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Equitable Servitudes and the Statute of Frauds

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EQUITABLE SERVITUDES AND THE STATUTE OF FRAUDS

Any attempt at discussion of the applicability of the statute of frauds to equitable servitudes upon land brings us to what Justice Cardozo has described as "one of the battlefields of the law."[1] Professor Reno introduces a short discussion of the problem with this statement: "One of the most difficult problems presented to the courts for solution is the extent to which the various statutes of frauds are applicable to equitable servitudes."[2]

It is not to be expected that any definitive answer to the numerous problems presented will be reached herein, but we may outline the ways in which the problem can be approached and examine a few of the cases illustrative of these views.

The problem arises, usually, in one of two ways: (1) the agreement purporting to create the servitude is oral;[3] and (2) the common grantor, in making sales of lots in a subdivision subject to express restrictions, orally agrees that the remaining lots will be sold subject to the same restrictions but then sells some of the remaining lots without any such restrictions to purchasers with notice.[4]

It can readily be seen that in either of the situations described the restriction, or "equitable servitude," which the plaintiff would be attempting to enforce is one which must depend for its very existence upon an oral agreement — unless, of course, in the second instance a general building scheme can be found to exist on the basis of those lots sold with deeds containing express restrictions. Are we to allow this oral agreement to create a "servitude" upon the land unsupported by any written contract, or are we to regard it as coming within the statute of frauds and therefore unenforceable? The answer depends very largely upon the method of approach to the problem and, indeed, upon the very definition of the term "equitable servitude." There is little or no general agreement as to the nature, origin, operation, or enforceability of this anomalous type of restriction on the use of land. An analysis of its nature and scope of operation would

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[1]Bristol v. Woodward, 251 N.Y. 275, 287, 167 N.E. 441, 445 (1929).

[2]*The Enforcement of Equitable Servitudes in Land: Part II,* 28 VA. L. REV. 1067, 1090 (1942).

[3]*Cf.* Miller v. Babb, 263 S.W. 253 (Tex. Comm'n App. 1924); Florsheim v. Reinberger, 173 Wis. 150, 179 N.W. 793 (1921).

[4]*Cf.* Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1913); Ham v. Massasoit Real Estate Co., 42 R.I. 293, 107 Atl. 205 (1919).

seem essential in order to determine the question of its enforceability generally, and more particularly as relating to the applicability of the statute of frauds.

A brief glance at the English Statute of Frauds[5] and the various modifications of this statute found in all of the states shows that they contain separate sections which may be applicable: the first section relating to conveyances of interests in land and the fourth to executory contracts. Under the fourth section two subsections may be relevant: one relating to executory contracts for the sale of an interest in land, and the other relating to agreements not capable of performance within one year.

The problem may be approached in two ways: (1) an equitable servitude is a property interest in the nature of an equitable easement; or (2) it is a purely contractual obligation. A search of numerous cases decided in recent years reveals that there is a wide variation among the states as to what is or is not an "interest in land," and as to whether restrictive covenants involve any such interest.[6] There

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[5]29 CAR. II, c. 3 (1677).

[6]Statute of frauds protects equitable estates in land as well as legal, Coleman v. Coleman, 48 Ariz. 337, 61 P.2d 441 (1936).

An agreement restricting use of land is not a "personal agreement" but is an "agreement in rem" and must be in writing in order to be enforceable, Droutman v. The E. M. & L. Garage, Inc., 129 N.J. Eq. 1, 19 A.2d 25 (Ch.), *aff'd*, 129 N.J. Eq. 545 (Ct. Err. & App. 1941).

The servitude imposed by restrictive covenants is a species of "incorporeal right" which restrains the owner of the servient estate from making certain use of his property, and it is an "interest in land," conveyance of which is within the statute of frauds, so that such restraint may not be effectively imposed except by deed or other writing duly registered, Turner v. Glenn, 220 N.C. 620, 18 S.E.2d 197 (1942).

The term "interest in land" as used in the statute of frauds means some portion of title or right of possession and does not include agreements which may affect land but which do not contemplate transfer of any title, ownership, or possession. Carter v. McCall, 193 S.C. 456, 8 S.E.2d 844 (1940).

A right granted a person to hunt on grantor's premises is not a mere "license," but an interest in real estate in the nature of an "incorporeal hereditament," and hence within the statute of frauds, so as to require writing for its creation, Anderson v. Gipson, 144 S.W.2d 948 (Tex. Civ. App. 1940).

