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Bertel M. Sparks  
*New York University School of Law*

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# MICHIGAN LAW REVIEW

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## LEGAL EFFECT OF CONTRACTS TO DEVISE OR BEQUEATH PRIOR TO THE DEATH OF THE PROMISOR: I\*

*Bertel M. Sparks†*

QUESTIONS involving the rights, duties, powers, privileges, and immunities of parties to contracts to devise or bequeath are frequently raised prior to the death of the party promising to make the devise or bequest. In essence the problem is one of analyzing the legal relationships existing prior to the date set for performance. An analysis of these relationships is undertaken in this article. Vital questions concerning the formation of such contracts and their enforcement after the promisor's death are considered only when they appear essential to the development of the main theme which concerns the contract's effect prior to the time when actual performance is possible.

### *Interest Remaining in the Property Owner after He Has Made a Valid Contract to Devise or Bequeath His Property*

Contracts to make wills are probably less adequately understood by the parties to them than any other contracts known to the law. The vagueness of the layman's conception of this particular legal device is well illustrated by the ambiguous and indefinite promises constituting the contracts. A contract to devise Blackacre for a consideration of \$8,000 payable immediately might be a reasonably definite contract,<sup>1</sup> but promises to devise "Blackacre" are less common in the law than are promises to will "all my property," "all the property I may own at my death," "one-half of all my earthly goods," or some other entity represented by a phrase equally incapable of identifying any property at all at the time the contract is entered into. It is diffi-

\* This article is based upon a section of a thesis written in partial fulfillment of requirements for the S.J.D. degree at the University of Michigan Law School.

† Associate Professor of Law, New York University School of Law.—Ed.

<sup>1</sup> A contract even in these terms might leave some uncertainty as to when the will is to be made, the effect of failure to make the will, the effect of a subsequent inter vivos sale of Blackacre, the extent of restrictions imposed upon the promisor's use of Blackacre, the extent to which Blackacre is liable for the debts of the promisor or of the promisee prior to the promisor's death, the application of rules as to lapse in the event the promisee predeceases the promisor, and many other questions that might arise.

cult to determine what effect the parties to such a contract intended the transaction to have upon the promisor's future dealings with his property. The parties rarely express themselves upon this subject, and, as a matter of fact, it is not likely that they had any "intent" at all. The more plausible conclusion is that they didn't even think about the matter. But this fact, if it be the fact, does not relieve the courts of the responsibility of construing such contracts as come before them.

So far as actual intent is concerned the promisor probably never even thought of the possibility that such a contract might restrict him in his relationship to his own property during his own life. When a husband and wife execute wills leaving their property to the survivor and make a contract that the survivor shall leave his or her property to an agreed beneficiary, when a man promises his prospective wife that he will devise or bequeath her one-half of his estate if she will marry him, or when a father contracts with his children that he will leave his estate to them in equal portions, it is doubtful if any one of these promisors gives very much conscious thought to the extent to which he might be restricting his own use or right of disposition of his property during his lifetime. Yet if some such restrictions are not presumed these promises tend to become almost illusory or at least lose much of the potency generally attributed to them by the courts. A situation might be supposed wherein *A* contracts that if he should happen to own any property at his death, that property would go to *B*, but that it is clearly and expressly understood that *A* is free to defeat *B*'s expectations by disposing of his entire estate prior to his death. *A*'s promise would probably be sufficient consideration to support a contract for there is a definite commitment that upon the happening of a named contingency *B* will get real value from his bargain. Although the happening or non-happening of this contingency is entirely within the control of *A*, the only means by which *A* can defeat *B*'s claim is by making an absolute inter vivos disposition of all his assets, a possible detriment to himself. While legal consideration can be found in such a promise, it should be clear that nothing so speculative and uncertain is contemplated by the parties to a serious contract for the making of a will. Should it be held that the promisor is always left free to defeat the effect of his promise by completely and deliberately denuding himself of his assets immediately after entering into the bargain it would seem that the contracts could serve very little purpose other than that of being either gambling devices or instruments of fraud and would be unworthy of legal protection.

Where legal advice is possible it is highly important that a person about to agree to devise or bequeath his property be fully informed

of the probable consequences of such a contract. He should also have pointed out to him the possibility that a future change of circumstances might make such a contract undesirable. A party to such a contract should be made to understand clearly that the law does not permit a man to have his cake and eat it too. If he does enter into such a contract he should do so with a knowledge of the legal significance which the law will attach to his act, and with a realization that a part of that legal significance might be the prevention of his making some future use or disposition of his property which might become highly desirable to him. That parties have often failed to consider these matters is demonstrated by the frequency with which they have tried to get from under the effects of the contracts once they have entered into them. To accomplish this result various means have been attempted, including inter vivos gifts, inter vivos sales, transfers with a reservation of a life estate, various types of trust arrangements, and others. Some of these schemes have achieved the desired purpose and some of them haven't. It would seem that most of these unfortunate experiences could be avoided if the parties realized in advance the nature of the obligation the promisor assumed toward his promisee.

One of the most frequent means employed by promisors to avoid the effect of their contracts to devise or bequeath has been that of inter vivos dispositions of property. There seems to be a vague notion that since the contract is one to make a will or not to revoke a will already made, the promise cannot affect an inter vivos disposition which leaves nothing in the estate of the promisor upon which the will can operate.<sup>2</sup> It has long been established that in cases of promises to devise specific real estate, any subsequent conveyance by the promisor which does not constitute the grantee a bona fide purchaser is ineffective as against one claiming under the contract.<sup>3</sup> Such a contract may be

<sup>2</sup> This contention is frequently made where the contract is for all the property the promisor owns at death. Some courts have been misled by the apparent logic of such an argument and seem to have held that there is no restriction placed upon inter vivos transfers. *Powell v. McBlain*, 222 Iowa 799, 269 N.W. 883 (1936). Others have construed the contract as creating more substantial rights in the promisee but have experienced difficulty avoiding the effect of an erroneous view that the contract was for a will rather than for property. This needless struggle in mental gymnastics has sometimes led to the strained construction of an inter vivos transfer of property as a change in a will. Thus, where there was a contract not to change a will it was reasoned that a conveyance of the property was such a change because it took the property out of the will. *McCormick v. McRae*, 11 U.C.Q.B. 187 (1854). Since a will has no effect until the death of the testator it is difficult to see how property could go "into" the will prior to that time, and it is even more difficult to see how anything could be taken out of the will before it went into it.

<sup>3</sup> *Stone v. Lacy*, 242 Ala. 393, 6 S. (2d) 481 (1942); *Osborn v. Hoyt*, 181 Cal. 336, 184 P. 854 (1919); *Newman v. French*, 138 Iowa 482, 116 N.W. 468 (1908); *Kastell v. Hillman*, 53 N.J. Eq. 49, 30 A. 535 (1894); *Young v. Young*, 45 N.J. Eq. 27, 16 A.

considered analogous to a contract to sell, the time for performance being the death of the promisor, and little difficulty will be experienced in developing a theory for the remedy granted. Not only is the promisor prevented from disposing of the property, but he is without power to mortgage more than his life interest,<sup>4</sup> and is not privileged in destroying or encumbering the property.<sup>5</sup> He is free during his lifetime to lease the property to the promisee,<sup>6</sup> and, of course may create an absolute interest in a bona fide purchaser.<sup>7</sup> The contract then seems to be one that the promisor will do such acts as are necessary to transmit the property to the promisor at his death, and will do nothing to interfere with or render impossible that transmission.

In the event of a contract to bequeath specific non-unique chattels if the promisor makes an inter vivos disposition of the property the promisee has a cause of action against the promisor's estate for their value.<sup>8</sup>

In a contract to devise or bequeath all or a fractional part of one's estate, no specific property being encompassed by the contract, a more

921 (1889); *Erwin v. Erwin*, 17 N.Y.S. 442 (1892), *affd.* 139 N.Y. 616, 35 N.E. 204 (1893); *Ankeny v. Lieuallen*, 169 Ore. 206, 113 P. (2d) 1113 (1941), *affd. on rehearing*, 169 Ore. 222, 127 P. (2d) 735 (1942); *McCullom v. Mackrell*, 13 S.D. 262, 83 N.W. 255 (1900); *McCormick v. McRae*, 11 U.C.Q.B. 187 (1854).

*Contra*: A recent West Virginia case contains dicta to the effect that the promisor is free to convey the real estate any time prior to his death and that if he does convey, the promisee's only remedy is an action against the estate for damages. This is unsound unless it is also assumed that the transferee is a bona fide purchaser. The confused reasoning indulged in by the court is demonstrated by its apparent feeling that the rights of the promisee were testamentary rather than contractual. If this were actually the case why should even an action for damages be permitted? See *Hannah v. Beasley*, 132 W.Va. 814 at 823-824, 53 S.E. (2d) 729 (1949).

Where the promisor has left a will in conformity with the contract and the promisee has given consideration without notice of any prior contracts or conveyances by the promisor at least two courts have taken the position that the promisee is himself a bona fide purchaser and will take priority over a prior grantee or promisee. *Larkins v. Howard*, 252 Ala. 9, 39 S. 224 (1949); *Andrews v. Lary*, (Tex. Civ. App. 1949) 224 S.W. (2d) 770. That such a promisee has given value and is without notice is clear. The theory of the court in each case was that the requirement of legal title was satisfied by the will. The reasoning applied is rather artificial since the rights asserted are contractual rather than testamentary and if it is recognized that the will is essential to the promisee's right it must be admitted that the property was removed from the promisor's estate prior to the will's effective date. If the promisees had been regarded as contracting vendees their rights could have been disposed of on a simple question of priorities without the necessity of classifying them as bona fide purchasers, and in each instance the result would have been the same as that reached by the court.

<sup>4</sup> *Ankeny v. Lieuallen*, 169 Ore. 206, 113 P. (2d) 1113 (1941), *affd. on rehearing*, 169 Ore. 222, 127 P. (2d) 735 (1942).

<sup>5</sup> *Cagle v. Justus*, 196 Ga. 826, 28 S.E. (2d) 255 (1943); *Bird v. Pope*, 73 Mich. 483, 41 N.W. 514 (1889).

<sup>6</sup> *Brock v. Noecker*, 66 N.D. 567, 267 N.W. 656 (1936).

<sup>7</sup> *Androscoggin County Savings Bank v. Tracy*, 115 Me. 433, 99 A. 257 (1916) (promisee was permitted the benefit of his contract by tracing the proceeds of the sale into the hands of the promisor).

<sup>8</sup> *Ragsdale v. Achuff*, 324 Mo. 1159, 27 S.W. (2d) 6 (1930).

difficult problem arises. In such cases it is clear that it was not within the contemplation of the parties that the estate would be kept in exactly the same form as it existed when the contract was made. It is equally clear that if the parties were entering into a serious bargain, it was not contemplated that the promisor would have the privilege of deliberately defeating the promisee's prospects by arranging his affairs so that there would be nothing in his estate at his death.<sup>9</sup> Wherever it is at all possible, the courts have construed these inter vivos dispositions as testamentary in character and, therefore, in violation of the promisee's interest.<sup>10</sup> For this purpose an absolute conveyance with a reservation of a life interest in the grantor is held testamentary.<sup>11</sup> Even though an irrevocable trust is created and the property conveyed to a trustee to be held for the benefit of the grantor for life, remainder to some other persons, the transaction has been treated as testamentary for the purpose of construing the rights of the promisee under a prior contract to leave all or a proportionate part of the estate by will.<sup>12</sup> The same result is reached where the transfer is absolute but the transferee agrees to pay the transferor an annuity for life.<sup>13</sup> The theory of these cases has been that a contract to leave all or a proportionate part of one's estate at death does not restrict the promisor in his manner of disposition before death, but that any disposition which preserves to the promisor the beneficial interest during his life will be considered a disposition at death and therefore ineffective as to persons claiming through the contract. In reaching this result these cases have originated a special definition of a testamentary disposition applicable to this particular situation only. It is difficult to see how the mere fact of reserving a life estate in the grantor, whether it be a legal life estate or a mere equitable estate through a trust mechanism, can be said to make the transaction testamentary. There is nothing testamentary about a present conveyance, provided it is absolute and irrevocable, even though a life interest is reserved in the

<sup>9</sup> But see *Powell v. McBlain*, 222 Iowa 799, 269 N.W. 883 (1936).

<sup>10</sup> *Rogers v. Schlotterback*, 167 Cal. 35, 138 P. 728 (1914); *DeJong v. Huyser*, 233 Iowa 1315, 11 N.W. (2d) 566 (1943); *Sample v. Butler University*, 211 Ind. 122, 4 N.E. (2d) 545 (1936), modified 211 Ind. 139, 5 N.E. (2d) 888 (1937); *Logan v. Wienholt*, 7 Bligh N.S. 1, 5 Eng. Rep. 674 (1833); *Fortescue v. Hennah*, 19 Ves. Jr. 67, 34 Eng. Rep. 443 (1812); *Keays v. Gilmore*, 8 Ir. Rep. (Eq.) 290 (1873).

<sup>11</sup> *Rogers v. Schlotterback*, 167 Cal. 35, 138 P. 728 (1914); *DeJong v. Huyser*, 233 Iowa 1315, 11 N.W. (2d) 566 (1943); *Fortescue v. Hennah*, 19 Ves. Jr. 67, 34 Eng. Rep. 443 (1812).

<sup>12</sup> *Farmers Nat. Bank of Danville v. Young*, 297 Ky. 95, 179 S.W. (2d) 229 (1944); *Logan v. Wienholt*, 7 Bligh N.S. 1, 5 Eng. Rep. 674 (1833). In this connection it has also been held that a tentative (savings bank) trust is testamentary in character. In *Nelson's Will*, 106 N.Y.S. (2d) 427 (1951).

