# Part Performance In Ohio

Ohio General Code Sections 8617 to 8621 are patterned after the original English Statute of Frauds.[1] The purpose behind such a statute is to prevent mistakes, frauds, and perjuries by barring actions based on certain important types of contracts which are not in writing. The sections of the code herein considered do not declare a contract to be a complete nullity merely because it is not in writing. The words "No action shall be brought" are considered to be a rule of evidence, not a prohibition against the making of oral transactions.[2]

If the drafters of these statutes had gone one step further and declared that no such contract could be made by parol it is possible that there would be no mitigating doctrine known as part performance. But because the statute denies only the cause of action and leaves the contract between the parties otherwise intact, the courts of England and nearly all the courts in this country have been loathe to apply the statute in all its harshness.[3] The doctrine of part performance is the well-known device used by these courts to preclude the use of the Statute of Frauds as an *instrument* of fraud rather than as a preventive.

The theory behind the doctrine of part performance is that one who has permitted another to perform acts or expend large amounts of money on the faith of a parol agreement, or who accepts the benefit of the other's part performance for which the party performing cannot be adequately compensated in damages, is not permitted to assert the Statute of Frauds.

It is not the purpose of this comment to discuss the doctrine of part performance in its entirety. Instead an effort will be made (1) to show the confusion which surrounded its development in Ohio, in terms of the applicability of the doctrine at law and in equity, and (2) to analyze briefly a few of the Ohio decisions as to what constitutes part performance.

## The Applicability of the Doctrine

Historically, the doctrine was not recognized at law.[4] The law courts could only bow before the plain meaning of the statute, and nothing could satisfy the statute but a writing. Courts of equity, on the other hand, would not allow a person who had partially performed under an oral contract to be defrauded by the defense of

[1] Stat. 29 Car. II, c. 3 (1677).

[2] Pomeroy, Specific Performance of Contracts 181 (3rd ed. 1926).

[3] *Id.* at 182.

[4] Franklin v. Matoa Gold Mining Co., 158 Fed. 941 (8th Cir. 1907); Montuori v. Bailen, 290 Mass. 72, 194 N.E. 714 (1935); White v. McKnight, 146 S.C. 59, 143 S.E. 552 (1928).

the Statute of Frauds. In these courts it was held that the promisor was estopped from setting up this defense if such a fraud would be the result.[5] It is for this reason that it is said that the contract is taken out of the statute, rather than saying that the statute is complied with.[6]

But at an early date considerable confusion arose in Ohio as to whether the doctrine might also be applicable at law. The case of *Wilbur v. Paine*[7] was an action of trespass quare clausum fregit, wherein the plaintiff, in order to establish his title, was forced to rely on the doctrine of part performance. Without discussing the applicability of this doctrine in an action at law, the court found sufficient performance and gave judgment for the plaintiff.

The idea that part performance could be used in an action at law was against the weight of authority elsewhere,[8] but at least there was an "Ohio rule" to be followed.[9] This rule lasted until 1901 when *Kling v. Bordner*[10] was decided. This was another action at law and in the fifth paragraph of the syllabus it is stated, "The doctrine of part performance obtains in equity only, and does not avail to render a contract which is void by the statute because unwritten or unsigned, capable of being sued on in a court of law." Nowhere in the case is there any mention of *Wilbur v. Paine.*

When the question was next raised by the case of *La Bounty v. Brumback,*[11] an action at law, the court had an opportunity to overrule or to at least distinguish either *Wilbur v. Paine* or the *Bordner* case. It did neither, however, but instead stated that the plea of part performance was just as effectual in an action at law at that time as it was in *Wilbur v. Paine.* The court admitted that this was against the weight of authority, but it did not admit that there were contrary decisions by the same court. At this point there was justifiable confusion among the Ohio attorneys.[12]

In *Hodges v. Ettinger,*[13] decided in 1934, the court handed down what should have been a very important decision. *Kling v. Bordner* and *La Bounty v. Brumback* were both considered and each was modified. The *La Bounty* case, allowing the use of part performance

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[5] Wolfe v. Wallingford Bank and Trust Co., 124 Conn. 507, 1 A. 2d 146 (1938).

[6] Tsuboi v. Cohn, 40 Idaho 102, 231 Pac. 708 (1925).

[7] 1 Ohio 251 (1824).

[8] Freeport v. Bartol, 3 Me. 340 (1825); Kidder v. Hunt, 1 Pick. (Mass.) 328 (1823).

[9] Grant v. Ramsey, 7 Ohio St. 157 (1857); Speck v. Waggoner, 3 Ohio 292 (1827).

[10] 65 Ohio St. 86, 61 N.E. 148 (1901).

