

ELIZABETH RAULS, Appellant, v. **JAMES A. MANNING** and **MARIE V. RAILEY**, Executors of the Property of the Late **LIZZIE MARIE LOMAX**,
Appellees.

OBJECTIONS TO THE PROBATE OF A WILL.

Argued October 19, 1949. Decided December 16, 1949.

1. One complaining of fraud must apply for relief at the earliest convenient moment after knowledge of fraud or the Court will not grant relief.
2. Under the Statute of Frauds an oral promise to the tenant to execute a deed is unenforceable and the tenant is a tenant at will.
3. Neither a testamentary gift nor generally the capacity of a beneficiary to take property is adjudicated by probate.
4. A judgment probating a will determines that the instrument is the last will of the testator without reference to the right of the testator to dispose of the property which he undertakes to bequeath.
5. On appeal from judgment admitting will to probate over objections of appellant, *judgment affirmed.*

MR. JUSTICE BARCLAY delivered the opinion of the Court.

"To Mrs. Sarian Clarke, I Will and Bequeath one lot over the brook, the identical spot on which Mrs. Elizabeth Rauls built a small house. I desire my Executors and Executrix to refund to Mrs. Elizabeth Rauls the amount of ten dollars (\$10.00) which she gave me as an advance intending thereby to buy said premises, that over ten years she made no effort on making further payments notwithstanding she has been enjoying said premises unmolested, yet I desire my Executor and Executrix to relieve her from any liabilities and the aforesaid amount be refunded, because I sympathize with her condition, to Mrs. Sarian Clarke her use and behoof forever.

The above paragraph in the will of Mrs. Lizzie Marie Lomax has given birth to this case.

The salient and outstanding objection made by objector, now appellant, to the

probate of the last will and testament of Lizzie Lomax is that testatrix was guilty of fraud in that testatrix some years ago entered into a verbal contract with objector, now appellant, in which testatrix promised to convey by deed to appellant a certain piece of land in the city of Greenville, Sinoe County, in consideration of which appellant was to do her laundry. It appears from the evidence adduced that objector performed the laundry work from 1934 to 1939, that at that time she requested testatrix to execute the deed transferring said land, and that up until 1940 when objector was leaving Sinoe for Monrovia objector had not been given the deed.

From the evidence it also appears that although Reverend Greene was requested to write the deed, yet there was no agreed purchase price for the land, and last but of importance is the fact that the will was signed by testatrix in the presence of witnesses and that testatrix at the time was of sound mind and disposing memory and was of legal age for the execution of a last will and testament.

Objector having lost the case in the court below has appealed here upon a bill of exceptions containing four counts succinctly stated as follows:

1. Because in overruling objector's objections to Counsellor Crayton appearing in the case representing Respondents referred to him in the words : "his acts therefore rather show to the Court that he was shown himself to be an unreliable friend rather than they are, against professional ethics."
2. Because T. E. Cess Pelham one of the attesting witnesses to the purported Will should not have deposed as a witness, because he was the writer and custodian thereof and it was he who requested one of the attesting witnesses to sign although in the presence of testatrix.
3. Because although it was brought out in evidence that there did exist a verbal contract between testatrix and objector as above stated, yet testatrix devised said land to one Sarian Clarke, which act on the part of testatrix implies fraud, nevertheless the judge's charge to the jury ignored those pertinent points and stated *inter alia* that to vitiate a will on the ground of fraud the contract relied on must be in writing and that said contract must be the deed for said parcel of land duly executed in keeping with the law.
4. Because the judge instructed the jury to bring in a verdict allowing probate of the will, predicated on issues of law and precluding such evidence to which its attention should have been called.

Appellant in her brief stressed only the question of fraud, contending that because of the verbal contract testator had no legal right to devise the said lot to Sarian Clarke, and that having done so shows the said will to be a work of fraudulent contrivances and makes the whole will a nullity.

The questions presented are :

(1) Whether objections to a valid will on the ground that testator fraudulently had reneged on a promise to sell a lot to objector, although receiving some money, but without fixing the price, would be sustained and prevent probate.

(2) Whether objections to the probate of an otherwise valid will, on the ground that testator had included in his will and devised lands not his, would be sustained and thereby vitiate the will.

First we must consider the nature of the fraud.

"Fraud in its ordinary application to cases of contract includes any trick or artifice employed by one person to induce another to fall into or detain him in an error, so that he may make an agreement contrary to his interest; and it may consist in misrepresenting or concealing material facts, and may be effected by words or by actions. Where a party intentionally or by design misrepresents a material fact or produces a false impression, in order to mislead another or to obtain an undue advantage of him, there is a positive fraud in the fullest sense of the term." *Murdock v. The United States Trading Co.*, 3 L.L.R. 288, 295 (1932).

In the case *Page v. Jackson*, 2 L.L.R. 77 (1912) it was held that a party complaining of fraud must apply for relief at the earliest convenient moment after knowledge of fraud or the court will refuse to grant relief.

In *Pyne v. Bardu*, 3 L.L.R. 371 (1933) is a case in point. Plaintiff-in-error was the agent for the owner of a tract of land in Monrovia. The owner permitted defendant-in-error to occupy it and erect a hut thereon. After defendant-in-error had occupied it for several years a demand was made upon him to surrender possession of the property. Defendant-in-error refused to comply, contending that he had paid the owner five pounds for a life estate in the land by oral agreement. On a writ of error the Court held that in view of the requirements of the statute of frauds, an estate of life tenancy of real estate cannot be proved by parol ; and that defendant

was a tenant at will and therefore subject to be dispossessed at any time.

In this case the evidence adduced at the trial having conclusively shown that objector actually did laundry work from 1934 to 1939 and that testatrix lived until 1947, we are of the opinion that objector had sufficient time in which to enter an action of specific performance to compel the execution of the deed, if she considered the purported deed consummated on her part. Not having done so, she is guilty of laches and cannot successfully prevent the probate of an otherwise valid will based on her objections.

Validity of a particular testamentary gift contained in a will is not a subject for determination in the Probate Court, for "the judgment of probate is not conclusive on such issue, nor, as a general rule, is the capacity of a beneficiary to take property adjudicated by probate." 57 Am. Jur. *Wills* § 947 (1948). The question of ownership by the testator of property claimed to belong to his estate is neither involved in nor determined by the probate of his will. A judgment probating a will determines that the instrument is the last will of the testator without reference to the right of the latter to dispose of the property which he undertakes to bequeath. *Id.* § 948.

Consequently, we must affirm the judgment of the lower court with costs against objector. And it is hereby so ordered.

Affirmed.