<sup>13</sup> *Sample v. Butler University*, 211 Ind. 122, 4 N.E. (2d) 545 (1936), modified 211 Ind. 139, 5 N.E. (2d) 888 (1937).

grantor, and no one would argue that such a conveyance would have to be executed as a will. Although some cases can be found which seem to base their actual decision on the testamentary theory,<sup>14</sup> it is rather apparent that the courts using language to this effect are usually doing nothing more than holding that the promisor cannot dispose of his property in a manner which would constitute bad faith toward the promisee, and that the reservation of a life interest to himself is evidence of bad faith.

Something more than the testamentary disposition theory is clearly necessary to any logical analysis of the cases or any accurate description of the promisor's obligations toward his promisee. It was established at an early date that if the promisor of a contract to will a fractional part of all the property he may own at his death makes an absolute inter vivos transfer, retaining no interest whatever to himself, for the very purpose of avoiding the effect of the contract the transfer will be set aside in cases where the transferees are mere volunteers.<sup>15</sup> Even though the promisor did not bind any particular property and did not promise that there would be anything at all in his estate at his death, he was deprived by the contract of the privilege of disposing of his estate for the purpose of preventing the property from passing to the promisee.<sup>16</sup> No dissent from this view has been found where the intent of the promisor is clear.<sup>17</sup> Here again the courts have sometimes clung to the view that the promisor is free to make any disposition that is not testamentary, but that a disposition for the purpose of avoiding the contract is in effect testamentary.<sup>18</sup> There is no more reason for calling this a testamentary disposition than there is for saying that the absolute conveyance with a reservation of a life interest is testamentary. It is merely the court's effort to evade the responsibility of attempting to define the interest one has in his property after he has made a contract to devise his estate in a particular manner, but has not contracted that any specific property

<sup>14</sup> *Keays v. Gilmore*, 8 Ir. Rep. (Eq.) 290 (1873).

<sup>15</sup> *Gregor v. Kemp*, 3 Swanst. 404n. (1722) reported in note to *Gordon v. Gordon*, 3 Swanst. 400 at 404, 36 Eng. Rep. 910 at 926.

<sup>16</sup> In *Gregor v. Kemp*, *id.* at 406n., the Lord Chancellor was of the opinion that the promisor was "not restrained from disposing of her estate any way in her lifetime, and had a full power over it, but with this single exception, *viz.* she was restrained from making a distribution on purpose to defeat the covenant. . . ."

<sup>17</sup> *Whitney v. Hay*, 181 U.S. 77, 21 S.Ct. 537 (1901); *Whiton v. Whiton*, 179 Ill. 32, 53 N.E. 722 (1899) (gift of all of one's property, thus becoming completely dependent upon the transferee held to be sufficient evidence of such intent); *Hatcher v. Sawyer*, 243 Iowa 858, 52 N.W. (2d) 490 (1952); *Chantland v. Sherman*, 148 Iowa 352, 125 N.W. 871 (1910) (evidence of intent demonstrated by the promisor's open repudiation of the contract); *Eaton v. Eaton*, 233 Mass. 351, 124 N.E. 37 (1919); *Huffine v. Lincoln*, 52 Mont. 585, 160 P. 820 (1916) (intention openly declared by the promisor).

<sup>18</sup> *Whiton v. Whiton*, 179 Ill. 32 at 54, 53 N.E. 722 (1899).

will be included in his estate. In these cases where there is an intent to deprive the promisee of his prospects under the contracts the courts have often talked of the fraud of the promisor.<sup>19</sup> Discussions of fraud in this respect are misleading since a mere breach of a contract, however intentional, is not fraud.

There are also many situations where even though there is no evidence of actual intent on the part of the promisor to defeat the contractual rights, inter vivos conveyances are set aside because they are in substantial violation of the agreement. A gift made by the promisor during his lifetime may be so out of proportion to the size of his estate as to impeach the integrity of the agreement, and it is in this group of cases, where no actual intent to defeat the rights of the promisee is shown and where not even a perverted theory of testamentary disposition can be utilized, that the actual interest remaining in the promisor can best be defined. It is clearly inequitable to permit one to contract to make a will leaving his entire estate to a named person at death and then defeat the effect of the will by making an inter vivos gift of all his property, thus leaving nothing upon which his will made in compliance with the contract can operate. Such a transfer, if the property is still in the hands of a mere volunteer, is ineffective so far as defeating the contractual rights is concerned.<sup>20</sup> The same result is reached where the inter vivos transfer consists of not all, but a substantial portion of the promisor's estate.<sup>21</sup> One owning a life estate in certain property and the fee in other property, but under a contractual duty to will his entire estate to the remainderman, cannot make a gratuitous transfer of all the property in which he owns a fee.<sup>22</sup> A contract to leave a child an equal portion with other children is violated by inter vivos gifts in substantial amounts to the other children.<sup>23</sup>

In spite of all these restraints the promisor is still not without the

<sup>19</sup> *Whiton v. Whiton*, 179 Ill. 32 at 54, 53 N.E. 722 (1899); *Huffine v. Lincoln*, 52 Mont. 585 at 593, 160 P. 820 (1916).

<sup>20</sup> *Bruce v. Moon*, 57 S.C. 60, 35 S.E. 415 (1900).

<sup>21</sup> *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E. (2d) 568 (1945); *Riddell v. Riddell*, 146 La. 37, 83 S. 369 (1919); *Skinner v. Rasche*, 165 Ky. 108, 176 S.W. 942 (1915); *Quinn v. Quinn*, 5 S.D. 328, 58 N.W. 808 (1894); *Swingley v. Daniels*, 123 Wash. 409, 212 P. 729 (1923).

<sup>22</sup> *Williams v. Williams*, 123 Va. 643, 96 S.E. 749 (1918).

<sup>23</sup> *Rastetter v. Hoeminger*, 214 N.Y. 66, 108 N.E. 210 (1915); *Willis v. Black*, 4 Russ. 170, 38 Eng. Rep. 769 (1828), reversing *Willis v. Black*, 1 Sim. & St. 525, 57 Eng. Rep. 208 (1824).

The reasoning here is that the promise, like the agreement for a fractional part, is a promise to make a devise or bequest the value of which will depend largely upon the size of the promisor's estate at death. Any act of the promisor which reduces the size of the estate in a manner demonstrative of lack of good faith with the promisee is in violation of the agreement. *Logan v. Wienholt*, 7 Bligh N.S. 1, 5 Eng. Rep. 674 (1833).



privilege of reasonable use of his property, nor is he hampered in conveying or even giving it away so long as the gifts are reasonable and made in good faith,<sup>24</sup> and certainly he may dispose of the entire estate for his own maintenance.<sup>25</sup> After making a contract to will all of one's estate to a named person, the promisor may even validly contract with a third person to devise a specific tract of land included in the estate in return for support and maintenance of the promisor for life.<sup>26</sup>

It has already been seen that one cannot dispose of any of his estate for the specific purpose of avoiding the contractual obligation. But assuming that no such purpose exists he can convey a reasonable amount as he chooses, by gift or otherwise. The important question then is that of determining where the line is to be drawn. As is often the situation when dealing with judicial questions, it is impossible to identify that line in such terms as will assure certainty of result in all cases, but the lack of certainty need be no more pronounced here than elsewhere in the legal system. A possible answer to the problem has been suggested in *Dickinson v. Seaman*,<sup>27</sup> a case involving an antenuptial contract by which the husband agreed to devise and bequeath his entire estate to the wife's daughter by a previous marriage. The size of the husband's estate was not indicated in the opinion except that he was a man of means and died possessed of considerable wealth. Prior to his death he assigned an insurance policy in the amount of \$10,000 to his brothers and sisters. In holding the assignment valid the court stated:

"It is asked, however, whether the decedent could give away all his property to his own relatives, and thus defeat the antenuptial contract altogether. And, assuming that he could not do this because it would be unreasonable, it is further asked where the line is to be drawn between the power to give away all and to give away nothing. That line is to be drawn where the courts always draw it when they can, along the boundary of good faith. . . . Reasonable gifts were impliedly authorized. Un-

<sup>24</sup> *Noble v. Metcalf*, 157 Ala. 295, 47 S. 1007 (1908); *Ohms v. Church of the Nazarene*, 64 Idaho 262, 130 P. (2d) 679 (1942); *National Life Ins. Co. v. Watson*, 141 Kan. 903, 44 P. (2d) 269 (1935); *Fourth Nat. Bank v. First Presbyterian Church*, 134 Kan. 643, 7 P. (2d) 81 (1932); *Price v. Aylor*, 258 Ky. 1, 79 S.W. (2d) 350 (1935); *Matter of Salisbury*, 242 App. Div. 645, 272 N.Y.S. 135, affd. 265 N.Y. 536, 193 N.E. 308 (1934); *Rastetter v. Hoenninger*, 214 N.Y. 66, 108 N.E. 210 (1915); *Dickinson v. Seaman*, 193 N.Y. 18, 85 N.E. 818 (1908).

<sup>25</sup> See *Price v. Aylor*, 258 Ky. 1 at 4, 79 S.W. (2d) 350 (1935).

<sup>26</sup> *Smith v. McHenry*, 111 Kan. 659, 207 P. 1108 (1922).

<sup>27</sup> 193 N.Y. 18, 85 N.E. 818 (1908).

reasonable gifts were not, even if made without actual intent to defraud."<sup>28</sup>

The greatest difficulty with the above statement is its apparent emphasis upon good faith as the deciding factor. If it was intended that the test of reasonableness be applied as an independent basis for decision in cases where no question of good faith was involved, then the solution offered is fairly workable, but if reasonableness was intended as merely an element in the determination of good or bad faith, then the statement is extremely inadequate. While it seems clear that a transfer made in bad faith will not be permitted to defeat the rights of a promisee of a contract to devise or bequeath, it is equally clear that bad faith is merely one of a number of elements any one of which will produce the same result. It is not difficult to imagine a situation where a promisor might give away such large quantities of his estate that the gifts would be set aside even though they were made in perfectly good faith. This very situation is illustrated by *Skinner v. Rasche*,<sup>29</sup> where an inter vivos transfer made in the utmost of good faith was insufficient to defeat the rights under the contract. In that case the promisor died believing that the transfer made by him would result in placing title in the beneficiary of the contract. Although he was mistaken as to the legal consequences of his act, the court set aside his inter vivos transfer and gave the third party beneficiary the property.

Not only the size of the gift but also its purpose may be considered in determining its reasonableness. This element was particularly prominent in *Fourth National Bank v. First Presbyterian Church*<sup>30</sup> where a husband and wife executed wills by which each of them left the other his or her entire estate for life, remainder to an agreed charity, and contracted with each other not to change their wills. After the wife died and the husband took possession of her property the combined estates amounted to about \$650,000. A gift of \$100,000 by the husband for the purpose of erecting a memorial to his wife was held to be a reasonable gift. The court emphasized the purpose of the gift in determining the validity of the transaction and seemed to indicate that a gift of this amount for a less worthy purpose might have been invalidated.

<sup>28</sup> *Dickinson v. Seaman*, 193 N.Y. 18 at 24, 85 N.E. 818 (1908).

<sup>29</sup> 165 Ky. 108, 176 S.W. 942 (1915). There was some reasoning in the case to the effect that this was a testamentary gift because the property was impressed with a trust. Just how the existence of such a trust, if it did exist, would make the gift testamentary is not easy to understand.

<sup>30</sup> 134 Kan. 643, 7 P. (2d) 81 (1932).

In *Ohms v. Church of the Nazarene*<sup>31</sup> it was held that where the contract is made between a husband and wife by which the survivor of them is obligated to leave his or her estate to a third party, their relationship with the third party as well as the purpose of the gift may be considered in determining the reasonableness of inter vivos gifts made by the survivor. According to the terms of the contract the entire estate of the survivor was to go to the husband's children by a former marriage. The husband died first. Thereafter the wife made a gift of more than half the estate to a charity. In holding this gift valid the court relied upon the fact that the husband's children had been separated from him for several years, had visited him very little even in his last days, and that the charity had contributed much to the welfare of the wife. This is probably as far as any court has gone in sustaining a gift of this kind.

There is in the contract to will all or a fractional part of the property one may own at death a contract not creating any particular debt of any kind and not applicable to any specific property, and yet it does have the effect of restricting the owner in his power over his assets. It appears that the promisor who is fabulously wealthy when he enters into such a contract but is later reduced to poverty through imprudent or unwise investments violates no duty to the promisee.<sup>32</sup> If the contracts are interpreted literally they usually would pertain to only such property as the promisor happened to possess at his death, imposing upon him no obligation to possess any at that time and leaving him perfectly free to arrange his affairs so that he would not have any. The courts have taken a more practical approach by doing what might be called the raising of a presumption that the promisor actually promised something more, though he was not very articulate in expressing the terms of the promise, and have held that the contract did place some restrictions upon him. The tendency of the courts while reaching this result to describe the disposition made by the derelict promisor as testamentary is nothing more than an effort to bring the relief given within the express terms of the contract. If the disposition is testamentary it is in violation of the express agreement and involves no problem in interpretation or construction. The effort to avoid interpretation and construction problems when there has been an inter vivos transfer has often resulted in describing as testamentary that which is definitely not testamentary according to any accepted meaning of that word.

<sup>31</sup> 64 Idaho 262, 130 P. (2d) 679 (1942).

<sup>32</sup> See *Fourth Nat. Bank v. First Presbyterian Church*, 134 Kan. 643 at 648-649, 7 P. (2d) 81 (1932).

The argument that an inter vivos transfer by the promisor is valid unless it is made with intent to deprive the promisee of his gift is equally without merit. It was observed above that the size of the gifts may be so out of proportion to the size of the promisor's estate that the gifts will be set aside regardless of any intent of the promisor. Apparently misled by the language used by the courts in situations where the intent is clearly present, a few cases can be found which appear to require the positive showing of an actual intent of the promisor to defeat the contract.<sup>33</sup> Such a theory is not supported by the decisions based on the reasonableness of the size of the gift, and is completely repudiated by a consideration of cases such as *Skinner v. Rasche*<sup>34</sup> where the opposite intent was affirmatively shown.

