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EFFECT OF STATUTE OF FRAUDS ON CONTRACTS FOR TESTAMENTARY DISPOSITION

MAX C. PETERSON*

I. The Indiana Cases

Validity in General. A contract whereby a person obligates himself for a valuable consideration to make a specified provision by will is not illegal or against public policy. Such contracts have been accorded the same recognition and subjected to the same restrictions in Indiana as any other contracts.¹

Contracts Not to be Performed Within One Year. The fifth section of our Statute of Frauds provides: "No action shall be brought * * upon any agreement that is not to be performed within one year from the making thereof * * unless there is a proper memorandum." The Indiana cases all hold that this section does not invalidate a contract to make a will. Thus, a contract to pay for services by bequest was not affected by the fifth section of the statute for the reason that by the death of the promisor it might have been performed within a year.² Later the court reiterated its position, saying: "There is nothing in the question made as to the section of the Statute of Frauds which requires contracts not to be performed within a year from the making thereof to be in writing. The contract might have been performed within that time in one event, that is, in the event of the death of Frost [the promisor] within the year."³

The Indiana decisions have consistently adhered to the rule that where the performance of the contract depends upon a contingency that may or may not happen within a year

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¹ Roehl v. Haumesser, 114 Ind. 311, 15 N.E. 345 (1887); Caviness v. Rushton, 101 Ind. 500 (1884). Other cases holding the same are too numerous to be listed. As to the validity of agreement to make identical or joint wills, see: Sample v. Butler University, 211 Ind. 122, 15 N.E. (2d) 545, 5 N.E. (2d) 888 (1936), 108 A. L. R. 857 (1937); Manrow v. Deveney, 33 N.E. (2d) 371 (Ind. App. 1941).

² IND. STAT. ANN. (Burns, 1933) § 33-101.

³ Bell v. Hewitt's Executors, 24 Ind. 280 (1865).

⁴ Frost v. Tarr, 53 Ind. 390 (1876).
the fifth section does not apply.\(^5\) An agreement to make provision by will is performed by the death of the promisor leaving a will in conformity with the agreement; and since it is always possible for the promisor to die within a year from the time the contract is made, the fifth section of the statute does not apply.

Contracts for the Sale of Land. The fourth clause of Indiana Statute of Frauds reads: "No action shall be brought * * upon any contract for the sale of lands" unless the contract or a proper memorandum is in writing.\(^6\)

Is a contract to devise land a contract for the sale of land within the meaning of this section? A consideration of Indiana holdings in chronological order is illuminating. First, is Stafford v. Bartholomew, 2 Ind. 153, decided in 1850. In that case the plaintiff alleged in a bill in chancery that he had advanced $100.00 to his father, in consideration of which the father had agreed to devise him 80 acres of land. The Supreme Court with pioneer terseness, disdainful of explanations, said: "That was not an agreement that could be specifically enforced; nor could it be enforced as a contract of sale, at least, in this case, as no possession was ever taken by the plaintiff." The Statute of Frauds is not mentioned, but we may plausibly infer that the court had it in mind, especially in view of the reference to possession.

The question was next presented in Lee v. Carter, 52 Ind. 342 (1876). In this case the defendant's decedent and the plaintiff agreed orally that if the latter would take possession of, clear, and improve a farm belonging to the decedent, the decedent would devise and bequeath all his property, real and personal, to the plaintiff. The plaintiff fully performed, but the decedent died without leaving a will in compliance with his promise. He left realty of the value of $8,000 and personalty of the value of $600; and the plaintiff brought this action for the value of both. In affirming a decision for the plaintiff, the court said: "In Bell v. Hewitt's Execu-


\(^6\) IND. STAT. ANN. (Burns, 1933) § 33-101.
tors, 24 Ind. 280, this identical question was presented, and it was there held that services rendered under an express agreement that they were to be compensated by a provision to be inserted in the will of the party for whom they were rendered were a sufficient consideration for such promise, and that the promise alleged upon that consideration made a valid contract, not affected by the Statute of Frauds, for a breach of which an action arises, as in any other case of breach of contract."

The case displays a misconception of the problem involved. *Bell v. Hewitt's Executors* (later to be discussed in this paper), the only authority relied upon, is clearly misconstrued. In the *Bell* case there was an agreement to bequeath a certain sum of money, not, as in the *Lee* case, a promise to leave by will all of an estate consisting of both real and personal property.

