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ENFORCEMENT OF CONTRACTS TO DEVISE OR BEQUEATH AFTER THE DEATH OF THE PROMISOR*

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The problems involved in the enforcement of contracts to devise or bequeath after the death of a defaulting promisor are numerous, diverse, and often paradoxical in their appearance. Whether a question of probate, of property, or of contract is presented remains unanswered in too many instances. Failure to answer this initial inquiry is sometimes the only explanation for apparently conflicting decisions. This article is an effort to analyze these varied problems with a view of charting a reasonably safe course to be pursued by the disappointed promisee seeking his remedy after the promisor's death. For the purposes of this discussion a valid contract and a breach by the promisor are assumed; consequently, problems relating to the formation of such contracts and the means which may be adopted within the lifetime of the promisor to protect the various interests involved are omitted.

Effect of Contract on Probate

According to the accepted interpretation of a probate proceeding, the probate of a will is the establishment of a particular thing as the last will and testament of a definite person. The legal effect or operation of the will is of no concern. Whether or not the testator has violated some obligation by making the will or whether or not there is any property upon which the will can operate are matters beyond the scope of an action to secure admission to probate.

All the above propositions appear to be well established and are often stated as truisms. However, as soon as a contract for a testamentary disposition enters the picture, courts and commentators alike have a tendency to forget the truisms they have been enunciating and begin to treat probate as something more than a

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mere proceeding to decide what is the will. The first effort in this direction was made at an early date in the development of the contractual will concept. A will made pursuant to contract and a subsequent, inconsistent will were both offered for probate. In favor of the earlier will it was urged that it was the last legal will, that by entering into the contract the testator disabled himself from making any testamentary disposition not in harmony with the contract. It was sought to draw an analogy between the position of a promisor under a contractual obligation to make a particular testamentary disposition and that of a married woman without capacity to make a will without the consent of her husband. These arguments were rejected and the most recent will was admitted to probate even though its effect was to revoke the prior will made pursuant to the contract.[1] A similar result was reached in this country at a reasonably early date in the history of contracts to devise or bequeath.[2] This same position has been adopted by a clear majority of the courts in which the question has been raised[3] although an apparent misunderstanding of the nature of probate has led to an opposite result in some cases. Relying upon an earlier decision which gave a promisee an entirely different remedy[4] the Alabama court has denied probate to the testator's most recent will and accepted an earlier will made pursuant to contract.[5] The same principle has received some recognition elsewhere[6] and apparently has its foun-

1. Pohlman v. Untzellman, 2 Lee 319, 161 Eng. Rep. 355 (1756).
2. Sumner v. Crane, 155 Mass. 483, 29 N. E. 1151 (1892).
3. *In re* Carpentier's Estate, 104 Cal. App. 33, 285 Pac. 348 (1st Dist. 1930); *In re* Rolls' Estate, 193 Cal. 594, 226 Pac. 608 (1924); Manrow v. Deveney, 109 Ind. App. 264, 33 N. E. 2d 371 (1941); *In re* Estate of Adkins, 161 Kan. 239, 167 P. 2d 618 (1946); *In re* Hirschhorn's Estate, 76 N. Y. S. 2d 344 (Surr. Ct. 1947), *aff'd*, 273 App. Div. 852,, 77 N. Y. S. 2d 152 (1948); *In re* Gudewicz' Will, 72 N. Y. S. 2d 838 (Surr. Ct. 1947); Schley v. Donlin, olson here
131 Misc. 208, 225 N. Y. Supp. 453 (Sup. Ct. 1927); Morgan v. Sanborn, 225 N. Y. 454, 122 N. E. 696 (1919); *In re* Hermann's Will, 178 App. Div. 182, 165 N. Y. Supp. 298, *aff'd*, 222 N. Y. 564, 118 N. E. 1062 (1917); Van Vlack v. Van Vlack, 181 Ore. 646, 182 P. 2d 969, *rehearing denied*, 185 P. 2d 575 (1947); Shawver v. Parks, 239 S. W. 2d 188 (Tex. Civ. App. 1951); Pullen v. Russ, 209 S. W. 2d 630 (Tex. Civ. App. 1948; Hobson v. Blackburn, 1 Add. 247, 162 Eng. Rep. 95 (1822); *see In re* Berry's Estate, 195 Cal. 354, 233 Pac. 330 (1925); Norris's Estate, 329 Pa. 483, 198 Atl. 142 (1938).
4. Bolman v. Overall, 80 Ala. 451, 2 So. 624 (1886) (awarding relief in the nature of specific performance).
5. Walker v. Yarbrough, 200 Ala. 458, 76 So. 390 (1917). An earlier decision denying an injunction against probate of a will revoking a prior will made pursuant to contract, Allen v. Bromberg, 147 Ala. 317, 41 So. 771 (1906), was left undisturbed.
6. Hatcher v. Sawyer, 243 Iowa 858, 52 N. W. 2d 490 (1952) (injunction against probate of inconsistent will sustained); Sherman v. Goodson's Heirs, 219 S. W. 839 (Tex. Civ. App. 1920) (intermediate court decision of doubtful authority even in the jurisdiction where decided); *see In re*

dation in the misguided notion that since the contract is valid and may be enforced at law or in equity it is merely prolonging litigation to deny complete relief in the probate court.[7]

Probate remedies demanded in cases where the actual wrong is a breach of contract take a variety of forms. Where a will made pursuant to contract was burned by the testator in the presence of witnesses and with the expressed intention of revoking it equity directed its probate as a destroyed will.[8] One court has refused to probate a will inconsistent with a contract even though there never was a will pursuant to the contract and the result of the court's action was intestacy of the decedent.[9] On the other hand it has been held that the promisee of the contract is not a proper party to contest the inconsistent will.[10] This would appear to be the better result. Probate courts are usually without either the machinery or the jurisdiction for determining the validity of contracts, and if they make such determinations their findings are not res judicata in subsequent actions at law or in equity.[11] A problem of no small consequence is suggested by *Bray v. Cooper*[12] where the last will was admitted to probate but with a restriction that it would be void and unenforceable as to those parts inconsistent with a previous contract. Where the contract covers only part of the estate the

McGinley's Estate, 257 Pa. 478, 101 Atl. 807 (1917) (remanded for a jury determination of whether or not there was a contract). In an intermediate court case where no final determination could be reached because the contract was not sufficiently proved, California has indicated that a will inconsistent with a prior contract could not be probated. Estate of Crawford, 69 Cal. App. 2d 607, 160 P. 2d 64 (2d Dist. 1945). However, in view of other cases in that state it seems to be reasonably safe to assume that the last will can be probated there regardless of any previously executed contract. *In re* Carpentier's Estate, 104 Cal. App. 33, 285 Pac. 348 (1st Dist. 1930); *In re* Roll's Estate, 193 Cal. 594, 226 Pac. 608 (1924); *see In re* Berry's Estate, 195 Cal. 354, 233 Pac. 330 (1925). At least one court has gone so far as to set aside probate of a will revoking a prior will made pursuant to a contract. Frazier v. Patterson, 243 Ill. 80, 90 N. E. 216 (1909).

7. This same theory has been vigorously asserted by a few commentators. Goddard, *Mutual Wills*, 17 Mich. L. Rev. 677 (1919). But it would appear that the better view is *contra*. Atkinson, Wills § 48 (2d ed. 1953); 4 Page, Wills § 1709 (Lifetime ed. 1941).

8. Jordan v. McGrew, 400 Ill. 275, 79 N. E. 2d 622 (1948).

9. Estate of Doerfer, 100 Colo. 304, 67 P. 2d 492 (1937). The decision was based upon a provision of the Colorado Statutes which authorizes will contests based, not only upon objections raising an issue as to whether the writing in question is the last will, but also "objections to the legality of the contents of such will." Colo. Stat. Ann. c. 176, § 63 (1935). Even under each a statute as this it might well be questioned whether the existence of a contractual obligation removing property from the effective operation of a will should be regarded as rendering the will illegal.

10. Winter's Estate, 34 Del. Co. 12 (Pa. Orph. 1945).

11. Fuller v. Nelle, 12 Cal. App. 2d 576, 55 P. 2d 1248 (1st Dist. 1936); Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699 (1893).

12. 145 Kan. 642, 66 P. 2d 592 (1937).

situation can easily be imagined where two wills would have to be probated with much resulting confusion. In fact this might well be the result in almost every case since the mere appointment of a new executor should be sufficient to give some validity to the new will.

The short cut sought to be achieved by making contract litigation a part of the probate procedure is likely to prove an expensive short cut. The real contest in such cases would almost always be over the validity of the contract, a matter with which probate courts are usually not familiar. Of more serious consequence is the new definition of a will that is inherent in such a procedure. An additional element would appear needed in the Wills Act. Not only would it be necessary that the testator's wishes be in writing, signed by the testator, attested by witnesses, etc., but there would be the added requirement that those last wishes, however formally expressed, be not inconsistent with any previous contractual obligations of the testator. If this new requirement is found socially desirable no doubt it should be incorporated into existing jurisprudence, but it should be understood at the outset that it is a new requirement loaded with a multitude of concepts new to the law of wills.

The difficulty grows out of the tendency to unite the will and the contract into one legal concept. An attempted union of such basically opposite devices is to invite unnecessary confusion to say the least. This fusion of thought has produced extremely peculiar results in some instances. Any attempt to affirmatively compel the execution of a will would appear destined to certain failure because of the inherent difficulties involved in compelling such an act and also because the very terms of the contract would necessarily imply that the promisor had until the end of his life to perform. However, once the will has been executed its revocation has been enjoined in Indiana,[13] and dicta supporting the same proposition can be found elsewhere.[14] Without making any reference to this rather strange decision Indiana has more recently held that it is the last will of a decedent that is entitled to probate even though an earlier will has

13. Lovett v. Lovett, 87 Ind. App. 42, 155 N. E. 528, *rehearing denied*, 87 Ind. App. 52, 157 N. E. 104 (1927), *noted*, 3 Ind. L. J. 242 (1927); 26 Mich. L. Rev. 464 (1928); 7 Tenn. L. Rev. 66 (1928); 1 U. of Cin. L. Rev. 498 (1928); 76 U. of Pa. L. Rev. 110 (1927). The same type of relief has apparently been granted in Georgia. Cagle v. Justus, 196 Ga. 826, 28 S. E. 2d 255 (1943) (case decided on demurrer making it difficult to ascertain whether or not this specific item of relief was granted).

14. *See* Elmer v. Elmer, 271 Mich. 517, 260 N. W. 759 (1935); Cobb v. Hanford, 88 Hun 21 (N.Y. 1895); *Ex parte* Hineline, 166 S. C. 352, 164 S. E. 887 (1932).

been executed pursuant to contract.[15] If it is the last will that must be probated what would be the effect of the secret execution of a revoking instrument in a case where there had issued an injunction against revocation? What penalty could be imposed upon the dead testator? It would appear that at the very best an injunction against revocation is a vain thing and that real relief to the promisee must be sought through some other means.

If a promisor can be enjoined from revoking a will made pursuant to contract, it would seem that even where no such injunction is sought probate of a subsequent inconsistent will could be enjoined. Such a remedy has been granted in New York,[16] but it was more recently denied there[17] and probably is not the law in that state at the present time.[18] The right to an injunction against probate of the inconsistent will is recognized in Iowa[19] and possibly California,[20] but the better view would appear otherwise.[21] The Iowa doctrine was established when a bill in equity asked that title to the decedent's real estate be established in the beneficiaries of the contract and that a trust be impressed upon the personalty. The relief was granted and then probate of the inconsistent will was enjoined on the theory that it would constitute a cloud on title.[22] The result

15. Manrow v. Deveney, 109 Ind. App. 264, 33 N. E. 2d 371 (1941).

16. Cobb v. Hanford, 88 Hun 21 (N.Y. 1895).

17. Matter of Martin's Will, 128 Misc. 659, 220 N. Y. Supp. 398 (Surr. Ct. 1927), *noted,* 13 Va. L. Rev. 660 (1927).

18. An injunctive remedy of this sort would appear wholly inconsistent with the more recent New York cases which have sustained the probate of the last will even though the effect was revocation of a prior contractual will. *In re* Hirschhorn's Estate, 76 N. Y. S. 2d 344 (Surr. Ct. 1947), *aff'd,* 273 App. Div. 852, 77 N. Y. S. 2d 152 (1948); *In re* Gudewicz' Will, 72 N. Y. S. 2d 838 (Surr. Ct. 1947); Schley v. Donlin, 131 Misc. 208, 225 N. Y. Supp. 453 (Sup. Ct. 1927); Morgan v. Sanborn, 225 N. Y. 454, 122 N. E. 696 (1919).

19. Hatcher v. Sawyer, 243 Iowa 858, 52 N. W. 2d 490 (1952); Child v. Smith, 225 Iowa 1205, 282 N. W. 316 (1939).

20. An injunction was granted in the lower court and no appeal was taken. After the time for appeal had elapsed the will was offered for probate. The supreme court sustained the denial of probate on the theory that it was bound by the prior decree, but no position was taken as to the propriety of the decree or what result would have been reached if an appeal had been taken within the proper time. Matter of Estate of Chase, 169 Cal. 625, 147 Pac. 461 (1915). It is very unlikely that such injunctive relief would be sustained in California should the question arise in a proper case. Relief of this kind would be wholly inconsistent with the cases in that jurisdiction refusing to consider the existence of the contract ground for contest of probate of a subsequent inconsistent will. *In re* Carpentier's Estate, 104 Cal. App. 33, 285 Pac. 348 (1st Dist. 1930); *In re* Rolls' Estate, 193 Cal. 594, 226 Pac. 608 (1924); *see In re* Berry's Estate, 195 Cal. 354, 361, 233 Pac. 330, 333 (1925).

21. Allen v. Bromberg, 147 Ala. 317, 41 So. 771 (1906); Matter of Martin's Will, 128 Misc. 659, 220 N. Y. Supp. 398 (Surr. Ct. 1927), *noted,* 13 Va. L. Rev. 660 (1927); Dickerson v. Murfield, 183 Ore. 147, 191 P. 2d 380 (1948).

22. Child v. Smith, 225 Iowa 1205, 282 N. W. 316 (1939).

is no more justified than would be a holding that probate of a will would place a cloud on the title to adeemed property in any case where there has been an ademption.

Another area in which failure to separate the will from the contract can easily lead to confusion arises out of a contest of probate of a will made in pursuance of a contract on the ground that the promisee failed to perform his bargain. No definitive authority has been found on this question but where the issue has been raised it appears that counsel have treated the will and the contract as one instrument the entirety of which must stand or fall together.[23] It would seem that a more logical approach would be along the conditional will theory with the argument that the effectiveness of the will was conditional upon performance by the promisee. Unless this condition were expressed in the will the contest would most likely fail, for while extraneous evidence may be admitted to show lack of testamentary intent[24] such evidence of a conditional intent should be denied.[25]

Closely related to the problem of the promisee's failure to perform is that of the mutual recission of the contract without a revocation of the contractual will. Here the will is entitled to probate,[26]

23. Such contests have been undertaken but have been disposed of by decisions that the promisees in fact performed, thus leaving uncertainty as to what would happen should there be a finding of nonperformance. *In re* Berry's Estate, 195 Cal. 354, 233 Pac. 330 (1925) (containing dicta that nonperformance would be immaterial); *In re* Donaldson's Estate, 26 Wash. 2d 72, 173 P. 2d 159 (1946).

24. *In re* Watkin's Estate, 116 Wash. 190, 198 Pac. 721 (1921); Lister v. Smith, 3 Sw. & Tr. 282, 164 Eng. Rep. 1282 (1863); 1 Jarman, Wills 30 (8th ed. 1951); 1 Page, Wills § 53.