Where restrictions forbidding the erection of any building except single-family residences were included in deeds to various purchasers of lots in a certain addition and the restrictions were for the benefit of all land in the addition, the restrictive covenants were not within the statute of frauds, Reeves v. Morris, 155 Kan. 231, 124 P.2d 488 (1942).

are many holdings on the point which treat the problem generally, but few of these contain any fine analysis of the reasoning behind the rule.

The two approaches previously suggested have been referred to in various ways, for example, the *Norcross v. James* view,[7] as opposed to the *Hodge v. Sloan* view[8] or "Stone's" view;[9] but for convenience they are referred to hereinafter as the property theory and the contract theory, respectively. The remainder of this discussion is divided into two parts in which these theories or approaches are considered in more detail, with particular emphasis on the latter, since the general trend seems to be in that direction.

The Property Theory. When we approach the problem upon the theory that equitable servitudes are property interests in the nature of equitable easements, there really is not much of a problem: the result is pretty nearly a foregone conclusion. It is evident the first section of the statute of frauds would be applicable, and an oral agreement could not operate to create an enforceable servitude against subsequent possessors of the burdened land; nor, indeed, would it seem that such an agreement would be enforced against the original covenantor — for if an interest is transferred by the agreement is it not transferred when the contract is made? If a property interest is regarded as the basis for enforcement, it would seem that there is no better reason to enforce the restriction against the original party to the agreement than against subsequent assignees of the land. Most of the cases in which the issue has been expressly decided on this basis seem to have reached the almost inevitable conclusion that the first section of the statute of frauds renders the restriction unenforceable.[10]

A building restriction is a negative easement and cannot be shown by parol, being within the statute of frauds, Pepper v. West End Devel. Co., 211 N.C. 166, 189 S.E. 628 (1937).

An easement or servitude is "an interest in land" and hence cannot be treated other than by an instrument in writing, under the statute, Monk v. Danna, 110 S.W.2d 84 (Tex. Civ. App. 1937).

[7]Norcross v. James, 140 Mass. 188, 2 N.E. 946 (1885).

[8]Hodge v. Sloan, 107 N.Y. 244, 17 N.E. 335 (1887).

[9]Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 COL. L. REV. 291 (1918).

[10]*E.g.*, Scheuer v. Britt, 217 Ala. 196, 115 So. 237 (1928); Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1913); Tibbetts v. Tibbetts, 66 N.H. 360, 20 Atl. 979 (1890); Davis v. Robinson, 189 N.C. 589, 127 S.E. 697 (1925); Miller v. Babb, 263

Reno, however, raises this point:[11] Even though an oral agreement cannot operate as a conveyance of an equitable servitude, can it perhaps be construed to be an executory contract for the creation of a valid equitable servitude in the future? This view would seem to be particularly felicitous in the "subdivision" cases in which the oral agreement is a promise by a common grantor, made at the time of earlier sales of lots subject to express restrictions, that the remaining lots will be sold subject to the same restrictions. An immediate objection to this possible solution is seen, however, in the provisions of the fourth section of the statute in the subsection dealing with executory contracts for the creation of interests in land. Thus this executory contract, if we view it as such, would be unenforceable, just as a servitude created by parol. There is a possibility, however, that in some cases, if this view were used, the equitable doctrine of part performance[12] could be applied to take the case out of the statute.[13]

The argument has been advanced in several cases that this equitable doctrine of part performance should be applied in the "subdivision" cases previously mentioned, since the earlier purchasers have purchased lots in reliance upon the oral promise of the common grantor, paid their consideration in full, and have in many cases built permanent improvements upon their lots in reliance upon the restrictions. It is to be noted, however, that in all of these cases the courts have denied the claim that improvements erected upon the purchaser's own lot and money paid as consideration for such land can be treated as evidence of an oral agreement to impose a burden upon the remaining lands of the common grantor.[14] In this connection we must

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S.W. 253 (Tex. Comm'n App. 1924); Florsheim v. Reinberger, 173 Wis. 150, 179 N.W. 793 (1921).

[11]*Supra* note 2, at 1090.

[12]*E.g.*, State *ex rel.* Wirt v. Superior Ct., 10 Wash.2d 362, 116 P.2d 752 (1941).

