear part performance of verbal agreements."

[3] Kentucky, Mississippi, Tennessee and North Carolina do not recognize the doctrine. In Kentucky and North Carolina, the courts will give the vendee a lien upon the land for the value of improvements placed there by him, less the rental value of the land during the occupation. See cases cited in Note, 101 A. L. R. 923, 944-948. *Cf.* Boehm v. Boehm, 182 Md. 254, 34 A. 2d 447 (1943); Green v. Drummond, 31 Md. 71 (1869).

> the words are confirmed and illuminated by deeds. A power of dispensation, departing from the letter in supposed adherence to the spirit, involves an assumption of jurisdiction easily abused, and justified only within the limits imposed by history and precedent. The power is not exercised unless the policy of the law is saved."[4]

In Maryland the courts have vacillated from a rather narrow and limited recognition of the doctrine, to cases like the present which, it is submitted, have extended it unduly. The doctrine was first recognized, although not applied, in *Worley v. Walling*.[5] In that case a father was alleged to have promised his daughter certain lands if she would marry someone of whom he approved. After her marriage, the father put the daughter and husband in possession of land which they held and improved for ten years. The Court recognized the doctrine of part performance but refused to apply it, saying:

> "Much stress has been laid on Walling's putting the couple in possession after their marriage, as if this could not be done, unless in pursuance of a former engagement to make the daughter a tenant in fee simple. But since the time of passing the acts relative to deeds, no inference is to be drawn from the merely suffering a man to take possession of land, except that he is to be a tenant at will."

Here there is applied strictly the basic rule limiting the application of the doctrine, — the acts of part performance relied upon must be such as can be reasonably explained only by the existence of the agreement alleged; if the acts are such that another explanation is also possible, they are not sufficient to remove the contract from the statute.

The Court of Appeals has frequently reiterated this principle. So, in *Chesapeake and Ohio Canal Company v. Young*,[6] it said:

> "Where the party claims to take the case out of the Statute of Frauds, on the ground of part performance of the contract, he must make out, by clear and satisfactory proof the existence of the contract as laid in

[4] Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273, 274 (1922).
[5] 1 H. & J. 208, 210 (1801).
[6] 3 Md. 480, 490 (1853).

> the bill; the act of part performance must be of the identical contract set up."

And in *Semmes v. Worthington*,[7] where specific performance was refused of an oral contract to convey, allegedly made in consideration for services which the plaintiff had performed for his uncle, the court said:

> "The act relied upon as part performance must, in itself furnish evidence of the identity of the contract; and it is not enough that it is evidence of some agreement, but it *must relate to and be unequivocal evidence of the particular agreement charged in the bill.*"

Similar language is found in such recently decided cases as *Boehm v. Boehm*,[8] *Kaufmann v. Adalman*,[9] and *Serio v. Von Nordeck*.[10]

If this is to be regarded as the basic rule governing the application of the doctrine of part performance, as the Court of Appeals has from the beginning insisted, then it seems obvious that acts of part performance which consist entirely of the rendition of personal services to the alleged promisor are insufficient to satisfy it. They furnish absolutely no necessary indication of the existence of any contract for the sale of land, let alone the particular contract alleged, for they are reasonably explainable, not only on the basis of the contract alleged, but as well on the basis of a promise to pay money or to make a bequest of money or chattels. Nothing points unequivocally to a contract to leave land, or any particular land, and there is no exclusive possession of the land claimed or the making of substantial improvements thereon by the promisee, as normally required to evidence such an agreement.[11] Where the services rendered are of an ordinary nature and as such can be compensated for by damages at law there is of course no justification in any event for granting specific performance, since the promisee can recover the value thereof on a *quantum meruit*. But even where the services are unique, or the promisee is a relative or close friend of the promisor and offers love, affection, society and friendship above and beyond the ordinary services rendered, such services, though incapable of measurement in terms

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[7] 38 Md. 298, 326 (1873). Italics are the Court's.
[8] 182 Md. 254, 265, 34 A. 2d 447, 452 (1943).
[9] 186 Md. 639, 651, 47 A. 2d 755, 761 (1946).
[10] 189 Md. 388, 392, 56 A. 2d 41, 42 (1947).
[11] See *Restatement, Contracts*, Sec. 197.

of money, are, it is submitted, no more unequivocally referable to a particular contract to leave particular land than ordinary services and equally fail to satisfy the basic rule as to the kind of part performance necessary to take an oral contract out of the Statute of Frauds.

