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Bertel M. Sparks

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## PROBLEMS IN THE FORMATION OF CONTRACTS TO DEVISE OR BEQUEATH†

*Bertel M. Sparks\**

A principle which appears too obvious to require statement but which is so elusive that it is often lost sight of is that a contract to devise or bequeath necessarily involves a contract. Offer, acceptance, consideration, etc., are no less necessary here than in other types of contracts. A contract to make a will is not created by a fixed intention to make a will, a moral obligation to make a will, or even a promise to make a will. These undoubtedly sound rules of law would tend to materially decrease litigation in this field were it not for the existence of two diverse factors which combine to war against any degree of clarification. On the one hand there is the policy in favor of giving effect to intended property arrangements and on the other there is recognition that parties are probably less likely to accurately express themselves concerning contracts to devise or bequeath than upon any other kind of transaction. Operating under this handicap the thing done sometimes becomes blurred with a thing contracted for, and what was intended or what appears morally just strives to occupy the position of a thing agreed upon.

Much of the litigation concerning contracts to make wills has been prompted by nothing more than a feeling that the decedent ought to have made a certain property disposition and that he therefore must have contracted to that effect. To this it need only be said that moral oughtness, however strong or compelling, does not create a legally enforceable obligation. Frequent declarations by a decedent of his intention to leave his property to a particular person coupled with considerable services rendered by that person to the decedent does not create a contract.<sup>1</sup> The rule is the same even when the declarations of intent are made in connection with requests for the services.<sup>2</sup> Even though there

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\* See Contributors' Section, Masthead, p. 94, for biographical data.

<sup>1</sup> *Crowell v. Parks*, 209 Ark. 803, 193 S.W.2d 483 (1946); *Sneed's Ex'r v. Smith*, 255 Ky. 132, 72 S.W.2d 1028 (1934) (emphasizing the tendency of some courts to find a contract where none really existed); *Allen v. Dillard*, 15 Wash. 2d 35, 129 P.2d 813 (1942); *Thompson v. Weimer*, 1 Wash. 2d 145, 95 P.2d 772 (1939).

<sup>2</sup> *Sunday v. Laverse*, 318 Mich. 240, 28 N.W.2d 89 (1947); *In re Cramer's Estate*, 296 Mich. 44, 295 N.W. 553 (1941); *Stichler Estate*, 359 Pa. 262, 59 A.2d 51 (1948). But cf. *Lemire v. Halley*, 91 N.H. 357, 19 A.2d 436 (1941).

A higher degree of proof is necessary to prove a contract to compensate for services by will than is required to show that they were not gratuitously performed. *Long v. Rumsey*, 12 Cal. 2d 334, 84 P.2d 146 (1938).

is an agreement for a will of a certain tenor there is no contract unless it is also shown that the agreement is in return for a promise or other consideration from the promisee.<sup>3</sup> Where an infant is reared in a foster home and renders substantial services and filial devotion to the foster parents who frequently declare their intention to reward the infant by will there is a particularly strong case of moral persuasiveness in favor of making the will, but these facts do not show a contract for the making of such a will.<sup>4</sup> Another instance of a strong feeling of oughtness but a complete lack of evidence of a contract is illustrated by *Berdan v. Berdan*.<sup>5</sup> A father wrote a letter to his son explaining that although the bulk of the family fortune was being left to the mother in the family the son could rest assured that it would all pass to him upon his mother's death. The mother aided the cause by adding to the same letter her written assurance that the father's signature was authentic, ". . . in case you might want to use it. Lawfully." All these cases present situations where it appears likely that some kind of agreement or understanding was reached, but extreme care should be exercised to see that that likelihood does not become a substitute for evidence of a contract.

#### REQUIREMENT THAT THE CONTRACT BE PROVED BY CLEAR AND CONVINCING EVIDENCE

Guarding against an otherwise probable tendency to find a contract based upon moral oughtness rather than upon offer and acceptance supported by consideration is the rule requiring a higher degree of evidence to sustain a contract to make a will than is required in contracts generally. While this rule has been variously stated, its most usual form is that the evidence of contracts to devise or bequeath must be clear and convincing.<sup>6</sup> Other statements of the rule have been to the effect that

<sup>3</sup> *Soho v. Wimbrough*, 145 Md. 498, 125 Atl. 767 (1924); *Ehling v. Diebert*, 128 N.J. Eq. 115, 15 A.2d 655 (1940); *Stafford v. Reed*, 363 Pa. 405, 70 A.2d 345 (1950).

<sup>4</sup> *Groening v. McCambridge*, 282 Mich. 135, 275 N.W. 795 (1937); *In re Schinasi's Estate*, 139 Misc. 459, 248 N.Y. Supp. 691 (Surr. Ct. N.Y. County 1931), *aff'd*, 233 App. Div. 738, 250 N.Y. Supp. 895 and 233 App. Div. 738, 250 N.Y. Supp. 896 (1st Dep't 1931); *Monsen v. Monsen*, 174 Cal. 97, 162 Pac. 90 (1916). For an illustration of a case finding a contract under these circumstances and upon what appeared to be rather slender evidence see *Van Tine v. Van Tine*, 15 Atl. 249 (N.J. Eq. 1888).

<sup>5</sup> 39 Cal. App. 2d 478, 103 P.2d 622 (1940).

<sup>6</sup> *Moumal v. Walsh*, 9 Alaska 656, 662 (1940) ("clear, satisfactory and convincing"); *Carter v. Walker*, 200 Ark. 465, 471, 139 S.W.2d 233, 235 (1940); *Klussman v. Wessling*, 238 Ill. 568, 572, 87 N.E. 544, 546 (1909) ("clearest and most convincing"); *Kisor v. Litzenberg*, 203 Iowa 1183, 1187, 212 N.W. 343, 345 (1927) ("proof, when resting in parol, must be clear, satisfactory, and convincing"); *Soho v. Wimbrough*, 145 Md. 498, 510, 125 Atl. 767, 771 (1924) ("definite and certain, strong and convincing"); *In re Estate of*

evidence of the contract must be shown to be indisputable,<sup>7</sup> beyond all legitimate controversy,<sup>8</sup> substantially beyond reasonable doubt,<sup>9</sup> or beyond reasonable doubt.<sup>10</sup> Although this last statement of the rule, identifying the degree of proof required with that necessary to prove guilt in criminal cases,<sup>11</sup> might be too stringent, it is quite generally recognized that something more than a mere preponderance of the evidence is necessary. There have been suggestions on the one hand that the rule does not apply except where the alleged contract is for a disposition to a stranger to the blood of the promisor<sup>12</sup> and on the other that it is particularly applicable in cases involving near relatives.<sup>13</sup> The more widely accepted view and the view more nearly in accord with sound policy is that something more than a mere preponderance of evidence should be required to establish such a contract in any case regardless of the relationship or lack of relationship of the parties.<sup>14</sup> The only proper exception would be in those limited situations where action is brought within the lifetime of the promisor while the promisor is still available to present his side of the case. The rule is supported by the same policy

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LeBorius, 224 Minn. 203, 214, 28 N.W.2d 157, 163 (1947) ("clear, positive, and convincing"); *In re Estate of Opel v. Aurien*, 352 Mo. 592, 600, 179 S.W.2d 1, 4 (1944) ("a very high degree of proof"); *Cox v. Williamson*, 124 Mont. 512, 525, 227 P.2d 614, 621 (1951) ("clear, cogent, and convincing"); *Boyle v. Dudley*, 87 N.H. 282, 284, 179 Atl. 11, 13 (1935); *Ehling v. Diebert*, 128 N.J. Eq. 115, 119, 15 A.2d 655, 657 (1940); *In re Gudewicz' Will*, 72 N.Y.S.2d 838, 839 (Surr. Ct. Richmond County 1947); *Shakespeare v. Markham*, 72 N.Y. 400, 403 (1878) (contract should be allowed to stand only when it is supported "by the strongest evidence"); *Alban v. Schnieders*, 67 Ohio App. 397, 399, 34 N.E.2d 302, 303 (1940); *Hunter v. Allen*, 174 Ore. 261, 278, 147 P.2d 213, 219 modified 174 Ore. 286, 148 P.2d 936 (1944) ("clear, concise, convincing and satisfactory").

