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William L. Eagleton

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JOINT AND MUTUAL WILLS: MUTUAL PROMISES TO DEVISE AS A MEANS OF CONVEYANCING

WILLIAM L. EAGLETON*

In property and testamentary fields, the common law has suffered from the lack, or non-use, of a conveyancing tool capable of filling the gap between the property settlement deed and the will. That this deficiency is being remedied is attested by the remarkable number of reported cases in the last three decades, involving joint, simultaneous, and mutual wills in combination with contracts restricting the privilege of revoking them.¹

In Continental Europe, these instruments have for centuries been in common use. There have been several varieties, some emphasizing the contract with its flexibility in carrying out the particular intention of the parties, and others more nearly resembling the will with its rigid formalism.² The contractual gift *causa mortis* (*Gemächte, Geschäfte, Gelübde*) of the early middle ages was the forerunner of both the will and the contract of inheritance,³ and out of the latter the joint will emerged in the fourteenth century.⁴ Its growth in different countries has not been uniform. As its main and often exclusive use was by husband and wife, the development of community ownership crowded it out in France, and

*Assistant Professor of Law, University of Chicago.

¹In the last twenty years alone, there have been over seventy-five cases involving the enforcement of the contract connected with such wills. In the entire period before 1900 there was a total of less than twenty, over half of which were decided in the last dozen years of that period. Warnings against the use of these instruments, because of their newness, were prevalent as late as 1911 (note, 136 Am. St. Rep. 592).

The legal contests lag many years behind the current practice in the execution of wills. A casual inquiry among attorneys indicates that these instruments are now being used even more than the recent flood of cases would indicate, the encouraging tendency being to state the terms of the contract in writing.

The interest aroused by the recent cases is shown by the large number of articles, notes, and comments in both the English and the American law reviews and periodicals. The leading articles are: Costigan, *Constructive Trusts* (1915) 28 HARV. L. REV. 237, 247; Drake, *Contracts to Will All Property* (1909) 7 MICH. L. REV. 318; Goddard, *Mutual Wills* (1919) 17 MICH. L. REV. 677; Partridge, *Revocability of Mutual Wills* (1929) 77 U. OF PA. L. REV. 357.

²HUEBNER, HISTORY OF GERMANY'S PRIVATE LAW (2d ed. 1913), translated in 4 CONTINENTAL LEGAL HISTORY SERIES (1918) § 112, pp. 740-754, especially pp. 753, 754-

³*Ibid.* 746.

⁴*Ibid.* 753.

it was finally forbidden by the Ordinance of 1735.⁵ In Germany, on the other hand, its existence in some form has been continuous throughout these many centuries, and the Civil Code of 1900 authorizes and codifies both the mutual testament⁶ (restricted in use to husband and wife) and the mutual contract of inheritance.⁷ In Scotland the "mutual settlement" is apparently still in common use.⁸

In contrast with that ancient usage in neighboring countries, the common law was very slow in developing this field. Perhaps the reason was the practical one that the status of the married woman prevented its employment in the most common case, by husband and wife. There appears to have been no difficulty, except lack of precedent, in the way of its use and development by others, since the component parts, the will and the contract to devise, existed in the law. Two persons certainly could have executed separate wills, if they could not also have combined the two in one "joint" will. And they could have executed a contract, each promising to keep his will in force (*i.e.*, to devise his property in the manner provided in his will).

However, such a contract containing similar promises to devise by each of the parties was almost unknown to the conveyancer until the last fifty years. True, such a contract was enforced in *Dufour v. Pereira*⁹ in 1769, but in that case foreigners had executed a joint will in accordance with the practice in their native country,¹⁰ and Lord Camden was struck by "the novelty of the thing". The contemporary discussion of that case by Francis Hargrave¹¹ shows the clear understanding of the problem by that noted barrister;

⁵BRISSAUD, HISTORY OF FRENCH PRIVATE LAW (2d ed. 1908), translated in 3 CONTINENTAL LEGAL HISTORY SERIES (1912) § 498, p. 702, and § 505, p. 712. This ban has been repeated in the Napoleonic Code, the Swiss Civil Code, and in some other codes. See LA. REV. CIV. CODE (Merrick, 1900) art. 1572 (1565); *Orelina v. Heirs of Haggerty*, 12 La. Ann. 880 (1857); *Wood v. Roane*, 35 La. Ann. 856 (1883); *Ervin v. Shelby's Heirs*, 146 La. 573, 83 So. 835 (1920).

