St. John's Law Review

Volume 22
Number 2 *Volume 22, April 1948, Number 2*

Article 17

Statute of Frauds--Oral Agreement for Partition of Land--Invalidity of Defense of Oral Agreement Not to Partition in Action Brought for Partition

St. John's Law Review

incumbrance, for the court specifically states that it is not an incumbrance. Furthermore if it were an incumbrance, the vendee would not have been liable under the contract, as it released him if the title to either lot were unmarketable. Therefore, the case of subsequent zoning regulation must be treated as an exception to the general rule in New York, that where a bargain is fair when made, the fact that changing circumstances have made it a hard one, is no defense to specific performance.[10]

M. S. R.

STATUTE OF FRAUDS—ORAL AGREEMENT FOR PARTITION OF LAND—INVALIDITY OF DEFENSE OF ORAL AGREEMENT NOT TO PARTITION IN ACTION BROUGHT FOR PARTITION.—An action was brought in the Court of Chancery in New Jersey for the partition of land. The defendants interposed an answer alleging that they and the complainants agreed orally with each other not to bring any suit for the partition of land before August 23, 1948, the maturity date of a certain mortgage. The complainants moved to strike out the answer upon the ground that the alleged agreement was unenforcible under those sections of the New Jersey Statute of Frauds known as R. S. 25:1-2 and 5(d) N. J. S. A. The first of these sections provides that no interest in real estate shall be surrendered unless by deed or note in writing. The second that no action shall be brought upon an "oral contract or sale of real estate, or any interest in or concerning the same." *Held,* that the agreement set forth in the answer was within the statute and unenforcible, constituted no defense to the action and had to be stricken out. *Wujciak v. Wujciak, et al.,* — N. J. Eq. —, 55 A. 2d 164 (1947).

The precise question involved apparently had never previously been presented to the New Jersey courts for consideration; but the second section of the statute which forbids the bringing of an action has been construed to preclude the use of such an oral contract as a defense.[1]

The court found support for its conclusion in other comparable situations. Thus it was held that the oral consent of one who enjoys an easement of light and air that the owner of the servient tenement might build in disregard of the easement was unenforcible;[2] likewise the oral permission given an abutting owner to erect a building en-

[10] Sanford v. Smith, — Misc. —, 66 N. Y. S. 2d 780 (Sup. Ct. 1946); Urbis Realty Co. v. Globe Realty Co., 235 N. Y. 194, 139 N. E. 238 (1923); Froehlich v. K. W. W. Holding Co., 116 Misc. 275, 190 N. Y. Supp. 324 (Sup. Ct. 1921).

[1] Brands v. Cassidy, 125 N. J. Eq. 346, 5 A. 2d 685 (Ch. 1939); *id.,* 124 N. J. Eq. 417, 1 A. 2d 639 (Ch. 1938).

[2] Ware v. Chew, 43 N. J. Eq. 493, 11 Atl. 746 (Ch. 1888).

croaching on the complainant's land.[3] Among other oral agreements or surrenders which were held unenforcible are the following: an agreement by a land owner with his next door neighbor restricting the use of his land,[4] a promise by a mortgagee, after default, not to take possession,[5] also an agreement not to foreclose a mortgage for a certain time upon the premise that the mortgage was an interest in land and the privileges and powers inherent in it are also interests in land. A necessary characteristic of a mortgage would be lacking if there was no power to enforce payment by foreclosure.[6]

At common law and before the enactment of the Statute of Frauds tenants in common of land could make a partition thereof by parol by delivery of seizin or actual delivery of possession of the land.[7] The reason was that the only privity between them was possession. If that was severed in a lawful manner they each held their estates in severalty, absolutely. No deed was necessary. This did not apply to joint tenants however, for neither could make delivery to the other.[8]

However, the rule that the Statute of Frauds is applicable to a parol or verbal partition is not universal.[9] In the majority jurisdictions which hold that a parol partition is within the Statute of Frauds and therefore unenforcible as lacking the essential requirements of being in writing, the rule is predicated upon the premise that there is involved a transfer or release of an interest in land which comes within the letter and spirit of the Statute of Frauds.[10]

In those jurisdictions which give validity to a parol partition, the theory is that such partition is not a conveyance or sale of the land within the meaning of the statute, but simply a segregation of that part of the land held in common which belongs to each tenant in common.