Thus it becomes necessary to fall back upon the question of what is reasonable under the facts of the particular case to determine the extent to which the promisor can dispose of his property. The reasonableness required here can best be defined in terms of what one would do in the normal course of his affairs. Coupled with this requirement there is the added restriction that he cannot make gifts which would substantially alter his estate or which would not likely be made by one intending to permit his estate to continue as a going concern. He is free to mortgage the assets in the regular course of business<sup>35</sup> or to invest and reinvest any or all of his property<sup>36</sup> and is not responsible for losses that might result.<sup>37</sup> He has a marketable title to any or all of his assets.<sup>38</sup> He is free to make gifts which would normally be made by one of his station in life,<sup>39</sup> and may make extraordinary gifts for particularly meritorious purposes<sup>40</sup> or where it appears that the contract was for the benefit of a third party beneficiary in whom the promisee had but little more than an incidental interest and whose moral claim to the property is very slight.<sup>41</sup> He cannot give his property away for the purpose of avoiding his obligation under the con-

<sup>33</sup> *Austin v. Davis*, 128 Ind. 472, 26 N.E. 890 (1891); *Schauer v. Schauer*, 43 N.M. 209, 89 P. (2d) 521 (1939).

<sup>34</sup> 165 Ky. 108, 176 S.W. 942 (1915), cited supra note 29.

<sup>35</sup> *National Life Ins. Co. v. Watson*, 141 Kan. 903, 44 P. (2d) 269 (1935).

<sup>36</sup> *Noble v. Metcalf*, 157 Ala. 295, 47 S. 1007 (1908).

<sup>37</sup> See *Fourth Nat. Bank v. First Presbyterian Church*, 134 Kan. 643 at 648-649, 7 P. (2d) 81 (1932); *Webster & Milford's Case*, 2 Eq. Cas. Abr. 362 at 363, 22 Eng. Rep. 308 (1708).

<sup>38</sup> *Needham v. Kirkman*, 3 Barn. & Ald. 531, 106 Eng. Rep. 755 (1820).

<sup>39</sup> *Dickinson v. Seaman*, 193 N.Y. 18, 85 N.E. 818 (1908).

<sup>40</sup> *Fourth Nat. Bank v. First Presbyterian Church*, 134 Kan. 643, 7 P. (2d) 81 (1932).

<sup>41</sup> *Ohms v. Church of the Nazarene*, 64 Idaho 262, 130 P. (2d) 679 (1942) (also considered the meritorious nature of the gift).

tract,<sup>42</sup> nor may he, regardless of intent, make substantial gifts of a nature that would defeat the reasonably foreseeable economic value anticipated by the promisee.<sup>43</sup> The fact that this standard is not fixed or definite should not hinder a court of equity in its application. It is a standard of reasonableness well known to equity jurisprudence.

A restriction upon the promisor's use and disposition of his property even though he did not expressly contract to have, and is not required to have, any property at his death is nothing novel or anomalous in the law. It is a restriction demanded by good faith and fair dealing and without which the contract ceases to have meaning. If analogy is needed it can be easily found. A servant, when he enters into a contract of employment, impliedly agrees that he will not use or disclose to his master's detriment trade secrets which he learns in the course of his employment.<sup>44</sup> A sale of good will, without any express agreement to refrain from competition, carries with it an implied promise not to compete.<sup>45</sup> Property disposed of by the exercise of a general power of appointment may be appropriated to pay the debts of the appointor.<sup>46</sup> All these are equitable doctrines engrafted on express contracts or written instruments because consonant with fundamental principles of justice. To hold that a contract to make a devise or bequest, the amount of which is to be determined by the size of the promisor's estate at death, did not include an implied agreement for reasonable use by the promisor would be an imputation of vanity to the entire transaction.

It follows from what has already been said that a conveyance procured by a third person for the purpose of defeating the effect of the contract<sup>47</sup> or any conveyance resulting from undue influence<sup>48</sup> cannot deprive the promisee of his contractual rights, and the promisee

<sup>42</sup> *Whiton v. Whiton*, 179 Ill. 32, 53 N.E. 722 (1899); *Chantland v. Sherman*, 148 Iowa 352, 125 N.W. 871 (1910); *Eaton v. Eaton*, 233 Mass. 351, 124 N.E. 37 (1919); *Huffine v. Lincoln*, 52 Mont. 585, 160 P. 820 (1916); *Gregor v. Kemp*, 3 Swanst. 404, note, 36 Eng. Rep. 926 (1722).

<sup>43</sup> *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E. (2d) 568 (1945); *Riddell v. Riddell*, 146 La. 37, 83 S. 369 (1919); *Skinner v. Rasche*, 165 Ky. 108, 176 S.W. 942 (1915); *Quinn v. Quinn*, 5 S.D. 328, 58 N.W. 808 (1894); *Swingley v. Daniels*, 123 Wash. 409, 212 P. 729 (1923).

<sup>44</sup> *Belmont Laboratories v. Heist*, 300 Pa. 542, 151 A. 15 (1930), modified 303 Pa. 7, 154 A. 19 (1931); *Stevens & Co. v. Stiles*, 29 R.I. 399, 71 A. 802 (1909).

<sup>45</sup> *Foss v. Roby*, 195 Mass. 292, 81 N.E. 199 (1907); *Old Corner Book Store v. Upham*, 194 Mass. 101, 80 N.E. 228 (1907).

<sup>46</sup> *Jackson v. Franklin*, 179 Ga. 840, 177 S.E. 731 (1934); *Clapp v. Ingraham*, 126 Mass. 200 (1879); *Thompson v. Towne*, 2 Vern. 319, 23 Eng. Rep. 806 (1694).

<sup>47</sup> *Campbell v. Brown*, 268 App. Div. 324, 51 N.Y.S. (2d) 310 (1944).

<sup>48</sup> *McGuire v. McGuire*, 74 Ky. (11 Bush) 142 (1874); *Carmichael v. Carmichael*, 72 Mich. 76, 40 N.W. 173 (1888); *Phillip v. Phillip*, 96 Misc. 471, 160 N.Y.S. 624 (1916).

is the proper party to bring the appropriate action in the event such a conveyance has been made.<sup>49</sup>

Although the cases heretofore considered have usually involved gifts, it must not be assumed that the existence of a consideration is within itself sufficient to validate the transfer of property by one who has contracted to leave his entire estate by will. If the transferee has knowledge of the prior contract he cannot be a bona fide purchaser and will be in no better position than if he had taken as a mere donee.<sup>50</sup> It is also true that the consideration may be so out of proportion to the value of the property transferred<sup>51</sup> or the nature of the consideration may so tend to indicate an intent to avoid the contract<sup>52</sup> that the good faith of the transaction will be impeached.

The dearth of cases dealing directly with the promisor's privilege of committing waste during his lifetime makes it necessary that most of the conclusions concerning this question be drawn from the implications found in the cases involving restraints upon his power of disposition. Since his power of disposition is restricted to transfers made in good faith and for reasonable purposes, it would seem that his privilege of use and enjoyment would most certainly not include the privilege of deliberately or wantonly wasting or destroying the property. In *Noble v. Metcalf*<sup>53</sup> after the promisor had conveyed certain real estate the promisee brought his bill in equity to have himself declared a remainderman after a life estate and to enjoin the commission of waste. It was found that the transfer was reasonable and in good faith and, therefore, not in violation of the contract. Under such circumstances the denial of the relief sought cannot be interpreted as having any effect upon the question of the promisee's right to enjoin the commission of waste. An injunction has been granted against waste where the contract concerned specific property,<sup>54</sup> and no reason appears why the same relief should not be available even though specific property was not concerned if unreasonable or wanton waste were threatened.

<sup>49</sup> *McGuire v. McGuire*, 74 Ky. (11 Bush) 142 (1874); *Carmichael v. Carmichael*, 72 Mich. 76, 40 N.W. 173 (1888); *Campbell v. Brown*, 268 App. Div. 324, 51 N.Y.S. (2d) 310 (1944); *Phillip v. Phillip*, 96 Misc. 471, 160 N.Y.S. 624 (1916).

<sup>50</sup> *Vanduyne v. Vreeland*, 12 N.J. Eq. (1 Beasley) 142 (1858).

<sup>51</sup> *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831 (1929).

<sup>52</sup> *Vanduyne v. Vreeland*, 12 N.J. Eq. (1 Beasley) 142 (1858). The consideration here was a bond conditioned upon the grantee's boarding, maintaining, and providing for the promisor and his wife for their lives. The grantee also had knowledge of the prior contract, and, therefore, was not a bona fide purchaser.

<sup>53</sup> 157 Ala. 295, 47 S. 1007 (1908).

<sup>54</sup> *Cagle v. Justus*, 196 Ga. 826, 28 S.E. (2d) 255 (1943).

Although the promisor cannot give his property away in unreasonable amounts or even sell it to persons having notice of the prior contract, his power to give good title to a bona fide purchaser is apparently unquestioned.<sup>55</sup> This point is emphasized in all the cases involving the inter vivos transfers of the promisor, and it seems that a failure to allege that the transferee is not a bona fide purchaser is fatal to recovery<sup>56</sup> even under circumstances where it is difficult to see how he could reasonably be more than a mere volunteer.<sup>57</sup> Where the trial court fails to make any findings on the question of good faith it is proper on appeal to remand the case for a reconsideration and a factual determination of that issue.<sup>58</sup>

In any legal relationship where rights of creditors intervene it can be stated as axiomatic that if there have been no fraudulent conveyances a creditor can enforce his claim against the assets of his debtor only. In the event it becomes necessary for him to levy upon any property of the debtor the levy cannot extend any further than the interest of the debtor in that property. If the debtor has in good faith lawfully disposed of any rights with regard to that property, those rights if in the hands of bona fide purchasers cannot be affected by a judgment sale of the debtor's property. The question then suggested is, what interest, if any, has the promisor of a contract to make a will put beyond the reach of his creditors? Stated more in terms of the creditor seeking to enforce his judgment, the question would be, after one has made a contract to make a will, what interest in his property is still undisposed of and still available for the payment of his debts?

In the case of specific property it would seem that the contract is one that the promisee will receive the property concerned at the death of the promisor. Since he has parted with any interest extending beyond his life, it is difficult to see how his creditors could secure the benefit of any value beyond that date. This result was reached in *Ankeny v. Lieuallen*<sup>59</sup> where the promisor had secured his debt by giving his creditor a mortgage on the property subject to the contract, the mortgagee having full knowledge of the agreement. In foreclosure proceedings it was held that the mortgage was ineffective as to anything more than an estate for the life of the promisor.

<sup>55</sup> *Fuchs v. Fuchs*, 48 Mo. App. 18 (1892).

<sup>56</sup> *Stone v. Lacy*, 242 Ala. 393, 6 S. (2d) 481 (1942).

<sup>57</sup> *Ryan v. Boston Letter Carriers' Mutual Benefit Association*, 222 Mass. 237, 110 N.E. 281 (1915).

<sup>58</sup> *Rastetter v. Hoenninger*, 214 N.Y. 66, 108 N.E. 210 (1915).

<sup>59</sup> 169 Ore. 206, 113 P. (2d) 1113 (1941), *affd.* on rehearing, 169 Ore. 222, 127 P. (2d) 735 (1942).

In the case of a contract to will all or a fractional part of the estate one may own at death an entirely different situation exists. Here the promisee has no claim to any specific property and it is not anticipated that the promisor will be restricted in the use of his property in his normal business affairs or for his own wants, needs, or convenience. This would certainly be sufficient to render his property liable for bona fide debts to the same extent and in the same manner as if no contract existed. In *National Life Insurance Co. v. Watson*<sup>60</sup> one under a contract to will all his estate in a certain manner gave a mortgage on certain property as security for a debt. When foreclosure proceedings were instituted the beneficiaries of the contract came in to defend the action and claimed an interest in the property. The court very properly held that since the promisor had a right to use or dispose of the property for his own benefit, it was certainly liable for his debts, and that since it was liable for his debts it was subject to mortgage by him.<sup>61</sup> The soundness of the result reached is so obvious that the question has rarely been before the courts.

Of course it is assumed that the debt concerned is a bona fide debt incurred in real business transactions. It would seem that the same requirements as to reasonableness and good faith which apply to transfers of property by the promisor would be equally applicable to the creation of a debt by him. Although no case has been found directly in point it is very unlikely that an artificial debt deliberately created for the purpose of avoiding the effect of the contract would be recognized even though it might be supported by legal consideration. Actual transfers by the promisor have been set aside on the ground that the consideration received was grossly out of proportion to the value of the property transferred,<sup>62</sup> and no reason appears why the same rule should not apply if the promisor should create a debt for a nominal or insignificant consideration.<sup>63</sup>

<sup>60</sup> 141 Kan. 903, 44 P. (2d) 269 (1935).

<sup>61</sup> "Certainly he had a right to borrow the \$2,000 sued for in this action. And the judgment creditor could certainly have subjected this particular 100 acres to execution sale to the satisfaction of its judgment without a mortgage lien thereon. . . ." *National Life Ins. Co. v. Watson*, 141 Kan. 903 at 905, 44 P. (2d) 269 (1935).

<sup>62</sup> *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831 (1929).

