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Part Performance and Equitable Estoppel in Tennessee

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PART PERFORMANCE AND EQUITABLE ESTOPPEL IN TENNESSEE

The Tennessee chancery courts have repeatedly been petitioned for the specific enforcement of parol contracts for the sale of land, on the basis of part performance.[1] The Tennessee Supreme Court has consistently refused to give such relief, emphatically laying down the rule that part performance of a parol contract for the sale of land does not serve as a substitute for the writing required by the Statute of Frauds.[2]

In the comparatively recent federal case, *Interstate Co. v. Bry-Block Mercantile Co.*,[3] Judge Anderson considered the possibility that some equitable doctrine such as equitable estoppel might prevent the parol vendor from asserting the Statute of Frauds as a defense to an action for the enforcement of a parol contract for the sale of an interest in land. In this case an unsigned five-year lease was given the lessee, who went into possession, made valuable improvements and expended large sums of money preparing the premises for his use. A conflict as to the terms of the lease arose, and the lessee sought to enjoin the lessor from molesting him in his possession. The lessor relied on the Statute of Frauds as a bar to the action. The court pointed out that it was bound by and was following Tennessee law and held that equitable estoppel prevented the lessor from relying on the Statute of Frauds. In this case there was such part performance of the parol contract as to entitle the lessee to specific performance of the contract of lease in those jurisdictions recognizing the doctrine. Thus, by issuing the injunction in the *Bry-Block* case the court reached substantially the same result other courts would have in applying the doctrine of part performance.

The purpose of this note is to determine the extent to which Tennessee courts will recognize and enforce parol contracts for the sale of an interest in land when the petitioner relies on such equitable doctrines as equitable estoppel, constructive trust or part performance; to point out the distinctions between equitable estoppel and part performance, as applied to the Statute of Frauds in Tennessee; and to analyze the cases to determine the extent to which the de-

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1. The term "part performance" is a misnomer; because when a parol purchaser goes into possession and makes improvements on the land, etc., he is not, in the usual situation, performing any obligation under the parol contract. However, the term is inveterate and will be used for the purposes of this note.

2. "No action shall be brought: . . . (4) Upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year; . . . Unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized." TENN. CODE ANN. § 7831 (Williams, 1934).

3. 30 F. 2d 172 (W. D. Tenn. 1928).

cision of a particular case may depend on whether the petitioner relies on equitable estoppel, parol trust or part performance.

DEFINITIONS AND APPLICATION

In general, the jurisdictions which recognize that part performance takes the case from the literal application of the Statute of Frauds require as a condition that one of the following elements be present: (1) the taking of possession pursuant to the parol contract, with the vendor's permission or acquiescence, plus the making of valuable improvements on the land, or (2) the taking of such possession, plus the payment of part or all the purchase price.[4]

A clear and concise definition of equitable estoppel or estoppel in pais cannot be given, as the doctrine is co-extensive with equity and good conscience.[5] Each case in this growing branch of the law must rest on its own peculiar facts.[6] For these reasons, decided cases are of less value than in many other fields of the law. However, a general working set of requisites found in a current legal encyclopedia is: "The essential elements of an equitable estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material fact or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth of the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially." [7]

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4. The above statement of requisites is not meant to cover all the possible situations. Note also that it is assumed that the contract is one which the courts would otherwise specifically enforce. See *e.g.*, Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383 (1895); Hunt v. Boyce, 176 Ark. 303, 3 S. W. 2d 342 (1928); Price v. Bell, 91 Ala. 180, 8 So. 565 (1890); Dunckel v. Dunckel, 141 N. Y. 427, 36 N. E. 405 (1894); Note, 101 A. L. R. 923 (1936); POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS § 134 (1879); 4 POMEROY, EQUITY JURISPRUDENCE § 1400 *et seq.* (5th ed. 1941); 49 AM. JUR., *Specific Perf.* § 1 (1943). 2 WILLISTON, CONTRACTS § 494 (Rev. ed. 1936).

5. Hume v. Bank, 77 Tenn. 728 (1882).

6. Covington v. McMurry, 4 Tenn. C. C. A. 378 (1913); Currens v. Lauderdale, 118 Tenn. 496, 101 S. W. 431 (1907); Galbraith v. Lunsford, 87 Tenn. 89, 9 S. W. 365 (1888); Neal v. Cox, 7 Tenn. 443 (1824).