In some of these jurisdictions, however, which enforce parol agreements for partition, the decisions seem to rest upon the difference in language employed in the statute. Thus, the English statute embraces not only a sale of the land, but any interest in or concerning it; while in other statutes the language is confined to the sale

---

[3] Capone v. Ranzulli, 99 N. J. Eq. 627, 134 Atl. 553 (Ch. 1926).

[4] Droutman v. E. M. & L. Garage, 129 N. J. Eq. 1, 19 A. 2d 25 (Ch. 1940).

[5] Montuori v. Bailen, 290 Mass. 72, 194 N. E. 714 (1935); see Note, 97 A. L. R. 789 (1935).

[6] George v. Meinersmann, 119 N. J. L. 460, 197 Atl. 1, 2 (1938). *But cf.* Tompkins v. Tompkins, 21 N. J. Eq. 338 (Ch. 1871), and Van Syckel v. O'Hearn, 50 N. J. Eq. 173, 24 Atl. 1024 (Ch. 1892), in which such contracts were enforced on principles of promissory estoppel because the mortgagor had changed his position in reliance on the extension of the mortgage.

[7] Berry v. Seawall, 65 Fed. 742 (C. C. A. 6th 1895); Wood v. Fleet, 36 N. Y. 499 (1867).

[8] Docton v. Priest, 78 Eng. Rep. 354 (1588).

[9] See Note, 133 A. L. R. 485-487 (1939).

[10] Berry v. Seawall, *supra.*

of land. Accordingly, on the theory that partition is not a sale of land, but only a separation between joint owners or tenants in common of their respective interests in land, parol partitions have been held valid.[11]

In the great majority of the jurisdictions it has been held that irrespective of whether the Statute of Frauds is applicable, parol partition is valid where the parties to the agreement have taken possession in severalty of the respective portions allotted to them pursuant to such agreement.[12]

In some cases, however, it has been held that a parol partition of land is void as being within the Statute of Frauds even though possession in severalty is taken thereunder.[13]

In striking out the answer in the instant case, the court noted the absence of any allegation therein that the defendants had been induced to take or abstained from any action by the complainant's alleged promise not to bring any suit for partition. The agreement was executory on both sides and accordingly invalid within the terms of the Statute of Frauds. When there has been an actual execution of the oral contract equity will enforce the agreement.[14]

D. M. S.

TAXATION — ESTATE TAX — APPORTIONMENT — DECEDENT ESTATE LAW § 124.—This is a proceeding in the matter of the estate of Ogden Livingston Mills, upon the final accounting of his executors.

The deceased created three revocable *inter-vivos* trusts for the benefit of various individuals in the six-year period before his death in 1937. The trustees object to the executors' proposed allocation of estate taxes from the principal of said trusts on the ground that a codicil to the decedent's will provides for the payment of such taxes out of the general estate. Payment of counsel fees from the decedent's estate was also requested.

The codicil in dispute stated: "I direct that all estate, inheritance, transfer and succession taxes imposed upon my estate or any

---

[11] Meacham v. Meacham, 91 Tenn. 532, 19 S. W. 757 (1892); McKnight v. Bell, 135 Pa. 358, 19 Atl. 1036 (1890); Moore v. Kerr, 46 Ind. 468 (1874).

[12] Sanger v. Merritt, 131 N. Y. 614, 30 N. E. 100 (1892); Taylor v. Millard, 118 N. Y. 244, 23 N. E. 376 (1890); Wood v. Fleet, 36 N. Y. 499 (1867); Baker v. Lorillard, 4 N. Y. 257 (1850).

[13] Fort v. Allen, 110 N. C. 183, 14 S. E. 685 (1892); Ballow v. Hale, 47 N. H. 347 (1867); Porter v. Hill, 9 Mass. 34 (1812).

[14] Jones v. Jones, 118 App. Div. 148, 103 N. Y. Supp. 141 (1st Dep't 1907), citing Wood v. Fleet, 36 N. Y. 499 (1867), and Taylor v. Millard, 118 N. Y. 244, 23 N. E. 376 (1890).