

# Michigan Law Review

---

Volume 52 | Issue 2

---

1953

## Wills - Enforcement of Parol Contract to Devise Real Property

John S. Slavens S.Ed.

*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Contracts Commons](#), [Estates and Trusts Commons](#), and the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

John S. Slavens S.Ed., *Wills - Enforcement of Parol Contract to Devise Real Property*, 52 MICH. L. REV. 319 (1953).

Available at: <https://repository.law.umich.edu/mlr/vol52/iss2/20>

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

WILLS—ENFORCEMENT OF PAROL CONTRACT TO DEVISE REAL PROPERTY—  
Plaintiffs and decedent made an oral agreement whereby plaintiffs agreed to pay decedent a yearly sum and to make repairs on certain real estate in return for which decedent agreed to devise the real estate to plaintiffs. Plaintiffs had been in possession of the property for several years and had vastly improved its value when decedent died, devising the property to third parties. Plaintiffs brought this action for specific performance against the devisees. The trial court, satisfied that the oral contract had been established, entered the decree for specific performance. On appeal, *held*, affirmed. A person can make a valid agreement for disposition of his property by will, and a court of equity can decree specific

performance<sup>1</sup> of an oral contract to devise land if the oral agreement is established. *Kelley v. Dodge*, 334 Mich. 503, 54 N.W. (2d) 730 (1952).

A person can make an enforceable contract to devise his property in a particular way as long as the essential elements of a valid contract are present.<sup>2</sup> A contract to make a will need not comply with the Statute of Wills because in legal effect it is treated not as a will but as a contract.<sup>3</sup> In a few states special statutory provisions require a writing before any action may be brought on an agreement to devise property.<sup>4</sup> Although contracts to devise real property are subject to the Statute of Frauds, the vast majority of courts will enforce oral contracts to devise if there has been part performance.<sup>5</sup> The doctrine of part performance is a flexible one; consequently, courts differ as to facts necessary to constitute a part performance.<sup>6</sup> Generally, payment of money in itself is not a sufficient part performance.<sup>7</sup> Likewise the mere taking of possession may not be a sufficient performance within the doctrine.<sup>8</sup> However, the taking of possession combined with an additional factor such as payment, rendition of services, or the making of improvements usually will bring the case within the doctrine.<sup>9</sup> If the contract is to devise land, frequently the consideration is a promise to care for the devisor until his death. If such care is provided, these contracts usually are held valid.<sup>10</sup> Part performance takes an oral contract from the operation of the Statute of Frauds since it indicates the existence of the contract<sup>11</sup> and injects an element of detrimental reliance to offset the likelihood of fraud and perjury.<sup>12</sup> The facts of the instant case brings it well within the precedents on part performance. The broader rule laid down by the court, that an oral contract to devise property is enforceable, is not, if taken at face value,

<sup>1</sup> The question of remedies is beyond the scope of this note. See ATKINSON, WILLS §68 (1937); annotation, 69 A.L.R. 14 (1930); *Teske v. Dittberner*, 70 Neb. 544, 98 N.W. 57 (1903).

<sup>2</sup> 4 PAGE, WILLS §1707 (1941). See *Canada v. Ihmsen*, 33 Wyo. 439, 240 P. 927 (1925).

<sup>3</sup> 4 PAGE, WILLS §1717 (1941). See *First Presbyterian Church v. Dennis*, 178 Iowa 1352, 161 N.W. 183 (1917); *Estate of McLean*, 219 Wis. 222, 262 N.W. 707 (1935).

<sup>4</sup> ATKINSON, WILLS §68 (1937). See *Brought v. Howard*, 30 Ariz. 522, 249 P. 76 (1926).

<sup>5</sup> 4 PAGE, WILLS §1719 (1941).

<sup>6</sup> 2 CORBIN, CONTRACTS §426 (1950).

<sup>7</sup> *Id.*, §431. See also *Pearson v. Gardner*, 202 Mich. 360, 168 N.W. 485 (1918).

<sup>8</sup> See HANDLER, CASES ON VENDORS AND PURCHASERS 27 (1933). See also *Pearson v. Gardner*, note 7 *supra*.

<sup>9</sup> 2 CORBIN, CONTRACTS §433 (1950); *Woodworth v. Porter*, 224 Mich. 470, 194 N.W. 1015 (1923).

<sup>10</sup> *Bird v. Pope*, 73 Mich. 483, 41 N.W. 514 (1889). *Woods v. Johnson*, 266 Mich. 172, 253 N.W. 257 (1934); *Finn v. Finn, Admr.*, (Ky. 1951) 244 S.W. (2d) 435; 2 CORBIN, CONTRACTS §426 (1950).

<sup>11</sup> See *Langston v. Currie*, 95 Mont. 57, 26 P. (2d) 160 (1933).

<sup>12</sup> 4 PAGE, WILLS §1719 (1941). See also 14 WASH. L. REV. 30 (1939); *Torgerson v. Hauge*, 34 N.D. 646, 159 N.W. 6 (1916); *Hatcher v. Sawyer*, 243 Iowa 858, 52 N.W. (2d) 490 (1952); *Nelson v. Schoonover*, 89 Kan. 388, 131 P. 147 (1913); cf. *Miller v. Carr*, 137 Fla. 114, 188 So. 103 (1939). Part performance doctrine is limited to land contracts. *Osborne v. Kimball*, 41 Kan. 187, 21 P. 163 (1889).

corroborated by authority either in Michigan<sup>13</sup> or in most other jurisdictions.<sup>14</sup> The court relied solely on *Carmichael v. Carmichael*,<sup>15</sup> which held that a parol contract to devise, if partly performed, could be enforced. Other courts have made broad statements similar to that in the principal case; yet in each instance part performance has been present.<sup>16</sup> One court has said that an oral contract to devise realty violates the spirit of both the Statutes of Wills and of Frauds, but when fairly made and substantially performed, equity will enforce it.<sup>17</sup> This view fairly summarizes the approach of the courts, and whether the rule stated by a court is general as in the principal case, or is specific in requiring part performance, it is submitted that in either case an oral contract to devise realty will be established to the court's satisfaction, and thus be enforceable, only if there has been part performance.

*John S. Slavens, S.Ed.*

<sup>13</sup> See *Woods v. Johnson*, note 10 supra (oral contract to devise land in return for care of promisor until his death binding on devisees); *Smith v. Thompson*, 250 Mich. 302, 230 N.W. 156 (1930) (oral contract to make mutual wills binding on survivor).

<sup>14</sup> Note 12 supra.

<sup>15</sup> 72 Mich. 76, 40 N.W. 173 (1888).

<sup>16</sup> *Resor v. Schaefer*, 193 Wash. 91, 74 P. (2d) 917 (1937); *Finn v. Finn, Admr.*, note 10 supra; *Ward v. Hislop*, 122 Neb. 15, 238 N.W. 769 (1931).

<sup>17</sup> *Teske v. Dittberner*, 65 Neb. 167, 91 N.W. 181 (1902).