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Oral Contracts to Dispose of Property at Death

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where it has been plainly discredited, even in the field where it has had its origin.[20] Especially is this true in this case where the prisoner has adequate tort remedies.

Therefore, it is the conclusion of the writer that the holding in the principal case is the correct view. The reason for the Common Law doctrine no longer exists inasmuch as plaintiff has a remedy against the offending officer where he can prove actual harm. Accordingly, the doctrine of trespass ab initio should be discarded.

—Ted James.
1943

[20]PROSSER ON TORTS p. 157. *Supra*, note 8.

ORAL CONTRACTS TO DISPOSE OF PROPERTY AT DEATH

In *Gravelin* v. *Porier*[1] the plaintiff sued the administrator upon an oral agreement of deceased to leave the plaintiff a "child's share in the estate." The estate was composed of both real and personal property. The Supreme Court held that such an oral agreement was within the Montana statute of frauds[2] both as an "agreement for the sale of real property" and an "agreement for the sale of goods." In *Rowe* v. *Eggum*[3] an oral agreement not to change an existing will was also held to be within the statute of frauds.

In these cases Montana is in accord with the prevailing rule.[4] However, in other states, distinctions are sometimes made so that certain types of such oral agreements are withdrawn from the statute of frauds.[5] For example, a contract to die intestate has been held not to be within the statute.[6] But tho there are no direct decisions on these distinctions, the language

[1](1926) 77 Mont. 260, 250 P. 823.
[2]R. C. M. 1935, §10, 613.
[3](1938) 107 Mont. 378, 87 P. (2d) 189.
[4]Holz v. Stephen (1936) 362 Ill. 527, 200 N. E. 601, 106, A. L. R. 737; Nelson v. Schoonover (1913) 89 Kan. 388, 131 P. 147; Hamilton v. Thirston (1901) 93 Md. 213, 48 Atl. 709; Alexander v. Lewes (1918) 194 Wash. 32, 175 P. 572; Thompson v. Weimar (1939) 1 Wash. (2d) 145, 95 p. (2d) 772. SCHOULER, WILLS (6th ed. 1923) §696, p. 795. *Frauds, Statute of*, 24 C. J. §170.
[5]Schnebly, *Contracts to Make Testamentary Dispositions*, 24 *Mich. L. Rev.* 749 (1926).
[6]Stahl v. Stevenson (1918) 102 Kan. 447, 171 P. 1164; Quinn v. Quinn (1894) 5 S. D. 328, 58 N. W. 808, 49 Am. L. R. 875.

of the rest of the Montana cases[7] supports the conclusion that all types of oral contracts to dispose of property at death are within the Montana statute of frauds.

Since such contracts come within the statute, the promisee is barred from an action at law.[8] However, in many cases the promisee has given valuable consideration in reliance on the oral promise. In order to prevent the statute of frauds from becoming an instrument of fraud in such cases, equity courts have adopted the equitable doctrine that "part performance" will in some circumstances take the case out of the statute. This doctrine is based on the general interpretation that the statute of frauds does not affect the legality of the contract but is a rule of evidence as to the method of proof. Thus in equity "part performance" in some cases is held to be an adequate substitute for the written evidence which the statute requires in law.[9]

The Montana Supreme Court has applied the doctrine of part performance in several fields,[10] including contracts to dispose of property at death.[11] Section 10,611 of R. C. M. 1935 specifically provides that the doctrine may apply to transfers of real property required to be in writing. However, the Court in the cases under consideration has not found it necessary to mention this section, but has relied on the generally accepted rule

[7]Burns v. Smith (1898) 21 Mont. 251, 53 P. 742; Lincoln v. Huffine (1916) 52 Mont. 585, 160 P. 820; Wilburn v. Wagner (1921) 59 Mont. 386, 196 P. 978; Sanger v. Huguenel (1922) 65 Mont. 236, 211 P. 341; Wonderlich v. Holt (1929) 86 Mont. 260, 283 P. 423; Langston v. Currie (1933) 95 Mont. 57, 26 P. (2d) 160; Erwin v. Mark (1937) 105 Mont. 361, 73 P. (2d) 537.