7. 19 AM. JUR., *Estoppel* § 42 (1939). A similar definition is found in 3 POMEROY, EQUITY JURISPRUDENCE § 805 (5th ed. 1941). "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded . . . from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." 3 POMEROY, EQUITY JURISPRUDENCE § 804 (5th ed. 1941), quoted with approval in Mem-

In order to illustrate the application of the doctrines of equitable estoppel and part performance, suppose the following factual situation: *A* contracts by parol to sell land to *B*. *B* goes into possession, builds a dwelling and appurtenances on the land, encloses the same and resides thereon for several years and then sells the land to *C*, who further improves the land. *A* now seeks to eject *C*, who brings his bill in equity praying for specific performance of the contract between *A* and *B*, and an injunction against the action at law.[8]

Assuming that the contract would be enforced but for the absence of the writing required by the Statute of Frauds, a clear case of part performance is presented. Possession was taken by the parol purchaser in pursuance of the contract and valuable improvements made on the land. The strictest jurisdiction which recognizes the doctrine of part performance would specifically execute the parol contract.[9]

If *C* knew nothing of the relationship between *A* and *B*, a clear case of equitable estoppel is presented.[10] *A*'s conduct in standing by and seeing *B* deal with the land as though it were his, exercising the power of ownership to the point of alienation, without making known his claim, was a representation of fact. It could be argued that it was a question of law whether *B* had the indefeasible title which he purported to convey to *C*.[11] But it is a fact that *A* had consciously acquiesced in *B*'s dealing with the land as though he were the owner in fee, and in effect represented to *B*, *C* and the world that *B* had the power and the right to convey the land to *C*. When *A* stood by for several years and saw *B* building and improving the land, it is reasonable to say he expected third persons to rely on his conduct and assume that *B* was the owner in fee. That *A* knew the true facts as between himself and *B*, there is no question.

C, who is claiming the benefit of the estoppel, did not know but that *B* had an indefeasible title, and may be regarded as having relied on the conduct (silence and acquiescence) of *A*, purchased the land, went into possession and had materially changed his position by expending money, time and labor in improving the premises. During the period of *C*'s possession, before suit, *A* had acquiesced in *C*'s acts of ownership. In such case, is *A*, who is in a court of conscience, to be allowed to set up a technical legal defense to *C*'s

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phis Consolidated Gas and Electric Co. v. Simpson, 118 Tenn. 532, 540-41, 103 S. W. 788, 790 (1907).

8. The hypothetical situation is very similar to that of Patton v. M'Clure, 8 Tenn. 333 (1828).

9. See Note, 101 A. L. R. 923-33 (1936).

10. Covington v. McMurry, 4 Tenn. C. C. A. 378 (1913); Currens v. Lauderdale, 118 Tenn. 496, 101 S. W. 431 (1907); Gheen v. Osborne, 58 Tenn. 61 (1872); Patton v. M'Clure, 8 Tenn. 333 (1828); Neal v. Cox, 7 Tenn. 443 (1824); Notes, 101 A. L. R. 923, 935 (1936), 75 A. L. R. 650 (1931).

11. That a mistake of law does not affect rights, see Tate v. Tate, 126 Tenn. 169, 148 S. W. 1042 (1912); Parkey v. Ramsey, 111 Tenn. 302, 76 S. W. 812 (1903). Summers, *The Doctrine of Equitable Estoppel Applied to the Statute of Frauds*, 79 U. OF PA. L. REV. 440, 457 (1913).

claim? He will not be allowed to plead the Statute of Frauds; he will be estopped to do so.[12] To hold otherwise would be to allow *A* to perpetrate a fraud on *C*.[13]

Suppose *B* had not sold the land to *C*, but had gone into possession as in the hypothesis, made improvements and lived on the land for several years when *A* brought his ejectment action. It would appear that *B* would be in substantially the same equitable position as *C*, had he not sold the property but continued to live on it up to the time *A* sought to regain possession. Should *A* be allowed to plead the Statute of Frauds as a bar to the action? The decisions on this point in Tennessee seem to be in conflict.[14] Before pursuing this point further it is necessary to give the theoretical foundation of the doctrines of part performance and equitable estoppel.