25. Sewell v. Slingluff, 57 Md. 537 (1882); Atkinson, Wills § 83 (2d ed. 1953); 1 Page Wills § 92.

Contra: Some confusion concerning conditional wills centers around two-party contracts that the survivor shall take the property of the first to die. Here it is customary for each party to execute a will in favor of the other. If the survivor neglects to change his will it has sometimes been held that evidence of the contract will be admitted to show that the will was conditional upon the testator's being the first to die, an event which failed to happen. Maloney v. Rose, 224 Iowa 1071, 277 N. W. 572 (1938); Maurer v. Johansson, 223 Iowa 1102, 274 N. W. 99 (1937); Anderson v. Anderson, 181 Iowa 578, 164 N. W. 1042 (1917); *In re* Estate of Reed, 125 W. Va. 555, 26 S. E. 2d 222 (1943); Wilson v. Starbuck, 116 W. Va. 554, 182 S. E. 539 (1935).

For an excellent discussion of conditional wills generally see Evans, *Conditional Wills,* 35 Mich. L. Rev. 1049 (1937).

26. *In re* Mortensen's Will, 157 Misc. 717, 284 N. Y. Supp. 420 (Surr. Ct. 1936). Rescission of the contract could not be anything more than a demonstration of intent to revoke, and a mere intent to revoke, regardless of how clearly that intent is manifest, is not within itself a revocation. Atkinson, Wills § 84 (2d ed. 1953).

but it should be possible to impress a constructive trust in favor of those who would take had the will been revoked.[27]

It is clear that the overwhelming weight of authority is that probate of a will is not affected by the existence of a contractual obligation on the part of the testator. Contrary authority can usually be dismissed as a judicial accident or mistake not being followed even in the jurisdiction where decided. This proposition is not weakened by a case such as In re *Gredler's Estate*[28] where it was held that a statute invalidating a bequest to charity if the testator died within thirty days after the execution of the will did not apply to a charitable bequest made in performance of a previously existing contract. The rationale there was, not that the contract as such had any bearing on probate, but rather that the reason for the statute did not exist in that case. The statute was designed to insure that charitable gifts were the result of the free desires of testators without the pressures and coercion brought on by the doubts and terrors often associated with impending death. A testator who is merely fulfilling a contractual obligation has no need for this protection.

Another situation in which a kind of probate recognition is given to the existence of a contract without altering the proposition that a contract for a testamentary disposition cannot affect the probate of a will involves adoption contracts. Where a decedent enters into a contract for the adoption of a minor child but dies without ever completing the adoption process, the child is a proper party to contest the decedent's will.[29] This kind of recognition involves nothing more than a determination of status. No adjudication of property rights is sought. The would-be adopted child is merely given the status of a contestant in the proceeding to probate the will of his allegedly adoptive parent. He is permitted to raise any questions of fraud, undue influence, or other matters impugning a proper execution. If the contest is successful a proceeding in equity is still necessary to establish the child's right to inheritance. There is some authority that this probate recognition of a contract for the purpose of determining status should be denied and that the child

27. The establishment of a constructive trust here would be found more difficult than in the case of a promisor who died while the contract was still in effect but without the agreed will. In the rescission case the beneficiary of the alleged constructive trust would be a mere volunteer and the beneficiary of the unrevoked will would be innocent of any fraud or other wrongdoing. However, the transfer by the unrevoked will should be regarded as a transfer by mistake and a remedy provided on the theory of unjust enrichment.

28. 361 Pa. 384, 65 A. 2d 404 (1949).

29. *In re* Biehn's Estate, 41 Ariz. 403, 18 P. 2d 1112 (1933); *In re* Stoiber's Estate, 101 Colo. 192, 72 P. 2d 276 (1937); Ezell v. Mobley, 160 Ga. 872, 129 S. E. 532 (1925).

should not be permitted to contest the will until after he has proceeded in equity and obtained a decree of quasi-adoption.[30]

Even in jurisdictions where probate courts are given extensive equity powers there is sound reason for keeping the contract and the will separate. Until a new dimension is added to the Wills Act it must be the last will that is admitted to probate regardless of any contractual obligations that might exist. As soon as a different result is reached the formalities characterizing a testamentary act will have lost their significance. This is not to say a probate court could not, through an accounting procedure or otherwise, supervise the administration of decedents' estates in many instances in a way to permit an actual distribution in accordance with the terms of the contract.[31] Of course when the personal representative succeeds to the estate of the deceased he takes it subject to whatever burdens or encumbrances that exist against it. A contract to devise or bequeath creates an equitable right in the promisee. That equitable right in the promisee constitutes an encumbrance or burden upon the estate and may be asserted by filing a claim in the probate court in the usual manner prescribed for the filing of ordinary claims against a decedent's estate.[32] This type of procedure does not question the admission of the last will to probate. It is a claim against the estate and if recognized might have the effect of consuming part or all the property before the provisions of the will are applied to it. Whether the claim is allowed[33] or denied[34] an appeal

30. A New York court has strongly indicated that a mere contract for adoption cannot give the would-be adopted child any status whatever to contest the will of the allegedly adoptive parent in that state. However, this cannot be regarded as anything more than dicta since in the case in which it was pronounced the contract had actually been made with the decedent's husband, the decedent not being made a party to it. *In re* Bamber's Estate, 147 Misc. 712, 265 N. Y. Supp. 798 (Surr. Ct. 1933). See also the dissenting opinion in Ezell v. Mobley, 160 Ga. 872, 882, 129 S. E. 532, 538 (1925).

31. Schley v. Donlin, 131 Misc. 208, 225 N. Y. Supp. 453 (Sup. Ct. 1927); *In re* Kocher's Estate, 354 Pa. 81, 46 A. 2d 488 (1946). A statute granting rather extensive legal and equitable powers to a probate court might give the court power to settle the contract rights through an accounting procedure or some other appropriate action, but it does not authorize probate of a revoked contractural will. *In re* Lamerdin's Estate, 157 Misc. 431, 284 N. Y. Supp. 608 (Surr. Ct. 1935); *In re* Higgins' Estate, 148 Misc. 30, 266 N. Y. Supp. 503 (Surr. Ct. 1933).

32. Merchants Nat. Bank of Mobile v. Cotnam, 250 Ala. 316, 34 So. 2d 122 (1948); Appeal of Spurr, 116 Conn. 108, 163 Atl. 608 (1933); Downing v. Harris Trust & Savings Bank, 318 Ill. 323, 149 N. E. 256 (1925); *In re* Wert's Estate, 165 Kan. 49, 193 P. 2d 253, *aff'd on rehearing*, 166 Kan. 159, 199 P. 2d 793 (1948); Sard v. Sard, 147 Me. 46, 83 A. 2d 286 (1951); Kalscheuer v. Cooke's Estate, 207 Minn. 437, 292 N. W. 96 (1940); *In re* Schoenbachler's Estate, 310 Pa. 396, 165 Atl. 505 (1933); Ellis v. Cary, 74 Wis. 176, 42 N. W. 252 (1889).

33. Appeal of Spurr, *supra* note 32; Downing v. Harris Trust & Savings Bank, *supra* note 32; *In re* Schoenbachler's Estate, *supra* note 32; Dilger v. McQuade's Estate, 158 Wis. 328, 148 N. W. 1085 (1914).

may be taken and since the right of trial to a jury exists in either event[35] the usual result is a trial de novo. Although this proceeding originates in the probate court the right the promisee seeks to enforce is recognized as a claim in contract and is handled as such without any effort to interfere with the normal administration of the estate or to alter testamentary formalities by the introduction of contractual innovations.

If the promisee is permitted to file exceptions to the executor's inventory, a probate court exercising equity powers might be capable of granting relief upon the contract in this manner without disturbing probate of an inconsistent will. The purpose of such a bill of exceptions is to correct the inventory by seeing that it accurately reflects the items of property included in the decedent's estate and excludes items not within his estate and not subject to administration. It would seem quite proper to exclude property which belonged to the exceptor as beneficiary of a trust. The critical question is whether the court can exercise its equity power to declare a constructive trust in favor of the promisee in a hearing on exceptions to an inventory. Such action by a probate court has been sustained,[36] but it has also been denied on the ground that a hearing on exceptions cannot be used as a substitute remedy for the impression of a constructive trust.[37] The most serious objection is that such a hearing is a summary proceeding unsuited to the remedy sought.

Although relief to the disappointed promisee might be available in the probate court in a few limited situations, it should be remembered that the ultimate wrong is breach of contract and that a breach of contract is not an appropriate ground for either granting or refusing probate to a will. This is far more than a mere formal requirement. It is a requirement dictated by the basic Anglo-American concept of a will. To insist upon it does not in any way deny the validity of contracts to devise or bequeath. It does leave the parties to such contracts to their appropriate legal or equitable relief without necessitating any change in the law of wills.

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34. *In re* Wert's Estate, 165 Kan. 49, 193 P. 2d 253, *aff'd on rehearing,* 166 Kan. 159, 199 P. 2d 793 (1948); Kalscheuer v. Cooke's Estate, 207 Minn. 437, 292 N. W. 96 (1940); Ellis v. Cary, 74 Wis. 176, 42 N. W. 252 (1889).

35. Appeal of Spurr, 116 Conn. 108, 163 Atl. 608 (1933); Downing v. Harris Trust & Savings Bank, 318 Ill. 323, 149 N. E. 256 (1925); Dilger v. McQuade's Estate, 158 Wis. 328, 148 N. W. 1085 (1914).

36. *In re* Barnes' Estate, 108 N. E. 2d 88 (Ohio Ct. Com. Pl. 1950), *aff'd,* 108 N. E. 2d 101 (Ohio App. 1952).

37. *In re* Thrush's Estate, 76 Ohio App. 411, 64 N. E. 2d 839 (1945).

Legal Remedies Available to the Promisee after the Death of the Promisor

The fact that the performance contemplated by one of the parties to a contract is the making of a will should not in and of itself cause any variation in the legal remedies available in the event of a breach. Failure to recognize this principle, together with the effort that is often made to attach a peculiar significance to the will element of the transaction, often hinders, or at least complicates, the plaintiff's prospects for recovery when the agreed will is not made. What is said here applies to a contract to leave property by will. It should not be confused with the performance of services in the hope that the person receiving the services will make testamentary provision for the person rendering them.[38] Neither should it be identified with the rendering of services under circumstances which lend themselves to an implication of a promise to pay.[39]

Where there is a contract to devise or bequeath and the promisee fully performs on his part, if the promisor dies without fulfilling his obligation an ordinary action at law for breach of contract will lie.[40] The action is for breach of contract by the deceased and should be brought against the personal representative in the same way as any other contract claim against the estate. The claim is assignable and may be enforced in the name of the assignee.[41] Ordinarily the measure of damages will be the value of the thing promised by the promisor.[42] Where the thing promised is a specific sum of money or a specific item of preperty the amount of damages is easy of

38. Davison v. Davison, 13 N. J. Eq. (2 Beasley) 246 (Ch. 1861); Le Sage v. Coussmaker, 1 Esp. 187, 170 Eng. Rep. 323 (1794); Osborn v. Governors of Guy's Hospital, 2 Strange 728, 93 Eng. Rep. 812 (1726). Neither is it of any concern that the person receiving the services fully intended to compensate for them by will. "In such action it must appear that the services were rendered under an agreement to devise and not merely that the decedent intended to make a will recognizing such services." Sneed's Ex'r v. Smith, 255 Ky. 132, 137-138, 72 S. W. 2d 1028, 1031 (1934).

39. Lockwood v. Robbins, 125 Ind. 398, 25 N. E. 455 (1890); Kruse's Adm'r v. Corder, 258 Ky. 774, 81 S. W. 2d 600 (1935); Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226, 41 N. W. 905 (1889); 1 Williston, Contracts §§ 36, 91A (rev. ed. 1938).

40. Where such an action is transferred to equity mandamus will issue to compel a trial in the law court to protect the promisee's right to a trial by jury. *Ex parte* Simons, 247 U. S. 231 (1918).

41. Cullen v. Woolverton, 65 N. J. L. 279, 47 Atl. 626 (1900).

42. Roy v. Pos, 183 Cal. 359, 191 Pac. 542 (1920); Strakosch v. Connecticut Trust & Safe Deposit Co., 96 Conn. 471, 114 Atl. 660 (1921); Farrington v. Richardson, 153 Fla. 907, 16 So. 2d 158 (1944); Gordon v. Spellman, 145 Ga. 682, 89 S. E. 749 (1916); Thompson v. Romack, 174 Iowa 155, 156 N. W. 310 (1916); Small's Adm'r v. Peters, 233 Ky. 576, 26 S. W. 2d 491 (1930); Jenkins v. Stetson, 91 Mass. (9 Allen) 128 (1864); Day v. Washburn, 76 N. H. 203, 81 Atl. 474 (1911) (relief actually granted in equity); Williams v. Buntin, 4 Tenn. App. 340 (1927).

determination.[43] If the promise is to give the entire estate or a fractional part thereof an action at law is hardly the appropriate remedy, but if that remedy is entertained the value of the thing promised is still the measure of damages.[44] The difficulty here is with the remedy itself. Before the amount of damages can be fixed the net value of the estate must be ascertained.[45] Since a jury is not a satisfactory body to supervise an estate accounting the law court should decline jurisdiction and transfer the case to equity where the parties will find a forum more adapted to their needs.[46]

An interesting problem in construction is presented by a contract to bequeath "all my personal estate," where the question might well be raised whether or not the promisee is entitled to have debts and costs of administration paid out of real estate. Although there does not appear to be any clear judicial determination on the point[47] the answer should depend upon the intent of the parties and it is more probable that a gift of all personal property remaining in the estate after the normal payment of debts and costs of administration was intended.

Where the consideration given by the promisee consists of services to the promisor, the emphasis sometimes placed upon the difficulty involved in measuring the value of the services,[48] together with what appears to be an occasional dictum to the effect that the measure of damages is the value of the services rendered,[49] tends to create some misunderstanding. Such dicta are usually found in cases denying recovery because the contract was inadequately

43. Newell v. Capelle, 14 F. Supp. 147 (D. Del. 1936), *aff'd*, 86 F. 2d 1007 (3d Cir. 1936) (holding action at law to be the only remedy available); Morrison v. Land, 169 Cal. 580, 147 Pac. 259 (1915) (action for specific performance denied on the theory that an action at law for the sum promised was the only remedy); Exchange Nat. Bank of Tampa v. Bryan, 122 Fla. 479, 165 So. 685 (1936); Halsey v. Snell, 214 N. C. 209, 198 S. E. 633 (1938).

44. Dilger v. McQuade's Estate, 158 Wis. 328, 148 N. W. 1085 (1914) (judgment for such sum as remained after debts and costs of administration were paid).

45. Oles v. Wilson, 57 Colo. 246, 141 Pac. 489 (1914); *In re* Peterson, 76 Neb. 652, 107 N. W. 993 (1906), *aff'd and explained on rehearing*, 76 Neb. 661, 111 N. W. 361 (1907); Estate of Soles, 215 Wis. 129, 253 N. W. 801 (1934).

46. *In re* Peterson, 76 Neb. 652, 107 N. W. 993 (1906), *aff'd and explained on rehearing*, 76 Neb. 661, 111 N. W. 361 (1907).

47. *See* Jenkins v. Stetson, 91 Mass. (9 Allen) 128 (1864) (an opinion involving a contract such as the one here under consideration but failing to deal with the question of abatement between personalty and realty).

48. *See* Small's Adm'r v. Peters, 233 Ky. 576, 26 S. W. 2d 491 (1930).

