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Specific Performance of a Parol Agreement to Convey Real Estate. Part Performance to Take the Contract Out of the Statute of Frauds

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the general rule in regard to misdemeanors, although the rule as stated in the cases last cited, would include smelling, feeling and hearing and make a search, on other reasonable grounds for belief, illegal. This is a remarkable result and is avoided by the holding in the principal case.

It may be seen from this however, that the chief ground of contention is the answer to the question, "What is reasonable?" As the court in *United States v. Kaplan*, 286 Fed. 963, aptly puts it, "Unreasonable search is the menace against which the Fourth Amendment to the Constitution and the search warrant statutes protect. Reasonable searches are always permissible." Construed in the light of what was deemed an unreasonable search and seizure when the amendment was passed, which has ever been the rule, is such a search of the fastest wheeled vehicle unreasonable? An officer may spend some time procuring a warrant to search a house and yet be reasonably certain that the house will be there when he returns. No so with an automobile, it and the liquor in it, may be in the next state by that time.

It is submitted that the case is sound, both on authority and common sense and that its practicability will have a universal appeal with the laity as well as with the members of the bar.

—C. M. L., Jr.

SPECIFIC PERFORMANCE OF A PAROL AGREEMENT TO CONVEY REAL ESTATE. PART PERFORMANCE TO TAKE THE CONTRACT OUT OF THE STATUTE OF FRAUDS.—F, and old man, orally promised P, his daughter, to convey to her certain real estate in recompense for her services and companionship while maintaining his home and caring for him during old age. P did so care for F, and maintained his home for a period of ten years, but never went into possession of the land. F died, not having conveyed or devised the property as agreed, and P sued for specific performance of F's agreement. *Held*, Performance of a parol agreement to convey land in consideration of companionship during old age will be granted by a court of equity despite non-possession of the promisee. *Hurley v. Beattie et al.*, 126 S. E. 562 (W. Va. 1925).

Section 4 of the Statutes of Frauds, Ch. 98 § 1, W.Va. Code provides "no action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments, or any in-

terest in or concerning them, unless the 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 thereunto by him lawfully authorized." It is the generally accepted view that part performance of a parol contract to convey land has, under certain circumstances, the effect of taking such contract out of the operation of the Statute of Frauds, that equity may decree its specific performance. *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696, 25 R. C. L. 258. The question then is, what acts of the vendee constitute such part performance as to take the agreement out of the operation of the Statute of Frauds? The general rule seems to be that in order to make acts of part performance such as will authorize a court of equity to enforce a parol agreement, it is essential that they should appear solely with a view to the agreement being performed. If they are acts which might have been done with any other view they will not take the case out of the Statute of Frauds. *Steenrod's Administrator v. W. P. and B. R. R. Co.*, 27 W. Va. 1, *Wilde v. Fox*, 1 Rand 165, *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742, *Hale v. Hale*, 90 Va. 728, 19 S. E. 739. The act of part performance relied upon to take the case out of the Statute of Frauds must be unequivocally referable to the contract or must of itself give rise to the inference of some contract relating to the land so that a court may, from the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which according to their legal rights they would be in if there was no contract. *Plunkett v. Bryant*, 101 Va. 814, 45 S. E. 742, *Maddison v. Alderson*, 8 App. Cas. 467, 47 J. P. 821, 36 Cyc. 645.

In the principal case what is there in the act of P in living with and caring for her aged father for a period of ten years, without ever being in possession of the land, the subject of the contract, which points unequivocally to any contract regarding that land? Would P's act relied upon as part performance give rise to any inference of a contract regarding the land in question? Would it not be as reasonable for one who did not know, to suppose that P was living with her father for a money consideration, or because she felt it her duty to do so or possibly to provide a home for herself? For equity to enforce a parol contract to convey land the circumstances must have been such that a refusal of full execution would operate a fraud on the party and would place him in a position which would not allow of money compensation.

Campbell v. Fetterman, 20 W.Va. 398, *Lowry v. Buffington*, 6 W. Va. 249, *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297, *Stone v. Hill*, 52 W. Va. 63, 43 S. E. 92. And ordinary personal services, the value of which can be estimated, are not by themselves a sufficient act of part performance. *Reel v. Reel*, 59 W. Va. 106, 52 S. E. 1023, *Goodwin v. Bartlett*, 43 W. Va. 332, 27 S. E. 325. It seems there is nothing here in P's acts of service as a housekeeper for ten years that cannot be compensated for in money. In *Weeks v. Lund*, 69 N. H. 78, 45 Atl. 249, P agreed to care for the decedent during his life in consideration of a certain weekly sum and a parol promise of decedent to devise land to P on his death. P never went into possession of the land. In an action by P for specific performance the court held that the services were such as could be estimated in money, and so their performance was not such a part performance as would take the contract out of the Statute of Frauds and justify a decree of specific performance. An oral agreement for the conveyance of land in consideration of services rendered, where no other act is done in execution of the agreement except the performance of the services, though they be personal, will not be enforced, such services not being part performance sufficient to take the contract out of the Statute of Frauds. *Cooper v. Colson*, 66 N. J. Eq 328, 58 Atl. 337, *Rodman v. Rodman*, 112 Wis. 378, 88 N. W. 218. It is not the purpose of this article to attempt to show that the principal case is all wrong or without authority, for it is recognized that there are numerous decisions of this country which substantially uphold the decision of this case. The rule seems to be that an agreement for the support and care of one, in consideration of a promise to convey the property on which the promisor lived with the promisee, is taken out of the Statute of Frauds by performance on the part of the latter during the life of the former, and the agreement will be enforced against the heirs of the promisor. *Watson v. Mahan*, 20 Ind. 223, *Lamb v. Hinman*, 46 Mich. 112, 8 N. W. 709, *Brinton v. Van Cott*, 8 Utah 480, 33 Pac. 218, *Fishbourne v. Ferguson*, 85 Va. 321, 7 S. E. 361, *Gorgon v. Speelman*, 145 Ga. 682, 89 S. E. 749. It will be noted, however, in above cases that in addition to performance of services the promisee was actually in possession of the land which was the subject of the agreement. A Washington case holds that where decedent orally agreed to leave another real estate on his death in return for care and nursing, neither possession of the property or making of improvements by the other is

requisite to lay a basis for specific performance. *Velikanje v. Alickman*, 98 Wash. 584, 168 Pac. 465.

So while the principle case is by no means without authority it seems to go further in its decision than any other case in this jurisdiction and perhaps too far in deciding that mere acts of personal service by P in caring for her father, are such part performance as to take the father's oral agreement to convey real estate out of the Statute of Frauds. Undoubtedly, the case flies directly in the face of the Statute of Frauds, and since we have such a statute why disregard it? It would seem to be better to deny P her relief in equity, and to leave her to her action at law for services rendered, where it seems she could obtain full compensation on a *quantum meruit* basis.

—J. H. W.