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WILLS - JOINT AND MUTUAL WILLS - CONTRACTS TO BEQUEATH AND DEVISE - STATUTE OF FRAUDS

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WILLS — JOINT AND MUTUAL WILLS — CONTRACTS TO BEQUEATH AND DEVISE — STATUTE OF FRAUDS — Husband and wife made joint and mutual wills, each giving to the survivor a life interest in his or her separate property with the remainder to their foster daughter, the plaintiff. The wife died first, but the husband destroyed the entire will, and took possession of all the wife's property. The husband then died intestate, and plaintiff brought suit against the heirs to enforce the dispositions made by the joint and mutual will. Plaintiff introduced evidence to show that the will was the product of a contract, and therefore irrevocable. Defendant objected on the ground that the agreement was not in writing and not enforceable under the statute of frauds. *Held*, judgment for plaintiff affirmed, the contract being enforceable because partly performed. *West v. Sims*, (Kan. 1941) 109 P. (2d) 479.

A joint and mutual will is one in which the same instrument is executed by two or more persons as their respective wills and which contains reciprocal pro-

visions.[1] So far as probate is concerned, two entirely separate wills are thereby created.[2] When made in pursuance of a valid contract, the instrument is still revocable as a will, but its terms are enforceable through the normal contract remedies.[3] Only two sections of the statute of frauds have been construed to apply to contracts to make wills.[4] The courts have been uniform in holding that agreements to give realty come within the purview of the statute,[5] while agreements to give personalty are generally construed to fall without its scope.[6] While normally an agreement such as that in the principal case would be unenforceable, several arguments can be made to reach a contrary conclusion. Ever since the passage of the statute of frauds, equity courts have declared that part performance will take a given contract outside the scope of the statute. The court here invoked that principle, saying that the wife's performance was sufficient part performance of the entire contract to make it enforceable.[7] The type of part performance necessary to take the contract out of the statute is usually quite difficult to anticipate. Some courts follow the "unequivocal reference" theory and enforce the contract only when the partial performance indicates the terms of the contract.[8] Others follow a fraud theory which allows enforcement because of what has been done in reliance upon the contract.[9] Still others limit relief to a quasi-contractual action for benefits conferred.[10] Plaintiff in the principal case

[1] ATKINSON, WILLS, § 69 (1937).

[2] ATKINSON, WILLS, § 70 (1937).

[3] ATKINSON, WILLS, § 70 (1937).

[4] Sec. 4: "no action shall be brought . . . upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or . . . upon any agreement that is not to be performed within the space of one year from the making thereof; . . . unless the agreement . . . shall be in writing. . . ." Sec. 17: "no contract for the sale of any goods, wares and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same . . . or that some note or memorandum in writing of the said bargain be made and signed. . . ." 29 Car. II, c. 3 (1676).

[5] Edwards v. Brown, 308 Ill. 350, 139 N. E. 618 (1923); Wright v. Green, 67 Ind. App. 433, 119 N. E. 379 (1918); Payne v. Jones, 230 Mich. 257, 202 N. W. 935 (1925).

[6] Hull v. Thomas, 82 Conn. 674, 74 A. 925 (1910); Wellington v. Apthorp, 145 Mass. 69, 13 N. E. 10 (1887). *Contra*: Ohlendiek v. Schuler, (C. C. A. 6th, 1929) 30 F. (2d) 5, criticized in 38 YALE L. J. 997 (1929). On the application of the statute of frauds generally, see Schnebly, "Contracts to Make Testamentary Dispositions as Affected by the Statute of Frauds," 24 MICH. L. REV. 749 (1926).

[7] See principal case, 109 P. (2d) at 482. Accord: Brown v. Webster, 90 Neb. 591, 134 N. W. 185 (1912); Doyle v. Fischer, 183 Wis. 599, 198 N. W. 763 (1924). *Contra*: McClanahan v. McClanahan, 77 Wash. 138, 137 P. 479 (1913) (mutual wills only).