<sup>63</sup> See also *Ralyea v. Venners*, 155 Misc. 539, 280 N.Y.S. 8 (1935) and *Phillip v. Phillip*, 96 Misc. 471, 160 N.Y.S. 624 (1916), where mortgages given by the promisor without consideration were denied enforcement. The cases, however, are not too helpful in this connection in view of the fact that there is some doubt as to whether or not a mortgage as a gift is valid in any event. It seems clear that a mortgage need not be supported by consideration, and this has become the basis for the positive statement by some writers that a mortgage is a proper subject of a gift by the mortgagor. *WALSH, MORTGAGES* §14 (1934). However, the fact that a mortgage given to support an obligation is enforceable only to the extent that the obligation is enforceable has led others to express doubts as to



*Interest of the Promisee Prior to the Death of the Promisor*

An analysis of the extent to which a contract to devise or bequeath restricts an owner of property in dealing with his assets during his lifetime is by no means a complete solution to the problems that are likely to arise before his death. By the very terms of the contract the promisee was to receive the property at the death of the promisor. He was given no rights of beneficial enjoyment or of control prior to that time. It was contemplated that he would receive the property through the promisor's will, but a will has no effect until the death of the testator. While struggling with this usually unexpressed view that the will is somehow a necessary part of the machinery by which the promisee receives the property, and often failing to define the interests created by the contract itself, the courts have experienced considerable difficulty in developing a theory for the granting of relief to the promisee prior to the time set for the performance of the agreement.

Little imagination is necessary to suppose many situations in which relief of some kind prior to the death of the promisor is absolutely essential if the promisee's interests are to be protected. If the promisee is forced to sit quietly by while the promisor squanders the property, makes huge gifts, commits waste, executes mortgages, or performs many other acts inconsistent with the contract, the result will often be that by the time the property is to go over to the promisee, it will be non-existent or in the hands of bona fide purchasers. Some relief against situations of this nature is essential if vitality is to be given to this type of contract.

Probably the simplest type of relief against these improper acts of the promisor is to hold that they relieve the promisee of his obligation to perform his part of the bargain. In the case of *Eaton v. Eaton*<sup>64</sup> an antenuptial contract was made whereby the husband agreed to leave one-fourth of his estate to his wife, and the wife agreed to accept this amount in full satisfaction of her distributive share and not contest the will. Prior to his death the husband made large gifts to his children by a prior marriage with a view to avoiding the effect of the antenuptial contract. He died leaving his widow one-fourth of his greatly reduced estate. It was held that the wife was relieved of her obligation not to contest the will.

whether or not a mortgage as an actual gift and unconnected with any obligation of any kind would be of any effect. 5 TIFFANY, REAL PROPERTY, 3d ed., §1401 (1939). See also 4 AMERICAN LAW OF PROPERTY §16.67 (1952).

<sup>64</sup> 233 Mass. 351, 124 N.E. 37 (1919).

Another simple mode of relief which avoids the difficulty involved in allowing an action before the promisee is entitled to the property is that of setting aside the inter vivos transfer after the promisee's rights have matured. Whether it is a contract to will specific property<sup>65</sup> or an unascertained and indefinite amount depending upon the size of the estate<sup>66</sup> a transfer made in violation of the contract may be set aside after the death of the promisor. Whether the prayer is that the deed be set aside and the property permitted to pass under a valid unrevoked will,<sup>67</sup> the deed decreed ineffective and a distribution made according to the terms of the contract as if no transfer had been made,<sup>68</sup> or merely that the title be quieted in the promisee,<sup>69</sup> or whether the transferees are asked to convey to the promisee,<sup>70</sup> seems to be immaterial. The right of the promisee to receive the property after the death of the promisor cannot be affected by the promisor's wrongful inter vivos transfer, and whatever decree is appropriate to that end, provided the rights of innocent third parties have not intervened, will be granted. Where some consideration has been given by the transferee, but he is still not in the position of a bona fide purchaser, at least one court has set aside the transfer as to part of the property while permitting a retention of part as compensation for the consideration paid.<sup>71</sup>

<sup>65</sup> *Kastell v. Hillman*, 53 N.J. Eq. 49, 30 A. 535 (1894); *Erwin v. Erwin*, 17 N.Y.S. 442 (1892), *affd.* 139 N.Y. 616, 35 N.E. 204 (1893).

<sup>66</sup> *Whiton v. Whiton*, 179 Ill. 32, 53 N.E. 722 (1899); *Johnson v. Soden*, 152 Kan. 284, 103 P. (2d) 812 (1940); *Skinner v. Rasche*, 165 Ky. 108, 176 S.W. 942 (1915); *McGuire v. McGuire*, 74 Ky. (11 Bush) 142 (1874); *Riddell v. Riddell*, 146 La. 37, 83 S. 369 (1919); *Bower v. Daniel*, 198 Mo. 289, 95 S.W. 347 (1906); *Getchell v. Tinker*, 291 Mich. 267, 289 N.W. 156 (1939); *Lay v. Proctor*, 147 Ore. 545, 34 P. (2d) 331 (1934); *Schramm v. Burkhart*, 137 Ore. 208, 2 P. (2d) 14 (1931); *Daniels v. Aharonian*, 63 R.I. 282, 7 A. (2d) 767 (1939); *Bruce v. Moon*, 57 S.C. 60, 35 S.E. 415 (1900); *Quinn v. Quinn*, 5 S.D. 328, 58 N.W. 808 (1894); *Swingley v. Daniels*, 123 Wash. 409, 212 P. 729 (1923); *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831 (1929); *Gregor v. Kemp*, 3 Swanst. 404, note, 36 Eng. Rep. 926 (1722).

<sup>67</sup> *Riddell v. Riddell*, 146 La. 37, 83 S. 369 (1919); *Bruce v. Moon*, 57 S.C. 60, 35 S.E. 415 (1900); *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831 (1929); *Lay v. Proctor*, 147 Ore. 545, 34 P. (2d) 331 (1934) (transferee declared a trustee for the estate and directed to convey to the executor so the property could be handled as part of the estate). See *McGuire v. McGuire*, 74 Ky. (11 Bush) 142 at 154 (1874).

<sup>68</sup> *Daniels v. Aharonian*, 63 R.I. 282, 7 A. (2d) 767 (1939); *Quinn v. Quinn*, 5 S.D. 328, 58 N.W. 808 (1894); *Gregor v. Kemp*, 3 Swanst. 404, note, 36 Eng. Rep. 926 (1722).

<sup>69</sup> *McCullom v. Mackrell*, 13 S.D. 262, 83 N.W. 255 (1900).

<sup>70</sup> *Whitney v. Hay*, 181 U.S. 77, 21 S.Ct. 537 (1901) (transferee declared a trustee and directed to convey to the promisee); *Williams v. Williams*, 123 Va. 643, 96 S.E. 749 (1918).

<sup>71</sup> *Bruce v. Moon*, 57 S.C. 60, 35 S.E. 415 (1900). This was a case in which there had been a contract to will one's entire estate in consideration of nursing, care, and maintenance for life. The promisor, without cause, left the care, nursing, and maintenance being properly provided by the promisee and transferred his property to the transferee in consideration of an agreement for support and maintenance for life. Thus the considera-

The remedies mentioned above might be very satisfactory in certain limited situations but are insufficient to cover all the eventualities that might arise. The rule that if the promisor has put his property beyond the scope of the operation of his will the promisee is relieved of performance is of little comfort to a promisee who has already performed, nor will a rule that wrongful inter vivos conveyances may be set aside after the death of the promisor be of any assistance in cases where the property has gotten into the hands of bona fide purchasers. When the promisee attempts to bring his action within the lifetime of the promisor he is faced with the difficulty that he has no immediate claim to the property.<sup>72</sup> His contract is that he shall have the property at the promisor's death. In the case of a contract for all or a fractional part of an estate he is faced with the further difficulty that he cannot point to any particular property or any particular value and say that that is what he will eventually be entitled to. Regardless of the present size of the estate there is always the possibility that it will completely evaporate in the normal course of business through bona fide inter vivos transactions so that there will never be anything for his contract to operate upon. But the fact that the estate may evaporate does not require the promisee to endure an improper act tending in that direction merely because there is a possibility that his interest may never ripen into a possessory estate.

In the case of specific property an inter vivos conveyance to one other than a bona fide purchaser may be set aside even though the promisor is still living.<sup>73</sup> The same is true with regard to contracts

tion rendered by the transferee was consideration which, had there been no breach of the original agreement, would have been rendered by the promisee. Therefore, it seemed equitable that the transferee should be compensated.

A similar equitable adjustment will be made where the promisee brings action during the life of the promisor and it is found that the third person to whom a wrongful conveyance has been made has rendered part of the consideration which was to have been rendered by the promisee. *Gupton v. Gupton*, 47 Mo. 37 (1870).

The soundness of the proposition might well be attacked on the theory that where there is a contract to will property in exchange for services to be rendered to the promisor, if the promisor, without cause, ceases to receive the services the promisee may earn his legacy or devise by holding himself at all times in readiness to perform. See *Davison v. Davison*, 13 N.J. Eq. (2 Beasley) 246 (1861).

<sup>72</sup> *Maud v. Maud*, 33 Ohio St. 147 (1877). Dicta can be found to the effect that if the promisor puts it out of his power to perform the contract, e.g., conveys to a third person, the promisee is entitled to specific performance even during the lifetime of the promisor, but it is apparent that all that is meant by such statements is that equity will interfere during the lifetime of the promisor to protect the promisee's interest which is to arise in the future. *Hayes v. Moffatt*, 83 Mont. 214 at 229-230, 271 P. 433 (1928).

<sup>73</sup> *White v. Masee*, 202 Iowa 1304, 211 N.W. 839 (1927); *Brackenbury v. Hodgkin*, 116 Me. 399, 102 A. 106 (1917) (decree was that the grantee reconvey to the promisor and that the promisor hold the legal title impressed with a trust in favor of the promisee); *Carmichael v. Carmichael*, 72 Mich. 76, 40 N.W. 173 (1888); *Pflugar v. Pultz*, 43 N.J. Eq. 440, 11 A. 123 (1887); *Davison v. Davison*, 13 N.J. Eq. (2 Beasley) 246 (1861).

to devise or bequeath all or a fractional part of an estate where the transfer is of such a nature as to constitute a violation of the contract,<sup>74</sup> the courts usually failing even to discuss the question of whether or not there should be a distinction between specific property and unascertained property.<sup>75</sup> Other cases have reached the same result in a different manner in that instead of setting the transfer aside they have granted a decree that the transferee holds the property subject to the contract.<sup>76</sup> Where one of two joint promisors dies leaving his entire estate to the other for life, remainder to third persons, the promisee is entitled to a decree that, subject to a life interest in the joint promisor, the property is impressed with a trust<sup>77</sup> for the preservation of his right to receive it at the termination of that interest, the surviving promisor being given full power to consume and to dispose for reasonable purposes during his lifetime.<sup>78</sup> A decree that the grantee holds subject to the contract has the advantage of recognizing the complete freedom of the promisor to deal with his own interest as he sees fit, but at the same time preserving the right of the promisee to receive the property at the promisor's death. Such a theory appears particularly desirable when it is remembered that it was this right to

<sup>74</sup> *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E. (2d) 568 (1945); *Stewart v. Shelton*, 356 Mo. 258, 201 S.W. (2d) 395 (1947); *Phillip v. Phillip*, 96 Misc. 471, 160 N.Y.S. 624 (1916) (fraud and undue influence exerted by the transferee).

<sup>75</sup> Some courts have indicated that such a distinction should be made. In *Galloway v. Eichells*, 1 N.J. Super. 584, 62 A. (2d) 499 (1948), a contract was made to will all of one's property. After a will had been made pursuant to the contract the promisor revoked the will and was about to sell certain lands owned within the state and to leave the state. The promisee brought an action for "specific performance" and for an injunction against the sale or encumbrance of the land. Just what type of "specific performance" was being sought is not clear but it was apparently an attempt to compel the execution of the will. The court denied any equitable relief at all and stated that the plaintiff's only remedy was an action at law in quantum meruit for the consideration that had been given. Although the court seemed to rely heavily upon the fact that no particular property was bound and to indicate that if particular property were bound they could have granted equitable relief of some sort, the case cannot be taken as authority for the proposition that equitable relief could never be granted within the lifetime of the promisor in case of contracts to will all of one's estate. There is nothing in the opinion to indicate that there was an allegation that the sale being threatened was other than a reasonable one or that there was danger that the property was about to be wrongfully put outside the scope of the promisor's estate. Of course the mere fact that there was about to be a sale should not entitle the promisor to immediate relief unless specific property was involved.

<sup>76</sup> *Osborn v. Hoyt*, 181 Cal. 336, 184 P. 854 (1919) (action brought during the lifetime of the promisor, but promisor died before judgment was rendered); *Clancy v. Flusky*, 187 Ill. 605, 58 N.E. 594 (1900) (promisor died during the pendency of the suit, and the decree rendered merely quieted title in the promisee); *Newman v. French*, 138 Iowa 482, 116 N.W. 468 (1908); *Hill v. Ribble*, 132 N.J. Eq. 486, 28 A. (2d) 780 (1942) (enjoined further conveyance); *Vanduyne v. Vreeland*, 12 N.J. Eq. (1 Beasley) 142 (1858).

<sup>77</sup> The court referred to this as a trust though the utility of the use of the term trust in this connection may well be questioned.

<sup>78</sup> *Matheson v. Gullickson*, 222 Minn. 369, 24 N.W. (2d) 704 (1946).

receive the property at the death of the promisor that was the subject of the contract in the first place.

The theory of the relief granted in these cases is that it is necessary to prevent future harm. Although the promisee is not entitled to the fruits of his contract at the time the action is brought, if relief is postponed there is danger that he will be forever foreclosed by the intervention of bona fide purchasers or by the permanent destruction of the property. He has not been harmed when the action is brought but alleges that he will be irreparably harmed in the future if the court does not intervene in his behalf. His relief has been described in some of the cases as being in the nature of a bill *quia timet*.<sup>79</sup> But whatever might be the theoretical explanation, the relief given should always be sufficiently flexible to take care of the exigencies of the particular cases.

