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CONTRACTS TO MAKE WILLS IN PENNSYLVANIA

By

A. J. WHITE HUTTON*

It is trite law that a will is revocable and has no binding effect until probated after death of the maker. So, a will has been called an ambulatory instrument until death. An able writer has thus defined a will:

> "A will is the legally enforceable declaration of a person's intention of what he desires to be done after his death, which declaration is revocable during his lifetime, and is operative for no purpose until death, and is applicable to the situation which exists at the maker's decease."[1]

In *Re Gredler's Estate*,[2] Stern, J., however, thus asserts:

> "It is well established that an agreement to make a will or to devise one's property to a particular person or for a particular purpose is binding and irrevocable when supported by what the law regards as valid consideration."

Consequently, in Pennsylvania the doctrine of irrevocability of wills has been established. Thirty odd years ago in *McGinley's Estate*[3] Mestrezat, J. declared:

> "It is well settled that one may enter into a valid contract to dispose by will of his property, real or personal, in a particular way, and that such will is irrevocable and the contract will be specifically enforced."

Incongruity

When it is said that a will is a revocable instrument and does not become fixed until the death of the maker but later one finds that the courts have declared a will may be irrevocable, the two statements appear incongruous and irreconcilable. However, the inconsistence is more apparent than real. What is actually meant is that a will per se is always revocable but if it is also a contract or part of a contract, the testamentary characteristic presents one phase of law and the contractual feature shows another phase of the same general situation.

Again, theories sometimes become confused with actualities in matters of procedure and remedies. A court may determine that the will as a testamentary disposition is revocable but notwithstanding may later hold the same enforceable as a contractual obligation. In Pennsylvania, the courts have viewed the problem realistically by declaring that a will is irrevocable under certain circumstances. In *Cawley's Estate*[4] after explaining the difference between a contract and a will, pointing out that the former carries an obligation and the right to require per-

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1 ATKINSON ON WILLS, page 1 (1937), citing other definitions. *Cf.* Re Douglas' Estate, 303 Pa. 227, 154 A. 376 (1931).
2 361 Pa. 384, 65 A.2d 404 (1949), citing cases.
3 257 Pa. 478, 101 A. 807 (1917).
4 136 Pa. 628, 20 A. 567 (1890).

formance, whereas the latter is a statement of the purpose or wish of the maker as it exists at the time and subject to change by him, Williams, J. continued as follows:

> "Although these instruments are so unlike, they may be, and sometimes are combined so as to give a testamentary character to what purports to be a contract, or to convert a will into an irrevocable agreement."

Contract To Devise
Johnson v. McCue[5]

In the titled case a grandfather, desirous of retaining the company and services of a grandson, agreed to devise sixty acres of land to the grandson, the latter in turn agreeing to pay the former and his wife, during their joint lives a stated sum of money annually. The grandfather executed a will making the devise and on the same date the grandson executed and delivered his obligation for the annual payments by instrument in writing under hand and seal. The grandson entered into possession and later made the annual payments until his death unmarried and without issue. The grandfather surviving refused tender of the annual payments from the heirs of the grandson and made another will, revoking the earlier one, thus repudiating the original transaction. Upon his death and probate of the later will, revoking the former one, an ejectment was brought by the heirs of the grandson against the devisees of the grandfather. The court instructed the jury that the will and agreement constituted a contract between the parties, enforceable in equity and the grandfather had no power to revoke the will, the estate vesting in the heirs of the grandson upon the grandfather's death. The defendants excepted to the charge and upon verdict and judgment for plaintiffs, sued out a writ assigning the charge for error. In affirming the judgment, Lowrie, C. J. explained:

> "The writings in this case are quite a new invention; and as is usual in such cases, however cheap may be the single instrument, the test of its principle must be very expensive to somebody. The principal writing is in the form of a will, devising the land in controversy together with other lands. At the time of its execution, the devisees, as we may call them, executed and delivered to the devisor, in consideration thereof, a contract under seal, by which each agreed to pay to the devisor $12.50 (a year as it is understood) and that, in case of neglect to do so, the grant in the will should be null and void, as to the party neglecting. In addition to these facts, it is admitted that the two papers represent one transaction; that the devisor acknowledged and performed the arrangement so long as the devisee of this particular piece of land lived; that he admitted him to take and hold the possession, and received from him the sum of $12.50 a year; and that since the devisee's death it has been regularly tendered to him and refused.

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[5] 34 Pa. 180 (1859); McCue v. Johnson, 25 Pa. 306 (1855).