[8]Thompson v. Weimar (1939) 1 Wash. (2d) 145, 95 P. 2d 772. 2 PAGE, THE LAW OF CONTRACTS (2d ed. 1919) §1372, p. 2362.

[9]Gravelin v. Porier, *supra* note 1; O'Hara v. Lynch (1915) 172 Cal. 525, 157 P. 608. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) §96, p. 232.

[10]McIntyre v. Dawes (1924) 71 M. 367, 229 P. 846; Eccles v. Kendrick (1927) 80 M. 120, 259 P. 609.

[11]It is interesting to note that California with the identical statute of frauds decided that contracts to convey property at death did not fall within the statute. Monsen v. Monsen (1916) 174 Cal. 97, 162 P. 90. Owens v. McNally 113 Cal. 444, 45 P. 710 cites itself as the first California case on the subject and was decided in 1896. R. C. M. 1935, §7519 is identical to California Civil Code §1624 and was first enacted in 1871. R. C. M. 1935, §10,613 is identical to California Code of Civil Procedure §1973 and was first enacted in 1895. Thus, the Montana Supreme Court was free to follow its own interpretation. However, in 1905 and 1907, California amended her statute of frauds to specifically provide that an "agreement to devise or bequeath" must be in writing. Then in Trout v. Olgivie (1919) 41 Cal. App. 867, 182 P. 333 the California Court decided that now even part performance would not remove such cases from the statute.

which it codifies.[12] As to personalty, the Supreme Court said in *Gravelin* v. *Porier* at page 830 of 250 Pacific[13] that the

> "... equitable doctrine of part performance does not apply to all such contracts, but courts of equity decree specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy."

This suggests, that although the same test of inadequacy of damages is applied to both realty and personalty, damages are more likely to be inadequate in contracts involving realty because of the peculiar nature of that type of property.

The acts necessary to constitute part performance are the same generally for this type of contract as for other contracts.[14] These two tests are generally laid down, both of which must be met:[15] First, the acts must be such that the promisee cannot be restored to his original condition, even by compensation in money. Second, the acts must be referable exclusively to the oral contract. Montana has adopted the first test as shown by the quotation from *Gravelin v. Porier* above. Montana has adopted a liberal interpretation of this test. *Erwin* v. *Marks*[16] involved an oral contract to bequeath $4000.00. It was held that personal services such as writing letters and confidential advice, "which could not be purchased or had on an ordinary employment basis" were sufficient to constitute part performance. In fact, the Supreme Court went further and said as dictum that specific performance might be had "regardless of the character of the service rendered," if the remedy at law were inadequate. Thus, personal services would be sufficient part performance even tho compensable in damages if the exact amount of such damages could not be proved in law. However, it may well be doubted if this dictum will be followed in view of the generally established rule to the contrary.[17]

[12]California has interpreted a similar statute, California Civil Code §1741, to mean that the doctrine of part performance should be confined to contracts relating to the sale of land. Trout v. Olgivie, *supra* note 11. On the other hand, Idaho has interpreted an identical statute, Idaho Code of Civil Procedure §7975, to mean that part performance would apply to both real and personal property. Bedal v. Johnson (1923) 37 Idaho 359, 218 P. 641.

[13]77 M. at page 270. *Supra* note 1.

[14]Coleman WILLS-CONTRACTS TO DEVISE, 10 TEXAS L. REV. 358 (1932); 15 L. R. A. (N. S.) 466.

[15]2 PAGE, THE LAW OF CONTRACTS (2d ed. 1919) §1373, p. 2364.

[16](1937) 105 M. 361, 73 P. (2d) 537.

