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## Statute of Frauds-Specific Enforcement of Oral Contract to Convey Land-Part Performance

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STATUTE OF FRAUDS—SPECIFIC ENFORCEMENT OF ORAL CONTRACT TO CONVEY LAND—PART PERFORMANCE—In 1920 the decedent proposed to his daughter, the plaintiff, that if she and her husband would dispose of their home in Indianapolis, and if her husband would relinquish his employment there; and if the family would move to Jasper county, Indiana, and build a home and make improvements on the south forty acres of the home place of the decedent, he would, by his will, devise to the plaintiff the said forty acres. Relying upon this offer the plaintiff and her husband sold and disposed of their home in Indianapolis, removed to Jasper county and con-

structed on said south forty acres permanent and lasting improvements, consisting of a dwelling house, summer kitchen, barn, cornercrib, and other improvements of the value of \$2,500, with the knowledge and approval of the decedent who with his wife, the defendant, lived on the home place within 170 rods of the improvements. The plaintiff and her family have ever since resided in the dwelling house. All of the improvements were made on the S. 10 acres of the N.  $13\frac{1}{2}$  acres of the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 18 in the year 1921 or 1922, and in 1923 the plaintiff and her husband built a fence along the north side of said 10 acres inclosing the same and separating it from the lands occupied by the decedent and the defendant. The plaintiff has never been in possession of more than the said 10 acres. The decedent devised to the plaintiff the said  $13\frac{1}{2}$  acres which included the 10 acres of which the plaintiff was in possession, and to the defendant he devised the  $26\frac{1}{2}$  acres which constituted the remaining portion of the 40 acres covered by the parol agreement. The plaintiff seeks to be adjudged the owner of this  $26\frac{1}{2}$  acres and prays that a commissioner be appointed to convey the record title to her. The trial court found that the plaintiff was entitled to have specific performance of the parol contract and the defendant appeals. *Held*, judgment reversed, and the cause remanded with instructions to restate the conclusions of law in favor of the defendant and to enter judgment accordingly. The specific enforcement of an oral contract for the conveyance of real estate, within the Statute of Frauds, cannot be had in the absence of possession taken by the purchaser under and pursuant to the contract, even though there has been complete compliance with the terms of the contract on the part of the persons to whom the land was to be conveyed. *Donnelly v. Fletemeyer*, Appellate Court of Indiana, July 1, 1931, 176 N. E. 868.

Apparently, under this decision, possession must be taken by the grantee under an oral contract to convey land, of the *entire* premises contracted to be conveyed in order to take the contract out of the operation of the Statute of Frauds, or the doctrine of part performance can not be invoked. Had the decedent disinherited the plaintiff altogether could she have enforced a conveyance of the ten acres which she and her husband had occupied and improved? The logical consequence of the decision in the principal case is that she could not. Obviously, a part of such an indivisible contract could not be so taken out of the operation of the statute (which theoretically reaches no farther than to deny the right of action to enforce such an agreement) and the rest of the contract left within the operation of the statute. But why should the partial taking of possession in pursuance of the contract not be a sufficient part performance? This point seems to have received little or no consideration from the courts. It has been held in several states that where there is an entire contract for the sale of distinct parcels to the vendee for a gross price, his possession of one of the parcels is deemed to be a possession of all. In the case of *Smith v. Underdunck*, 1 Sandf. Ch. 579 (N. Y., 1884), the court said, "I find no authority which requires the buyer to take possession of *all* the lands sold, in order to make such a part performance as will establish a parol agreement for their sale. The reason assigned for giving this effect to the act of taking possession, is as applicable to entering into a part of the land sold, as it is to an entry into the possession of the whole." And see *Eryson v. McShane*, 48 W. Va. 126; *Bertz v. Paff*, 95 Wis. 95; Browne on *The Statute of Frauds*, Sec. 475.

It is said by Professor Story that, "A verbal agreement for the sale of lands or an interest therein may be enforced in either of two cases: first, when that agreement has been partly performed; and secondly, when to declare the agreement invalid would work a fraud upon the plaintiff." 2 *Story's Equity Jurisprudence* 78. It is submitted that the principal case might well be regarded to be either one, or both, of these two cases. The plaintiff has performed her part of the contract and the consideration given by her can not be adequately measured in terms of money. It is arguable that the decedent was, after the performance by the plaintiff, a trustee of the 40 acres for the plaintiff and that she was entitled to it in equity. Does not the decedent's failure to convey or devise the land to the plaintiff work a fraud upon her? And since the plaintiff has paid the consideration (either on the bargain theory or on the theory of promissory estoppel) for the promise and in addition has taken possession of a part of the premises, it is submitted that there has been such part performance as to take the contract out of the operation of the statute. The court has assumed without deciding, and apparently without noticing, the proposition that possession of a part of the premises is not such a possession as is required to constitute part performance. Such an assumption seems unwarranted in view of the fact that this point has never been decided, in this state at least. The proposition seems dubious on principle and has been so declared by the text writers and the majority of the few cases in which it has been considered.

There are a variety of views on the doctrine of part performance and as many, or more, theories in support of them. Kentucky, Mississippi, North Carolina, and Tennessee have repudiated the doctrine altogether. In some states, including Indiana, the fair value of services rendered or benefits conferred upon the vendor by the vendee in pursuance of the contract may be recovered in quasi contract, while in other states such a recovery is denied. *St. Joseph, etc., Co. v. Globe, etc., Co.*, 156 Ind. 665. In most jurisdictions the payment of the purchase money, in full or in part, is not a sufficient act of performance to take the contract out of the operation of the statute, but a contrary rule prevails in Delaware by an early decision and in Iowa by statute, while in Georgia some of the cases recognize payment as sufficient although at least one of the earlier cases does not. In England, Indiana, and many of the states possession taken in pursuance of the contract is sufficient part performance. (*Brown on The Statute of Frauds*, sec. 467; *Peterbaugh v. Peterbaugh*, 131 Ind. 289) while other states require in addition to possession either full or part payment of the purchase price or improvements made upon the property by the vendee. While the doctrine of part performance applies to oral gifts of land, or promises to give land, it is generally required in such cases, to authorize specific enforcement, that both possession is taken and improvements are made by the donee. *Brown on The Statute of Frauds*, sec. 467; *Swales v. Jackson*, 126 Ind. 282.