Merely setting aside transfers wrongfully made is often inadequate relief if the recalcitrant promisor is left free to follow it with other transfers equally prejudicial to the rights of the promisee. This danger may be averted by including in the decree setting a conveyance aside<sup>80</sup> or directing that the grantee hold subject to the rights of the promisee<sup>81</sup> an injunction against future conveyances. Even though there has been no wrongful conveyance by the promisor, the promisee is entitled to an injunction against a threatened transfer which is likely to result in putting the property beyond his reach.<sup>82</sup> One of the problems not often discussed by the courts is the difficulty in framing a

<sup>79</sup> "Though she is not, at this stage of the case, entitled to specific performance, either positively or negatively, she is entitled to maintain a suit on the principle of *quia timet*, to preserve her rights in the contract and property, and to protect her in performance, to the end that she may ultimately be in a position to claim and secure the benefits of the contract." *White v. Masee*, 202 Iowa 1304 at 1308, 211 N.W. 839 (1927) (setting aside a deed and enjoining the grantee's interference with the promisee's performance of the contract).

For a case decreeing that the grantee holds the property subject to the rights of the promisee, and giving particular attention to an analysis of the theory of the relief in terms of *quia timet* see *Vanduyne v. Vreeland*, 12 N.J. Eq. (1 Beasley) 142 (1858).

The protection of property against danger of present loss or deterioration on behalf of one having a future right of enjoyment has long been recognized as a proper application of the *quia timet* doctrine. 2 STORRY, EQUITY JURISPRUDENCE §§825-851 (1836).

<sup>80</sup> *Pflugar v. Pultz*, 43 N.J. Eq. 440, 11 A. 123 (1887); *Davison v. Davison*, 13 N.J. Eq. (2 Beasley) 246 (1861).

<sup>81</sup> *Newman v. French*, 138 Iowa 482, 116 N.W. 468 (1908); *Hill v. Ribble*, 132 N.J. Eq. 486, 28 A. (2d) 780 (1942).

<sup>82</sup> *Cagle v. Justus*, 196 Ga. 826, 28 S.E. (2d) 255 (1943) (restrained from selling the land, cutting timber, or otherwise damaging the property); *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N.W. 56 (1915); *Schondelmayer v. Schondelmayer*, 320 Mich. 565, 31 N.W. (2d) 721 (1948); *Winchell v. Mixer*, 316 Mich. 151, 25 N.W. (2d) 147 (1946) (injunction against disposing for any purpose except support and maintenance unless property of equal value is received in return); *Bird v. Pope*, 73 Mich. 483, 41 N.W. 514 (1889) (restrained from conveying or encumbering); *Matheson v. Gullickson*, 222 Minn. 369, 24 N.W. (2d) 704 (1946) (permitted to dispose for reasonable purposes).

decree of this nature which will protect the rights of the promisee and at the same time preserve to the promisor his privilege of making such good faith transfers as suit his needs or convenience. In their enthusiasm to protect promisees the courts have sometimes failed to exercise the proper degree of caution to see that they do not give them more protection than they deserve. In *Campbell v. Dunkelberger*<sup>83</sup> a contract covering an entire estate was involved, the will having already been made subject to a contract not to change. The beneficiary of the contract sought an injunction against a threatened wrongful conveyance of a certain piece of realty included in the estate. The decree granted restrained the promisor from "disposing of the property . . . in any manner." To impose such a restriction is probably to hold the promisor to more than he bargained for and to restrict him in a manner not contemplated by the parties to the contract. It is probably more desirable that decrees of this kind be restricted to enjoining particular threatened transfers or, at least, to transfers of a particular nature. A threatened transfer should not be enjoined unless it is one made in bad faith or one which is otherwise sufficiently unreasonable to constitute an actual violation of the contract, a mere allegation that the promisor is about to sell the property not being sufficient to state a cause of action.<sup>84</sup>

This tendency of the courts to extend all protection possible to the promisee coupled with the desire of equity to give complete relief in one action has led to some peculiar results. In *Chantland v. Sherman*<sup>85</sup> there was a contract to divide an estate equally between the promisor's daughter and stepdaughter. When the promisor repudiated her contract by an open declaration of intention not to leave anything to the stepdaughter, a decree was obtained directing the immediate conveyance to the stepdaughter of an undivided one-half of the promisor's estate subject to a life interest in the promisor.<sup>86</sup> Just what would have been the effect of the conveyance should the entire estate have become necessary to the support and maintenance of the promisor was not dealt with in the opinion. While this type of relief might have been appropriate if specific property had been involved, it is difficult to justify in the situation presented.

<sup>83</sup> 172 Iowa 385, 153 N.W. 56 (1915).

<sup>84</sup> *Schauer v. Schauer*, 43 N.M. 209, 89 P. (2d) 521 (1939). Cf. *Galloway v. Eichells*, 1 N.J. Super. 584, 62 A. (2d) 499 (1948).

<sup>85</sup> 148 Iowa 352, 125 N.W. 871 (1910).

<sup>86</sup> See *Winchell v. Mixer*, 316 Mich. 151, 25 N.W. (2d) 147 (1946), where a similar relief was given, but the decree framed in such a manner as to limit its application to an amount not to exceed the economic value which would have shifted to the promisees at the death of the promisor if they had never entered into the contract at all.

Where a promisor subject to a contract to will his entire estate to particular persons at his death begins making extravagant gifts, thus indicating a danger of dissipation of the estate, a trustee has been appointed to take immediate control of the property and manage it for the benefit of the promisor during his life and at the same time preserve the interests of the ultimate beneficiaries or promisees.<sup>87</sup> This type of relief, like the immediate conveyance to the promisee, reaches a result not provided for in the contract. Both have the effect of preserving the promisee's interest by giving a high degree of insurance against the possibility of the property falling into the hands of bona fide purchasers,<sup>88</sup> but they both have the disadvantage of imposing upon the parties a relationship definitely not included in the contract. Such relief should not be resorted to unless, under the facts of the particular case, it appears to be the only means of protecting the promisee's interest.<sup>89</sup> Otherwise the courts are likely to find themselves enforcing contracts which have little relation to the contracts actually entered into by the parties.<sup>90</sup>

<sup>87</sup> *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E. (2d) 568 (1945).

<sup>88</sup> In the case of real property the promisee is given the very material advantage of a record title to protect his interest. No case has been found where it has been necessary to rule upon the question whether or not he could secure this advantage by recording the contract itself. In *Ankeny v. Lieuellen*, 169 Ore. 206, 113 P. (2d) 1113 (1941), *affd.* on rehearing 169 Ore. 222, 127 P. (2d) 735 (1942), the contract was on record, but the mortgagee taking a subsequent mortgage on the property had actual notice of the contract, and the court refused to rule on whether or not the record notice would have been sufficient.

In *Getchell v. Tinker*, 291 Mich. 267, 289 N.W. 156 (1939), a contract to dispose of property at death was incorporated in a property settlement agreement between an estranged husband and wife which was recorded in the office of the register of deeds. But in setting aside an *inter vivos* conveyance made in violation of the contract the court gave no indication whether reliance was made upon record notice to the grantee or whether for some other reason the grantee was not a bona fide purchaser.

Likewise in *Krcmar v. Krcmar*, 202 Iowa 1166, 211 N.W. 699 (1927), a written contract between a father and son reciting the fact that it was agreed that a codicil executed by the father devising certain property to the son was to act as a conveyance was acknowledged by both parties and recorded. Thereafter the father conveyed the property to his wife and died. In an action to quiet title it was held that the property went to the son by virtue of the recorded contract. Although the court noted that the grantee had "constructive notice of the contract by reason of its being of record" (202 Iowa at 1170), the case is not conclusive authority for that proposition since it was also shown that the grantee had actual notice, and it was not indicated in the opinion that she gave consideration for the conveyance.

The contract was acknowledged and recorded in *Ochs v. Ochs*, 122 N.J. Eq. 143, 192 A. 502 (1937), but no question concerning the effect of the record was raised in the litigation that developed.

<sup>89</sup> As between the two the decree putting title in the promisee subject to the life estate in the promisor should be least likely to frustrate the intent of the parties. Here the effect would usually be the same as would have resulted if the contract had been carried out. However, the establishment of the trust might be particularly undesirable because of the cost of administering the trust. It would certainly be unwise in the small estates usually involved in this type of transaction.

<sup>90</sup> See *Huffine v. Lincoln*, 52 Mont. 585, 160 P. 820 (1916).

One of the difficulties experienced in enjoining conveyances prejudicial to the interests of the promisee arises out of the fact that the consideration given by the promisee is often personal services to be performed for the promisor as long as he lives. The wrongful transfer of the property is usually accompanied by an abandonment of the receipt of the services. It seems that the proper conclusion is that so long as the promisee holds himself in readiness to render the services he is entitled to the protection of his interests.<sup>91</sup> In some situations where extreme unpleasantness has developed between the parties so as to make the personal services contracted for virtually impossible the court might require an alternative type of performance by the promisee as a condition precedent to the granting of equitable relief. In *White v. Masseur*<sup>92</sup> an aged father contracted with his daughter that he would devise the daughter a certain tract of land if the daughter and her husband would abandon their existing home and move into the home of the father, and nurse and care for him as long as he lived. After the daughter entered upon performance the father left the home and purported to transfer the land to his son. The daughter brought her bill in equity to enjoin the son from interfering with her performance of the contract and to cancel the deed. Although the daughter was still holding herself in readiness to perform her obligation and had not committed any act that could be termed a breach of her duty toward her father, such a degree of unpleasantness had developed between them that it was unthinkable that the father could return to the home occupied by the daughter. While granting the relief asked for the court exercised its extraordinary powers and re-

<sup>91</sup> *Pflugar v. Pultz*, 43 N.J. Eq. 440, 11 A. 123 (1887); *Davison v. Davison*, 13 N.J. Eq. (2 Beasley) 246 (1861). In *Fitzpatrick v. Michael*, 177 Md. 248, 9 A. (2d) 639 (1939), it might appear that an opposite result was reached but the decision was actually based on other grounds. In that case the promisor agreed to pay weekly wages for services rendered as well as devise certain real estate by will. The contract was oral and therefore within the statute of frauds. After being discharged from her employment the promisee brought action to enforce specific performance within the lifetime of the promisor. It was found that since the services already rendered were neither unequivocally referable to the contract or incapable of monetary valuation there was no basis for relief against the operation of the statute of frauds; consequently, the contract could not be enforced. There is nothing in the case to indicate that if the statute of frauds barrier could have been overcome the promisee would not have been entitled to protection of her interest in the real estate.

Where the promisee was also lessee of the premises and the promisor lessor had conveyed to a third person who joined with the promisor in an effort to terminate the lease it was decreed that the grantee held subject to the contract, that further conveyance be enjoined, and that the promisee was entitled to the property upon the death of the promisor provided he continued to fulfill his obligations under the contract. *Hill v. Ribble*, 132 N.J. Eq. 486, 28 A. (2d) 780 (1942).

<sup>92</sup> 202 Iowa 1304, 211 N.W. 839 (1927).



quired as a condition precedent to the issuance of the decree the payment by the daughter of a reasonable rent into court to be applied to the support and maintenance of the father.

The personal service feature of these contracts has also caused an encounter with the mutuality of remedy doctrine where injunctive relief has been sought. Where the obligation of the promisee consists of the performance of personal services which could not be specifically enforced, at least one court has refused to enjoin the promisor from giving away or disposing of her property in a manner inconsistent with the terms of the contract.<sup>93</sup> The reason given for the decision was that equity will not enjoin a breach of a contract which is incapable of specific enforcement, and that this one could not be specifically enforced because of lack of mutuality of remedy. It seems that this difficulty could have been avoided by the application of the theory that the relief sought was not an injunction against a breach of contract but an injunction to protect an interest in property whose conveyance to the promisee was to become due at a future time.

As previously indicated the usual ground for equitable jurisdiction in these cases is that it is necessary to protect a legally cognizable interest which is not being presently infringed upon, but which is in danger of permanent loss if present steps are not taken to ward off such danger. There is nothing inherent in a contract to make a will which automatically gives equity jurisdiction of the case. The usual reasons for equitable relief must of course be found. Paramount among these are inadequacy of remedy at law and, at least in this situation, danger of irreparable damage to or loss of property.

In case of a contract to devise specific real estate the nature of the property itself should be sufficient to give equitable jurisdiction in the same way that equity will interfere when the vendor of a contract to sell land is about to commit an act which will make performance impossible. But equitable relief is not limited to promises to devise specific real estate. As has already been observed, courts grant the various types of equitable relief in cases where the property to be devised or bequeathed depends upon the size of the promisor's estate

<sup>93</sup> O'Brien v. O'Brien, 197 Cal. 577, 241 P. 861 (1925). In Nunn v. Boal, 29 Ohio App. 141, 162 N.E. 724 (1928), "specific performance" of a contract to devise specific real estate in return for personal services was denied, the court giving lack of mutuality as a reason for the decision. The action was brought within the lifetime of the promisor and before the promisee had fully performed and before he was, according to any construction, entitled to the property. See Maud v. Maud, 33 Ohio St. 147 (1877). Just what theory specific performance could have been granted on at that time is difficult to see. If the action had been one to protect the right to receive the real estate at the later date a better case for the plaintiff might have been presented.

at death,<sup>94</sup> and often fail to give any discussion whatever as to the possibility of any distinction between this type of case and a case where specific property is involved. This failure to discuss the type of the property promised as a basis for equitable jurisdiction is probably due to the fact that other grounds are usually present.

Often the consideration for contracts to devise or bequeath consists of the rendering of companionship, society, or filial devotion to the promisor. In such cases the emphasis placed upon the difficulty or impossibility of determining the pecuniary value of the services rendered might tend to create the impression that the courts are relying upon this factor as a basis for equitable jurisdiction.<sup>95</sup> However, it is believed that any proper analysis of the cases will reveal that the emphasis appears only when the agreement is oral and the uniqueness of the promisee's services is significant because it is an element to be considered in determining whether or not there has been sufficient part performance to remove the contract from the operation of the statute of frauds.<sup>96</sup> The peculiar nature of the services might well be an important factor where a statute of frauds problem is raised but it cannot be said to form a basis for equitable jurisdiction.

