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Notes

THE DOCTRINE OF PART PERFORMANCE AND CONTRACTS TO DEVISE IN KENTUCKY

Miller v. Miller,¹ a 1960 Kentucky case, may have a profound effect upon Kentucky law. A mother, as guardian of her illegitimate child, brought an action to enforce an oral promise by the deceased father to will certain real and personal property to their child in consideration of the mother's forbearance from bringing bastardy proceedings.

The action was brought against the heirs, who still retained the property, and the administrator; the complaint alternatively demanded specific performance or \$55,000 damages. The testimony as to the value of the land given by the heirs' witnesses varied from \$12,000 to \$15,000, but that given by the plaintiff's witnesses varied from \$46,000 to \$60,000. Comparable property had recently sold for \$28,500. The chancellor found the proof of the contract to be "clear and convincing" and entered a judgment against the administrator for \$32,750 as the fair market value of the property. The complaint was dismissed as to the heirs.

Even though the judgment was technically in their favor, the heirs were allowed to appeal; they contended that the established value was erroneous. The Court of Appeals reversed as to the measure and mode of recovery. The court affirmed the trial court's holding that the promisee of an oral contract to devise realty who has completed his performance, which cannot be computed pecuniarily, is entitled to a judgment for the value of the realty; but it reversed on the sole ground that in such a case where the realty is available for transfer and where its value cannot be determined except from conflicting testimony, the court should order the transfer of the property rather than a monetary recovery.

INTRODUCTION

The Court of Appeals has impliedly recognized the doctrine of part performance as a means of further circumventing the Statute of Frauds.² The purpose of this note is to demonstrate why the *Miller* decision may serve as the springboard for the general adoption of the doctrine of part performance, especially as to the commercial oral

¹ 335 S.W.2d 884 (Ky. 1960).

² Ky. Rev. Stat. § 371.010(6) (1960) [Hereinafter cited as KRS].

contract for the sale of realty. This purpose is developed in the conclusion of this note which follows a discussion of necessary background material. First, there will be an explanation of the general nature of contracts to devise, and of the remedies available to the surviving promisee or third-party beneficiary (who was to be made devisee). Second, there will be a discussion of Kentucky's former unique manner of granting relief and its rationale—a refusal to recognize the part performance doctrine. Third is a discussion of the *Miller* opinion which abandoned this unique position.

I. CONTRACTS TO DEVISE REALTY

A. Areas of Use

The contract to devise³ realty or an entire estate is one of the layman's favorite estate-planning tools⁴ and naturally so since it appears to be the best solution to several personal problems. To an elderly person of limited wealth it provides the best assurance of dependable personal care and adequate livelihood until death while avoiding the setting up of a trust or the sale of his property.⁵ The latter two means are not only instinctively undesirable, but may prove vastly inadequate financially. To impoverished parents the contract to devise is often the most practical and desirable means of providing for a child, for in consideration of relinquishing the custody, love, and affection of the child, they may procure the promise of a childless or philanthropic individual to provide for the child by will, or to adopt or to make him an heir.⁶ To the unwed mother and putative father such a contract is more desirable than public bastardy proceedings.

B. Sources of Confusion

1. *Contract and Will Complications.* The validity of the *written* contract to devise is now without question,⁷ but the application of this

³ In this note, "devise" will be used only in conjunction with realty and "bequeath" only with personalty even though both terms are often used in reference to either type of property or to a combination of both. Even if only a small part of an estate which is to be devised is realty, "devised" will be used.

⁴ See Sparks, *Contract to Devise or Bequeath as an Estate Planning Device*, 20 Mo. L. Rev. 1 (1955). This statement is further supported by the large volume of reported cases concerning this device. See American Digest System, Wills, Keys 58-68.

⁵ *Gibson v. Crawford*, 247 Ky. 228, 233, 56 S.W.2d 985, 987 (1932) stated: "By far the greater number of cases [concerning contracts to devise] are dealing with contracts or agreements to make a devise in consideration of services performed or to be performed. . . ." For numerous examples see Annots., 101 A.L.R. 923, 1097 (1936), 69 A.L.R. 14 (1930).

⁶ See Hirsch, *Contracts to Devise and Bequeath*, 9 Wis. L. Rev. 267, 269 (1934).

⁷ 1 Page, Wills § 10.1 (Bowe-Parker rev. 1960) [Hereinafter cited as Page]. However, doubt as to validity still exists in one area—contracts to surrender custody

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rule is confused⁸ by other factors. This is due first to the "dual aspect" of the device. Each aspect must be treated separately since "our law has no separate concept of 'will made in pursuance of contract.'"⁹ The device need not comply with the Statute of Wills because it is treated not as a will but as a contract;¹⁰ yet, a will made pursuant to the contract is as revocable as any other will.¹¹ Upon revocation of the will the promisee may nevertheless obtain the same result by getting a decree of specific performance on the ground that legal remedies are clearly inadequate because of the immeasurability of his performance and the fact that the contract concerned land and the final disposition of a lifetime's accumulations.¹² This specific enforcement, however, is subject to a widow's dower rights.¹³ Frequent contracts to make joint wills, which may be held to be irrevocable, add to the com-

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of a child in consideration of a promise to devise property to or make him an heir. *Hooks v. Bridgewater*, 111 Tex. 122, —, 229 S.W. 1114, 1118 (1921), said such contracts should be void as a matter of public policy, for their enforcement would detract from parental duty and be detrimental to child welfare. See Annot., 15 A.L.R. 223 (1921).

Davis v. Jones' Adm'r, 94 Ky. 320, 22 S.W. 331 (1893), held that contracts to make a child an heir are against public policy since they provide for irregular devolution of property; the only way to make a child a legal heir is by compliance with the adoption statute. However, where the promisor is the father, the Court of Appeals has expressly denied the application of *Davis* because of the bastardy statute, which compels the father to support his illegitimate child (KRS ch. 406), the moral obligation of the father, and the welfare of the child. *Hehr's Adm'r v. Hehr*, 288 Ky. 580, 157 S.W.2d 111 (1941).

As to contracts to adopt a non-relative as an heir rather than to devise to him, the Kentucky court has said: "An agreement by a person to make another, not related to him, his heir, is against the policy of the common law, and [such a person does not become his heir] where the procedure is prescribed by the statute, authorizing the adoption of a legal heir, has not been followed." *Carter v. Capshaw*, 249 Ky. 483, 489, 60 S.W.2d 959, 961-62 (1933). For cases supporting the contra, and apparently the majority view, see Annot., 171 A.L.R. 1315 (1947), 142 A.L.R. 84 (1943), 69 A.L.R. 14, 39-47 (1930), 27 A.L.R. 1325 (1923).

However, the possibility that the Kentucky court would change its position even after the *Miller* case is doubtful. See *Higgason v. Henry*, 313 S.W.2d 275 (Ky. 1958). Frequently these contracts are accompanied by covenants to provide for the child by will or to make him an heir. Simply because of this combination, such contracts have been enforced. See Annot., 27 A.L.R., *op. cit. supra*, at 1337.

⁸ *Gibson v. Crawford*, 247 Ky. 228, 233, 56 S.W.2d 985, 987 (1932), said: "As a matter of first impression, it appears that there is a great conflict of authorities dealing with the question of contracts to devise land."

⁹ Atkinson, *Wills* § 49 (2d ed. 1953).

¹⁰ 1 Page § 10.3.

¹¹ *Watkins v. Covington Trust & Banking Co.*, 303 Ky. 644, 198 S.W.2d 964 (1947). *Contra*, *Johnston v. Tomme*, 199 Miss. 337, 24 So.2d 730 (1946), commented on in 18 Miss. L.J. 328 (1947).

¹² See Sparks, *Contracts to Make Wills* 146 (1956), and Part II of this note.

¹³ *Wides v. Wides' Ex'r*, 299 Ky. 103, 184 S.W.2d 579 (1944); *Whiteside & Kostas, Recent Developments in the Kentucky Law of Wills—1949-1954*, 42 Ky. L.J. 671, 674 (1954).

plexity¹⁴ as do contracts not to make wills.¹⁵ An instrument written to be a will, but invalid as such, may be a valid contract,¹⁶ yet the converse is scarcely conceivable due to the necessity of testamentary form. An instrument may be both a contract and a will.¹⁷ Contracts to devise are easily confused with agreements to compensate for personal services generally or by will. The distinction is important because of the presumption of gratuity between relatives¹⁸ and because of the application of the Statute of Limitations if the services ended prior to death.¹⁹ Such confusion is probably inherent in any utilizable combination of an irrevocable and immediately operative instrument with one that is revocable and inoperative until some future death—a combination which, in effect, permits a property owner to purchase a valuable service or right while retaining the benefit of the purchase price for life.²⁰

2. *Public Policy Considerations Against Enforcement.* There is one policy consideration operating against all of these contracts, thereby causing suspicion and confusion as to their enforcement, *i.e.*, the policy against allowing distribution contrary to the Statute of Decents is always present when the deceased fails to comply with the Statute of Wills.²¹ There are five other policy considerations operating against

¹⁴ See *Alocco v. Fouche*, — Cal. —, 11 Cal. Rptr. 818, 822 (1961); *Monninger v. Koob*, 405 Ill. 417, 91 N.E.2d 411 (1950); *Boner's Adm'x v. Chesnut's Ex'r*, 317 S.W.2d 867 (Ky. 1958); *Gibson v. Crawford*, 247 Ky. 228, 233, 16 S.W.2d 985, 987 (1932); Annot., 169 A.L.R. 11 (1947).