49. In a case where specific performance was denied on the theory that there was an adequate remedy at law it was indicated that in the action at law the measure of damages would necessarily be the value of the services. Simonson v. Moseley, 183 Minn. 525, 237 N. W. 413 (1931) (contract was oral and involved real estate but Statute of Frauds was not relied upon as a ground for the decision).

proved,[50] cases where the value of the services was the only remedy sought,[51] or where recovery upon the contract was impossible because of the Statute of Frauds or some similar rule.[52] However prevalent such dicta may be, to state the proposition is to refute it. To apply it would constitute a denial of the value of the bargain and a definite impairment of the obligation of contract.[53]

In Wisconsin a peculiar doctrine has emerged concerning contracts in which the promisor agrees to compensate by will in consideration of the promisee's foregoing his right to sue upon a presently existing claim. The contract is treated as one based upon a past or executed consideration and the amount of recovery is limited to the value of the previously existing claim regardless of the value of the thing promised.[54] The Wisconsin court has experienced difficulty distinguishing the recovery granted in such cases from the recovery denied in the case of an agreement to extend the time of payment of a debt without altering the rate or amount.[55] The court has apparently failed to recognize that the embarrassing similarity results, not from the contract itself, but from the erroneous interpretation given the contract by the court. The promisee certainly foregoes something when he abandons his right to sue on a present claim, and the promisor certainly gains something of value when he is permitted continued use of his money until his death. These factors, and not the previous claim, constitute the true consideration for the promisor's agreement to compensate by will, and there should be no interference with the promisee's right to recover the agreed price.[56]

If full performance by the promisee is prevented by the promisor, the value of the thing contracted for may nevertheless be recovered,[57] except that from this measure of damages there should

50. Jones Estate, 359 Pa. 260, 261, 59 A. 2d 50, 51 (1948); Stichler Estate, 359 Pa. 262, 263, 59 A. 2d 51 (1948).

51. Purviance v. Shultz, 16 Ind. App. 94, 95, 44 N. E. 766 (1896) (recovery also limited by the fact that no specific compensation was ever agreed upon); McAllister's Adm'r v. Bronaugh, 113 S. W. 821, 822 (Ky. 1908) (further recovery probably prevented by the Statute of Frauds though that was not referred to in the opinion); Strubble v. Strubble, 42 Ohio App. 353, 354, 182 N. E. 48 (1932), *noted*, 9 Notre Dame Law. 361 (1934).

52. Rudd v. Planters Bank & Trust Co., 283 Ky. 351, 354, 141 S. W. 2d 299, 301 (1940).

53. *See* Frieders v. Frieders' Estate, 180 Wis. 430, 436, 193 N. W. 77, 79 (1923) (dissenting opinion).

54. Frieders v. Frieders' Estate, 180 Wis. 430, 193 N. W. 77 (1923); Murtha v. Donohoo, 149 Wis. 481, 136 N. W. 158 (1912).

55. *Id.* at 485, 136 N. W. at 159-160.

56. Halsey v. Snell, 214 N. C. 209, 198 S. E. 633 (1938); *see* Frieders v. Frieders' Estate, 180 Wis. 430, 436, 193 N. W. 77, 79 (1923) (dissenting opinion).

57. Jenkins v. Stetson, 91 Mass. (9 Allen) 128 (1864).

be deducted the estimated cost the promisee has saved to himself by his nonperformance.[58] In order to be entitled to this remedy it is necessary that the promisee remain in readiness to perform at all times. Failure to do so might be construed as his own breach and prevent his recovering even the value of any part performance actually rendered.[59]

Contracts to devise or bequeath are all too often informal arrangements among relatives or close friends arrived at without the advice of counsel. These arrangements evince a commendable degree of mutual trust and confidence, but unfortunately it is a confidence that is breached in a large number of cases. The promisee who has faithfully performed his share of the bargain often finds enforcement of his contract barred by the Statute of Frauds. In such instances he may resort to an action at law, not to enforce the contract, but to recover compensation for the benefits he has conferred upon the promisor in reliance upon the oral agreement. The action is in the nature of the common counts in assumpsit;[60] and since the consideration given by the promisee is usually services to the promisor, the count will most likely be in quantum meruit where the value of the services rendered will be the measure of damages.[61] Interest on the amount recovered is calculated from the date of judgment rather than from the date of the promisor's death since no liquidated sum existed until judgment was rendered.[62] Recovery for the reasonable market value of the services is permitted even though the promisor has committed no legal wrong in failing to perform an unenforceable contract.[63] The services were rendered in reliance upon the promisor's unenforceable agreement, and a total denial of relief would result in an enrichment of the estate to the detriment of the promisee.[64]

58. Roy v. Pos, 183 Cal. 359, 191 Pac. 542 (1920).

59. Jackson v. Boston Safe Deposit & Trust Co., 310 Mass. 593, 39 N. E. 2d 85 (1942).

60. 2 Corbin, Contracts § 330 (1950).

61. Quirk v. Bank of Commerce & Trust Co., 244 Fed. 682 (6th Cir. 1917); Zellner v. Wassman, 184 Cal. 80, 193 Pac. 84 (1920); Appeal of Spurr, 116 Conn. 108, 163 Atl. 608 (1933); Wallace v. Long, 105 Ind. 522, 5 N. E. 666 (1886); Ruehl v. Davidson's Ex'r, 237 Ky. 53, 34 S. W. 2d 937 (1931); Donovan v. Walsh, 238 Mass. 356, 130 N. E. 841 (1921); Ellis v. Berry, 145 Miss. 652, 110 So. 211 (1926); Lemire v. Haley, 91 N. H. 357, 19 A. 2d 436 (1941); Stewart v. Wyrick, 228 N. C. 429, 45 S. E. 2d 764 (1947); *In re* Anderson's Estate, 348 Pa. 294, 35 A. 2d 301 (1944); Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767 (1905); Nelson v. Christensen, 169 Wis. 373, 172 N. W. 741 (1919).

62. Mussinon's Adm'r v. Herrin, 252 Ky. 495, 67 S. W. 2d 710 (1934).

63. Griffith v. Robertson, 73 Kan. 666, 85 Pac. 748 (1906); see generally 2 Corbin, Contracts § 327.

64. For an opinion emphasizing the equitable nature of the promisee's claim and the unjust enrichment that would result if a remedy were not provided, see Grantham v. Grantham, 205 N. C. 363, 171 S. E. 331 (1933).

Recovery in quantum meruit such as is described above should not be confused with an action for damages for breach of the contract where an entirely different measure of damages is demanded. However, recovery in quantum meruit cannot be had unless the contract even though oral, is proved. Proof of the contract usually includes evidence of the value of the thing promised to be devised or bequeathed. In the quantum meruit action such evidence is not conclusive as to the amount of damages, but it does have some probative value in that it is an indication of what the parties themselves considered the services worth.[65] That the jury should receive testimony concerning the value of the thing promised for any purpose is open to criticism on the ground that it is extremely difficult for them to draw a distinction between using it as evidence of reasonable compensation for services and evidence of an enforceable obligation.[66] However, such evidence is so simliar to declarations against interest it is difficult to justify its exclusion. If the services rendered are of such a personal and intimate nature that their value cannot be reasonably ascertained the value placed upon them by the contract becomes the actual measure of damages.[67]

Of course there might well be circumstances other than the Statute of Frauds in which recovery in quantum meruit can be had upon an unenforceable contract. If a good faith performance is rendered under a contract that is inequitable and unconscionable in nature[68] or one in which events subsequent to its formation tend to make its enforcement a violation of public policy[69] a quantum meruit recovery may nevertheless be had. The same is true of a contract whose terms are not sufficiently certain to be proved in other types

65. Settlemires v. Corum, 304 Ky. 105, 200 S. W. 2d 105 (1947) (evidence primarily for the purpose of showing that the promisee had performed); Ham v. Goodrich, 37 N. H. 185 (1858); Norton v. McLelland, 208 N. C. 137, 179 S. E. 443 (1935); Browne, Statute of Frauds § 126 (5th ed. 1880); 2 Corbin, Contracts § 328; 2 Williston, Contracts § 536 (rev. ed. 1936). The value of the thing promised may be of such an uncertain quantity at the time the contract is entered into that its probative force in the ascertainment of the parties' estimate of the value of the services is neutralized. Where rather indefinite services were rendered in exchange for a promise to leave the bulk of an estate by will, it was held that evidence concerning the value of the estate would have probative effect in determining the value of the services. Quirk v. Bank of Commerce & Trust Co., 244 Fed. 682 (6th Cir. 1917).

66. 4 Page, Wills § 1735.

67. Bowling v. Bowling's Adm'r, 222 Ky. 396, 300 S. W. 876 (1927); Waters v. Cline, 121 Ky. 611, 85 S. W. 209 (1905). Cases of this type have been erroneously cited for the proposition that evidence of the value of the thing promised is not admissible unless the services performed are incapable of valuation. 2 Corbin, Contracts § 328, n. 58.

68. Imthurn v. Martin, 150 Kan. 906, 96 P. 2d 860 (1940).

69. Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896).

of actions.[70] In each of these situations the promisee is permitted to recover the actual value of a performance rendered in reliance upon an unenforceable contract.

Recovery for the value of services rendered is also permitted where the promise to compensate by will is no more definite than that the promisee will be paid.[71] It has been held that if a promisor, after entering into such a contract, executes a will providing for the promisee, that provision becomes the measure of damages even though the will is later revoked.[72] The rule was satisfactory in the case in which it was announced, but it is assumed that this method of estimating damages would not be binding upon a promisee seeking to show that the provision in the revoked will was in fact too small.

Comparatively few cases have been found involving a devise or bequest to the promisee but not in accordance with the terms of the contract; however, where the question has been raised, there is little uniformity in the results reached. In *Green v. Orgain*[73] it was held that even though a will purporting to be the will of the promisor and purporting to fulfill the obligation under the contract was offered for probate the promisee could remain aloof from the probate proceeding and bring action on his contract while the question of probate was still pending. No harm resulted in the case concerned since the paper offered was not properly executed and it appeared certain that it could never be probated. However, the basis for the decision, that is that the promisee can disclaim his rights under the will in any case and enforce the contract, seems more doubtful. If the will were admitted to probate and if it did contain a provision in strict compliance with the contract a renunciation by the promisee should be regarded as a refusal to accept a valid tender of performance and should bar any further attempt on his part to enforce the contract.

It has been held that the acceptance of a legacy by a promisee is such an election as will bar an action on the contract even though the legacy might be an inadequate or incomplete performance.[74]

70. Moreen v. Carlson's Estates, 365 Ill. 482, 6 N. E. 2d 871 (1937); Shakespeare v. Markham, 72 N. Y. 400 (1878) (uncertainty as to parties); Graham v. Graham's Ex'rs, 34 Pa. 475 (1859) (uncertainty as to the thing promised).

71. Succession of McNamara, 48 La. Ann. 45, 18 So. 908 (1896); Kalscheuer v. Cooke's Estate, 207 Minn. 437, 292 N. W. 96 (1940); Steffler v. Schroeder, 12 N. J. Super. 243, 79 A. 2d 485 (App. Div. 1951).

72. *In re* McLean's Estate, 219 Wis. 222, 262 N. W. 707 (1935).

73. 46 S. W. 477 (Tenn. 1898).

74. Noyes v. Noyes, 233 Mass. 55, 123 N. E. 395 (1919) (an equitable action enjoining further proceeding on a judgment previously obtained in an action at law and emphasizing that the promisee could not accept the benefits

Such a position is untenable and is out of harmony with the majority opinion.[75] Mere acceptance of a legacy is no indication of an intent to accept it in complete performance of the obligation due the promisee. The real question for decision is whether or not the legacy should be credited toward payment of the contractual obligation so as to constitute a partial performance. Where the contract was for a bequest of a sum of money and the will provided for only a few small items of personal property, it was held that in an action for damages the value of the items bequeathed would have to be deducted from the sum contracted for.[76] Likewise where a will was executed and approved by the promisee as part of the transaction forming the contract and a subsequent inconsistent will less favorable to the promisee was admitted to probate, it was held that the measure of damages was the difference between the value of the property included in the promised will and the value of that actually bequeathed.[77] In two connected cases holding that a contract for services which does not fix the amount of compensation entitles the promisee to recover the value of the services less any provision actually made for him in the promisor's will,[78] the concurring justice seems to have pointed to a more satisfactory solution. His position is that in every case where the promisee receives something from the

given him under the will and at the same time enforce a judgment nullifying substantial portions of its other parts.)

A New Jersey decision taking a similar position involved a contract for services in which there was no specific provision as to the amount the promisee should receive. The court held that a reasonable amount would be presumed and that acceptance of the provision made by will estopped the promisee from claiming more. Steffler v. Schroeder, 12 N. J. Super. 243, 79 A. 2d 485 (App. Div. 1951). The case might not be regarded as authority in an action involving a more definite promise. However, the better view is that even where the promise is no more definite than that the promisee will be well paid, acceptance of a legacy will not bar further recovery where the legacy is less than the reasonable value of the services rendered. Kalscheuer v. Cooke's Estate, 207 Minn. 437, 292 N. W. 96 (1940); Sidmore v. Allen, 207 Minn. 452, 292 N. W. 95 (1940).

75. Appeal of Spurr, 116 Conn. 108, 163 Atl. 608 (1933); Downing v. Harris Trust & Savings Bank, 318 Ill. 323, 149 N. E. 256 (1925); Rizzo v. Cunningham, 303 Mass. 16, 20 N. E. 2d 471 (1939); Kalscheuer v. Cooke's Estate, 207 Minn. 437, 292 N. W. 96 (1940); Sidmore v. Allen, 207 Minn. 452, 292 N. W. 95 (1940); Jefferson v. Simpson, 83 W. Va. 274, 98 S. E. 212 (1919).

76. *Ibid.* (contract to bequeath from $4,000 to $6,000 held to entitle the promisee to at least $4,000).

77. Downing v. Harris Trust & Savings Bank, 318 Ill. 323, 149 N. E. 256 (1925).

See also Hudson v. Hudson, 87 Ga. 678, 13 S. E. 583 (1891), where in an action by a son on a contract with his father for the father's entire estate in return for services the son was required to account for inter vivos gifts from the father.

78. Kalscheuer v. Cooke's Estate, 107 Minn. 437, 292 N. W. 96 (1940); Sidmore v. Allen, 207 Minn. 452, 292 N. W. 95 (1940).

will there is raised a question of fact whether or not the testamentary provision was intended as a performance of the contract or as a gratuity.[79] If a gratuity was intended, there is no sound reason why the promisee should not accept his gift and still be permitted to enforce his contract without abatement. This has been permitted in actions to recover the value of services rendered in reliance upon unenforceable contracts to devise specific real estate[80] as well as those to devise or bequeath all property owned by the promisor,[81] and the fact that the property left to the promisee by will actually exceeds the value of the services makes no difference.[82]

If equitable defenses are permitted in actions at law, it is practicable in some instances to test the validity of a contract to devise by action in ejectment. If, as is often the case, the promisee is left in possession of the real estate at the promisor's death and the heirs of the promisor seek to eject him he may offer the contract as an equitable defense and counterclaim for specific performance.[83] The Supreme Court of Pennsylvania has declared by way of dicta that the promisee may enforce his contract by bringing his own action in ejectment,[84] but is doubtful if such a preceeding should be entertained until the promisee has established his title through other means.

Specific Performance and Other Equitable Remedies

In many instances actions at law provide satisfactory remedies for breaches of contracts to devise or bequeath. However, the bulk of the litigation in this field is found in chancery. Any inquiry into why this is so raises many questions concerning the nature of the rights and obligations created by such contracts. Is there something inherent in a contract to make a will that gives equity jurisdiction, or is there something peculiar about the social and economic forces leading to the formation of such contracts which dictates terms of the kind ordinarily dealt with in equity?

