

APPLICABILITY OF THE OHIO STATUTE OF FRAUDS TO AN ORAL LEASE FOR TWO YEARS

An action in forcible entry and detainer was brought by the Shillito Company to obtain possession of certain real estate which was held by Roos. Roos claimed under an oral lease for two years, renewable for two years, with a monthly rental. The tenant had papered the rooms and repaired the plumbing and claimed that the agreement had been taken out of the statute of frauds by part performance. The Court of Appeals of Hamilton County held that Roos was wrongfully withholding possession as the agreement had not been taken out of the Statute of Frauds. *Roos v. John Shillito Co.*, 52 Ohio App. 262, Ohio Bar, Aug. 24, 1936.

Three statutes are pertinent to the problem. Ohio Gen. Code, Section 8620 provides, "No lease, * * * shall be assigned or granted except by deed, or note in writing, * * *." In another chapter of the code, are the other two relevant statutes. Ohio Gen. Code, Section 8510 provides that a "* * * lease of any estate or interest in real property must be signed by the grantor, * * *, or lessor, and such signing be acknowledged * * * in the presence of two witnesses, who shall attest the signing * * *." Ohio Gen. Code, Section 8517 states, "Nothing in this chapter contained shall affect the validity of any lease * *, for any term not exceeding three years, or require such lease to be attested, acknowledged, or recorded." (Italics writer's). Thus Ohio Gen. Code, Section 8620 definitely provides, *without exception*, that all conveyances of interests in land are entirely void unless in writing. On the other hand, Ohio Gen. Code Section 8517 states that the formalities set out in Section 8510 Gen. Code are not necessary in case of a lease for less than three years. The effect of violating the statute on formalities for conveyances is similar to a violation of the statute of frauds, since the lease would be void in either event. In *Richardson v. Bates*, 8 Ohio St. 257 (1858), the court said, "We regard the two statutes under consideration as consistent with, and independent of each other." Accordingly, a lease may be defective under the statute on conveyances, notwithstanding the fact that it is valid under the statute of frauds. *Wineburgh v. Toledo Corp.*, 125 Ohio St. 219, 181 N.E. 20, 36 Ohio L. Rep. 307, 82 A.L.R. 1315 (1932).

Although the Ohio statute of frauds does not make any exception for leases of less than three years duration, the early English statute of frauds included such an exception. It provided that all leases not in writing shall have effect of leases at will except all leases of less than three years. 29 Car. 2, Ch. 3. Holdings under this statute probably

have affected the decisions in a few early Ohio cases. See *Wilber v. Paine*, 1 Ohio 251 (1824); *Grant v. Ramsey*, 7 Ohio St. 158 (1857). There is dictum in this latter case to the effect that possession under an oral lease for any number of years will make the lease effective at law. See also *La Bounty v. Brumback*, 126 Ohio St. 96, 37 Ohio L. Rep. 381, 184 N.E. 5 (1933).

These early Ohio cases might be interpreted to mean that a lease of less than three years was not intended to be within the Ohio statute of frauds. Or they may mean that oral leases can be sustained at law upon the doctrine of part performance. For an excellent discussion of this point, see *Carey v. Richards*, 2 Ohio Dec. Rep. 630, 4 W.L.M. 251 (1860), in which the court pointed out, at page 635, that the dictum in *Grant v. Ramsey*, supra, was not in line with the law of Ohio. This raises the question of whether part performance is an equitable doctrine or a doctrine applicable in law. In the case of *Wilber v. Paine*, supra, the court said that it was a legal doctrine. In another case, in an action for money only, it was also held to be a legal doctrine. *La Bounty v. Brumback*, supra. Where a lease was defective under Ohio Gen. Code, Section 8510, it was held to be an equitable doctrine. *Wheeler v. Nims*, 23 Ohio N.P. (N.S.) 527, 20 Ohio L. Rep. 332 (1921). In accord: *Ossage v. Foley*, 20 Ohio App. 16, 153 N.E. 117 (1923); *Kling, admr. v. Bordner*, 65 Ohio St. 86, 61 N.E. 148 (1901); *Carey v. Richards*, supra; *Connelley v. Byerley*, 20 Ohio N.P. (N.S.) 321, 28 Ohio Dec. 150 (1917); *Hodges v. Ettinger*, 46 Ohio App. 307, 39 Ohio L. Rep. 402 (1933). These decisions indicate that in Ohio part performance is an equitable doctrine. See, *Hodges v. Ettinger*, 127 Ohio St. 460, 39 Ohio L. Rep. 653, 189 N.E. 113 (1934), in which the court limits the *La Bounty case*, supra.