¹⁵ See Annot., 32 A.L.R.2d 370 (1953).

¹⁶ See *Bolman v. Overall*, 80 Ala. 451, 2 So. 624 (1887); *Ward v. Ward*, 96 Utah 263, 85 P.2d 635 (1938); Annot., 69 A.L.R. 14, 205, 206 (1930). The revoked or invalid will may be evidence or memorandum of an oral contract. See *Mussinon's Adm'r v. Herrin*, 252 Ky. 495, 67 S.W.2d 710 (1934); *Weiss v. Storm*, 126 So.2d 295 (Fla. 1961); *Hirsch, Contracts to Devise and Bequeath, Part II*, 9 Wis. L. Rev. 388, 393 (1934).

¹⁷ *Atkinson, Wills* §§ 44, 48 (2d ed. 1953).

¹⁸ See *Sneed's Ex'r v. Smith*, 255 Ky. 132, 138, 72 S.W.2d 1028, 1031 (1934); *Walker v. Dill's Adm'r*, 186 Ky. 638, 218 S.W. 247 (1920); Annot., 7 A.L.R.2d 12 (1949).

¹⁹ *Hirsch, Contracts to Devise and Bequeath, Part II*, 9 Wis. L. Rev. 388, 401 (1934), says that, in general, an action on the contract to will accrues at promisor's death, but an action on quantum meruit accrues at completion of the services. This distinction apparently does not apply to quasi-contractual actions for quantum meruit brought after the death of one who had orally promised to devise realty in return for the promisee's services. See *Nelson v. Christensen*, 169 Wis. 373, 172 N.W. 741 (1919); *Martin v. Martin's Estate*, 108 Wis. 284, 84 N.W. 439 (1900).

²⁰ 27 Yale L.J. 542 (1918).

²¹ *Davis v. Jones' Adm'r*, 94 Ky. 320, 22 S.W. 331 (1893); 1 Page § 10.1. See KRS 394.040 for requisites of a valid will and KRS ch. 391 on descent and distribution. Note that the *Davis* case mentions the two other exceptions to the policy against disposition of property contrary to the Statute of Descents—adoption as prescribed by statute and enforceable contracts to devise.

"Policy" is often misused, but for the purpose of this note "policy considerations" are those considerations of social, economic and political factors which

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enforcement in specific cases: (1) In the case of the unmarried couple there is the possibility the contract also contemplated that the illicit relationship would continue or that the mother would forbear prosecuting for seduction, either of which, if true, would void the entire contract.²² (2) Contrary to the early common-law policy of ignoring the illegitimate child as *nullius filius*, the putative father is no longer prohibited from contracting to support the child, but he still has no non-statutory duty to do so.²³ Such a promise is not binding unless the mother has given new consideration.²⁴ Her only other recourse is to bastardy proceedings; if her performance is to forbear this right, her claim to it must at least be reasonable and in good faith.²⁵ A survival of the early common-law policy is found in the Kentucky statute denying an illegitimate child the right to inherit from anyone other than his mother and her kindred.²⁶ (3) In certain cases a minority of states, including Kentucky, find that contracts to surrender the custody of children may be against public policy as detracting from parental responsibility and detrimental to child welfare.²⁷ (4) Attempts to enforce alleged personal service contracts frequently encounter the presumption of gratuity which the law raises when the parties are relatives.²⁸ (5) The policy consideration which has the most important practical effect is the policy supporting the Statute of Frauds, as developed *infra*.

3. *Failure to Write the Contract or Will.* The third source of confusion is the fact that generally when the controversy reaches the court

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impel the court to adopt a certain course of action, which thereafter is called a "policy."

The "policy" supporting the Statute of Wills may be a seventh "policy consideration" in cases concerning contracts to make mutual wills. *Lindley v. Lindley*, 67 N.M. 439, —, 356 P.2d 455, 459 (1960) said: "For reasons of public policy, courts should be cautious to sustain contracts to make mutual wills, because such contracts, in effect, destroy the revocability of wills, and fail to allow for changes in circumstances as years pass."

²² See *Bowling v. Bowling's Adm'r*, 222 Ky. 396, 300 S.W. 876 (1927); *Steele v. Crawford*, 197 Ky. 798, 248 S.W. 197 (1923); *Doty's Adm'r v. Doty's Guardian*, 118 Ky. 204, 80 S.W. 803 (1904).

²³ *Hehr's Adm'r v. Hehr*, 288 Ky. 580, 157 S.W.2d 111 (1941); *Mercer v. Mercer's Adm'r*, 87 Ky. 30, 7 S.W. 401 (1888); Annot., 30 A.L.R. 1067 (1924).

²⁴ *Steele v. Crawford*, 197 Ky. 790, 248 S.W. 197 (1923) (dictum).

²⁵ See *Fiege v. Boehm*, 210 Md. 352, 123 A.2d 316 (1956); 1 Williston, Contracts § 135 (rev. ed. 1936).

²⁶ See KRS 391.090; *Napier v. Hodge*, 293 S.W.2d 870 (Ky. 1956). There is also a slight survival of this policy in statutory form in New York. See Application of Norman, 205 N.Y.S.2d 260, 264 (1960) (dictum). Also, New Mexico Stat. Ann. § 29-1-18 (1953) provides that illegitimate children may inherit from their fathers only if his recognition of them is in writing.

²⁷ See *supra* note 7.

²⁸ See Annot., 7 A.L.R.2d 12 (1949).

there is no writing. Due to ignorance of the law and to mutuality of trust between the parties, the contract is seldom reduced to writing. Furthermore, the will is seldom executed because of the fear of the aged property owners that the services might deteriorate or the general irresponsibility of the putative father and the intimacy of situations concerning children born out of wedlock. Thus the surviving promisee is frequently left with only an oral contract in return for years of service, surrender of a private home, surrender of custody of a child, or expenditure for supporting a child whom the father had a statutory duty to support.

The policy consideration against irregular distribution is supported by even more suspicion when such is attempted without a written instrument²⁹ due to the increased opportunity for fraud and the difficulty of disproving an alleged contract to devise.³⁰ This suspicion, plus the ancient policy "requiring all contracts touching lands to be reduced to writing,"³¹ has had profound legal consequences; nearly all states have denied effect to nuncupative wills.³² At least ten have extended their Statutes of Frauds to expressly include contracts to will.³³ The courts of the rest, including Kentucky's, hold contracts to devise realty or an estate including realty to be within their Statutes of Frauds as a "contract or sale of lands"³⁴ thereby rendering oral

²⁹ *Rash v. Peoples Deposit Bank & Trust Co.*, 91 F. Supp. 825, 826 (E.D.Ky. 1950) (concerned a lost contract, but the opinion explained the basis of this suspicion); *Napier v. Hodge*, 293 S.W.2d 870 (Ky. 1956); 1 Page §§ 10.10, 10.43.

³⁰ *Broughton v. Broughton*, 203 Ky. 692, 262 S.W. 1089 (1924). See *Moreen v. Carlson's Estate*, 365 Ill. 482, 6 N.E.2d 871 (1937); *Hunter v. Allen*, 174 Ore. 261, 147 P.2d 213 (1944).

³¹ *Tiggelbeck v. Russell*, 187 Ore. 554, —, 213 P.2d 156, 161 (1949).

³² KRS 394.040 requires a will to be written. KRS 394.050 provides for the standard exception as to the oral wills of active soldiers and sailors, but even these are limited to personalty. Certain minor exceptions have been made as to personalty. See Annot., 1916E L.R.A. 1132; 2 Page §§ 20.13-16.

³³ Ala. Code Recomp. tit. 20 § 3(6) (1958); Alaska Comp. Laws Ann. § 58-2(b) (Supp. 1960); Ariz. Rev. Stat. § 44-101(8) (1956); Cal. Civil Code § 1624(6); Del. Code Ann. tit. 6, § 2715 (1953); Hawaii Rev. Laws ch. 190, § 5 (1956); Me. Rev. Stat. ch. 119, § 1 (1954); Mass. Laws Ann. ch. 259, § 5 (1956); N. Y. Pers. Prop. Laws § 31; N. C. Gen. Stat. § 22-3 (1953) (applies only to contracts with illiterate Cherokee Indians); Ohio Rev. Code Ann. § 2107.04 (1954).

New Mexico's statutes treat these contracts uniquely. N. M. Stat. Ann. § 31-8-14 (1953) provides that all claims against the estates of deceased persons growing out of alleged contracts to adopt or to treat claimant as an heir must be written and signed "unless the claimant shall prove . . . that he carried out and fulfilled all of the terms of said contract." This amounts to legislative recognition of the principle that part performance will take oral contracts to devise out of the Statute of Frauds. New Mexico is also unique in that its statutes do not require land and marriage contracts to be in writing.