Probably the case that falls most clearly into equity jurisdiction is that of the contract to devise a particular tract of real estate. Here the analogy to the contract to convey real property is readily apparent. If the grantee of a contract to convey Blackacre is entitled

79. Kalscheuer v. Cooke's Estate, 207 Minn. 437, 442, 292 N. W. 96, 97 (1940) (concurring opinion).
80. Appeal of Spurr, 116 Conn. 108, 163 Atl. 608 (1933).
81. Rizzo v. Cunningham, 303 Mass. 16, 20 N. E. 2d 471 (1939).
82. Appeal of Spurr, 116 Conn. 108, 163 Atl. 608 (1933).
83. Godine v. Kidd, 64 Hun 585, 19 N. Y. Supp. 335 (1892); Morrish v. Price, 293 Pa. 169, 142 Atl. 137 (1928); Shroyer v. Smith, 204 Pa. 310, 54 Atl. 24 (1903); Thrall v. Thrall, 60 Wis. 503, 19 N. W. 353 (1884).
84. Van Meter v. Norris, 318 Pa. 137, 140 Atl. 799, 800 (1935).

to specific performance of his contract, it would seem to follow almost without question that some type of specific relief should be given to the promisee of a contract to devise Blackacre. A difficulty which must be faced at the outset is that by the time the contract to devise is breached the promisor is dead and title to the property concerned has devolved upon others. Whether this devolution takes place by intestate succession or by devise, the persons receiving the property find themselves with a title which would never have been theirs but for the breach of contract by the decedent through whom they must claim. Although the heirs or devisee concerned have committed no wrong themselves if they are permitted to retain the property, they will be unjustly enriched at the expense of the promisee. If the contract is clearly proved, the Statute of Frauds is satisfied, and relief is timely sought it is almost universally held that a bill in equity will result in placing title in the promisee.[85]

The action to enforce a contract to devise is usually in the form of a bill for specific performance and the relief given is usually a decree that the heirs or devisees take legal title as constructive trustees for the benefit of the promisee. Courts and commentators alike often emphasize that this is not true specific performance.[86] It is said that since it is a contract to make a will there can be no breach until the promisor dies; consequently, no action will lie until that time and a dead man cannot be compelled to execute a will. This appears to be a pointless argument which ignores the very nature of the transaction involved. The essential element is the transfer of title at death. The execution of the will is merely the vehicle through which the parties contemplated putting that transfer into effect.[87] When the promisor fails to perform his obligation,

85. Fred v. Asbury, 105 Ark. 494, 152 S. W. 155 (1912); Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929 (1st Dist. 1912); Anson v. Haywood, 397 Ill. 370, 74 N. E. 2d 489 (1947); Kromar v. Kromar, 202 Iowa 1166, 211 N. W. 699 (1927); McDonald v. Scheifler, 323 Mich. 117, 34 N. W. 2d 573 (1948); Anding v. Davis, 38 Miss. (9 George) 574 (1860); Adams v. Moberg, 356 Mo. 1175, 205 S. W. 2d 553 (1947); Teske v. Dittberner, 70 Neb. 544, 98 N. W. 57 (1903); Loffus v. Maw, 3 Giff. 592, 66 Eng. Rep. 544 (1862).

86. West v. Stainback, 108 Cal. App. 2d 806, 240 P. 2d 366 (2d Dist. 1952); Brickley v. Leonard, 129 Me. 94, 149 Atl. 833 (1930); *In re* Soden's Estate, 148 Atl. 12 (N.J. Prerog. Ct. 1929); 4 Page, Wills § 1736; Hirsch, *Contracts to Devise and Bequeath, Part II*, 9 Wis. L. Rev. 388, 396 (1934).

87. Any thought that the making of the will is more than a mere incidental feature to the transfer of title is refuted by a reference to the cases where a constructive trust has been imposed even though the contract made no provision for a will. Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929 (1st Dist. 1912) (referred to as a resulting trust although constructive trust would have been a more accurate designation); Best v. Gralapp, 69 Neb. 811, 96 N. W. 641 (1903), *aff'd on rehearing*, 69 Neb. 815, 99 N. W. 837 (1904). The argument has been unsuccessfully made that a contract to make a will is fully performed by the execution of the will even though it is later revoked.

equity seizes upon the constructive trust as a substitute vehicle to accomplish the same result. It is just as accurate to apply the term specific performance to a remedy of this type as it is to give that designation to a transfer by court decree when a deed is contemplated.

Where specific real estate is involved, the uniqueness of the land may be seized upon as ground for equitable jurisdiction to enforce specific performance in the same way in which that principle is applied in contracts to convey.[88] The same doctrine might well be extended to include contracts for wills of real estate plus a sum of money[89] or real estate plus non-unique personal property[90] on the theory that the contract must be dealt with as a whole and that since equity is given jurisdiction because of the real estate involved it will take jurisdiction for all purposes. But equity does not stop here. Promises to leave an entire estate[91] or a fractional part of an estate[92] by will are often specifically enforced in equity without placing any special significance upon the presence or absence of land or unique chattels as part of the promisor's property. It then becomes neces-

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If the execution of the will were the fundamental item the argument would appear valid. Scham v. Besse, 397 Ill. 309, 74 N. E. 2d 517 (1947).

For a treatment of the distinction between constructive trusts and resulting trusts, see 3 Scott, Trusts § 462.1 (1939).

88. The social and economic importance of land has long been considered such that the remedy at law for breach of a contract to convey is inadequate. The contract may be specifically enforced by either party to it. 3 American Law of Property § 11.68 (Casner ed. 1952); 5 Corbin, Contracts § 1143. Of course there is no occasion for the promisor's seeking specific performance on the contract to devise; consequently, cases on the point are not available.

89. Brickley v. Leonard, 129 Me. 94, 149 Atl. 833 (1930); McCullough v. McCullough, 153 Wash. 625, 280 Pac. 70 (1929). The decree may quiet title to the real estate in the promisee and direct the administrator to pay over the money. A copy of the decree may then be certified to the probate court with direction that it be accepted as an established claim. Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792 (1915).

90. Mickle v. Moore, 193 Ga. 150, 17 S. E. 2d 728 (1941).

91. Bolman v. Overall, 80 Ala. 451, 2 So. 624 (1886); Moumal v. Walsh, 9 Alaska 656 (1940); Barr v. Ferris, 41 Cal. App. 2d 527, 107 P. 2d 269 (4th Dist. 1940); Matthews v. Blanos, 201 Ga. 549, 40 S. E. 2d 715 (1946); Scham v. Besse, 397 Ill. 309, 74 N. E. 2d 517 (1947); West v. Sims, 153 Kan. 248, 109 P. 2d 479 (1941); Howe v. Watson, 179 Mass. 30, 60 N. E. 415 (1901); Laird v. Vila, 93 Minn. 45, 100 N. W. 656 (1904); Sportsman v. Halstead, 347 Mo. 286, 147 S. W. 2d 447 (1941); Brown v. Webster, 90 Neb. 591, 134 N. W. 185 (1912); Stuckey v. Truett, 124 S. C. 122, 117 S. E. 192 (1922); Ellis v. Wadleigh, 27 Wash. 2d 941, 182 P. 2d 49 (1947).

92. Fowler v. Hansen, 48 Cal. App. 2d 518, 120 P. 2d 161 (2d Dist. 1941); Oles v. Wilson, 57 Colo. 246, 141 Pac. 489 (1914); Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S. E. 2d 766 (1940); Chehak v. Battles, 133 Iowa 107, 110 N. W. 330 (1907); Johnson v. Soden, 152 Kan. 284, 103 P. 2d 812 (1940); Jannetta v. Jannetta, 205 Minn. 266, 285 N. W. 619 (1939); Roth v. Roth, 340 Mo. 1043, 104 S. W. 2d 314 (1937); Johnson v. Hubbell, 10 N. J. Eq. (2 Stockton) 332 (Ch. 1855); Morgan v. Sanborn, 225 N. Y. 454, 122 N. E. 696 (1919); Kelley v. Devin, 65 Ore. 211, 132 Pac. 535 (1913); Carstairs v. Bomar, 119 Tex. 364, 29 S. W. 2d 334 (1930).

sary to find something other than the uniqueness of the thing promised as a basis for jurisdiction to grant this unique remedy.

It is frequently stated that specific performance wil be decreed where the promisee's performance is of such a nature as to make its valuation in money difficult or impossible.[93] In view of the fact that contracts to devise or bequeath are often agreements for the rendering of intimate personal services involving companionship, society, or filial obligations the ease with which it may be said that such services are incapable of monetary valuation is readily apparent. The fallacy of relying upon such a theory as a basis for equitable jurisdiction is revealed when it is remembered that there is no necessity for the court's determining the value of the services in an ordinary action at law for damages where the aim is to recover, not the value of the services rendered, but rather the value of the promised performance. The value of the property to be devised or bequeathed is the measure of damages[94] and unless some other obstacle is encountered the remedy at law is quite adequate.

A careful reading of the cases appearing to stand for the proposition that difficulty or impossibility of determining a monetary value of the promisee's performance is ground for specific enforcement will reveal that most of them do not hold that at all. Such declarations are usually found in connection with the equitable fraud theory of relief against the application of the Statute of Frauds where the position is taken that if the promisee's performance is such that he cannot be compensated by a return to him of the consideration paid the promisor will not be permitted to set up the Statute of Frauds as a defense to an action on the contract.[95] The frequency with which contracts for the making of wills are informal oral arrangements has resulted in an unusually large number of

93. Oles v. Wilson, *supra* note 92; Smith v. Nyburg, 136 Kan. 572, 16 P. 2d 493 (1932); Downing v. Maag, 215 Minn. 506, 10 N. W. 2d 778 (1943); Simonson v. Moseley, 183 Minn. 525, 237 N. W. 413 (1931); Sutton v. Hayden, 62 Mo. 101 (1876); Tiggelbeck v. Russell, 187 Ore. 554, 213 P. 2d 156 (1949).

94. See cases cited in notes 42-44 *supra.*

95. White v. Smith, 43 Idaho 354, 253 Pac. 849 (1926); Svanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4 (1899); Teske v. Dittberner, 70 Neb. 544, 98 N. W. 57 (1903); Clark v. Atkins, 188 Va. 668, 51 S. E. 2nd 222 (1949); 2 Corbin, Contracts § 435 (1950); Pomeroy, Specific Performance § 114 (3d ed. 1926).

In jurisdictions refusing to recognize the "equitable fraud" or "hardship" theory of relief against the Statute of Frauds specific performance of the oral contract to devise in return for services is denied. Hooks v. Bridgewater, 111 Tex. 122, 229 S. W. 1114 (1921). Courts refusing to recognize part performance of any kind as ground for taking an oral contract out of the operation of the Statute of Frauds permit an action at law to recover the consideration paid by the promisee and where that consideration consists of services incapable of valuation the value of the thing promised is accepted as their true value. Walker v. Dill's Adm'r, 186 Ky. 638, 218 S. W. 247 (1920).

"equitable fraud" or "hardship" cases in this field. The nature of the promisee's performance is often used as a basis for taking the case out of the operation of the Statute of Frauds. It is then possible to prove the oral contract but some other ground must be found for equitable jurisdiction to enforce specific performance.

The fundamental basis for equitable jurisdiction, inadequacy of the remedy at law, must be found here as well as elsewhere. In cases of contracts to devise or bequeath all or a fractional part of an estate that inadequacy rests, not in any uniqueness of the consideration furnished by the promisee, and not in any unique qualities of the thing promised, but rather in a uniqueness in the manner of ascertaining the thing promised. The thing promised depends upon the value of the estate. This necessarily means the net value.[96] The law court has no adequate means of ascertaining that value while the administration is pending.[97] The proper forum for an accounting of liabilities and a determination of the net amount of a decedent's estate is the probate court. If action on the contract must be postponed until this is done and if the promisee is left to his remedy at law, he is likely to find the property beyond his reach in the hands of the decedent's legal successors and his action barred by non-claim statutes. Adequate relief to the promisee depends upon the power of equity to give specific relief to prevent unjust enrichment. In doing this equity proceeds to act upon the title to the property. In the usual proceeding the executor or administrator and the promisor's successors, whether they be heirs and next of kin or beneficiaries of an inconsistent will, are made parties defendant.[98] A

96. Oles v. Wilson, 57 Colo. 246, 141 Pac. 489 (1914); *In re* Peterson, 76 Neb. 652, 107 N. W. 993 (1906), *aff'd and explained on rehearing*, 76 Neb. 661, 111 N. W. 361 (1907); Estate of Soles, 215 Wis. 129, 253 N. W. 801 (1934).

97. Action at law for a judgment based upon the net value of an estate should not be entertained in any event. The law court is not equipped to handle estate accounting and a jury is not competent to determine the value of an estate. Grant v. Grant, 63 Conn. 530, 29 Atl. 15 (1893); *In re* Peterson, 76 Neb. 652, 107 N. W. 993 (1906), *aff'd and explained on rehearing*, 76 Neb. 661, 111 N. W. 361 (1907). *See also* Trower v. Young, 40 Cal. App. 2d 539, 105 P. 2d 160 (4th Dist. 1940). Conceivably an action at law could be maintained and a judgment rendered for the net value of the estate thereby making a remedy at law possible. Relief of this kind has been granted in Wisconsin. Dilger v. McQuade's Estate, 158 Wis. 328, 148 N. W. 1085 (1914). But equitable relief is clearly better adapted to the doing of complete justice in such cases and the fact that there is a possible remedy at law should not deprive equity of jurisdiction. O'Connor v. Immele, 77 N. D. 346, 43 N. W. 2d 649 (1950).

98. Bolman v. Overall, 80 Ala. 451, 2 So. 624 (1886); Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007 (2d Dist. 1912); Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S. E. 2d 766 (1940); Downing v. Maag, 215 Minn. 506, 10 N. W. 2d 778 (1943); Adams v. Moberg, 356 Mo. 1175, 205 S. W. 2d 553 (1947); Clark v. Atkins, 188 Va. 668, 51 S. E. 2d 222 (1949).

constructive trust is then impressed upon the entire estate. Administration proceeds in the usual way so far as payment of debts and expenses is concerned, but the decree provides for transfer of the entire estate or fractional part thereof as the case may be to the promisee at the time for distribution.[99]

Although both the personal representative and the heirs or devisees are usually made parties to an action for specific performance of a contract to make a will, a determination of who are the necessary parties depends upon the nature of the property involved and the type of the relief sought. If the estate consists entirely of personal property, the personal representative is the only necessary party,[100] but if real estate is involved the heirs or devisees must be named.[101] Although both the personal representative and the promisor's successors would appear to be proper parties in any event, since the decree operates only upon title to the property in the hands of the successors,[102] it has been said that the personal representative is not even a proper party unless there is a prayer for some type of relief against him.[103] The relief often sought in such cases is that the executor or administrator be enjoined from distributing the property to anyone other than the promisee.[104] Such an injunction is sometimes desirable and may be obtained while a final determination of the rights under the contract is still pend-

99. The manner used to get legal title to the promisee is of no particular significance. In many instances the promisee is adjudged the true owner and the decree itself serves to transfer title. Cox v. Hutto, 216 Ala. 232, 113 So. 40 (1927); Bray v. Cooper, 145 Kan. 642, 66 P. 2d 592 (1937); Adams v. Moberg, *supra* note 98; Baylor v. Bath, 189 S. C. 269, 1 S. E. 2d 139 (1938). The heirs or devisees are sometimes directed to convey to the promisee. Decrees to this effect usually carry the added provision that if the heir or devisee fails to convey, the clerk of the court or a commissioner will execute the formality for him. Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007 (2d Dist. 1912); Anson v. Haywood, 397 Ill. 370, 74 N. E. 2d 489 (1947); Stuckey v. Truett, 124 S. C. 122, 117 S. E. 192 (1922); Goilmere v. Battison, 1 Vern. 48, 23 Eng. Rep. 301 (1682). The executor may be directed to convey the land and deliver the personalty to the promisee. Scham v. Besse, 397 Ill. 309, 74 N. E. 2d 517 (1947); *In re* Stevens' Will, 192 Misc. 179, 78 N. Y. S. 2d 868 (Surr. Ct. 1948); Brock v. Noecker, 66 N. D. 567, 267 N. W. 656 (1936). If the prayer is for the property or its value it is within the discretion of the court to direct that the property be turned over to the promisee or that it be sold and he be given the proceeds. Estate of Soles, 215 Wis. 129, 253 N. W. 801 (1934).

100. Rubalcava v. Garst, 56 N. M. 647, 248 P. 2d 207 (1952).

101. Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007 (2d Dist. 1912); Rubalcava v. Garst, 56 N. M. 647, 248 P. 2d 207 (1952).

102. "The district court judgment has nothing to do with the devolution of title by testation or descent. That devolution is adjudged by the probate court. Then, and not until then, the district court judgment operates on the title, as by the decree of distribution it is confirmed in the distributees." Jannetta v. Jannetta, 205 Minn. 266, 271, 285 N. W. 619, 622 (1939).

103. Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007 (2d Dist. 1912).

104. *Ibid.*; Svanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4 (1899); Morgan v. Sanborn, 225 N. Y. 454, 122 N. E. 696 (1919).

ing.[105] Since the claim made in any event is ultimately a claim by the promisee against the promisor's legal successors, if the contract is enforced court costs should be borne by the heir or devisee, not the estate.[106]

The action for specific performance is not a claim against the estate. It is a claim of title to the estate.[107] The decision that the executor is the only necessary party defendant to a binding decree as to the personalty[108] rests, not upon the executor's power to defend claims against the estate, but upon the executor's title to the personal property in the estate. The right of the promisee to recover is not affected by his failure to make objection to distribution and settlement of the estate,[109] his own petition for issuance of letters,[110] or even the filing of his own claim against the estate.[111] It is a claim of property which is completely independent of probate and may be brought after the probate decree has become final.[112]

Emphasis upon the distinction between a claim of title to property and a claim against the estate has led to the granting of specific performance of contracts to bequeath a definite sum of money in a few instances.[113] It is submitted that this is an erroneous application of the claim-of-title principle. It is a principle to be used as an explanation of equitable relief when no adequate remedy at law exists and not as a basis for equitable jurisdiction even where adequate relief could be had in an action for damages. If the promisee's only claim is for a specific sum of money his remedy at

105. Jannetta v. Jannetta, 205 Minn. 266, 285 N. W. 619 (1939).

106. Turner v. Theiss, 129 W. Va. 23, 38 S. E. 2d 369 (1946).

107. Moumal v. Walsh, 9 Alaska 656 (1940); Fred v. Asbury, 105 Ark. 494, 152 S. W. 155 (1912); Trower v. Young, 40 Cal. App. 2d 539, 105 P. 2d 160 (4th Dist. 1940); Ashbauth v. Davis, 71 Idaho 150, 227 P. 2d 954 (1951); Brickley v. Leonard, 129 Me. 94, 149 Atl. 833 (1930); Svanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4 (1899); Erwin v. Mark, 105 Mont. 361, 73 P. 2d 537 (1937); McCullough v. McCullough, 153 Wash. 625, 280 Pac. 70 (1929).

In many instances the promisee has the choice of claiming title to the estate through an action for specific performance or of pursuing his claim against the estate through other means. The application of the non-claim statutes might vary depending upon the remedy sought. See text at notes 222-229 *infra*.

108. Rubalcava v. Garst, 56 N. M. 647, 248 P. 2d 207 (1952).

109. Mosloski v. Gamble, 191 Minn. 170, 253 N. W. 378 (1934); Phalen v. U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943 (1906).

110. Mosloski v. Gamble, *supra* note 109; Thrall v. Thrall, 60 Wis. 503, 19 N. W. 353 (1884).

111. *Ibid.*

112. White v. Smith, 43 Idaho 354, 253 Pac. 849 (1926).

113. Wilkins v. Anderson, 172 Md. 700, 191 Atl. 433 (1937); Erwin v. Mark, 105 Mont. 361, 73 P. 2d 537 (1937) (emphasizing the promisee's position as being that of a legatee). *See* Sheffield v. Baker, 201 Ark. 527, 145 S. W. 2d 347 (1940) (contract not sufficiently proved but an indication that equity would have granted relief if it had been).

law through an action against the personal representative is complete and readily available.[114]

Of course the fact that the thing promised is a definite sum of money will not prevent jurisdiction in equity if there are special circumstances making the remedy at law inadequate and the promisee is still in good conscience entitled to relief. In *Ohlendiek v. Schuler*[115] the promisee was an enemy alien at the time of the promisor's death and as such was barred from bringing action in the American courts. But two years later his status as an enemy alien was removed, but by this time action at law was barred by the statute of limitations. Equity nevertheless entertained an action for specific performance.[116] Where the promisor conveys most of his property to volunteers prior to his death so that an action against the personal representative would be ineffective the grantees may be declared constructive trustees and an equitable lien imposed to the extent of the promisee's claim.[117]

Equity will intervene to recover the property from third persons when the promisor makes inter vivos transfers in bad faith and in contravention of the contract. An inter vivos conveyance of specific real estate to one having knowledge that it is the subject matter of a contract to devise is ineffective against the promisee and will be set aside upon his petition after the death of the promisor.[118] The same rule will apply to a transfer of a particular tract of land made in bad faith to a mere volunteer even though the contract is in general terms for an entire estate.[119] If the contract includes par-

114. Newell v. Capelle, 14 F. Supp. 147 (D. Del. 1936), *aff'd* 86 F. 2d 1007 (3d Cir. 1936); Zellner v. Wassman, 184 Cal. 80, 193 Pac. 84 (1920); Morrison v. Land, 169 Cal. 580, 147 Pac. 259 (1915); Welsh v. Hour, 100 N. J. Eq. 417, 136 Atl. 327 (Ch. 1927).

115. 299 Fed. 182 (6th Cir. 1924).

116. Of course in the absence of such extenuating circumstances the fact that an action is barred by the statute of limitations is not the kind of inadequacy of legal remedy as will give equity jurisdiction. Shive v. Barrow, 88 Cal. App. 2d 838, 199 P. 2d 693 (2d Dist. 1948).

117. West v. Stainback, 108 Cal. App. 2d 806, 240 P. 2d 366 (2d Dist. 1952).

118. Kremar v. Kremar, 202 Iowa 1166, 211 N. W. 699 (1927); Parsell v. Stryker, 41 N. Y. 480 (1869). Where the conveyance is to a bona fide purchaser if the proceeds can be traced into the estate a constructive trust will be impressed there. Dillon v. Gray, 87 Kan. 129, 123 Pac. 878 (1912). Where the status of bona fide purchaser is raised actual notice of the contract is usually found. It would seem that constructive notice could be given by recording in the same way contracts to convey are recorded. *See* Kremar v. Kremar *supra*.

119. Johnson v. Soden, 152 Kan. 284, 103 P. 2d 812 (1940); Hickman v. Harrell, 211 S. W. 2d 374 (Tex. Civ. App. 1948); Allen v. Ross, 199 Wis. 162, 225 N. W. 831 (1929). The fact that grantees of grantees of the promisor are involved makes no difference so long as all are mere volunteers. Oswald v. Nehls, 233 Ill. 438, 84 N. E. 619 (1908).

ticular real estate and identified non-unique chattels and both are transferred to a volunteer and the promisor's estate remains solvent, the promisee may obtain a decree vesting title to the realty in himself and awarding damages against the executor in the amount of the value of the personalty.[120] If the estate is insolvent and the property can be traced, a constructive trust should be impressed upon both realty and personalty in the hands of transferees.[121] Even where the property cannot be traced a decree has been awarded that the transferees pay over a sum of money equal to its value.[122] While it is clear that the promisee is entitled to follow the property into the hands of volunteers so long as it can be traced, recovery of damages would seem to involve converting innocent donees into wrongdoers and should probably be denied.

Further difficulties might arise where there is a contract for the devise of specific real estate and the promisor sells the subject matter of the contract to a bona fide purchaser. It has been held that if the proceeds of the sale are used to buy other land a remedy in the nature of specific performance is available to compel a conveyance of the substituted land to the promisee.[123]

The general rules restricting or limiting the relief available wherever specific performance is sought are not altered or varied by the fact that a promise to make a will is involved. The requirement that the contract be fair and reasonable demands that the consideration be not grossly disproportionate.[124] Contracts to devise or bequeath usually involve agreements for some type of support, care, or maintenance of the promisor. If the care is to continue only so long as the promisor's funds last and the promisee is to receive the promisor's entire estate in case of his demise before that time, the contract will not be specifically enforced even though the promisee fully performs.[125] However, if the promisee binds himself to care for the promisor for his entire life the fact that the promisor dies when only a small amount of care has been rendered will not affect the promisee's right to receive the entire estate.[126] An important factor which runs throughout these contracts is that they are usually arrangements among relatives or very close friends,

120. Ragsdale v. Achuff, 324 Mo. 1159, 27 S. W. 2d 6 (1930).
121. Ralyea v. Venners, 155 Misc. 539, 280 N. Y. Supp. 8 (Sup. Ct. 1935).
122. Wright v. Wright, 215 Ky. 394, 285 S. W. 188 (1926).
123. Colby v. Street, 146 Minn. 290, 178 N. W. 599 (1920).
124. Sportsman v. Halstead, 347 Mo. 286, 147 S. W. 2d 447 (1941); *In re* Byrne's Estate, 122 Pa. Super. 413, 186 Atl. 187 (1936).
125. Imthurn v. Martin, 150 Kan. 906, 96 P. 2d 860 (1939).
126. Matthews v. Blanos, 201 Ga. 549, 40 S. E. 2d 715 (1946).

and a contract which might appear unfair or unconscionable between strangers might be entirely reasonable between near relatives.[127] It is also quite possible that a contract which seems altogether proper when made might be rendered unconscionable by subsequent events. In *Flowers v. Roberts*[128] a contract requiring the promisee and his family to move into the home of an aged relative and care for her was involved. Extremely strained relations later developed between the parties and ejectment was brought against the promisee who claimed title and a right to specific enforcement of his contract. The court denied relief to the promisee but indicated that if harmony was later restored and performance by him became practicable a remedy might be granted. Some courts hold that a contract by which an unmarried person agrees to leave his entire estate by will is by its nature unfair to a subsequent spouse and will not be specifically enforced against such spouse.[129] Wherever specific relief is denied because of the unfairness or unreasonableness of the contract the promisee may recover at law in quantum meruit.

The enforcement of specific performance is sometimes prevented by the promisee's failure to completely fulfill his own obligations.[130] The promisee or third party beneficiary may also lose his right to any relief whatever by conducting himself in a manner inconsistent with the contract.[131]

A rule often pronounced is that in order to sustain a decree for specific performance the contract must show a higher degree of certainty than is required to sustain an action at law.[132] There is little indication from the cases that the rule is of any force except to the extent to which it may be said that more evidence is required to prove an enforceable contract either in law or equity than is required to rebut a presumption that services were performed

127. Parsell v. Stryker, 41 N. Y. 480 (1869).
128. 220 S. C. 110, 66 S. E. 2d 612 (1951).
129. Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896).
130. Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478 (1951). Specific performance has been denied even where full performance by the promisee was prevented by the promisor. Roy v. Pos, 183 Cal. 359, 191 Pac. 542 (1920). But if the promisee has substantially performed and has held himself in readiness to complete the performance an omission which was made with the consent of the promisor should not hinder an action for specific enforcement of the contract. Ellis v. Wadleigh, 27 Wash. 2d 941, 182 P. 2d 49 (1947). If the promisee's default consists of a failure to compensate the promisor for certain items for which he was obligated specific performance may be decreed upon condition that payments are made. Kelley v. Dodge, 334 Mich. 499, 54 N. W. 2d 730 (1952).
131. Wolf v. Rich, 154 Kan. 636, 121 P. 2d 270 (1942).
132. Ward v. Ward, 94 Colo. 275, 278, 30 P. 2d 853, 854 (1934); Anderson v. Whipple, 71 Idaho 112, 124, 227 P. 2d 351, 358 (1951).

gratuitously.[133] An agreement to reward a family for care and maintenance rendered the promisor[134] or to give the promisee as much as any relation of the promisor[135] would each appear to be too uncertain by any standard to be specifically enforced. But courts frequently declare that a contract to make a will may be specifically enforced if its terms are reasonably certain.[136] In *Lawrence v. Prosser*[137] there was a contract to "provide amply" for the promisee. Subsequently a will was made which appeared to carry out the contract. A later will revoked the first and left only a small legacy to the promisee. It was held that whatever certainty the contract lacked was supplied by the first will. In *Morgan v. Sanborn*[138] a husband and wife contracted with each other that the survivor of them would distribute their entire property among the next of kin of each of them according to his or her discretion. The wife was the survivor and it was her discretion to distribute the entire amount to her own next of kin. The next of kin of the husband obtained a decree of specific performance giving them one-half the property.

Lack of mutuality of remedy is occasionally given potency as a defense to an action for specific performance to devise in return for services rendered.[139] However, it is ordinarily recognized, here as well as elsewhere in contract law, that since the promisee has already fully performed the services the fact that he could not have been compelled to perform them will not prevent him from obtaining specific relief.[140]

Direct actions for specific performance or the establishment of constructive trusts are not the only channels through which equity may move to secure the promisee's right to the property. Reference has already been made to counterclaims for specific performance in ejectment actions where equitable defenses to actions at law are permitted.[141] The promisee's rights may also be litigated in an action brought against him by the promisor's successors to quiet

133. Long v. Rumsey, 12 Cal. 2d 334, 84 P. 2d 146 (1938).
134. Shakespeare v. Markham, 72 N. Y. 400 (1878).
135. Graham v. Graham's Ex'rs, 34 Pa. 475 (1859).
136. Ellis v. Wadleigh, 27 Wash. 2d 941, 949-951, 182 P. 2d 49, 53-54 (1947).
137. 88 N. J. Eq. 43, 101 Atl. 1040 (Ch. 1917).
138. 225 N. Y. 454, 122 N. E. 696 (1919).
139. Martin v. Martin, 230 S. W. 2d 547 (Tex. Civ. App. 1950).
140. Bolander v. Godsil, 116 F. 2d 437 (9th Cir. 1940); Ashbauth v. Davis, 71 Idaho 150, 227 P. 2d 954 (1951); Oswald v. Nehls, 233 Ill. 438, 84 N. E. 619 (1908); Bray v. Cooper, 145 Kan. 642, 66 P. 2d 592 (1937); Howe v. Watson, 179 Mass. 30, 60 N. E. 415 (1901); Sutton v. Hayden, 62 Mo. 101 (1876); Burdine v. Burdine's Ex'r, 98 Va. 515, 36 S. E. 992 (1900); 5 Corbin, Contracts §§ 1180, 1189.
141. See text at notes 83-84 *supra*.

their title.[142] Some courts have permitted the promisee to bring his own action to quiet title.[143] While there is no substantive difference between the result reached in this type of action and an action to impress a constructive trust, the suit to quiet title in the promisee raises theoretical questions of no small consequence. In the strict sense there is no basis for an action to quiet title since the promisee does not have any legal title.[144] Therefore, it becomes necessary for the decree quieting the title to also serve as a transfer of title. A prayer that the title be quieted is sometimes made a part of a petition to impress a constructive trust[145] or to set aside an inter vivos conveyance by the promisor.[146]

Where an action is brought for specific enforcement but that relief is denied because of the Statute of Frauds[147] or because of a partial default by the promisee[148] equity will retain jurisdiction to award compensation for the performance rendered. The measure of the award in such cases is the value of the promisee's performance, not the value of the thing promised.[149] An equitable lien for the amount of the award should be established against the property promised.[150]

If the promisee is one of a number of heirs or devisees of the promisor his right to the property may be determined in an action

142. Chehak v. Battles, 133 Iowa 107, 110 N. W. 330 (1907).

143. Mountz v. Brown, 119 Ind. App. 38, 81 N. E. 2d 374 (1948); Krcmar v. Krcmar, 202 Iowa 1166, 211 N. W. 699 (1927); Best v. Gralapp, 69 Neb. 811, 96 N. W. 641 (1903), *aff'd on rehearing*, 69 Neb. 815, 99 N. W. 837 (1904). The suit to quiet title may be maintained against a grantee who received a conveyance from the promisor without consideration. McCullom v. Mackrell, 13 S. D. 262, 83 N. W. 255 (1900).

144. *See* Kelley v. Devin, 65 Ore. 211, 216, 132 Pac. 535, 536 (1913).

145. Trower v. Young, 40 Cal. App. 2d 539, 105 P. 2d 160 (4th Dist. 1940).

146. Mau v. McManaman, 29 Cal. App. 2d 631, 85 P. 2d 209 (3d Dist. 1938).

147. Thomas v. Feese, 21 Ky. L. Rep. 206, 51 S. W. 150 (1899); Grantham v. Grantham, 205 N. C. 363, 171 S. E. 331 (1933); *In re* Byrne's Estate, 122 Pa. Super. 413, 186 Atl. 187 (1936).