[8] Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273 (1922); Francis v. Thomas, 129 Tex. 579, 106 S. W. (2d) 257 (1937); McCallister v. McCallister, 342 Ill. 231, 173 N. E. 745 (1930).

[9] Brown v. Hoag, 35 Minn. 373, 29 N. W. 135 (1886); Carmichael v. Carmichael, 72 Mich. 76, 40 N. W. 173 (1888).

[10] Carter v. Carter, 182 N. C. 186, 108 S. E. 765 (1921); 17 A. L. R. 949 (1922), and cases therein cited.

might also have argued that the particular agreement was not within the scope of the statute of frauds because of the prior ruling of the Kansas court that an oral promise to leave one's estate generally, specifying neither real nor personal property, was enforceable.[11] This result was reached because the court was unable to find a sufficient and substantial reason to make the statute applicable; a contract to give realty is within the statute and one to give personalty is without. A promise to leave one's estate generally does not necessarily include either one. The mere circumstances of possessing realty, either at the time of making the promise or at the death of the promisor, was not felt to offer a sufficient justification for denying validity to the promise. Whatever weakness existed in the promisee's case was not in the promise itself, but in the fortuitous circumstances surrounding the promise. The application of such a rule in the principal case would result in enforcement of the oral promise. The argument might also be made that the will executed in satisfaction of the obligation to devise or bequeath is sufficient compliance with the statute of frauds. The courts usually require, however, that words of promise be found in the will itself to achieve this result.[12] Finally, if the court denied any effect to the oral agreement, plaintiff might still obtain relief because of the joint and mutual will alone. Plaintiff might successfully claim that the parties here made a contract not to revoke the disposition made by the joint and mutual will. This agreement may be said to be without the statute of frauds since it is not an agreement to make a given disposition, but an agreement not to change a disposition already made; [13] or, since so many of the courts have been willing to find such a contract from the formal nature of the joint and mutual will itself [14] which is in writing, it may be admitted to be within the scope of the statute and in full compliance therewith.[15] These arguments to a great extent seem to justify a desired result rather than to be a means of reaching it, but justification for their acceptance may be found in the presently increasing dissatisfaction with the statute.[16]

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[11] Stahl v. Stevenson, 102 Kan. 447, 171 P. 1164 (1918). See Schnebly, "Contracts to Make Testamentary Dispositions as Affected by the State of Frauds," 24 MICH. L. REV. 749 at 763 (1926).

[12] Holsz v. Stephen, 362 Ill. 527, 200 N. E. 601 (1936); Laune v. Chandless, 99 N. J. Eq. 186, 131 A. 634 (1926); Hathaway v. Jones, 48 Ohio App. 447, 194 N. E. 37 (1934). Brown v. Webster, 90 Neb. 591, 134 N. W. 185 (1912), held that the oral contract and will were substantially one transaction, and apparently eliminated this requirement.

[13] See dissenting opinion in Gibson v. Crawford, 247 Ky. 228, 56 S. W. (2d) 985 (1932), noted in 28 ILL. L. REV. 298 (1933).

[14] Frazier v. Patterson, 243 Ill. 80, 90 N. E. 216 (1909); Campbell v. Dunkelberger, 172 Iowa 385, 153 N. W. 56 (1915); Lewis v. Lewis, 104 Kan. 269, 178 P. 421 (1919); Baker v. Syfritt, 147 Iowa 49, 125 N. W. 998 (1910). *Contra*: Rolls v. Allen, 204 Cal. 604, 269 P. 450 (1928) (aided by statute); Menke v. Duwe, 117 Kan. 207, 230 P. 1065 (1924); In re Rhodes' Estate, 277 Pa. 450, 121 A. 327 (1923).

[15] 19 MINN. L. REV. 95 at 106 (1934).

[16] 69 U. S. L. REV. 11 (1935).