Now, it appears from the facts that the court could have found, no doubt correctly, that there was sufficient part performance by the plaintiff to remove the contract from the statute, but the opinion is not based on this point. The court merely says, with a cheerful laconicism that the contract is "not affected by the Statute of Frauds," and that is the end of the matter.

Two years later the Supreme Court again held a contract to devise to be unaffected by the Statute. In *Mauck v. Melton*, 64 Ind. 414 (1878), in an action for partition wherein the plaintiffs claimed as heirs of one Mary Gilmore, the defendant answered that Mary had agreed orally with her that if she (defendant) would care for her (Mary) during her life, she would convey the land in question to defendant or leave it to her by will and that the defendant performed and also made valuable improvements on the land. In affirming a judgment for the defendant, the court said, "It has been decided by this court, and we think correctly, that a contract such as that set up in the second paragraph of the answer is not within the Statute of Frauds, and may be specifically enforced by appropriate proceedings." Again the court neglects to relate the reasoning by which the result is reached.

We come now to *Wallace v. Long*, 105 Ind. 522, 5 N.E. 666 (1885), a landmark case, a case of first importance on the whole subject. Here the defendant's decedent orally agreed
with the plaintiff's ward that if the latter would live with her and serve her wants until her (decedent's) death, she would, at her death, leave plaintiff's ward her entire estate. The plaintiff's ward fully performed, the decedent died, and the plaintiff brought this action for the value of her entire estate, which consisted of both realty ($5000) and personalty ($1000). The court held that the plaintiff could recover only in quantum meruit for her services, saying that where the title to real property, or to personal property of the value of more than fifty dollars\(^7\) is to be acquired by purchase, the Statute of Frauds applies in the same manner whether the consideration is to be paid in services, money, or anything else; and holding by necessary inference that a contract to devise or bequeath is a contract to sell. The case specifically modifies Lee v. Carter, supra; and disposes of Mauck v. Melton, supra, by saying that the case was taken from the operation of the statute by part performance. (The Mauck case did not so hold, as we have seen, but rather that the contract was not within the statute in the first place). We also find in this significant case the only utterance of the Indiana courts throughout their entire treatment of the subject on the policies involved. Said the court: "* * if there is one class of cases more than another in which a tight rein should be held and the Statute rigorously applied, it is that class in which it is proposed by parol to intercept from rightful heirs the transmission of estates."

Thus the Wallace case, changing the Indiana rule, held directly that a contract to devise land is within the Statute of Frauds; and the case has been followed unanimously in Indiana as to this point to the present day.\(^8\) In Wright v Green the rule is squarely stated thus: "The gist of the complaint is that in consideration of appellant's natural mother agreeing to her adoption by Lucinda E. Wright, the latter agreed that the child should inherit from her the 226 acres

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\(^7\) This case was decided before the amount was changed to $500 by the Uniform Sales Act.

of land which she owned. It is not averred that the agreement was in writing or that there was a memorandum there- of, in writing, signed by Lucinda E. Wright, or by any other person authorized to act for her. The agreement, therefore, was in parol. Such an agreement is in law a contract for the sale of land, and falls within the prohibition of our Statute of Frauds."

Part Performance. Having reached the conclusion that contracts to devise are repugnant to the fourth section of the Statute of Frauds in Indiana, the matter of part performance must be considered. What degree of performance on the part of a promisee will be sufficient to induce a court of equity to refuse to apply the inhibitions of the Statute, or, as we lawyers rather ineptly put it, "to take the contract out of the Statute"?

In Wallace v. Long, supra, it was held that where the contract to devise is in consideration of services, performance of the services will not take it out of the Statute. This rule has been followed throughout the Indiana cases. "The transaction is not taken out of the control of the Statute by the performance on the part of the child, evidenced by its living with its adopted parents in conformity with such an agreement." In one case the plaintiff had not only performed the services, but had taken possession of the land; and the court still refused to take the contract from the Statute, saying that it did not appear that such possession was taken under the contract and with the knowledge and consent of the promisor.

