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CONTRACTS—STATUTE OF FRAUDS: PART PERFORMANCE AS A BASIS FOR MONEY DAMAGES—*Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971).

Plaintiff entered into an oral agreement to work defendant's farm for three years with an option to buy at the end of the term. The agreement specified that plaintiff would receive an annual salary, one-half of which would be retained and applied to the purchase price should plaintiff choose to buy the farm. On election to buy, plaintiff was to receive, as a credit towards the purchase price, one-third of the farm's increased value over \$40,000. In addition, the agreement provided for a board of appraisers to settle potential disputes about the farm's value. Plaintiff took possession, made valuable improvements, and, after three years, offered to buy the farm. Defendant refused to sell, and ordered plaintiff to vacate. Plaintiff, claiming that part performance took the case out of the Statute of Frauds, sued for damages for the alleged breach of the oral contract of sale. During the pendency of this action, defendant conveyed the farm to a third person. The Court of Appeals denied relief. The Washington Supreme Court reversed. *Held*: a contract exempted by part performance from the Statute of Frauds may serve as the basis for an action at law for money damages.¹ *Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971).

The relief granted under *Miller* greatly expands the previously available remedy in Washington, and is a distinct departure from the general rule applied in other jurisdictions that the doctrine of part performance is equitable in nature and thus an insufficient basis for an action at law for money damages on an oral contract.²

1. The *Miller* court based its holding on a liberal interpretation of the Washington Statute of Frauds as excluding any use of that statute as an instrument of fraud. Most courts agree that the Statute of Frauds should not be used to work a fraud. See 45 AM. JUR. *Statute of Frauds* § 578 (1948); Annot., 75 A.L.R. 650 (1931). But few have extended this rationale to allow an award of damages.

The applicable Washington Statute of Frauds provides that "[e]very conveyance of real estate or any interest therein... shall be by deed..." WASH. REV. CODE § 64.04.010 (1958).

2. *Evans v. Mason*, 82 Ariz. 40, 308 P.2d 245 (1957). See also 2 A. CORBIN, CONTRACTS § 422 (1950); *White v. McKnight*, 146 S.C. 59, 143 S.E. 552 (1928).

The extent of prior relief in Washington is illustrated by three cases cited in *Miller*: *Chamberlain v. Abrams*, 36 Wash. 587, 79 P. 204 (1905) (damages were denied in an action involving a sale of land to which the defendant had not acquired title); *Johnson v.*

Analysis of the cases subscribing to the general rule reveals little, if any, of the underlying reasoning. The part performance doctrine was an early invention of the equity courts devised to afford a remedy for inequitable results under the Statute of Frauds.³ It is based on the belief that in certain situations it would be fraudulent to permit the defendant to escape performance of his part of the bargain after he had permitted the plaintiff to perform in reliance upon the agreement.⁴ However, relief based on part performance was limited to specific performance; legal damages were unavailable.⁵ The limitation of the remedy to specific performance stemmed from the fact that part performance operated on the equitable theory of estoppel to assert the Statute of Frauds as a defense, and not on the theory of a revalidation of the contract.⁶ The contract, being within the Statute of Frauds, was invalid; and because an action for money damages demanded a *valid* contract,⁷ no damages could be recovered.

Upper, 38 Wash. 693, 80 P. 801 (1905) (damages again were denied in an action involving an oral agreement between the parties providing that plaintiff was to work defendant's farm for 5 years in return for a share of the profits); and *Goodwin v. Gillingham*, 10 Wn.2d 656, 117 P.2d 959 (1941) (involving an oral contract to "make, execute, and deliver" a written lease on an apartment house for a term of 3 years where the plaintiff took possession and made valuable improvements, but the court ruled that the part performance doctrine had no place in an action at law for damages, and thus the contract was within the Statute of Frauds).

The Washington court adopted the general rule in *Goodwin*, seemingly in disregard of *Browder v. Phinney*, 30 Wash. 74, 70 P.264 (1902) in which the court, in dictum, expressed a view clearly to the contrary:

[A] part performance of the contract . . . would render the lessor liable in damages for its violation by him; and the court in holding that part performance could not be shown in an action for damages, lost sight of the concurrent jurisdiction with which the courts are clothed. . . .