In Colorado it is provided by statute that a contract to make a will cannot be enforced unless it is, ". . . proved by clear, satisfactory and convincing evidence." Colo. Stat. Ann. c. 176, § 70(1) (Supp. 1953).

<sup>7</sup> *Rolls v. Allen*, 204 Cal. 604, 608, 269 Pac. 450, 452 (1928) ("most indisputable"); *Stafford v. Reed*, 363 Pa. 405, 410, 70 A.2d 345, 348 (1950) ("clear, precise, and indubitable").

<sup>8</sup> *McGregor v. McGregor*, 25 Wash. 2d 511, 513, 171 P.2d 694, 695 (1946); *Whiting v. Armstrong*, 23 Wash. 2d 290, 291, 160 P.2d 1014, 1015 (1945); *Aho v. Ahola*, 4 Wash. 2d 598, 600, 104 P.2d 487, 488 (1940).

<sup>9</sup> *Crowell v. Parks*, 209 Ark. 803, 804-805, 193 S.W.2d 483, 484 (1946); *Sheffield v. Baker*, 201 Ark. 527, 529, 145 S.W.2d 347, 348 (1940).

<sup>10</sup> *Matthews v. Blanos*, 201 Ga. 549, 563, 40 S.E.2d 715, 726 (1946); *Mickle v. Moore*, 193 Ga. 150, 153, 17 S.E.2d 728, 730 (1941); *Brickley v. Leonard*, 129 Me. 94, 97, 149 Atl. 833, 835 (1930).

<sup>11</sup> The identity of the rule adopted with that applied in criminal cases was expressly alluded to in *Salmon v. McCrary*, 197 Ga. 281, 285, 29 S.E.2d 58, 60 (1944).

<sup>12</sup> *Bower v. Daniel*, 198 Mo. 289, 327, 95 S.W. 347, 359 (1906).

<sup>13</sup> *White v. Risdon*, 140 N.J. Eq. 613, 55 A.2d 308 (1947).

<sup>14</sup> *Contra: Small's Adm'r v. Peters*, 233 Ky. 576, 26 S.W.2d 491 (1930).

considerations as lie behind the requirement that a testator when executing his will be surrounded by attestors and by the formalities of execution in order that he might be protected from those who would seek to practice a fraud upon him. The temptation to set up false claims against a decedent's estate after the decedent's opportunity to answer the claims or explain his conduct has been terminated by his death is too great to be left unguarded.<sup>15</sup> Some degree of protection is afforded by the usual "dead man statutes"<sup>16</sup> but it is believed that these statutes are insufficient to provide adequate safeguards against the defeat of a dead person's legitimate wishes by the fraudulent allegation of a contract to make a will. As has been previously demonstrated evidence of circumstances tending to establish such a contract often exists even though no such contract was ever made, and after the promisor is dead rebutting evidence is likely to be very difficult to find. The rule requiring that contracts to devise or bequeath be proved by clear and convincing evidence should be strictly adhered to and all attempted encroachments upon it carefully guarded against.<sup>17</sup>

#### JOINT AND MUTUAL WILLS

The courts do not always display the desired amount of diligence in the application of the "clear and convincing" rule and this tendency becomes especially pronounced when they are confronted with the wills of two or more persons which, when considered together, show on their face, by their reciprocal provisions or otherwise, that they were intended as part of one integrated scheme or plan. Such wills might consist of one document executed by two or more persons as the will of each of them, in which case they will be referred to as joint wills; or they might consist of separate documents which nevertheless reveal the common scheme or plan, in which case they will be referred to as mutual wills. Where wills of this kind are concerned the courts still give verbal adherence to the

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<sup>15</sup> A few cases emphasizing the policy justification for the requirement of a high order of proof to sustain the enforcement of contracts to devise or bequeath are *Mundorff v. Kilbourn*, 4 Md. 459 (1853); *Tracy v. Danzinger*, 253 App. Div. 418, 3 N.Y.S.2d 24 (3d Dep't 1938); *Graham v. Graham's Ex'rs*, 34 Pa. 475 (1859); *Payn v. Hoge*, 21 Wash. 2d 32, 149 P.2d 939 (1944).

<sup>16</sup> See note 76 *infra*.

<sup>17</sup> It should be noted that the requirement of clear and convincing evidence does not necessitate direct evidence. *Tooker v. Vreeland*, 92 N.J. Eq. (7 B. Stockton) 340, 112 Atl. 665 (1921); *Stuckey v. Truett*, 124 S.C. 122, 117 S.E. 192 (1923) (no testimony by witnesses who heard the parties make the contract); *Williams v. Williams*, 123 Va. 643, 96 S.E. 749 (1918). But see *Graham v. Graham's Ex'rs*, 34 Pa. 475 (1859). It is also clear that it is not essential that the contract be proved by the number of witnesses required for the attestation of wills. *Boggan v. Scruggs*, 200 Miss. 747, 29 So.2d 86 (1947).

rule that clear and convincing evidence is required to prove the existence of a contract, but an examination of the results reached raises a very real question as to the exactitude with which the rule is applied. When two people execute a common document as the will of each of them or when they execute separate documents at approximately the same time and in identical or almost identical language there is a tendency to pass too easily to the conclusion that such action must have been the result of a contract.

The clear weight of authority, and certainly the sounder view, is that the mere presence of either joint or mutual wills does not raise any presumption that they were executed in pursuance of a contract.<sup>18</sup> Nor is this rule altered by evidence that the parties had "agreed" to the making of such wills.<sup>19</sup> Of course they had so agreed. The mere presence of such wills reveals that the parties must have talked the matter over and must have arrived at an understanding or agreement concerning their testamentary dispositions. Such discussions and such understandings between persons of close affinities, especially between husbands and wives, are not unusual and the fact that they have taken place is no indication that there has been any thought of a binding contract.

It is sometimes said that joint wills, that is to say the wills of two or more persons executed on one piece of paper as the will of each of them, having reciprocal provisions constitutes stronger evidence of a contract than does similar provisions contained in two separate documents.<sup>20</sup> The use of such pronouns as "we", "our", and "us" in joint wills is often said to be indicative of a contract,<sup>21</sup> especially where the property being

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<sup>18</sup> See cases cited in notes 21-24 *infra*. In at least one state there is statutory provision that, "The fact that two or more wills were executed at or about the same time by different persons shall not of itself be any evidence that such wills were made in consideration of each other." Colo. Stat. Ann. c. 176, § 70(1) (Supp. 1953).

<sup>19</sup> *Hoffert's Estate*, 65 Pa. Super. 515 (1917) (a joint will stating, "Whereas we have agreed with each other . . ."); In re *Estate of Pennington*, 158 Kan. 495, 148 P.2d 516 (1944) (each of two mutual wills stating on its face that it was made "in consideration of" the other having been made). Evidence of a common understanding or evidence that two people were of the same mind when they executed their wills is not evidence of a contract. See *Paull v. Earlywine*, 195 Okla. 486, 159 P.2d 556 (1945).

<sup>20</sup> *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909) (holding that the execution of a joint will with reciprocal provisions is sufficient proof of the existence of a contract); *Tutunjian v. Vetzgian*, 64 N.Y.S.2d 140 (Sup. Ct. Queens County 1946), *aff'd*, 274 App. Div. 910, 83 N.Y.S.2d 184 (2d Dep't 1948), *aff'd*, 299 N.Y. 315, 87 N.E.2d 275 (1949); *Seat v. Seat*, 172 Tenn. (8 Beeler) 618, 113 S.W.2d 751 (1938).

<sup>21</sup> *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N.W. 56 (1915); In re *Nelson's Will*, 200 Misc. 3, 106 N.Y.S.2d 427 (Surr. Ct. Kings County 1951); *Rastetter v. Hoeningner*, 214 N.Y. 66, 108 N.E. 210 (1915).

disposed of is held by entireties<sup>22</sup> or where it is referred to as joint property though actually held in severalty.<sup>23</sup> Such language should be taken as nothing more than the normal and natural usage of two people attempting to execute two wills as one document. It indicates that they have talked over their testamentary plans and have agreed upon a certain scheme of disposition, but is completely silent as to whether or not a contract has been entered into. Such has been the position of the better reasoned opinions.<sup>24</sup>

Closely related to the problem of joint wills is the situation presented by two wills executed by different testators as separate documents but indicating on their face or through the surrounding circumstances that the two were parts of a single transaction or at least had been discussed or considered together. Sometimes the language is identical except for such differences as are necessitated by two different testators being involved. There is sometimes evidence that the two testators consulted the draftsman together and quite often both wills are attested by the same group of attestors. The provisions of such wills are usually reciprocal in that each testator gives the other a life estate, with or without a power to consume, with a gift over to a common remainderman. Do any or all of these factors prove the existence of a contract for the making of these mutual wills? The general rule is that they do not.<sup>25</sup> An

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<sup>22</sup> *Seat v. Seat*, 172 Tenn. (8 Beeler) 618, 113 S.W.2d 751 (1938).