In Donnelly v. Fletemeyer, 94 Ind. App. 337, 176 N.E. 868, 179 N.E. 190 (1931), the plaintiff and her husband, in reliance upon an oral promise of the decedent to devise her 40 acres of land, relinquished their employment, sold their home, moved to the farm, erected permanent improvements, and continuously resided thereon, all with the decedent's knowledge and approval, their possession being limited, however, to 10 acres of the 40. The court held that possession was absolutely necessary, even though there had been performance in full.

8a 67 Ind. App. 433, 119 N.E. 379 (1918).
8 Baxter v. Kitch, 37 Ind. 564 (1871); Austin v. Davis, 128 Ind. 472, 26 N.E. 890 (1891); Johns v. Johns, 67 Ind. 440 (1879); Hershman v. Pascal, 4 Ind. App. 330, 30 N.E. 932 (1891).
10 Neal v. Neal, 69 Ind. 419 (1880).
and that since the possession here was only as to 10 acres, it was not sufficient to arrest the operation of the Statute.

However, in a recent case, the Appellate Court showed a tendency to relax the harshness of this rule. The plaintiff had entered into an agreement with her aunt whereby plaintiff, her husband, and son were to leave their home, come and live with the aunt on real estate owned by her, take care of the aunt, and look after the real estate, in consideration of which the aunt was to leave the real estate to plaintiff by will. The plaintiff fully performed, shared possession of the real estate in question with the aunt, and erected improvements thereon. The court granted specific performance, and in the course of its opinion made the following statement: "We believe it to be the rule that where the grantee takes such possession of the property as is consistent with the existing conditions and circumstances imposed by the contract, and where the contract has been fully performed, specific performance should not be denied for the sole reason that the possession taken was not exclusive in the ordinary meaning of the term."\(^{12}\)

In this case is exhibited an inclination to overcome the previous reluctance of the Indiana courts to rescue such contracts from the dragon "Statute of Frauds" with that facile sword called "Part Performance."

In Donnelly v. Fletemeyer, supra, the court had said that "the possession must be yielded by one party, and accepted by the other, as done in performance of the contract." In the Brown case the possession was not "yielded" or delivered up to the exclusive authority of the promisee. In fact, it could be a fair inference from the facts that the promisor retained control of the premises until her death. The court admits that possession is necessary, but says in this type of case, where personal services form the consideration, the possession need not be exclusive, need only be consistent with the contract.

It should be remarked here that there is no reason to suppose the rules of part performance applied to contracts to make a will are any different from those applied to other types of contracts embraced by the Statute of Frauds, but the writer has necessarily confined this part of the discussion to the former type because of the vastness of the general field.

Performance of services alone, then, will not save the

contract, but performance coupled with possession consistent with the contract and the construction of improvements is sufficient to warrant specific performance. Of course, if the oral contract to devise is fully performed on both sides, it will not be upset.\textsubscript{13}

In the \textit{Lovett} case there was an oral contract whereby the defendant agreed to devise and bequeath all her property to the plaintiff. Pursuant thereto, the defendant executed a will, leaving the property as agreed, but later threatened to revoke the will. The plaintiff brought this action to enjoin such revocation, and the court granted the injunction, neatly disposing of the Statute of Frauds with the observation that it applied only to executory contracts, and that this contract was fully executed and performed by the defendant's making of the will. Doubtless the court could perceive no inconsistency in saying in one breath that a contract is fully performed, and then proceeding to enjoin its breach in the next; but it is submitted that a contract to devise is not performed until the testator's death with a provision in his will as agreed upon, and that the contract cannot be breached until his death without leaving such a will.\textsubscript{14}

Contracts to Bequeath Personalty or Money. The Uniform Sales Act, adopted in Indiana in 1929, provides:

"A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars ($500) or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum of the contract or sale be signed by the party to be charged or his agent in that behalf"\textsuperscript{15}

"A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price."\textsuperscript{16}

\textsuperscript{13} Lovett v. Lovett, 87 Ind. App. 42, 155 N.E. 523, 157 N.E. 104 (1927); Ballard V. Camplin, 161 Ind. 16, 67 N.E. 505 (1903).

