

MILDRED A. MONTGOMERY-TRAYS, surviving heir of ABRAHAM L. MONTGOMERY, Intestate, Appellant, v. STELLA V. MONTGOMERY, widow of ABRAHAM L. MONTGOMERY, Intestate, and MARION MAJOR-PRATT, Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,
COUNTY OF SINOE.

Argued November 13, 1967. Decided January 18, 1967.

1. Where one party to an oral contract for the sale of land has, in reliance on the contract, so far performed his part thereof that it would amount to a fraud upon him to allow the other party to repudiate the contract by invoking the statute of frauds, courts should regard the case as removed from the operation of the statute of frauds and decree specific performance of the oral contract.

In the course of estate proceedings, objection was made by coadministratrix, the appellant, to delivery of a deed to real property by her coadministratrix, an appellee, to the coappellee, who, in the lifetime of the intestate, had paid him the purchase price of the property, had been pointed out by the intestate to witnesses as the new owner of the property, and had received the deed to the property from him. On appeal from the judgment of the lower court ordering the issuance of an administratrix's deed, the *judgment* was *affirmed* and the deed ordered delivered.

Clarence O. Tuning for appellant. *Richards and Bernard* for appellees.

MR. JUSTICE SIMPSON delivered the opinion of the Court.

On November 24, 1964, while residing in the City of Greenville, Sinoe County, Abraham L. Montgomery de-

parted this life for a celestial abode, leaving to mourn his demise his wife, Stella V. Montgomery, and a niece, in the person of Mildred A. Montgomery-Trays.

By virtue of the demise of Mr. Montgomery, application was made to the Probate Court at Greenville for the appointment of the widow as administratrix of the estate of decedent. The application as sought was granted and thereupon letters of administration issued in January, 1965, to the administratrix declaring her sole administratrix of the estate. Subsequently, the widow applied to court to have the decedent's niece, in the person of appellant, named as one of the administratrices of the said estate. This application was also granted by the court and the two administratrices were granted letters of administration.

Subsequently, coadministratrix-appellant returned to Harper City, in Maryland County, where she resides and the coadministratrix-appellee on February 18, 1965, filed an inventory of the estate alleging that the worldly goods of the intestate amounted to \$20.75. Upon learning of this, one John L. Morris, a representative of the appellant, raised issue in the Probate Court in respect to the declared value of the estate, alleging, *inter alia*, that the widow had received \$590.00 from a joint venture at Butaw, Sinoe County, for the destruction of certain crops and live trees owned by the intestate, and that this amount for which she was compensated constituted a portion of the estate and had not been included as part of the assets.

Thereafter, this matter was ordered investigated by the assigned Circuit Judge, Hon. Daniel Drapper, who conducted an investigation on September 27, 1966. It was conceded by counsel for appellee Montgomery that \$500.00 had been received by her, but that this amount was received subsequent to the filing of the inventory on February 18, 1965. The court, in ruling, held that since the widow had the responsibility for the interment of the intestate, consideration should be given this fact in a de-

termination of how these proceeds were to be divided. Accordingly, the widow was granted two-thirds of this amount, and the niece one-third of the said amount. However, the court further determined that the amount receivable by the appellant should be liquidated in monthly installments, at the rate of \$15.00 per month.

This matter subsided temporarily until January 5, 1967, when counsel for appellant appeared in court and made averment to the effect that the widow, though ordered to do so by the court, had failed and neglected to surrender into court for a period of one year, the deed covering the one-hundred-odd-acre tract of land owned by the intestate, situated at Butaw, in Sinoe County. The clerk of the court was ordered to issue a writ of summons upon appellee Montgomery and one John L. Morris, to appear in court on January 9, 1967, to show cause why the orders of the judge had not been complied with in respect to producing and submitting to the court the subject deed. On February 3, as the court met for the conduct of business, the widow presented a certificate, supported by an affidavit which stated that the subject property covered by the deed at issue had been the subject of a sale from the intestate to one Marion Major-Pratt. The certificate further stated that the intestate had, in the presence of several witnesses, taken the aforesaid Marion Major-Pratt onto the property during his lifetime and had placed her in possession of the same by informing the custodians placed upon the property by him of the fact that he had bargained and sold the said property to appellee Pratt.

In addition to the above, the certificate also stated that the decedent had delivered to Major-Pratt prior to his demise his evidence of title in the form of the deed. This being the case, the judge held that this was a sufficient part performance on the part of Mrs. Pratt to warrant the ordering of an administrator's deed in her favor for the subject property. To this ruling of the judge and

the final judgment, exceptions were taken and an appeal announced to this Court for a review of that judgment.

Predicated upon the above-recited facts, we are required as a matter of law to review the aforesaid judgment for a determination of whether or not the same conforms to the statutes and laws of this Republic. In effect, there is but one issue to be determined by us at this time, and the same has to do with whether or not a party may, by placing an individual in possession of property and, furthermore, receiving money as the purchase price for the same, be made to specifically perform the contract obligations, and be ordered to deliver the deed to the grantee.

In respect to part performance, the following is found in 49 AM. JUR., *Statute of Frauds*, § 419:

“Subject to a rule to the contrary followed in a few jurisdictions, it is the accepted view that part performance of a parol contract for the sale of real estate has the effect, subject to certain conditions concerning the nature and extent of the acts constituting performance and the right to equitable relief generally, of taking such contract from the operation of the statute of frauds, so that chancery may decree its specific performance or grant other equitable relief.”

Continuing, at Section 421:

“The true basis of the doctrine of part performance, according to the overwhelming weight of authority, is that it would be a fraud upon the plaintiff if the defendant were permitted to escape performance of his part of the oral agreement after he has permitted the plaintiff to perform in reliance upon the agreement. The oral contract is enforced in harmony with the principle that courts of equity will not allow the statute to be used as an instrument of fraud. In other words, the doctrine of part performance was established for the same purpose for which the statute of frauds itself was enacted, namely, for the prevention

of fraud, and arose from the necessity of preventing the statute from becoming an agent of fraud, for it could not have been the intention of the statute to enable any party to commit a fraud with impunity. As often stated, where one party to an oral contract for the sale of land has, in reliance on the contract, so far performed his part thereof that it would be a fraud upon him to allow the other party to repudiate the contract by invoking the statute of frauds, equity will regard the case as removed from the operation of the statute. It is not merely to remedy a possible loss to the plaintiff, or to prevent an unjust retention of benefit by the defendant who sets up the statute of frauds as a defense to an action on the contract after he has refused to perform it, that equity may intervene to decree specific performance in the case of land a contract which, although not in writing as required by the statute of frauds, has been partially performed by the plaintiff. Equity acts to decree specific performance because, by reason of the part performance, the relation of the parties has been changed and a restoration to their former condition would be impracticable, so that to refuse to execute the contract would amount to a fraud upon plaintiff. 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 to invalidate the agreement. Similar facts may also be sufficient to support the right to equitable relief in reforming a contract to include lands omitted therefrom by mistake and the specific performance of the contract as reformed."

From the above-quoted provisions of law, it can readily be seen that there has been such performance by the ap-

pellee, Marion Pratt, to remove this case from the operation of statute of frauds and to compel the specific performance of the parol contract by ordering the administratrix's deed to be issued.

In the circumstances, the judgment of the court below is hereby affirmed, with costs against appellant. And it is hereby so ordered.

Affirmed.