"We cannot therefore regard the principal writing as a will. A will is simply a unipartite disposition of property; but this writing is part of an arrangement and disposition that are essentially bipartite, and hence not subject to the will of one only, and therefore not revocable like a last will. To effectuate the intention of the writings, we must strain the bungling form of the scrivener. We must treat the two papers as one contract, whereby one man, on consideration of the covenants of the other, grants to that other a given estate in land to vest in possession at the death of the grantor. We treat the grant as an executed one, because otherwise the remedy would be in the Orphans' Court, 5 Harris 193, and because the parties have not raised any question about the proper forum."

In the earlier case of *Brinker* v. *Brinker*[6] Gibson, C. J. ruled that where an agreement to devise is shown by the terms of the will, there is a sufficient compliance with the requirements of the statute of frauds. This case is striking as the will was lost, allegedly destroyed by a member of the family, and consequently the facts had to be developed by parol. In *Johnson* v. *McCue* it will be noted the action was ejectment and in *Brinker* v. *Brinker* a bill in equity.

In *Smith* v. *Tuit*[7] it was held that a paper in the form of a will, devising real estate expressly in consideration of and as compensation for specific services to be rendered by the devisee, may operate as a memorandum of a contract for the sale of land sufficient to comply with the statute of frauds, and as such be admissible in evidence during the lifetime of the testator. In this case the testator conveyed the real estate devised and ejectment was brought by the grantee against the devisee in possession under the terms of the devise. At trial the offer of defendant of the will, to be followed by evidence of possession and performance of the contract, was objected to and the objection was sustained. Later the court instructed the jury that under the evidence the verdict should be for the plaintiff. The jury returned a verdict as instructed and a motion for new trial having been discharged, judgment was entered for the plaintiff. In holding the trial court erred in rejecting the offer of proof by the defendant and reversing the judgment with new trial awarded. Green, J. declared:

". . . It has long been held that such a case is not affected by the statute of frauds, because the terms of the agreement are put in writing, to wit, the will, and this is a sufficient compliance with the requirements of the statute: *Brinker* v. *Brinker,* 7 Pa. 53. The circumstance that it is not to take effect finally, until after the testator's death, will not prevent a specific performance during the life of the testator, if he has put the other party to the agreement in possession of the land. This was held in *McCue* v. *Johnson,* 25 Pa. 306, where the decree was refused only because there was no provision for possession during the life of the devisor in either the will or written contract, and no sufficient proof of a verbal contract for such possession. But in *Johnson* v. *McCue,* 34 Pa. 180, the same will and agreement were enforced in favor of the first devisee

[6] 7 Pa. 53 (1847).
[7] 127 Pa. 341, 17 A. 906 (1889).

against devisees by a subsequent will, on the ground that the first will and agreement must be treated as an executed contract which the devisor was not at liberty to disregard. It is true, in that case the stipulation of the devisee was expressed in a written paper, but the decision of the question as to how the will was to be regarded, was not put upon that ground; and in *Brinker* v. *Brinker* the devisee's part of the contract was in parol, but he was nevertheless held entitled to treat the will as a contract and not as a will, and to have specific performance. It is true this was before our statute of frauds was passed, but the will was held to be a sufficient writing to take the case out of the statute in any event. In *McCue* v. *Johnson,* supra, the court said, 'In point of fact so far as the instrument by which the conveyance is to take place, is involved, it is an executed contract on condition to take effect at the time specified. A devise transfers the legal estate and not an equity to be perfected by another instrument. It is the same as if a deed had been executed to take effect in futuro, only that the common law incident of a feoffment forbids the freehold remaining in abeyance, and a resort must therefore be had to a devise or a conveyance under the statute of uses."

"It is clear, therefore, upon all the authorities, that the testamentary character of the testator's agreement is not a bar to relief, as upon an executed contract. The difficulty in regard to possession by the devisee during the lifetime of the devisor is removed, in the present case, by the fact that the will itself provides for a present possession to begin the day after the will was executed."

The aforegoing cases illustrate the contract to devise which is embraced in the will itself and is a part thereof. However, the contract to devise may be separate and not connected with any testamentary disposition. In *Cridge's Estate,* 289 Pa. 331, 137 A. 455 (1927), there is an illustration of an agreement to devise but which was never carried out by the promisor and the matter was presented to the orphans' court by the parties aggrieved in the form of a petition to compel conveyance of the real estate in question, the promisor having died. In affirming the decree of the court below granting specific performance, Sadler, J., explained:

"The present proceeding was instituted in the orphans' court, and petitioner demanded specific performance of the contract of sale. It was urged on behalf of Cridge's estate that the statute of frauds intervened, but this cannot be, for the claim presented is founded on the written contract of sale, the only dispute being as to whether the consideration was correctly expressed. In addition the money presently payable was paid over, actual possession of the farm was taken, and the property remained in the hands of the proposed grantees thereafter: *Piatt* v. *Seif,* 207 Pa. 614; *Lord's App.,* 105 Pa. 451; *Parry* v. *Miller,* 247 Pa. 45; *Jamison* v. *Dimock,* 95 Pa. 52; *Leap* v. *Leahey,* 67 Pa. Super. 337.