\textsuperscript{14} "A contract to make a will cannot be broken by non-performance until the death of the testator, since the testator has the whole of his life in which to perform." Lewis v. Siegman, 296 Pac. 51 (Ore. 1931). See also Hopkins v. Ratliff, 115 Ind. 213, 17 N.E. 288 (1888), holding that one agreeing to make a will is not in default during his lifetime, even though he has made a will contrary to his agreement.

\textsuperscript{15} IND. STAT. ANN. (Burns, 1933) §§ 33-105 and 58-104 (identical).

\textsuperscript{16} IND. STAT. ANN. (Burns, 1933) § 58-101.
"'Goods' includes all chattels personal other than things in action and money.* *.*"\(^{17}\)

Wallace v. Long, supra, and another subsequent case\(^{18}\) expressly held that an agreement to bequeath chattels of more than fifty dollars in value is vitiated by the Statute of Frauds. However, in both these cases the agreement also included real estate. They are, therefore, not direct authority upon the precise question of whether a promise to bequeath personal property only is blighted by the Statute. The statements in that regard are rather in the nature of dicta. An example of such a contract would be a parol agreement for a valuable consideration to leave certain jewels, let us say, or securities, by will. No Indiana case passing squarely upon the enforceability of such a contract is found. However, there is no reason to believe that the statements in these two cases will not be sufficient authority for striking down such contracts in the future.

A contract to leave a certain sum of money by will, unless in payment for land or goods purchased by the testator, would seem clearly to fall outside the scope of the Statute. The Sales Act, as we have seen, specifically excepts money from its definition of goods.

Obviously, the section as to sale of goods does not apply to a promise of money compensation for personal services; and the section as to performance within a year has been definitely held not to apply where such compensation is to be by will.\(^{19}\)

In Bell v. Hewitt's Executors, 24 Ind. 280 (1865), earlier discussed in this paper, the decedent orally agreed with the plaintiff that if the latter would live with and work for him

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\(^{17}\) IND. STAT. ANN. (Burns, 1933) § 58-606. Since most of the cases to be discussed here arose under the former Statute, perhaps it should be set out here: "No contract for the sale of any goods, for the price of fifty dollars or more, shall be valid, unless the purchaser shall receive part of such property, or shall give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." IND. STAT. ANN. (Burns, 1926) § 8049. This Statute is undoubtedly superseded by the Sales Act provision, although it has not been specifically so held in Indiana. See Eigen v. Rosolin, 85 N.J.L. 515, 89 Atl. 923 (1914); Fredenburg v. Horn, 108 Ore. 672, 218 Pac. 939 (1923). It is not conceived that the change is productive of any important difference in the subject at hand.

\(^{18}\) Austin v. Davis, 128 Ind. 472, 26 N.E. 890, 12 L. R. A. 120 (1891).

\(^{19}\) See, supra, p. —.
until his death, he would bequeath him five hundred dollars. The court held the plaintiff was entitled to recover the $500, saying, "The alleged agreement, having been performed by the plaintiff, is not affected by the Statute of Frauds." It appears, however, that the Statute was not applicable in the first instance, and that the court need not have relied on performance. Indeed, a long line of later cases has held performance of services not sufficient to withdraw the contract from the Statute, as we have noted above.

In Purviance v. Purviance, 14 Ind. App. 269, 42 N.E. 364 (1895), it was held that forbearance from bringing a claim against the estate of a decedent on an oral contract to pay for services by will was sufficient consideration for a promise of the decedent's widow to pay the claim. The Statute of Frauds was not mentioned.

In Woods v. Matlock, 19 Ind. App. 364, 48 N.E. 384 (1897), it was said that, "An express promise to pay a certain sum of money at or after the death of the promisor, if founded upon a valuable consideration, may be enforced after his death against his estate." But again the question of the Statute of Frauds was not considered.

It is also to be noted that Wallace v. Long, which may almost be regarded as the foundation of the present Indiana law on the subject, did not deny the validity of an oral contract to bequeath money, but expressly recognized the correctness of Bell v. Hewitt, saying "There was in that case clearly no impediment in the way of the maintenance of an action on the contract to recover the stipulated wages."

Although the reasoning in Bell v. Hewitt is questionable, the result reached is manifestly correct, and, as strengthened by the dictum in Wallace v. Long, it is probably a sufficient basis upon which to conclude that contracts to bequeath money are impervious to the Statute.

