South Carolina Law Review

Volume 17 | Issue 4 Article 8

1964

Specific Performance of Oral Contracts to Devise

Wendell O. Brown

NOTES

SPECIFIC PERFORMANCE OF ORAL CONTRACTS TO DEVISE

I. Introduction

The courts are continually confronted with oral contracts to devise. Most involve promises to devise in return for services to be rendered by the promisee, while others involve mutual promises to make specified dispositions by respective wills. Many such contracts are between parties with close family ties, and their mutual confidence that each will perform his promise without resort to the courts is usually well founded.

The purpose of this note is to explore the remedy of specific performance of oral contracts to devise—the remedy most often sought when the promisor does fail to make the promised will, or having made it, breaks his promise by revoking the will or alienating the property to defeat the devise. Particular emphasis is given to part performance which is generally relied on to remove the agreement from the operation of the Statute of Frauds. The cases are numerous and the results are often determined by the particular facts of each case.

II. Specific Performance Generally

The remedy of specific performance enables a court with equity power to compel at least substantial performance of a contract.[1] However, neither party to the contract has an absolute right to this remedy; the court may grant or refuse it in its discretion. A court of equity will usually only accept jurisdiction when ample remedy is unavailable in a court of law.[2] Even then a decree will be granted only when damages would otherwise be inadequate.[3] Equity also requires that the contract possess all the essential elements of a legal contract[4] and that it be capable of enforcement in a court of law.[5]

1. 5 Williston, Contracts § 1418 (rev. ed. 1937).

2. This principle is true as much in actions for specific performance of contracts to make a will as in other contracts. *E.g.*, Flowers v. Roberts, 220 S.C. 110, 66 S.E.2d 612 (1951); Samuel v. Young, 214 S.C. 91, 51 S.E.2d 367 (1949).

3. Sarter v. Gordon, 2 Hill Eq. 121 (S.C. 1835).

4. Brown v. Graham, 242 S.C. 491, 131 S.E.2d 421 (1963).

5. Brown v. Graham, *supra* note 4; Baylor v. Bath, 189 S.C. 269, 1 S.E.2d 139 (1938); 5 Williston, Contracts § 1421 (rev. ed. 1937).

Specific performance is most often sought in land conveyance contracts. Partly due to the social and economic importance of land during the development of the doctrines of equity, and partly due to the uniqueness of any one particular tract, land contracts are always specifically enforceable. They are enforceable by either party regardless of the form of the contract and despite the fact that either could sue for damages.[6]

Land devise contracts and land sale contracts are similar in nature,[7] as both involve the transfer of an interest in land, and it would appear that specific performance should be granted for the same reason in both cases.

It is well settled that one can make an enforceable contract to dispose of property by will.[8] However, there can be no breach until the death of the promisor, and even then the remedy at law may be adequate.[9] Therefore, equity will usually not grant specific performance during the promisor's life. Nevertheless, it may prevent a disposition of the land during the promisor's life if relief by a court of law after the promisor's death would be inadequate.[10] Further, the South Carolina Supreme Court has prevented a transfer by injunction during the promisor's life if the promisor has repudiated the contract.[11] But if the property has been transferred to a bona fide purchaser for value, equity is unable to enforce performance, as it will against one who is not a bona fide purchaser for value.[12] The promisor's only remedy is then at law for damages or, when there is no writing to meet

6. Board of Presbyterian Church v. Dreher, 185 S.C. 65, 193 S.E. 189 (1937); Anderson v. Chick, Bailey's Eq. 118 (1830).

7. White v. McKnight, 146 S.C. 59, 143 S.E. 552 (1928); Brown v. Golightly, 106 S.C. 519, 91 S.E. 869 (1917).

8. *E.g.*, Brown v. Golightly, 106 S.C. 519, 91 S.E. 869 (1917); Wilson v. Gordon, 73 S.C. 155, 53 S.E. 79 (1905); Gary v. James, 4 Desaus. Eq. 185 (S.C. 1811).

> By this agreement he has renounced that absolute power of disposing of his estate at his pleasure, or even at his caprice, with which the law had clothed him: and I cannot doubt that he could bind himself to do so. No cases were cited on this point. But there are cases which shew that men may bind themselves to make their wills in a particular way. . . . a man may renounce every power, benefit, or right, which the laws give him, and he will be bound by his agreement to do so, provided the agreement be entered into fairly, without surprise, imposition, or fraud, and that it be reasonable and moral.