"A careful examination of the record, reading it in light of the applicable authorities, leads us to the conclusion that the assignments of error must be overruled."

Contract Not To Devise
Taylor v. Mitchell[8]

If one can contract to make a devise as has been shown by the authorities already discussed, it would seem to follow logically that the converse should be legally possible and one may contract not to make a devise. In the titled case is an illustration of this situation. C, by an agreement under his hand and seal and for a valuable consideration covenanted that he would not by deed, mortgage, sale, judgment, devise or otherwise, prejudice or interfere with the rights of his heirs at law as to their free and equal share in all his real estate, but that the same should remain free and uncontrolled, to be divided equally among all his legal heirs, at his decease. C later made a will wherein he devised his real estate to certain heirs but did not include T, one of his heirs therein. T brought ejectment to recover his interest as one of the heirs of C, claiming a one-fourth share in the real estate under the agreement. The jury found for the plaintiff but the court on the question of law reserved entered a judgment *n.o.v.* for the defendants, which was assigned for error to the supreme court. In reversing and entering judgment for the plaintiff, Trunkey, J. observed:

> "William Carson's deed, dated 5th August 1862, is so far from being testamentary, that it contains his covenant not to devise his real estate. The sole question is, whether that covenant shall prevail against his will. (After reciting the contract the learned Justice continued). The plain meaning is, that for a valuable consideration, the covenantor agreed to hold his real estate unincumbered, free and uncontrolled, to be divided amongst his heirs. Had he contracted, for the same consideration, to sell his land and give possession at his death, and make provision for conveyance, after his decease, to such persons as should be his heirs, the intent would not be more obvious. For purpose of reaching the like end he covenanted to stand seised to the use of his heirs."[9]

Oral Contract To Devise
Hertzog v. Hertzog[10]

In this case it was held that in an action for breach of a parol contract for the conveyance of land, in consideration of money paid and services rendered, the damages are to be measured by the amount of the consideration, and not by the value of the land. The trial court charged the jury, inter alia, as follows:

> "If the jury should be satisfied from this, that the old man declared his intention to bequeath this land to John, and held this as an inducement for him to contribute to the acquisition of the estate, and he did so, and he afterwards disappointed the hopes of the expectant devisee, by dying without any testamentary disposition of his property, then we say to you, that the plaintiff is entitled to recover from the estate of the de-

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8 87 Pa. 518 (1878).
9 This case cited with approval, In re Kocher's Estate, 354 Pa. 81, 46 A.2d 488 (1946), per Stern, J. See also VanMeter v. Norris, 318 Pa. 137, 177 A. 799 (1935).
10 34 Pa. 418 (1859).

fendant, any amount which he can show was contributed towards the purchase, with interest from the death of the defendant."

To this charge plaintiff excepted. A verdict and judgment having been rendered in plaintiff's favor, he removed the case to the supreme court, assigning the quoted charge for error.

In affirming the judgment Woodward, J. declared:

> "The omission from our statute of frauds and perjuries, of the 4th section of the British statute, after which ours was modelled, left us free to sue on parol contracts for the sale of lands. But such actions were rare in the early history of our jurisprudence; and when they were brought, the measure of damages, though not very distinctly defined in the cases, was so controlled, that specific performance of the contract should not be virtually enforced. It is too manifest for debate, that if the value of the land may be recovered in an action of case upon the parol contract, the statute, as we have it, is effectually evaded, as if the land itself were recovered in ejectment."[11]

This reasoning has been followed in other types of the same general class of cases as for instance in *Redditt* v. *Horn*[12] where Jones, J. cited the *Hertzog* case and observed that suit of the specific performance of an oral agreement concerning lands can be maintained only in circumstances giving rise to equities sufficient of themselves to take the case out of the statute of frauds.

In *Re Byrne's Estate*[13] Baldrige, Judge, explained:

> "There is no dispute over the proposition that an oral agreement to give land as compensation for services to be rendered is enforceable only if it is followed by exclusive possession of the land and the making of improvements which cannot be adequately compensated in damages. *Morrish et al* v. *Price et ux.*, 293 Pa. 169, 142 A. 137."