Contracts to Leave by Will all or a Portion of an Estate Consisting of both Real and Personal Property. The controlling Indiana cases on this subject have already been discussed in connection with contracts to devise. The court in Lee v. Carter held an oral contract to leave all of an estate consisting of both real and personal property unaffected by the Statute. This decision was interpreted on the basis of part performance in Wallace v. Long. An intervening case

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20 See page —, supra.
which held that such a contract was not embraced by the Statute was specifically overruled by the *Wallace* case.

It has been unanimously held in Indiana since the *Wallace* case that a contract for testamentary disposition of all or a proportionate part of an estate including both realty and personalty is unenforceable by reason of the Statute of Frauds. This principle has long been regarded in the opinions as too well entrenched in authority to necessitate discussion.

The reasoning behind this rule has, except for *Wallace v. Long*, been left for us to supply. Are such contracts unenforceable because the part as to realty and the part as to personalty being each respectively unable to withstand the Statute, the whole would inevitably fall, or because the part as to realty is alone inhibited, but the contract indivisible? Either premise is supportable, but in view of the holding in the *Wallace* case that contracts to bequeath are within the Statute, the former is the neater answer.

Suppose, then, a contract to leave by will all of an estate consisting partly of land and partly of money? As we have seen, the part as to money is enforceable. No Indiana case of this exact factual nature has been found, but we may be able to deduce the answer from the general rules. The classic principle of severability is followed in Indiana. It is thus quoted from Browne on the Statute of Frauds in *Rainbold v. East*, 56 Ind. 538 (1877): "It is clear that if the several parts or items of an engagement are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the whole, or that a distinct engagement as to any one part or item cannot be fairly and reasonably extracted from the transaction, no recovery can be had upon such part or item, however clear of the Statute of Frauds it may be, or whatever be the form of action employed. The engagement in such case is said to be entire."

Where the component parts of a contract are inter-

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21 Frost v. Tarr, 53 Ind. 390 (1876).
dependent or conditioned on each other, the contract is said to be entire, and if any portion is within the Statute, the whole is unenforceable. It is only where the parts are separate, distinct, and severable, that the part falling outside the Statute will remain unaffected.\textsuperscript{23}

Although this rule is easier of statement than of application, it would seem that a contract to leave all or a portion of an estate by will would ordinarily be indivisible, and hence that if any part is afflicted by the Statute it cannot be amputated to save the rest.

Part Payment. Of course if any of the exceptions listed by the Sales Act, i.e. acceptance and receipt, giving of something in earnest, or part payment, has occurred, an oral contract to bequeath chattels would undoubtedly be enforceable. It has been held in Indiana that part payment can be in services where such are the agreed consideration for the goods.\textsuperscript{24} However, the holding in the \textit{Wallace} case must be logically interpreted to mean that where the contract is for both realty and personalty, it is indivisible, and that even though the services forming the consideration are performed so that the part as to personalty taken by itself would be valid, the whole contract must fall because of the invalidity of the part as to realty.

Quantum Meruit. It has been held in Indiana, apparently without exception, that where a contract for testamentary disposition is rendered unenforceable by the Statute of Frauds, recovery may be had in \textit{quantum meruit} for the value of services performed in consideration of the promise to devise or bequeath, and proof of the oral contract is permitted to rebut the presumption that the services were gratuitously rendered.\textsuperscript{25}

\textsuperscript{23} Davis v. Cox, 178 Ind. 486, 99 N.E. 803 (1912); Doan v. Dow, 8 Ind. App. 324, 35 N.E. 709 (1893); Lowman v. Sheets, 124 Ind. 416, 24 N.E. 351, 7 L.R.A. 784 (1890).

\textsuperscript{24} Weir v. Hudnut, 115 Ind. 525, 18 N.E. 24 (1888).