Id. at 76, 70 P. at 264. This statement seems to be a broad negation of the general rule, based on the merger of law courts with equity courts. There is only one form of civil action in Washington. WASH. CIV. R. SUPER. CT. 2. In any event, *Browder* is supportive of the *Miller* position. However, the case is an isolated one, not cited by the *Miller* court, which instead stated that prior Washington law had supported the general rule. *Miller v. McCamish*, 78 Wn.2d at 827, 479 P.2d at 922.

3. The term "part performance" implies that the terms of the contract have been partly complied with. Actually, the designation is not always appropriate, for very often what is involved in the performance includes factors not contained in the contract, such as the making of improvements. See 2 A. CORBIN, *supra* note 2, at §§ 433-34.

4. See, e.g., *Goodwin v. Gillingham*, 10 Wn.2d 656, 662, 117 P.2d 959, 961 (1941).

5. E. FRY, *SPECIFIC PERFORMANCE* § 578 (6th ed. 1921); J. POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* § 1409 n.1 (4th ed. 1919).

6. *Goodwin*, 10 Wn.2d at 662, 117 P.2d at 961. Actually, if the suit based on part performance is allowed because the defendant is estopped from asserting the Statute of Frauds as a defense, that removal of the bar of the Statute should leave the contract free from objection and existing as a proper basis for an award of damages.

7. *Id.* at 662, 117 P.2d at 961.

Presumably, the assumption that damages could only follow from a valid written contract stemmed from the age-old division between law courts and equity courts.⁸ Law courts granted damages as the exclusive remedy for contract breach,⁹ and after the enactment of the Statute of Frauds¹⁰ even this relief was denied in suits based on oral contracts. The principle developed that equity courts could not award relief within the special province of the law courts, especially when those same law courts had formulated a rule denying damages in exactly the same situation.¹¹ This principle was probably enhanced by the incessant jurisdictional conflicts between the two judiciary branches—a conflict acute enough to cause jealous guarding of rules and remedies.¹²

However cogent this separation of remedies may have been during the divorce of law from equity, the fusion of the two branches would seem to have precluded any further need for it.¹³ Nevertheless, many jurisdictions regard the fusion of law and equity as only procedural, and of no effect on substantive divisions.¹⁴ Today, however, there seems to be no more reason for continuing substantive distinctions than for continuing procedural ones.¹⁵

8. For a concise discussion of the evolution of the equity courts see 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 23-37 (5th ed. 1941).

9. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 678 (5th ed. 1956). Plucknett states that the common law courts very early awarded relief approximating specific performance, but that with age the courts gradually restricted themselves to awarding only damages. Plucknett calls this aging process *rigor juris*, and suggests that the need for equity courts arose in part from the very ossification of the law courts.

10. The Statute of Frauds was enacted in England in 1676.

11. That equity courts were limited in jurisdiction and generally did not award damages is well recognized. See 1 J. POMEROY, *supra* note 8, at 437; T. PLUCKNETT, *supra* note 9, at 690.

12. The law courts often came into conflict with the equity courts when the latter courts, in certain instances, enjoined the parties from proceeding at law, or, if they had already done so, from effectuating the judgment. This interference was necessary for the survival of equity, but it caused a rift that became increasingly volatile and reached its peak during the reign of James I. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-65 (3d ed. 1922).

13. See 2 A. CORBIN, *supra* note 2, at § 422; 30 MINN. L. REV. 208, 209 (1946).

14. See, e.g., *Evans v. Mason*, 82 Ariz. 40, 308 P.2d 245 (1957). Washington Civil Rule 2 has been interpreted by the courts as a purely procedural rule, not affecting substantive distinctions between law and equity. See *Yount v. Indianola Beach Estates, Inc.*, 63 Wn.2d 519, 387 P.2d 975 (1964). But the fusion may be extended to some substantive cases, at least if the distinction erased by *Miller* could be considered substantive. Even if that distinction is considered procedural, the fact is that old distinctions based solely on the historical development of law and equity are breaking down.