THEORETICAL BASES OF PART PERFORMANCE AND EQUITABLE ESTOPPEL

The doctrine of part performance has been explained on two separate theories: (1) that the acts of part performance furnish clear and definite proof of the parol contract, and the statute then is inapplicable,[15] and (2) that the acts, conduct and acquiescence of the parol vendor give rise to an equity in favor of the parol purchaser, which, if not recognized, would amount to a fraud on the purchaser.[16] This theory is clearly based on the doctrine of equitable estoppel.

Many cases are not clear as to what theory is used, and seem to include a smattering of both.[17] The "proof of contract" theory is difficult to support for two principal reasons: (1) if the theory is rigidly adhered to, parol evidence is allowed to show the contract before the equities which are being enforced have been shown to exist;[18] (2) a parol contract of sale might conceivably be established beyond doubt, in a case where the parol purchaser had neither

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12. See note 10 *supra*.

13. It is true there is no fraud in the technical legal sense. "It is urged that actual fraud must exist before an estoppel can be maintained against a person sui juris. . . . It is true that there is a theory which makes the essence of estoppel to consist of fraud; but this theory is not supported by principle or authority." Galbraith v. Lunsford, 87 Tenn. 89, 104, 9 S. W. 365, 1 L. R. A. 522 (1888). But *cf.* Hackney v. Hackney, 27 Tenn. 451 (1847).

14. Covington v. McMurry, 4 Tenn. C. C. A. 378 (1913) (held an estoppel in an analogous situation); Gheen v. Osborne, 58 Tenn. 61, 69 (1872) (dictum that there would be no estoppel in such case).

15. See *e.g.*, Jones v. Jones, 333 Mo. 478, 63 S. W. 2d 146 (1933); Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273 (1922); 37 MICH. L. REV. 673 (1939).

16. Notes, 101 A. L. R. 923, 935 (1936), 75 A. L. R. 650 (1931). See BROWNE, STATUTE OF FRAUDS § 455 (3d ed. 1870); RESTATEMENT, CONTRACTS § 178, comment *f* (1932); 37 MICH. L. REV. 673 (1939).

17. *E.g.*, Texas Pacific Coal and Oil Company v. Hamil, 238 S. W. 672 (TEX. Civ. App. 1922) (where the two theories were considered in the same case). For a discussion of the cases, see 13 MINN. L. REV. 744 (1929); 2 WILLISTON, CONTRACTS §§ 533, 533A. (Rev. ed. 1936).

18. BROWNE, STATUTE OF FRAUDS § 455 (3d ed. 1870); Notes, 101 A. L. R. 923 (1936), 75 A. L. R. 650 (1931).

taken possession nor paid part of the purchase price. In such case courts voicing the "proof of contract" theory would not decree specific performance.[19] Thus, to say that the acts of part performance unequivocally establish the contract, and the Statute of Frauds is then not applicable, is to argue in a circle, coming out substantially with the equitable estoppel theory of part performance.

The majority of the jurisdictions which recoguize the doctrine of part performance as taking a case out of the Statute of Frauds do so on the theory of equitable estoppel and fraud, actual or constructive.[20] The fraud spoken of here is not necessarily the antecedent fraud, conscioiisly intended by the party making the parol agreement to sell, but the moral fraud and wrong inherent in the consequences of allowing the parol vendor to set up the Statute of Frauds as a bar to the consummation of the contract. Thus, where a parol contract for the sale of land has been made, and the vendor has knowingly aided or permitted the purchaser to go into possession, make valuable and permanent improvements, expending money and labor in reliance on the parol agreement, treating it as a valid and binding contract, all of which would not have been done except for the contract, and the relations of the parties have been materially changed, then it would be a gross injustice and moral fraud on the purchaser to allow the vendor to set up the Statute of Frauds as a bar, and secure to himself the fruits of the labor of the purchaser.[21] The Statute of Frauds was passed to prevent fraud, not to foster and encourage it.

There may be acts, conduct or language insufficient to constitute what the courts deem sufficient part performance to remove the case from the Statute of Frauds, and, nevertheless, the doctrine of equitable estoppel may be invoked to preclude reliance on the Statute of Frauds as a bar to the action.[22] From what has been said, it appears that the true theoretical basis of part performance is equitable estoppel, and equitable estoppel may be applied where the facts of the case are insufficient to constitute the requisite part performance.