\textsuperscript{25} Kettry v. Thumma, 9 Ind. App. 498, 36 N.E. 919 (1894); Knight v. Knight, 6 Ind. App. 268, 33 N.E. 456 (1893); Miller v. Eldridge, 126 Ind. 461, 27 N.E. 132 (1890); Schoonover v. Vachon, 121 Ind. 3, 22 N.E. 777 (1889); Gullett v. Gullett, 23 Ind. App. 670, 63 N.E. 782 (1901); Nelson v. Masterton, 2 Ind. App. 524, 22 N.E. 731 (1891). The action, of course, must be brought for the value of the services, not for the value of the property which the decedent agreed to devise. Stone v. Morgan, 13 Ind. App. 48, 41 N.E. 79 (1895).
Conclusions. The present law in Indiana appears to be, that:

(1) Oral contracts for transfer of property by will are unaffected by the section of the Statute of Frauds relating to performance within a year.

(2) Oral contracts to devise land are within the fourth section of the Statute of Frauds and are not taken out by the performance of services alone. Full performance by the promisee together with possession consistent with the contract and the erection of lasting improvements is deemed sufficient in equity to remove such a contract from the Statute.

(3) Oral contracts to bequeath goods or choses in action of the value of $500.00 or upwards are within the Statute of Frauds unless there is acceptance and receipt, something given in earnest, or in part is acceptance and receipt, something given in earnest, or in part payment, as provided for by the applicable section of the Sales Act. Performance of services, where such constitute the consideration, would be sufficient part payment.

(4) An oral contract to bequeath a sum of money other than in payment for land or for chattels of the value of $500 or more is unaffected by the Statute of Frauds.

(5) Oral contracts to leave by will all or an undivided portion of an estate any part of which consists of real estate are within the Statute of Frauds; and part performance, in order to take such contracts from the operation of the Statute, must be to the same extent as in contracts to devise land.

II. Other Jurisdictions

Limitations of space restrict the scope of this article largely to the Indiana decisions. For comparative purposes, however, a cursory glance must be taken at some of the rules adhered to in other states.

Validity in General. Elsewhere, as in Indiana, it is regarded as elementary that a valid agreement may be made on a good consideration to give property by will.26a

Fifth Section. That the type of contract under discussion is not in contravention of the section of the Statute of Frauds requiring agreements the performance of which extends beyond the period of a year, or other specified period of time,

26a See 2 PAGE, CONTRACTS (2d ed. 1920) § 865; Notes (1930) 69 A.L.R. 14, 18, (1937) 106 A.L.R. 742, 744. “A contract to make a will is not invalid because of its subject matter, * * for since one may bargain and sell, give away or otherwise surrender every right and property interest which he has there can be no sound reason why he cannot also validly agree to dispose of it by will.” Fitzpatrick v. Michael, 177 Md. 248, 9 A. (2d) 639 (1940).
to be in writing may also be taken as well established.26 This rule rests upon the principle that an oral contract which may by its terms be fully performed within the year does not fall within the compass of this section, although in some contingencies performance might extend beyond the year.27

Contracts to Devise. A preponderance of authority approaching unanimity supports the view that an agreement to devise an interest in real estate is required to be in writing by the section of the Statute relating to the sale of land.28 There is, however, an occasional straggling case to the contrary.29

Contracts to Bequeath Chattels or Money. In other states, as in Indiana, only scant authority can be found as to the applicability for the sale of goods section of the Statute to contracts to bequeath specific personal property. It has occasionally been said that an oral agreement to compensate for personal services by will, where the promisor neither at that time nor at the time of his death had any real estate, is not within the Statute of Frauds.30 This expression, however, is unfortunate for the reason that it fails to distinguish between

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27 Joseph Martin, Inc. v. McNulty, 300 Mass. 573, 16 N.E. (2d) 4 (1938); Wood, Statute of Frauds (1884) § 275. "A contract which, by its terms, is to be performed during the life of a given person, or at his death, is not within this clause of the Statute." 1 PAGE, CONTRACTS (Supp. to 2d. ed. 1929) § 1281.