³⁴ *Bitzer v. Mook's Ex'r*, 271 S.W.2d 877 (Ky. 1954); *Duke's Adm'r v. Crump*, 185 Ky. 323, 215 S.W. 41 (1919); *Sparks, Contracts to Make Wills* 41 (1956); 2 *Williston, Contracts* § 488 (rev. ed. 1936).

contracts "unenforceable" or "void."³⁵ However, these contracts are held not to be within the more-than-one-year provision.³⁶ Neither are oral contracts to bequeath held to be within the provision requiring contracts for the sale of personalty, exceeding a certain amount, to be written.³⁷

4. *Difficulty in Determining the Value of Performance.* As discussed *infra*, where the promisee is denied recovery on the contract, but is given the remedy of restitution, a fourth source of confusion arises from the difficulty of the rules used in determining the reasonable value to the promisor of the promisee's performance.

II. REMEDIES OF THE PROMISEE AFTER BREACH³⁸

A. Restitution of Quantum Meruit

Although the surviving promisee of an alleged oral contract to devise is without legal remedy on the contract, he may have restitution of quantum meruit for the benefit unjustly retained by the promisor's estate so long as promisee's performance is capable of monetary evaluation.³⁹ The majority, including Kentucky, allow recovery in quasi-contract for the reasonable value of the services rendered in reliance

³⁵ The wording of the statute determines whether the oral contract will be treated as unenforceable or void. A majority provide that such a contract is unenforceable. 22 Temple L.Q. 340 (1949). Jeanblanc, *Restitution Under the Statute of Frauds: What Constitutes an Unjust Retention*, 48 Mich. L. Rev. 934 n.43 (1950) and 2 Williston, Contracts § 526 (rev. ed. 1936) list eighteen states. KRS 371.010 provides that: "No action shall be brought. . ."

³⁶ The rationale is that the promisor may die within the first year; therefore, the contract is not incapable of being performed within one year. *Lee v. McCrocklin*, 247 Ky. 44, 56 S.W.2d 570 (1933); *Atkinson*, Wills § 48, at 214 (2d ed. 1953).

³⁷ 1 Page § 10.11. At one time Kentucky held *contra*. See *infra* notes 119 and 120. This, of course, is true only in the absence of a statutory requirement that all contracts to devise or bequeath be in writing.

³⁸ For cases as to the promisee's remedies during the promisor's lifetime, which is naturally prior to any breach of a contract to devise, see Annot., 7 A.L.R.2d 1166 (1949).

³⁹ "The doctrine of these cases is predicated on the premises that the deceased has actually received the benefit of the contract from its performance by the plaintiff, and it would be unconscionable for him to repudiate it and retain the consideration." *Hinton v. Hinton's Ex'r*, 239 Ky. 664, 668, 40 S.W.2d 296, 298 (1931) (dictum).

Of course, the Statute of Frauds bars any action by the promisee for specific performance or for damages for the breach of contract. See *Cheatham's Ex'r v. Parr*, 308 Ky. 175, 214 S.W.2d 91 (1948), for discussion of both rules. This opinion also discusses the fatal variance which occurred, at least prior to the adoption of the Civil Rules, when the promisee's pleadings were based upon an action on an expressed contract. For discussion of this action see 2 Corbin, Contracts § 436 (1950); *Kranskopt, Solving Statute of Frauds Problems*, 20 Ohio St. L.J. 237, 251-63 (1959), contains a modern explanation directed toward the practicing attorney.

upon the oral contract,⁴⁰ without restriction to its terms.⁴¹ The rules used in ascertaining reasonable value coupled with the existence of two other views as to the method of measurement of the unjust enrichment—oral agreement and the cost to the promisee⁴²—constitute the fourth source of confusion.

Loose language in opinions, rules of evidence and rules of damages used in this determination lend these quasi-contractual actions such a character that they cannot be distinguished from actions on expressed contracts.⁴³ To the extent that they are not distinguished, there is a clear violation of the purpose of the Statute of Frauds which was to prevent any enforcement of unwritten but expressed land contracts whether they be oral or implied-in-fact.⁴⁴ The following are examples of failures to make this distinction. In most quasi-contractual actions the "promise" and the other terms are generally fictions⁴⁵ not considered by the court. However, when an action is in quasi-contract merely to evade the Statute of Frauds, the majority admit proof of these terms as evidence of an admission of the value of the promisee's performance⁴⁶ and of a transaction resulting in unjust enrichment.⁴⁷ In quasi-contractual actions, when the parties are relatives, the contract is required to be proved to rebut a presumption of gratuity.⁴⁸ Where personal services are given for the purchase of land there is very little authority for allowing the value of the land to be shown.⁴⁹ However, where the oral contract is to devise, the suspicion surrounding these agreements alone requires that the contract be proved.⁵⁰ In determining reasonable

⁴⁰ *Duke's Adm'r v. Crump*, 185 Ky. 323, 215 S.W. 41 (1919); Restatement, Contracts § 348, comment a (1932); 49 Am. Jur. *Statute of Frauds* §§ 569, 571 (1943); Jeanblanc, *Restitution Under the Statute of Frauds: Measurement of the Legal Benefit Unjustly Retained*, 15 Mo. L. Rev. 1, 10 (1950), contains an extensive list of cases so holding.

⁴¹ Corbin, *Contracts* § 327 (1950); 2 Williston, *Contracts* § 536 (rev. ed. 1936).

⁴² See Jeanblanc, *Restitution Under the Statute of Frauds: Measurement of the Legal Benefit Unjustly Retained*, 15 Mo. L. Rev. 1 (1950). Kentucky rejected the first minority view in *Hinton v. Hinton's Ex'r*, 239 Ky. 664, 40 S.W.2d 296 (1931).

⁴³ Costigan, *Implied-in-Fact Contracts and Mutual Assent*, 33 Harv. L. Rev. 376 (1920).

⁴⁴ *McElroy v. Ludlum*, 32 N.J.Eq. 828 (1880); Jeanblanc, *supra* note 42, at 5.

⁴⁵ 2 Corbin, *Contracts* § 330 (1950).

⁴⁶ *Id.* § 328 (Disregard Kentucky cases for they do not support the proposition for which they are cited.); 2 Williston, *Contracts* § 536 (rev. ed. 1936); Woodward, *Quasi Contracts* §§ 103-04 (1913); Annot., 49 A.L.R. 1121 (1927).

⁴⁷ Krauskopf, *Solving Statute of Frauds Problems*, 20 Ohio St. L.J. 237, 257-60 (1959).

⁴⁸ See Annots., 7 A.L.R.2d 8 (1949), 69 A.L.R. 14, 96 (1930).

⁴⁹ See *Offeman v. Robertson-Cole Studios*, 80 Cal. App. 1, 251 Pac. 830 (1926). *Brown*, *Statute of Frauds* § 125 (1870); Annot., 49 A.L.R. 1121, 1124 (1927).

⁵⁰ *Finn v. Finn's Adm'r*, 244 S.W.2d 435 (Ky. 1951); Sparks, *Contracts to Make Wills* 140 (1956).

value of the services, their market value and the situation of the parties are considered. Since this proof usually includes evidence of the value of any land involved, the question arises as to how much probative weight this value should have.

In order to retain any quasi-contractual nature, the value of the land should be no more than a factor to consider⁵¹ except where the devise was to be for specific property and where the extent and duration of the services were known at the time of the contract.⁵² Such instances are very rare since performance generally continues until the promisor's death. The consideration for the performance is more frequently a promise to devise an entire estate, to adopt a child, or to make a child the promisor's heir; thus, the pecuniary value of the promise or the services is known at the time of the contract. This exception, if followed, would further confuse the distinction between actions in quasi-contract and actions on the contract. However, such confusion is no more than that caused by the failure of most courts to deduct benefit received by the promisee in room, board, clothing, education, etc. These deductions would be expected in an action in quasi-contract⁵³ where recovery is for unjust enrichment retained after any benefit received by the plaintiff has been deducted.

Kentucky, likewise, has failed to make the distinction between actions barred by the Statute of Frauds and those in quasi-contract. The contract must be established by "clear and convincing" proof;⁵⁴ the right of a third-party beneficiary to recover in quantum meruit is not questioned⁵⁵ even though he personally has made no performance. The nature of the services determines the competency of evidence of the value of the promised consideration. Evidence of the value of the promised land is incompetent⁵⁶ except where the value of the performance is immeasurable. This exception, which is peculiar to Kentucky, is discussed, *infra*, under the heading of "The Waters Rule."

In most cases, quantum meruit is not granted simply because the services rendered for the promisor are found to be incapable of

⁵¹ See Annot., 106 A.L.R. 742, 753 (1937).

⁵² See *Quirk v. Bank of Commerce & Trust Co.*, 244 Fed. 682 (6th Cir. 1917); *Reynolds v. Connor*, 190 Okla. 323, 123 P.2d 664 (1941); *Woodward*, *Quasi Contracts* § 105 (1913).

⁵³ This is true for all Kentucky cases cited for either restitution of quantum meruit or the *Waters* rule *infra* page 232, and is exemplified in the *Miller* case.

⁵⁴ See *Finn v. Finn's Adm'r*, 244 S.W.2d 435 (Ky. 1951); *Broughton v. Broughton's Adm'r*, 203 Ky. 692, 696, 262 S.W. 1089, 1091 (1924).