The relief given in such case differs only in that in the case of part performance the contract is specifically enforced and a conveyance made, whereas, in the case of equitable estoppel, at least it would seem in Tennessee,[23] the party estopped is perpetually enjoined from in any way molesting the other party in his possession or setting up title to the premises. This type of relief, particularly in case a fee is involved, may cast a cloud on title and diminish its

19. See Notes, 101 A. L. R. 923-33 (1936), 75 A. L. R. 650-54 (1931).

20. Note, 101 A. L. R. 923, 935 n. 33 (1936) (where cases from 36 jurisdictions are cited as supporting this proposition); 75 A. L. R. 650 (1931).

21. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS § 104 (1879).

22. Vogel v. Shaw, 42 Wyo. 333, 294 Pac. 687, 75 A. L. R. 639 (1930); Note, 75 A. L. R. 650 (1931).

23. Gheen v. Osborne, 58 Tenn. 61 (1872) (held in applying the doctrine of equitable estoppel, that the Statute of Frauds prevented the specific performance yet an estoppel was shown and a perpetual injunction would issue to prevent the defendant from claiming title or in any way disposing of it).

marketability. When the end result is substantially the same, there seems to be no reason why the courts should not go all the way and decree specific performance.

PART PERFORMANCE IN TENNESSEE

The various states of the United States have substantially followed the English pattern in their Statutes of Frauds. It has been contended that previous to the enactment of the English Statute of Frauds courts of equity required a parol purchaser of land at least to have taken possession before the court would exercise its sound judicial discretion and specifically enforce the parol agreement.[24] Be that as it may, less than a decade after the passage of the English statute, courts were specifically enforcing parol agreements for the sale of land on the basis of part performance.[25] The doctrine of part performance as taking a case from the application of the Statute of Frauds is recognized today in England and all the States of the United States with the exception of four, which include Tennessee.[26]

In an early Tennessee decision the court took the attitude by way of dictum that the Statute of Frauds would be strictly construed.[27] A few years later in *Neal v. Cox*[28] the court stated that equity would specifically enforce a parol contract for the sale of land, where there had been sufficient part performance. Four years later the court decided *Patton v. M'Clure,*[29] in which it categorically denied the application of the doctrine of part performance as taking a case from the application of the Statute of Frauds in Tennessee.

In the *Patton* case, M'Clure by parol contracted to sell a ten-foot strip of land to Searcy. Searcy went into possession, built a dwelling and appurtenances on the land, enclosed the same and resided thereon until he sold the land to Patton. Patton lived on the land for several years and further improved it. Then M'Clure sought to eject Patton, and Patton brought his bill in equity praying for specific performance of the contract between M'Clure and Searcy and an injunction against the action at law. M'Clure admitted giving possession to Searcy but denied the sale and set up the Statute of Frauds. The court in reversing the Chancellor below and denying the application of the doctrine of part performance in Tennessee said, "The only question to be asked a complainant applying to the Court for aid to enforce a contract for the sale of lands, is: Have you the writing required by the Statute of Frauds . . . ? If the

24. Costigan, *The Date and Authorship of the Statute of Frauds,* 26 HARV. L. REV. 329 (1913); Hening, *The Original Drafts of the Statute of Frauds and Their Authors,* 61 U. OF PA. L. REV. 283 (1913).
25. Butcher v. Stapely, 1 Vern. 363, 23 Eng. Rep. 524 (Ch. 1685).
26. The states are: Ky., Miss., N. C., and Tenn. Note, 101 A. L. R. 923, 944 (1936).
27. Townsend v. Sharp, 2 Tenn. 192 (1812).
28. 7 Tenn. 443 (1824).
29. 8 Tenn. 333 (1828).

answer is in the negative the response by the court must in every case be the same: Your contract is void, your parol evidence inadmissable, and the Court can neither hear nor help you." [30]