Rivers v. Executors of Rivers, 3 Desaus. Eq. 190, 194-95 (S.C. 1811).

9. 5 WILLISTON, CONTRACTS § 1421 (rev. ed. 1937).

10. *Ibid.*

11. Sizemore v. Jennings, 88 S.C. 243, 70 S.E. 726 (1911).

12. Bruce v. Moon, 57 S.C. 60, 35 S.E. 415 (1900).

the requirements of the Statute of Frauds, in quantum meruit.[13] The court has further held that if no time for making the will is set, there is no implication that it is to be made during the promisor's life; and no action for breach or rescission will lie unless he repudiates the contract and puts it out of his power to perform.[14] Nevertheless, although a contract is usually unenforceable both in law and in equity only against a contracting party, the courts construe contracts to devise or bequeath as imposing a trust upon the property, compelling not only the heirs or personal representatives but others holding under them with notice of the trust to transfer the land or other subject matter to the promisee.[15]

The same requirements for enforcing contracts apply to equity as apply to law, and one requirement in law is that any applicable Statute of Frauds be complied with. Therefore, on principle, the requirement of compliance with the Statute of Frauds should apply with equal force in equity cases. However, equity has created an exception to this statutory requirement where the promisee of an oral contract to devise has partly performed.

Although in most instances an action for specific performance is brought by the promisee, the contract may involve a promise to devise to a third party who may sue as a third party beneficiary.[16]

III. Oral Contracts and Specific Performance

A. The Statute of Frauds

The Statute of Frauds requires that certain classes of contracts either be in writing or that there be some writing signed by the party to be changed showing its essential elements. The Statute of Frauds contained in the South Carolina Code[18] is similar to those enacted in most other states.

13. White v. McKnight, 146 S.C. 59, 143 S.E. 552 (1928); Bruce v. Moon, 57 S.C. 60, 35 S.E. 415 (1900).

14. Harmon v. Aughtry, 226 S.C. 371, 85 S.E.2d 284 (1955).

15. Turnipseed v. Sirrine, 57 S.C. 559, 35 S.E. 757 (1900); Annot., 69 A.L.R. 14, 26 (1930).

16. Ellisor v. Watts, 227 S.C. 411, 88 S.E.2d 351 (1955); McMillan v. King, 193 S.C. 14, 7 S.E.2d 521 (1940); Stuckey v. Truett, 124 S.C. 122, 117 S.E. 192 (1923); Brown v. Golightly, 106 S.C. 519, 91 S.E. 869 (1917); Wilson v. Gordon, 73 S.C. 155, 53 S.E. 59 (1905).

17. White v. McKnight, 146 S.C. 59, 143 S.E. 552 (1928); Brown v. Golightly, 106 S.C. 519, 91 S.E. 869 (1917).

18. S.C. Code Ann. § 11-101 (1962).

§ 11-101 *Agreements required to be in writing—no action shall be brought whereby:*

(4) To charge any person upon any contract for sale of lands, tenements or hereditaments or any interest in or concerning them; or

. . . Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing signed by the party to be charged therewith or some person thereunto by him lawfully authorized.[19]

B. Doctrine of Part Performance

The doctrine of part performance provides an exception to the general rule and allows a court of equity to decree specific performance despite non-compliance with the statute. However, the doctrine is available only when the value of services rendered by the promisee cannot be estimated in monetary terms or where inequity or injustice would otherwise result.[20] The Statute of Frauds is designed to *prevent* fraud, and only when enforcement of the statute would result in fraud do the courts allow a departure from it.[21] In other cases the doctrine of part performance is said to be based on *estoppel.*[22] And the courts may also grant specific performance on the theory of *equitable* ownership.[23] At all events, part performance is purely an equitable doctrine and will not support an action at law for damages.

In *Fogle v. St. Michael Church*[24] the court said that a contract to devise is enforced upon the same principles as a contract

19. It would seem obvious that the provisions of the Statute of Frauds relating to promises not to be performed within a year does not affect agreements to make a certain disposition of property by will, since the promisor might die within the year. However, the early case of Izard v. Middleton, 1 Desaus. Eq. 116 (S.C. 1785), held such a promise to be within the one year clause. This holding was later overruled in Turnipseed v. Sirrine, 57 S.C. 559, 35 S.E. 757 (1900).

