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REFORMATION IN EQUITY OF CONTRACTS VOID
UNDER THE STATUTE OF FRAUDS.

OF all the points where the jurisdiction of courts of equity may come into conflict with the provisions of the Statute of Frauds, the one indicated by the title of this article is perhaps the most important as it is certainly the most disputed. It is a well-known principle that equity will relieve against the consequences of fraud, accident or mistake. But suppose that the relief proposed necessitates the reconstruction of an instrument of writing which, on its face, is void, as not fulfilling the requirements of the statute. Will equity withdraw it from the operation of the statute, reform it upon parol evidence, and then decree its specific performance?

It is believed that there are only two classes of cases where this direct conflict can occur: (1) Where the written agreement, as it stands, is too large; that is, where the parol evidence introduced to throw light upon the transaction shows that the contract, through fraud, accident or mistake, is made to include more in its subject-matter than was originally intended by the parties, and where the relief demanded is the rescission of the agreement as to this extraneous matter and its specific performance upon lines conforming to the real meaning of the parties: (2) Where the written agreement, as it stands, is too narrow—where it does not embody all the elements of the original contract, whether as to subject-matter or other provisions. And this will also include the

case of an agreement hopeless under the statute, in consequence of defects, omissions or obscurities. In regard to the first class, it seems to be generally admitted that since the acceptance of parol evidence to correct and reform it does not *make* a new contract, but only narrows one already made, it does not materially conflict with the statute. But in regard to the second class of cases, it is contended on the one hand, that the admission of oral testimony to enlarge the agreement to the full measure intended by the parties would be, in effect, to create a new contract out of elements previously resting in parol, by making it include a subject-matter not otherwise within its scope, and that under such circumstances the Statute of Frauds is conclusive and irrefragible. On the other hand, it is urged that it lies within the general jurisdiction of courts of equity to reform and enforce *all* agreements defective or imperfect through fraud or error. Here there occurs a decided conflict of authorities. One line of decisions holds that while parol evidence may be admissible in the first class of cases mentioned above, it must be strictly confined thereto. Another series of cases holds that parol evidence is alike to be entertained in either class of cases. The decisions are not to be reconciled—they can only be placed side by side. And it will be expedient first to review the cases upholding the strict application of the statute, and then those to the contrary.

Among the former class of cases, the most important and authoritative is that of *Glass v. Hulburt*, 102 Mass. 24, from the Supreme Court of Massachusetts. The opinion is by WELLS, J., and the following is an abridgment of it: The relief prayed for was that the contract (for the sale of land) should be made to include a certain portion of the tract which had been, through fraud or mistake, omitted from the conveyance already made. The opinion begins by stating the general jurisdiction of equity courts in cases of fraud and mistake, which is even, at times, concurrent with the remedy at law, but is always administered with reference to certain recognised rules and principles of chancery jurisprudence and often restricted by provisions of positive law. If there exists merely an oral contract, in such a case, then the Statute of Frauds is a perfect bar, and there can be no remedy except rescission. If there has been a part performance of the agreement, then, according to the general principles of equity, the case will be removed from the operation of the statute. But (1) payment of the whole consideration is not a sufficient perform-

ance for this purpose; nor (2) is possession under a defective agreement; nor (3) a conveyance only of a portion of the land, for that is in direct disregard and implied disavowal of the oral contract. The court then shows that to grant the relief demanded by the plaintiff would be to enforce the specific performance of a contract for the sale of land, for which there exists no memorandum, note, or other evidence in writing signed by the party to be charged therewith. Can this be done? The power to rectify deeds and other instruments in writing exists in this court under one of two statutory clauses—that which confers jurisdiction in cases of fraud, accident or mistake, or that which provides for relief in chancery where there is no adequate remedy at law. But this power will always be exercised in subordination to statutory provisions. Among such provisions is the Statute of Frauds. This statute is not a mere rule of evidence, but a positive restriction upon judicial authority in affording remedies. It requires the contract to be substantiated by some writing, and the fact that the want of such writing is occasioned by fraud, accident or mistake, is not a material circumstance, unless superior equities intervene which will estop the defendant to set up the statute. “Where the proposed reformation of an instrument involves the specific performance of an oral agreement within the Statute of Frauds; or where the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the Statute of Frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel, to deprive the party of the right to set up that defence.” Accident or mistake will not alone constitute such estoppel. There must also be a change of condition or position, made on the faith of the contract, with the knowledge and acquiescence, actual or implied, of the other party, and without redress if the agreement is defeated. Where courts of equity reform instruments and make them operative, it is because the oral agreement is binding, though imperfectly reduced to writing. But this is not the case where the oral agreement falls under the statute. If the statute intervenes, and the writing is imperfect, it is the same as if no writing in fact existed. Under the other head—fraud—if the party has changed his rights, it would be a fraud to set up the statute against him, and therefore it is not allowed. But this, again, supposes part performance.