[17]Morrisson v. Land (1915) 169 Cal. 580, 147 P. 259; Monsen v. Monsen (1916) 174 Cal. 97, 162 P. 90; Ballou v. First National Bank of Colorado (1935) 98 Colo. 101, 53 P. (2d) 592.

The Supreme Court has also adopted the second test and said that:

"... the acts of the claimant (should be) referable alone to the contract."[18]

Some courts hold that there can be no act of part performance for the sale of realty in which possession is not taken under the contract.[19] Texas even goes so far as to require payment of the consideration, possession by the vendee, and the making of valuable improvements.[20] In Montana possession is not the *sine qua non* of part performance. In *Gravelin* v. *Porier*[21] the surrender of a child by the mother to the promisor for adoption was held to be full performance and to remove the case from the statute of frauds. In *Rowe* v. *Eggum*[22] the promisee was in possession, but possession was taken under a separate lease. The personal service of the promisee in caring for and nursing the promisor was held to be sufficient part performance even tho realty was involved.

As for oral contracts to bequeath personalty, for example money, possession is clearly not essential for part performance.[23]

In *McIntyre* v. *Dawes*[24] the Supreme Court said at page 849 of 229 Pacific that an oral contract "... unless removed from the statute by an exception was not only invalid and unenforceable, but evidence of its contents may not be received."[25] Therefore, acts which meet the requirements of part performance must first be shown to prove the existence of such a contract; and only after such proof will parol evidence be admitted to show the contract itself and its terms.[26]

Even after part performance has been shown so as to justify the admission of oral evidence, the plaintiff still has many difficulties to hurdle before he can sustain his burden of proof of such contracts. First, he is met with R. C. M. 1935 section 10,535, subdivision 3 which provides that a party may not be a

[18]Sanger v. Huguenel (1922) 65 M. 236, 211 P. 341. The case cites Bauman v. Kusian (1913) 164 Cal. 582, 129 P. 986, 44 L. R. A. (N. S.) 756. Also: McIntyre v. Dawes, note 10 *supra*.
[19]Burns v. McCormick (1922) 233 N. Y. 230, 135 N. E. 273; Farin v. Matthews (1912) 62 Or. 517, 124 P. 675, 41 L. R. A. (N. S.) 184.
[20]Hooks v. Bridgewater (1921) 111 Tex. 122, 229 S. W. 114, 15 A. L. R. 216.
[21]Note 1 *supra*.
[22]Note 3 *supra*.
[23]Erwin v. Marks, note 16 *supra*.
[24]*Supra* note 10.
[25]Accord: Dreidlein v. Manger (1923) 69 M. 155, 220 P. 1107.
[26]POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d. ed. 1926) §107, p. 257.

witness in a claim against an estate as to direct transactions or oral communications between himself and deceased, unless it appears in the court's discretion that without his testimony injustice will be done. Thus, the plaintiff, or other parties claiming under the oral contract, will be prima facie incompetent witnesses. The trial court will not be justified in admitting such testimony at its discretion until sufficient other evidence is offered to make it reasonably appear that otherwise injustice will be done.[27] However, the court may then at its discretion admit such testimony if it finds that otherwise the plaintiff will be unable to make out a prima facie case, and may refuse such testimony if plaintiff has already made out a prima facie case.[28] Even after they are admitted, such "Declarations against interest are said to be the weakest and least satisfactory of any evidence in persuasive value."[29]

Further, plaintiff will find that such oral contracts are "generally not favored,"[30] "are regarded with suspicion,"[31] "are scrutinized with peculiar care,"[32] and that the "courts have grown conservative as to the nature of evidence required to establish them."[33] So Montana requires that such contracts ". . . be supported by clear, strong, and convincing evidence."[34] But this requirement is said to apply to the quality of the evidence and not the quantity. Thus, a preponderance of the evidence is held sufficient to sustain the allegations of the complaint.[35]