⁵⁵ The research for this note revealed no opinion from any court which questioned the right of a third-party beneficiary of an unenforceable oral contract to recover in quantum meruit.

⁵⁶ *Hinton v. Hinton's Ex'r*, 239 Ky. 664, 40 S.W.2d 296 (1931); *Benge's Adm'r v. Creech*, 175 Ky. 6, 192 S.W. 817 (1917).

reduction to a "reasonable value" in monetary terms due to their filial and intimate nature and the fact that the promisee's whole life has been altered in rendering them. He has often given up home and occupation to live and care for the invalid promisor for several years. The unwed mother's forbearance has consistently been treated as immeasurable⁵⁷ even though an adequate measure apparently would be an estimate of the amount she could have received through bastardy proceedings plus interest.⁵⁸ However, custody is often surrendered to the father,⁵⁹ thereby defying any rational attempt to place pecuniary value on the consideration he received. The impossibility of evaluating love and affection is also generally a barrier to awarding money damages for the breach of agreements to adopt or to surrender custody of a child.⁶⁰

B. The Majority Rule Allowing Specific Performance

1. *The Rule in General.* Where the promisee's performance is immeasurable, the vast majority (formerly not including Kentucky) recognize that only the immediate parties were capable of determining an adequate value for the promisee's performance and therefore employ the doctrine of part performance to take the contract to devise out of the Statute of Frauds and decree specific performance.⁶¹ This is

⁵⁷ *Miller v. Miller*, 335 S.W.2d 884 (Ky. 1960) (the principal case); *Moore's Adm'r v. Wagner's Adm'r*, 243 Ky. 351, 48 S.W.2d 15 (1932), allowed the personal representative of an illegitimate child who had predeceased his father to recover as a third-party beneficiary; *Bowling v. Bowling's Adm'r*, 222 Ky. 396, 300 S.W. 876 (1927). In none of these cases was the custody of the child surrendered by the mother.

⁵⁸ Under KRS 406.090, she could have recovered periodic payments in any amount fixed by the jury. Consideration would be given to the father's financial status. See Annot., 74 A.L.R. 763 (1931).

⁵⁹ See *Doty's Adm'r v. Doty's Guardian*, 118 Ky. 204, 80 S.W. 803 (1904); *Benge v. Hiatt's Adm'r*, 82 Ky. 666, 56 Am. Rep. 912 (1885). In the *Benge* case, the value of the things promised was considered even though the father lived only a few days after custody was surrendered. See 49 Am. Jur. *Statute of Frauds* § 531 (1943).

⁶⁰ See Annot., 69 A.L.R. 14, 33, 151 (1930).

⁶¹ *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710 (1896), mentioned an "overwhelming weight of authority"; Annots., 106 A.L.R. 742, 756, 760 (1937), 69 A.L.R. 14, 146 (1930); 1 Page § 10.15 n.6 (Kentucky cases there cited do not stand for this proposition, but only that the value of the land will be given); Annot., 15 L.R.A. (N.S.) 466 (1908).

The contrary is the rule in those states where no part performance is recognized without change in possession. Annot., 69 A.L.R. 14, 139 (1930); 1 Page § 10.1.

For examples of specific performance where the promisee forbore various legal rights, see Annot., 101 A.L.R. 923, 1114 (1936); 36 U. Det. L.J. 316, 320 (1958).

For examples of specific performance of adoption contracts where the statutory process for adoption had not been completed, see Annots., 171 A.L.R. 1315 (1947), 142 A.L.R. 84 (1943), 27 A.L.R. 1325 (1923).

sometimes technically referred to as "quasi-specific performance" since the decree does not compel the dead promisor to execute a will, but instead requires his heirs to convey the land.⁶² Due to the suspicion cast upon these contracts, the evidence of them is scrutinized with even more care than in actions for quantum meruit. The quality of evidence required in different jurisdictions ranges from "clear, explicit, and definite"⁶³ to "so strong as to be substantially beyond reasonable doubt."⁶⁴

2. *The Sound Basis of the Rule.* "Equitable fraud" is the ground for the decree of specific performance.⁶⁵ In this note and in the cases used herein, "equitable fraud" refers to the fact that to allow the promisor to use the Statute of Frauds as a defense after having knowingly received the benefits of the promisee's immeasurable performance would work a fraud on the promisee,⁶⁶ since this immeasurability precludes an adequate remedy at law. Thus the rendition of personal services and forbearance of legal rights are sufficient to take these scrutinized contracts out of the statute notwithstanding the fact

⁶² 1 Page § 10.30; Costigan, *Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession*, 28 Harv. L. Rev. 237, 243-45 (1915).

Of course the right to the decree is conditioned upon proof of inadequacy of legal remedies and of a legal, reasonable contract. If the performance is immeasurable, there can be no adequate legal remedy. See 57 Am. Jur. *Wills* §§ 193-96 (1948); 36 U. Det. L.J., 316, 320 (1958).

The California court has developed a very comprehensive rule:

To enforce an oral contract to bequeath or devise property in equity by quasi-specific performance, it must be shown that the contract is definite and certain, the consideration adequate, that the contract is founded on good morals and *not against public policy*, that the character of the services is such that a money payment would not furnish adequate compensation to the plaintiff, that there is such a change in plaintiff's condition and relations in reliance on the contract that a refusal to complete the contract would be a fraud upon him, and that the remedy asked for is not harsh, oppressive or unjust to innocent third parties. (Emphasis added.) Walker v. Calloway, 99 Cal.App.2d 675, —, 222 P.2d 455, 459 (1950).

⁶³ Thompson v. St. Louis Union Trust Co., 363 Mo. 667, —, 253 S.W.2d 116, 120 (1952), required seven more factors to also be present in order to qualify for specific performance.

⁶⁴ Sheffield v. Baker, 201 Ark. 527, —, 145 S.W.2d 347, 348 (1940). These are but two of numerous tests used as listed in 1 Page § 10.43. For the quality of the proof required in general see 2 Corbin, *Contracts* § 442 (1950).

⁶⁵ See Tiggelbeck v. Russell, 187 Ore. 554, 213 P.2d 156 (1949); Annot., 69 A.L.R. 14, 32, 148 (1930); 1 Page § 10.13 n.6.

⁶⁶ This is substantially the same as Pomeroy's much-used definition found in 4 Pomeroy, *Equity Jurisprudence* § 1409 (5th ed. Symons 1941). However, courts more frequently say that to deny equitable relief would be to use the Statute to perpetrate fraud and hardship rather than to prevent them, as is its purpose. Frequently, this meaning is also conveyed by the axiom that the statute should be used as "a shield and not a sword." Krauskopf, *Solving Statute of Frauds Problems*, 20 Ohio St. L.J. 237, 239-50 (1959), contains a good discussion of the modern interpretation of the term.

that these performances are uncommon bases⁶⁷ for application of the doctrine of part performance.

The decree, however, is well grounded since the doctrine of equitable fraud is the very basis of the whole doctrine of part performance in the United States.⁶⁸ These two doctrines have been referred to as separate devices for taking a contract out of the statute, and apparently they did originate independently.⁶⁹ Ten years after the original Statute of Frauds was enacted, the English Chancellor began enforcing oral land contracts if the promisee could show his acts of part performance to be so referable to the oral contract as to give rise to an inference of some contract relating to land; generally change of possession was sufficient.⁷⁰ However, due to the influence of Pomeroy's concept of equitable fraud as the basis of a great part of all equitable jurisdiction, the American majority now remove contracts from the statute solely because not to do so would work a fraud on the promisee.⁷¹ The basis for these decrees is further strengthened in that the modern theory of equitable fraud no longer requires misrepresentation or fraudulent intention on the part of the promisor, which were required under the old doctrine of equitable estoppel.⁷²

Certain collateral points further support the soundness of these decrees. (1) The parties rarely intended any pecuniary standard of

⁶⁷ Assuming that the value of the services is measurable, the reasons why they are not more frequently used as bases for part performance are:

- (1) Generally, services may be adequately compensated in damages at law.
- (2) A close relationship commonly exists between the parties; therefore, this type of performance is not necessarily referable to a contract. In fact, the presumption is contra, and if so, this type of performance is more likely to be referable to a contract to compensate rather than to devise.
- (3) Proof of the existence of services performed is more difficult to establish than that of a change in possession, improvements made, or payments tendered. See 2 Corbin, *Contracts* § 435 (1950); 14 Harv. L. Rev. 64 (1900).

⁶⁸ Annots., 101 A.L.R. 923, 935 (1936), 75 A.L.R. 650 (1931); 2 Story, *Equity Jurisprudence* § 1045 (14th ed. 1918).

⁶⁹ See Pound, *The Progress of the Law 1918-1919—Equity*, 33 Harv. L. Rev. 420, 813, 929, 937 (1920).

⁷⁰ *Infra* note 94; *Frame v. Dawson*, 14 Ves. Jun. 386, 33 Eng. Rep. 569 (1807). See Moreland, *Statute of Frauds and Part Performance*, 78 U. Pa. L. Rev. 51, 67 (1929).