The Maryland decisions, which like the instant case hold to the contrary, and regard rendition of unique services as sufficient stem from the case of *Neal v. Hamilton*.[12] In that case plaintiff, stated by the Court to have been regarded as a "natural grandchild" by the decedent, alleged a promise by the decedent to leave her all his property, in reliance upon which she left a job as a waitress, paying $35 to $55 per week, on which she supported her mother and herself. She became the cook, housekeeper, nurse and companion of the decedent for $12 a week plus room and board for herself and her mother, taking care of him and giving him her society and companionship. Decedent died intestate within twenty-one months and the plaintiff sought specific performance. The Court of Appeals granted specific performance, saying:

> "While the performance of ordinary services will not take an oral contract out of the Statute of Frauds, if the value of such services can be ascertained with reasonable accuracy in an action at law, and adequately compensated by a recovery of damages, yet where it is impossible to restore the plaintiff to his original position by any legal remedy, the essential condition of equity jurisdiction in case of part performance is fulfilled, and the rendition of the services will take the parol contract out of the Statute of Frauds. . . . The promisor . . . craved companionship and affection, and a comfortable home brightened by the presence of the plaintiff. . . . The plaintiff dutifully supplied what he sought, and it is impossible to estimate their value to the intestate by any pecuniary standard."

The requirement, so frequently stated before and since, that the acts of part performance relied upon must be *unequivocally* referable not only to some contract but to the very contract alleged, was practically ignored, the Court saying merely:

> "The acts of part performance are referable to, and consistent with the contract alleged."

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[12] 159 Md. 447, 451, 150 A. 867, 869 (1930).

It is submitted that they were clearly equally referable to, and consistent with, a promise to provide for the plaintiff by a cash bequest.

It would seem accordingly that the rule in Maryland as to acts of part performance sufficient to take a parole contract to convey or devise land out of the Statute of Frauds must be stated as follows: — The acts of part performance relied upon must be unequivocally referable, not to *some* agreement, but to the particular agreement alleged, *except* where such acts take the form of the rendition of unique services in which case they need not be unequivocally referable to the alleged agreement but only consistent therewith.

Although many courts have adopted this exception to the general doctrine of part performance,[13] it is submitted that it is both an illogical and an exceedingly dangerous one. The ease with which fraudulent claims may be urged upon the court is at once apparent. This type of case is, indeed, an excellent example of what the Statute of Frauds was designed to prevent. The mere fact that the promisor in these cases is dead should alert the courts to the unlimited possibilities of fraud. It is comparatively easy to allege a promise never actually made, and comparatively difficult to disprove it. The reasons leading to the enactment of the Statute of Frauds apply therefore with particular force and it would seem that in consequence the rule requiring acts to have been done which clearly and unequivocally point to the contract alleged and can in no other way be accounted for, should be particularly strongly insisted upon. The Court of Appeals has in fact said only recently, that in oral contracts to dispose of property by will "the requirement as to part performance may perhaps be more exacting than in cases of ordinary contracts of sale."[14]

The Court of Appeals has, however, followed *Neal v. Hamilton,* in two other cases prior to the instant case and its holding must therefore be regarded as now firmly established in Maryland. In *Mannix v. Baumgardner,*[15] the plaintiff was the stepdaughter of the decedent. She alleged a promise by the decedent that he would leave her his entire estate, if she would care for him for the remainder of his life. Specific performance was granted on the

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[13] See cases cited in Note, 101 A. L. R. 923, 1097 *et seq.*
[14] Serio v. Von Nordeck, 189 Md. 388, 392, 56 A. 2d 41, 42 (1947).
[15] 184 Md. 600, 42 A. 2d 124 (1945).

authority of *Neal v. Hamilton,* the services being held unique and not capable of compensation in money.

In *Nichols v. Reed,*[16] the plaintiff had been reared as a son in the home of the decedent. Plaintiff alleged a promise to leave him certain land if plaintiff and his wife left their home and employment and took care of decedent until his death. Plaintiff complied, and cared for decedent from 1938 until 1941. At eighty years of age, the decedent told plaintiff and his wife to leave the premises, in view of his forthcoming marriage stating, however, that this would not affect the agreement. Decedent married and died two months later. The Court granted specific performance, saying:

> "Oral contracts to devise land are legal, if the services constituting the consideration for the devise are not ordinary services and are such services that are classified as unique and peculiar services."

Even so, the instant case seems to carry the rule of *Neal v. Hamilton* to an extreme point, for it was emphasized in that case, and in those following it, that the services relied upon as part performance must be peculiar and unique and that rendition of ordinary services presented no ground for granting equitable relief. In *Neal v. Hamilton,* the plaintiff was the granddaughter of the promisor's late wife, and natural love and affection was a factor in the relationship of the parties. This was true also in *Mannix v. Baumgardner,* where the plaintiff was the stepdaughter of the decedent, and in *Nichols v. Reed,* where the plaintiff had been reared as a son in the home of the promisor.

In the instant case, however, the plaintiff was merely a former employee who rendered ordinary domestic services and nothing further. Many cases have held that nursing, housekeeping, and domestic services, such as were here involved, are capable of valuation in money, are in no way peculiar or special in nature and do not constitute part performance sufficient to justify specific performance of alleged parole contracts to devise land.[17]

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[16] 186 Md. 317, 321, 46 A. 2d 695, 697 (1946).

[17] See cases cited in Note, 101 A. L. R. 923, 1104 *et seq.* and *cf.* Weaver v. King, 184 Md. 283, 40 A. 2d 511 (1945) and Fitzpatrick v. Michael, 177 Md. 248, 9 A. 2d 639 (1939).