DEPARTMENT OF WILLS, EXECUTORS AND ADMINISTRATORS.

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SYNGE *v.* SYNGE.[1]

The defendant agreed by ante-nuptial written promise to leave a certain house and land, by will, to the plaintiff for life, if she would marry him. The marriage took place but sometime afterward he conveyed the property to third parties.

In an action for damages for breach of contract the court held that the conveyance by the husband was a breach of contract for which the wife had an immediate right of action and could recover damages.

CONTRACTS TO MAKE WILLS.

The law is in a somewhat unsettled state with regard to joint and mutual wills and contracts to make wills. The point most difficult to overcome is the irrevocable quality of such instruments, for one of the chief features of a will is its ambulatory character.

The case of *Dufour* v. *Pereira*, 1 Dick. 419, decided in 1769, is one of the oldest cases on this subject and one of those most frequently cited as establishing the validity of mutual wills. Husband and wife had made a mutual will, and on the death of the husband it was proved as his will, the wife taking the benefits it conferred on her. Before her death she made another will which if carried into effect would revoke the mutual will. The question to be decided was whether her second will should be admitted to probate or declared void.

The court decided that the wife could not revoke the mutual

[1] Reported in 1 Q. B. 466 (1894).

will after the death of the husband, Lord Camden saying: "It might have been revoked by both jointly; it might have been revoked separately, provided the party intending it had given notice to the other of such revocation. But I cannot be of opinion that either of them, could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another will. It is a contract between the parties which cannot be rescinded, but by the consent of both."

In 1797, *Walpole* v. *Orford*, 3 Ves. 402, was decided. George, Earl of Orford, in 1752, made a will in favor of the defendants; but in 1756 he and Lord Walpole each made a will (a reciprocal sacrifice of female issue) in favor of the collateral heirs, male, in order to preserve the family estates in the name of Walpole. Lord W. died in 1757, and Earl G. in 1791; but in 1776 the latter had made a codicil in which he referred to his last will as dated November 25, 1752. A bill was presented, claiming that Earl G. had made a mistake in referring to his last will as dated 1752, and that, under the circumstances, he must have meant 1756; and even though he did not, he could not revoke his will of 1756 by the codicil of 1776, because the wills made by him and Lord W. were mutual wills, in the nature of a compact, and Earl G., having acquiesced for thirty-five years in the benefits conferred on him by the will of Lord W., could not revoke his own to the detriment of the heirs of Lord W.

The two wills were executed at the same time and place, were drawn by the same solicitor, had the same witnesses, and were expressed in similar language, and there was other evidence that they were intended as mutual wills; but Lord Loughborough dismissed the bill on the grounds that the terms of the agreement were not clear, certain, and fair, and that there was not the degree of evidence required by the Statute of Frauds.

Lord Hargrave, in his excellent discussion of the case, 2 *Hargrave's Jurisconsult Exercitations*, 70, disagrees with the decision reached by Lord Loughborough, and thinks the evidence sufficient to establish the instruments as mutual wills.

He believed that, as Earl G. had taken benefits under the will, equity as well as good faith and conscience should restrain him from disappointing its provisions.

In his opinion, there was a binding compact or agreement which neither party should have been allowed to revoke without giving due notice to the other; otherwise, it would give license to both to impose on each other at pleasure and gain undue advantage over the other. His opinion agrees with that of Lord Camden, in *Dufour* v. *Pereira*, and is sanctioned by the decisions of many courts: *Carmichael* v. *Carmichael*, 72 Mich. 76; *Bird* v. *Pope*, 73 Mich. 483; *Breathitt* v. *Whittaker's Ex'rs*, 8 B. Monroe, 530; *Bolman* v. *Overall*, 80 Ala. 457.

Lord Hargrave states several very early cases in which actions were brought and sustained for breach of agreement, in consideration of which certain testamentary dispositions had been made and gives others in which specific performance had been decreed. From which cases he infers that compacts and agreements on the faith of which wills are made, or forborne to be made, are enforceable at law or in equity; the party injured by the breach receiving damages or relief in the nature of specific performance.

The first decision in this country on mutual wills is *Izard* v. *Middleton*, 1 Desaus, 115, in 1785. R. and J. had verbally agreed that if either should die without male issue, he should bequeath a certain sum to the survivor for the purpose of keeping up the family name. R. made his will accordingly, trusting that J. would do the same, but on the death of J. found that J. had bequeathed his entire estate to his sister. The agreement being within the Statute of Frauds a bill for its specific performance was dismissed. The case is not well reported, but from the opinion of the court it is usually cited as sanctioning the validity of mutual wills.