20. 3 WILLISTON, CONTRACTS § 488 (3d ed. 1960).

21. McLauchlin v. Gressette, 224 S.C. 296, 79 S.E.2d 149 (1953).
The stringent rule of the quantum of proof required results (when the alleged contract rests in parol) from the fact that such a contract is in the teeth of the Statute of Frauds and specific performance (or its equivalent) is properly allowable only when enforcement of that statute would result in a fraud upon the promisee. Only in prevention of fraud do Courts allow a violation of the statute.
Young v. Levy, 206 S.C. 1, 15, 32 S.E.2d 889, 894 (1945).

22. McMillan v. King, 193 S.C. 14, 7 S.E.2d 521 (1940).

23. Fogle v. St. Michael Church, 48 S.C. 86, 26 S.E. 99 (1896); McLauchlin v. Gressette, 224 S.C. 296, 79 S.E.2d 149 (1953).

24. 48 S.C. 86, 26 S.E. 99 (1896).

to convey, and that a judgment for specific performance relates back to the time of the making of the contract, giving the contract priority over a subsequent contrary will.

As has been seen, specific performance of an oral contract to devise can only be enforced against the promisor during his lifetime. Therefore, if specific performance based upon part performance is to be granted, the same rule applies as in cases of a written contract, and after the promisor's death the court will construe the agreement as impressing a trust upon the property and will compel the heirs or others holding the property with notice of the trust, to convey to the promisee.[25] The court will not allow this remedy to be defeated by the promisor's conveyance of the land unless the rights of purchasers are deserving of protection.[26]

C. Establishing The Contract

While the courts sustain contracts to make testamentary dispositions, they are reluctant to find such a contract when it rests in parol.[27] They are sympathetic with the promisor's right to convey his property and to change his beneficiaries, and recognize that a contract to devise partially deprives the promisor of the enjoyment of his property.[28] Consequently, the court requires a high degree of evidence to establish an oral contract to devise.[29] There must be clear and convincing evidence,[30] not only that the contract was made but that the promisee has performed his part.[31] A mere preponderance of the evidence is insufficient.[32]

25. Bruce v. Moon, 57 S.C. 60, 35 S.E. 415 (1900).

26. White v. McKnight, 146 S.C. 59, 143 S.E. 552 (1928); Bruce v. Moon, *supra* note 25; Fogle v. St. Michael Church, 48 S.C. 86, 26 S.E. 99 (1896).

27. Kerr v. Kennedy, 105 S.C. 496, 90 S.E. 177 (1916); Dicks v. Cassels, 100 S.C. 341, 84 S.E. 878 (1915); McKeegan v. O'Neill, 22 S.C. 454 (1885).

28. Kerr v. Kennedy, *supra* note 27; Dicks v. Cassels, *supra* note 27.

29. In Brown v. Golightly, 106 S.C. 519, 91 S.E. 869 (1916) the South Carolina Supreme Court said that an oral contract to devise could not be established by parol evidence alone and that there had to be some writing to take it out of the statute of frauds. In a concurring opinion, Mr. Justice Hydrick stated that such a contract could be proved by parol evidence. He reasoned that if part performance of a land contract could take a case out of the Statute of Frauds, then part performance of a contract to devise land should have the same effect. The concurring opinion has prevailed in South Carolina. See footnote 76 *infra*.

30. Brown v. Golightly, *supra* note 29; Kerr v. Kennedy, 105 S.C. 496, 90 S.E. 117 (1916); Dicks v. Cassels, 100 S.C. 341, 84 S.E. 878 (1915); Wilson v. Gordon, 73 S.C. 155, 53 S.E. 59 (1905). The court sometimes says the evidence must be "clear, cogent and convincing." See Hayes v. Israel, 242 S.C. 497, 131 S.E.2d 506 (1963); Kerr v. Kennedy, 105 S.C. 496, 90 S.E. 177 (1916).