[11] 126 Ohio St. 96, 184 N.E. 5 (1933).

[12] 8 U. OF CIN. L. REV. 190, 192 (1934).

[13] 127 Ohio St. 460, 189 N.E. 113 (1934).

in an action at law, was held to be too broad, and conversely, the *Kling* case, denying its use at law, was considered too restricting. Judge Stephenson pointed out the fact that whether or not the doctrine could be used at law or only in equity was no longer very material since the distinction between the two had been abolished and both legal and equitable causes could be joined in the same action.[14] The court then laid down a rule which was intended to strike a medium between the cases it had modified. It was well stated in the following syllabus:

> The doctrine of part performance can be invoked, to take a case out of the statute of frauds in Ohio only in cases involving the sale or leasing of real estate, *wherein there has been a delivery of possession* of the real estate in question, and in settlements made upon consideration of marriage, followed by actual marriage. *Such doctrine of part performance has no place in the law governing contracts for personal services.* (Emphasis supplied)

The rule of this case would have limited the use of part performance to cases based on specified transactions, regardless of whether the action were at law or in equity. If the supreme court had considered itself limited by this decision the applicability of part performance in Ohio would have been substantially different from what it is today. But that *Hodges v. Ettinger* does not serve as a limitation in all cases is shown by two recent decisions.

The cases of *Snyder v. Warde, Adm'x*[15] and *Goetx v. Jacobs*[16] are similar in that each involved an oral promise to convey real property in return for personal services rendered by the promisee until the death of the promisor. In each case the plaintiff asked for specific performance and relied on the doctrine of part performance to take the contract out of the Statute of Frauds. In the *Goetz* case specific performance was granted. In the *Snyder* case the decree was denied, but only because the court found that the plaintiff's performance was not sufficient to satisfy the requirements of the part performance doctrine.

In neither case was *Hodges v. Ettinger* distinguished, in spite of the fact that (1) the cases involved contracts for personal services, and (2) in the *Snyder* case there was no possession. If the *Hodges* case stood alone it could be argued that the reference to "contracts for personal services" was meant to exclude only those contracts calling for personal services for monetary consideration, but this argument is weakened by the language of the *Snyder* case itself. The court there cited *Hodges v. Ettinger* as authority for the proposition that payment of consideration, even when the consid-

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[14] OHIO GEN. CODE § 11238.

[15] 151 Ohio St. 426, 86 N.E. 2d 489 (1949).

[16] 59 Ohio L. Abs. 25 (1949), Ohio Bar, March 5, 1951.

eration consists of the rendition of personal services, could not constitute sufficient part performance.[17] The court seemingly recognized the *Hodges* case, but went on to cite two older Ohio cases to the effect that if the services rendered were not compensable in damages, specific performance could be granted.[18] The case turned on the fact that the services were compensable. The court did not consider itself limited by the *Hodges* case.

The *Snyder* case involved a promise to devise real property in exchange for personal services. Such a contract is within the intendment of the words, "sale . . . of real estate,"[19] but it should be remembered that the *Hodges* case qualifies the above words by adding, "wherein there has been a delivery of possession of the real estate in question . . . ." In the *Snyder* case there was no possession of the type usually required to take a contract out of the Statute.[20]

It is not suggested that *Hodges v. Ettinger* should have been followed. The rule of that case would have denied the use of the part performance doctrine in cases where its use is perhaps more beneficial than in any other situation, i.e., an oral promise to deed or devise real property in exchange for personal services. The requirement of a delivery of possession would work a great hardship in a case where the plaintiff had performed to his detriment but had never received possession of the premises. The application of the part performance doctrine to cases like *Snyder v. Warde* and *Goetz v. Jacobs* is in accordance with the purpose of the doctrine, which is to prevent the defense of the Statute of Frauds from working a fraud upon someone who has changed his position by performing under an oral contract.

It is the inconsistency of the cases since *Wilbur v. Paine* that casts doubt upon the problem. The court has followed a zig-zag pattern which provided authority for the advocates of opposite views, seeming to ignore rather than to overrule or distinguish its prior decisions. Even if the cases ignored are implicity overruled, the frequency with which the rules are changed tends to weaken the value of precedent in this field of law.

### What Constitutes Part Performance

The obvious purpose behind the Statute of Frauds is the prevention of frauds; but to allow the statute to be pleaded as a defense to all actions based on oral contracts within the Statute of

[17] 151 Ohio St. 426, 434, 86 N.E. 2d 489 (1949).

[18] Newbold v. Michael, 110 Ohio St. 588, 144 N.E. 715 (1924); Shahan v. Swan, 48 Ohio St. 25, 26 N.E. 222 (1891).