<sup>23</sup> *Baker v. Syfritt*, 147 Iowa 49, 125 N.W. 998 (1910).

<sup>24</sup> *Rolls v. Allen*, 204 Cal. 604, 269 Pac. 450 (1928) (the court declaring that the execution of joint wills with reciprocal provisions had no tendency to show the existence of a contractual obligation); *Jacoby v. Jacoby*, 342 Ill. App. 277, 96 N.E.2d 362 (1950); *Menke v. Duwe*, 117 Kan. 207, 230 Pac. 1065 (1924); *Glidewell v. Glidewell*, 360 Mo. 713, 230 S.W.2d 752 (1950); *Ginn v. Edmundson*, 173 N.C. 85, 91 S.E. 696 (1917); *In re Gudewicz' Will*, 72 N.Y.S.2d 838 (Surr. Ct. Richmond County 1947); *In re Rhodes' Estate*, 277 Pa. 450, 121 Atl. 327 (1923); *Hoffert's Estate*, 65 Pa. Super. 515 (1917) (not influenced by a provision in the will that, "Whereas we have agreed to and with each other . . ."). *Contra: Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909); *Culver v. Hess*, 234 Iowa 877, 14 N.W.2d 692 (1944); *Lewis v. Lewis*, 104 Kan. 269, 178 Pac. 421 (1919); *Sherman v. Goodson's Heirs*, 219 S.W. 839 (Tex. Civ. App. 1920); *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763 (1924).

<sup>25</sup> Wills drawn in identical language and containing reciprocal provisions indicate a common understanding but do not show a contract. *Lynch v. Lichtenthaler*, 85 Cal. App. 2d 437, 193 P.2d 77 (1948); *Johansen v. Davenport Bank & Trust Co.*, 242 Iowa 172, 46 N.W.2d 48 (1951); *Eicholtz v. Grunewald*, 313 Mich. 666, 21 N.W.2d 914 (1946); *Wallace v. Wallace*, 216 N.Y. 28, 109 N.E. 872 (1915); *Edson v. Parsons*, 155 N.Y. 555, 50 N.E. 265 (1898); *Paul v. Earlywine*, 195 Okla. 486, 159 P.2d 556 (1945); *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041 (1913); *In Matter of Werkman's Will*, 122 W. Va. 583, 13 S.E.2d 73 (1940). Employment of a common draftsman and common attestors does not strengthen the case in favor of a contract. *National Bank of Austin v. Emerson*, 335 Ill. App. 494, 82 N.E.2d 382 (1948); *Knox v. Perkins*, 86 N.H. 66, 163 Atl. 497 (1932);

opposite result is sometimes reached especially where the wills are prepared by the same draftsman at the joint request of the testators and executed at the same time and attested by the same attestors.<sup>26</sup> The fact that each testator had knowledge of the other will is sometimes emphasized as evidence of a contractual relationship.<sup>27</sup> It is quite apparent that all these cases which are contrary to the general rule stated above result from a confusion of evidence of an understanding or a common plan with evidence of a contract. This confusion has resulted in the finding of some contracts on extremely slender evidence<sup>28</sup> and in the occasional suggestion that the presence of reciprocal provisions is sufficient without more to prove the contractual relationship.<sup>29</sup>

The rule requiring clear and convincing evidence to prove a contract to devise or bequeath coupled with the laxity of the courts in the application of the rule in joint and mutual will cases creates such uncertainty as to require that special care be exercised in the drafting of instruments of this type. Probably the best suggestion concerning the joint will is that it should not be used. All too frequently it operates as an invitation to litigation and it never serves any purpose which cannot be achieved by two separate instruments. If it is felt that the joint will must be used there should be written into the instrument a statement as to whether or not it is being executed in pursuance of a contract.<sup>30</sup> It is also advisable that such declarations be written into individual wills when two such wills contain reciprocal provisions and are being executed in conjunction with each other. Whether the wills be executed as one document or as two the words concerning the contract should be extremely clear and specific. Mere requests that the survivor of two

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In re Strong's Will, 171 Misc. 445, 12 N.Y.S.2d 544 (Surr. Ct. Monroe County 1939); Kingsbury v. Kingsbury, 120 Misc. 362, 198 N.Y. Supp. 512 (Sup. Ct. Kings County 1923); Ridders v. Ridders, 156 Ore. 165, 65 P.2d 1424 (1937). The fact that the testators execute the wills simultaneously and in the presence of each other makes no difference. Klussman v. Wessling, 238 Ill. 568, 87 N.E. 544 (1909); Elmer v. Elmer, 271 Mich. 517, 260 N.W. 759 (1935); Sommers v. Zuck, 139 N.J. Eq. 245, 50 A.2d 648 (1947); Wiley v. Trustees of Masonic Hall and Asylum Fund, 9 N.Y.S.2d 836 (Sup. Ct. Erie County 1939).

<sup>26</sup> Mack v. Swanson, 140 Neb. 295, 299 N.W. 543 (1941); Schramm v. Burkhardt, 137 Ore. 208, 2 P.2d 14 (1931).

<sup>27</sup> Maurer v. Johansson, 223 Iowa 1102, 274 N.W. 99 (1937).

<sup>28</sup> E.g., Trindle v. Zimmerman, 115 Colo. 323, 172 P.2d 676 (1946).

<sup>29</sup> See Chambers v. Porter, 183 N.W. 431, 434 (Iowa 1921).

<sup>30</sup> For an illustration of a joint will which stated on its face that it was made pursuant to contract see Berry v. Berry's Estate, 168 Kan. 253, 212 P.2d 283 (1949). The same objective was achieved with less apt phraseology in Curry v. Cotton, 356 Ill. 538, 191 N.E. 307 (1934). If it is intended that the survivor of the joint makers is to be free to make an inconsistent disposition this fact should be declared in the instrument. Will of Sechler, 224 Wis. 613, 272 N.W. 854 (1937).

parties make a particular disposition of the property cannot prove a contract.<sup>31</sup> The same is true of statements in the joint will that the parties have "agreed" to the disposition provided for if there is nothing further to indicate an actual bargain.<sup>32</sup> Even a declaration in one of two mutual wills that it was made "in consideration" of the other does not show that there was any contract between the parties concerned.<sup>33</sup> And a statement in a will which clearly declares that the will was or was not executed pursuant to a contract is not conclusive evidence of the truth of such statement.<sup>34</sup> However, it is some evidence and there is authority that where the will contains a statement that it is made pursuant to an agreement between the testator and the legatee whereby the legatee is to dispose of his or her property in a certain manner, acceptance of the legacy is such an acquiescence in the statement as to estop the legatee from denying the existence of the contract.<sup>35</sup>

Care should be exercised to see that the document is identified on its face as a will made in pursuance of a contract. The draftsman should keep in mind that the instrument he is preparing is to operate as a will and that the contractual language employed is evidentiary and is collateral to and not part of the dispositive provisions. In *Curry v. Cotton*<sup>36</sup> there were alternating references in the instrument before the court as "this . . . will" and "this covenant." The instrument was construed as a will made pursuant to a contract. In *Spinks v. Rice*<sup>37</sup> contractual and dispositive language was blended in an almost inseparable manner. The instrument was signed by the parties and attested by a notary public. The court was of the view that since it was intended as a will it could not operate as a contract. Since it was not executed in the manner appropriate to wills it was denied any effect whatever.

#### DEGREE OF CERTAINTY REQUIRED

An inquiry into the degree of certainty of terms essential for the enforcement of contracts to devise or bequeath is another area in which there is revealed a tendency on the part of some courts to find contracts upon less evidence than their statement of the rule would seem to indicate. Recognition that the final disposition of one's estate is a subject

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<sup>31</sup> *Hays v. Jones*, 122 Fla. 67, 164 So. 841 (1935) (joint will); *In re Quaranta's Estate*, 109 N.Y.S.2d 637 (Surr. Ct. Bronx County 1952) (mutual will with reciprocal provisions).

