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PERFORMANCE OF SERVICES AS GROUNDS FOR TAKING AN ORAL CONTRACT OUT OF THE STATUTE OF FRAUDS

It is generally held that an oral promise to leave land to the promisee at the death of the promisor in return for the promisee's caring for the promisor during his life comes within the provision of the Statute of Frauds relating to oral contracts to convey lands. This raises the question whether such a contract should be specifically enforced where there has been complete performance by the promisee. A case of this kind often arises where the aged person has orally promised to grant land in return for services and delays making a conveyance because he is afraid that the promisee will not render services after the land has been conveyed to him, and the promisor finally dies without having made a conveyance. If the promise is to devise land, the promisor is afraid that if he executes a will the promisee will learn of this fact and, being anxious to enjoy the fruits of his services, will take steps to bring the promisor to a premature death. Harboring this fear, the promisor finally dies intestate.

There is quite a diversity of opinion among the American courts as to whether or not such a contract should be specifically enforced where there has been part performance. Some courts apply the letter of the statute and leave the plaintiff to his remedy at law. The weight of authority, however, seems to be that specific performance should be granted.

Note.—Some courts hold that taking possession of the land is a

1 Judy v. Gilbert, 77 Ind. 96, 40 Am. Rep. 239; Berge v. Hiatt's Admr., 82 Ky. 666; Grant v. Grant, 29 Atl. 15 (Conn.).
which grant specific performance may be divided into two
groups: those holding that full performance by the plaintiff *ipso facto* justifies specific performance, the other group holding that
the services rendered must be of such an unusual nature that it
is impossible to determine their value by a pecuniary standard.
An illustrative case of the first group is *Speck v. Dodson*,
supra (Note 3). There the plaintiff came from another state to
live with his aunt and her husband, under an oral agreement
that plaintiff should have what property they owned at their
death. In pursuance of that agreement plaintiff did live with
and care for them during their lives. The suit was between the
plaintiff and the administrator and the heirs of the decedents.
Specific performance was granted. The case of *Newbold v. Michael* well illustrates the other view. The facts of this case
are essentially the same as those of the Arkansas case. The court
refused to grant specific performance because the services ren-
dered by the plaintiff were not of such a peculiar nature that
their value could not be measured by a pecuniary standard, and
it would work no fraud upon the plaintiff to deny her specific
performance of the contract and let her recover at law for the
reasonable value of her services. This difference of result from
a similar set of facts warrants an examination of the reasons of
the courts for following the respective views.

The Statute of Frauds was passed to "preserve the title to
real property from the chances, the uncertainties and the fraud
attending the admission of parol testimony." Where the parol
contract is provable by the *acts* of the parties, thus rendering its
proof by parol testimony unnecessary, and it appears that the
acts of the plaintiff, done in reliance on the parol promise, have
cau$ed him to materially change his position to his disadvantage,
it is then contended that justice would be done by taking such
a contract out of the operation of the statute and allow specific

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prerequisite to specific performance, *Weeks v. Lund*, 45 Atl. 249, 69 N.
H. 78; *Faunce v. Woods*, 5 Fed. (2d) 753. Where several separate
tracts are the subject matter, possession of one has been held to be
sufficient possession of all, *Bryson v. McShane*, supra, Note 3. In Texas
there may be specific performance only when the vendee has been
placed in possession of the land and has made valuable and permanent
improvements thereon, *Terry v. Graft*, 87 S. W. 844. There must be a
change of position in reliance upon the contract, or the promise must
be induced by a change which has already taken place, *Faunce v. Woods*, supra.

*144 N. E. 715* (Ohio).
performance, without regard to whether or not the value of the plaintiff's services may be determined by a pecuniary standard. The mere fact that there has been part performance is deemed sufficient. This is the view of the first group. The contract must be established, however, by evidence that is clear, positive and convincing. The courts coming within the second group contend that proof of the oral contract by the acts of the parties is fraught with just as much danger as is its proof by parol testimony. These courts further contend that the statute was intended to apply to equity courts the same as to law courts and only in an extreme case, as for example where the services are of such a peculiar nature that their value cannot be measured in money and to deny plaintiff specific performance would work a virtual fraud on him, should a court of equity exempt the case from the statute. Ohio, Illinois, California, New Jersey and New York follow this strict rule. There are other jurisdictions represented by Kansas, Minnesota and West Virginia which hold that the services must be of such a nature that their value is not readily measurable by a pecuniary standard, but a less stringent rule is applied in determining what services are thus characterized.

There are various reasons advanced to justify specific performance of these contracts. The soundest and most common reason is the impossibility of determining the pecuniary value of the services and if specific performance were denied it would work a virtual fraud on the plaintiff since he would have no adequate remedy at law. Again it is said that if the acts of the parties are sufficient to show clearly an agreement to sell, neither party should in equity be heard to complain of its specific enforcement. This is clearly an application of the theory of estoppel. Another argument is that the parties did not intend that the services should be compensated for in money and courts of equity should effectuate this intention where one party has fully performed. Some courts feel that as the decedent re-

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2 Taylor v. Holyfield, 130 Pac. 208 (Kan.); Svenburg v. Fosse, supra, Note 3; Bryson v. McShane, supra, cited in Note under 3.
3 Lathrop v. Marble, supra, Note 3.
ceived what he contracted for, it is equitable that plaintiff should have specific performance.\textsuperscript{8}

It is a well established rule that damages can never be recovered at law for the breach of a contract which does not comply with the Statute of Frauds. But if all or a part of the purchase price has been paid or services rendered, there is a remedy at law available. There can be recovery for money had and received or on a quantum meruit for the reasonable value of the services rendered.\textsuperscript{9} The only right which accrues to the plaintiff on the contract is the right of specific performance in equity, and this right exists only when there is not an adequate remedy at law. In the class of cases under consideration an adequate remedy at law is unavailable only when the value of the services are not susceptible to measurement by a pecuniary standard. This is a sound and fundamental equitable principle. It would seem then that the cases in which specific performance is allowed merely on the ground of part performance, without regard to whether or not the plaintiff has an adequate remedy at law, do not rest on a sound principle. The plaintiff is given a remedy on the contract when really no right on it has accrued to him.

The fact that there is such great conflict of opinion among the courts on this class of contracts is cogent proof that their equitable solution is difficult. Such a case requires the exercise of the most careful discretion by the chancellor. The rendering of services is an equivocal act, i.e., it does not necessarily refer to an agreement to grant or devise land. Even if the contract is established there remains the problem of proving the particular land or the amount of the land which was the subject-matter of the contract.

**CONCLUSION**

From a study of this class of cases it seems that the equitable principle best governing their determination would be as follows: Where the plaintiff has rendered ordinary personal or professional services, the value of which is readily measurable by a pecuniary standard, his injury is not irreparable and specific performance should be denied. If, however, the terms of the oral contract are clearly proved and have been fully per-


\textsuperscript{9} Kilg v. Bordner, 61 N. E. 143, 65 Ohio State 86.
formed by the plaintiff causing him to irretrievably change his position to his disadvantage, and the services which he has rendered are of such a peculiar nature that their value is not susceptible to measurement by a pecuniary standard, then he is without an adequate remedy at law. To deny him specific performance would be manifestly unjust and would work a virtual fraud on him; to prevent this a court of equity should specifically enforce the oral contract.

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