Oral Contract To Bequeath
Graham v. Graham's Exrs.[14]

It is now well settled law that an oral contract to bequeath in general terms is unenforceable as such against the estate of the deceased promissor although such contract does not come within the terms of our statute of frauds. The titled case, occurring a century ago, is typical of many found in the reports. An aged farmer of some means and having an invalid wife, proposed to a young niece and her sister that they should come and live with the uncle and aunt performing domestic services, including care of the invalid aunt. Said the uncle, in substance: that if these nieces would go and live with him till his death, he would "give to each as much as any relation on earth." A witness stated

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11 Jack v. McKee, 9 Pa. 235 and kindred cases were overruled. The opinion of Woodward, J. in the Hertzog case gives the history of the dialectical combat between Woodward and Rogers, J. J. *Cf.* 11 DICK. L. REV. 171 (1907); 55 DICK. L. REV. 96 (1951).
12 361 Pa. 533, 64 A.2d 809 (1949).
13 122 Pa. Super. 413, 186 A. 187 (1936).
14 34 Pa. 475 (1859).

as follows: "He said, if they would go with him, he would give them, at his death, as much as any relation he had on earth." At the death of the uncle an action in assumpsit was brought by one of the nieces against the executors of the uncle to recover damages for the breach of an alleged parol contract by the decedent to give her, in consideration of services rendered, a portion of his estate, at his decease. At the trial the plaintiff offered to prove the value of the testator's estate and the shares thereof taken by his nephews under his will, for the purpose of showing the measure of her damages. To this offer the defendants objected, contending the measure of damages was the value of the services rendered, and was not to be governed by the amount of the testator's estate.

Williams, J. (later of the supreme court) sustained the objection, holding the alleged contract vague and uncertain but allowing recovery for any services performed and upon the basis of reasonable compensation therefor, observing:

> "If they cannot have specific performance of the promise, or such damages as would be equivalent thereto, they are entitled to such damages as will fully compensate them for all the services actually rendered."

To this opinion the plaintiff excepted and a verdict and judgment having been rendered for the plaintiff for $296., she removed the cause to the supreme court and assigned the ruling for error. In affirming the judgment Strong, J., inter alia, reasoned:

> "The temptation to set up claims against the estates of decedents, particularly such decedents as have left no lineal heirs, is very great. . . . Such claims are always dangerous, and when they rest upon parol evidence, they should be strictly scanned. Especially, when an attempt is made, under cover of a parol contract, to effect a distribution different from that which the law makes, or that which the decedent has directed by his will, should it meet with no favor in a court of law. (After reviewing the evidence the learned Justice concluded). So far is this testimony from amounting to clear, direct, and positive proof of a contract, definite and certain, that it leaves it extremely doubtful whether any contract was intended: whether anything more was held out or understood than encouragement to expect a legacy. . . . But, at all events, the contract, if any, is too uncertain to admit of enforcement. How much did the decedent promise to give? The amount is uncertain, and, from the nature of the arrangement, is incapable of being rendered certain. . . . But without pressing the insufficiency of the proof of the contract even if it were definite and certain, it by no means follows that the measure of damages, in an action for its breach, is the value of the thing promised at the time of the breach. . . . This case, indeed, is not affected by the statute of frauds, but if the measure of damages must be what is contended for by the plaintiff, what less is the result than the establishment of a parol will?"[15]

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15 The general result in this case has been followed and the case itself repeatedly cited. The above excerpts in the main represent the present attitude of our appellate courts. For a typical expression of attitude toward claims against estates for personal services resting on parol testimony, Monson's Estate, 160 Pa. Super. 631, 53 A.2d 909 (1947).

In *Cramer* v. *McKinney*[16] Stearne, J., in an excellent summary of this class of cases, declared:

> "Where a contract to will the whole or part of an estate has been proven, and a breach shown, the measure of damages is the value of the services rendered, and not the estate promised to be given: *Graham* v. *Graham's Exrs.*, 34 Pa. 475; *Neal's Ex'rs.* v. *Gilmore,* 79 Pa. 421; *Kauss* v. *Rohner,* 172 Pa. 481, 33 A. 1016, 51 Am. St. Rep. 762; *Byrne's Estate,* 122 Pa. Super. Ct. 413, 186 A. 187."