15. See 2 A. CORBIN, *supra* note 2, at § 422; 1 J. POMEROY, *supra* note 8, at § 44 n.5.

A related rationale, not mentioned in the Washington decisions, was the fear that an award of damages would contravene the purpose of the Statute of Frauds¹⁶—that purpose being to prevent the fraud concomitant upon uncertain oral agreements.¹⁷ Withholding damages for suits on contracts within the Statute of Frauds would certainly prevent the fraud resulting from the uncertainty involved in oral sales, but courts have long awarded specific performance in the same situation.¹⁸ Since specific performance is usually the preferred remedy, the addition of damages as a remedy would only slightly enlarge the intrusion upon the statute. It is significant to note that the *Miller* court demanded the same rigid standards for exemption from the statute as now required for specific performance. The court required sufficient proof of the terms of the contract to remove all doubt as to the parties' oral agreement.¹⁹ Also, the acts done in part performance must have "unmistakably point[ed] to the existence of the claimed agreement."²⁰ Such strict requirements should guarantee that the purpose of the statute is not subverted. Further, as the *Miller* court recognized, when the uncertainty possible in an oral contract does not exist, the reasons for the application of the Statute of Frauds disappear.²¹ Since the purpose of the Statute is to prevent fraud, the courts should not

16. See 49 AM. JUR. *Statute of Frauds* § 426 (1943).

17. 2 A. CORBIN, *supra* note 2, at § 275.

18. E. g., *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 457 P.2d 603 (1969); *Mobley v. Harkins*, 14 Wn.2d 276, 128 P.2d 289 (1942).

19. *Miller*, 78 Wn.2d at 829, 479 P.2d at 923. The *Miller* court stated that the contract must "be proven by evidence that is clear and unequivocal and which leaves no doubt as to its terms, character, and existence. . . . A mere preponderance of the evidence is not sufficient. . . ." *Id.*, quoting from *Granquist v. McKean*, 29 Wn.2d 440, 445, 187 P.2d 623, 626 (1947).

20. *Miller*, 78 Wn.2d at 829, 479 P.2d at 924. There are no precise requirements for a sufficient part performance; each case presents a special problem, and the index the courts employ is necessarily indefinite, *i.e.*, what must the plaintiff have done to make it inequitable to allow the defendant to rely on the Statute of Frauds as a defense. See *Mobley v. Harkins*, 14 Wn.2d 276, 128 P.2d 289 (1942).

A skeleton formulation of acts necessary for sufficient part performance of land sale contracts was established in *Richardson v. Taylor Land & Livestock Co.*, 25 Wn.2d 518, 171 P.2d 703 (1946):

The principal elements or circumstances involved in determining whether there has been sufficient part performance by a purchaser of real estate under an oral contract otherwise within the statute of frauds, are (1) delivery and assumption of actual and exclusive possession of the land; (2) payment or tender of the consideration, whether in money, or services; and (3) the making of permanent, substantial and valuable improvements, referable to the contract.

Id. at 528-29, 171 P.2d at 709-10.

21. *Miller*, 78 Wn.2d at 829, 479 P.2d at 924.

hesitate to award damages whenever the Statute is being used to work a fraud.

The court liberally construed the Statute of Frauds to topple the old rule that denied damages for a claim based on the part performance theory. Surprisingly, the court so ruled without reference to similar decisions from other jurisdictions, giving *Miller* the impression of isolation. Actually, the seeds of destruction of the general rule were sown early in the development of the law when the equity courts began to assert jurisdiction over legal damages.²² In a proper suit for specific performance, equity granted damages when specific relief was too difficult to enforce or when the seller had conveyed to a bona fide purchaser, making specific performance impossible.²³ Following these early decisions came a series of American cases that awarded damages in similar situations.²⁴ Analysis of the scope of these cases is complicated by the fact that in most of them specific performance was impossible, indicating that such impossibility may be a necessary element

22. See, e.g., *Denton v. Stewart*, 1 Cox Eq. Cas. 258 (1786).

23. The great majority of courts allow the award of damages when the plaintiff seeks specific performance and is ignorant of the fact that the defendant cannot perform. J. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS § 477 (3rd ed. 1926); *Cunningham v. Duncan*, 4 Wash. 506, 30 P. 647 (1892).

