

No 7483 Equity

2. Verme Ref. 658 referred to by Mrs. Greenleaf in support of the proposition first quoted, when a testator gave an annuity to his nephew, and his brother, (who was his executor and devisee of his real estate), promised to pay the annuity, otherwise the testator would have charged it on his lands devised, it was decreed that the executor should specifically perform his promise by paying the annuity although he had freely administered all the personal estate. So in Hutton vs Fowler, 21 Law 211 where a testator intended by will to give timber to raise portions for his younger children, but his eldest son being by, desired him not to give the timber, because it would deface the estate and promised that he would answer for the value of it to his brother and sisters, and the testator forbore to cut the timber and after his death the eldest son refused to comply with her promise; he was held bound by it. There are other similar instances are found amongst the decided cases. "There are," says Fowery, vol 2, Sec 1054 "a few cases which seem to hold that a trust will arise under these circumstances from a verbal promise of a devisee or legatee to hold property for the benefit of another person, this position, however, is clearly opposed to settled principles. The only ground upon which such a trust can be raised, and is raised by the overwhelming weight of authority, is actual, intentional fraud." It was said by Chancellor Johnson in the case of Gaither vs Gaither, 3 Md.; Chancery Decision 160 "If an heir or personal representative or devisee whose interests would be prejudiced by the insertion of a provision in a will in favor of some third person, induces the testator to omit such provision by assurances that his wishes shall be executed as though the provision was made. Such assurance will raise a trust which though not available at law will be enforced in equity on the ground of fraud." It must be obvious at a glance that to prove the fraud by restating the agreement and then to give effect to the agreement because of the fraud, is reasoning in a vicious circle.

But the same proposition stated by Greenleaf and upheld in ^{the} cases above alluded to and repeated with approval, by Chancellor Johnson though not enforced by him, is not prevented in this case.

In each ^{of the} cases referred to in the text books the contest was between the beneficiary under the will,