31. Hayes v. Israel, 242 S.C. 497, 131 S.E.2d 506 (1963); Kerr v. Kennedy, *supra* note 30.

32. Young v. Levy, 206 S.C. 1, 32 S.E.2d 889 (1945).

Findings of fact by the master in equity that are concurred in by the circuit judge will not be disturbed on appeal unless such findings are without evidentiary support.[33] This rule appears to run counter to the general requirement that the evidence be clear and convincing.[34]

The terms of the contract must be definite and certain,[35] and must possess all the essential elements of a legal contract.[36] It must have been deliberately entered into by the decedent, founded upon valuable consideration,[37] and not violative of law or public policy.[38] A mere declaration of intent will not give rise to a contract.[39] The minds of the parties must meet. The promisor must understand that not only is he promising to perform a future act, but that he is presently relinquishing his right to change his mind and is entering into an irrevocable contract.[40] The intention of the parties can be determined from the surrounding circumstances as well as from testimony of witnesses, and subsequent acts may show that no contract was intended.[41]

The evidence to sustain an oral contract to devise is closely scrutinized.[42] Although no particular number of witnesses is

33. Hayes v. Israel, 242 S.C. 497, 131 S.E.2d 506 (1963).

34. See Karesh, *Wills and Trusts, 1963-1964 Survey of S.C. Law,* 17 S.C.L.Rev. 178, 180 (1965).

35. Dicks v. Cassels, 100 S.C. 341, 84 S.E. 878 (1915); Wilson v. Gordon, 73 S.C. 155, 53 S.E. 79 (1905).

36. Brown v. Graham, 242 S.C. 491, 131 S.E.2d 421 (1963); Baylor v. Bath, 189 S.C. 269, 1 S.E.2d 139 (1938).

37. Erskine v. Erskine, 107 S.C. 233, 92 S.E. 465 (1917); McKeegan v. O'Neill, 22 S.C. 454 (1885).

38. Grant v. Butt, 198 S.C. 298, 17 S.E.2d 689 (1941). The plaintiff was either a Negro woman or part Negro and part Indian. She contended that she had lived with decedent, a white man, for over 30 years in a state of concubinage, in return for his oral promise to leave her one-half of his estate by will. The court held the contract void stating that the courts of this state will not lend aid to the enforcement of a contract that is in violation of law or opposed to sound public policy.

39. Bruce v. Green, 118 S.C. 27, 110 S.E. 77 (1921); Kerr v. Kennedy, 105 S.C. 496, 90 S.E. 177 (1916); Callum v. Rice, 35 S.C. 551, 15 S.E. 268 (1892).

40. Kerr v. Kennedy, *supra* note 39.

41. In Kerr v. Kennedy, 105 S.C. 496, 502-03, 90 S.E. 177, 178-79 (1916), the court, speaking of the opinion of the circuit judge said, "He ignored entirely the environment and circumstances of the whole case. . . . The subsequent acts of the parties themselves show that they considered it not a binding irrevocable contract, but simply a declaration of intention." *Accord,* Hayes v. Israel, 242 S.C. 497, 131 S.E.2d 506 (1963); Brown v. Graham, 242 S.C. 491, 131 S.E.2d 421 (1963) (Plaintiff bought 15 acres of the land from the heirs of the decedent, and claimed decedent contracted to devise to him); Ellisor v. Watts, 227 S.C. 411, 88 S.E.2d 351 (1955); Kirkpatrick v. Kirkpatrick, 223 S.C. 357, 75 S.E.2d 876 (1953); Stuckey v. Truett, 124 S.C. 122, 117 S.E. 192 (1923); Wilson v. Gordon, 73 S.C. 155, 53 S.E. 79 (1905).

42. Erskine v. Erskine, 107 S.C. 233, 92 S.E. 465 (1917).

necessary if the testimony is clear and convincing,[43] the promisee is not competent to testify as to the terms of the agreement because of the "dead man statute."[44] However, if the defendant does not object it will be admitted and given the weight of other testimony.[45]

It is well settled that a revoked will which does not refer to the oral contract to devise does not satisfy the Statute of Frauds,[46] and the existence of a will with contrary provisions may raise the inference that there was no contract,[47] particularly where it makes a fair distribution of the estate among the natural objects of the testator's bounty.[48] A will or written contract creates a strong implication that the whole intention has been expressed and that there was no contrary agreement or intention.[49]

The concurrent execution of separate wills with reciprocal provisions or identical dispositions is not alone sufficient to establish a contract between the makers. There must be proof of the contract from another source.[50] This is particularly true in the case of a husband and wife because many couples make reciprocal wills without contracting to do so.[51] If an executed will does refer to the terms of the agreement, however, it may

43. Stuckey v. Truett, 124 S.C. 122, 117 S.E. 192 (1923).

44. S.C. CODE ANN. § 26-401 (1962); Young v. Levy, 206 S.C. 1, 32 S.E.2d 889 (1945); Stuckey v. Truett, *supra* note 43; Brown v. Golightly, 106 S.C. 519, 91 S.E. 869 (1917); Dicks v. Cassels, 100 S.C. 341, 84 S.E. 878 (1915).