<sup>32</sup> *Hoffert's Estate*, 65 Pa. Super. 515 (1917).

<sup>33</sup> *In re Estate of Pennington*, 158 Kan. 495, 148 P.2d 516 (1944).

<sup>34</sup> *Polak v. Polak*, 248 Wis. 425, 22 N.W.2d 153 (1946).

<sup>35</sup> *McGinn v. Gilroy*, 178 Ore. 24, 165 P.2d 73 (1946).

<sup>36</sup> 356 Ill. 538, 191 N.E. 307 (1934).

<sup>37</sup> 187 Va. 730, 47 S.E.2d 424 (1948).

concerning which very few members of society are likely to express themselves with any pronounced measure of preciseness has led to some laxity concerning the certainty of terms required and in many instances has served as a channel for an indirect encroachment upon the clear and convincing rule itself.

A rule requiring that an offer and an acceptance be proved by clear and convincing evidence loses much of its potency when the generalities defining the terms of the offer and acceptance become too broad or indefinite.<sup>38</sup> There should be no objection to a contract to devise or bequeath an entire estate or a certain fractional part of an estate even though the estate is incapable of identification until after the death of the promisor. Likewise a contract that the promisee shall receive certain property at the death of the promisor should not be objectionable because of a failure to specify whether he is to receive it by will or by some other means.<sup>39</sup> However, a promise that the alleged promisee will receive the "bulk" of the promisor's estate,<sup>40</sup> enough for "sufficient and competent maintenance,"<sup>41</sup> enough to prevent him from becoming a public charge,<sup>42</sup> or an amount sufficient to produce a certain income,<sup>43</sup> or that he will be well paid for his services<sup>44</sup> or liberally provided for<sup>45</sup> have more of the appearance of declarations of intention than of actual bargains. Yet each

<sup>38</sup> For a case suggesting that the contract need not be certain in all its terms see *In re Wert's Estate*, 165 Kan. 49, 193 P.2d 253, rehearing, 166 Kan. 159, 199 P.2d 793 (1948).

<sup>39</sup> *Barr v. Ferris*, 41 Cal. App. 2d 527, 107 P.2d 269 (1940); *Keefe v. Keefe*, 19 Cal. App. 310, 125 Pac. 929 (1912); *Glover v. Fillmore*, 88 Kan. 545, 129 Pac. 144, aff'd on rehearing, 89 Kan. 480, 132 Pac. 147 (1913); *Howe v. Watson*, 179 Mass. 30, 60 N.E. 415 (1901); *Adams v. Moberg*, 356 Mo. 1175, 205 S.W.2d 553 (1947); *Sutton v. Hayden*, 62 Mo. 101 (1876); *Best v. Gralapp*, 69 Neb. 811, 96 N.W. 641 (1903); *Barkworth v. Young*, 4 Drew. 1, 62 Eng. Rep. 1 (1856).

<sup>40</sup> *Quirk v. Bank of Commerce & Trust Co.*, 244 Fed. 682 (6th Cir. 1917) (recovery on the contract prevented by Statute of Frauds; recovery in quantum meruit allowed). But see *Thompson v. Weimer*, 1 Wash. 2d 145, 95 P.2d 772 (1939).

<sup>41</sup> *Rivers v. Rivers*, 3 Desaus. 190 (S.C. 1811).

<sup>42</sup> *In re McLean's Estate*, 219 Wis. 222, 262 N.W. 707 (1935). In this case it was held that the thing promised was defined by the promisor's subsequent execution of a will allegedly made in pursuance of contract. While subsequent acts of the parties might be a satisfactory means of defining the terms of a contract in many instances, it would hardly seem appropriate where the subsequent act is a unilateral one not acquiesced in or even known to the other party.

<sup>43</sup> *Strakosch v. Connecticut Trust & Safe Deposit Co.*, 96 Conn. 471, 114 Atl. 660 (1921).

<sup>44</sup> *Succession of Oliver*, 184 La. 26, 165 So. 318 (1936); *Kalscheuer v. Cooke's Estate*, 207 Minn. 437, 292 N.W. 96 (1940); *Sidmore v. Allen*, 207 Minn. 452, 292 N.W. 95 (1940); *Ellis v. Berry*, 145 Miss. 652, 110 So. 211 (1926); *Cullen v. Woolverton*, 65 N.J.L. 279, 47 Atl. 626 (1900).

<sup>45</sup> *Green v. Orgain*, 46 S.W. 477 (Tenn. 1898).

of these has been held sufficiently certain to justify the finding of a contract. A promise to make one an heir has been construed as a promise to give a child's part and, therefore, a sufficiently definite term of a contract.<sup>46</sup> An agreement to bequeath from \$4,000.00 to \$6,000.00 became an enforceable promise to leave at least \$4,000.00.<sup>47</sup> An agreement between a husband and wife that the survivor would distribute his or her property among the next of kin of the two of them was enforced as a contract for equal division between the two groups where the survivor failed to make any distribution whatever.<sup>48</sup>

The problem of certainty sometimes involves the consideration to be rendered by the promisee or even the identification of the parties. When the consideration consists of services to be rendered the services are often not clearly defined. The extent to which provision for food, shelter, medical care, and similar items are included in a promise "to stay with and care for" is somewhat uncertain.<sup>49</sup> Sometimes the prior relationship of the parties is relied upon to determine the services to be rendered.<sup>50</sup> In the case of a general discussion whereby a family agrees to render services to the promisor in return for the promisor's agreement to make testamentary provision for the family the contract might fail because the parties to the alleged contract are not properly identified.<sup>51</sup>

The looseness of the terms in many of these promises raises a rather serious question as to whether it can be rightly said that the contracts were proved by clear and convincing evidence. These very cases also illustrate the soundness of the policy supporting the clear and convincing rule. An aged or insecure person who is receiving faithful attention or generous support from a near friend or relative is likely to become very lavish in his declarations concerning the extent to which his friend or relative will in some way be rewarded. To permit an unscrupulous benefactor to use these declarations after death has made it impossible for the object of his solicitude to deny or explain his actions is likely to be

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<sup>46</sup> *Hehr's Adm'r v. Hehr*, 288 Ky. 580, 157 S.W.2d 111 (1941); *Bowling v. Bowling's Adm'r*, 222 Ky. 396, 300 S.W. 876 (1927).

The promisor's agreement that he will leave to the promisee "as much as to any relation on earth" has been held too indefinite to be enforced as a contract. *Graham v. Graham's Ex'rs*, 34 Pa. 475 (1859). But see *Logan v. Wienholt*, 7 Bligh. (N.S.) 1, 5 Eng. Rep. 674 (1833).

<sup>47</sup> *Jefferson v. Simpson*, 83 W. Va. 274, 98 S.E. 212 (1919).

<sup>48</sup> *Morgan v. Sanborn*, 225 N.Y. 454, 122 N.E. 696 (1919).

<sup>49</sup> *Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 351 (1912).

<sup>50</sup> *Burdine v. Burdine's Ex'r*, 98 Va. 515, 36 S.E. 992 (1900) (master-servant relationship had existed between the parties for several years).

<sup>51</sup> *Shakespeare v. Markham*, 72 N.Y. 400 (1878).

going beyond what either party even imagined at the time the declarations were made.

#### CONSIDERATION

The rules governing the consideration required in contracts to devise or bequeath are no different from the rules governing consideration in other types of contracts. Mutual promises whereby each of two persons contracts with each other to make a will of a certain tenor are sufficient consideration for each other.<sup>52</sup> Even though the contract is that the first to die will leave his estate to the survivor and there is no obligation placed upon the survivor not to change his will the mutual promises are nevertheless adequate consideration.<sup>53</sup> Each party has assumed the possibility of being bound in his testamentary disposition, a possibility which is sure to become a reality in case of one of them. A promise to devise all of one's interest in certain property is legal consideration even though the promisor actually has no interest and even though the unlikelihood of his having any interest is known to both parties at the time the bargain is entered into.<sup>54</sup>

Due to the frequency with which contracts to devise or bequeath are concerned with informal family arrangements, often involving a mere continuation of an existing state of affairs, the problem of past consideration is likely to be encountered more often than in contracts generally. Here, as elsewhere, the general rule is that a thing given before a promise was made cannot be a valuable consideration for that promise.<sup>55</sup> A promise by a grandfather to will property to a grandson if the parents would give the grandson the name of the grandfather is unenforceable when it is shown that the grandson was given his grandfather's name before the promise was ever made.<sup>56</sup> A statement in a will that it is made as reimbursement for a specific past consideration together with proof that the named consideration was actually given is insufficient to establish a contractual liability.<sup>57</sup> However, if the promise is made for services

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<sup>52</sup> *Ashbauth v. Davis*, 71 Idaho 150, 227 P.2d 954 (1951); *Brown v. Webster*, 90 Neb. 591, 134 N.W. 185 (1912); *Auger v. Shideler*, 23 Wash. 2d 505, 161 P.2d 200 (1945).