[13]It is well settled that part performance of a verbal contract within the statute of frauds has no effect at law to take the case out of the statute. In equity, however, where the verbal contract relates to the sale of land the rule is otherwise, upon the ground that it would be a fraud upon the party who, in reliance upon the contract and pursuant thereto, has partly performed it, to permit the other party to refuse performance. This doctrine is applied under actions for specific performance, and the agreements must be such as would have been susceptible to a decree of specific performance had they been in writing. SMITH, THE LAW OF FRAUDS AND THE STATUTE OF FRAUDS §349 (1907).

[14]*E.g.*, Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1913); Ham v. Massasoit Real Estate Co., 42 R.I. 293, 107 Atl. 205 (1919).

remember that the doctrine is applicable only when the acts of part performance are done in reliance upon and pursuant to the alleged oral agreement. These holdings are consistent with the majority view that the doctrine of part performance must be limited in its application to acts which are solely explainable by reference to the oral contract.

Some states, however, have extended the applicability of the doctrine of part performance so that it will include any acts made in reliance upon the oral contract which would lead to irreparable injury if the contract were not enforced.[15] If this view is taken, it is seen that part performance comes very close to being a part of the doctrine of equitable estoppel. This, Reno says,[16] is probably the explanation of the New York cases, which, after admitting that an equitable servitude is a property interest within the terms of the statute of frauds, have then proceeded to enforce oral agreements upon the basis of estoppel.[17] He further points out that when a common grantor, in sales of expressly restricted subdivision lots, has orally promised or represented that the remaining lots will be similarly restricted, jurisdictions that will not enforce orally created equitable servitudes may permit enforcement on the ground that there immediately arises an implied reciprocal servitude against the remaining land.[18] Thus the application of the statute can be avoided by enforcing not the oral promise or representation of the common grantor but an implied reciprocal servitude arising from the combination of the express restriction in the purchaser's own deed and the oral promise.[19] Actually the cases do not discuss the application of the statute; however, this

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[15]See Note, 38 HARV. L. REV. 967 (1925), for a discussion of these two views as to the nature of the acts sufficient to satisfy the equitable doctrine of part performance.

[16]*Supra* note 2.

[17]Phillips v. West Rockaway Land Co., 226 N.Y. 507, 124 N.E. 87 (1919); Nissen v. McCafferty, 202 App. Div. 528, 195 N.Y. Supp. 549 (2d Dep't 1922); Bimson v. Baultman, 3 App. Div. 198, 38 N.Y. Supp. 209 (2d Dep't 1896). *But cf.* Clanton v. Scruggs, 95 Ala. 279, 10 So. 757 (1891), expressly denying the applicability of estoppel for the reason that the doctrine can have no application to a breach of a promise.

[18]*E.g.*, Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925); Tallmadge v. East River Bank, 26 N.Y. 105 (1863); Lawrence v. Woods, 54 Tex. Civ. App. 233, 118 S.W. 551 (1909); Spicer v. Martin, 14 App. Cas. 12 (1888).

[19]Allen v. Detroit, 167 Mich. 464, 133 N.W. 317 (1911) (court specifically pointed out the fact that the common grantor's representations were oral).

can be justified under the view that the reciprocal servitude is implied from the express written restrictions upon the purchaser's own land.[20] Since the deed was signed by the common grantor, the statute of frauds is satisfied.

In *Snow v. Van Dam*[21] the lower court awarded a decree to plaintiff enjoining the defendants' erection of a large building to be used for the sale of ice cream and dairy products as being in violation of restrictions limiting the use of the property to residential purposes. A group of lots in a tract had been sold at various times by the general owner of the tract to various persons, the deeds containing, with negligible exceptions, a uniform set of restrictions, the material one being a stipulation that only one dwelling house should be erected or maintained on each lot at any given time, with further provisions as to minimum cost of the dwellings and the maintenance of certain appurtenances thereto. Apparently the deeds were recorded, although the point was not expressly raised, except that in a later deed it was held that the deed, and the restrictions contained in it, did not become operative until the date of registration[22] of the deed, which was dated a few days earlier than the date upon which it was registered. It was held, in accordance with *Sprague v. Kimball*,[23] which was repeatedly cited by the court, that the statute of frauds applied to such restrictions, although the covenants here were in writing so as to satisfy the statute. The Massachusetts statute cited in *Sprague v. Kimball*[24] is in substance the same as Section 1 of the original English statute of frauds. The existence of a building scheme was discussed, with extensive citations of authority, as being important to establish the scope and extent of the restrictions as well as the property that they were intended to benefit. It was stated, however, that an express restriction was necessary to burden any particular piece of property, even though the existence of the scheme could be established where not every lot was restricted or where there were some variations in the restrictions. The case lays down no new rules of law and in fact seems to take a rather narrow view of the effect of the existence of a

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[20]"They [implied reciprocal servitudes] arise, if at all, out of a benefit accorded the land retained by restrictions upon neighboring land sold by a common owner." Sanborn v. McLean, 233 Mich. 227, 230, 206 N.W. 496, 497 (1925).