American courts have gone much farther than the above rule, allowing equity to award damages in lieu of specific performance even when the plaintiff knew at the time of bringing suit that specific performance was impossible. J. POMEROY, *supra* at § 478, citing *Mobile County v. Kimball*, 102 U.S. 691 (1880). Another case awarding damages in this situation was *Jervis v. Smith*, 1 Hoff Ch. 470 (1840), a New York case decided before the merger of law and equity, a fact that led one commentator to remark that damages should certainly be awarded after the merger. 30 MINN. L. REV. 209 (1946).

24. One state, Georgia, has well-established precedent allowing damages in the *Miller* situation. Another state, Ohio, had several early cases in accord with *Miller*, but the doctrine has been muddied by more recent cases. The Georgia rule seems to stem from dictum in the early case of *Chastain v. Smith*, 30 Ga. 96 (1859), although that case involved a suit for specific performance. The leading Georgia case is *McLeod v. Hendry*, 126 Ga. 167, 54 S.E. 949 (1906). The rule seems so well established that recent cases do not even discuss the issue, merely citing the key cases. E.g., *Nash v. Greenig*, 108 Ga. App. 763, 134 S.E.2d 483 (1963).

The key to the Georgia rule may lie in a statute that allows the superior court to adjust legal and equitable rights and remedies. GA. CODE ANN. § 81-101 (1962).

The rule in Ohio has shifted alternately between cases in accord with the *Miller* case and cases that show preference for the general rule. For examples of the former cases see *Grant v. Ramsey*, 7 Ohio St. 157 (1857); *Waggoner v. Speck*, 3 Ohio St. 292 (1827); *La Bounty v. Brumback*, 126 Ohio St. 96, 184 N.E. 5 (1933); *Artcraft Specialty Co. v. Center Woodland Realty Co.*, 40 Ohio App. 125, 178 N.E. 213 (1931). For examples of the latter cases see *Ossage v. Foley*, 20 Ohio App. 16, 153 N.E. 117 (1923); *Kling v. Bordner*, 65 Ohio St. 86, 61 N.E. 148 (1901); *Hodges v. Ettinger*, 127 Ohio St. 460, 189 N.E. 113 (1934). The more modern cases show a tendency to support the *Miller* position. *Hughes v. Oberholtzer*, 162 Ohio St. 330, 123 N.E.2d 393 (1954). For a good analysis see 7 U. CIN. L. REV. 300 (1933).

in a suit for damages.²⁵ However, the language of several cases indicates a somewhat broader principle, with ramifications beyond the impossibility situation.²⁶ At least one decision can be read to allow damages as an alternative remedy to specific performance.²⁷ *Miller* did not refer to these cases. Therefore, in the absence of such guidelines, it is necessary to turn to analysis of the case itself.

In *Miller*, the specific performance remedy was vitiated by the conveyance to a bona fide purchaser.²⁸ That fact could indicate a very strict limitation of the result to cases involving sufficient part performance to remove the case from the Statute of Frauds and in which specific performance was impossible. Arguably, though, the case could support the broader proposition that damages are always an alternative remedy. The issue and holding as stated do not limit the case's application to instances where there has been a conveyance to a bona fide purchaser.²⁹ However, since the rationale of the case is to allow relief in damages when denial would work a fraud, it could be argued that no fraud could be worked *unless* specific performance was impossible—because otherwise the plaintiff would not be totally without relief. The case is not clear on this point, but its tone suggests a willingness to allow damages as an alternative remedy.

Even if read restrictively with respect to alternative remedies, the *Miller* decision may be expanded beyond its factual pattern to allow

25. See *Jervis v. Smith*, 1 Hoff. Ch. 470 (1840). For other examples see 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1087 (14th ed. 1918).