<sup>53</sup> *Turnipseed v. Serrine*, 57 S.C. 559, 35 S.E. 757 (1900).

<sup>54</sup> *Rosenberg v. Equitable Trust Co.*, 68 F. Supp. 991 (D. Del. 1946).

<sup>55</sup> 1 Williston, *Contracts* § 142 (Williston and Thompson ed. 1936). For a critical analysis of the entire problem of past consideration and a discussion of the so-called exceptions to the general rule see 1 Corbin, *Contracts* § 210 et seq. (1950).

<sup>56</sup> *Lanfier v. Lanfier*, 227 Iowa 258, 288 N.W. 104 (1939).

<sup>57</sup> *Pershall v. Elliott*, 249 N.Y. 183, 163 N.E. 554 (1928). Even though the contract is in writing a recital of consideration is not conclusive evidence that consideration was given. *Rose v. Southern Michigan National Bank of Coldwater*, 328 Mich. 639, 44 N.W.2d 192 (1950).

performed and to be performed and it is contemplated that the services are to continue after the making of the bargain the fact that the bulk of the services might have been rendered before the promise was made is no obstacle to its enforceability.<sup>58</sup>

Forbearance or a promise to forbear from the doing of a thing which one is otherwise entitled to do is sufficient consideration for a contract to make a will. This would include the foregoing of a contemplated business tour,<sup>59</sup> an agreement not to bring a bona fide suit,<sup>60</sup> an agreement to refrain from certain business opportunities,<sup>61</sup> or the settlement of a family dispute concerning title to property.<sup>62</sup> The essential element in these cases is that the forbearance be real and not merely pretended or artificial. An agreement to settle a controversy concerning an estate is insufficient consideration for a promise to devise when there obviously exists no adequate foundation for the controversy.<sup>63</sup>

Since actions to enforce contracts to devise or bequeath are often in equity and in the nature of actions for specific performance, the equitable requirement of substantial consideration must be met before the powers of equity can be invoked. Even here it is no bar to say that the promised performance was contingent and as actually developed proved to be small. An agreement to care for an aged promisor until his death is substantial consideration even though the promisor actually dies within a short time after the bargain is entered into.<sup>64</sup> However, a wife's giving up of her inchoate dower and her promise to dispose of her entire estate in a certain manner is not substantial consideration where the wife in fact had no estate and no apparent prospects of getting one and where the contract gave her an interest in her husband's estate which was in excess of any dower interest she might have had.<sup>65</sup>

Since contracts to devise or bequeath usually involve family arrangements of some sort care must be exercised that the supposed consideration is not merely a promise to comply with an existing legal obligation.

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<sup>58</sup> *Chase v. Stevens*, 34 Cal. App. 98, 166 Pac. 1035 (1917).

<sup>59</sup> *Downing v. Maag*, 215 Minn. 506, 10 N.W.2d 778 (1943).

<sup>60</sup> *Paton v. Paton*, 152 Kan. 351, 103 P.2d 826 (1940); *Moore's Adm'r v. Wagers' Adm'r*, 243 Ky. 351, 48 S.W.2d 15 (1932); *Roth v. Roth*, 340 Mo. 1043, 104 S.W.2d 314 (1937); *Halsey v. Snell*, 214 N.C. 209, 198 S.E. 633 (1938); *Murtha v. Donohoo*, 149 Wis. 481, 136 N.W. 158 (1912).

<sup>61</sup> *Tiggelbeck v. Russell*, 187 Ore. 554, 213 P.2d 156 (1949).

<sup>62</sup> *Cagle v. Justus*, 196 Ga. 826, 28 S.E.2d 255 (1943); *Farmers National Bank of Danville, Ky. v. Young*, 297 Ky. 95, 179 S.W.2d 229 (1944).

<sup>63</sup> *Steber v. Combs*, 121 W. Va. 509, 5 S.E.2d 420 (1939).

<sup>64</sup> *Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 351 (1912).

<sup>65</sup> *In re Johnson's Estate*, 233 Iowa 782, 10 N.W.2d 664 (1943).

In the case of antenuptial contracts the marriage is sufficient consideration for a promise to devise whether the promisor is a party to the marriage<sup>66</sup> or a parent of one of the parties.<sup>67</sup> The relinquishment of a child for adoption is also adequate consideration for a contract,<sup>68</sup> but if the contract alleged is with the child himself and the child's consent is not necessary to the validity of the adoption then neither the child's giving of consent nor his promise to conduct himself as a dutiful child can support a promise to devise.<sup>69</sup> The consent is a futile thing since the adoption would be equally effective without it, and the promise to be a dutiful child is no consideration since it is nothing more than a promise to do what the law requires. However, if the thing promised is not a legal obligation at the time the contract is entered into the validity of the contract is not affected by its becoming such an obligation later.<sup>70</sup>

#### "DEAD MAN STATUTES"

Other problems encountered in the establishment of contracts to devise or bequeath but which are no more peculiar here than in contracts generally include questions of undue influence,<sup>71</sup> contracts for an illegal purpose,<sup>72</sup> infants' contracts,<sup>73</sup> rules against contracts between husband and wife,<sup>74</sup> and others.<sup>75</sup> The statutes commonly referred to as "dead man statutes" prohibiting a party to a transaction or communication with a deceased person from testifying to such transaction or communication in an action against the decedent's estate are involved here more frequently than in other types of contracts, but the nature of the contract

<sup>66</sup> DeJong v. Huyser, 233 Iowa 1315, 11 N.W.2d 566 (1943).

<sup>67</sup> Phalen v. U. S. Trust Co., 186 N.Y. 178, 78 N.E. 943 (1906).

<sup>68</sup> Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S.E.2d 766 (1940).

<sup>69</sup> MacGowan v. Barber, 127 F.2d 458 (2d Cir. 1942).

<sup>70</sup> This question can arise when the parties unite in marriage subsequent to the contract and the consideration consists of a promise to render services of a type which would necessarily be performed as incident to the marriage relation. Luther v. National Bank of Commerce, 2 Wash. 2d 470, 98 P.2d 667 (1940).

<sup>71</sup> Daniels v. Aharonian, 63 R.I. 282, 7 A.2d 767 (1939) (refusal of a husband to make a will in favor of his wife unless she agreed to make a will as he should direct held not to be such undue influence as would invalidate the will of the wife carrying out the agreement).

<sup>72</sup> Corcoran v. John F. Trommer, Inc., 203 Misc. 37, 113 N.Y.S.2d 627 (Sup. Ct. N.Y. County 1952).

<sup>73</sup> Purviance v Shultz, 16 Ind. App. 94, 44 N.E. 766 (1896).

<sup>74</sup> Laird v. Vila, 93 Minn. 45, 100 N.W. 656 (1904) (validity cannot be denied after one party has fully performed and the other has accepted the benefit of the performance).

<sup>75</sup> E.g., the problem raised by the offer for a unilateral contract where the offeree has entered upon but has not completed performance. Brackenbury v. Hodgkin, 116 Me. 399, 102 Atl. 106 (1917).

has not produced any unique rules for the construction or application of such statutes.<sup>76</sup> An analysis of the wisdom or lack of wisdom of these statutes is beyond the scope of this paper, but it can be safely said that they are not adequate guards against the unscrupulous and unwarrantable assertion of contracts to devise or bequeath.