[21]291 Mass. 477, 197 N.E. 224 (1935).

[22]MASS. GEN. LAWS c. 185, §57 (1932).

[23]213 Mass. 380, 100 N.E. 622 (1913).

[24]MASS. GEN. LAWS c. 183, §3 (1932).

general building scheme, but it has some value for the extensive citations contained therein.[25]

This case and many others like it seem to entertain no doubt that the equitable servitude is an interest in land within the meaning of the first section of the statute, although at least in this one the existence of the contract theory is recognized, the court citing among other cases and writings *Bristol v. Woodward.*[26]

The Contract Theory. It appears that several courts have used the contract theory of enforcement of equitable servitudes as a means of avoiding the obstacle presented by the statute of frauds.[27] The argument is advanced in these cases that equity is merely granting specific performance of a contract, and that therefore no interest or easement in land within the meaning of the statute is involved.[28]

It can readily be seen that such an approach completely eliminates the first section of the English statute, so that it need not even be considered. It does not, however, necessarily exclude the possibility of application of the fourth section, relative to executory contracts. It has previously been noted that two subsections of this latter section may apply, one concerning executory contracts for the sale of any interest in land and the other dealing with agreements not capable of performance within one year. It is immediately obvious that the same argument which eliminates the first section of the English statute from consideration will also eliminate the subsection formerly mentioned relating to executory contracts for the sale of any interest in land.

There still remains, however, the provision in another subsection of the fourth section which requires all executory contracts not to

[25]The decree of the lower court was affirmed, with the exception of a modification as to the duration of a permanent injunction which had been granted, in accordance with a peculiar statute limiting the operation of such restrictions upon land to a period of 30 years.

[26]251 N.Y. 275, 167 N.E. 441 (1929).

[27]*E.g.,* Thornton v. Schobe, 79 Colo. 25, 243 Pac. 617 (1925); Hall v. Solomon, 61 Conn. 476, 23 Atl. 876 (1892); Hegna v. Peters, 199 Iowa 259, 201 N.W. 803 (1925); Lewis v. Gollner, 129 N.Y. 227, 29 N.E. 81 (1891); Johnson v. Mt. Baker Church, 113 Wash. 458, 194 Pac. 536 (1920).

[28]"An agreement for the sale of an interest in or concerning real estate contemplates a transfer of some portion of the title. An agreement not to carry on a particular kind of business on certain premises is not an agreement for the sale of an interest in or concerning said premises." Hall v. Solomon, 61 Conn. 476, 483, 23 Atl. 876, 878 (1892).

be performed within one year to be evidenced by a written memorandum. If we regard the equitable servitude as merely an executory contract which is susceptible to a decree of specific performance by a court of equity against all possessors of the land, then such an agreement still comes within this subsection unless it can be construed to be capable of performance within one year.[29] We find three cases worthy of note as having discussed the applicability of this subsection in applying the contract theory to the problem of the enforceability of equitable servitudes.

In *Long v. Cramer Meat & Packing Co.*[30] there was a parol understanding by which the tenants in common agreed that they would not use their lands for the grazing and watering of sheep. The court held that it was from its nature incapable of performance, or not to be performed, within a year, "and, resting wholly in parol, did violence to the statute of frauds, and would not have been specifically enforceable even against the original parties to it."[31] The decree of the lower court awarding the plaintiffs an injunction and damages was reversed and the cause remanded.

The case of *Hall v. Solomon*[32] presented the problem of an oral argument that property should not be used for the sale of intoxicating liquors. The court affirmed the lower court's decree awarding a permanent injunction. The first section of the statute earlier referred to was considered, the court holding that no interest in or concerning land was involved.[33] Then the court stated: "Nor is it an agreement not to be performed within one year, under another clause of the statute. It has been pretty uniformly held that contracts which may be performed within one year are not within the statute."[34] The court did not further elaborate or give any reason for its holding that the contract could be performed within a year. It is obvious that, as in the preceding case, the agreement was restrictive and un-

[29]When no definite time is fixed by the parties for performance of the agreement, and there is nothing in its terms to show that it could not be performed within a year, according to its intent and the understanding of the parties, it should not be construed as being within the statute of frauds. Yates v. Ball, 132 Fla. 132, 181 So. 341 (1937); *accord,* Land v. Cooper, 250 Ala. 271, 34 So.2d 313 (1948); Berger v. Jackson, 156 Fla. 251, 23 So.2d 265 (1945) (oral agreement to compensate promisee upon promissor's death).