45. Hayes v. Israel, 242 S.C. 497, 131 S.E.2d 506 (1963); Riddle v. George, 181 S.C. 360, 187 S.E. 524 (1936).

46. Young v. Levy, 206 S.C. 1, 32 S.E.2d 889 (1945); McMillan v. King, 193 S.C. 14, 7 S.E.2d 521 (1940); White v. McKnight, 146 S.C. 59, 143 S.E. 552 (1928).

47. McLaughlin v. Gressette, 224 S.C. 296, 79 S.E.2d 49 (1953); Young v. Levy, *supra* note 46; McMillan v. King, *supra* note 46; Annots. 69 A.L.R. 14, 210 (1930) and 106 A.L.R. 742, 766 (1937).

48. Only in prevention of fraud do Courts allow a violation of the statute. Furthermore, sometimes, as in the case where there was a subsequent contrary will, the granting of the relief sought would result in denying the deceased the power of disposing of his property by last will as he sees fit, which is a prime right . . . of the possessor of property. Here the latter has a special appeal to a Court of equity for the testator had accumulated a considerable estate by his industry and thrift. So many of his race are "under-privileged." By his own efforts, he was not.

Young v. Levy, 206 S.C. 1, 15, 32 S.E.2d 889, 894 (1945).

49. Young v. Levy, *supra* note 48; Dicks v. Cassels, 100 S.C. 341, 84 S.E. 878 (1915); Wilson v. Gordon, 73 S.C. 155, 53 S.E. 79 (1905).

50. Hayes v. Israel, 242 S.C. 497, 131 S.E.2d 506 (1963); Looper v. Whitaker, 231 S.C. 219, 98 S.E.2d 266 (1957); Ellisor v. Watts, 227 S.C. 411, 88 S.E.2d 351 (1955).

51. Looper v. Whitaker, 231 S.C. 219 98 S.E.2d 266 (1957).

be sufficient to satisfy the requirements of the Statute of Frauds.[52]

D. Personal Services as Past Performance

1. *Character of the services.* For specific performance to be granted, it must appear that the services performed by the promisee are of an exceptional character. Not only must the parties have intended that the services not be measured by ordinary monetary standards, but measurements by such standards must be impossible.[53] The services anticipated by this rule are generally those of a personal nature[54] and must appear to be exceptional in character or involve a change in the whole course of the promisee's life.[55]

The factual situations most often involve the sick, aged or infirm who have promised to devise in return for some close relative's[56] moving into their home and caring for them. The law furnishes no monetary standard by which these services may be valued and equity can only decree specific performance.[57]

As a general rule, the promisee must have completely performed unless, through no fault of his own, complete performance has become impossible.[58] At all events, the promisee must perform the promised services diligently and in good faith.[59]

52. Bruce v. Moon, 57 S.C. 60, 35 S.E. 415 (1900).

53. Under these circumstances, our Supreme Court has consistently . . . recognized . . . that the Statute is not a bar to specific performance. This is especially true where, as here, neither the legal benefit to the promisor nor the legal detriment to the promisee is susceptible of reasonably accurate pecuniary measurement and the parties never intended that they should be thus measured.

McLauchlin v. Gressette, 224 S.C. 296, 316, 79 S.E.2d 149, 158 (1953).

54. Annot., 69 A.L.R. 14, 149-50 (1930).

55. This rule has not been specifically stated in South Carolina, but in every case where specific performance has been decreed, the promisee's life was changed, as by giving up former employment or moving into the promisor's home. See McLauchlin v. Gressette, 224 S.C. 296, 79 S.E.2d 149 (1953); Kirkpatrick v. Kirkpatrick, 223 S.C. 357, 75 S.E.2d 876 (1953); Baylor v. Bath, 189 S.C. 269, 1 S.E.2d 139 (1938); Annots., 69 A.L.R. 14, 133 (1930) and 106 A.L.R. 742, 758 (1937).