#### STATUTE OF FRAUDS

In contracts to make wills the consideration to be rendered by the promisee as well as the nature of the property promised by the promisor is of almost unlimited variety. This necessarily means that in the enforcement of such contracts the Statute of Frauds is frequently encountered. So extensive is the subject matter covered by contracts to devise or bequeath that any complete analysis of their relation to the Statute of Frauds would entail a complete study of the Statute in all its ramifications. No such work is attempted here. What is attempted is a brief summary of the application of the Statute of Frauds<sup>77</sup> to contracts to make wills with special attention being given to those situations in which the result reached is influenced or determined by the nature of the interests created by this particular kind of contract. It should be emphasized at the outset that with the exception of those states in which a special provision concerning contracts to make wills has been added

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<sup>76</sup> A few of the cases in which such statutes have been applied are as follows: *Farrington v. Richardson*, 153 Fla. 907, 16 So.2d 158 (1944); *Roberts v. Johnson*, 152 Ga. 746, 111 S.E. 194 (1922); *Oswald v. Nehls*, 233 Ill. 438, 84 N.E. 619 (1908); *Johansen v. Davenport Bank & Trust Co.*, 242 Iowa 172, 46 N.W.2d 48 (1951); *Emery v. Wheeler*, 129 Me. 428, 152 Atl. 624 (1930); *In re Cramer's Estate*, 296 Mich. 44, 295 N.W. 553 (1941); *Cullen v. Woolverton*, 65 N.J.L. 279, 47 Atl. 626 (1900); *Godine v. Kidd*, 64 Hun 585, 19 N.Y. Supp. 335 (1st Dep't 1892); *Price v. Askins*, 212 N.C. 583, 194 S.E. 284 (1937); *Southard v. Curson*, 13 Ohio App. 289 (1920); *Dilger v. McQuade's Estate*, 158 Wis. 328, 148 N.W. 1085 (1914).

<sup>77</sup> Sections four and seventeen of the English Statute of Frauds of 1676 have been adopted in substantially their original form in most United States jurisdictions and are ordinarily used as a basis for any general treatment of the subject. When the Statute of Frauds is referred to herein the language of the English Statute is intended unless otherwise indicated. The material portions of that Statute are as follows:

No action shall be brought . . . to charge any person upon any agreement made upon consideration of marriage; 4, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; 5, or upon any agreement that is not to be performed within the space of one year from the making thereof; 6, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing. . . .

29 Car. II, c. 3, § 4 (1676).

No contract for the sale of any goods, wares, and merchandises for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part-payment, or that some note or memorandum in writing of the said bargain be made and signed. . . .

29 Car. II, c. 3, § 17 (1676).

to the Statute of Frauds<sup>78</sup> such contracts are just as much but no more subject to the Statute than are other contracts. Instances which might appear in conflict with this statement are instances in which there has been a peculiar or erroneous construction placed upon the interests created by the contract.

At an early date it was decided that a contract to devise or bequeath was not a contract not to be performed within a year within the meaning of the Statute of Frauds since it was possible that it might be performed within that time.<sup>79</sup> Although there has been an occasional dissent from this position<sup>80</sup> it is the almost universal opinion<sup>81</sup> and is in accord with the construction placed upon that provision of the Statute in other types of contracts.<sup>82</sup> On the same theory an agreement to render personal services to the promisor for his life, the consideration often given in these cases, is not a promise not to be performed within a year.<sup>83</sup> On the other hand an agreement to render personal services for a designated number of years if for more than one is within the ban of the Statute.<sup>84</sup>

A contract to devise real estate is within that provision of the Statute covering a "contract or sale of lands."<sup>85</sup> Where difficulty is experienced in thinking of a contract for the devise of land as a contract for a conveyance it is sometimes rationalized by describing the will as a conveyance by way of appointment.<sup>86</sup> Such reasoning, however, should

<sup>78</sup> Note 116 *infra*.

<sup>79</sup> *Fenton v. Emblers*, 3 Burr. 1278, 97 Eng. Rep. 831 (1762).

<sup>80</sup> *Van Duyne v. Vreeland*, 12 N.J. Eq. (1 Beasley) 142 (1858) (contract taken out of the operation of the Statute by part performance); *Izard v. Middleton*, 1 Desaus. 116 (S.C. 1785).

<sup>81</sup> *Appleby v. Noble*, 101 Conn. 54, 124 Atl. 717 (1924); *Berger v. Jackson*, 156 Fla. 251, 23 So. 2d 265 (1945); *Heery v. Reed*, 80 Kan. 380, 102 Pac. 846 (1909); *Story v. Story*, 22 Ky. L. Rep. 1714, 61 S.W. 279 (1901); *Boggan v. Scruggs*, 200 Miss. 747, 29 So. 2d 86 (1947); 4 Page, Wills § 1717 (1941).

<sup>82</sup> *Browne*, Statute of Frauds §§ 274-283 (4th ed. 1880).

<sup>83</sup> *Boggan v. Scruggs*, 200 Miss. 747, 29 So. 2d 86 (1947).

<sup>84</sup> *Heine v. The First Trust Company of Wichita*, 141 Kan. 370, 41 P.2d 767 (1935). Since a contract for the rendering of personal services is necessarily conditioned upon survival of the person to whom such services are being rendered and since death might possibly occur within a year it might be argued that contracts of this kind are without the Statute on the same ground as the promise to render services for life. However, the distinction can be justified on the theory that in one case there is a complete performance and in the other performance is excused. 2 Corbin, Contracts § 447 (1950).

<sup>85</sup> *Fred v. Asbury*, 105 Ark. 494, 152 S.W. 155 (1912); *Miller v. Carr*, 137 Fla. 114, 188 So. 103 (1939); *Rudd v. Planters Bank & Trust Co.*, 283 Ky. 351, 141 S.W.2d 299 (1940); *Brickley v. Leonard*, 129 Me. 94, 149 Atl. 833 (1930); *Donovan v. Walsh*, 238 Mass. 356, 130 N.E. 841 (1921); *Salsbury v. Sackrider*, 284 Mich. 493, 280 N.W. 926 (1938).

<sup>86</sup> *Gould v. Mansfield*, 103 Mass. 408 (1869); Schnebly, "Contracts to Make Testa-

be unnecessary. This provision of the Statute of Frauds is a provision against oral contracts for the transfer of title to real estate. A contract to devise is a contract for the transfer of such a title. The fact that a will happens to be the instrument by which the transfer is to be brought about is incidental and should not affect the Statute's application.

What is said above about contracts for the devise of real estate applies with equal force to contracts for the bequest of personalty when there is involved the statutory requirement that a contract for the sale of personal property of more than a certain amount be in writing.<sup>87</sup> Some commentators have taken the position that contracts to bequeath are not subject to the Statute of Frauds and have endeavored to justify a distinction between the rules governing realty and those applicable to personalty on the ground that in one instance the Statute refers to a contract "or" sale and in the other to a contract "for" sale.<sup>88</sup> There appears no rational basis for such a distinction nor is it justified by the cases ordinarily cited as authority for it. On an entirely different ground, however, it would seem that the statutory provision covering contracts for the sale of goods would be satisfied in most instances, which probably accounts for the fact that this provision has not been before the courts as often as that relative to realty. It will be remembered that part payment is as effective as a writing for satisfying the Statute of Frauds requirement concerning contracts for the sale of goods. In the usual contract to make a will the promisee has rendered full performance by the time the action is brought. The Statute of Frauds then is not a barrier to the enforcement, not because it is inapplicable, but because it has been satisfied.<sup>89</sup>

Contracts for the making of wills are often contracts for entire estates rather than contracts for any specific real estate or specific personalty. From what has already been said it will be observed that in many instances these contracts will be within the Statute of Frauds if real estate is involved but not affected by the Statute if the estate is made up entirely of personal property. If the estate consists partly of personalty and partly of realty a further complication arises. Since the contract is

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mentary Dispositions as Affected by the Statute of Frauds," 24 Mich. L. Rev. 749, 758-759 (1926).

<sup>87</sup> Wallace v. Long, 105 Ind. 522, 5 N.E. 666 (1886); Maloney v. Maloney, 258 Ky. 567, 80 S.W.2d 611 (1935); Boyle v. Dudley, 87 N.H. 282, 179 Atl. 11 (1935). But see Exchange National Bank of Tampa v. Bryan, 122 Fla. 479, 483, 165 So. 685, 686 (1936) (no rationalization offered and no authority cited; contract was for services which had been performed).