Does the large number of joint and mutual will cases recently reported in states having community property indicate that Brissaud's reason is erroneous, or that modern society, by complicating community property problems, has produced a need for these instruments in such states?

⁶Sections 2268-2273.

⁷Sections 2274-2302, especially § 2298.

⁸(1876) 20 JOUR. JUR. 558; (1880) 24 JOUR. JUR. 23. For the Roman-Dutch law, see *Denyssen v. Mostert*, L. R. 4 P. C. 236 (1872), on appeal to the Privy Council from the colony of the Cape of Good Hope.

⁹1 Dick. 419, 2 HARG. JURID. ARG. 272, 304, 2 HARG. EXER. 70, 100 (1769).

¹⁰See *Walpole v. Orford*, 3 Ves. Jr. 402, 417, 4 Rev. Rep. 38, 30 Eng. Reprt. 1076 (1797) (for this case see also 2 HARG. JURID. ARG. 272, 2 HARG. EXER. 70).

¹¹*Supra* note 9.

yet it was not until near the close of the last century that we find another reported case wherein such a contract was enforced.¹² The intervening period of 120 years had produced a few cases involving and discussing the contract,¹³ but its main problem was the validity of the joint will as a will. That preliminary problem was strenuously contested, and though unanimity has probably now been reached,¹⁴ it was not until the last seventy years that a respectable number of states held that a joint will could be good as the separate will of each testator.¹⁵

¹²*Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528 (1888); *Turnipseed v. Sirrine*, 57 S. C. 559, 35 S. E. 757, 76 Am. St. Rep. 580 (1899). In *Eldred v. Warner*, 1 Ariz. 175 (1875), a contract of this type was enforced though no will was executed or considered necessary by the parties (see *infra* note 30). To these might be added *Duval v. Duval*, 54 N. J. Eq. 581, 35 Atl. 750 (1896); *Allen v. Boomer*, 82 Wis. 364, 52 N. W. 426 (1892). In *McGuire v. McGuire*, 74 Ky. 142 (1874), the contract was not, as such, enforced, but its existence aided in proving undue influence. *Breathitt v. Whittaker*, 47 Ky. 530 (1856) was not a "joint will" of the type discussed in this article.

¹³Before 1900, the following cases rejected the contract as not proved: *Robinson v. Mandell*, Fed. Cas. No. 11, 959, 3 Cliff. 169 (D. Mass. 1868); *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135 (1870); *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573 (1869); *Drischler v. Van Den Henden*, 49 N. Y. Super. Ct. 508 (1883); *Gooding v. Brown*, 35 Hun 148 (N. Y. Sup. Ct. 1885); *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265, 3 Prob. Rep. Ann. 178 (1898); *Uniontown Reformed Church v. Wise*, 17 Ohio C. C. 659, 6 Ohio C. D. 703 (1896); *In re Cawley's Estate*, 136 Pa. 628, 20 Atl. 567, 10 L. R. A. 93 (1890); *Izard v. Middleton*, 1 Desauss. Eq. 116 (S. C. 1785); *Hale v. Hale*, 90 Va. 728, 19 S. E. 739 (1894); *Walpole v. Orford*, *supra* note 10. See also *Everdell v. Hill*, 58 App. Div. 151, 68 N. Y. Supp. 719 (1st Dept. 1901), *aff'd* without opinion, 170 N. Y. 581, 63 N. E. 1116 (1902), *rev'g* 27 Misc. 285, 58 N. Y. Supp. 447 (Sup. Ct. 1899). The following cases denied the particular relief requested: *Sumner v. Crane*, 155 Mass. 483, 29 N. E. 1151, 15 L. R. A. 447 (1892); *Matter of Keep*, 1 Connoly 104, 2 N. Y. Supp. 205 (Surr. Ct. 1888); *Bynum v. Bynum*, 33 N. C. 632 (1850); *Hobson v. Blackburn*, 1 Addams, Eccl. Rep. 274 (1822).

¹⁴Ohio may possibly be *contra*. See *Betts v. Harper and Walker v. Walker*, both *infra* note 15.