[30]155 Cal. 402, 101 Pac. 297 (1909).

[31]*Id.* at 406, 101 Pac. at 298.

[32]61 Conn. 476, 23 Atl. 876 (1892).

[33]See note 28 *supra.*

[34]61 Conn. 476, 484, 23 Atl. 876, 878 (1892), citing cases.

limited as to time, so that the only contingency on which the agreement could be performed within one year would be a sufficient change in the neighborhood so that equity would refuse to enforce it. If this was the reason for the holding, it is respectfully submitted that this is a rather weak basis for the decision.

A different and rather novel solution was offered by an early case[35] in which the court affirmed a judgment of the lower court awarding the plaintiff damages for breach of the oral agreement in a special action of assumpsit, upon a plea of non-assumpit. After discussing the other arguments presented by the defendant, the court went on to say, with regard to the statute of frauds:[36]

> "It is too obvious to admit of discussion that the agreement of the plaintiff in error, that the 'Jewel House' should not be used as a tavern, is not affected by any provision of the first section of the statute of frauds. That portion of the section in relation to agreements, which are not to be performed within the space of one year from the making thereof, has been supposed to be applicable. This enactment extends only to contracts which are not to be carried into full, effective, and complete execution within a year from the making thereof; or, in other words, to cease, in which by the express appointment or understanding of the parties, the thing is not to be performed within a year. . . . Of necessity, it can be applicable only to affirmative contracts, for how can it be held to apply to a negative contract or stipulation – to a thing not only not to be done within a year, but not to be done at all, at any time?"

This view may not be too easy to comprehend, since it would have, it seems, a peculiar effect on any negative contract. But if accepted, affirmative equitable servitudes would still be subject to the requirements of the statute of frauds even though viewed as contract rights only; oral restrictive servitudes, however, would be fully enforceable.

Reno, in the article previously cited,[37] comes to the conclusion that the best answer to the argument that equitable servitudes, even if treated as not creating any interest in land, still come within the

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[35]Leinau v. Smart, 30 Tenn. (11 Humph.) 308 (1950).

[36]*Id.* at 311.

[37]*Supra* note 2.

subsection as to executory contracts not capable of performance within one year is found in the English doctrine that this subsection does not apply to unilateral contracts or to bilateral contracts one side of which has been fully performed within the year.[38] Equitable servitudes can in most instances be looked at as bilateral contracts in which the promisee has fully performed his side of the contract. They usually arise in a sale of land to the promisor or in the sale of land from the promisor to the promisee; and the promisee will usually have performed his side of the contract within the year, in the former case by the conveyance of the burdened land and in the latter by the payment of the purchase price for the benefited land. Only when there is no transfer of land but the oral agreement purports to create mutual equitable servitudes in consideration for each other would this solution fail. Thus, outside of this last situation, the obstacle of the statute of frauds to the enforcement of oral agreements purporting to create equitable servitudes can be avoided by approaching the problem as the enforcement of contract rights only.

Perhaps by way of conclusion it would be only appropriate to quote again from Justice Cardozo's opinion in *Bristol v. Woodward*:[39]

> "Difficulties there are in either view if the underlying concept is pressed to the limit of its logic. . . .
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> "We do not need to choose now between these conflicting methods of approach. . . . Each of the two methods will doubtless have contributed a share to the ultimate generalization. In the end we may find that they have come together so often and in so many ways that there is no longer space between the paths, no longer choice to make between them. What began as a contractual right may be so protected by remedies, legal and equitable, that it will be indistinguishable from a real interest, a title to the land itself. What has thus developed into an interest may retain such traces and reminiscenses of its contractual history that for the purpose of the Statute of Frauds, its quality will be determined according to its origin . . . .
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> "The ultimate generalization is . . . for the future."

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[38]See RESTATEMENT, CONTRACTS §198, comment *a* (1932).
[39]251 N.Y. 275, 288, 167 N.E. 441, 446 (1929).