148. Hodgson v. Martin, 90 Ore. 105, 166 Pac. 929 (1917), *modified and aff'd*, 90 Ore. 108, 175 Pac. 671 (1918).

149. Grantham v. Grantham, 205 N. C. 363, 171 S. E. 331 (1933).

150. Worthwhile authority on the establishment of the lien has not been found. Such a lien was established in Thomas v. Feese, 21 Ky. L. Rep. 206, 51 S. W. 150 (1899). That case involved a contract to leave an entire estate as compensation for services. The estate at the time of the contract and at the time of the promisor's death consisted principally of two small tracts of real estate. The court seemed to treat the contract in the first instance as one to compensate for services hence ground for not applying the Statute of Frauds and secondly as one to devise particular real estate therefore ground for establishing the lien.

Where there is a contract for an entire estate and the promisor repudiates before the promisee has completed his performance the promisee will not be entitled to a lien in an action for damages while the promisor is still alive. Johnston v. Myers, 138 Iowa 497, 116 N. W. 600 (1908).

brought against him for partition of the premises.[151] Occasionally the promisor leaves a will in conformity with the contract but wrongfully or in bad faith conveys the property to others prior to his death. If the transferees are not bona fide purchasers the conveyance will be set aside and the property permitted to pass under the will.[152] Even a conveyance of real estate which took place prior to the formation of the contract may be cancelled in this manner if the deed was not recorded and the promisee rendered a full performance without notice of its existence.[153]

A remedy which does not seem to have been used but which might be practicable in some instances is a bill of interpleader brought by the executor or administrator. By this procedure the rival claimants could be brought before the court and their respective rights determined before distribution is made.[154]

Contracts to devise or bequeath are by their nature arrangements for the final winding up of the affairs of the promisors. Such a final winding up is likely to include a plan for disposition of a home, a business involving real property, an entire estate, or a fractional part of an estate. Agreements of this kind are without adequate remedies at law. Particular circumstances might arise which would render inadequate the legal remedy for a breach of contract to bequeath a sum of money or a non-unique chattel, but unless such peculiar circumstances are actually present there is no justification for equitable intervention in these cases.

Priority and Abatement

Very little direct authority is available on the position of the promisee of a contract to make a will with respect to the claims of creditors and legatees. Statements can be found in the cases that the promisee's claim is not a claim against the estate but a claim of property which is itself subject to claims against the estate;[155] that

151. Naylor v. Shelton, 102 Ark. 30, 143 S. W. 117 (1912); Van Tine v. Van Tine, 15 Atl. 249 (N.J. Eq. 1888).

152. Allen v. Ross, 199 Wis. 162, 225 N. W. 831 (1929).

153. Larkins v. Howard, 252 Ala. 9, 39 So. 2d 224 (1949).

154. In Day v. Washburn, 76 N. H. 203, 81 Atl. 474 (1911) the promisee of a contract to devise or bequeath an entire estate brought action for specific performance naming both the administrator and the legatees of an inconsistent will as defendants. In sustaining equitable jurisdiction to grant the relief prayed for the court treated the action as if it were a bill of interpleader by which the administrator had brought the opposing parties before the court. The administrator was then directed to distribute the estate to the promisee leaving no property upon which the will could operate.

If the promisee is also the administrator he may establish his title to the property in a bill against the heirs for settlement of the estate. Rose v. Reese, 290 Ky. 356, 160 S. W. 2d 614 (1941).

155. O'Connor v. Immele, 77 N. D. 346, 353, 43 N. W. 2d 649, 654 (1950).

it is not part of the estate and not subject to claims against the estate;[156] that it is a legacy which must abate with other legacies;[157] that it ranks with other creditors;[158] and many other apparently conflicting declarations. These expressions are usually unaccompanied by any analysis of the nature of the promise being enforced and are most often found in cases where there is not such insufficiency of assets as to necessitate any actual decision on priorities.

Whatever rights the promisee might have are rights arising out of contract and the nature of the contract must be taken into account in any consideration of priorities. If the contract is for specific real estate or unique chattels the promisee acquires an equitable right to the property concerned when the contract is entered into. This equitable right is on the same footing as the right acquired by a contracting vendee in similar circumstances and should not be defeated by anyone other than a bona fide purchaser.[159] If the promisee has fully performed when the promisor dies the equitable right to ownership and possession passes to him immediately and cannot be subjected to claims against the estate.[160] It is a right of ownership which may be asserted after the time permitted for the filing of claims by creditors has passed.[161]

In *Legro v. Kelley*[162] the promisee of a contract to bequeath certain unique personalty was in possession of the property when the promisor died. The executrix brought action for possession. Although there were unpaid creditors and no other property in the estate the court held that the promisee was entitled to the property and that it did not even have to go through the process of administration.

The promisee of a contract to will all or a fractional part of the promisor's estate also has an equitable right capable of being specifically enforced. It too is a right to title, not a claim against the

156. "On the contrary, the right to recover is based upon the fact that the property claimed does not belong to the estate, but belongs to the person asserting title. . . ." Fred v. Asbury, 105 Ark. 494, 499, 152 S. W. 155, 157 (1912).

157. Sard v. Sard, 147 Me. 46, 51, 83 A. 2d 286, 290 (1951); Erwin v. Mark, 105 Mont. 361, 373-374, 73 P. 2d 537, 540-541 (1937).

158. Searcy v. Clark, 190 Ark. 1069, 1072, 82 S. W. 2d 839, 840 (1935).

159. Legro v. Kelley, 311 Mass. 674, 42 N. E. 2d 836 (1942).

160. An appropriate form of a decree for specific performance would be one vesting title in the promisee "free and clear of any and all claims or debts of the estate of" the promisor. Adams v. Moberg, 356 Mo. 1175, 1185, 205 S. W. 2d 553, 558 (1947).

161. Fred v. Asbury, 105 Ark 494, 152 S. W. 155 (1912); Brickley v. Leonard, 129 Me. 94, 149 Atl. 833 (1930); New England Trust Co. v. Spaulding, 310 Mass. 424, 38 N. E. 2d 672 (1941) (option to buy unique personal property); McCullough v. McCullough, 153 Wash. 625, 280 Pac. 70 (1929).

162. 311 Mass. 674, 42 N. E. 2d 836 (1942).

estate.[163] It differs materially from the rights under a contract to devise a specific thing in that it does not purport to give the promisee any right to any particular property either at the time of the formation of the contract or at the death of the promisor. By the terms of the contract the promisee is entitled to what is left at the promisor's death. Inter vivos obligations of the promisor must be met before there is anything left for the promisee.[164] The promisee did not contract for and is not entitled to the status of a creditor.[165] The contract creates rather than removes the need for an administration.[166]

It is concerning this type of contract that it is accurate to say that the right acquired by the promisee is a property right in the estate which is itself subject to claims against the estate.[167] To this it must be added that claims of legatees and devisees are not claims against the estate. These are claims of property which are subordinate to the right of the promisee. The satisfaction of the contract takes the property out of the estate as soon as all administration expenses and inter vivos obligations are paid leaving nothing upon which an inconsistent will can operate.[168]

A contract for a bequest of a specific sum of money or a non-unique chattel is materially different from either of the two types of contracts referred to above and raises different problems in priority and abatement. The promisee acquires a right to receive property or money at the promisor's death, but there is not involved any uniqueness which can give the promisee an equitable right to any particular item of property. In the event of a breach he can

163. Moumal v. Walsh, 9 Alaska 656 (1940); Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007 (2d Dist. 1912); Ashbauth v. Davis, 71 Idaho 150, 227 P. 2d 954 (1951); Svanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4 (1899); O'Connor v. Immele, 77 N. D. 346, 43 N. W. 2d 649 (1950).

164. *See* Brown v. Webster, 90 Neb. 591, 134 N. W. 185 (1912); Estate of Soles, 215 Wis. 129, 253 N. W. 801 (1934).

165. Ashbauth v. Davis, 71 Idaho 150, 227 P. 2d 954 (1951).

Where the consideration for an agreement to leave an entire estate was services to be rendered by the promisee, in awarding damages for the value of the services the Kentucky Court of Appeals seems to have given the promisee priority over a judgment creditor of the estate. The basis for the decision is too uncertain to constitute reliable authority but it appears that the court conceived of the contract as one to devise particular real estate in which the priority was given. Thomas v. Feese, 21 Ky. L. Rep. 206, 51 S. W. 150 (1899).

166. Wallace v. Hill, 207 Okla. 319, 249 P. 2d 452 (1952).

167. O'Connor v. Immele, 77 N. D. 346, 43 N. W. 2d 649 (1950).

168. *In re* Peterson, 76 Neb. 652, 107 N. W. 993 (1906), *aff'd and explained on rehearing*, 76 Neb. 661, 111 N. W. 361 (1907); Day v. Washburn, 76 N. H. 203, 81 Atl. 474 (1911); Estate of Soles, 215 Wis. 129, 253 N. W. 801 (1934). If the contract is for a fractional part of the estate that fractional part is calculated after all debts and administration costs are paid. Lang v. Chase, 130 Me. 267, 155 Atl. 273 (1931).

be fully compensated in money. This lack of a right to any specific property would appear to negate any attempt to claim a priority over other bona fide obligees of the promisor. At the same time the contract is for a definite value. It is not a contract for what is left when all other obligations are provided for. There is no reason why a contract to pay $100 at death should have any higher or lower priority than a contract to pay $100 on demand or at a fixed date which is still future.

It has been said that a contract to bequeath a specific sum of money or other non-unique personal property is merely a contract that the promisee will be a legatee to that extent in the promisor's will.[169] If he is only a legatee, not only are his rights subordinate to all creditors, but his claim must abate with other legacies in the event there are insufficient assets to pay them all in full. Such a position is unsound. It has been taken in cases where no insufficiency of assets was indicated and no actual decision on the matter called for. Should the dicta announced be applied the effectiveness of such contracts would be destroyed. The promisor could always provide for legacies so large that the rules of abatement would virtually eradicate the rights of the promisee.

Recognition that the promisee has a contractual right which is not illusory but does not have a claim to any specific property demands that he be treated as an unsecured creditor of the estate. If assets are insufficient to pay all creditors of that class the rights of the promisee must abate ratably with others, but he as well as other creditors must be fully paid before there is anything left for legatees.[170]

The clarity of the promisee's position as well as the ease with which priority and abatement problems are resolved varies directly with the emphasis the court places upon the nature of the particular contract before them. Efforts to classify the promisee as a legatee or a creditor are misleading rather than helpful. He should be recognized as a promisee of a contract to make a will. The key to his

169. *See* Sard v. Sard, 147 Me. 46, 51, 83 A. 2d 286, 290 (1951); Erwin v. Mark, 105 Mont. 361, 373-374, 73 P. 2d 537, 540-541 (1937); *In re* Hoyt's Estate, 174 Misc. 512, 21 N. Y. S. 2d 107 (Surr. Ct. 1940) (involving a distributive share of the surviving spouse).

170. Clear authority on this point is strangely lacking. For a case involving a promissory note payable at death see Searcy v. Clark, 190 Ark. 1069, 82 S. W. 2d 839 (1935). But see Krell v. Codman, 154 Mass. 454, 28 N. E. 578 (1891), where a promise to pay six months after death was involved. No priority or abatement problem was before the court but it was indicated that if such a question had been raised the claim of the promisee would be subordinate to all other debts but prior to legacies. It should be noted that the fact that the promise was under seal but without consideration might account for this peculiar suggestion as to priority.

position with reference to legatees, creditors, or other claimants of the property left by the promisor is to be found in the terms of the contract. In some instances this position is comparable to that of a creditor, in others it is comparable to that of a legatee, and in still others it is unlike either creditor or legatee.

Effect of Contract Upon Dower, Curtesy, or Other Right of Surviving Spouse

There is considerable conflict of authority concerning the rights of surviving spouses of promisors of contracts to make wills. Not only is there the usual confusion resulting from every effort to unite the contractual with the testamentary concept, but the tendency of the courts to extend preferential treatment to the rights of spouses supplies an additional complicating factor. The usual problem concerning marital rights in this area is that of the promisor who, prior to the time of his marriage, contracts to make a will in favor of some third person. Such a contract is an existing obligation at the time the marriage is entered into. It is a liability which has the effect of removing property from the estate and would appear to be no less a liability after the marriage than it was before whether the spouse knew of its existence or not.

If a contract to devise a specific tract of real estate creates in the promisee an unconditional right to receive that real estate upon the death of the promisor it would appear certain that a marriage of the promisor after entering into such a contract could not operate to give his wife any dower rights in the property concerned.[171] It would appear equally certain that if the right created in the promisee represents an obligation against the estate of the promisor the property should not be included as part of the promisor's estate for the purpose of calculating the surviving spouse's distributive share.[172] A literal interpretation of the contract would seem to call for these same results as to both dower and distributive share where the contract is for the entire estate, and such has been the result in a number of cases.[173] Whether dower or statutory share

171. Burdine v. Burdine's Ex'r, 98 Va. 515, 36 S. E. 992 (1900) (emphasizing the analogy to the contract to sell).

172. *See* Price v. Craig, 164 Miss. 42, 143 So. 694 (1932). (This case cannot be taken as clear authority for the proposition stated since it was a contract for specific real estate and all other property the promisor might own. The court emphasized that the promisee acquired a vested property right by entering into the contract and that the promisor had a bare legal title at the time of the marriage).

173. Baker v. Syfritt, 147 Iowa 49, 125 N. W. 998 (1910) (treating the promisor as holding the property as trustee at the time of the marriage); *In re* Davis' Estate, 171 Kan. 605, 237 P. 2d 396 (1951) (holding that the wife's lack of knowledge of the husband's contract at the time of marriage

is involved the contract removes from the distributable estate the property covered by it. Under this doctrine if the contract is for a specific item of property any right which might arise in a future spouse with reference to that property is necessarily subject to the contractual obligation. Application of the same principle to a contract for all property owned by the promisor at his death prevents a subsequent spouse from ever acquiring any marital right of any kind which would not be subordinate to the claim of the promisee.

Logical as the conclusions stated above may appear judicial displeasure with their harshness toward surviving spouses has resulted in a considerable degree of modification. At the time of his marriage a husband was under a contractual obligation to leave a legacy of a certain amount to a prior wife in In re *Hoyt's Estate*.[174] The husband later died leaving a will in conformity with the contract. It was held that this contractual legacy was included in the husband's estate for the purpose of calculating the distributive share of his surviving widow and was subject to the widow's claim. In re *Tanenbaum's Estate*[175] was cited as authority but the court failed to take cognizance of the fact that in the *Tanenbaum* case an entirely different question was presented. Both cases involved separation agreements in which the respective husbands had agreed to provide for their wives through their wills. In the *Tanenbaum* case the parties were never divorced. Upon the death of the husband the wife claimed both her contractual legacy and her distributive share. The theory adopted by the court was that the contractual legacy was nevertheless a "legacy" which put the widow to an election.[176] In the *Hoyt* case the court seized upon this classification of the contractual legacy as a "legacy" and concluded that it was necessarily part of the distributable estate. The soundness of this decision

makes no difference); Lewis v. Lewis, 104 Kan. 269, 178 Pac. 421 (1919) (indicating that a different result might be reached if a fraud was intended); Dillon v. Gray, 87 Kan. 129, 123 Pac. 878 (1912) (suggesting that the wife might be given dower if the circumstances are such that it would otherwise be inequitable); Ralyea v. Venners, 155 Misc. 539, 280 N. Y. Supp. 8 (Sup. Ct. 1935) (rights of promisee not affected by a statute providing that marriage revokes a will previously executed).

174. 174 Misc. 512, 21 N. Y. S. 2d 107 (Surr. Ct. 1940).