56. Samuel v. Young, 214 S.C. 91, 51 S.E.2d 367 (1949); Prater v. Prater, 94 S.C. 267, 77 S.E. 936 (1913); Young v. Levy, 206 S.C. 1, 32 S.E.2d 889 (1945); McLaughlin v. Gressette, *supra* note 55; Kerr v. Kennedy, 105 S.C. 496, 90 S.E. 177 (1916); Kirkpatrick v. Kirkpatrick, 223 S.C. 357, 75 S.E.2d 876 (1953) (grandnephew and half great-aunt); Bruce v. Moon, 57 S.C. 60, 35 S.E. 415 (1900) (apparently promisor and promisee not related).

57. 49 Am. Jur. *Statute of Frauds* § 529 (1943).

58. Samuel v. Young, 214 S.C. 91, 51 S.E.2d 367 (1949); Bruce v. Moon, 57 S.C. 60, 35 S.E. 415 (1900).

59. Samuel v. Young, 214 S.C. 91, 51 S.E.2d 367 (1949).

If performance is to be rendered by two or more persons and one dies or otherwise does not perform, the promisor can rescind. However, if he intends to rescind he must notify the promisee within a reasonable time or he may waive his right by allowing the promisee to continue performance.[60]

2. *Referability of services to the contract.* Not every performance by the promisee is sufficient to satisfy the Statute of Frauds. The performance must be unequivocally referable to the agreement.[61] In the words of Mr. Justice Cardozo (in a case involving an oral promise to devise) "What is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done."[62] Apparently, the requirement of referability as expressed by Justice Cardozo is that the services performed must evidence *the particular contract* that has been alleged, or at least *that type of contract.* And, although a majority of cases in this county are disposed of without mentioning this rule, it is evidently applied when the facts clearly indicate that the performance was not referable to the contract.[63]

This rule, although never stated by the South Carolina Supreme Court in a land *devise* case, has been expressly recognized with reference to oral contracts to convey.[64] However, though the situation is not entirely clear, it does appear that in South Carolina, unlike New York,[65] the performance need not be *unequivocably* referable to the agreement. It may be held sufficient regardless of its being equally referable to some other agreement than a contract to devise.[66]

3. *Possession of the Promised Land.* No South Carolina cases have held that possession of the land is necessary. This is in conformity with the rule in all but those few jurisdictions which regard possession as essential.[67] However, possession and improvement in reliance on the promise to devise is generally re-

60. Prater v. Prater, 94 S.C. 267, 77 S.E. 936 (1913).

61. Annots., 69 A.L.R. 14, 129 (1930) and 106 A.L.R. 742, 757 (1937).

62. Burns v. McCormick, 233 N.Y. 230, 135 N.E. 273 (1922).

63. Annot., 69 A.L.R. 14, 131 (1930).

64. Scurry v. Edwards, 232 S.C. 53, 100 S.E.2d 812 (1957); Aust. v. Beard, 230 S.C. 515, 96 S.E.2d 558 (1957).

65. Burns v. McCormick, 233 N.Y. 230, 135 N.E. 273 (1922).

66. Kirkpatrick v. Kirkpatrick, 223 S.C. 357, 75 S.E.2d 876 (1953); McLauchlin v. Gressette, 224 S.C. 296, 79 S.E.2d 149 (1953); Baylor v. Bath, 189 S.C. 269, 1 S.E.2d 139 (1938).

67. Annot., 69 A.L.R. 14, 139 (1930).

garded as sufficient part performance. Where possession is required it must be notorious, exclusive, and obviously in pursuance of the contract; merely residing with and caring for the promisor is insufficient.[68] In South Carolina either possession alone[69] or improvements alone[70] may in some cases remove a contract to convey from the statute. This could arguably be applied to contracts to devise should such a case arise.

When the services rendered are incapable of monetary valuation, South Carolina, with the majority, regards such services as sufficient irrespective of possession. However, payment which may be expressed in money or its equivalent is insufficient since return of such consideration would restore the parties to their original positions.[71]

E. Types of Part Performance

1. *Promise to Devise to Another. Stuckey v. Truett*[72] concerned a devise made pursuant to a return promise that the promisor would devise the property to another. The South Carolina Supreme Court held that by leaving the will in effect until his death the promisee had fully performed, and the contract was thereby removed from the Statute of Frauds.[73] However, *Stuckey* involved a promise between husband and wife, and since naming the husband as beneficiary is not necessarily referable to a contract to devise to another, the case appears in serious conflict with the requirement of unequivocal referability.