[19] Grant v. Grant, 63 Conn. 530, 29 Atl. 15 (1893); Shahan v. Swan, *supra* note 18.

[20] Wood v. Thornly, 58 Ill. 464 (1871).

Frauds would often result in the perpetration, rather than the prevention, of a fraud. It is generally agreed that this is the justification for the existence of the doctrine of part performance. Mere proof of the contract the plaintiff seeks to enforce is never sufficient to take it out of the statute because the statute assumes the existence of a contract. Even proof that the defendant will be unjustly enriched if the contract is not enforced is not enough to justify a decree of specific performance.[21] The plaintiff who seeks specific performance of an oral contract must show that he has performed under the contract, and that because he has performed only the remedy of specific enforcement will furnish adequate relief.[22] He must show that he will be *defrauded* if the agreement is not enforced.[23]

The application of this policy to a given fact situation is well exemplified by three recent Ohio cases. In *Snyder v. Warde, Adm'x.*[24] the plaintiff's husband had deserted her and her two small children. In order to support them she advertised for a position as a housekeeper. Harper responded to her advertisement and employed her at $40 per month plus room and board for her and the children. Her services included general housework, chauffeuring, secretarial work, assisting Harper in his business, and miscellaneous tasks of a personal nature. Harper became very fond of the family. They ate at a common table. Harper gave the children spending money and made certain that they all attended Sunday school. He often spoke of his plans for the children's futures, which included a plan for sending the boy to a private school. About a year after plaintiff was employed, Harper told her that he would devise one-half of his real property to her if she continued in his service until his death. Plaintiff did remain in his employ, but Harper died intestate. Plaintiff's action was for specific performance against the administratrix of Harper's estate, and was based on her part performance. The court of appeals reversed the court of common pleas and gave judgment for the plaintiff, but the Ohio Supreme Court reversed on the ground that there was not sufficient part performance to justify enforcement of the oral contract. The court analyzed in detail the services rendered by the plaintiff and found that even though they were varied and numerous they were all compensable in money. The fourth paragraph of the syllabus states the theory of the case:

"Ordinary services to be non-compensable from a pecuniary standpoint, generally, must be such as involve a detriment or sacri-

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[21] Andrews v. Charon, 289 Mass. 1, 193 N.E. 737 (1935).

[22] Corlin v. Bacon, 322 Mo. 435, 16 S.W. 2d 46 (1929); Armstrong v. Kattenhorn, 11 Ohio 265 (1842).

[23] Wilbur v. Paine, 1 Ohio 251 (1824).

[24] 151 Ohio St. 426, 86 N.E. 2d 489 (1949).

fice upon the part of the one rendering them, motivated by sentiment rather than expectation of payment."

A more recent case is *Goetz v. Jacobs*.[25] In this case an elderly woman was suffering from an incurable illness and could find no one to give her the assistance she needed. She and her husband prevailed upon the husband's niece to live with them and perform nursing and housekeeping services. The niece and her husband had to sell their own house and with their children move into the house of the elderly couple. The only consideration for this work and sacrifice was the oral promise by the old man that he would convey to them his real property. The plaintiffs were put into possession, the elderly couple retaining only two rooms in the house, but the old man died before the deed was given. In an action for specific performance there was a judgment for defendant, but the court of appeals reversed. The latter court held that the services rendered by plaintiffs were not compensable in money, and therefore specific performance was necessary.

Turning first to the facts of the two cases, it is easy to see why a distinction was made between them as to the compensability of the services. In the *Snyder* case the services were all of a type that are performed every day by thousands of persons for monetary compensation. That the services were compensable is evidenced by the fact that plaintiff accepted the job on a salary basis. It was not until later that the promise to devise was made, and plaintiff continued to receive her salary.

Commenting upon the fact that a feeling of friendship developed between Harper and the family, Judge Stewart said, "We know of no rule by which it is necessary for an employer and employee to dislike or hate each other." Something more than friendship between the parties, therefore, is needed to make services non-compensable.

The element missing in the *Snyder* case was found in the *Goetz* case. Here was more than a friendship developing between strangers. In this case a close relative had given nursing care and comfort to an old woman during her illness. The type of services rendered under such circumstances can never be correctly measured in dollars and cents. This view is shared by the majority of courts in this country, but it has not always been the rule in Ohio.[26]

The significance of the non-compensable character of the services rendered is obvious. If they are not compensable, and if specific performance is denied, the court will be allowing the Statute of Frauds to work a fraud upon the performer. Therefore, when courts speak in terms of compensability they are merely following

[25] 59 Ohio L. Abs. 25 (1949).