⁷¹ Even Pound, who supports the view that the two theories should be distinguished, admits this influence. *Supra* note 69. This is also evidenced in the large number of citations to Pomeroy, *Specific Performance* §§ 102-04 (3d ed. 1926) and 4 Pomeroy, *Equity Jurisprudence* § 1293 (5th ed. Symons 1941), and the earlier editions of these works. See also the cases in Annot., 101 A.L.R. 923, 935 (1936).

⁷² See Krauskopf, *Solving Statute of Frauds Problems*, 20 Ohio St. L.J. 237 (1959), for a discussion of the modern theory of equitable fraud in connection with the older devices for circumventing the Statute of Frauds. See also Moreland, *Statute of Frauds and Part Performance*, 78 U. Pa. L. Rev. 51, 76 (1929).

compensation.⁷³ (2) Unlike taking possession, making improvements, or paying the purchase price as evidentiary acts of part performance, the requirement of unequivocalness of services and forbearances to a contract is not strict.⁷⁴ This fact supports the decree to the extent that the weight of the defendant's argument that the performance was equivocal is reduced. If the promisee has taken possession, his case for entry of a decree is greatly strengthened since possession alone is recognized as sufficient part performance by England and many American jurisdictions and by a majority if coupled with improvements, payment, or both.⁷⁵ These situations are exceptional for the promisee of an oral contract to devise is seldom in a position to take possession or make improvements since any control he has over the promisor's realty is generally that of an agent. (4) The promisee has always made full or part payment through his services or forbearance, but payment alone is never held to be sufficient part performance.⁷⁶ However, if payment has been made in services or forbearance, the value of which is immeasurable, this payment is sufficient part performance and is said to be quite analogous to part performance by a combination of taking possession and making improvements,⁷⁷ which is considered the "strongest and most unequivocal act of part performance."⁷⁸

C. The *Waters* or Kentucky Rule

1. *In General.* Even though the majority rule is based on the doctrine of equitable fraud, is supported by the intent of the parties, is grounded upon a type of performance which is analogous to the strongest acts of part performance, and is made relatively immune from the risk of supporting fraudulent claims by its requirement of a high quality of proof of the alleged contract, Kentucky had never decreed "quasi-performance" prior to the *Miller* case. Instead, under

⁷³ See *Walker v. Calloway*, 99 Cal. 675, 222 P.2d 455 (1950); *Rhodes v. Rhodes*, 3 Sand. Ch. 279, 16 N.Y. Ch. 305 (1846); *Brinton v. Van Cott*, 8 Utah 408, 33 Pac. 218 (1893).

⁷⁴ The very nature of this type of performance renders strict unequivocalness relatively impossible for reasons enumerated in *supra* note 67; thus, a large degree of discretion is given the chancellor. The result is confusion and conflict on this point. See 2 Corbin, *Contracts* §§ 430, 435, 441 (1950) and 1 Page § 10.13.

⁷⁵ Part performance is an area where generalizations are hard to make, but there is no shortage of attempts to do so. A concise analysis of the position of American jurisdictions is found in Chafee & Simpson, *Cases on Equity* 657 (3rd ed. 1951) and Chafee & Re, *Cases and Materials on Equity* 609 (4th ed. 1958).

See generally Annot., 101 A.L.R. 923 (1936); 2 Corbin, *Contracts* §§ 420-40 (1950); 19 Ky. L.J. 43 (1931); *supra* note 70. For examples of combinations of services and possessions, see *Kelly v. Dodge*, 334 Mich. 499, 54 N.W.2d 730 (1952); Annot., 101 A.L.R. *supra* at 1095; 2 Corbin, *op. cit. supra*, § 437.

⁷⁶ See 2 Corbin, *Contracts* § 431 (1950).

⁷⁷ Pomeroy, *Specific Performance* § 114 (3rd ed. 1926).

⁷⁸ *Id.* § 126, at 323; see 2 Corbin, *Contracts* § 431 (1950).

the unique *Waters* rule,⁷⁹ the promisee recovered the *value* of the promised realty. The Court of Appeals stated this rule as follows:

[I]n cases in which it is possible to determine from the evidence the reasonable value of the services performed this will be the measure of recovery, but where the thing done or services performed are of such nature as not to admit of a reduction to a monetary value, then the [oral] contract made between the parties will be received to fix the value; and in case where lands or other property is agreed to be devised, the value of such property or land will be considered as the measure of recovery, though the thing itself cannot be recovered nor the contract specifically enforced.⁸⁰

The *Waters* rule is an example of the fourth source of confusion because of the similarity of its mode of measuring damages to the measurement of damages for breach of an express contract.⁸¹ For policy reasons, its requirement that the contract be established by "clear and convincing" proof⁸² was even more exacting in the case of alleged contracts to forbear from bringing bastardy proceedings.⁸³ Even the Court of Appeals has referred to these recoveries in quantum meruit as damages for breach of contract.⁸⁴

Since 1859 the *Waters* rule has been justified on several grounds: (1) The doctrine of equitable fraud has been applied to avoid the defense of the Statute of Frauds in much the same manner as it is applied by the majority which grant specific performance.⁸⁵ (2) The contract has been "resorted to, not as the measure of damages for failing to convey the property, but as constituting the standard of value established by the promisor himself."⁸⁶ (3) The rationalization used to support recovery of quantum meruit has been applied, even though the unjust enrichment is immeasurable, because the contract measure of the consideration received is the only measure which will

⁷⁹ *Waters v. Cline*, 121 Ky. 611, 85 S.W. 209 (1905). This rule was first announced in *Berry v. Graddy*, 58 Ky. 553 (1859), and has been consistently followed and referred to in numerous Kentucky opinions. *Duke's Adm'r v. Crump*, 185 Ky. 323, 215 S.W. 41 (1919), is probably the case most often cited for the rule.

⁸⁰ *Walker v. Dill's Adm'r*, 186 Ky. 638, 643, 218 S.W. 247, 249 (1920).

⁸¹ See *Wallace v. Long*, 105 Ind. 522, 5 N.E. 666 (1886); *Finn v. Finn's Adm'r*, 244 S.W.2d 435 (Ky. 1951); *Costigan*, *supra* note 43, at 387-88 n.19.

⁸² *Finn v. Finn's Adm'r*, 244 S.W.2d 435 (Ky. 1951); *Broughton v. Broughton*, 203 Ky. 692, 262 S.W. 1089 (1924).

⁸³ See *Napier v. Hodge*, 293 S.W.2d 870 (Ky. 1956).

⁸⁴ See *Hehr's Adm'r v. Hehr*, 288 Ky. 580, 584, 157 S.W.2d 111, 113 (1941).

⁸⁵ For example, *Berry v. Graddy*, 58 Ky. 553, 558 (1859), stated:

It would, therefore, amount to a fraud upon the former [promisee], after he has executed the agreement, to deprive him of the benefit of it, on the ground that the contract was verbal merely. He cannot be restored to the situation he was before the contract was made, nor can he be compensated in damages by any other standard than that furnished by the contract itself.

⁸⁶ As summarized in the *Miller* opinion, 335 S.W.2d 885, 888 (Ky. 1960).

approximate justice.⁸⁷ (4) The truism, "we cannot recede from the doctrine so often laid down,"⁸⁸ has been employed as a crutch.

2. *The Result of a Refusal to Recognize the Part Performance Doctrine.* An analysis of the Kentucky opinions, however, clearly reveals that the real basis of the *Waters* rule was a reluctance to leave the four-state minority which did not recognize the part performance doctrine, and that the *Waters* rule was adopted as the next most equitable substitute for specific performance.⁸⁹ This minority of Mississippi,⁹⁰ North Carolina,⁹¹ Kentucky and Tennessee⁹² adopted the English Statute of Frauds almost in its entirety.⁹³ But their courts have refused to follow either the English rule that possession is sufficient part performance, which developed only ten years after the statute was adopted in 1676,⁹⁴ or the even more exacting rules of part performance, which have developed in this country.⁹⁵ Kentucky's position is even more peculiar due to her close relationship with Virginia, which had adopted the liberal English part performance rule before Kentucky became a state.⁹⁶

"No more distinct or forceful statement of the minority doctrine exists than in"⁹⁷ the 1808 Kentucky case of *Grant's Heirs v. Craig-miles*.⁹⁸ The English doctrine of part performance was rejected and

⁸⁷ *Waters v. Cline*, 121 Ky. 611, 617, 85 S.W. 209, 210 (1905), said:

The cases . . . following *Berry v. Graddy*, rest on the idea that the defendant, having received the consideration of the [oral] contract, will not be permitted to retain what he has thus received, when he repudiates the contract. . . .

⁸⁸ *Id.* at 618, 85 S.W. at 210.

⁸⁹ See, e.g., *Walker v. Dill's Adm'r*, 186 Ky. 638, 218 S.W. 247 (1920); *Waters v. Cline*, 121 Ky. 611, 85 S.W. 209 (1905).

⁹⁰ *Howie v. Swaggard*, 142 Miss. 409, 107 So. 556 (1926); *McGuire v. Stevens*, 42 Miss. 724 (1869); Annot., 101 A.L.R. 923, 947 (1936).