Judge Catron, who rendered the opinion, felt very strongly about the rule he was laying down. He stated that he had discussed the matter extrajudicially, knowing the matter was to be brought before the court, and that his opinion was formed without "compromise with that of any brother judge." [31] The *Patton* case could have been properly decided without denying the application of the doctrine of part performance. "The bill does not even allege what consideration was to be given. . . . That Searcy ever paid anything toward the ground is not alleged, but the reverse, with submission to pay what it was reasonably worth. Here the allegation is one way, the proof another, and conflicting; and this court is asked to make so much of the contract as fixes the value of the ground, and thus cause it to be executed by a specific decree . . ." [32] The court could have properly recognized the doctrine of part performance and refused to give the requested relief on the basis that the contract was not sufficiently definite and certain to be specifically enforced. "The general rule that a contract is not sufficiently certain and definite to be specifically enforced when some of the essential terms are left for the future determination or agreement of the parties is usually applied where the contract price is left to be determined by the parties." [33] Thus, it might be said the Tennessee rule that part performance does not remove a case from the Statute of Frauds which was laid down in the *Patton* case was unnecessary to the decision of that case. Whether this retrospective analysis of the case is correct or not, the highest court of Tennessee has never departed from the rule announced in the *Patton* case, when the petitioner has based his prayer for relief on the part performance of a parol contract for the sale of land.[34]

The rule that part performance will not relieve from the application of the strict letter of the Statute of Frauds has been applied in so many cases "that it may now be regarded as a rule of property in this state." [35] In *Goodloe v. Goodloe*,[36] the petitioner at the solicitation of his aunt entered into her services upon a parol agreement that she would devise him a farm. The petitioner complied in every respect and brought his bill for specific performance and in the alternative for a decree fixing the value of his services. The de-

30. *Id.* at 346. That a parol contract for the sale of land is not void and if otherwise enforceable will be enforced if the vendor does not plead the statute see Harris v. Morgan, 157 Tenn. 140, 7 S. W. 2d 53 (1928); Choate v. Sewell, 142 Tenn. 487, 221 S. W. 190 (1919); Brakefield v. Anderson, 87 Tenn. 206, 10 S. W. 360 (1889).

31. 8 Tenn. 333, 344 (1828).

32. *Id.* at 441.

33. 49 AM. JUR., *Specific Perf.* § 29 (1943).

34. See *e.g.*, Webb v. Shultz, 184 Tenn. 235, 198 S. W. 2d 333 (1946); Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767 (1905); Patterson v. Davis, 28 Tenn. App. 571, 192 S. W. 2d 227 (1945).

35. Goodloe v. Goodloe, 116 Tenn. 252, 254, 92 S. W. 767 (1905).

36. *Ibid.*

fendant relied on the Statute of Frauds. The court said, "It is true, as insisted by complainant's counsel, that the weight of authority, English and American, is that part performance of a contract under the conditions disclosed in this record, will take the contract out of the operation of the statute of frauds. . ." [37] The case as reported does not set forth the type of services or whether the complainant took exclusive possession of the land which was to be devised to him. If the services were of a personal nature, and the complainant did not take possession and make improvements on the land, the statement above quoted may be open to question. "It may be stated as a general rule that the mere rendition of services by the plaintiff in reliance upon the defendant's parol promise to convey real estate to him, without any other act by the plaintiff, such as going into possession or making improvements, is not a sufficient part performance to warrant the specific enforcement of the oral agreement, where the services are capable of adequate pecuniary measurement and compensation." [38]

In *Webb v. Shultz*,[39] the complainants by parol agreed, for a stated consideration, to convey a fee to defendants who in turn agreed to reconvey complainants a life estate. The complainants executed a warranty deed in favor of defendants, making no exception, reservation or limitation whatsoever. The complainants remained in possession and brought a bill seeking an injunction against a sale by defendants, who relied on the Statute of Frauds. The court said, "The rule that part performance of a parol contract will not relieve from the application of the statute has become a rule of property." [40] The reason for discussion of the doctrine of part performance under the facts of the *Shultz* case is difficult to understand, for according to the definition and requisites for the application of the doctrine, none of the requisites was present in that case.[41]

Although many of the cases, laying down the rule that part performance is not recognized in Tennessee, were not true part performance cases according to the orthodox view, it may be safely stated that Tennessee has repudiated the doctrine to the extent that recognition of it in the future is unlikely. According to the langnage used in the cases, regardless of the merits in a particular case, if the complainant bases his prayer for relief on part performance of a parol

37. *Id.* at 254, 92 S. W. at 767.