26. See *Sourbier v. Claman*, 101 Ind. App. 679, 200 N.E. 721 (1936) (oral lease); *Wolfe v. Wallingford Bank & Trust Co.*, 124 Conn. 507, 1 A.2d 146 (1938) (oral agreement to convey mortgaged realty). See also *Deisher v. Stein*, 34 Kan. 39, 7 P. 608 (1885) (oral agreement to execute lease).

27. *McLeod v. Hendry*, 126 Ga. 167, 54 S.E. 949 (1906) (breach of oral agreement to reconvey land).

28. *Miller*, 78 Wn.2d at 830, 479 P.2d at 924 (emphasis added):

Alternatively, however, where the breaching party has transferred the property *thus making specific performance impossible*, the injured party, upon proper showing, is nevertheless entitled to the benefit of his bargain and he may seek it through legal damages.

29. In *Miller*, the court framed the issue as follows:

Whether a contract, within the statute of frauds and exempted therefrom by part performance may serve as a basis for an action at law for money damages.

78 Wn.2d at 824, 479 P.2d at 921 (emphasis in original). The precise holding was stated in the following terms:

Where an oral contract or agreement is satisfactorily demonstrated . . . such oral contract or agreement, within the statute of frauds but exempted therefrom by part performance, may serve as a basis for an action at law for money damages.

Id. at 829, 479 P.2d at 924.

damage awards based on oral contracts other than for the sale of land.³⁰ Although specifically involving a land conveyance, the opinion is not limited by its rationale to such contracts. Again, the court purports to allow damages simply for "oral contracts or agreements."³¹ Of course, the requirements of proof of part performance must be present for any such suit.³²

Perhaps the most far reaching aspect of the decision stems from the court's extremely lucid attack on the problem of equitable-legal exchange of remedies. The courts that have awarded damages in situations similar to *Miller* have differed widely in awareness of the underlying significance of the damage award.³³ Some fail even to recognize the general rule.³⁴ Thus, the fact that *Miller* squarely faced and re-

30. For the other kinds of oral contracts that come within the Statute of Frauds see WASH. REV. CODE § 19.36.010 (1961) and WASH. REV. CODE § 62A.2-106 (1965). The Uniform Commercial Code provides a similar remedy. U.C.C. 2-201 (Statute of Frauds) exempts cases from the statute if sufficient acts of part performance have taken place. U.C.C. 2-716 gives the buyer, on the seller's breach, the right to specific performance of an agreement for unique goods. U.C.C. 2-715 gives the buyer, on the seller's breach, the right to award of damages. Thus, assuming an oral contract for the sale of unique goods, the buyer would be entitled to alternative remedies if he could demonstrate sufficient part performance of the agreement.

31. See note 29, *supra*.

32. See notes 19 and 20, *supra*.

33. Several courts apparently recognize the doctrine of part performance as equitable in nature, and still award damages. See *Sourbier v. Claman*, 101 Ind. App. 679, 200 N.E. 721 (1936); *Arcraft Specialty Co. v. Canter Woodland Realty Co.*, 40 Ohio App. 125, 178 N.E. 213 (1931).

Other courts suggest that the theory involved is legal in nature, and, thus, that damages is the obvious remedy.

See *Wolfe v. Wallingford Bank & Trust Co.*, 124 Conn. 507, 1 A.2d 146 (1938). The case refers to the theory underlying the doctrine of part performance as that of estoppel, and states that estoppel is a theory recognized at law. That would seem to imply that damages would be awarded as a matter of course.

Another reference to part performance as a legal theory is in 30 MINN. L. REV. 209 (1946), a note that cites *La Bounty v. Brumback*, 126 Ohio St. 96, 184 N.E. 5 (1933), and *McLeod v. Hendry*, 126 Ga. 167, 54 S.E. 949 (1906) in support of that proposition.