Fraud in the preparation, form or execution of the instrument, only applies where the writing is perfect on its face and satisfies the statute; *e. g.*, where an absolute deed is declared a mortgage. "Fraud may destroy a title or right acquired by its means, but it has no creative force. It will not confer title. In the absence of a legal contract by the agreement of the parties, it will not establish one, nor authorize the court to declare one by its decree." "The tendency of the human mind, when fraud and injustice are manifest, is to strain every point to compass its defeat, and to render full redress to the party upon whom it has been practised. This influence has led to decisions in which the facts of the particular case were regarded more than the considerations of public policy upon which the statute is founded and entitled to be maintained. Courts have sometimes regarded it as a matter of judicial merit to wrest from under the statute all cases in which the lineaments of fraud in any form were discernible. But the impulse of moral reprobation of deceit and fraud, however commendable in itself, is liable to mislead if taken as the guide to judicial decrees. * * * We are satisfied that, upon principle, the conveyance of land cannot be decreed in equity by reason merely of an oral agreement therefor, against a party denying the agreement and relying upon the Statute of Frauds, in the absence of evidence of change of situation or part performance creating an estoppel against the plea of the statute. This rule applies as well to the enforcement of such an agreement by way of rectifying a deed as to a direct suit for its specific performance. We are satisfied, also, that this is the rule to be derived from a great preponderance of the authorities." *Glass v. Hulburt*, 102 Mass. 24. See also *Pierce v. Colcord*, 113 Id. 372.

The next case in importance, and one entirely in accordance with the foregoing, is *Elder v. Elder*, 10 Me. 80. There the plaintiff sought to add certain terms to the written agreement, but this was held to be within the prohibition of the Statute of Frauds. The court holds the following language: "It is one thing to limit the effect of an instrument, and another to extend it beyond what its terms import. A deed by mistake conveys two farms instead of one. If the suffering party is relieved in such a case by a court of chancery, full effect is not given to the terms of a written instrument. But the Statute of Frauds does not prescribe what effect shall be given to contracts in writing; it leaves that to be determined in courts of

law and equity. A deed conveys one farm when it may be proved by parol that it should have conveyed two. Here equity cannot relieve without violating the statute. To do so, would be to enforce a contract, in relation to the farm omitted, without a memorandum in writing signed by the party to be charged or by his authorized agent. These are distinctions, which may be fairly taken, between the case cited from New York (*Gillespie v. Moon*, 2 Johns. Ch. 585), where the plaintiff sought to be relieved from the undue operation of a deed which conveyed too much, and the case before us, where the prayer of the plaintiff is, that a contract in writing may be so extended by parol testimony as to embrace more land than the contract covers. But whether this court, sitting as a court of equity, would receive parol evidence of a mistake in a deed, to restrain its operation, it is not necessary to decide. There may be a great appearance of equity in such a proceeding; but it may admit of question whether more perfect justice would not be administered by holding parties to abide by their written contracts deliberately made and free from fraud. As far as this rule has been relaxed by the clear, unequivocal, and settled practice of chancery, we are doubtless bound by it in administering that of our system, but we are not disposed to adopt any new or doubtful exceptions to so salutary a rule:” *Elder v. Elder* 10 Maine 80. See also 2 Wharton on Evidence, §§ 904, 1024.

In a later case in the same court, the description of the land was found to be defective, and specific performance was refused, on the ground of the statute: *Jordan v. Fay*, 40 Maine 130.