29 Woods v. Dunn, 81 Ore. 457, 159 Pac. 1158 (1916) holds that the word "sale" in this section of the Statute does not include a devise.

compensation by money and compensation by goods. Logically, a bequest of chattels surely comes as near to being a sale as a devise of land, but there seems to be some disparity of opinion on this point.\textsuperscript{31}

It is generally held that an agreement for payment of money by will need not be in writing.\textsuperscript{32} As stated succintly in one case, such a contract "is not a contract for the sale of land or goods, and may be performed within a year. Therefore, it is not within the Statute of Frauds."\textsuperscript{33}

**Estate Consisting of Both Real and Personal Property.** Also in accord with the Indiana decisions is the preponderant currents of opinion that an oral contract to leave by will all or an undivided portion of an estate consisting in part of realty is obnoxious to the Statute,\textsuperscript{34} although there is an occasional ripple of dissent.\textsuperscript{35} Such contracts, it is reasoned, are entire and indivisible, so that the segment relating to realty being invalid, the contract is wholly unenforceable.\textsuperscript{36}

It may be well to note here that in at least two states all contracts for transfer by will are specifically required by statute to be in writing.\textsuperscript{37}


\textsuperscript{35}In Smith v. Nyburg, 136 Kan. 572, 16 P. (2d) 493 (1932), it was held that a contract to leave a share of an estate consisting of both realty and personalty by will was free from the Statute because "this oral contract did not deal with specific real property." The reasoning seems palpably fallacious, for what difference should it make what particular words are used as long as the intent is to form an agreement for transfer of property including real estate? Moreover, it is to be noted that part performance was also relied on by the court as grounds for upholding the contract. See also Stahl v. Stevenson, 102 Kan. 447, 171 Pac. 1164 (1918), drawing the same deceptive distinction between a contract to devise real estate and one to leave a certain portion of an estate including realty.

\textsuperscript{36}See Note (1931) 71 A.L.R. 479, 485.

Part Performance. This paper is far too short for an extended excursion into that jungle of discord and confusion which is the realm of part performance, and in the midst of which he sits like an ogre in his castle, sneering languidly at our puny efforts to rationalize or harmonize him, or even catalogue his fascinating variety of rules. However, the weight of authority, again in harmony with the Indiana view, appears to be that performance of services alone is not sufficient to obviate the Statute, although authority for the opposite view can be readily educed, and there is some authority that full performance by the plaintiff will *ipso facto* liberate the contract from the Statute. In many jurisdictions the rule permits specific performance regardless of the Statute where services have been rendered the value of which cannot be measured by a pecuniary standard, so that an action in *quantum meruit* would be an inadequate remedy. Usually in such cases some mention is made of the fact that the *status quo* cannot be restored or that the denial of equitable relief would foster a fraud upon the promisee.

Delivery of possession doubtless has the same effect on contracts to devise as on ordinary contracts for the sale of land.

It is frequently said that the part performance must be unavoidably referable or pointing unequivocally to the existence of such a contract. It is obvious that this restriction cannot be strictly applied, however, since an imaginative mind could envisage many possible explanations for the performance of services besides a contract to devise property.

In a recent New York case the interesting question was presented as to whether the *testator*, or rather his successors in interest, could rely upon part performance to take the contract from the operation of the Statute, where it was sought to be enforced against the promisee or beneficiary. In

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38 *Williston, Contracts* (rev. ed. 1936) § 494.
deciding in the negative, the court said: "A contract not to revoke a will or to make a will may be enforced even when not in writing if there has been a change in the position of the parties other than through marriage, but no such change takes effect and nothing is parted with by making a will which in and of itself accomplishes nothing until death."\(^{43}\)

Quantum Meruit. Where a contract for disposition of property by will is unenforceable by reason of the Statute of Frauds, a quasi-contractual action may be maintained for quantum meruit, or the reasonable value of services rendered by the promisee pursuant to the contract. It is so held in practically all jurisdictions.\(^{44}\)

III. Critique

Strictly speaking, the whole question of applying the Statute of Frauds to contracts to make a will turns upon whether or not contracts to devise or bequeath are contracts to sell. Strangely enough, little discussion by the courts on this exact point can be found.

The word "sale" is ordinarily defined judicially as a transfer of the title to property for a consideration.\(^{45}\) Following this definition literally, a contract to devise is a contract to sell because it is an agreement to transfer the title to land for a consideration; and since, under the definition, the mode of transfer is not material, it may be by will as well as by deed. The same reasoning applies to personal property.