Since the *Miller* court based its holding on statutory interpretation, and since statutory interpretation is necessary in law as well as equity, it could be argued that the case rests on a legal theory. However, the statutory interpretation and the theory of part performance are really the same in focus. The court used statutory interpretation to read an exemption into the Statute of Frauds applicable whenever the statute would be used as an instrument for fraud. But to determine when a fraud would be worked, it is necessary to employ what we now call the doctrine of part performance, a doctrine previously recognized in Washington as essentially equitable. So whether the *Miller* court meant to allow damages because it recognized the theory as legal or because it recognized that damages could flow from an equitable theory remains unclear.

34. See, e.g., *McLeod v. Hendry*, 126 Ga. 167, 54 S.E. 949 (1906); *Sourbier v. Claman*, 101 Ind. App. 679, 200 N.E. 721 (1936); *Luettich v. Putnam*, 287 S.W.2d 727 (Tex. Civ. App. 1956).

solved the problem may have significant ramifications in other areas of the law. Since the general rule rested on the division between law and equity,³⁵ the *Miller* court's rejection of the rule indicates that the court also rejects the underlying reasoning.³⁶ The *Miller* case might, therefore, logically be used to support the proposition that law and equity have completely merged, on both the procedural and substantive levels. If that is true, it would mean that all doctrine that is based *solely* on the historical development of equity courts apart from law courts would be abrogated. An example of a rule of this type is that disallowing a jury trial in equity cases. The Washington Constitution secures the right to jury trial,³⁷ but this right has been interpreted to include only those cases triable by jury at the time the constitution was adopted.³⁸ Since equity suits were excluded from this category, there is no right to a jury trial in such cases. However, the exclusion seems to be based solely on the historical distinction between law and equity, and could be abrogated by their merger. The limitation of the right to a trial by jury to those cases triable by jury at the time the state constitution was adopted would remain despite a present holding that law and equity had merged, but this limitation is judicially imposed and could be changed by a new interpretation. In fact, the Washington courts have recently indicated a tendency to allow jury trials in equity proceedings.³⁹ *Miller* may lend some support to the dissolution of historical distinctions between legal and equitable actions and the right to trial by jury.

An example of a doctrine arising from equity courts for a reason not purely historical is the "uniqueness" requirement for relief of specific performance.⁴⁰ The requirement arose as equity's way of avoiding the law courts' jurisdiction—there was no adequate remedy

35. See note 8, *supra*.

36. *Miller*, 78 Wn.2d at 827-28, 479 P.2d at 923.

37. WASH. CONST. art. I, § 21.

38. See *Garey v. City of Pasco*, 89 Wash. 382, 154 P. 433 (1916).

39. See *Scavenius v. Manchester Port District*, 2 Wn. App. 126, 467 P.2d 372 (1970).

40. The general rule is that the court will not grant specific performance if an adequate remedy exists at law. 2 A. CORBIN, *supra* note 2, at § 1136 (1964). An adequate remedy at law is money damages. If the contract involves a unique item such as land, then there can be no adequate remedy at law, and specific performance is granted. There is, however, some evidence indicating that courts often award specific performance even when damages are an adequate remedy. The merger of law courts and equity courts has probably aided courts in allowing the specific remedy. *Id.*

at law in these situations. Thus, the "uniqueness" requirement is somewhat dependent upon the historical development of equity courts. However, were the "uniqueness" requirement abandoned, buyers of even the most trival, commonplace goods would be able to demand specific performance. Since the buyer can easily "cover" in these situations, allowing specific performance would merely increase the potential for harassment.

Though abrogation of doctrines based on purely historical distinctions between equity and law seems eminently logical, the development of the law regarding the part performance doctrine has not always been governed by logic. Indeed, the general rule denying legal damages for an equitable cause of action, without separately functioning law and equity courts, suggests a certain irrationality. Further, the *Miller* court did not explicitly state such a broad proposition—the opinion is limited to the oral contract-part performance situation. *Miller*, then, avoids the crucial question of the scope of the law-equity merger, but read broadly, it could represent a significant step toward the closing of the traditional division between law and equity.