2. *Surrender of a Child.* Generally, the surrender of custody of a child and the performance of filial services by the child is sufficient performance to remove the promisee's promise to devise to the child from the statute.[74] And, though one South Carolina decision directly in point denied enforcement,[75] the case has

68. Annots., 69 A.L.R. 14, 141 (1930) and 106 A.L.R. 742, 759 (1937).
69. Scurry v. Edwards, 232 S.C. 53, 100 S.E.2d 812 (1957).
70. Aust v. Beard, 230 S.C. 515, 96 S.E.2d 558 (1957).
71. Annots., 69 A.L.R. 14, 149 (1930) and 106 A.L.R. 742, 760 (1937).
72. 124 S.C. 122, 117 S.E. 192 (1923).
73. The rule cited by Justice Cothran in Stuckey v. Truett, *supra* note 72, as supporting the creation of a constructive trust is contained in RESTATEMENT (SECOND), TRUSTS § 55 (1959). That rule and the one relied upon by Justice Cothran seems to be that for a constructive trust to arise the person procuring the devise must promise to hold the property on trust for a third person. This was not the situation in this case, and the rule would seem not to apply.
74. Annots., 69 A.L.R. 14, 151 (1930) and 106 A.L.R. 742, 761 (1937).
75. Brown v. Golightly, 106 S.C. 519, 91 S.E. 869 (1917).

not been followed.[76] However, the court has implied a condition of filial obedience and has denied specific performance when it was not forthcoming.[77]

3. *Promise to Marry.* Marriage is not sufficient part performance either to remove a contract from the Statute of Frauds provision relating to transfers of interests in land or agreements in consideration of marriage.[78] Therefore, despite a promise to marry being coupled with other promises which have been sufficiently performed to remove the contract from the land transfer provision, it is not removed from the statute.[79] However, this may not be true in South Carolina.[80]

4. *Joint or Mutual Wills.* Joint or mutual wills not executed pursuant to a contract may be revoked without notice[81] by either

76. While the holding of Brown v. Golightly, *supra* note 75, that a contract to devise could not be established by parol evidence alone has not been specifically overruled, it has been so distinguished and discredited as to be of no authority for this point. In Stuckey v. Truett, 124 S.C. 122, 117 S.E. 192 (1923), the circuit court opinion adopted by the South Carolina Supreme Court stated that Brown v. Golightly did not hold that there could not be specific performance based on part performance. In McMillan v. King, 193 S.C. 14, 7 S.E.2d 521 (1940), the court again adopted the opinion of the circuit court which cited Brown v. Golightly as a specific holding by the South Carolina Supreme Court that an agreement to devise land is not enforceable unless in writing or taken out of the statute by a showing of part performance. In Young v. Levy, 206 S.C. 1, 32 S.E.2d 889 (1945), the court cited both the majority and concurring opinions of Brown v. Golightly. In a dissenting opinion Mr. Chief Justice Baker said that the case had, while not specifically by name, been overruled time and again and was of no authority. In McLauchlin v. Gressette, 224 S.C. 296, 79 S.E.2d 149 (1953), the court cited Brown v. Golightly as the one exception in modern times to the court's consistent recognition that the Statute of Frauds is not a bar to specific performance of oral contracts to devise where there has been part performance. This case seems to indicate that the court recognized Brown v. Golightly as inconsistent with its holdings in other similar cases and does not consider it as authority in South Carolina. Brown v. Golightly was last cited in Looper v. Whitaker, 231 S.C. 219, 98 S.E.2d 266 (1957), in which the concurring opinion of Mr. Justice Hydrick was cited as saying that the evidence did not meet the required measure of proof as it was not sufficiently clear, definite and certain.

77. The court, in Large v. Large, 232 S.C. 70, 100 S.E.2d 825 (1957), denied specific performance because the "deeded" child had failed to fulfill the obligation of filial obedience: the child left the foster home, and adopted a "do as I care" attitude.

78. 49 AM. JUR. *Statute of Frauds* § 520 (1943).