⁹¹ *Ballard v. Boyette*, 171 N.C. 24, 86 S.E. 175 (1915); *Luten v. Badham*, 127 N.C. 96, 37 S.E. 143 (1900); Annot., 101 A.L.R. 923, 947 (1936).

⁹² *Goodloe v. Goodloe*, 116 Tenn. 252, 92 S.W. 767 (1906), recognized the minority position as a "rule of property"; Annot., 101 A.L.R. 923, 948 (1936).

⁹³ 19 Ky. L.J. 43, 44 (1931).

⁹⁴ *Butcher v. Stapely*, 1 Vern. 363, 23 Eng. Rep. 524 (1685); *Foxcroft v. Lester, Colles* 108, 1 Eng. Rep. 205 (1700). See 18 Ky. L.J. 379 (1930); *supra* note 70.

⁹⁵ See *supra* note 75.

⁹⁶ See *Caldwell v. Carrington's Heirs*, 34 U.S. 86 (1835) (written by Marshall, C. J.); *McMillin v. McMillin*, 23 Ky. (7 T.B. Mon.) 560 (1828).

One reason why the Kentucky court failed to follow the English cases may have been an 1807 Kentucky statute prohibiting reading or treating as authority in Kentucky courts any English post revolutionary cases. Professor Dukeminier in *Kentucky Perpetuities Law Restated and Reformed*, 49 Ky. L.J. 1 n.9 (1960), used this same reasoning as a possible answer to why English authority was not followed in a certain area in the law of perpetuities. See Ky. Acts 1807, ch. 7; *Richman v. Hoffman*, 3 Ky. (Hardin) 356, 373 (1808).

⁹⁷ Annot., 101 A.L.R. 923, 944 (1936).

⁹⁸ 4 Ky. (1 Bibb) 203 (1808).

specific performance was denied to a vendee's heirs even though the deceased had made part payment in services of the "sixty pounds per hundred" and had acquired possession before being killed by the Indians. Why this opinion would become the basis of Kentucky's position as the outstanding advocate of the minority rule is hard to understand. The English rule requires only the taking of possession, but here the promisee had also made part payment. Furthermore, the holding was merely that the evidence was insufficient to establish the contract so that the vendee's heirs would not have been entitled to a decree even "if the statute were out of the way";⁹⁹ therefore, the discussion of part performance is dictum. Moreover, the decision could have been rested on the fact that the defendant did not plead the Statute of Frauds; normally this omission would constitute a waiver of that defense.¹⁰⁰ The decision is also weak authority because it is based upon these two grounds either of which would have been sufficient.

Grant's Heirs and subsequent decisions continuously rejected the doctrine of part performance because (1) it would make the Statute of Frauds "a dead letter,"¹⁰¹ (2) it would increase litigation since it was an "uncertain and perplexed rule of action,"¹⁰² and (3) it was supported by policy considerations outweighed by those supporting the statute. *Grant's Heirs* admitted that a contract could often be proved by parol evidence as strongly as if it were in writing and that in such cases the statute would be a protector of fraud. "[B]ut this is only a partial evil resulting from the general good" for which the one claiming under the contract "must take the blame himself, for it is his own folly or negligence that has made him part with performance" in the absence of the "requisite written evidence."¹⁰³ Then, to defend the decision against contentions that it rejected the doctrine of equitable fraud, the court rationalized that "the statute has for its object the prevention of perjuries, as well as frauds. . . ."¹⁰⁴ (4) The court pictured the English rule as based upon the proposition that the

⁹⁹ *Id.* at 208.

¹⁰⁰ See Annot., 49 L.R.A. (N.S.) 1, 35 (1911). However, the court in *Grant's Heirs v. Craigmiles*, 4 Ky. (1 Bibb) 203, 209 (1808), justified its consideration of this defense: "The omission of the guardian to insist upon a legal defense . . . ought not to be prejudiced to the interest of the infants." This appears to be the general rule. See Annot., 158 A.L.R. 165 (1945); Annot., 32 L.R.A. 671, 680 (1896).

¹⁰¹ See *Hayden v. M'Ilvain*, 7 Ky. (4 Bibb) 57, 59 (1815); *Johnston's Devises v. MacConnell*, 6 Ky. (3 Bibb) 2 (1813).

¹⁰² *Grant's Heirs v. Craigmiles*, 4 Ky. (1 Bibb) 203, 205 (1808).

¹⁰³ *Id.* at 206.

¹⁰⁴ *Haydon v. M'Ilvain*, 7 Ky. (4 Bibb) 57, 59 (1815).

unequivocal act of the possession was sufficient evidence of the contract to satisfy the framers of the statute.¹⁰⁵ And then it said: "[T]o require a higher degree of evidence . . . is not for the purpose of aiding the plaintiff, but for protecting the defendant against the fraud of the plaintiff and the perjury of the witness."¹⁰⁶ As to the English rule this conclusion may have been correct,¹⁰⁷ but the Court of Appeals has never recognized that the American doctrine of part performance is based upon equitable fraud rather than unequivocal or evidentiary acts. Upon this questionable reasoning Kentucky followed and developed the minority rule as a "rule of property"¹⁰⁸ to the extent that to trace its history would be impractical and superfluous.¹⁰⁹

3. *Hidden Retreat from the Refusal to Recognize Part Performance.* The Kentucky court for a long time has indicated that its rejection of part performance was more consistent in theory than in the practical implications of its decisions. The following are examples. A dictum in 1868 indicated that equitable fraud could justify specific performance,¹¹⁰ but the suggestion was not adopted.¹¹¹ In 1898, a vendee's relinquishment of his easements in consideration of an easement over other land and the use of the latter easement by his heirs were said to be "such a part performance of the parol contract for a right of way as took it out of the statute."¹¹² By 1890 the doctrine of part performance was established as to contracts not to be performed within one year so long as they had been fully performed by the plaintiff.¹¹³ In 1954 a contract proved only by memoranda (which on sound principles should have been considered incomplete as a matter of law) was specifically enforced (without mentioning part per-

¹⁰⁵ *Grant's Heirs v. Craigmiles*, 4 Ky. (1 Bibb) 203, 205 (1808), exemplifies this fact in the following quotation:

Some judges have thought that another kind of evidence was equipollent with written evidence; such as paying the consideration, being let into possession, making valuable improvements, etc., which are deemed part performance.

¹⁰⁶ *Ibid.*

¹⁰⁷ See Moreland, *Statute of Frauds and Part Performance*, 78 U. Pa. L. Rev. 51, 69-73 (1929); *supra* notes 75 and 94.

¹⁰⁸ This is the status of the minority's consistent rejection as phrased by the Tennessee court in *Goodloe v. Goodloe*, 116 Tenn. 252, 92 S.W. 767 (1906).

¹⁰⁹ For annotations to numerous cases see, Legislative Research Commission, *Notes and Annots. to the Kentucky Revised Statutes* 194 (1944 Supp. 1960).

¹¹⁰ *Overstreet v. Rice*, 67 Ky. (4 Bush) 1 (1868).

¹¹¹ See *Annot.*, 101 A.L.R. 923, 945 (1936).

¹¹² *Beinlein v. Johns*, 102 Ky. 570, 577, 44 S.W. 128, 130 (1898); *but see Annot.*, 101 A.L.R. 923, 946 n.69 (1936), for a possible explanation.

¹¹³ See *Pilcher v. Stadler*, 276 Ky. 450, 124 S.W.2d 475 (1939); *Smith v. Cloyd*, 260 Ky. 393, 85 S.W.2d 873 (1935); *Dant v. Head*, 12 Ky. L. Rep. 153, 13 S.W. 1073 (1890), as interpreted by *East Tenn. Tel. Co. v. Paris Elec. Co.*, 156 Ky. 762, 162 S.W. 530 (1914); 2 *Corbin, Contracts* § 459, at 587 (1950).

formance) merely to avoid perpetrating a fraud upon the plaintiff due to his extended possession and inadequacy of legal remedy.¹¹⁴

Several oral contracts for the purpose of dealing in realty are enforced simply by finding them not to be *within* the statute rather than that part performance has taken them *out of* the statute. An oral partnership agreement for the purpose of dealing in realty is not within the statute although such a joint purchase would be, without the element of partnership.¹¹⁵ Verbal agreements to buy¹¹⁶ or sell¹¹⁷ realty for another are not within the statute unless the agent buys in his name and with his money at a non-judicial sale.¹¹⁸ In 1935 a contract to bequeath was held to be within the provision of the Uniform Sales Act requiring a contract for the sale of personalty exceeding five-hundred dollars to be written;¹¹⁹ however, in 1951 this decision was overruled as applying to contracts to bequeath for services.¹²⁰

Under a theory of constructive trust, Kentucky and a small minority enforce oral land trusts for third person *cestui* without requiring a confidential relationship,¹²¹ a rule which Scott considers "a clear violation of the Statute of Frauds."¹²² Thus, if A conveys to B upon an oral

¹¹⁴ Phelps v. Ham, 273 S.W.2d 814 (Ky. 1954), enforced a contract to buy realty which was found to have been sufficiently evidenced by simple receipts of monthly payments of \$41.67 signed by the vendee. Since these receipts were equivocal either as receipts for monthly rent or for installment payments of a purchase price at \$500 per year, they apparently were insufficient memoranda as a matter of law.