As conducive to clear legal reasoning and consequent accurate pleading and precise proofs, the contract to will cases, involving the estate promised for the services performed, must be kept clear from the personal service cases based upon no express promise, but on the promise implied in law, that is on the quantum meruit. *Bemis* v. *VanPelt*[17] is an example wherein Judge Rhodes has presented a well reasoned opinion, pointing out, quoting Moschzisker, J.:[18]

> "Unless, by amendment or otherwise, there is a clear averment in the statement of claim showing a plain intention to plant plaintiff's case on a pure quantum meruit basis, the rule (correctly set forth by Judge Landis in *Wolf* v. *Yeager's Ex'rs.*, 20 Lancaster Law Rev. 67) controls that, where one claims on an express contract to pay a fixed compensation, he cannot, on failure to prove the contract, entitle himself to recover by proving simply the value of services rendered, without showing an actual promise to pay."[19]

From the aforegoing cases and the excerpts from the several opinions, it is apparent the courts have adhered quite closely to the views expressed in the early decisions. In *Re Roberts' Estate,*[20] Stearne, J., declared:

> "Claims against a decedent's estate for wages for personal services, where it is alleged that the same are to be paid for by testamentary provision, must be examined with great care."

Joint, Mutual and Reciprocal Wills

The various wills acts in Pennsylvania have never laid down any required form of testamentary disposition and it is, therefore, trite law that testators may adopt any form deemed desirable provided the language used indicates the wishes of the writer concerning the disposition of his property at death, meantime having the right to revoke the testamentary instrument. It has already been pointed out that a property owner may contract either to make or not to make a will. The contract may be extraneous or embodied in the will. There is a series of cases in the reports called joint, mutual and reciprocal wills where it has been contended, sometimes with success, that these particular types of

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16 355 Pa. 202, 49 A.2d 374 (1946); *accd.* Jones' Estate, 359 Pa. 26, 50 A.2d 50 (1948); Stichler's Estate, 359 Pa. 262, 59 A.2d 51 (1948). These were all oral contract cases.
17 139 Pa. Super. 282, 11 A.2d 499 (1940).
18 Witten v. Stout, Ex'r., 284 Pa. at page 412, 131 A. at page 361 (1925).
19 Cramer v. McKinney, note 16; Conti Co. v. Donovan, 358 Pa. 566, 57 A.2d 872 (1948), *accd.*
20 350 Pa. 467, 39 A.2d 592 (1944).

wills disclose intrinsically a contractual situation and by reason thereof not the subject of revocation by the testator.

Cawley's Estate[21]

Benjamin and Mary Cawley were brother and sister, each of advanced age, unmarried, and having lived together for many years. Each owned a certain amount of property, real and personal. Instead of each making a separate will they both joined in one testamentary paper. Benjamin died August 12, 1887, and the paper was admitted to probate as his last will. On January 29, 1888 Mary died and the same paper was again admitted to probate, this time as the will of Mary. Later a paper was offered for probate executed by Mary bearing date September 5, 1887, revoking all prior wills. Which was the last will of Mary? The register sustained the first paper after a rehearing. From this decree an appeal was taken to the orphans' court, which reversed the register. Bucher, P. J. thus reasoned:

> "Now, in the present case, even if the estate of Mary is liable upon an enforceable contract, it does not follow that the joint will must stand as her true will, and the subsequent will offered for probate be rejected, but the contrary is true. We cannot take a short cut by refusing the probate of the second will, and say that the joint will shall stand as Mary's will and thus dispose of the whole case.[22] But there is no evidence dehors the joint will itself to establish a contractual relation between these parties, and the joint will per se does not point to any contract; and, regarding the joint will as the separate will of each, there was nothing to prevent Mary from revoking her first will as she has in fact done."

The supreme court affirmed the decree of the lower court, Williams, J. declaring there was no contract involved as shown by the evidence or the joint or double will itself.

McGinley's Estate[23]

A husband and wife had made mutual wills dated May 22, 1914. The husband died September 9, 1914, survived by the wife. On April 6, 1915 the wife executed a second will, revoking the previous one. On death of the wife the later will was admitted to probate. Upon appeal to the orphans' court, an issue was prayed for on three points, (1) lack of testamentary capacity, (2) undue influence and (3) that the will as in violation of contract between the husband and wife and the appellants as evidenced by the mutual wills of the husband and wife. The prayer was denied on all three points but on appeal the decree was reversed as to the third point. Said Mestrezat, J.:

> "We cannot assent to the learned judge's conclusion that the oral evidence submitted in conjunction with the wills of May 22, 1914,

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21 136 Pa. 628, 20 A. 567 (1890); for sequel see Cawley's Estate, 162 Pa. 520, 29 A. 701 (1894).
22 "The new will might violate the contract but it is nevertheless a valid will and can be probated—See Norris' Estate, 329 Pa. 483 (1938)." Bargy, 2354, 169 Am. Law Rep. 12,n, 14,n, 22,n, 33,n.
23 257 Pa. 478, 101 A. 807 (1917).

was insufficient to justify the court in granting an issue to determine whether the parties entered into the agreement as alleged by the contestants. . . . It is well settled that one may enter into a valid contract to dispose by will of his property, real or personal, in a particular way, and that such will is irrevocable and the contract will be specifically enforced."