Where a husband and wife have contracted with each other that the property of the survivor shall go to a particular beneficiary a court of equity will interfere after the death of the first to die and before the death of the survivor to protect the interest of the beneficiary.<sup>97</sup> Such contracts usually include either inter vivos or testamentary transfers of property between the spouses as part of the consideration. The courts then often offer as a reason for equitable jurisdiction the theory that since the promisor received part of his estate through and as a result of the contract, he will not be permitted to deal with the property in a manner inconsistent with his bargain.<sup>98</sup> Standing alone this

<sup>94</sup> *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E. (2d) 568 (1945) (trustee appointed during the lifetime of the promisor); *Winchell v. Mixter*, 316 Mich. 151, 25 N.W. (2d) 147 (1946) (decree that promisee was owner subject to the life interest in the promisor); *Matheson v. Gullickson*, 222 Minn. 369, 24 N.W. (2d) 704 (1946) (decree that the property is impressed with a trust for the preservation of the promisee's interest); *Vanduyne v. Vreeland*, 12 N.J. Eq. (1 Beasley) 142 (1858) (decree that the property is held subject to the interest of the promisee); *Phillip v. Phillip*, 96 Misc. 471, 160 N.Y.S. 624 (1916) (inter vivos transfer by the promisor set aside).

<sup>95</sup> See *Matheson v. Gullickson*, 222 Minn. 369, 24 N.W. (2d) 704 (1946); *Vanduyne v. Vreeland*, 12 N.J. Eq. (1 Beasley) 142 (1858).

<sup>96</sup> 2 CORBIN, CONTRACTS §435 (1950); POMEROY, SPECIFIC PERFORMANCE, 3d ed., §114 (1926).

<sup>97</sup> *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N.W. 56 (1915); *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E. (2d) 568 (1945); *Phillip v. Phillip*, 96 Misc. 471, 160 N.Y.S. 624 (1916).

<sup>98</sup> In *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N.W. 56 (1915), the court merely said that the wife was estopped from making any distribution of the property except that provided in the contract. It is difficult to see how there is a basis for estoppel here.

would appear to be an empty assertion inasmuch as the extent to which the property received from the other spouse increased the size of the promisor's estate could be readily determined and compensated for in damages.

Where a holder of a future interest in property transfers his interest to the holder of the estate of present enjoyment upon a contract that the transferee will devise or bequeath a proportionate part of his estate to the transferor at his death, the interest thus acquired by the transferor will be protected by equity.<sup>99</sup> The same result is also reached even where it is perfectly obvious that there is nothing peculiar in the nature of the consideration and absolutely no means by which the consideration given can be associated with the thing promised.<sup>100</sup> The effect of these cases is a clear demonstration that the grounds for equitable relief are to be found in the right of the promisee and not in the nature of the consideration promised or furnished by him. The promisee has acquired a right which is worthy of protection and for which there is no adequate remedy at law. That right is that the entire property of the promisor shall be permitted to flow to him upon the death of the promisor with only such diminution or impairment as is consistent with reasonable use by the promisor. It is a right to receive property at some future time and relief in equity should be based solely upon the protection of that right. The value of the right is impossible of determination within the lifetime of the promisor. The promisor has the privilege of consuming or disposing of the entire estate during his lifetime, the only restriction being that he do so in a reasonable manner. The promisee has no present interest in any property of any kind and there is no assurance that he will ever have any such interest. His interest is future and contingent. Any attempted inter vivos gift which is unreasonable or any act of waste or any other act of the promisor which violates the contract is a wrong against the promisee, but when he brings action in equity he is not seeking redress for that wrong. He is seeking the court's protection against the future effect of the wrong.<sup>101</sup> If action is delayed until the promisee is actually entitled to the property contracted for there is danger that the entire estate will be dissipated through im-

<sup>99</sup> *Chantland v. Sherman*, 148 Iowa 352, 125 N.W. 871 (1910); *Winchell v. Mixer*, 316 Mich. 151, 25 N.W. (2d) 147 (1946).

<sup>100</sup> *Lovett v. Lovett*, 87 Ind. App. 42, 155 N.E. 528, rehearing den. 87 Ind. App. 52, 157 N.E. 104 (1927) (consideration consisted of professional service the value of which could have been easily determined and which it was admitted was extremely small in comparison to the property promised).

<sup>101</sup> *Vanduyne v. Vreeland*, 12 N.J. Eq. (1 Beasley) 142 (1858).

proper channels and will be beyond his reach. The aid of equity is invoked for the preservation of property to its proper function.<sup>102</sup>

Although the promisee has the privilege of pursuing equitable relief when the promisor repudiates the contract, he is not limited to that type of procedure. The promisee may, at his election,<sup>103</sup> treat the contract as rescinded and maintain an action on the theory of quantum meruit<sup>104</sup> or maintain an action on the contract on the theory of the anticipatory breach.<sup>105</sup> The principal difference between the theory of equitable and legal relief in this type of case is that where equitable relief is sought the plaintiff is usually seeking the aid of the court to protect an interest in particular assets whose conveyance to him is due at a future time. In the action at law he is seeking immediate redress for the wrong of the defendant. The failure of litigants to state clearly the theory of their actions has resulted in a confusion among the courts concerning the nature of the relief granted, and this confusion has developed many apparent inconsistencies in the opinions. This confusion and these inconsistencies will tend to disappear if the relief sought in each particular case is carefully analyzed.

It is essential to remember in all cases that the promisor has his entire life within which to perform a contract to make a will. Whether the action is at law or in equity there is no basis for expecting an actual performance of the contract prior to the promisor's death. To constitute a basis for a cause of action the repudiation by the promisor must be positive and absolute. Mere statements by the promisor made in the heat of anger and unaccompanied by any acts will not constitute a breach cognizable either at law or in equity,<sup>106</sup> nor is an offer

<sup>102</sup>This is analogous to many situations where equitable relief is sought to protect against a future loss from an improper assertion of rights, as under a written instrument such as a deed which could become a cloud on the plaintiff's title or a negotiable instrument which could become a claim against the plaintiff if transferred to a bona fide purchaser. With regard to equitable relief of this nature generally see *McCLINTOCK*, EQUITY §184 (1936); 2 *STORY*, EQUITY JURISPRUDENCE, 12th ed., §§825-851 (1877); 6 *WILLISTON*, CONTRACTS, rev. ed., §1880 (1938).

<sup>103</sup>See *Mug v. Ostendorf*, 49 Ind. App. 71, 77, 96 N.E. 780, 782 (1911) (contract for specific real estate); *Moorhead v. Fry*, 24 Pa. (12 Harris) 37 at 38-39 (1854) (contract for all property owned at death). In each of these cases the action was in quantum meruit. While granting the relief asked for the court indicated in each case that a choice of remedies was available.

<sup>104</sup>*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).

<sup>105</sup>*Edwards v. Slate*, 184 Mass. 317, 68 N.E. 342 (1903). See *O'Brien v. O'Brien*, 197 Cal. 577, 241 P. 861 (1925); *Farrington v. Richardson*, 153 Fla. 907, 16 S. (2d) 158 (1944) (action brought within the life of the promisor but promisor died while the suit was pending); *McCurry v. Purgason*, 170 N.C. 463, 87 S.E. 244 (1915).

<sup>106</sup>*Henson v. Neumann*, 286 Ill. App. 197, 3 N.E. (2d) 110 (1936).

by the promisor to satisfy his obligation by an inter vivos payment of a sum considered inadequate by the promisee sufficient basis for a cause of action within the promisor's lifetime.<sup>107</sup> A statement of repudiation accompanied by a refusal by the promisor to receive further performance by the promisee<sup>108</sup> or a disposition of the property inconsistent with the terms of the contract<sup>109</sup> is sufficient to constitute a breach. The same has been held where the promisor executed an inconsistent will and openly declared his intent not to perform the contract.<sup>110</sup> The development of extreme animosity between promisor and promisee might be sufficient indication of a probable effort by the promisor to avoid his obligation to justify an injunction against a wrongful inter vivos transfer.<sup>111</sup>

The theory of the action in quantum meruit is that the promisee is willing to treat this repudiation by the promisor as putting an end to the contract and that the promisee is merely asking for a return of the consideration paid.<sup>112</sup> There is no effort in this action to insist upon any rights acquired under the contract and no effort to obtain either the property or the value of the property contracted for. It is simply an action for payment of the actual value of the services rendered or other consideration paid in reliance upon the contract. Since such a rescission of the contract puts an end to any interest the promisee might have acquired in the property promised, it would seem to follow that the promisee, in an action in quantum meruit, is not entitled to any lien upon the property of the promisor for payment of his damages, and such has been the conclusion of the courts.<sup>113</sup>

<sup>107</sup> *Patterson v. Patterson*, 13 Johns. (N.Y.) 379 (1816).

<sup>108</sup> *Mug v. Ostendorf*, 49 Ind. App. 71, 96 N.E. 780 (1911); *Carter v. Witherspoon*, 156 Miss. 597, 126 S. 388 (1930).

<sup>109</sup> *Canada v. Canada*, 60 Mass. (6 Cushing) 15 (1850); *Moorhead v. Fry*, 24 Pa. (12 Harris) 37 (1854). It might be argued that since the promisor has his entire lifetime within which to perform his contract, there could not be a breach in any event until his death. There is always the possibility that even though he disposes of the property he may later reacquire it and devise or bequeath it in accordance with the terms of the contract. Such an argument, however, would be highly fanciful and has not appealed to the courts.

<sup>110</sup> *Smith v. Long*, 183 Okla. 441, 83 P. (2d) 167 (1938).

<sup>111</sup> *Schondelmayer v. Schondelmayer*, 320 Mich. 565, 31 N.W. (2d) 721 (1948).

<sup>112</sup> *Mug v. Ostendorf*, 49 Ind. App. 71, 96 N.E. 780 (1911); *Johnston v. Myers*, 138 Iowa 497, 116 N.W. 600 (1908); *Johnson v. Starr*, 321 Mass. 566, 74 N.E. (2d) 137 (1947); *Canada v. Canada*, 60 Mass. (6 Cushing) 15 (1850); *Carter v. Witherspoon*, 156 Miss. 597, 126 S. 388 (1930); *Moorhead v. Fry*, 24 Pa. (12 Harris) 37 (1854).

<sup>113</sup> *Johnston v. Myers*, 138 Iowa 497, 116 N.W. 600 (1908); *Carter v. Witherspoon*, 156 Miss. 597, 126 S. 388 (1930). The language of the court in each of these cases tended to indicate that no equitable relief could be obtained during the lifetime of the promisor, but such a position is far beyond what was necessary to the decision of the case. In each case the contract was for the whole property of the promisor. The promisee was trying to obtain a return of his consideration during the life of the promisor. To have given him a lien on any specific property of the promisor would have given him a lien upon property which might never have come to him if the contract had been fully performed.

In an action for damages for anticipatory breach the promisee is abandoning his prospects of receiving the thing contracted for the same as he is in the action in quantum meruit. The distinction between the two is that in the action for the anticipatory breach, the promisee is still treating the contract as in force and is praying for a measurement of damages based on the actual loss caused by the breach, not merely for a return of the consideration paid.<sup>114</sup> This type of relief is impracticable in cases where the amount of property devised or bequeathed is to be determined by the size of the promisor's estate at death for the reason that when the action is brought there is little basis for estimating the size of that estate. However, if the contract is for a specific object or a liquidated sum of money there should be little difficulty in estimating the amount of damages. Of course the value of the property promised will not be the amount of damages because according to the terms of the contract it is a future, not a presently due, performance to which the promisee is entitled, and life expectancies must be taken into account in calculating damages.<sup>115</sup> In the usual situation the breach will also be accompanied by a forced termination of performance by the promisee before he has completed his part of the consideration. In such cases it is the promisee's right to earn the legacy that is destroyed by the breach and it is the value of this right that constitutes the measure of damages.<sup>116</sup> If the promisee has been let into possession and has made improvements upon the land promised to be devised, the cost of the improvements reasonably incurred is a proper item of damages even though the cost might exceed the value added to the land.<sup>117</sup>

Due to variations in the facts of individual cases and in the manner in which they are brought before the courts, a count of jurisdictions recognizing or refusing to recognize any particular type of relief is impossible. However, it appears that equitable relief will be granted, whether specific real estate<sup>118</sup> or an indefinite amount of property based on the size of the promisor's estate at death<sup>119</sup> is involved, provided

<sup>114</sup> See *Farrington v. Richardson*, 153 Fla. 907, 16 S. (2d) 158 (1944).

<sup>115</sup> *Syngue v. Syngue*, [1894] 1 Q.B. 466.

<sup>116</sup> *Edwards v. Slate*, 184 Mass. 317, 68 N.E. 342 (1903) (contract for a specific sum of money). But see *Johnson v. Starr*, 321 Mass. 566, 74 N.E. (2d) 137 (1947).

<sup>117</sup> *Trisch v. Fairman*, 334 Mich. 432, 54 N.W. (2d) 621 (1952) (action was in equity for a money decree).

<sup>118</sup> *Cagle v. Justus*, 196 Ga. 826, 28 S.E. (2d) 255 (1943); *White v. Massee*, 202 Iowa 1304, 211 N.W. 839 (1927); *Brackenbury v. Hodgkin*, 116 Me. 399, 102 A. 106 (1917); *Bird v. Pope*, 73 Mich. 483, 41 N.W. 514 (1889).