¹¹⁵ Jones v. Nickell, 297 Ky. 81, 179 S.W.2d 195 (1944).

¹¹⁶ Davis v. Spicer, 128 S.W. 294 (Ky. 1910).

¹¹⁷ Oliver v. Morgan, 198 Ky. 442, 248 S.W. 1020 (1923); Talbet v. Bowman, 8 Ky. (1 A.K. Mar.) 436 (1819).

¹¹⁸ See Day v. Amburgey, 147 Ky. 123, 143 S.W. 1033 (1912). *But see infra* note 149.

¹¹⁹ Maloney v. Maloney, 258 Ky. 567, 80 S.W.2d 611 (1935), concerned an estate containing both realty and personalty where action to impress a trust was denied because it was a "sale" of personalty over \$500 and thus within Ky. Stat. § 2651b-4 (Carroll's 1930).

¹²⁰ Finn v. Finn's Adm'r, 244 S.W.2d 435 (Ky. 1951), concerned KRS 361.040, now KRS 355.2-201 (Uniform Commercial Code § 2-201).

¹²¹ Newton v. Newton's Adm'r, 214 Ky. 278, 283 S.W. 83 (1926); Becker v. Neurath, 149 Ky. 421, 149 S.W. 857 (1912). In these cases there was a confidential relationship between the grantor and grantee, but no emphasis was placed upon that fact. Where there is such a relationship, a majority will impose a trust (1 Scott, Trusts § 45.2 (2d ed. 1956).); therefore, it follows, that, where the land was devised or allowed to descend by intestacy to the defendant in reliance upon his oral promise to convey to another, the promise is enforced "everywhere" because the confidential relationship is inherent in these situations. 2 Corbin, Contracts § 401, at 381 (1950).

A confidential relationship is necessary in Kentucky only if the oral promise was made after the absolute conveyance. Shortridge v. Shortridge, 207 Ky. 790, 270 S.W. 47 (1925). See Huff v. Fuller, 197 Ky. 119, 246 S.W. 149 (1922).

One reason for Kentucky's position is that she has not enacted the seventh and eighth sections of the original Statute of Frauds, which required express trusts in land to be in writing.

¹²² 1 Scott, Trusts 333 (2d ed. 1956).

trust for C or upon an oral contract to convey to C, Kentucky will raise a constructive trust in favor of C so long as B merely promised to so convey and thereby induced A to convey to him.¹²³ The normal requisites for imposition of a trust—actual fraud, duress, undue influence—need not be shown.¹²⁴ The only reason given why a constructive trust is not imposed in favor of the promisee of an oral contract to devise is that the parol promise is made by the title-holder whereas it must be made by the person to whom the title-holder conveys.¹²⁵ Thus, only a devisee who orally agreed with his devisor to hold or dispose of property in a given way is subjected to possible imposition of this constructive trust, which is said to be impressed upon the land before the devisee is vested with title.¹²⁶ Notwithstanding the vagueness of this distinction, such equitable relief is liberally granted to the beneficiary when necessary to prevent the perpetration of fraud,¹²⁷ even where the arrangement is unenforceable by the grantor for reasons other than the Statute of Frauds.¹²⁸ The Kentucky court gave the following rationalization for this circumvention of the statute: "the reason is that a constructive trust is raised in equity from the nature of the transaction rather than created by the verbal contract."¹²⁹

In 1915, *Skinner v. Rasche*¹³⁰ specifically enforced an oral contract to devise (as a defense) by construing the facts to justify the imposition of a constructive trust. A deceased couple had orally promised to devise all their property to defendant, then five-years-old, in consideration of surrender of custody by her parents. Subsequently, the husband conveyed all his realty to his wife whose devise to defendant was considered void, at least for the purpose of the holding. The property owned by the wife at her death had come to her from three sources, part by deed from her husband made after their contract to devise, a second part (not owned by him at the time of that deed) by his will, and a third part by her purchase. As to the two parts which came from him, her title was always impressed with a constructive trust to carry out *his* contract to devise. The court, however, enforced a trust

¹²³ *Becker v. Neurath*, 149 Ky. 421, 149 S.W. 857 (1912).

¹²⁴ *Ibid.* These traditional requirements are discussed in 4 Pomeroy, *Equity Jurisprudence* § 1053 (5th ed. Symons 1941).

¹²⁵ *Becker v. Neurath*, 149 Ky. 421, 425, 149 S.W. 857, 859 (1912).

¹²⁶ *Shrader's Ex'r v. Shrader*, 228 Ky. 374, 15 S.W.2d 246 (1929).

¹²⁷ See *Stiefvater v. Stiefvater*, 246 Ky. 646, 53 S.W.2d 926 (1932); *Rudd v. Gates*, 191 Ky. 456, 230 S.W. 906 (1921); *Gilmer*, *Current Developments in Resulting Trusts and Constructive Trusts in Kentucky*, 42 Ky. L.J. 455, 463 (1954).

¹²⁸ See *Stiefvater v. Stiefvater*, 246 Ky. 646, 53 S.W.2d 926 (1932), which concerned a bootlegger's conveyance to his wife, to avoid possible attachment for fines in the future, in consideration of an oral promise that upon his death she would convey to his son.

¹²⁹ *Stiefvater v. Stiefvater*, 246 Ky. 646, 648, 53 S.W.2d 926, 927 (1932).

¹³⁰ 165 Ky. 108, 176 S.W. 942 (1915).

in defendant's favor as to all three parts. The only interest the defendant could possibly have had in the part acquired by the wife by purchase was by virtue of the wife's contract to devise. As to this part the *Waters* rule would have entitled defendant to damages in the amount of the value of the property. The court, in imposing a constructive trust on this part, in effect, specifically enforced the wife's oral contract to devise. Had the Statute of Frauds been considered, this decision would have been pure recognition of part performance. Possible explanations as to why the statute was not discussed are that it was not pleaded or that the court was misled by the fact that the major portion of the property involved in the case was impressed with a constructive trust to which the statute does not apply.¹³¹ The court recognized the defendant's continuous rendition of personal services as sufficient consideration to support the wife's oral reiteration of the contract after her inability to contract as a married woman was removed by the Weisinger law.¹³² Subsequent opinions have stated that the *Skinner* holding specifically enforced an oral contract to devise because it was "an exceptional case."¹³³ Apparently, this was in reference to the fact that the will might have been held valid as to the defendant, a devisee, had she not been one of the attesting witnesses.

As to restrictive covenants which run with the land, House concluded "that the modern Kentucky Court would enforce any oral promises of the covenantor to bind his land when the covenantee's restriction is written in the original agreement"¹³⁴ notwithstanding the contention that such are required by the Statute of Frauds to be in writing.¹³⁵

Note that the common reason for granting relief in these decisions, so similar to that of employing the doctrine of part performance, is that to do otherwise would be inequitable. However, in one respect, Kentucky has always expressly admitted the harshness of not recognizing part performance by granting the promisee an equitable lien on the realty for his expense incurred in reliance upon the oral contract.¹³⁶ Thus a promisee in possession who recovered under the *Waters* rule could remain in possession until the promisor's estate paid

¹³¹ See Gilmer, *Current Developments in Resulting Trusts and Constructive Trusts in Kentucky*, 42 Ky. L.J. 455 (1954).

¹³² Ky. Stat. §§ 2127-48 (Carroll's 1936).

¹³³ *Broughton v. Broughton*, 203 Ky. 692, 696, 262 S.W. 1089, 1090 (1924).

¹³⁴ Note, 45 Ky. L.J. 637, 645 (1957).

¹³⁵ *Id.* at 641. See Sims, *The Law of Real Covenants: Exceptions to the Restatement*, 30 Cornell L.Q. 1, 27 (1944).

¹³⁶ *Crain v. Crain*, 197 Ky. 813, 814, 248 S.W. 176, 177 (1922) (dictum, containing a good statement of the rule); *Usher's Ex'r v. Flood*, 83 Ky. 552 (1884); 22 Ky. L.J. 434 (1934).

the value of the land which would be to the same effect as damages at law followed by levy of execution.

This discussion exemplifies the merit in Corbin's conclusion that "Kentucky is working out its own part performance doctrines."¹³⁷ Corbin also correctly concludes that the denial of part performance has neither avoided litigation, upheld the legislative intent, nor made the law less perplexing as predicted in *Grant's Heirs*.¹³⁸ Corbin says that it is "doubtful" that such denials are still the law in Kentucky.¹³⁹

D. *Miller v. Miller*: A Slight Modification of the Majority Rule

Even though both parties in the *Miller* case conceded that the value of the mother's forbearance was immeasurable, relief could have been granted under any one of three theories. By further engaging in fiction, the *Skinner* holding could have been extended to impose a constructive trust upon the land as of the time the contract was made. This would have been inadvisable since a prerequisite for imposing a constructive trust, notwithstanding the questionable portion of the *Skinner* holding,¹⁴⁰ is that legal title must be conveyed to a third party who thereby becomes charged with a duty to the beneficiary.¹⁴¹ By affirming the trial court's application of the *Waters* rule, the plaintiff would have received the approximated value of the realty. The *Waters* rule has found support in only three states¹⁴² and has been overruled after once being followed in three others.¹⁴³ It has been frequently criticized;¹⁴⁴ but never more ably than by Judge Palmore in the *Miller* opinion.