Concerning the course of procedure the learned justice concluded:

"This proceeding was conducted by the parties, and the question as to the validity of the alleged contract was determined by the court below on the theory that the contract, if valid, could be set up to defeat the probate of the will of 1915. In conformity with our practice, we have disposed of the appeal in like manner, and, hence, it is sufficient to say that we think the evidence justifies awarding an issue to determine whether an irrevocable contract was made between the parties as alleged by the contestants."[24]

From the *Cawley* and *McGinley* cases the principle appears that the joint or mutual wills may or may not support the construction of a contract depending upon the language of the wills coupled with the evidence of the surrounding circumstances. In the former case the facts supporting the contract theory were absent, whereas in the latter there was sufficient proof to send the case to the jury. In the later cases of *Hoffert's Estate*[25] and *Rhodes Estate*[26] the ruling of the *Cawley* case was followed. Said Walling, J. in *Rhodes Estate*:

"A clear contract between husband and wife must appear to deprive the latter of her rights under the law in their joint estate or in that of the former. The instant case is similar to *Hoffert's Est.*, 65 Pa. Superior Ct. 515 where, under like conditions, it is held a joint will made by husband and wife did not prevent the surviving husband from making a different testamentary disposition of his estate. And while *Cawley's Est.*, 136 Pa. 628, is not directly in point, it tends to support the decree here appealed from; and see *Wright's Est.*, 155 Pa. 64."

Gredler's Estate[27]

The facts of this case are interesting and unique. A husband and wife by their joint efforts accumulated a quantity of real and personal property, the title of which was held by them as tenants by the entireties. They consulted a lawyer concerning a testamentary disposition of their joint estate and mutually agreed in the presence of the lawyer that the survivor should provide by will for distribution of the joint estate after the survivor's death to the Catholic Church and its institutions. They were advised that it was not necessary to make a will in

[24] See Dewee's Est., 12 D. & C. at p. 95 (1920); for helpful classification of this type of will by Judge Stearne of Phila. O. C., now Stearne, J. of the supreme court. See Cridge's Est., 289 Pa. 331, 137 A. 455 (1927) as to proofs to comply with Statute of Frauds; Shroyer v. Smith, 204 Pa. 310, 54 A. 24 (1903).
[25] 65 Pa. Super. 515 (1917).
[26] 277 Pa. 450 (1923).
[27] 361 Pa. 384, 65 A.2d 404 (1949).

view of the entireties estate but that the agreement entered into by them would be sufficient. This agreement was not in writing and it gave considerable freedom in the matter of just what institutions of the Church should benefit, leaving these details to the discretion of the survivor. The husband died but left no will and sometime later the wife consulted the same lawyer concerning the making of a will to carry out the agreement between the husband and wife. Certain institutions were selected and the entire residuary estate distributed. Some years later the wife made a second will in which substantially the same bequeaths were made but the particular charities were changed. The testatrix died within 30 days thereafter and the question before the court was stated by Stearne, J. thus:

> "The question then arises: Where there was thus on the part of the testatrix a contractual obligation to will property to certain beneficiaries, was the devise made in performance of such obligation void by reason of her death within thirty days from the execution of her will?"

The lower court, Waite, P. J., of the Orphans' Court of Erie County, answered the question in the negative and this was affirmed by the supreme court.

After reviewing the facts the learned Justice took up the discussion of the law and cited *Hoffner's Estate*[28] and as the present case fell under the provisions of the Wills Act of 1917[29] the holding was in accordance with the *Hoffner* case that the later will although technically within the 30-day provision concerning charities nevertheless was not affected by this provision as the will was the carrying out of a contractual obligation.

Another interesting phase of the facts of the *Gredler* case was brought up by the learned Justice in the citation of *Moffitt* v. *Moffitt*[30] applying the law of oral trusts. Under this doctrine although the contract between the husband and wife was not in writing nevertheless as an oral trust it would be enforceable despite the provisions of the statute of frauds relating to real property. Emphasis was also placed upon the general principle of law that an agreement to make a will or to devise one's property to a particular person or for a particular purpose is binding and irrevocable when supported by what the law regards as valid consideration.