175. 258 App. Div. 285, 16 N. Y. S. 2d 507 (1939), *motion for leave to appeal denied*, 258 App. Div. 1054, 17 N. Y. S. 2d 1021, *motion for leave to appeal denied*, 282 N. Y. 810, 25 N. E. 2d 881 (1940).

176. The case could have been more properly disposed of as nothing more than an action to enforce an ordinary contract to which both husband and wife were parties. A contract between a husband and wife for the disposition of their respective properties precludes the survivor from claiming against the will of the spouse who dies first carrying the agreement into effect. Luthy v. Seaburn, 242 Iowa 184, 46 N. W. 2d 44 (1951); Seat v. Seat, 172 Tenn. (8 Beeler) 618, 113 S. W. 2d 751 (1938).

is very questionable. The analysis adopted is at least an invitation to future litigation when the same question arises where the promisor has failed to provide for the agreed legacy and the promisee seeks to enforce the contract. In such a case it is more demontrable that the promisee of a contract has rights entirely different from those of a legatee and that it is improper to place the two on the same footing.

Where contracts to devise or bequeath all the property owned by the promisor have been enforced in a manner to deprive a subsequent spouse of any property right in the decedent's estate, there has often been the suggestion that enforcement might be denied if the contract is entered into for the purpose of defrauding the future spouse[177] or if the circumstances are such that enforcement would be highly inequitable.[178] If the contract is entered into with an actual intent to defraud the future spouse, it can be set aside in the same manner as can a conveyance made on the eve of marriage with a similar intent.[179] There is also an established principle by which equity may deny the remedy of specific performance when to grant it would be inequitable or unjust to innocent third persons.[180] A surviving spouse who had no knowledge of the contract at the time of marriage would seem to qualify as an innocent third person who might suffer unjustly from enforcement of the contract. The problem encountered here is that of determining what circumstances are to be regarded as sufficient to justify equity in denying enforcement on this ground.

Emphasis is sometimes placed upon the economic position of the surviving spouse and the duration of the marriage as possible determining factors.[181] However, in *Owens v. McNally*,[182] probably the leading case on this point, no reference was made to either the length of the marriage relationship or the economic position of the parties.[183] The theory of the case seemed to be that the sanctity of the marital rights is sufficient that in every case it is against

177. *See* Lewis v. Lewis, 104 Kan. 269, 273, 178 Pac. 421, 422 (1919).
178. *See* Dillon v. Gray, 87 Kan. 129, 135-136, 123 Pac. 878, 880 (1912) (citing with approval cases from other jurisdictions where enforcement had been refused on the ground that it would constitute a hardship upon the surviving spouse).
179. 1 American Law of Property § 5.32 (Casner ed. 1952).
180. 5 Corbin, Contracts § 1169.
181. *See* Ruch v. Ruch, 159 Mich. 231, 124 N. W. 52 (1909).
182. 113 Cal. 444, 45 Pac. 710 (1896).
183. Although the opinion in *Owens v. McNally* failed to indicate either the duration of the marriage or the economic status of the surviving wife it was pointed out in a subsequent case that the promisor in the *Owens* case died only eight months after the marriage took place. Sargent v. Corey, 34 Cal. App. 193, 196, 166 Pac. 1021, 1023 (1st Dist. 1917).

public policy to permit those rights to be impaired by the specific enforcement of pre-nuptial contracts with third persons when the necessary effect of such enforcement is the complete consumption of a decedent's estate. Such a policy is particularly applicable to contracts to leave entire estates by will where the literal enforcement of the contract would result in the promisor's disabling himself from ever conferring a marital property right upon a future spouse.[184]

Wides v. Wides' Ex'r,[185] a well-reasoned Kentucky case, accepted the principle of *Owens v. McNally* but also relied upon a construction of the contract as a further ground for the decision. A statutory dower similar to common law dower and also a distributive share were involved.[186] The court reasoned that the contract to leave an entire estate by will necessarily meant the net estate and that the net estate could not be arrived at until all statutory interests of the surviving spouse had been deducted. A strict logician might contend that since the spouse's distributive share is ordinarily a percentage of the net estate it is improper to say that that share must be deducted before the net estate is ascertained. On the other hand the view taken by the court in the *Wides* case is probably in accord with the intent of the parties to the contract in most instances. A contract for all or a fractional part of the property the promisor might leave at death is a contract for an extremely uncertain quantity. It leaves the promisor free to conduct his affairs in a normal manner and assumes that obligations thus incurred in good faith will be paid before there is anything left for the promisee. The marital right, whether dower or a statutory share, would

184. Specific performance of such a contract cannot "be decreed without sweeping aside, as of no moment or avail, the rights of the wife and widow, vested under a contract most strongly favored by the law." Owens v. McNally, 113 Cal. 444, 453, 45 Pac. 710, 713 (1896); Van Duyne v. Vreeland, 12 N. J. Eq. (1 Beasley) 142 (Ch. 1858); *see* Alban v. Schnieders, 67 Ohio App. 397, 403, 34 N. E. 2d 302, 304 (1940); Fields v. Fields, 137 Wash. 592, 600-601, 243 Pac. 369, 371-372 (1926) (emphasizing the equities in favor of the widow although the case could have been decided entirely on the ground that the contract was not sufficiently proved).

Courts indicating that a promisor can in this manner disable himself from leaving property to his spouse at his death have declared that entering into a contract which accomplishes this result is so contrary to the normal or usual customs of society that evidence of intent to do so must be very clear. MacGowan v. Barber, 127 F. 2d 458, 463 (2d Cir. 1942) (seeming to assume that if a contract to devise or bequeath an entire estate were clearly established it would deprive the promisor of leaving any property at all to his wife at death).

185. 299 Ky. 103, 184 S. W. 2d 579 (1944).

186. Ky. Rev. Stat. § 392.090 (1953). Although both dower and distributive share were involved in this case there was no suggestion that any situation calling for a distinction between the two was presented.

probably be regarded as such an obligation by the average contracting party.

This second line of reasoning suggested by the *Wides* case offers no protection to the spouse where there is a contract to devise specific property. Whether or not specific enforcement of this kind of a contract should be denied on the ground that it would be inequitable or unjust to a surviving spouse whose marriage to the promisor took place subsequent to the formation of the contract presents more of a problem. The argument on behalf of the spouse would be less effective here than in case of a contract for an entire estate since the policy against permitting a promisor to voluntarily disable himself from ever conferring a marital property right upon a possible future spouse could not be applied. Property acquired after the marriage, or any property other than the specific real estate, would not be subject to the contract anyway. Nevertheless the rights of a promisee of a contract to devise a specific tract of real estate have been held subordinate to the claim of a surviving spouse for his statutory share even though the contract preceded the marriage.[187] A claim of dower would probably have been considered even stronger. Since the particular property concerned was charged with the obligation of the contract at the time the marriage was entered into such a decision with reference to either dower or statutory share is difficult to justify. It represents an over zealous effort to protect the property rights of a surviving spouse and has apparently resulted in giving the spouse a property right which was never really his.

The rights of the subsequent spouse are ordinarily raised as matters of defense in equitable actions for specific performance brought by the promisee. When the theory applied in granting the defense is that specific performance is a discretionary remedy[188] which will not be applied where the result would be harsh or unfair, a question arises as to what further effect the contract might have. It should be pointed out that no contention is made that the contract itself is against public policy even where it is a contract for an entire estate. The contract was valid and enforceable when made

187. Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S. W. 2d 905 (1939).

188. Although this is the usual or customary way of referring to the action taken when the remedy of specific performance is denied on the ground that the granting of such a remedy in the particular instance would be inequitable, unjust, or unfair the term "discretionary remedy" can be misleading. The discretion permitted is a judicial discretion. The rules for determining when specific performance will be granted are rather well established, and in many instances it could well be said that the remedy is available as a matter of right. 5 Corbin, Contracts § 1136.

but subsequent events were such as to make its enforcement inequitable to the extent to which marital rights of a subsequent spouse are thereby affected.[189] In all other respects the contract continues valid and enforceable.[190] Courts granting this type of relief are not called upon for any decision as to the effect of an action at law by the promisee, but the impression left is that the promisee would succeed if it could be assumed that a remedy at law was available to him in the absence of the spouse's claim. In most instances this would not curtail the protection available to the spouse since this type of protection should be restricted to cases involving contracts for entire estates, and the enforcement of contracts for entire estates should be confined to equity.[191] If the rights of a spouse have intervened in such a way as to prevent full specific enforcement the promisee should be permitted either to recover the value of the consideration rendered[192] or to enforce specific performance as to all property remaining after the claims of the spouse have been satisfied.[193]

If a contract to devise all or a fractional part of an estate is construed as a contract relating to all that remains after the rights of any possible surviving spouse have been satisfied no question could arise concerning a possible difference in result depending upon whether the action was at law or in equity.

The policy of favoring the rights of a surviving spouse should be confined to the protection of dower, curtesy, distributive share, or other marital right which the surviving spouse is ordinarily privileged to enforce by electing to take against the will. The court went beyond this boundary in In re *Arland's Estate*[194] where it was held that the promisee was deprived of the fruits of his bargain by a will which the promisor executed in favor of a wife he married subsequent to the contract. The case is without foundation in either

189. "So, while this contract was not void, as against public policy, at the time it was entered into, it must be held that the parties to it contracted in view of the fact that a subsequent marriage . . . might be consummated, and that the effect of this marriage would be to compel a court of equity, in justice to the widow or children, to deny specific performance." Owens v. McNally, 113 Cal. 444, 453-454, 45 Pac. 710, 713 (1896).

190. Wides v. Wides' Ex'r, 299 Ky. 103, 184 S. W. 2d 579 (1944); Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S. W. 2d 905 (1939).

191. See text at notes 44-46 *supra*.

192. *See* Owens v. McNally, 113 Cal. 444, 454, 45 Pac. 710, 713 (1896).

193. Wides v. Wides' Ex'r, 299 Ky. 103, 184 S. W. 2d 579 (1944); Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S. W. 2d 905 (1939).

194. 131 Wash. 297, 230 Pac. 157 (1924); *cf.* Sargent v. Corey, 34 Cal. App. 193, 166 Pac. 1021 (1st Dist. 1917) (refusing to set aside an inter vivos conveyance by the promisor to a subsequent wife).

reason or authority. There is no public policy giving a wife any preferred position as a gratuitous legatee of her husband.[195]

Courts extending protection to the marital rights of the surviving spouse often emphasize the spouse's lack of knowledge of the contract at the time of marriage.[196] Lack of notice of the contract would appear to be a proper requirement in these cases, but the extent to which constructive notice will be recognized, if at all, appears rather uncertain. A wife was regarded as being without notice even though the contract was on record as incorporated in a divorce decree dissolving a prior marriage of the promisor.[197] The decision seems quite proper but in those jurisdictions recognizing the claim of a subsequent spouse as a sufficient bar to an action for specific performance of a contract to devise a particular tract of real estate a more ticklish question could arise. Suppose the promisee had the contract placed on record in the same manner as a contract to convey. It would seem unreasonable to expect the prospective spouse to examine such records. On the other hand a good case could be made for the right of the promisee to protection under the recording acts. No case has been found where this particular point has been argued.[198] An analogy supporting the claim of the surviving spouse could possibly be drawn from other situations where it has been suggested that every contract to make a will is subject to the implied contingency that the promisor might later marry and thereby subject his estate to a claim of dower in his wife.[199] The implication of such a contingency as to both dower

195. Mayfield v. Cook, 201 Ala. 187, 77 So. 713 (1918).

196. *Id.* at 188, 77 So. at 714; Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 887, 129 S. W. 2d 905, 909 (1939).

197. Wides v. Wides' Ex'r, 299 Ky. 103, 184 S. W. 2d 579 (1944). Apparently actual knowledge by the widow is of no great significance in Kentucky. When this case was later reinstated on the trial docket the widow's adversaries offered to prove that she had actual knowledge of the contract at the time of her marriage. The evidence was rejected. On appeal this ruling was affirmed, the court taking the position that although the widow's lack of knowledge was a matter of considerable equity the paramount or controlling factor was the policy of the law in favor of protecting the widow. Since the court refused to even hear evidence on the point it is not clear what was meant by the statement as to the widow's innocence being a matter of considerable equity. Wides v. Wides, 300 Ky. 344, 188 S. W. 2d 471 (1945).

198. Such a contract was recorded in Burdine v. Burdine's Ex'r, 98 Va. 515, 36 S. E. 992 (1900). The promisee was permitted to enforce the contract but there was no indication that the court recognized any public policy against the enforcement of contracts of this type anyway.

199. Van Duyne v. Vreeland, 12 N. J. Eq. (1 Beasley) 142, 160 (Ch. 1858) (involving a contract for an entire estate). It might be argued that this result necessarily follows if a subsequent marriage is contemplated and if marriage is not contemplated the agreement probably violates the public policy against contracts in restraint of marriage. *See* Owens v. McNally, 113 Cal. 444, 453-454, 45 Pac. 710, 713 (1896).

and distributive share would seem reasonable where contracts for entire estates are concerned. If the contract is for specific property or a legacy of a certain amount the case becomes more questionable. To subject all promisees of such contracts to the claims of possible future spouses of the promisors for statutory shares would probably be a deterrent to the use of this legal device and would work great hardship in many instances. Claims of dower, being claims for life estates only, might not have such an unfortunate effect, but it is submitted that even the right of dower should not be recognized in particular property the deceased spouse had in good faith contracted to devise prior to the marriage.

Sometimes the making of the contract is accompanied by the execution of a will carrying it into effect and the promisor subsequently marries and then dies without ever revoking the will. The surviving spouse then claims her marital rights and pleads a statute providing that a will is revoked by marriage of the testator. The presence of such a statute has no effect upon the promisee's rights.[200] Courts arriving at this result usually say that these statutes do not apply to wills executed pursuant to contract. A better explanation is that the promisee's rights are derived through a contract and are not dependent upon the will.

Of course where dower is recognized in equitable interests the wife of the promisee takes dower in the promisee's right to have land devised to him.[201]

Closely related to the problem concerning the contract which is entered into prior to marriage is the effect of a spouse's contract during coverture for a testamentary disposition to a third person. It would seem that such a contract should be permitted under any circumstances where an actual disposition is permitted. However, it has been held that contracts for disposition of property by will cannot be used to deprive the surviving spouse of any rights he or she would have had had the contract not been made.[202] The only

200. Lewis v. Lewis, 104 Kan. 269, 178 Pac. 421 (1919); Mosloski v. Gamble, 191 Minn. 170, 253 N. W. 378 (1934); Ralyea v. Venners, 155 Misc. 539, 280 N. Y. Supp. 8 (Sup. Ct. 1935).

201. Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921 (Ch. 1889).

202. In Buehrle v. Buehrle, 291 Ill. 589, 126 N. E. 539 (1920) the court sought to justify its position on the theory that the promisee derived his rights through the will. This rationalization would seem to break down where no will is ever made but the promisee is nevertheless permitted to enforce his contract. Such was the situation in Ward v. Ward, 94 Colo. 275, 30 P. 2d 853 (1934) where it was held that the property taken by the promisee should be included in the promisor's estate for the purpose of calculating the spouse's statutory share. The court apparently assumed that it would be against public policy to permit a contract performable at death to deprive the wife of her statutory share in the husband's estate.

Where the surviving spouse is a party to a contract whereby the husband

possible justification for such a position is an over zealous policy in favor of giving special protection to the property rights of surviving spouses, and even this reason appears rather spurious in so far as it applies to property which could have been disposed of without the consent of the spouse.

When a contract to devise or bequeath is entered into, the promisee acquires certain rights and the promisor undertakes certain obligations. These rights and obligations continue in spite of a subsequent marriage by the promisor. For the purpose of ascertaining marital rights a contract for all or a fractional part of an estate has been construed as a contract for all or a fractional part of what remains after the marital rights of any surviving spouse have been provided for. If this construction is indulged in it is important to emphasize that it is a construction to be applied for this purpose and this purpose only. Aside from this possible solution there is considerable conflict of authority upon the question whether, and to what extent, a subsequent marriage is a sufficient intervening equity to prevent the promisee from asserting his rights against a surviving spouse who would otherwise have certain property rights in the promisor's estate. The question is one of policy and the answer depends upon the extent to which the rights of a surviving spouse are to be regarded as superior to or subordinate to contractual obligations created by the decedent prior to marriage. Unless the contract is one which by its terms disables the promisor from ever conferring a right to dower or a distributive share upon a surviving spouse it is doubtful if a subsequent marriage should hinder its enforcement.