<sup>119</sup> *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E. (2d) 568 (1945); *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N.W. 56 (1915); *Winchell v. Mixer*, 316 Mich. 151, 25 N.W. (2d) 147 (1946); *Matheson v. Gullickson*, 222 Minn. 369, 24 N.W. (2d) 704 (1946).

the action is brought on the theory of seeking protection of an equitable right to receive property at a future time.<sup>120</sup> Equitable relief will not be granted where the relief sought is immediate redress for the wrong committed by the promisor,<sup>121</sup> nor would it seem to be appropriate where a liquidated sum of money or a specific non-unique chattel is involved. Actions at law for damages caused by breach should be available in any event where such damages are capable of measurement,<sup>122</sup> and the action at law for recovery in quantum meruit should be available where the value of the consideration paid can be reasonably ascertained.<sup>123</sup> Where the situation presented is susceptible of more than one type of remedy, as is usually the case, the choice should rest with the plaintiff.<sup>124</sup> Statements apparently in conflict with the forms of relief here indicated are sometimes found but are usually without foundation. Where the contract is within the statute of frauds and recovery is denied on the ground that the part performance alleged is neither unequivocally referable to the contract or incapable of monetary valuation the language used in some opinions tends to indicate that in any event where the promisee of a contract to devise or bequeath can be adequately compensated for the consideration furnished no equitable relief will be granted within the lifetime of the promisor.<sup>125</sup> If such a proposition were actually applied it would seem to ignore the principle that a party to a con-

<sup>120</sup> Recovery often fails where some other theory is used. In *Stone v. Burgeson*, 215 Ala. 23, 109 S. 155 (1926), the prayer was "for a decree ascertaining the amount of respondent's indebtedness to complainant, as alleged, and declaring it to be a lien on respondent's land, or, in the alternative, for a decree requiring respondent to carry out his agreement by executing a will as promised." *Id.* at 24. Relief was denied, the court indicating by way of dictum that the only remedy was at law. Since the contract was one for all the promisor's estate at death it is apparent that the relief sought merely tended to obscure the rights of the promisee. If the case had been framed in terms of the right of the promisee to have the estate flow to him at death of the promisor, with only reasonable diminution during the promisor's life, equitable protection of that right might have been obtained.

<sup>121</sup> This question arises where the promisee is seeking immediate redress while the promisor is still living and entitled to reasonable use and consumption of any or all of his property, but the promisee seeks to establish a lien for the amount recovered upon some specific property included in the estate. In refusing the right to such a lien, the courts often indicate by way of dictum the unnecessary and much broader proposition that equitable relief can never be granted while the promisor is still alive if the promisee's performance can be compensated for in damages. *Johnston v. Myers*, 138 Iowa 497, 116 N.W. 600 (1908); *Carter v. Witherspoon*, 156 Miss. 597, 126 S. 388 (1930).

<sup>122</sup> *Edwards v. Slate*, 184 Mass. 317, 68 N.E. 342 (1903).

<sup>123</sup> *Mug v. Ostendorf*, 49 Ind. App. 71, 96 N.E. 780 (1911); *Canada v. Canada*, 60 Mass. (6 Cushing) 15 (1850); *Moorhead v. Fry*, 24 Pa. (12 Harris) 37 (1854).

<sup>124</sup> See *Mug v. Ostendorf*, 49 Ind. App. 71, 77, 96 N.E. 780, 782 (1911); *Moorhead v. Fry*, 24 Pa. (12 Harris) 37 at 38-39 (1854).

<sup>125</sup> See *Richardson v. Richardson*, 114 Minn. 12, 130 N.W. 4 (1911) (contract for promisor's entire estate); *Nunn v. Boal*, 29 Ohio App. 141, 162 N.E. 724 (1928) (contract for specific real estate).

tract is entitled to the benefit of his bargain, in this situation a benefit not available to him in any way except through a protection of his right to receive the thing promised. On the other hand, there is authority that an action at law will not be entertained during the lifetime of the promisor because no performance is due, but that equity might be called upon to preserve the property so that it will be available for the purposes of the contract upon the promisor's death.<sup>126</sup> This position denies the rather general rule of contract law that repudiation by one party gives the other a right to rescind and recover the consideration paid.<sup>127</sup> Still other courts have apparently felt that an action at law for a breach will not lie within the promisor's lifetime but that recovery in quantum meruit should be permitted.<sup>128</sup>

Although some conflicts of authority do exist and at least some support can probably be found for almost any position one chooses to take, it is believed that most of these differences of opinion are more apparent than real, and, more often than not, result from the manner in which the case is presented rather than any real difference in views as to the law on the subject.<sup>129</sup> When the theory of the action is based squarely upon the principles outlined above relief is rarely denied.

<sup>126</sup> See *Warden v. Hinds*, (4th Cir. 1908) 163 F. 201 at 206 (action at law for damages, but while denying relief the court stated that if it could be shown that there was danger of loss through extravagance or misconduct the promisee might possibly "file a bill quia timet on the equity side of the docket to have such testator declared a trustee to the extent of the claim; but . . . an action at law does not lie during the lifetime of the proposed testator"); *Henson v. Neumann*, 286 Ill. App. 197 at 203-205, 3 N.E. (2d) 110 (1936) (decision actually based upon failure to show a sufficient act of repudiation).

<sup>127</sup> 5 WILLISTON, CONTRACTS, rev. ed., §1466 (1937).

<sup>128</sup> See *Johnson v. Starr*, 321 Mass. 566, 74 N.E. (2d) 137 (1947) (oral contract to devise real estate but statute of frauds was not pleaded).

<sup>129</sup> Cases denying an equitable lien on specific property where action is brought in the promisor's lifetime for return of the consideration paid in contracts to will an entire estate have often given the appearance of holding that equitable relief would not be granted if the value of the consideration could be reasonably ascertained. *Johnston v. Myers*, 138 Iowa 497, 116 N.W. 600 (1908); *Carter v. Witherspoon*, 156 Miss. 597, 126 S. 388 (1930). A similar erroneous implication is found where relief was denied in a case where the prayer was "for a decree ascertaining the amount of respondent's indebtedness to complainant, as alleged, and declaring it to be lien on respondent's land, or, in the alternative, for a decree requiring respondent to carry out his agreement by executing a will as promised." It is not easy to see any possible basis for relief on a prayer of this sort. *Stone v. Burgeson*, 215 Ala. 23 at 24, 109 S. 155 (1926).

Where an employment contract included payment of wages and also a promise of a devise or bequest, and it was found that termination of the employment did not affect the promise to devise or bequeath and there was nothing to indicate that the contract would be impossible of enforcement at the death of the promisor, recovery was denied. Unfortunately the language of the opinion tended toward the conclusion that action on a contract to devise or bequeath could not be brought during the lifetime of the promisor. *Warden v. Hinds*, (4th Cir. 1908) 163 F. 201.

Where there was nothing to indicate that a threatened disposition of property was not a reasonable one equitable relief was denied, but the language of the court seemed broad enough to include the erroneous proposition that equitable relief could never be obtained



The right of the promisee to receive the property at the death of the promisor is a right which will descend to his heirs or personal representatives at his death,<sup>130</sup> may be devised,<sup>131</sup> or may be assigned.<sup>132</sup>

during the lifetime of the promisor in a contract to will all of one's property. *Galloway v. Eichells*, 1 N.J. Super. 584, 62 A. (2d) 499 (1948).

A denial of relief where there was a failure to show a sufficient act of repudiation has included dictum to the effect that no action at law can be brought on a contract unless some performance is due. *Henson v. Neumann*, 286 Ill. App. 197, 3 N.E. (2d) 110 (1936).

<sup>130</sup> *Trower v. Young*, 40 Cal. App. (2d) 539, 105 P. (2d) 160 (1940); *Powell v. McBlain*, 222 Iowa 799, 269 N.W. 883 (1936); *Kisor v. Litzberg*, 203 Iowa 1183, 212 N.W. 343 (1927); *Moore's Admr. v. Wagers' Admr.*, 243 Ky. 351, 48 S.W. (2d) 15 (1932); *Fuchs v. Fuchs*, 48 Mo. App. 18 (1892); *Torgerson v. Hauge*, 34 N.D. 646, 159 N.W. 6 (1916). See *Young v. Young*, 45 N.J. Eq. 27 at 34-35, 16 A. 921 (1889); *Prater v. Prater*, 94 S.C. 267, 77 S.E. 936 (1912) (specific performance denied because of the breach by the successor in interest, but right to recover for performance actually rendered recognized even under those circumstances without raising any question as to the descendibility of the right); *Estate of Leu*, 172 Wis. 530, 179 N.W. 796 (1920) (recovery denied because of the statute of limitations and statute of frauds, but the survival of the claim to the administrator or the successors in interest apparently not questioned); 4 PAGE, WILLS, 3d ed., §1755 (1941). But cf. *Pershall v. Elliott*, 249 N.Y. 183, 163 N.E. 554 (1928) [reaches a contra result, but it is not clear that this is not based on the terms of this particular contract, and the case is further distinguished in *Powell v. McBlain*, 222 Iowa 799 at 804-805, 269 N.W. 883 (1936)].

An opposite view is found in *Hirsch*, "Contracts to Devise and Bequeath: II," 9 WIS. L. REV. 388 (1934), where *O'Neil v. Ross*, 98 Cal. App. 306, 277 P. 123 (1929) and *Snyder v. Snyder*, 77 Wis. 95, 45 N.W. 818 (1890), are cited as authority. A careful examination of the cases cited leaves considerable doubt as to the soundness of the conclusion reached. In *O'Neil v. Ross* a contract is found on very doubtful evidence and then the court seems to hold that one under a contractual obligation to will his entire estate is really the owner of a fee with a mandatory special power of appointment and that the death of the intended appointees before the death of the appointor makes the exercise of the power impossible. The analysis of the problem in terms of powers is unusual to say the least. No reference is made to *Chase v. Stevens*, 34 Cal. App. 98, 166 P. 1035 (1917), where the right of the promisee of a contract to make a will to devise his interest was clearly upheld. The court in *O'Neil v. Ross* was apparently misled by the erroneous belief that it was dealing with a power of appointment. *Snyder v. Snyder* is another case in which, although the existence of a contract was found by the court, the evidence of it was very doubtful. A son was put on a farm by his father with the understanding that the son "would keep and work it in a good and husband-like manner while he occupied it, and that he would behave and conduct himself like a good man. . ." (77 Wis. 95 at 99, 45 N.W. 818), and that the father would if the son met these conditions devise him the land at his death. The court reached the conclusion that since the son "died more than twelve years before the father, the agreement under which the son entered into possession could not be carried out as the parties intended it should, and there is nothing that a court of equity could enforce in favor of the widow and children." *Id.* at 100. It was indicated that the court felt that the contract was little more than an agreement to deal fairly with the son in the final disposition of the father's estate. It appeared that this had been done. Provision actually made to the son's widow and children was more than ample to compensate for the improvements the son made upon the land, and the land was devised to another son who had made improvements valued at about thirty-five times the value of the improvements made by the deceased son. This case is far from conclusive authority that the right of the promisee in a contract to devise is not descendible, and the opinion does not even refer to *Estate of Leu*, 172 Wis. 530, 179 N.W. 796 (1920), which, although relief was denied on other grounds, seemed to recognize the descendibility of such a right as being beyond question.

<sup>131</sup> *Chase v. Stevens*, 34 Cal. App. 98, 166 P. 1035 (1917); *Ochs v. Ochs*, 122 N.J. Eq. 143, 192 A. 502 (1937); *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763 (1924).

<sup>132</sup> *Rosenberg v. Equitable Trust Co.*, (D.C. Del. 1946) 68 F. Supp. 991; *Swingley v. Daniels*, 123 Wash. 409, 212 P. 729 (1923).

As elsewhere in dealing with contracts to devise or bequeath, a few courts have allowed themselves to become confused by the peculiar notion that the will is an essential part of the machinery for getting the property to the promisee, and that it was the privilege of having a will made in his favor, rather than the right to have property pass to him at the death of the promisor, that was contracted for. This line of approach has led to the rather novel conclusion that since the promisor could have satisfied his obligation by making a will without anti-lapse provisions and that if the promisee had predeceased the promisor the legacy or devise would have lapsed, there is no basis for saying that the promisee had a descendible right.<sup>133</sup> This conclusion can be easily answered by the more general proposition that a devise or bequest made in satisfaction of an obligation will not lapse.<sup>134</sup> But a more satisfactory answer, and one which gets nearer the basic issues involved, is that the contract is for the right to have the property pass to the promisee at the death of the promisor, and that the will, as a means of accomplishing that result, is merely incidental.

To rely upon the effect of anti-lapse provisions in a will or upon anti-lapse legislation as a basis for determining the descendibility of the right of the promisee is to ignore the fundamental nature of that right. Since it is a right created by contract the terms of the contract should be the guide to whether or not there is anything which can survive the death of the promisee. Of course if the contract is of such a nature that the promise was intended to be personal to the promisee there would be no reason to suppose that any obligation existed after the promisee's death prior to that of the promisor,<sup>135</sup> and it would seem that even

<sup>133</sup> *Keasey v. Engles*, 259 Mich. 178, 242 N.W. 878 (1932) (taking the position that it was the contract, not the will, that was irrevocable, but that it was the will that passed the property); *McDonald v. McDonald*, 35 N.S.W. St. R. 173 (1935). See *Bassett v. Salter*, 25 N.Y.S. (2d) 176 (1940), *affd.* 262 App. Div. 967, 30 N.Y.S. (2d) 134 (1941) (apparently based on peculiar construction of the particular contract, however).

<sup>134</sup> *Bacon v. Kiteley*, 101 Colo. 559, 75 P. (2d) 590 (1938); *Ballard v. Camplin*, 161 Ind. 16, 67 N.E. 505 (1903); *Ward v. Bush*, 59 N.J. Eq. 144, 45 A. 534 (1900); *Stevens v. King*, [1904] 2 Ch. 30. See *McNeal v. Pierce*, 73 Ohio St. 7 at 14-15, 75 N.E. 938 (1905); 1 JARMAN, WILLS, 8th ed., 438 (1951); 4 PAGE, WILLS, 3d ed., §1417 (1941) (recognizing the rule but questioning the soundness of its technical basis).

