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STATUTE OF FRAUDS - ESTOPPEL AT LAW AS A SUBSTITUTE FOR PART PERFORMANCE IN EQUITY

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STATUTE OF FRAUDS — ESTOPPEL AT LAW AS A SUBSTITUTE FOR PART PERFORMANCE IN EQUITY — In 1930, plaintiff, as administratrix, mortgaged real estate to defendant. In 1933, plaintiff acquiesced in a foreclosure by defendant in pursuance of an oral agreement between the parties whereby it was understood that defendant would convey the land to plaintiff individually to hold for herself and others, plaintiff to give to defendant another mortgage for the same amount and to pay the costs. Defendant obtained title by foreclosure in March, 1934. Extensive repairs and improvements were made by plaintiff between September, 1934 and the spring of 1935. In October, 1934, defendant gave notice to plaintiff that it would not be bound by the contract and that part of the land had been sold. Plaintiff retained possession until November, 1935. This action was brought by plaintiff to recover damages for breach of the oral contract. *Held*, that the doctrine of estoppel at law is co-extensive with that of part performance in equity and that, by reason of plaintiff's possession and improvements on the land which was the subject of the oral contract, defendant is estopped to assert the statute of frauds. *Wolfe v. Wallingford*, (Conn. 1938) 1 A. (2d) 146.

A conflict of view exists as to the true basis of the doctrine of part performance in equity. It has been said that it grows out of the doctrine of equitable estoppel.[1] On the other hand, it has also been stated that the true basis is that

[1] Cases collected in 75 A. L. R. 650 (1931), in a note to Vogel v. Shaw, 42 Wyo. 333, 294 P. 687 (1930). See BROWNE, STATUTE OF FRAUDS, 5th ed., § 457a (1895); 1 CONTRACTS RESTATEMENT, § 178, comment f (1932). See also Sears v.

part performance affords sufficient proof of the existence of the contract.[2] Although in many cases, where the statute is held to be avoided, the facts are such as to make it possible to base the decision on either ground, this is not always so; and it would seem, therefore, that the two reasons given for the rule may properly be said to give rise to separate doctrines.[3] For example, the part performance doctrine is generally applied when there has been possession alone, and in such a case the element of detrimental reliance is clearly lacking.[4] In the law courts the doctrine of part performance is rejected by the overwhelming weight of authority.[5] This difficulty has, however, been obviated by equitable defense statutes in some states.[6] Moreover, the principle of equitable estoppel was not accepted by the law courts to bar the defense of the statute of frauds until comparatively recent times.[7] While there is some tendency dis-

Redick, (C. C. A. 8th, 1914) 211 F. 856; Andrews v. Charon, 289 Mass. 1, 193 N.E. 737 (1935); Feeney v. Clapp, 126 Cal. App. 729, 15 P. (2d) 178 (1932). Cf. 1 WILLISTON, CONTRACTS, rev. ed., 499 (1936), on the subject of promissory estoppel.

[2] Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273 (1922); Jones v. Jones, 333 Mo. 478, 63 S. W. (2d) 146 (1933); Grant's Heirs v. Craigmiles, 1 Bibb. (Ky.) 203 (1808). See discussion in BROWNE, STATUTE OF FRAUDS, 5th ed., §§ 455, 455a, 456 (1895).

[3] See 2 WILLISTON, CONTRACTS, rev. ed., §§ 533, 533a (1936). Courts have considered the two possibilities as separate within the same case. Texas Pacific Coal & Oil Co. v. Hamil, (Tex. Civ. App. 1922) 238 S. W. 672.

[4] See Hawke v. Ellwanger, 108 Cal. App. 105, 291 P. 279 (1930). Possession alone sufficient: Bradley v. Loveday, 98 Conn. 315, 119 A. 147 (1922); Allison v. Cemetery Caretaking Co., 283 Mo. 424, 223 S. W. 41 (1920). See Bresnahan v. Bresnahan, 71 Minn. 1, 73 N. W. 515 (1897); 18 KY. L. J. 379 (1930); 29 YALE L. J. 462 (1920). Generally, payment alone is not enough. Santoro v. Mack, 108 Conn. 683, 145 A. 273 (1929); Gutherie v. Anderson, 47 Kan. 383, 28 P. 164 (1891); Green v. Jones, 76 Me. 563 (1885).

It is suggested in 2 WILLISTON, CONTRACTS, rev. ed., § 533, p. 1543 (1936), that a possible reason for the limitation of part performance to land contracts is because the quasi-contractual remedy at law is adequate in all other cases. And see Hawke v. Ellwanger, 108 Cal. App. 105, 291 P. 279 (1930). On quasi-contractual recovery for part performance generally, see 2 WILLISTON, CONTRACTS, rev. ed., § 534 (1936); 20 CYC. 298 (1906).

[5] Cases collected in 59 A. L. R. 1305 (1929). Contra: La Bounty v. Brumback, 126 Ohio St. 96, 184 N. E. 5 (1933), discussed in 8 UNIV. CIN. L. REV. 190 (1934); Nellis & Co. v. Houser, 33 Ga. App. 266, 125 S. E. 790 (1924).