<sup>88</sup> Schnebly, supra note 86, at 754-6.

<sup>89</sup> Turnipseed v. Sirmine, 57 S.C. 559, 35 S.E. 757 (1900). Cf. Martocci v. The Greater New York Brewery, Inc., 301 N.Y. 57, 92 N.E.2d 887 (1950).

for all the property the promisor might own at the time of his death the consideration rendered by the promisee is ordinarily as applicable to one type of property as it is to the other. Therefore, the contract is indivisible and if the Statute of Frauds prevents its enforcement as to the real estate it will be unenforceable as to the whole.<sup>90</sup> This rule applies even though the realty amounts to only a small fraction of the entire estate.<sup>91</sup> The same is true where the contract is for something less than all the estate and could conceivably be completely satisfied out of personalty if the court were willing to make an election.<sup>92</sup>

It should be noted that in any event it is the property in the estate at the time of the promisor's death that is controlling. If the estate is made up wholly of personalty at that time the rules as to personal property will govern regardless of what might have been the situation at an earlier date.<sup>93</sup>

There is the further question whether a contract not to make a will is a contract for a conveyance of real estate or a sale of personal property within the meaning given to those terms when applying the Statute of Frauds. Such contracts are sometimes made with or for the benefit of the promisor's heirs or next of kin. If a contract to make a will is within the Statute only because the contemplated will is a sale or conveyance by way of appointment it would seem that the contract not to make a will would be outside the Statute since no "appointment" is contemplated. This reasoning has sometimes led to the conclusion that an oral contract not to make a will is enforceable even where real estate is involved.<sup>94</sup> A position giving a more realistic recognition to the results being sought by the parties is that a contract not to make a will, like a contract to

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<sup>90</sup> *Cheatham's Ex'r v. Parr*, 308 Ky. 175, 214 S.W.2d 91 (1948); *Lemire v. Haley*, 91 N.H. 357, 19 A.2d 436 (1941); *Kessler v. Olen*, 228 Wis. 662, 280 N.W. 352, rehearing denied, 228 Wis. 662, 281 N.W. 691 (1938); *Ellis v. Cary*, 74 Wis. 176, 42 N.W. 252 (1889).

<sup>91</sup> *In re Byrne's Estate*, 122 Pa. Super. 413, 186 Atl. 187 (1936) (real estate valued at about \$3,000.00 and personal property at about \$70,000.00).

<sup>92</sup> *Quirk v. Bank of Commerce & Trust Co.*, 244 Fed. 682 (6th Cir. 1917); *Upton v. Fitzgerald*, 129 Tex. 211, 103 S.W.2d 147 (1937); *In re Rosenthal's Estate*, 247 Wis. 555, 20 N.W.2d 643 (1945).

It has been suggested in Kansas that a contract to leave a specified fractional part of an estate by will is not within the realty provision of the Statute of Frauds since no specific real estate is involved. However, the authority is not very strong even in Kansas since each case containing this suggestion was actually decided or supported on other grounds. See *Smith v. Nyburg*, 136 Kan. 572, 576, 16 P.2d 493, 495-496 (1932) (sufficient part performance to take the case out of the operation of the Statute); *Stahl v. Stevenson*, 102 Kan. 447, 450, 171 Pac. 1164, 1165, rehearing denied, 102 Kan. 844, 171 Pac. 1164 (1918) (supported by the theory that a contract not to make a will is not within the Statute).

<sup>93</sup> *Turnipseed v. Sirrine*, 57 S.C. 559, 35 S.E. 757 (1900).

<sup>94</sup> *Stahl v. Stevenson*, 102 Kan. 447, 171 Pac. 1164, rehearing denied, 102 Kan. 844, 171 Pac. 1164 (1918); *Quinn v. Quinn*, 5 S.D. 328, 58 N.W. 808 (1894).

make a will, is a contract for the transfer of title to property and, therefore, subject to the operation of the Statute.<sup>95</sup> The same principle would apply to a contract not to revoke a will already made.<sup>96</sup>

Where the contract consists of a promise to make a will in consideration of the promisee's agreement to marry the promisor<sup>97</sup> or some third person<sup>98</sup> the contract falls within the Statute of Frauds provision requiring that contracts in consideration of marriage be in writing. Contracts to devise or bequeath are no different from other contracts so far as the problem of what constitutes an "agreement made upon consideration of marriage" is concerned; consequently, that particular question is not dealt with in this paper.<sup>99</sup> It should be noted that here, as well as elsewhere, marriage is not a performance which will remove these contracts from the operation of the Statute.<sup>100</sup>

The extent to which part performance can be relied upon to remove a contract to make a will from the operation of the Statute of Frauds depends upon the attitude toward the part performance doctrine in general in the particular jurisdiction concerned. Although it is not the present purpose to trace the history of that doctrine or to examine the basis upon which it rests<sup>101</sup> a few of its facets which are peculiar to contracts to make wills deserve comment.

The contract to make a will is most generally an arrangement between near relatives or close friends. Since these arrangements are usually entered into informally and without legal advice the lack of a writing is the rule rather than the exception. Frequently there is no occasion for the promisee's taking exclusive possession of land, making permanent improvements, or doing other things which might possibly be classified as acts unequivocally referable to the contract. If the theory that the acts themselves must "supply the framework of the promise"<sup>102</sup> is strictly adhered to the part performance rendered will usually be insufficient to

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<sup>95</sup> *Dicken v. McKinlay*, 163 Ill. 318, 45 N.E. 134 (1896); *Wright v. Green*, 67 Ind. App. 433, 119 N.E. 379 (1918); *In re Hayer's Estate*, 234 Iowa 299, 12 N.W.2d 520 (1944).

<sup>96</sup> *West v. Day Trust Co.*, 328 Mass. 381, 103 N.E.2d 813 (1952).

<sup>97</sup> *Busque v. Marcou*, 147 Me. 289, 86 A.2d 873 (1952) (contract also within the Statute on other grounds); *Tellez v. Tellez*, 51 N.M. 416, 186 P.2d 390 (1947); *Caton v. Caton*, L.R., 1 Ch. 137 (1865).

<sup>98</sup> *Austin v. Kuehn*, 211 Ill. 113, 71 N.E. 841 (1904).

<sup>99</sup> See generally 2 *Corbin, Contracts* §§ 460-466 (1950); *Browne, Statute of Frauds* §§ 215-224a (4th ed. 1880).

<sup>100</sup> *Tellez v. Tellez*, 51 N.M. 416, 186 P.2d 390 (1947); *Caton v. Caton*, L.R., 1 Ch. 137 (1865).

<sup>101</sup> See *Moreland, "Statute of Frauds and Part Performance,"* 78 U. of Pa. L. Rev. 51 (1929).

<sup>102</sup> *Burns v. McCormick*, 233 N.Y. 230, 235, 135 N.E. 273, 274 (1922).

give relief against the Statute.<sup>103</sup> On the other hand, if emphasis is placed upon the "hardship" or "virtual fraud" upon the promisee a different result can be reached. Contracts to devise or bequeath are often contracts for filial devotion, care, nursing, or other personal service. In almost every such case the society and companionship of the particular person concerned is a material part of the consideration. These are items of immense value to the promisor receiving the services and frequently involve great sacrifice on the part of the promisee. Yet their monetary valuation is impossible. In jurisdictions where this ground for relief against the Statute of Frauds is favorably looked upon<sup>104</sup> oral contracts to devise can often be enforced.<sup>105</sup> The fact that it is a contract to make a will does not within itself have any significance so far as relief against the Statute on this ground is concerned, but situations involving peculiar or unique services are more likely to be found here than in contracts for inter vivos conveyances.

Of course the Statute of Frauds is no bar to recovery upon an oral contract to devise if the contract was procured through an actual fraud upon the promisee.<sup>106</sup>

A question might well be raised as to whether a will executed in pursuance of an oral contract may serve either as the written memorandum required to satisfy the Statute of Frauds or as a sufficient part performance to remove the contract from the operation of the Statute. If a will duly executed by a promisor recites on its face that it is executed in pursuance of a contract, and if it contains a recital of the essential terms of the contract, there appears no reason why it could not constitute the necessary memorandum signed by the party to be charged.<sup>107</sup> In the absence of any such recital the will, whether it be one of two wills with reciprocal provisions<sup>108</sup> or an individual will without any counterpart

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<sup>103</sup> *Grant v. Grant*, 63 Conn. 530, 29 Atl. 15 (1893); *Diez v. Rosicky*, 145 Neb. 242, 16 N.W.2d 155 (1944) (probably not sufficient part performance on any theory); *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921) (apparently refusing to recognize any part performance unless permanent improvements are made).