This case was followed, in 1811, by *Rivers* v. *Ex'rs of Rivers*, 3 Desaus, 188, in which the court held that the husband would be bound by an ante-nuptial agreement to make adequate provision for the wife in consideration that she renounce all claims to his estate. The husband made pro-

vision for her in his will, but the court, considering it inadequate, decreed that it be enlarged, stating that a man may renounce every benefit or right which the law allows him if he does so fairly and without fraud, and he will be bound by his agreement so to do.

Cases in which it has been necessary to consider the force and validity of mutual wills have arisen in many of the States, and courts have almost always decided in their favor.

The case usually relied on by those claiming adversely to such instruments is *Hobson* v. *Blackburn*, 1 Add. 277, decided in 1822. In the course of his opinion, Sir John Nicholl said of a joint will: "An instrument of this nature is unknown to the testamentary law of this country, or in other words, it is unknown as a will." He thought, however, that it might be sustained in equity by making the devisees trustees for performing the testator's part of the agreement, but would not admit it to probate as a will, because it was irrevocable by the testators. This case is often cited as deciding that joint or mutual wills are void and cannot be admitted to probate, but this interpretation of the case is incorrect, for the will had previously been probated as the will of one of the testators, and was now asked to be admitted to probate in preference to a later will by one of the survivors, which revoked his share of the joint dispositions. This the court refused to do, deciding that joint wills are not irrevocable.

Clayton v. *Liverman*, 2 Dev. and Bat. 558, was decided on a misinterpretation of this case. After the death of two sisters, an instrument executed by them as their last will was offered for probate, but was refused because it purported to be a mutual will and was thought by the court to imply an agreement: *1 Wm.'s Ex'rs*, 8 (9 Ed.); but see also pp. 107–109.

As the instrument was an expression by each of the disposition she desired to have made of her property after her death, and as no revocation had been attempted by either sister, and probate had not been offered until after the death of both, it is difficult to see why it should not have been admitted either as a mutual will or as the separate will of each:

Redfield's Law and Practice of Surrogate Courts, 129; *Betts* v. *Harper*, 39 Ohio, 639.

The reasoning of the court in the case of *Ex parte Day*, 1 Bradf. 416, in which the facts were similar to those in Clayton and Liverman, is far more logical. The court says: "The subscription at the end of the will, the declaration of its testamentary character, and the attestation by two witnesses, if proved, are none the less true of each of the testators, because true of both," and "Because the will happens to be made in conformity to some agreement, or contains on its face matters of agreement, or shows mutuality of testamentary intention between two persons, and a compact or intention not to revoke, in my judgment it is none the less a will."

Where an agreement has been entered into to make a will of a certain tenor for a valuable consideration, as for services to be performed, and the promisee has fulfilled his part of the agreement, it is but just that the agreement should be enforced even though it is necessary to hold the first will irrevocable by a later will of the promisor. In many cases the contract has been that the promisor will bequeath his property to the promisee, in consideration that the promisee maintain him and give him a home for the remainder of his life. Though such agreements have been entered into verbally, and legatees under a second will have tried to justify their claims under the Statute of Frauds, if the contract is fair, just and reasonable, and the promisee has executed his part of the agreement, a court of equity will enforce the contract regardless of the Statute. *Bolman* v. *Overall*, 80 Ala. 451; *Wall* v. *Scales*, 47 N. C. 472.

In *Gould* v. *Mansfield*, however, the court decided that an oral agreement between two sisters, that each should make a will devising to the other all of her property, is a contract for the sale of lands, and therefore within the Statute, though it was shown that the surviving sister, who asked for the specific performance of the agreement, had performed services and expended money in the belief that the intestate had made a will in accordance with the agreement. As before stated, it is on the Statute of Frauds that the decisions in *Walpole* v. *Orford* and *Izard* v. *Middleton* partly rest.