[6] In the former appeal of the principal case, Wolfe v. Wallingford Bank & Trust Co., 122 Conn. 507, 191 A. 88 (1937), the court held that although the statute prescribed only one form of action the distinctions between law and equity were still in force and part performance could not be pleaded in an action that was essentially at law. But see Knauf & Tesch Co. v. Elkhart Lake Sand Co., 153 Wis. 306, 141 N. W. 701 (1913); Houston & T. C. R. R. v. Wright, 15 Tex. Civ. App. 151, 38 S. W. 836 (1897).

[7] In 48 L. R. A. (N. S.) 745 at 774 (1914), it is said: "There is little authority falling within the scope of this note which shows the transition of the law courts from their former position, and their gradual adoption of the rule of equity applying estoppel to real property, in derogation of the statute. This may be due partly to the fact that many states have abolished the distinction between legal and equitable remedies, thus

cernible in the more recent decisions towards its acceptance in this connection,[8] it is by no means universally accepted.[9] It is also to be noted that there is a difference between the application of the doctrine of estoppel, where it is accepted, and the doctrine of part performance. Thus it has often been held that no interest in land may pass by mere spoken words.[10] But it is apparent that no such difficulty stands in the way of the application of the doctrine of estoppel in an action for damages for breach of the contract. A more basic distinction arises in that the part performance doctrine is applied only to contracts relating to land.[11] But since estoppel in relation to the statute of frauds is governed by principles of estoppel generally, there seems to be no reason, as far as the reasoning of many courts is concerned, why its application should be so limited.[12] In general, it may be said that there is no cogent reason why law courts should not grant relief from the statute of frauds under the guise of estoppel to the same extent that equity grants such relief on the basis of part performance. But to apply estoppel promiscuously to all types of cases arising under the statute in reality amounts to judicial repeal of the statute.[13] In the principal case, the facts would justify the application of the doctrine of part performance to enforce the contract in equity.[14] It may be said, therefore, to be a proper case for the application of equitable estoppel at law to avoid the statute; but it may be doubted whether the court made a correct application of the

forcing the law courts to adopt equitable doctrines and remedies. It may also be partly due to the fact that some of the authority on this subject has arisen upon estoppels based upon other grounds than those of 'concealing or representing' the title to be in another. However that may be, the mass of preceding cases in which law courts have applied estoppel to real estate without consideration of the effect of the statute of frauds shows conclusively the position of those courts today." See also Summers, "The Doctrine of Estoppel Applied to the Statute of Frauds," 79 UNIV. PA. L. REV. 440 (1931).

[8] Ibid. And see Hamburger v. Hirsch, (Mo. App. 1919) 212 S. W. 49; Robertson v. Melton, (Tex. Civ. App. 1935) 86 S. W. (2d) 473; Zannis v. Greud Hotel Co., 256 Mich. 578, 240 N. W. 83 (1932); Abrams v. Abrams, 74 Kan. 888, 88 P. 70 (1906); Manning v. Franklin, 81 Cal. 205, 22 P. 550 (1889); Carnahan v. Terrall Bros., 137 Ark. 407, 209 S. W. 64 (1919); Keller v. Gerber, 49 Cal. App. 515, 193 P. 809 (1920); Vaughan v. Jackson, 27 N. M. 293, 200 P. 425 (1921); Hawke v. Ellwanger, 108 Cal. App. 105, 291 P. 279 (1930). See also Koschnitzky v. Hammond Lumber Co., 57 Wash. 320, 106 P. 900 (1910).

[9] Connell v. Slater, 137 Misc. 249, 243 N. Y. S. 25 (1930); Sursa v. Cash, 171 Mo. App. 396, 156 S. W. 779 (1913).

[10] Cases collected in 20 CYC. 222 (1906). See Dickerson v. Colgrove, 100 U. S. 578 (1879); Knauf & Tesch Co. v. Elkhart Lake Sand Co., 153 Wis. 306, 141 N. W. 701 (1913).

[11] 2 WILLISTON, CONTRACTS, rev. ed., § 533 (1936); 27 C. J. 343 ff. (1922).

[12] 2 WILLISTON, CONTRACTS, rev. ed., § 533a (1936). The leading case for this proposition is Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1910). See Morris Co. v. Mason, 171 Okla. 589, 39 P. (2d) 1, 43 P. (2d) 401 (1934); Carlin v. Bacon, 322 Mo. 435, 16 S. W. (2d) 46 (1929) (contracts not to be performed within a year); see also Conley v. Johnson, 69 Ark. 513, 64 S. W. 277 (1901), for a different terminology.

[13] See 44 HARV. L. REV. 1147 (1931), criticizing Vogel v. Shaw, 42 Wyo. 333, 294 P. 687 (1930), as judicial repeal of the statute.

[14] 1 CONTRACTS RESTATEMENT, § 197 (1932).

doctrine, since defendant apparently notified plaintiff that it would not abide by the contract before plaintiff had materially changed her position.[15]

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[15] In the principal case the court upheld the finding of the jury that plaintiff had relied on defendant's promise in spite of the latter's repudiation, although it does not appear from the report that plaintiff had made substantial repairs when notice was given. But see Hanson v. Marion, 128 Minn. 468, 151 N. W. 195 (1915); Brockman v. Di Giacomo, 76 Colo. 428, 232 P. 670 (1925). Cf. Ashby v. Ashby, 59 N. J. Eq. 547, 46 A. 522 (1900).