38. Note, 101 A. L. R. 923, 1091 (1936). See also Schnebly, *Contracts to Make Testamentary Dispositions as Affected by The Statute of Frauds*, 24 MICH. L. REV. 749, 758 n. 20 (1926); 31 MINN. L. REV. 496 (1947).

39. 184 Tenn. 235, 198 S. W. 2d 333 (1946).

40. *Id.* at 241.

41. See note 4 *supra*. There had been no taking of possession pursuant to the contract, making of improvements or payment of part or all of the purchase price. In Jennings v. Bishop, 3 Tenn. Cas. 138 (1883), the court by way of dictum discusses the doctrine of part performance when the facts presented in the case did not call for such discussion.

contract, he is bound to lose if the vendor pleads the Statute of Frauds. The courts will, however, allow a recovery in a proper case on a quantum meruit basis or a recovery for the permanent enhancement in value of the land by improvements, accounting for reasonable rents and profits.[42]

Equitable Estoppel in Tennessee

The extent of the application of the doctrine of equitable estoppel, as taking a case from the literal application of the Statute of Frauds in Tennessee, is not as clearly defined or delimited as that of part performance. The elements of equitable estoppel previously set out may not in a particular case be indispensable to the imposition of an equitable estoppel. "It would be unsafe and misleading to rely on these general requisites as applicable to every case, without examining the instances in which they have been modified or limited." [43]

In *Patton v. M'Clure*,[44] the court considered the doctrine of equitable estoppel. Judge Catron in speaking of the doctrine said, "No such case is set forth in the bill." [45] Judge Whyte in his concurring opinion said, "That defense cannot be set up in this case; though at present I am of opinion that the case made out by the evidence would be sufficient for relief if, by the rules of practice in chancery, it could be used and applied. . . . But there is no allegation in the bill that M'Clure stood by, saw the houses built, and other acts stated in the evidence done, and made no objection, or, being present, acted and behaved himself as if assenting thereto. No proofs can be taken in a cause that are not authorized by the pleadings, and if irregularly taken they cannot be used. . ." [46]

M'Clure argued that Patton knew or should have known that Searcy, his vendor, was a parol purchaser from M'Clure, and he thus acted in his own wrong. Judge Whyte answered this by saying that M'Clure by his acts, conduct and acquiescence in permitting Searcy to live on the land and exercise all the powers of ownership, without letting it be known that he did not regard the parol sale as vesting indefeasible title in Searcy, had led Patton to rely on such conduct, to his prejudice, if M'Clure were allowed to plead the Statute of Frauds as a complete bar to the action. Further, M'Clure stood by for three more years without objecting or making his claim known while

42. See *e.g.*, Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767 (1905); Jennings v. Bishop, 3 Tenn. Cas. 138 (1883).

43. 3 Pomeroy, Equity Jurisprudence § 805 (5th ed. 1941). For Tennessee cases discussing general requisites, see Covington v. McMurry, 4 Tenn. C. C. A. 378 (1913); Currens v. Lauderdale, 118 Tenn. 496, 101 S. W. 431 (1907); Electric Light Co. v. Gas Co., 99 Tenn. 371, 42 S. W. 19 (1897); Evans v. Belmont Land Co., 92 Tenn. 348, 21 S. W. 670 (1893); Galbraith v. Lunsford, 87 Tenn. 89, 9 S. W. 365 (1888).

44. 8 Tenn. 333 (1928).

45. *Id.* at 339.

46. *Id.* at 351.

Patton lived on and further improved the premises. It is a well-established principle of equity that if one maintains silence when in conscience he should speak, equity will debar him from speaking when in conscience he ought to remain silent.[47]

"A most important application [acquiescence as creating an equitable estoppel] includes all cases where an owner of property, A, stands by and knowingly permits another person, B, to deal with the property as though it were his, or as though he were rightly dealing with it, without imposing any objection, as by expending money upon it, making improvements, erecting buildings, and the like. Of course, it is essential that the one making the expenditures should have been acting in ignorance of the title and in the supposition that he was rightful in his dealing." [48]