Another case following in the same line is found in the Connecticut reports: *Osborn v. Phelps*, 19 Conn. 63. The facts were as follows: A. and B. made an agreement for the sale of land, and separate writings were drawn up for their respective signatures, one for A. as the vendor, and the other for B. as purchaser; but by a mistake the former was signed by B. and the latter by A. And consequently neither of the papers presented the true intention of the parties. The papers did not refer to each other in such a way that they could be connected. The court held that there could be no reformation of this contract; on the ground that it was necessary for the plaintiff to establish: (1) that the contract had been reduced to *writing*, and (2), that it was *signed* by the party to be charged. Failing this, the Statute of Frauds intervenes peremptorily and the suit cannot be maintained. The deci-

sion of the court rested principally on *Clinan v. Cooke*, 1 Sch. & L. 22, and *Elder v. Elder*, *supra*. One justice, however, dissented. He seems to predicate his views upon a strong anxiety to preserve intact the jurisdiction of equity courts in matters of fraud, accident, and mistake, and to have been influenced by *Gillespie v. Moon*, (cited below), though admitting the latter case to be contrary to the preponderance of authority. But he bases his decision on grounds entirely foreign to this question.

The courts of Michigan also contribute their support to this side of the doctrine. In a decision there rendered, (*Olimer v. Hovey*, 15 Mich. 18), it is held that equity may prune down a land contract which includes a larger subject-matter than was originally intended by the parties, but that nothing can be supplied or added, on parol evidence, to a contract too narrow, or void under the statute. The sole ground assigned is the statute itself. The principle of equitable estoppel is also recognised. The court relies upon the note to *Woolman v. Hearn*, cited below, and *Elder v. Elder*. Again, in a later case, "It is not the policy of courts of equity to enlarge the exceptions to the Statute of Frauds. Where parties see fit to neglect the means it provides for putting their agreements into a form which will prevent disputes, they must usually be content to trust to each other's promises, and not ask the courts to relieve them against the consequences of their own carelessness:" *Webster v. Gray*, 37 Mich. 37.

In a somewhat similar case the writing produced contained no sufficient description of the land to be conveyed, but it appeared that a subsequent verbal agreement between the parties fixed it accurately. But the court refused to reform the contract, stating that "courts of equity will not ordinarily compel the specific performance of a contract with variations or additions, or new terms to be made and introduced into it by parol evidence, for in such a case the attempt is to enforce a contract partly in writing and partly by parol, and courts of equity deem the writing to be higher proof of the real intentions of the parties than any parol proof can generally be, independently of the objection which arises under the Statute of Frauds:" *Whiteaker v. Vanschoiack*, 5 Oreg. 113.

A New York case holds that the *defendant* in a suit for specific performance may set up in defence, by parol evidence, that the contract does not express the true intent of the parties, through fraud, surprise, or mistake; but, by implication at least, refuses

the same privilege to a party complainant: *Best v. Stow*, 2 Sandf. Ch. p. *298. Other cases are cited in the note: *Dennis v. Dennis*, 4 Rich. Eq. (S. C.) 307; *Brooks v. Wheelock*, 11 Pick. 439; *Miller v. Chetwood*, 2 N. J. Eq. Rep. 199; *Nurse v. Seymour*, 13 Beav. 254; *Woollam v. Hearn*, 7 Ves. Jr. 211.

Finally, in the "Leading Cases in Equity" there is found a very able note to *Woollam v. Hearn*, by the American editor, discussing the whole subject of written instruments as varied or affected by parol, including the doctrine now under consideration. The note is too long to be more than briefly mentioned here. But it contains an elaborate review of all the authorities on the subject, approves *Glass v. Hulburt*, distinguishes *Gillespie v. Moon*, and its general trend is strongly in favor of supporting the statute: *Leading Cases in Equity*, Vol. II., Pt. I., p. 944 *et seq.* See particularly pp. 994-5-6.

But there is also an imposing array of authorities on the other side of the question. And in the first place, the case of *Glass v. Hulburt* has been often and seriously assailed. Pomeroy thinks that the allowance of reformation of the contract, in such cases, is not only supported by a great preponderance of judicial opinion, but is in entire accordance with the fundamental principles of equity jurisprudence; and he obviates the force of *Glass v. Hulburt* by showing that at the time that decision was rendered the equity jurisdiction of the Massachusetts and Maine courts was very limited, being conferred entirely by statute, and that it was the repeated declaration of those courts that they could not and would not extend their jurisdiction, thus defined, by implication: 2 Pomeroy's *Equity Jurisprudence*, § 866 *et seq.* This answer, however, is scarcely satisfactory, since the only question is, whether or not the jurisdiction of any court of equity *can* be large enough to work a virtual repeal of the Statute of Frauds. The leading case in favor of the equity side of the question is *Gillespie v. Moon*, mentioned above. The decision was rendered by Chancellor KENT in 1817. Here the premises to be conveyed were described, in the written agreement, by metes and bounds, adding the clause "200 acres, more or less," and the bounds given enclosed a tract of 250 acres. The bill was for a reformation of the contract, to make it include only the 200 acres originally intended. The chancellor says: "Whether such [parol] proof be admissible on the part of a plaintiff who seeks specific performance of an agreement in writing, and

at the same time seeks to vary it by parol proof, has been made a question." But the court firmly inclines to the opinion that it is so admissible: *Gillespie v. Moon*, 2 Johns. Ch. 585. But note that this case is held not inconsistent with *Elder v. Elder*, *supra*, since it limits the effect of an instrument, but does not seek to extend it beyond what its terms import.