[26] Kling v. Bordner, *supra* note 10.

the usual limitation on the specific performance of contracts within the Statute of Frauds, i.e., they should not be enforced unless a refusal to do so will operate as a fraud upon the plaintiff.

Another justification for the distinction between the two cases can be found in the requirement that the services rendered must be referable to the contract. There is a much stronger inference that the services in the *Goetz* case are referable to the contract claimed than there is in the case in which the plaintiff merely continued in her employment at the same salary after the promise was made. In neither case is this element discussed, but the requirement exists in Ohio as elsewhere.[27]

Thus it would seem that on the basis of services alone the distinction between the *Snyder* and the *Goetz* cases is well-drawn. But there is still another feature that serves to strengthen these holdings. The element of possession was lacking in the *Snyder* case (where specific performance was denied) but present in *Goetz v. Jacobs*. In each case the promisee and the promisor lived together in the house which was to be devised or conveyed, but in the *Snyder* case the house was still under the dominion of the promisor. The plaintiff had moved into the house as a servant, and her position in the household had not changed after the oral contract to devise was made. It is generally held that a mere continuance of a possession taken under another contract is not sufficient performance of the contract sued upon.[28] The plaintiffs in the *Goetz* case, however, were the dominant tenants. The aged couple remained in the house only because that was part of the contract. The plaintiffs' possession was as complete as possible under the contract and that is all that can be expected.[29]

The type of possession found in the *Goetz* case could in itself justify enforcement of the contract because the plaintiffs had changed their whole mode of living in order to take possession. Most courts say that possession, if combined with some additional element, such as the making of improvements,[30] will constitute part performance. Some courts say that possession alone is enough.[31] The usual justification for this latter view is that if the contract is not enforced the plaintiff in possession will be a trespasser.[32] However, a leading case in this field has held that a contract within the Statute of Frauds, even if not enforced, is a license to enter and

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[27] Shahan v. Swan, *supra* note 18; Woods v. Johnson, 226 Mich. 172, 253 N. W. 257 (1934).

[28] Anson v. Townsend, 73 Cal. 415, 15 Pac. 49 (1887); Myers v. Croswell, 45 Ohio St. 543, 15 N. E. 866 (1888).

[29] Best v. Gralapp, 69 Neb. 811, 99 N. W. 837 (1904).

[30] Whitney v. Hay, 181 U. S. 77 (1901).

[31] Bradley v. Loveday, 98 Conn. 315, 119 Atl. 147 (1922).

[32] Eastburn v. Wheeler, 23 Ind. 305 (1864).

a defense to an action of trespass.[33] To hold in all cases that possession alone or even possession combined with some other act is ipso facto part performance would seem to be a departure from the fraud theory on which the equity jurisdiction is based. Nevertheless there are Ohio cases holding that possession alone is enough.[34]

The case of *Tier v. Singrey*[35] was an action for specific performance of an oral contract for the sale of land. The plaintiff was a tenant in one of defendant's houses. When plaintiff paid his rent for a certain period, the defendant offered to sell him the house in which he lived and one other. Plaintiff accepted the offer and (1) made a down payment on the purchase price, (2) received back the rent he had just paid in advance, and (3) told the other tenant that he, the plaintiff, would collect the rent from then on. The plaintiff contended that if the contract was not enforced he would be greatly damaged because of the loss of his bargain, the value of the property being much greater than the contract price. Judge Matthias, in holding that specific performance should have been denied, stated that neither the loss of plaintiff's bargain nor his performance under the contract constituted a fraud upon him. Nothing that had transpired had changed the plaintiff's position to such an extent that money damages would not adequately compensate him. The significance of the case lies in the fact that the court relied heavily on two legal encyclopedias as authority for the holding that nothing short of a fraud upon the plaintiff should induce a court to grant specific performance of a contract within the Statute of Frauds.

Whether or not equity will specifically enforce a contract within the Ohio Statute of Frauds depends principally on how far the plaintiff has changed his position by performing under the contract. If he has performed to such an extent that he cannot be adequately compensated in damages, specific performance will probably be granted. This is in accordance with the idea that if the performer will be defrauded by a refusal to enforce the contract, specific performance should be granted. The fraud theory of part performance is the theory of the Ohio courts, even though they often speak in terms of compensability. The cases holding that possession is in itself sufficient partial performance are an exception to this rule, but it would seem that the reasoning of the present court will soon eliminate this exception.

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[33] Glass v. Hulbert, 102 Mass. 24 (1869).

[34] Waggoner v. Speck, *supra* note 9; Kemp v. Feldman, 84 Ohio App. 154, 81 N.E. 2d 319 (1948).

[35] 154 Ohio St. 521 (1951), Ohio Bar, February 19, 1951.