Statute Of Frauds

As indicated in this review the restrictive provisions of the statute of frauds play an important part in the matter of contracts to devise, nonetheless the cases show a liberality in application of the principles in keeping with the protection of the estates of the dead. The liberality is illustrated by *McGinley's Estate*[31]

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28 161 Pa. 311, 29 A. 33 (1894).
29 For present law see Section 7(1) of the Wills Act of 1947, Report—Decedent's Estates Laws of 1947, page 41.
30 340 Pa. 107, 16 A.2d 418 (1940).
31 Note 23

and *Cridge's Estate*[32] in the admission of contemporaneous oral testimony to supplement the writing and on the other hand the restrictive rulings in *Craig's Estate*[33] and in *Byrne's Estate*[34] establish certain judicial limitations. In the *Craig* case it was stated that a binding promise to make a will in favor of a particular person is valid, if it is based upon a sufficient consideration and is duly proved, but the proof must be direct and positive and its terms must be definite and certain. Furthermore, where two separate and distinct contracts, with separate and distinct considerations supporting them, either express or implied, are contained in the same paper, one may be enforced if it is legal, though the other is invalid. The reverse is true if the contract in the paper is an indivisible one. Simpson, J. also opined:

> "The mere fact of a promise to make a will in appellant's favor would not be sufficient; it would have to appear that testator also expressly agreed not to revoke it, or that the character of the transaction was such that an agreement to that effect must necessarily be implied therefrom. The record in this case fails to disclose any such evidence."

The reverse situation concerning the statute of frauds referred to in *Craig's Estate, supra,* was exemplified in the *Byrne* case where it was held that the contract being entire and part is within the statute it is unenforceable as a whole, and no action can be maintained to enforce the part which would not have been affected by the statute if it had been separate and distinct from the other part.[35] Consequently the rule was applicable that the measure of damages for breach of agreement to will property in consideration of services to be rendered is the value of the services performed on faith of the contract rather than the value of the property promised. In this case the agreement was oral and involved both real and personal estate of the decedent.

Measure Of Damages

The present article closes with a short study of the damage rules. In the matter of real estate contracts, if in writing sufficient to satisfy the statute of frauds, the vendee may have specific performance, but if he wants damages all that he can claim is what he expended on the faith of the contract and this rule applies to both oral and written contracts. In other words although the vendee may get specific performance he cannot in damages get the value of the bargain.[36] On the other hand whether the contract is oral or written the vendor can claim the value of the bargain as against the vendee.[37]

Applying these rules to contracts to devise, the devisee or the promisee of a contract to devise, if the statute terms are met, may have specific performance

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[32] 289 Pa. 331, 137 A. 455 (1927).
[33] 298 Pa. 235 (1929).
[34] 122 Pa. Super. 413, 186 A. 187 (1936).
[35] Citing 25 R.C.L. 704; see also 71 A.L.R. 475 at page 485.
[36] Vendee's Remedies by Trickett, 11 DICK. L. REV. 171 (1907).
[37] Vendor's Remedies by Trickett, 11 DICK. L. REV. 195 (1907).

but in damages, either on an oral or written contract, he cannot get more than the amount expended.[38]

If the property involved is personal then the statute not applying the rule of damages is not affected by the contract for a legacy being either oral or in writing.

In the contract to make bequests and legacies the action being upon an express contract many of the cases are determined upon whether the contract, although express in terms, is sufficiently definite and certain as to what is being bequeathed. This problem came up in the case of *Graham* v. *Graham's Ex'rs.*[39] and it was determined that the bequest was not sufficiently definite or certain. The same problem arose in *Thompson* v. *Stevens*[40] wherein a judgment of the lower court was affirmed. In the course of his opinion Sharswood, J. said:

> ". . . As our brother Williams said, in his opinion below, which was affirmed in this court: 'The testator did not intimate what or how much he would give to any relative he had on earth.' Who could say how much that would be? It depended on his own will, as if a man were to say, I will give you for these services just what I choose. In the case now before us, however, the contract as proved by Elizabeth Sheaf, and confirmed by the testimony of other witnesses, was, that 'if she (the plaintiff) would stay with him (the testator) as long as he lived, he would provide and give her full and plenty after he was gone, so that she need not to work.' Now, certainly, here is a measure by which the amount can be ascertained and which brings the case within the rule of certainty to a common intent. Consideration being had of the condition in life of the plaintiff, what annuity would place her in such circumstances that she need not work? The annuity tables settle what such an annuity is worth or can be bought for. It is true, that this mode of arriving at the plaintiff's compensation does not appear to have been pursued on the trial below, but it was left to the jury generally. The supervisory power of the court over the verdict must be resorted to where the amount found is more than was reasonable under the circumstances. We see no error in the manner in which the plaintiff's right of recovery under the alleged express contract was submitted to the jury."