So long as there is some doubt on the subject it might well be suggested as a precautionary measure that an anti-lapse provision always be included in the contract.

<sup>135</sup> This was apparently the difficulty in *Snyder v. Snyder*, 77 Wis. 95, 45 N.W. 818 (1890), where a son was to live on his father's farm and work it in a husbandlike manner and conduct himself like a good man in return for the promise of the father to devise him the farm. It was held that the death of the son prevented the carrying out of the contract as the parties intended.

The doctrine has been applied where the provision which was to have been made was one to give the promisor's son, the promisee, the option of buying certain property at a specified price after the promisor's death, if he chose to do so. *Pershall v. Elliott*, 249 N.Y. 183, 163 N.E. 554 (1928). Where the promise is to will a child a fractional part of the estate but the transaction, when considered as a whole, indicates that the promise is

though anti-lapse legislation existed it would have no application unless the will were actually made and left in effect at the death of the testator. There is also the possibility that there could be a contract to devise to the promisee provided the situation at the promisor's death were such that a devise to the promisee at that time would have any effect. In such a case the anti-lapse legislation would be material in determining whether or not the particular devise could be made, but here again it would be the contract that would be really controlling, and furthermore it is not likely that contracts can often be found with such terms. If any conditions precedent of this nature are included they are more likely to be that the promisee or some other specified person survive the promisor than they are to be that there be anti-lapse legislation in existence. In any event where the contract makes provision for the eventuality of the promisee's dying first no problem arises.<sup>136</sup> The real question is raised in cases where there is an ordinary contract to devise or bequeath with no express provision as to what will happen in case the promisee is the first to die, and the promisee, after completely performing his part of the contract<sup>137</sup> dies prior to the death of the promisor. The promisee in such a case has earned the right to have the property pass to him. Only the time is postponed. There is no reason

nothing more than that the child will not be disinherited, the promise is personal to the child, and the obligation created by it terminates with the child's death. *Bomar v. Carstairs*, 124 Tex. 492, 79 S.W. (2d) 841 (1935).

<sup>136</sup> The contracts actually coming before the courts rarely ever contain such express provisions, but much of the difficulty could always be avoided if they did. A good example of a simple means of avoiding doubt as to the intention of the parties is found in *Burdine v. Burdine's Exr.*, 98 Va. 515, 36 S.E. 992 (1900), where there was a contract to will certain property to the promisee and an alternative provision to will certain other property in the event the promisee predeceased the promisor.

<sup>137</sup> Whether or not the contract can be enforced where the promisee dies before complete performance would seem to depend upon whether or not the performance to be rendered by the promisee was of such a personal nature as to make it impossible for the heir or personal representative to perform in his stead. Where the consideration to be rendered consists of care and support, an offer to perform by the heir and administrator is sufficient to give them a right to enforce the contract. *Torgerson v. Hauge*, 34 N.D. 646, 159 N.W. 6 (1916). Even where the consideration to be rendered consists in part of the society and companionship of the particular individual concerned, it has been suggested that his death does nothing more than give the promisor a right to rescind, and that if he fails to exercise that right but continues to receive performance from the successor in interest without giving notice of his election to rescind within a reasonable time, he is bound by his promise. See *Prater v. Prater*, 94 S.C. 267 at 280, 77 S.E. 936 (1912) (relief denied, however, because the successor in interest actually breached the contract before the death of the promisor). Where full performance has become impossible because of his death prior to that of the promisor, the successor in interest has been permitted to recover for the performance actually rendered. *Fuchs v. Fuchs*, 48 Mo. App. 18 (1892). Where the performance yet to be done by the promisee consisted of paying over of money at the death of the promisor the promisee's devisee was entitled to specific performance upon tender of the money in *Ochs v. Ochs*, 122 N.J. Eq. 143, 192 A. 502 (1937).

why his early death should work a forfeiture.<sup>138</sup> The courts recognizing the right of the promisee as being descendible to his heirs, although usually found in states where anti-lapse legislation would have taken care of the matter if the will had been made, rarely ever mention such legislation in their analysis of the problem but rather base their decisions solely upon the survival of a right arising out of contract.<sup>139</sup> The promisee may by will dispose of his interest to the one other than those who would take a lapsed gift under an anti-lapse statute.<sup>140</sup> If the promisee assigns his interest and then predeceases the promisor the assignee may enforce the contract even though he is not one to whom the anti-lapse statutes would have given property devised to the promisee.<sup>141</sup> In jurisdictions recognizing dower in equitable interests the wife of the predeceased promisee is given dower in his interest under the contract, a result not provided for in the anti-lapse statutes.<sup>142</sup> It seems that the only effect of discussions of lapse legislation in this connection is to confuse unnecessarily the substantive rights of the parties with the vehicle by which they intended to achieve those rights, and, where followed, to work an obvious injustice in almost every case where the promisee predeceases the promisor.

This erroneous conception of the will as an essential part of the process of getting the property to the promisee has led to a few rather questionable decisions in still other situations. If the will is thought of as an essential part of the mechanism, it would seem logical that the promisee would have some right to have the will executed. Although an affirmative injunction to that effect has been sought,<sup>143</sup> no case has been found where such relief has been actually granted. The promisor has been enjoined from making a will other than in compliance with the contract,<sup>144</sup> and once a will has been made carrying out the provi-

<sup>138</sup> "The performance by Andrew [the promisee] was complete until his death. The contract did not specify that his death should forfeit all rights of his heirs or estate obtained under such performance. Equity should not imply or construe such a forfeiture where none has been stipulated. In fact every equity and circumstance is in favor of enforcement of the contract. . . ." *Torgerson v. Hauge*, 34 N.D. 646 at 659, 159 N.W. 6 (1916).

<sup>139</sup> *Powell v. McBlain*, 222 Iowa 799, 269 N.W. 883 (1936); *Kisor v. Litzenberg*, 203 Iowa 1183, 212 N.W. 343 (1927); *Moore's Admr. v. Wagers' Admr.*, 243 Ky. 351, 48 S.W. (2d) 15 (1932); *Fuchs v. Fuchs*, 48 Mo. App. 18 (1892); *Torgerson v. Hauge*, 34 N.D. 646, 159 N.W. 6 (1916).

<sup>140</sup> *Ochs v. Ochs*, 122 N.J. Eq. 143, 192 A. 502 (1937).

<sup>141</sup> *Rosenberg v. Equitable Trust Co.*, (D.C. Del. 1946) 68 F. Supp. 991.

<sup>142</sup> See *Young v. Young*, 45 N.J. Eq. 27 at 36, 16 A. 921 (1889). For a treatment of the law as to dower in equitable interests see 1 AMERICAN LAW OF PROPERTY §5.23 (1952).

<sup>143</sup> *Stone v. Burgeson*, 215 Ala. 23, 109 S. 155 (1926).

<sup>144</sup> *Duvale v. Duvale*, 54 N.J. Eq. 581, 35 A. 750 (1896), modified and affd. 56 N.J. Eq. 375, 39 A. 687, 40 A. 440 (1898).

sions of the contract, its revocation has been enjoined.<sup>145</sup> It is doubtful if either of these decrees could have any substantial effect on the rights of the parties. Either decree could have been violated in secret, and if such had taken place there is no clue as to any action that could have been taken after the death of the violator. Neither is there any clear indication that the rights of the promisee would have been affected by the compliance or noncompliance with the injunction. In case of the injunction against making a will other than in compliance with the contract, if the promisor made no will at all it would have been necessary to proceed against his heirs and next of kin after his death. There is no reason to believe that such a procedure would have had any advantage over a proceeding against the beneficiaries of an inconsistent will. In the case of the injunction against revocation, a revocation of the will would not have affected the promisee's rights under the contract which could have been enforced against volunteers, whether heirs or devisees. That this is true is clearly demonstrated by the numerous instances where the right of the promisee to the property is enforced, whether the action is brought before or after the death of the promisor, without regard to whether any will was ever executed.<sup>146</sup>

The only conceivable advantage of such injunctions during the lifetime of the promisor would appear to be the moral restraint they might impose upon him. But since the promisee will have the same rights whether the promisor complies with the injunction or not, no

<sup>145</sup> *Lovett v. Lovett*, 87 Ind. App. 42, 155 N.E. 528, rehearing den. 87 Ind. App. 52, 157 N.E. 104 (1927). One court has granted the prayer of the promisee for a declaratory judgment that a will executed pursuant to contract was irrevocable. *Stewart v. Shelton*, 356 Mo. 258, 201 S.W. (2d) 395 (1947).

<sup>146</sup> Citation of authority here seems inappropriate. Practically the whole body of litigation arising out of contracts to devise or bequeath arises out of the failure of the promisor to leave an effective will complying with the terms of the contract. If the existence of the will were an essential part of the machinery for getting the property to the promisee, the contract would tend to become ineffective and the law for enforcement where no will is made would be nullified. A few of the many cases enforcing the transfer of property without the aid of a will may be mentioned. *Keefe v. Keefe*, 19 Cal. App. 310, 125 P. 929 (1912) (contract was merely that the promisee should receive the property, the means by which he was to receive it not being specified and apparently not important); *Chehak v. Battles*, 133 Iowa 107, 110 N.W. 330 (1907); *Anderson v. Anderson*, 75 Kan. 117, 88 P. 743 (1907); *Howe v. Watson*, 179 Mass. 30, 60 N.E. 415 (1901); *Laird v. Vila*, 93 Minn. 45, 100 N.W. 656 (1904); *Crinkley v. Rogers*, 100 Neb. 647, 160 N.W. 974 (1916); *Matter of Stevens*, 192 Misc. 179, 78 N.Y.S. (2d) 868 (1948) (will gave only part of property contracted for, but it was held that beneficiary took all through the contract); *Kelley v. Devin*, 65 Ore. 211, 132 P. 535 (1913) (will gave property to third person); *Estate of Soles*, 215 Wis. 129, 253 N.W. 801 (1934) (will gave property to third person).

Even though there is a will made pursuant to the contract the promisee may rest his title upon the contract rather than taking through the will. *Legro v. Kelley*, 311 Mass. 674, 42 N.E. (2d) 836 (1942).

reason appears why even the moral restraint, however strong it might be, is of very great advantage. Where there is danger that the promisor is going to attempt to avoid his contract it is advantageous to have the existence of the contract litigated prior to his death because of the difficulties the promisee might face thereafter under the statutes restricting one's right to testify concerning his transactions with a dead person.<sup>147</sup> This advantage could be achieved through what appears to be the more appropriate remedy of an action to preserve his rights to the property.

A further question which suggests itself is whether or not the right of the promisee to receive property upon the death of the promisor is such a right as may be levied upon by the creditors of the promisee prior to the promisor's death. In the only case that has been found in which the courts have answered that question directly, the answer was in the negative.<sup>148</sup> The case involved a joint will executed by a husband and wife by which each of them gave his or her estate to the survivor, and the survivor disposed of his or her estate in a certain manner. There was a contract that the survivor would not change his will. After the death of the wife one of the beneficiaries who was given certain real estate and also a proportionate share in the residue became bankrupt, and the trustee in bankruptcy attempted to include the beneficiary's interest arising out of the contract in the bankrupt's estate. In denying the trustee access to that interest the court relied upon the theory that (1) a will has no effect until death, and (2) the parties to the contract did not intend that the beneficiary should have an alienable interest prior to the death of the surviving parent. The first objection can be dismissed as being completely without merit when it is noted that the trustee was seeking no interest under a will but rather an interest under a contract. The second objection is little more than an illustration of a further confusion of contractual and testamentary acts. The court stated, ". . . I am constrained to the conclusion that it was not the testamentary intent that any alienable interest in the estate should pass . . . until the death of the surviving parent."<sup>149</sup> It should have been clear that no question of testamentary intent was involved since no interest under a will was being asserted. The matter in issue concerned an interest created by contract. If that interest had been defined, the law dealing with its incidents could have been applied to determine its alienability.<sup>150</sup> Another argument used to support the decision was to

<sup>147</sup> *Winchell v. Mixer*, 316 Mich. 151, 25 N.W. (2d) 147 (1946).

<sup>148</sup> *In re Lage*, (D.C. Iowa 1927) 19 F. (2d) 153.

<sup>149</sup> *Id.* at 154.

<sup>150</sup> This is a good illustration of the confusion often caused by joint wills. In this case

the effect that the beneficiary could renounce the devise or bequest and thereby defeat the title of any possible purchaser even though the trustee should be permitted to sell the interest in the bankruptcy proceedings. It is doubtful if this is a valid argument, for although a beneficiary of a will ordinarily does have the privilege of renouncing a testamentary gift with impunity regardless of his creditors,<sup>151</sup> no case has been found sustaining his privilege to renounce and defeat the rights of his assignee where he has for a consideration assigned his rights under a contract to devise or bequeath. There is no reason why the assignee in bankruptcy should be in any less favorable position in this respect than the assignee of a voluntary assignment. Since most courts recognize the interest created by a contract to make a will as being a right of the promisee (or third party beneficiary) to have the property of the promisor flow to him at the promisor's death, and since this right is generally recognized as alienable, descendible, and devisable, the soundness of the decision in the case under discussion may well be questioned, and its value as a precedent doubted.

*To be concluded.*

the wills of two persons, together with a contract between them (the evidence of the contract was meager, but the court experienced no difficulty with that part of the case) were expressed in one instrument. The court treated it all as one instrument without any clear separation of the will of the wife from the will of the husband or separation of either of the wills from the contract.

<sup>151</sup> Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20 (1922); Tarr v. Robinson, 158 Pa. 60, 27 A. 859 (1893).