Where evidence of the conduct of a parol vendor, or one who simply stands by and sees another sell or deal with his land as his own, is admitted to create an estoppel, this estoppel contravenes the letter of the Statute of Frauds. "It is evident that in cases in which an estoppel of one not a party to a transaction involving real estate by failure to disclose his interest in the property affects the title to such property, the necessary effect of predicating an estoppel on the ground of silence is to supersede pro tanto the operation of the statute of frauds, in so far as it requires written evidence for the purpose of proving contracts respecting the disposition of interest in real property. All objections to the doctrine on this ground, however, have long since been abandoned." [49]

A typical case of equitable estoppel by acts of silence and acquiescence is that of *Gheen v. Osborne*,[50] in which *A*, the owner of a lot of 20-foot frontage, agreed by title bond to convey to *B*, for a valuable consideration, 26 feet. *C*, the father of *A*, owned the six feet, urged *B* to make the purchase, and was a witness to the title bond. *B* went on the land and made improvements extending over the six feet, paid part of the purchase price, and brought his bill in equity alleging that he bought the land in reliance on the representation that *A* was the owner of the 26 feet; that he had learned later that *C* had by parol sold the six feet to *A*, in order that *A* could sell the 26 feet to *B*. The bill prayed for specific execution, or if it would not be had, for abatement in purchase price and for compensation for improvements. *C* relied on the Statute of Frauds as a bar to the action, denying the entire case made against him. The court found as a fact that *A* was not authorized to act for *C*, but held that *C* was equitably estopped to set up title to the six feet. The court said by way of dictum that if *B* had known of the parol contract between *A* and *C* and had relied on it, it would have been fatal to *B*'s case. Thus, the court makes a dis-

47. Currens v. Lauderdale, 118 Tenn. 496, 101 S. W. 431 (1907); 3 POMEROY, EQUITY JURISPRUDENCE § 818 (5th ed. 1941).
48. 3 POMEROY, EQUITY JURISPRUDENCE § 818 (5th ed. 1941). See note 43 *supra*.
49. 19 AM. JUR., *Estoppel* § 92 (1939).
50. 58 Tenn. 61 (1872).

tinction between the case where *A* by parol sells to *B*, who goes on the land and makes valuable improvements, and later *A* seeks to avoid the parol sale; and the case where *A* by parol sells land to *B*, and *C* purchases the land from *B* under the assumption that *B* has good title and *A* stands by and does not assert his claim. It is submitted that the equities are substantially the same in both cases. In the first case put, where *A* by parol sells to *B* and *B*, in full reliance on *A*'s acts, conduct, acquiescence and his representation that he is conveying *B* an indefeasible title, goes on the land, living thereon, making permanent and valuable improvements on the land, if *A* is then allowed to set up the Statute of Frauds as a bar, is he not perpetrating a fraud on *B*? [51] True, the knowledge of the law is imputed to *B*, but it is likewise imputed to *A*.[52] The parol contract is not void but voidable,[53] and *A* has represented that he was conveying an indefeasible title, which, of course could not have been done if *A* may now assert the Statute of Frauds. Is *A* to be allowed to say in a court of conscience that he sold the land by parol, was satisfied with the bargain at the time, stood by and allowed *B* to act on the representation made and materially change his position, but that he now repudiates that conduct? In *Covington v. McMurry*,[54] the court held that such conduct could not be repudiated.

In the *Covington* case the defendant agreed with his mother by parol to a division of the farm left by her husband and his father; she was to relinquish her right to 108 acres of it, and he agreed to convey the remainder of the farm, 36 acres, to her in fee, but this agreement was not reduced to writing. The mother took possession of the 36 acres and retained it until her death, leaving it by will to her daughter. Plaintiff, devisee under the will, brought a bill for a permanent injunction against defendants ever claiming title in any way. Defendant set up the Statute of Frauds as a bar to the action, which the Chancellor below sustained. The court held, reversing the Chancellor, that defendant was equitably estopped to claim title. "We take it to be the law that the title to land may be divested and vested under the application of the doctrine of equitable estoppel, or estoppel in pais." [55] Is the *Covington* case not *contra* to the dictum in *Gheen v. Osborne*? [56] The decision in the *Covington* case is in conformity with the opinion of Judge Whyte in the *Patton* case.