Following this comes another decision by the same eminent jurist: *Keisselbrack v. Livingston*, 4 Johns. Ch. 144. After noticing the English doctrine, that parol proof is admissible, in such cases, in favor of a *defendant*, but not in behalf of a plaintiff seeking specific performance. "And why should not the party aggrieved by a mistake in the agreement have relief as well where he is plaintiff as where he is defendant. It cannot make any difference in the reasonableness and justice of a remedy whether the mistake was to the prejudice of one party or the other. If the court has a competent jurisdiction to correct such mistakes (and that is a point understood and settled), the agreement, when corrected and made to speak the real sense of the parties, ought to be enforced as well as any other agreement perfect in the first instance. It ought to have the same efficacy and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties."

Again, "In *Elder v. Elder* it is said, 'a deed conveys one farm when it may be proved by parol that it should have conveyed two. Here equity cannot relieve without violating the statute.' And it is thus attempted to distinguish that case from *Gillespie v. Moon*, where the deed conveyed too much land. If this position rests upon the provisions of the Maine statute, it is well enough. But we cannot accede to it as the true rule of chancery jurisprudence, to be derived from the adjudged cases in England and America. In our opinion, a court of equity is competent to correct and reform any material mistake in a deed or other written agreement, whether the mistake be the omission or insertion of a material stipulation; and whether it be made out by parol testimony, or be confirmed by other more cogent proofs. And the same rule applies to contracts within the operation of the Statute of Frauds:" *Tilton v. Tilton*, 9 N. H. 392. Affirmed in *Bellows v. Stone*, 14 Id. 175.

Again, it is held that where the evidence of mistake is clear and free from doubt, there exists no reason why the court should not correct the agreement and then decree its specific performance as

corrected: *Mosby v. Wall*, 23 Miss. 81. And, "there certainly can be no doubt now that it is competent to a party in a court of equity to offer parol evidence of a mistake in an agreement in writing relating to lands, to have it rectified, and then specifically executed as rectified. Cases establishing a contrary doctrine may readily be found, but these were repudiated by Chancellor KENT, who permitted the parol proof to be offered establishing the mistake, reformed the agreement according to the proof, and specifically executed it as reformed:" *Philpott v. Elliott*, 4 Md. Ch. 273. And again, "Nothing is better settled in this state than that not only can the ambiguities of a written instrument be explained by parol, but it may, in the same manner, be varied, added to, or even contradicted where it is shown that but for the oral stipulations made at the time, the party affected would not have executed it:" *Caley v. Phila. & Chester R. R. Co.*, 80 Pa. St. 370.

One of the broadest and most sweeping opinions is reported from Georgia. After giving an emphatic endorsement to *Gillespie v. Moon*, "we hold that parties, whether plaintiffs or defendants, whether seeking to set aside and cancel an agreement, or reform and enforce it, can be relieved, as well on account of mistake as fraud. It would be monstrous to suppose that the arm of the judiciary of Georgia was too short, or too weak, to reach and relieve, provided the contract variant from the true one could once be got into writing!" *Rogers v. Atkinson*, 1 Kelley 24-5. Affirmed in *Wall v. Arrington*, 13 Ga. 91.

Judge STORY gives the following views: "But the case intended to be put differs from each of these. It is where the party plaintiff seeks, not to set aside the agreement, but to enforce it when it is reformed and varied by the parol evidence. A very strong inclination of opinion has been repeatedly expressed by the English courts, not to decree a specific performance in this latter class of cases; that is to say, not to admit parol evidence to establish a mistake in a written agreement, and then to enforce it, as varied and established by that evidence. On various occasions such relief has, under such circumstances, been denied. But it is extremely difficult to perceive the principles upon which such decisions can be supported, consistently with the acknowledged exercise of jurisdiction in the court to reform written contracts, and to decree relief thereon. In America, Chancellor KENT, after a most elaborate consideration of the subject, has not hesitated to reject the distinc-