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Wills - Enforcement of Parol Contract to Devise Real Property

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Wills—Enforcement of Parol Contract to Devise Real Property—

Plaintiffs and decedent made an oral agreement whereby plaintiffs agreed to pay decedent a yearly sum and to make repairs on certain real estate in return for which decedent agreed to devise the real estate to plaintiffs. Plaintiffs had been in possession of the property for several years and had vastly improved its value when decedent died, devising the property to third parties. Plaintiffs brought this action for specific performance against the devisees. The trial court, satisfied that the oral contract had been established, entered the decree for specific performance. On appeal, held, affirmed. A person can make a valid agreement for disposition of his property by will, and a court of equity can decree specific

A person can make an enforceable contract to devise his property in a particular way as long as the essential elements of a valid contract are present. A contract to make a will need not comply with the Statute of Wills because in legal effect it is treated not as a will but as a contract. In a few states special statutory provisions require a writing before any action may be brought on an agreement to devise property. Although contracts to devise real property are subject to the Statute of Frauds, the vast majority of courts will enforce oral contracts to devise if there has been part performance. The doctrine of part performance is a flexible one; consequently, courts differ as to facts necessary to constitute a part performance. Generally, payment of money in itself is not a sufficient part performance. Likewise the mere taking of possession may not be a sufficient performance within the doctrine. However, the taking of possession combined with an additional factor such as payment, rendition of services, or the making of improvements usually will bring the case within the doctrine. If the contract is to devise land, frequently the consideration is a promise to care for the devisor until his death. If such care is provided, these contracts usually are held valid. Part performance takes an oral contract from the operation of the Statute of Frauds since it indicates the existence of the contract and injects an element of detrimental reliance to offset the likelihood of fraud and perjury. The facts of the instant case brings it well within the precedents on part performance. The broader rule laid down by the court, that an oral contract to devise property is enforceable, is not, if taken at face value,
corroborated by authority either in Michigan\textsuperscript{13} or in most other jurisdictions.\textsuperscript{14} The court relied solely on \textit{Carmichael v. Carmichael},\textsuperscript{15} which held that a parol contract to devise, if partly performed, could be enforced. Other courts have made broad statements similar to that in the principal case; yet in each instance part performance has been present.\textsuperscript{16} One court has said that an oral contract to devise realty violates the spirit of both the Statutes of Wills and of Frauds, but when fairly made and substantially performed, equity will enforce it.\textsuperscript{17} This view fairly summarizes the approach of the courts, and whether the rule stated by a court is general as in the principal case, or is specific in requiring part performance, it is submitted that in either case an oral contract to devise realty will be established to the court's satisfaction, and thus be enforceable, only if there has been part performance.

\textit{John S. Slavens, S.Ed.}

\textsuperscript{13} See Woods v. Johnson, note 10 supra (oral contract to devise land in return for care of promisor until his death binding on devisees); Smith v. Thompson, 250 Mich. 302, 230 N.W. 156 (1930) (oral contract to make mutual wills binding on survivor).

\textsuperscript{14} Note 12 supra.

\textsuperscript{15} 72 Mich. 76, 40 N.W. 173 (1888).


\textsuperscript{17} Teske v. Dittberner, 65 Neb. 167, 91 N.W. 181 (1902).