Statutes of Limitations and Other Bars to Recovery

By its very nature a contract to make a will is one in which the promisor has no obligation to perform prior to his death. Not only is he permitted to postpone his performance until his death, but his performance prior to that time is impossible. While it is true that he must execute the will while he is still alive, it is also true that he may revoke that will at any time and execute another one. His obligation is that he die leaving in effect a will carrying out the terms of the contract. Until he dies without leaving the necessary will he has not committed a breach. The breach occurs at death and the statute of limitations begins to run against the promisee's

and wife agree upon a manner of distributing their respective estates, the survivor is not permitted to claim against a will carrying the contract into effect. Luthy v. Seaburn, 242 Iowa 184, 46 N. W. 2d 44 (1951); Seat v. Seat, 172 Tenn. (8 Beeler) 618, 113 S. W. 2d 751 (1938).

cause of action at that time.[203] This rule is not altered by the fact that the promised devise or bequest is compensation for services which were completed many years before the promisor's death.[204]

The application of the statute of limitations to contracts to devise or bequeath is sometimes complicated by the promisor's express repudiation prior to his death. If the repudiation is sufficiently definite it might give the promisee an immediate cause of action in quantum meruit on the theory of rescission or for damages on the theory of an anticipatory breach.[205] Since a possible cause of action arises at the time of the repudiation it has been argued that the period of the statute of limitations should be calculated from that date. However, the promisee is not obligated to treat the contract as rescinded or to pursue damages for the anticipatory breach. He may at his election continue to keep the contract open until the time set for the promisor's performance has arrived. That time is fixed by the death of the promisor and if the promisee chooses to keep the contract open until then the statute of limitations will not begin to run prior to that date.[206]

Occasionally a distinction is made between an act of repudiation and an act which disables the promisor from performing. The result is that in case of an ordinary act of repudiation if the promisee refuses to recognize the repudiation and keeps the contract open until the promisor's death the statute of limitations will not begin to run against him until that time,[207] but if the promisor actually conveys the property to a third person he is regarded as having put performance beyond his power to control and the statute will

203. Troxel v. Childers, 299 Ky. 719, 187 S. W. 2d 264 (1945); Succession of Oliver, 184 La. 26, 165 So. 318 (1936); Ellis v. Berry, 145 Miss. 652, 110 So. 211 (1926); Roth v. Roth, 340 Mo. 1043, 104 S. W. 2d 314 (1937); Poole v. Janovy, 131 Okla. 219, 268 Pac. 291 (1928); *In re* Schoenbachler's Estate, 310 Pa. 396, 165 Atl. 505 (1933); Green v. Orgain, 46 S. W. 477 (Tenn. 1898).

204. Banks v. Howard, 117 Ga. 94, 43 S. E. 438 (1903) (holding that a claim for interest upon the value of the services from the time the services were performed may be allowed); Southard v. Curson, 13 Ohio App. 289 (1920).

205. Mug v. Ostendorf, 49 Ind. App. 71, 96 N. E. 780 (1911); Canada v. Canada, 60 Mass. (6 Cushing) 15 (1850); Smith v. Long, 183 Okla. 441, 83 P. 2d 167 (1938); Moorhead v. Fry, 24 Pa. (12 Harris) 37 (1854).

206. Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728 (1914); Wold v. Wold, 138 Minn. 409, 165 N. W. 229 (1917); Old Ladies Home Ass'n v. Hall, 212 Miss. 67, 52 So. 2d 650 (1951); Ga Nun v. Palmer, 202 N. Y. 483, 96 N. E. 99 (1911); McCurry v. Purgason, 170 N. C. 463, 87 S. E. 244 (1915). *Contra:* Church of Christ Home for Aged v. Nashville Trust Co., 184 Tenn. 629, 202 S. W. 2d 178 (1947); *see* Bonesteel v. Van Etten, 20 Hun 468 (N.Y. 1880) (actually based on insufficiency of evidence to prove the contract, but the court indicated that recovery would have been barred by the statute of limitations even if it had been clearly established).

207. Heery v. Reed, 80 Kan. 380, 102 Pac. 846 (1909).

begin to run against the promisee's rights at the time of the conveyance.[208] This position is highly questionable. The promisee should not be required to pursue his action for breach until the time for performance has arrived.[209]

Where the promisor makes an outright repudiation and if the promisee recognizes or accepts the repudiation and abandons the contract, the statute of limitations will run from that time.[210]

Where the contract includes an agreement by the promisor to do some act at a time prior to his death and in addition to the making of the will, additional complications sometimes arise: *Ga Nun v. Palmer*[211] involved a contract to pay a definite sum monthly until death and to leave still another sum by will. The promisor repudiated the contract, ceased payments as they came due, and then died without leaving the required will. In an action by the promisee for the sum promised as a legacy it was held that the statute did not begin to run until the promisor's death. Although no claim was made for the monthly payments the court indicated that the statute would begin to run as to them as they became due. The decision has been criticized on the ground that it involved an improper splitting of a cause of action.[212] Since no action was brought until the final performance was due and since recovery of the sum promised by will was the only relief sought, it does not appear that the question as to the splitting of a cause of action was properly presented or argued before the court. Even if payment of the monthly sums had been asked for, the case could well have been analyzed as one cause of action with part of the recovery barred. A better explanation is that a promisee should be permitted to bring action for the monthly payments as they become due and still keep the contract open as to future performance. The promisor should not be heard to complain since keeping the contract open is to his advantage in that it gives him an opportunity to repent and withdraw his repudiation at any time prior to the date for final performance.

208. Engelbrecht v. Herrington, 101 Kan. 720, 172 Pac. 715 (1917).

209. For a case refusing to recognize this distinction and holding that the statute of limitations does not begin to run until the promisor's death even though he makes wrongful inter vivos conveyances of the property see Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728 (1914). Even in Kansas the position is somewhat uncertain. A more recent case involved a joint promise by a husband and wife to leave their estate to their daughter. The husband died first leaving an inconsistent will. It was held that the statute of limitations did not begin to run against the daughter's right until the death of the wife. Smith v. Nyburg, 136 Kan. 572, 16 P. 2d 493 (1932).

210. *See* McCurry v. Purgason, 170 N. C. 463, 87 S. E. 244 (1915).

211. 202 N. Y. 483, 96 N. E. 99 (1911).

212. 4 Corbin, Contracts § 989.

A further problem is raised when the contract is unenforceable because of the Statute of Frauds or some similar reason but recovery for the value of the consideration given is permitted. The consideration is usually services performed by the promisee and in some instances the services are completed several years prior to the promisor's death. If it is held that the oral contract is so far void that evidence of it cannot be considered for any purpose other than to show that the services were not gratuitously performed and that the right to recover in quantum meruit rests wholly on an implied promise to compensate in some way, it would seem that the period of the statute of limitations would necessarily run from the time the services were rendered. A few cases have reached this result.[213] In some of them an effort has been made to draw a distinction between continuous and discontinuous services on the theory that there is no implication of an agreement for periodic payment; consequently, the statute of limitations will not begin to run until there is a termination or interruption of the services.[214] The better reasoned cases have taken the position that although there can be no recovery upon the oral contract evidence of the contact may be admitted to show that there was never any intention to compensate for the services prior to the death of the promisor; and that if the promisee, in the absence of a repudiation by the promisor, had brought action in quantum meruit prior to that time evidence of the oral contract would have been a complete defense. These cases have held that where the Statute of Frauds prevents the enforcement of a contract to make a will the statute of limitations will not begin to run against the right to recover in quantum meruit until the death of the promisor.[215] Failure to plead the contract even though the action is in quantum meruit for the value of services rendered sometimes frustrates the promisee's recovery. If the claim indicates on its face that it is a mere claim for services without reference to the promise to compensate by will the statute will run from the time the services are performed.[216]

213. Long v. Rumsey, 12 Cal. 2d 334, 84 P. 2d 146 (1938), *noted*, 27 Calif. L. Rev. 473 (1939); Estate of Leu, 172 Wis. 530, 179 N. W. 796 (1920); Nelson v. Christensen, 169 Wis. 373, 172 N. W. 741 (1919).

214. *See* Taylor v. Thieman, 132 Wis. 38, 46, 111 N. W. 229, 232 (1907). This distinction was subsequently repudiated. Estate of Leu, 172 Wis. 530, 535-536, 179 N. W. 796, 798 (1920).

215. Quirk v. Bank of Commerce & Trust Co., 244 Fed. 682 (6th Cir. 1917); Costello v. Costello, 134 Conn. 536, 59 A. 2d 520 (1948); Schempp v. Beardsley, 83 Conn. 34, 75 Atl. 141 (1910); Poole v. Janovy, 131 Okla. 219, 268 Pac. 291 (1928); *In re* Schoenbachler's Estate, 310 Pa. 396, 165 Atl. 505 (1933); Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767 (1905).

216. Boggan v. Scruggs, 200 Miss. 747, 29 So. 2d 86 (1947). A claim for interest from the date the services were performed is not repugnant to a

Probate of an inconsistent will is no bar to enforcement of the contract;[217] consequently, a statute regulating the time within which probate may be contested does not properly affect the time permitted for bringing an action on the contract.[218] However, Kansas has taken the position that where an inconsistent will is probated a subsequent action on the contract is so similar to a contest of the will that it cannot be entertained unless it is brought within the time permitted for will contests.[219] This is entirely out of harmony with the nature of the interests involved.

The effect of the promisee's acceptance of an inadequate provision in an inconsistent will[220] and of his failure to object to the probate of an inconsistent will[221] has already been discussed.

The question whether or not the promisee's rights are affected by statutes regulating the time within which claims must be filed against decedent's estates or fixing the time within which action upon such claims must be brought has often been before the courts. The specific nature of these statutes varies from state to state so that no categorical answer can be given which can be sure of application in every instance. Of course a statute could be drawn in such a way as to affirmatively exclude from or include within its application actions to enforce contracts to devise or bequeath. However, as the statutes actually exist they are sufficiently similar that certain generalizations can be made. The proper solution is usually found through an examination of the type of remedy pursued by the promisee. If the action is at law for damages a claim must be filed against the estate within the time allowed by the non-claim statutes.[222] If an equitable remedy in the nature of specific performance is sought the promisee is making no claim against the estate and need not be bound by the non-claim statutes. He is claiming title and may bring his action without ever filing a claim against

claim upon a promise to pay by will where the promise was to pay what the services were worth. Reasonable value of the services would mean reasonable value at the time of performance. It has been held that that should entitle the promisee to actual value plus interest from the time of performance until payment. Banks v. Howard, 117 Ga. 94, 43 S. E. 438 (1903).

217. Fuller v. Nelle, 12 Cal. App. 2d 576, 55 P. 2d 1248 (1st Dist. 1936) (holding that the probate court's determination that there was no contract is not res judicata in a subsequent proceeding); Phalen v. U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943 (1906) (promisee's rights not affected by his failure to object to the inconsistent will).

218. Perkins v. Allen, 133 Wash. 455, 234 Pac. 25 (1925).

219. Koch v. Wolf, 146 Kan. 247, 69 P. 2d 1088 (1937).

220. See text at notes 73-82 *supra.*

221. See text at notes 109-112 *supra.*

222. Morrison v. Land, 169 Cal. 580, 147 Pac. 259 (1915); Grant v. Grant, 63 Conn. 530, 29 Atl. 15 (1893); Estate of Leu, 172 Wis. 530, 179 N. W. 796 (1920).

the estate and after the time permitted for the filing of such claims has expired. This result is reached wherever ground for equitable jurisdiction is found whether that jurisdiction rests upon the fact that the contract is for all or a fractional part of the estate,[223] specific real property,[224] unique chattels, [225] or some other reason.[226]

Sometimes the promisee is faced with an apparent dilemma as to which remedy to pursue. The filing of a claim against the estate might be construed as an election which will bar a subsequent action for specific performance.[227] If the remedy of specific performance is pursued first it is possible that equitable relief will be denied after the expiration of the period for filing claims against the estate. Where specific performance of a contract to devise real estate was denied because of inadequacy of the consideration but the time for filing a claim against the estate had expired, equity retained jurisdiction to award compensation for the consideration rendered and made the award a lien upon the land.[228] Where the most desirable remedy seems to be in equity but there is doubt as to its availability it might be well to file a claim "without prejudice to any other remedy" and then sue for specific performance while the claim is still pending.[229]

Of course equitable relief is subject to the ordinary principles of the doctrine of laches and may be barred by the promisee's failure to pursue his cause with diligence. What constitutes due diligence

223. Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007 (2d Dist. 1912); Oles v. Wilson, 57 Colo. 246, 141 Pac. 489 (1914); Svanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4 (1899); O'Connor v. Immele, 77 N. D. 346, 43 N. W. 2d 649 (1950).

224. Fred v. Asbury, 105 Ark. 494, 152 S. W. 155 (1912); Brickley v. Leonard, 129 Me. 94, 149 Atl. 833 (1930); McCullough v. McCullough, 153 Wash. 625, 280 Pac. 70 (1929).

225. New England Trust Co. v. Spaulding, 310 Mass. 424, 38 N. E. 2d 672 (1941) (not a contract to make a will, but a contract giving an option to buy at death).

226. Where specific performance of a contract involving certain real estate was denied because of inadequacy of consideration equity retained jurisdiction to give a judgment for value of the consideration rendered even though the time for filing claims against the estate had passed. Selle v. Selle, 337 Mo. 1234, 88 S. W. 2d 877 (1935). In those few jurisdictions where it is held that the promisee of a contract to bequeath a certain sum of money is entitled to specific performance it necessarily follows that he has a right of ownership in the estate and is not bound by the non-claim statutes. Erwin v. Mark, 105 Mont. 361, 73 P. 2d 537 (1937).

227. There is no sound basis for forcing the promisee into an election of this type. Since there is no inconsistency in the kinds of relief sought the promisee should be permitted to file his claim against the estate, pursue his legal remedy, and after failing there file his bill for specific performance. Rowe v. Eggum, 107 Mont. 378, 87 P. 2d 189 (1938). The difficulty is that when the promisee files a claim for the value of services rendered this might be construed as a claim upon an implied promise and therefore a denial of the express contract. Laird v. Laird, 115 Mich. 352, 73 N. W. 382 (1897).

228. Selle v. Selle, 337 Mo. 1234, 88 S. W. 2d 877 (1935).

229. Fleming v. Dillon, 370 Ill. 325, 18 N. E. 2d 910 (1938).

must be ascertained from the circumstances surrounding each particular case and might be affected by the nature of the transaction, the position of the parties with respect to the property, the intervention of the rights of third persons, or other factors. If the promisee is ejected from the premises by the heirs of the promisor and then delays action for nine years proper diligence has not been exercised.[230] On the other hand a rather extended delay might be justified if it is for good reason. In *Evans v. Moore*[231] the promisor devised the property to a third person who had made an unenforceable promise to transfer it to the promisee when the promisee showed more signs of business responsibility. The promisee knew of the understanding and believed it would be carried out. Although he failed to bring his action until after the death of the promisor's devisee his right to specific performance was upheld. To refuse equitable relief prior to the expiration of the period of the statute of limitations would be highly unjustified unless substantial rights of third persons had intervened.[232]

The rules restricting the promisee's right to recover for breach of a contract to make a will are basically the same as the fundamental principles restricting recovery upon contract actions generally. When the problems are approached with that point of view and from the premise that it is a contract that is being dealt with the difficulties experienced in finding solutions are considerably reduced.

230. Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921 (1889).
231. 247 Ill. 60, 93 N. E. 118 (1910).
232. Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007 (1912).