If we avoid the peril of becoming too much enamored of definitions and turn to the broader concept of legislative

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\(^{43}\) Matter of Goldberg, 275 N.Y. 186, 9 N.E. (2d) 829 (1937). This decision is in conflict with the Indiana case of Lovett v. Lovett, 87 Ind. App. 42, 155 N.E. 528, 157 N.E. 104 (1927). The former case holds that execution of a will pursuant to an oral contract, so far from being full performance, is not even part performance. "As a will is necessarily until the last moment of life revocable, a contract to make any specified bequest, even when a will having that effect has been duly prepared and executed, is in truth a contract of a negative nature—a contract not to vary what has been so prepared and executed." Whatever one may think of the results, the New York rule has the better logic.


\(^{45}\) Union Securities, Inc. v. Merchants Trust & Savings Co., 205 Ind. 127, 185 N.E. 150, 186 N.E. 261 (1933); Radebaugh v. Scanlan, 41 Ind. App. 109, 82 N.E. 544 (1907).
intent, we may honestly doubt if the legislature ever meant for the Statute to include the types of contracts under discussion. But the type of evil which the legislature sought to eliminate by frowning upon oral contracts to convey may certainly arise in no lesser magnitude from the enforcement of contracts to devise. There is the same opportunity for profitable perjury except that the parties to the alleged agreement are both prevented from testifying, the one by death and the other by law. Thus in the case of a fraudulent suit, the supposed promisee's disadvantage of having to procure someone else to commit the perjury (a difficulty by no means insurmountable, especially when the decedent's surviving relatives are, as is often the case, divided into warring camps) is just about offset by the disadvantage of the promisor's representatives in not having the promisor in court to refute the false claim.

As a matter of fact the temptation to perpetrate a fraud is more likely to arise after death of the supposed promisor than otherwise. All lawyers are familiar with the situation where a niece, nephew, other relative, or even stranger to the family, disgruntled by the failure of a decedent to make handsome provision for him by will, begins to call up recollections of a vast amount of devoted service performed for the departed, and generous promises of testamentary compensation. In such cases there can be no doubt that many a casual remark, dropped by one rearing a child or receiving services in his old age, not regarded at the time by either party as a promise, will appear in the courtroom after its maker's death as a full-fledged, binding contract to leave all his estate to the plaintiff. Under such circumstances the opportunity, if not the means, of fabricating a false set of facts is almost thrust upon the would-be beneficiary. For it must be conceded that under usual circumstances it is beyond the scope of an ordinary man's imagination and initiative to pull a contract for the sale of land out of thin air.

On the other hand, there are unquestionably many such agreements actually made and relied upon. Let us consider the case, which often appears, of one living many years with an aged relative and faithfully serving his needs in reliance on his promise to leave a substantial portion of his estate to the one so serving. The promisee fully keeps his part of the bargain, foregoing, perhaps, many important opportunities in
life, but the relative is overtaken by death before he has car-
ried out his design of making the will, or he destroys, in a
senile caprice, one already made, or he leaves the will as
agreed, but it is successfully contested by his heirs at law.
Then, indeed, the reasonable value of the services seems a
poor assuagement of the loss of the bargain.

No logical difference between contracts to devise land
and contracts to bequeath goods can be perceived, as far as
the application of the Statute of Frauds is concerned. If the
former are held to be within the Statute, the latter, if the
value of the goods is over the statutory limit, should undoubt-
edly be also so held.

As to contracts to compensate for services by a bequest
of money it is doubtless logically correct to hold that they do
not fall within the range of any of the sections of the Statute.
One wonders, however, what reasons of policy make it more
desirable that oral contracts of this type should be enforce-
able any more than oral contracts to devise land or bequeath
chattels.

In conclusion, it seems that the rules in Indiana are in
substantial harmony with those followed in a majority of
the other states, except as to that vast field of judicial legis-
lation, part performance. In that respect our courts seem
to have been rather less liberal than those of some of our
sister states. If part performance is regarded as a sub-
stitute for written evidence, and if, as such, it is considered
essential that it be ascribable only to a contract to convey,
(or, in our case, devise), then the holding of the Indiana
courts seems justifiable, since the performance of services
obviously can be explained in many other ways.

It is difficult to find serious fault with the conclusions
reached in the prevailing decisions, assuming the Statute of
Frauds itself to be a just measure—and with that question
we are not here concerned. The hardship on the honest claim-
ant is ameliorated by allowing recovery of quantum meruit.
But the best way of escaping this hardship is to reduce the
contract to writing in the first instance.