One may renounce his right to dispose of his property at pleasure, and bind himself by contract to dispose of it by will to certain persons, and such contract will be enforced, not by setting aside the will, but by making the executor, heir or devisee, trustee to perform the contract: *Goilmere* v. *Battison*, 1 Vern. 48; *Johnson* v. *Hubbell*, 10 N. J. Eq. 332; *Maddox* v. *Rowe*, 23 Ga. 431; *Bolman* v. *Overall*, 80 Ala. 451; *Van Duyne* v. *Vreeland*, 12 N. J. Eq. 142; *Carmichael* v. *Carmichael*, 72 Mich. 76; *Bird* v. *Pope*, 73 Mich. 483; *Emery* v. *Darling*, 73 N. E. 715; *Smith* v. *Pierce*, 65 Vt. 200; *Wright* v. *Wright*, 23 L. R. A. 196; *3 Parsons on Contracts*, 406, 407.

In *Tuit* v. *Smith*, 137 Pa. 35, the plaintiff brought an action of ejectment claiming, under a deed dated 1885, from S., given in consideration that he support her. The defendant put in evidence a testamentary writing, dated 1884, in which S. stated that she bequeathed all of her property to the defendant for his kindness and care of her during her natural life, and also that he was to take possession of the house and take her into his family as a member thereof. The defendant acted in accordance with this agreement, but S. left the house within a year without cause. *Held*, that there was nothing to justify a recision of the contract, and ejectment was not granted.

Where a party has agreed to adopt a child and make him heir, and the party dies intestate, it often happens that heirs of the intestate will attempt to defeat the claims of the adopted child. In a case recently decided (1894), *Wright* v. *Wright*, 23 L. R. A. 196, the defendant was taken by W. and wife with the intention of adopting him as their son, the agreement being that he should become their heir and come into possession of their property. The defendant supposed he was the son of W., and faithfully performed his duties to his adopted parents, giving his entire time to them without remuneration. On the death of W., the defendant being then twenty-two years of age, learned of his adoption, and that the statute under which he had been adopted was unconstitutional.

W. having died intestate, his heirs claimed his property, but the court held that as there had been a contract, that the defendant should have the property of which W. might die

seized, and as there had been such performance on the part of the defendant as to take the case out of the Statute of Frauds, "equity should enforce this understanding despite the law," and the title and estate should vest in the defendant the same as if he had been the son: *Van Duyne* v. *Vreeland*, 12 N. J. Eq. 142; *Sharkey* v. *McDermot*, 91 Mo. 647; *Healey* v. *Simpson*, 113 Mo. 340.

In the cases thus far considered, the remedy for breach of contract to make a will in favor of a certain person or persons, was sought after the death of one of the contracting parties when his will was offered for probate, and its provisions were not consistent with the contract, or when having died intestate, heirs claimed the property in opposition to the contract; but in *Synge* v. *Synge* (1894), 1 Q. B. 466, an action for breach of damages was brought during the life of both contracting parties.

The defendant before marriage agreed, by letter, as an inducement thereto, to leave to the plaintiff by will a certain house and land for life. The marriage took place, but sometime afterward the defendant conveyed his entire estate to third parties. The plaintiff claimed a life estate in the property, commencing on her husband's death, and that the conveyance was subject thereto, or in the alternative, claimed damages for breach of contract.

Four questions were considered by the court. *First.* "Was there a binding contract?" This was decided in the affirmative, Kay, L. J., expressing his opinion that the proposal of terms was made as an inducement to the lady to marry, and that she married the defendant on the faith that he would keep his word.

Second. "Was there such a contract as could be enforced in equity, or was there a remedy in damages for the breach of it?" The decision on this point was that, marriage being a valuable consideration, and the contract being in writing so that no question on the Statute of Frauds could arise, equity would give effect to the proposal, or the plaintiff could recover damages for its breach: *Hammersley* v. *De Biel*, 12 Cl. and F. 45, at 78. See, also, *Wall* v. *Scales*, 47 W. C. 472.

Third. "Has the time arrived at which such remedy can be asserted?" The court said that, as the plaintiff asked for damages for breach of contract, and as by the conveyance the defendant had put it out of his power to perform his part of the contract, the plaintiff could maintain an action for its breach at once, and need not be delayed until the time set for the performance of the contract: *Hochster* v. *De La Tour*, 22 L. J. (Q. B.) 455; *Frost* v. *Knight*, Law Rep. 7 Ex. 111; *Short* v. *Stone*, 8 Q. B. 358; *Ford* v. *Tiley*, 6 B. and C. 325.

Fourth. "If remedy be by way of damages, what amount of damages should be given?" The answer to this was that "the amount must depend on the value of the possible life estate which plaintiff would be entitled to if she survived her husband."

This decision certainly is reasonable, for it would be unjust to allow the defendant to convey the property to third parties, regardless of his obligations under the contract into which he entered.

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