Likewise in *Elwood's Estate*[41] in affirming the decree of the court below, Schaffer, J. explained:

> ". . . As claimant is asking only the amount specified in the will, we need not determine the value of her services. She accepts the figure which the deceased himself fixed. Since the contract or agreement between the parties was that the service rendered the decedent at his request should be compensated by a money legacy, which under the testimony has been made definite in amount, that sum may be recovered. *Nusbaum's Estate,*

38 Hertzog v. Hertzog, 34 Pa. 418 (1859) Graham v. Graham's Exrs., 34 Pa. 475 (1859).
39 For discussion of this case see Note 14.
40 71 Pa. 161 (1872).
41 309 Pa. 505, 164 A. 617 (1932). *Accd.* Fondelier v. Riddel, 152 Pa. Super. 586, 33 A.2d (1943) 86, per Baldrige, J.

101 Pa. Super. Ct. 17; *Miller's Estate,* 136 Pa. 239, 20 A. 796; *Thompson* v. *Stevens,* 71 Pa. 161. This is not a case of mere hope for, or of services rendered solely in expectation of, a legacy. On the contrary the claim is based on a definite, uncontradicted request on the part of the decedent for the services of the claimant and her acceptance and loyal performance of her duties under it. Such a contract is capable of enforcement, since its terms are definite and clear, and established by direct and uncontroverted evidence. *Calvert* v. *Eberly,* 302 Pa. 152, 153 A. 146; *Schleich's Estate,* 286 Pa. 578, 134 A. 442; *Mack's Estate,* 278 Pa. 426, 123 A. 562."

If as already indicated the contract is oral, indivisible and affecting both real and personal property, the final result in a claim against the estate of a decedent for services rendered decedent may be that the claim will have to be based upon a quantum meruit instead of upon the express contract. In *Bemis* v. *VanPelt*[42] the decedent being ill proposed to the claimants that if they would take care of the decedent during the balance of his life preparing his meals, doing his housework and caring for and assisting him, he would at the time of his death in consideration thereof give to claimants all his real estate, specifying the same, and in addition thereto he would give them some money besides. The contract being oral was not enforceable as to the real estate and as to the personal property the bequest was indefinite and uncertain. Consequently, the judgment was reversed with a venire in order that the lower court could at a new trial correct its error in the confusion of express contract and the recovery on quantum meruit.[43]

In *Byrne's Estate*[44] the claimant was denied a recovery against the estate of a decedent for services rendered pursuant to an alleged oral contract on three grounds, (1) that the oral agreement was unenforceable under the Statute of Frauds of March 21, 1772, 1 Smith's Laws page 389, 33 P.S. Section 1, as against the real estate of the decedent, and (2) that the contract for personal services had not been sufficiently proved so as to be a claim against the personal property, and (3) for the reason that the contract alleged being an entire one and therefore not divisible and part being within the statute of frauds, this rendered the contract as to the personal estate unenforceable. However, the court below did allow the claimant a certain sum approximating $560.00 for services rendered the decedent for a period of 56 weeks at $10.00 per week, these services having been rendered to the decedent on the faith of the alleged agreement.

The present attitude of our supreme court to the personal service cases involved in the present discussion is reflected in *Jones' Estate*[45] and *Stichler's Estate*[46]

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42 139 Pa. Super. 282, 11 A.2d 499 (1950).
43 See note 17.
44 122 Pa. Super. 413, 186 A. 187 (1936).
45 350 Pa. 260, 59 A.2d 50 (1948).
46 350 Pa. 262, 59 A.2d 51 (1948).

requiring in an oral contract evidence more specific than a statement as alleged by the decedent to give his entire estate or a part thereof to the claimant in consideration of services. These alleged contracts apparently should be in writing signed by the decedent or if wholly proved by oral evidence should be based upon a specific and definite claim, or in other words a claim for a certain portion of the estate either as indicated by the Intestate Laws or by some specific amount of money or property. Otherwise the measure of damages if the claimant is to recover at all is based on the value of the services rendered.[47]

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[47] See Article, *Damages for Services Rendered in Reliance on Promise to Devise Unperformed*, 53 DICK. L. REV. 212 (1949).