<sup>104</sup> 2 Corbin, *Contracts* § 435 (1950); *Pomeroy, Specific Performance* § 114 (3d ed. 1926).

<sup>105</sup> *Fred v. Asbury*, 105 Ark. 494, 152 S.W. 155 (1912); *Savannah Bank & Trust Co. v. Wolff*, 191 Ga. 111, 11 S.E.2d 766 (1940); *White v. Smith*, 43 Idaho 354, 253 Pac. 849 (1926); *Nichols v. Reed*, 186 Md. 317, 46 A.2d 695 (1946); *Matheson v. Gullickson*, 222 Minn. 369, 24 N.W.2d 704 (1946); *McCullom v. Mackrell*, 13 S.D. 262, 83 N.W. 255 (1900); *Clark v. Atkins*, 188 Va. 668, 51 S.E.2d 222 (1949); *Bryson v. McShane*, 48 W. Va. 126, 35 S.E. 848 (1900) (not a contract to make a will but a good illustration of the "virtual fraud" or "hardship" theory of relief against the Statute of Frauds).

<sup>106</sup> *Manning v. Pippen*, 86 Ala. 357, 5 So. 572 (1888).

<sup>107</sup> *Curry v. Cotton*, 356 Ill. 538, 191 N.E. 307 (1934).

<sup>108</sup> *Brought v. Howard*, 30 Ariz. 522, 249 Pac. 76 (1926); *Gibson v. Crawford*, 247 Ky. 228, 56 S.W.2d 985 (1932); *Hale v. Hale*, 90 Va. 728, 19 S.E. 739 (1894); *Canada v. Ihmsen*, 33 Wyo. 439, 240 Pac. 927 (1925).

executed by the promisee,<sup>109</sup> is not a memorandum of the contract.<sup>110</sup> An opposite result can be reached where the execution of joint or mutual wills is regarded as sufficient evidence of the contract.<sup>111</sup> The error here lies in the assumption that the contract is proved by the execution of joint or mutual wills.<sup>112</sup> When this erroneous assumption is corrected the decision concerning the sufficiency of the memorandum for the purposes of the Statute of Frauds is necessarily different.

Curiously enough the argument is sometimes made that the mere execution of the will by the promisor is a performance which will take the case out of the operation of the Statute of Frauds. The argument is patently fallacious for at least two reasons. First, even if it be a part performance it is a performance by the promisor and therefore cannot ordinarily be taken advantage of by the promisee seeking enforcement of the contract.<sup>113</sup> Second, and more significant for present purposes, since a will is a revocable instrument execution of the will is really no performance at all. The promisor has not performed until he dies leaving the promised will in effect. For this reason the usual result has been that the execution of the will is without significance so far as relief against the Statute of Frauds on the ground of performance, either complete or partial, is concerned.<sup>114</sup> A few courts, however, have reasoned that the contract is for the execution of a will and that once the will is executed the promisor has made a complete and irrevocable performance of the contract. By the time action is brought the promisee has usually fully performed. The court then enforces the contract under the pretext of merely giving recognition to an already fully executed performance by

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<sup>109</sup> *Busque v. Marcou*, 147 Me. 289, 86 A.2d 873 (1952); *Holsz v. Stephen*, 362 Ill. 527, 200 N.E. 601 (1936); *Hathaway v. Jones*, 48 Ohio App. 447, 194 N.E. 37 (1934); *Southern v. Kittredge*, 85 N.H. 307, 158 Atl. 132 (1932); *Anderson Estate*, 348 Pa. 294, 35 A.2d 301 (1944); *White v. McKnight*, 146 S.C. 59, 143 S.E. 552 (1928); *Upton v. Fitzgerald*, 129 Tex. 211, 103 S.W.2d 147 (1937); *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041 (1913).

<sup>110</sup> But see *Shroyer v. Smith*, 204 Pa. 310, 315, 54 Atl. 24, 26 (1903) (indicating that the will was regarded as a sufficient memorandum but also containing evidence that the promisee had entered into possession under the contract).

<sup>111</sup> *Mack v. Swanson*, 140 Neb. 295, 299 N.W. 543 (1941); *Brown v. Webster*, 90 Neb. 591, 134 N.W. 185 (1912).

<sup>112</sup> The execution of joint or mutual wills should not of itself be considered as having any tendency to prove the existence of a contract. See text at notes 18-29 supra.

<sup>113</sup> *Browne*, Statute of Frauds § 453 (4th ed. 1880); 4 *Pomeroy*, Equity Jurisprudence § 1409 (5th ed. 1941).

<sup>114</sup> *Zellner v. Wassman*, 184 Cal. 80, 193 Pac. 84 (1920); *Busque v. Marcou*, 147 Me. 289, 86 A.2d 873 (1952); *Hale v. Hale*, 90 Va. 728, 19 S.E. 739 (1894); *McClanahan v. McClanahan*, 77 Wash. 138, 137 Pac. 479 (1913); *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041 (1913); *Canada v. Ihmsen*, 33 Wyo. 439, 240 Pac. 927 (1925); *Caton v. Caton*, L. R., 1 Ch. 137 (1865).

both parties.<sup>115</sup> Such a position is clearly without foundation and apparently rests upon the erroneous notion that the will is somehow an essential part of the machinery for getting the property to the promisee and that once the will is executed it is irrevocable and thereby becomes the vital element in the transaction.

In some states contracts to devise or bequeath as such have been expressly listed among those contracts required by the Statute of Frauds to be in writing.<sup>116</sup> This legislation reflects the feeling held by many that every kind of transaction which is intended to affect the distribution of a decedent's property at death should be evidenced by a writing. It is supported by the argument that it will tend to bring a greater degree of certainty into the handling of decedent's affairs and will eliminate a type of claim which is often spurious and always extremely difficult to disprove. Against such legislation it might be said that many of the most bona fide contracts to make wills are likely to involve family matters not often reduced to writing and that if enforcement is denied great inequity will result. The future trends of legislation of this type will depend upon which of these two opposing pulls becomes dominant. It is important to emphasize that wherever statutes are enacted requiring that contracts to make wills be reduced to writing such statutes should be regarded as supplemental to, not a substitute for, the rule that these contracts must be proved by clear and convincing evidence. If this rule is forgotten the statutory requirement will be insufficient to give adequate protection in courts of equity with a highly developed sensitivity for finding grounds upon which they can base relief against the application of a statute. If the clear and convincing rule is maintained estates are likely to find adequate protection against unwarranted claims of this kind whether or not they have the benefit of having additional provisions incorporated into the Statute of Frauds.

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<sup>115</sup> *McDowell v. Ritter*, 153 Fla. 50, 13 So. 2d 612 (1943); *Lovett v. Lovett*, 87 Ind. App. 42, 155 N.E. 528, rehearing denied, 87 Ind. App. 42, 157 N.E. 104 (1927) (cited as authority in *McDowell v. Ritter*, supra); *Johnston v. Tomme*, 199 Miss. 337, 24 So. 2d 730 (1946). Each case reaching this conclusion has apparently resulted from the court's failure to distinguish the irrevocability of the contract from a supposed irrevocability of the will. *Atkinson*, Wills § 49 (2d ed. 1953); 4 Page, Wills § 1709 (1941).

<sup>116</sup> Cal. Civ. Code § 1624 (1949); Me. Rev. Stat. c. 106, § 1 (1944), as amended by P.L. c. 185 (1947); Mass. Ann. Laws c. 259, § 5 (1933); N.Y. Pers. Prop. Law § 31; Ohio Rev. Code Ann. § 2107.04 (1954)

New Mexico has a statute requiring that a contract "to adopt the claimant, or to treat the claimant as an heir" be in writing. N. M. Stat. Ann. c. 33, § 814 (Supp. 1951). The extent to which the provision concerning a contract "to treat the claimant as an heir" will be construed to include contracts to make wills is apparently an open question. See *Rubalcava v. Garst*, 53 N.M. 295, 206 P.2d 1154 (1949), modified, 56 N.M. 647, 248 P.2d 207 (1952).