If such an oral contract is established by the preponderance of the evidence, plaintiff should be entitled to some remedy. The most common remedy is relief ". . . in the nature of specific performance." Clearly in a contract to make a will, strict specific performance is impossible since the testator is dead. However, the same result is had by fastening a trust on the property in the hands of the heirs or personal representatives.[36] But before such relief is given these oral contracts must

[27]Marcellus v. Wright (1923) 65 M. 580, 212 P. 299; Wunderlich v. Holt (1929) 86 M. 260, 283 P. 423; Langston v. Curie (1933) 95 M. 57, 26 P. (2d.) 537.
[28]Roy v. King's Estate (1919) 55 M. 567, 179 P. 821; Rowe v. Eggum, *supra* note 3.
[29]Langston v. Curie, *supra* note 27. Also Sanger v. Huguenel, (1922) 65 M. 236, 211 P. 349; Escallier v. Great Northern Ry. Co. (1912) 46 M. 238, 127 P. 458, Ann. Cas. 1914 B, 468.
[30]Sanger v. Huguenel, *supra* note 29.
[31]Alexander v. Lewes (1918) 104 Wash. 32, 175 P. 572.
[32]Bauman v. Kusian, *supra* note 18.
[33]Davis v. Manson (1918) 102 Atl. 714, 40 R. I. 567.
[34]Sanger v. Huguenel, *supra* note 29; Langston v. Curie, *supra* note 27; Rowe v. Eggum, *supra* note 3.
[35]In re Wray's Estate (1933) 93 M. 525, 19 P. (2d) 1051.
[36]Sanger v. Huguenel, *supra* note 29; Rowe v. Eggum, *supra* note 3.

meet the same requirements as other contracts before specific performance is granted.[37] Such contracts ". . . must be based on a valuable consideration; their terms must be reasonably certain as to their stipulations, their purposes, their parties, and the circumstances under which they were made."[38] Such contracts must also ". . . be free from all ambiguity,"[39] and " . . . must be fair and equitable."[40] Nor will such a contract be specifically enforced when rights of innocent third parties intervene.[41]

As has already been pointed out, since such oral contracts are within the statute of frauds, no action at law lies for breach of such contract.[42] However, in case plaintiff is unable to prove an oral contract so as to meet the requirements necessary for specific performance, he may still sue in quantum meruit for the value of services rendered. In such a suit no specific contract need be shown. In fact, it is error to permit evidence of the terms of such an oral contract, unless it is removed from the statute of frauds.[43] It has also been held that a prior suit in quantum meruit if dismissed, is not a bar to a subsequent suit for specific performance."[44]

Under some circumstances, plaintiff may be able to impose a constructive trust upon the property involved with the promisor or his heirs or representatives as trustee. This remedy is available only in the case of an intended testamentary disposition, which is thwarted by the promise of one in a confidential relation to the intending testator. The promisor then takes subject to performance; and a breach by him, whether fraudulent in intent or not, creates a constructive trust in favor of the original intended beneficiary.[45]

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[37]58 C. J. *Specific Performance* §309.
[38]Sanger v. Huguenel, *supra* note 29. Accord: Rowe v. Eggum, *supra* note 3.
[39]Wilburn v. Wagner (1921) 59 M. 386, 196 P. 978.
[40]Langston v. Curie, *supra* note 27.
[41]Owens v. McNally (1896) 113 Cal. 444, 45 P. 710; Gall v. Gall (1893) 138 N. Y. 675, 34 N. E. 515.
[42]*Supra* note 8. Accord: Hull v. Thomas (1910) 82 Conn. 647, 74 Atl. 925; Hamilton v. Thirston (1901) 93 Md. 213, 48 Atl. 709.
[43]Dreidlein v. Manger (1923) 69 M. 155, 220 P. 1107.
[44]Rowe v. Eggum, *supra* note 3.
[45]Huffine v. Lincoln (1916) 52 M. 585, 160 P. 820.