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SPECIFIC PERFORMANCE — CONTRACT TO MAKE A WILL — RIGHT TO SPECIFIC RELIEF FOR BREACH WHERE PROMISEE PREDECEASES PROMISOR — In September, 1930, Cornelius Powell died testate, leaving certain personalty absolutely to his wife, Elizabeth Powell, and devising certain realty to her for life, with a remainder over to his son, Clifford S. Powell. Subsequently, Elizabeth and Clifford entered into a written agreement whereby, in consideration that Clifford would convey all his interest in said realty to her, Elizabeth agreed to execute a will giving to Clifford "at her death all of the property then owned by her, whether real, personal, or mixed." Pursuant to this agreement, the requisite instruments were duly executed. On October 31, 1932, Clifford S. Powell died, leaving surviving his wife and two minor children. The widow, personally and as guardian of the minor children, is plaintiff herein. On September 4, 1934, Elizabeth Powell deeded the realty in controversy to her niece, Corrine E. McBlain, and also executed a will wholly disposing of the residue of her property to persons other than Clifford S. Powell. She has since died. This action followed for the specific performance of the original contract, a cancellation of the McBlain deed, the vesting in and conveyance to plaintiff of testatrix' property in conformity with the contract, and for general equitable relief. From a decree in conformity with the prayer of plaintiff's bill, Corrine E. McBlain appeals. *Held*, that the contract operated only as to property "owned by testatrix at her death" and hence was enforceable only to that extent. Decree modified accordingly. *Powell v. McBlain*, (Iowa 1936) 269 N. W. 883.

The law seems settled that a person may legally bind himself by contract to make a designated disposition of his property by will.¹ An agreement of this

¹ *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 639 (1918); *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415 (1901); *Rood, WILLS*, 2d ed., § 53 (1926); see also

nature is to be governed by the principles which control contracts generally.² Because of the extreme danger of fraud in this class of contracts, statutes have been enacted requiring them to be written or to be proved in writing.³ In the absence of such legislation, a writing has been held unnecessary.⁴ Relief for breach of such contracts may be had in various forms.⁵ The rule in Iowa is stated by the court in the principal case to be that upon the promisor's executing a will in accordance with the contract, that will becomes irrevocable.⁶ Other courts, however, have taken the position that revocability is an essential feature of any will, and that an irrevocable instrument cannot therefore be a will; no matter what else it is considered to be.⁷ Perhaps what the Iowa court really means is that under these circumstances, equity will aid the promisee to the extent of allowing the attainment of results that normally would have followed had the testator died leaving in force the will so made. A few courts have treated an unexecuted promise to devise as personal to the promisee and not binding upon the promisor if during his lifetime the promisee dies.⁸ Other courts, on the contrary, have held that unless there are obligations still to be performed by the promisee which can be performed only by him personally, his death prior to that of the promisor does not relieve the latter.⁹ The latter rule would seem particularly applicable to such a situation as is presented in the principal case, where the promisee had completely performed on his side prior to his death, and the Iowa court so held. In a recent English case the novel view was taken that inasmuch as the promisor might have performed his contract merely by making a devise without anti-lapse provisions, and had he so performed the devise would have lapsed by virtue of the promisee predeceasing him, specific performance would be denied.¹⁰ On the other hand, some English and American cases have laid down the proposition that a legacy or devise does not lapse when the promisor's intent

28 R. C. L. 64 (1921) and 2 A. L. R. 1193 (1919). On a related question, see Eagleton, "Joint and Mutual Wills; Mutual Promises to Devise as a Means of Conveyancing," 15 CORN. L. Q. 358 (1930).

² *Hemping v. Hemping*, 141 Iowa 535, 120 N. W. 111 (1909); *Reynolds v. Williams*, 282 Pa. 148, 127 A. 473 (1925).

³ Cal. Civ. Code (Deering, 1931), § 1624; Cal. Code Civ. Proc. (Deering, 1931), § 1973; Mass. Gen. Laws (1932), c. 259 (5), p. 3073.

⁴ *Doolittle v. McConnell*, 178 Cal. 697, 174 P. 305 (1918). But see, Eagleton, "Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing," 15 CORN. L. Q. 358 at 363 (1930) and Rood, *WILLS*, 2d ed., § 55 (1926).

⁵ 1 PAGE, *WILLS* 2d ed., §§ 105-108 (1926); Rood, *WILLS*, 2d ed., §§ 56-57 (1926); 69 A. L. R. 14 (1930).

⁶ Citing, among others, *Stewart v. Todd*, 190 Iowa 283, 173 N. W. 619 (1919); *Kisor v. Litzenberg*, 203 Iowa 1183, 212 N. W. 343 (1927).

⁷ 1 PAGE, *WILLS*, 2d ed., § 90 (1926).

⁸ *McDonald v. McDonald*, 35 N. S. W. St. Rep. 173 (1935); *Pershall v. Elliott*, 249 N. Y. 183, 163 N. E. 554 (1928).

⁹ *Chase v. Stevens*, 34 Cal. App. 98, 166 P. 1035 (1917); *Moore's Admr. v. Wagner's Admr.*, 243 Ky. 351, 48 S. W. (2d) 15 (1932).

¹⁰ *McDonald v. McDonald*, 35 N. S. W. St. Rep. 173 (1935).

in making it was to fulfill a legal or moral obligation.¹¹ The question of lapse was obviated in the principal case by virtue of a statute,¹² but lacking that provision, a stipulation in the contract against lapse would be a wise precaution. If the promise on its face indicates an intent to benefit the promisee or his estate, it could be argued that the promisor should be held on that account. Absent that circumstance, as a matter of fairness it could be said that the claimant under the promisee ought to succeed unless the heir or devisee of the promisor could prove that the promise was meant for the benefit of the promisee alone. In cases such as the principal one, it would seem not strictly correct to refer to the relief sought against the decedent's estate as specific performance of a contract made by the deceased during his lifetime, especially when, as between the parties to it, it was executed immediately upon being made. Rather the theory of the proceeding should be that of holding those who in fact took the property under the promisor-testator as trustees of that which he had contracted to devise or bequeath, for the benefit of the promisee-beneficiary.¹³ While the result reached in the principal case seems technically proper, even a cursory perusal of the opinion leaves the reader feeling that the plaintiff got decidedly the worst of the bargain.

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¹¹ *Stevens v. King*, [1904] 2 Ch. 30 at 33; *Ballard v. Camplin*, 161 Ind. 16, 67 N. E. 505 (1903); 1 JARMAN, WILLS, 7th ed., 398 (1930). But see 2 PAGE, WILLS, 2d ed., § 1245 (1926), where "intent" as a basis for relief from lapse is questioned.

¹² Iowa Code (1935), § 11861: "If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest."

¹³ See 1 PAGE, WILLS, 2d ed., § 107 (1926).