A similar result is reached in *Bloomstein v. Clees Brothers*,[57] where there was a parol agreement as to a right of way, and the defense set up was the Statute of Frauds. The court said, "But it has long been settled that equity may control the words of the statute, in order to prevent it from being used

51. See note 13 *supra*.
52. See note 11 *supra*.
53. See note 30 *supra*.
54. 4 Tenn. C. C. A. 378 (1913).
55. *Id.* at 396.
56. 58 Tenn. 61 (1872).
57. 3 Tenn. Ch. 433 (1877).

as a cover for the commission of the fraud which it was meant to suppress." [58]

Thus, according to the holdings in the above cases, it appears that there was some authority for the position taken in the *Bry-Block* case. In that case the court said, in holding that equitable estoppel prevented the parol lessor from asserting the Statute of Frauds, "There is a great deal of dicta—much of it conflicting—as to equitable estoppel and the statute of frauds, but I can find no case where the Tennessee chancery courts have refused relief in a case whose facts would make the statute, literally applied, an instrument of hardship, oppression, and fraud. The contrary idea, though widely prevalent among the bar of Tennessee, is like the thoroughly grounded popular belief that it is a felony to strike a man who wears glasses; on investigation no such rule exists." [59]

CONSTRUCTIVE OR RESULTING TRUST DOCTRINE

The constructive or resulting trust doctrine has been used in Tennessee to avoid the harsh results accompanying the strict application of the Statute of Frauds. This doctrine was ably and comprehensively reviewed in the recent case of *Brunson v. Gladish*,[60] in which the testator devised his property in fee to his wife with no written limitation, but by parol she agreed to leave a will giving half the property on her death to his heirs and half to her heirs. She died without leaving a will, and the heirs at law of the testator sought to impose a constructive trust as to half of the property remaining at her death, and thus to enforce the parol agreement. The Court of Appeals held that the doctrine of the *Goodloe* case applied and held for the heirs of the wife. The Supreme Court reversed and imposed a constructive trust, stating that the Statute of Frauds was not applicable to a constructive or resulting trust.

CONCLUSION

The general view of part performance is that it is based on equitable estoppel and fraud, actual or constructive. Tennessee does not recognize part performance but does recognize equitable estoppel and has applied the doctrine of equitable estoppel to situations which would be recognized as part performance in jurisdictions recognizing the doctrine.[61] Yet the letter of the

58. *Id.* at 439.

59. Interstate Co. v. Bry-Block Mercantile Co., 30 F. 2d 172, 176 (W. D. Tenn. 1928).

60. 174 Tenn. 309, 125 S. W. 2d 144 (1938). For other Tennessee cases dealing with the doctrine of constructive and resulting trusts as taking a case from the application of the Statute of Frauds, see Bible v. Marshall, 103 Tenn. 324, 52 S. W. 1077 (1889); McClure v. Doak, 65 Tenn. 364 (1873); Prichard v. Wallace, 36 Tenn. 212, 70 Am. Dec. 254 (1857).

61. Interstate Co. v. Bry-Block Mercantile Co., 30 F. 2d 172 (W. D. Tenn. 1928); Covington v. McMurry, 4 Tenn. C. C. A. 378 (1913). Bloomstein v. Clees Brothers, 3 Tenn. Ch. 433 (1877).

Statute of Frauds is contravened whether the means for so doing is called part performance, equitable estoppel or parol trust. Probably the reason the rule exists as it does in Tennessee is the peculiar way in which the facts were pleaded in the *Patton* case and the temporary dislike the English courts had for the doctrine of part performance at that time.[62] Judge Catron adopted that attitude and set a precedent in the *Patton* case which later courts have followed without analyzing or without attempting to uncover the reason for the rule, or the possible inconsistencies involved.

It is unlikely that the Tennessee court will change its attitude toward the doctrine of part performance in the absence of legislation, but a theoretical analysis of the exceptions to the statute would be of value. An amendment to Section Four of the Statute of Frauds, specifically providing for an exception in cases of part performance, such as some states have,[63] would do much to relieve what the writer believes to be productive in some cases of inequitable situations. In the absence of such legislation, anyone seeking relief must fit his case into one of the not-too-well-defined exceptions of equitable estoppel, or constructive or resulting trust.

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62. See opinion by Catron, J., in Patton v. M'Clure, 8 Tenn. 333, 335 (1828).
63. Note, 101 A. L. R. 923, 933 (1936).