The third possible theory, which was the one employed, was to decree the transfer of the title as if the oral contract were specifically enforced. In justifying this innovation in Kentucky, Judge Palmore first pictured the *Waters* rule as a sophistical fiction "originating in Victorian circumlocution"¹⁴⁵ under which the court circumvented the

¹³⁷ 2 Corbin, Contracts § 443, at 531 (1950).

¹³⁸ *Ibid*; *Grant's Heirs v. Craigmiles*, 4 Ky. (1 Bibb) 203 (1808).

¹³⁹ 2 Corbin, Contracts § 499 n.1 (Supp. 1960).

¹⁴⁰ *Supra* note 130 and related text.

¹⁴¹ See 4 Pomeroy, Equity Jurisprudence § 1044 (5th ed. Symons 1941).

¹⁴² *Benner v. Sledd*, 158 Ark. 47, 249 S.W. 556 (1923); *Gordon v. Spellmen*, 145 Ga. 682, 89 S.E. 749 (1916); *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921); *Henderson v. Davis*, 191 S.W. 358 (Tex. 1917) (dictum).

¹⁴³ *Wallace v. Long*, 105 Ind. 522, 5 N.E. 666 (1886); *Grantham v. Grant-ham*, 205 N.C. 363, 171 S.E. 331 (1933); *Erben v. Loriller*, 19 N.Y. 299 (1859).

¹⁴⁴ E.g., *Reynolds v. Conner*, 190 Okla. 323, 123 P.2d 664 (1941); *Frieders v. Frieders' Estate*, 180 Wis. 430, 193 N.E. 77 (1923); *Jeanblanc, Restitution Under the Statute of Frauds: Measurement of the Legal Benefit Unjustly Retained*, 15 Mo. L. Rev. 1, 14-15 (1950).

¹⁴⁵ *Miller v. Miller*, 335 S.W.2d 884, 889 (Ky. 1960). Note that all quotations in this and the succeeding paragraph are from the first five of the last seven paragraphs of the *Miller* opinion at pages 888-89.

Statute of Frauds by requiring the contract to be established by clear and convincing proof and by allowing the value of the expressed consideration to be recovered, but then denied specific enforcement because the Statute of Frauds was still applicable. Second, the *Waters* rule was recognized as having rendered the statute "useless and dead" to the extent of this circumvention. Third, the court refused to completely overrule the *Waters* rule even though it recognized that such a "sacrifice of the objectives underlying the Statute of Frauds in favor of a benevolent solicitude for those who would suffer irreparable hardship . . . may be of debatable wisdom," simply because the *Waters* rule is "so firmly entrenched as a part of the law." But to the extent the *Waters* rule resulted in a "hybrid rule calling for an *artificial measure* of recovery in lieu of the real thing," it was overruled for having "neither logical nor reasonable basis."

The phrase "artificial measure" was used in reference to the trial court's reliance upon the "permissive guesses" of witnesses as a basis for its "educated guess" as to the value of the property. This was the context in which the *Waters* doctrine was overruled for being a possible perpetrator of fraud, for "if the guess is wrong, one party or the other will suffer," but "if the property itself be decreed" neither will be prejudiced.

In summary, *Miller* has actually (though perhaps not theoretically) placed Kentucky in the majority (which specifically enforce oral contracts to devise) to the extent that an oral contract to devise established by clear and convincing proof may be specifically enforced where the value of the surviving promisee's performance is immeasurable and the land is available for transfer. The reasoning is that in view of the uncertainty in valuation of land by a trier of fact, the only way the court can prevent perpetration of fraud is to decree transfer of the realty. If a reasonable value can be placed upon the performance, recovery will still be for that amount in quantum meruit. If this is not possible, but the value of the land has been stipulated or may be *accurately* determined without possibility of prejudice to either party, recovery will still be for this value under the *Waters* rule.

III. CONCLUSION: SPECIFIC PERFORMANCE OF ORAL CONTRACTS TO

SELL REALTY IN KENTUCKY

"Part performance" was not mentioned in the *Miller* opinion; the court expressly refused to completely overrule the *Waters* doctrine. Furthermore, the logical inference is that Judge Palmore purposely employed only the *effect* of part performance in order to leave the court free to again reject the doctrine. Nevertheless, there are four

reasons why the opinion could serve as the basis for the general adoption of that doctrine, and thereby remove Kentucky from the four-state minority which has not specifically enforced a commercial oral land contract. Since these reasons, as listed below, are stated in summary form, they should be considered in context with their respective discussions in Parts I and II. (1) If an oral contract to devise in consideration of not bringing bastardy proceedings can be specifically enforced, a fortiori, an oral contract to sell realty should be. Courts are much more reluctant to specifically enforce oral contracts to devise than oral contracts to sell land due to the confusion and suspicion inseparably connected with the former.¹⁴⁶ The commercial contract is burdened by only one consideration of public policy¹⁴⁷ and is not confused by the law of wills;¹⁴⁸ in contrast, the *Miller* contract was of the most policy-ridden type,¹⁴⁹ excepting only those concerning surrender of custody.¹⁵⁰ (2) The only prerequisite for the *Miller* decree which precludes it from being an out-right recognition of part performance is that the value of the land must be incapable of any fairly accurate measurement.¹⁵¹ This factor can be completely nullified if the Kentucky court will find that the inherent uniqueness of land, which has always rendered legal damages inadequate as a remedy for breach of a written contract to sell or devise land,¹⁵² also applies to land under an oral commercial contract. To hold that land is "inherently" unique when the subject of a written contract, but not unique when the subject of an oral contract would be irrational since the characteristics of land are not affected by any contract. (3) The *Miller* opinion emphasizes the absurdity of not theoretically recognizing part performance since the statute is equally infringed upon whether the contract be used for the purpose of influencing the amount of recovery or as the foundation of the action.¹⁵³ The Court of Appeals

¹⁴⁶ See Part I, B, on pages 221-26.

¹⁴⁷ The policy supporting the Statute of Frauds. See *supra* note 31 and related text.

¹⁴⁸ See Part I, B, 1, on pages 221-23.

¹⁴⁹ See Part I, B, 2 and 3 on pages 223-26.

¹⁵⁰ See *supra* note 7.

¹⁵¹ See Part II, D, on pages 240-41.

¹⁵² 5 Corbin, Contracts § 1143 (1951). Professor Moreland, in annotating the Kentucky cases, concedes that they are in accord with Restatement, Contracts § 360 (1932), which recognizes the conclusive presumption that damages will not afford an adequate remedy for breach of a written land contract. 24 Ky. L.J. 272, 278 (1936). For student notes discussing his view that specific performance should be granted only as a matter of discretion due to the modern American conception that land has primarily only commercial value, see 23 Ky. L.J. 380 (1935) and 21 Ky. L.J. 348 (1933).

¹⁵³ See Part II, D, on pages 240-41.

has expressly admitted this disregard for the statute previously,¹⁵⁴ and implies the same by frequently enforcing oral contracts concerning interests in realty under the guise of less realistic theories.¹⁵⁵ These influences, coupled with the weight of Corbin's conclusions,¹⁵⁶ tend to negate all reasons for not recognizing part performance given in the unbroken line of cases following *Grant's Heirs*.¹⁵⁷ (4) The *Miller* decree was not based upon unequivocal acts but upon equitable fraud—the basis of the entire doctrine of part performance in America.¹⁵⁸ Kentucky has made extended use of this doctrine¹⁵⁹ but never more liberally. No evidence showed either party would in fact suffer irreparable injury; but the court considered the possibility of such to be sufficient even though claimed by the promisor's heirs rather than the third-party beneficiary.

For these reasons, any oral contract to sell or devise land established by clear and convincing proof should be specifically enforced in Kentucky if necessary to prevent perpetration of fraud.

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¹⁵⁴ E.g., *Head v. Schwartz' Ex'r*, 304 Ky. 798, 802, 202 S.W.2d 623, 625 (1947), which stated, as an indication of a basis for the court's attitude:

This statute was passed in England in 1676, and it soon found its way to America. In spite of its age, it has never fully soaked into the consciousness of all men, and we find every day where men have made contracts that are within the statute of frauds without reducing them to writing. . . .

¹⁵⁵ See Part II, C, 3 on pages 236-40.

¹⁵⁶ *Supra* notes 137-39 and related text.

¹⁵⁷ See Part II, C, 2 on pages 234-36.

¹⁵⁸ See *supra* note 68 and related text.

¹⁵⁹ Besides serving as a basis for the *Waters* and *Skinner* rules and the granting of equitable liens, *supra* notes 85, 130 and 136 respectively, the doctrine of equitable fraud is used to retain Kentucky in the small minority which allow a realty broker to collect his commission on a quantum meruit basis even though these commission contracts are now specifically within the Statute of Frauds. KRS 371.010(8); *Clinkenbeard v. Poole*, 266 S.W.2d 796 (Ky. 1954); 46 Ky. L.J. 278 (1957).