What is sufficient part performance to take an agreement out of the statute of frauds is a question that cannot be answered definitely. The payment of consideration alone is not enough in Ohio. *Newman v. Newman*, 103 Ohio St. 230, 133 N.E. 70, 18 A.L.R. 1089 (1921); *Townsend v. Fenton*, 32 Minn. 482, 21 N.W. 726 (1884). Nor will the taking of possession take a lease out of the operation of the statute, unless there are certain unequivocal acts connected with the possession which cannot be separated from the agreement. *Myers v. Crosswell*, 45 Ohio St. 543, 15 N.E. 866 (1888); but see, *Stark v. Turner*, 23 Ohio N.P. (N.S.) 313, 19 Ohio L. Rep. 392 (1921); *Seamen v. Aschermann*, 51 Wis. 678, 8 N.W. 818 (1881). In enforcing oral contracts for the sale of land, equity's jurisdiction is generally based on the ground of "fraud." The term "fraud" is used in the sense of injustice where there has been such part performance by the complaining

party that he cannot be restored to his original position. In such a case, equity will not permit the other party to escape from the obligations of his contract. *Purcell v. Coleman*, 6 Dist. Col. 59 (1864); *Townsend v. Fenton*, *supra*; Pomeroy, *Specific Performance of Contracts*, 3d Ed. 1926, page 245; for cases dealing with leases, see note 49 L.R.A. (N.S.) 113. For acts which do or do not amount to a sufficient part performance, see Pomeroy, *supra*, page 267.

Aside from a doctrine of part performance, occupancy and payment of rent under a void lease may have significant consequences. Although a void lease does not create a legal term, entry under such an agreement and payment of rent may result in the implication of a periodic tenancy. *R. R. Co. v. West*, 57 Ohio St. 161, 49 N.E. 344 (1897); *Wineburgh v. Toledo Corp.*, *supra*. This may be so even though no rent has been paid. *Rex Amusement Co. v. Nolan*, 11 Ohio App. 318, 30 Ohio C.A. 193, 16 Ohio L.Rep. 349 (1918). The duration of the tenancy which is implied depends upon the terms as to the payment of rent and the tenancy is subject to all the provisions of the lease, except as to duration. *R. R. Co. v. West*, *supra*; *Lithograph Bldg. Co. v. Watt*, 96 Ohio St. 74, 117 N.E. 25 (1917). Where monthly payments are made under an oral lease, a tenancy from month to month is created, but where the reservation is of annual rent, it is a tenancy from year to year. *Wineburgh v. Toledo Corp.*, *supra*; *R. R. Co. v. West*, *supra*. As to the foregoing propositions Ohio is in accord with the general rule. Tiffany, *Landlord and Tenant*, Vol. I, pages 123-135. The Ohio periodic tenancy differs from the common law periodic tenancy in that the Ohio tenancy is terminable without advance notice at the expiration of a rent period. The common law rule is that in a year to year tenancy six months notice is necessary, and in lesser periodic tenancies, such as month to month, a full period's notice is necessary. At common law a periodic tenancy was thought of as a continuing estate, which view apparently does not exist in Ohio. *Gladwel v. Holcomb*, 60 Ohio St. 427, 54 N.E. 473 (1899); see, Tiffany, *Landlord and Tenant*, Vol. II, page 1427.

The principal case would seem to have been decided correctly. The two year lease was clearly within the terms of Ohio Gen. Code, Section 8620, the statute of frauds. The Court was justified in its conclusion that there was not sufficient part performance to take the agreement out of the statute of fraud. On the other hand, there was a periodic tenancy created by occupancy and reservation of rent. As the rent reserved was a monthly one, the tenancy was one from month to month. And so under the Ohio view the tenancy was terminable at the end of any rent month.

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