79. Annot., 30 A.L.R.2d 1419, 1421 (1953).

80. In Hart v. Hart, 3 Desaus. Eq. 592 (S.C. 1813), the bride's father orally gave her a house and lot on her wedding day. The father's will stated that since he had given his daughter the property, she was not a legatee in his will. In the action to declare the property part of the father's estate, the court recognized the oral transfer as a marriage portion. The daughter and her husband had moved into the house, so this case, while not directly in point, seems to indicate that marriage coupled with possession is sufficient part performance.

81. Dicks v. Cassels, 100 S.C. 341, 84 S.E. 878 (1915).

party[82] at any time, either before or after the death of the other party and despite the fact that the latter may have died leaving his will in force[83] or that the survivor has received and enjoyed the benefits.[84] And if the wills are made pursuant to a contract, either may revoke during the lifetime of the other upon notification to him.[85] It is generally held that the death of one party before the other has revoked is not sufficient part performance by the survivor to take the promise of the decedent out of the Statute of Frauds.[86] However, the rule may be otherwise in South Carolina. *Turnipseed v. Sirrine*[87] held that the execution and non-revocation by the surviving promisor was sufficient part performance by him to remove the decedent's promise from the statute. This case, however, dealt with an oral bequest and may not be followed in the case of an oral devise.

If the devisee under a mutual will made pursuant to a contract accepts the property, the courts usually grant specific performance finding either sufficient part performance or an estoppel.[88]

IV. Quantum Meruit

If the promisee fails to establish the existence of the alleged contract, or if the promisor has conveyed away the promised land to a bona fide purchaser, the promisee's remedy is an action in quantum meruit to recover the money paid, the property delivered, or the value of the services rendered.[89] The law implies a promise on the part of the promisor to compensate the promisee and no express contract need be shown,[90] provided, of course, the services have not been rendered as a gratuity.

With this remedy available, evidence introduced in an unsuccessful attempt to prove an oral contract to devise will be relevant to show the decedent's acceptance of the services and his willingness to compensate. However, the law implies only a

82. Annot., 43 A.L.R. 1020, 1024 (1926).

83. Ellisor v. Watts, 227 S.C. 411, 88 S.E.2d 351 (1955).

84. Wilson v. Gordon, 73 S.C. 155, 53 S.E. 79 (1905).

85. Hayes v. Israel, 242 S.C. 497, 131 S.E.2d 502 (1963); Looper v. Whitaker, 231 S.C. 219, 98 S.E.2d 266 (1957); Annot., 106 A.L.R. 742, 761 (1937).

86. 49 Am. Jur. *Statute of Frauds* § 522 (1943).

87. 57 S.C. 559, 35 S.E. 757 (1900). See also, 49 Am. Jur. *Statute of Frauds* § 522 (1943).

88. 49 Am. Jur. *Statute of Frauds* § 522 (1943).

89. White v. McKnight, 146 S.C. 59, 143 S.E. 552 (1928); Annot., 69 A.L.R. 14, 90 (1930).

90. Hunter v. Hunter, 3 Strob. 321 (S.C. 1848).

promise to compensate *upon request*;[91] the promisee has the burden of proving he was to be paid *by will*.[92] If the promisee can establish a promise to pay by will, the statute of limitations begins to run upon the death of the promisor; if not, it runs from the time the services were actually rendered.[93]

V. CONCLUSION

In the area of part performance, South Carolina appears to vary from the majority of jurisdictions in several respects. The court has recognized in cases of oral contracts to *convey* land that unequivocal referability of the acts of performance to the contract is an essential element of the part performance doctrine. However, the court has not made a point of applying the same rule in cases of oral contracts to *devise*. It appears that once the contract is established almost any diligently performed acts of part performance will be sufficient.

All oral contracts to devise violate the Statute of Frauds, and all the elements of part performance, including referability of the services to the contract, should be required before specific performance is granted. The position of the South Carolina Supreme Court on this rule is in need of some clarification.

WENDELL O. BROWN

91. Hunter v. Hunter, *supra* note 90.

92. McConnell v. Crocker, 217 S.C. 334, 60 S.E.2d 673 (1950); Callum v. Rice, 35 S.C. 551, 15 S.E. 268 (1892); Hunter v. Hunter, 3 Strob. 321 (S.C. 1848).

93. McConnell v. Crocker, *supra* note 92; Callum v. Rice, *supra* note 92.