¹⁵For early English and American cases, see *In re Stracey and Stracey*, 1 Deane & Swa. 6 (1855); *In re Lovegrove*, 8 Jur. (N. S.) 442, 31 L. J. P. (N. S.) 87, 6 L. T. (N. S.) 131, 2 Swa. & Tr. 453 (1862); *In re Piazzi-Smyth* [1898] P. 7, 67 L. J. P. (N. S.) 4, 77 L. T. (N. S.) 375 (1897); *Lewis v. Scofield*, 26 Conn. 452, 68 Am. Dec. 404 (1857); *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751 (1858); *Black v. Richards*, 95 Ind. 184 (1883); *Murphy v. Black*, 41 Iowa 488 (1875); *Ex parte Day*, 1 Bradf. 476 (N. Y. Surr. Ct. 1851); *In re Diez*, 50 N. Y. 88 (1872); *In re Davis*, 120 N. C. 9, 26 S. E. 636, 58 Am. St. Rep. 771, 38 L. R. A. 289, 2 Prob. Rep. Ann. 198 (1897), overruling *Clayton v. Liverman*, 19 N. C. 588 (1837); *Betts v. Harper*, 39 Ohio St. 639, 48 Am. Rep. 477 (1884), limiting *Walker v. Walker*, 14 Ohio St. 157, 82 Am. Dec. 474 (1862). Also see *infra* notes 33, 34.

Our vocabulary in this field has been affected by this historical subservience of the contract problem to the wills problem. Although the contract is at least as important as the wills,¹⁶ the problems of law arising from the use of these instruments are usually discussed under the general term "joint and mutual wills". There is no word of art restricted in definition to the contractual double or multiple will;¹⁷ the instruments are designated only with reference to their physical appearance or contents as wills, and the terms are applied regardless of the existence or nonexistence of a contract restricting their revocability.

As opposed to "separate wills", a "joint will" is one where the same instrument is made the will of two or more testators, each of whom signs and executes it. Separate wills may be called "simultaneous" if they are executed as parts of one transaction. Either separate or joint wills are "reciprocal" or "mutual"¹⁸ if each contains a substantial bequest or devise to the other testator, either in fee or for life.

While these names are at times very useful, it is necessary to note again that they are based on the characteristics and contents of the wills, and not on the existence or provisions of the contract. In determining the contractual intention of the parties, the type of will may have some evidentiary value, but there are also many additional, and often more important, items of evidence available. Can it be possible that the mere form of the wills alone reveals, to any considerable degree of accuracy, the contractual intention of the parties? Certainly the courts, in discussing the contract, do carry out the intention of the parties as shown by all the evidence. Yet the result of the individual case is too commonly summarized as a dogmatic rule based entirely upon the form of the wills. The Illinois Supreme Court, in the case of *Frazier v. Patterson*,¹⁹ went so far as to recite, by way of dictum, a whole series of such arbitrary rules purporting to solve every problem in this whole field. Though these rules are often inconsistent and uniformly ignored when they fail

¹⁶The contract alone is essential to our method of conveyancing; the wills result from the performance of the contract and are therefore present when the contract is not broken, but their absence is merely a breach of the contract. See *infra* notes 30, 36.

¹⁷Professor Goddard, *op. cit. supra* note 1, has suggested the use of the word "mutual", and there is some authority for that use. However, "mutual" is used so often in these cases as synonymous with "reciprocal" that any such restricted use of the word might cause confusion.

¹⁸See *supra* note 17.

¹⁹243 Ill. 80, 90 N. E. 216, 27 L.R.A. (N.S.) 508, 17 ANN. CAS. 1003 (1909).

to carry out the proved intention of the parties, they have often been quoted and approved, and a warning must be given against them.

The Supreme Court of Kansas recently uttered such a warning. In 1919 that court²⁰ had approved *Frazier v. Patterson*,²¹ especially where it glibly explains why there must necessarily be a contract affecting the revocability of every joint and mutual will: "[W]here the parties execute their wills by the same instrument, it is not possible that such course could be adopted without some previous understanding or agreement between them."²² Five years later, when confronted with that statement in another joint and mutual will case, that same Kansas court courageously faced it and said: "This assertion lay beyond the boundary of the court's information. Such a thing [a joint and mutual will without a contract] is not only possible, but occurred in the case now under decision. . . . Non-existence of a contract . . . was proved by plaintiff and by defendant, and the case stands as a warning against dogmatic judicial declaration that a certain form necessarily expresses a certain reality."²³ Some of the other arbitrary rules of *Frazier v. Patterson* will be specifically noticed later; but this warning against such dogmatic rules based entirely on the form of the wills should be kept in mind in studying any of the problems involving the contract.

CONTRACTS TO DEVISE

While the contract to devise is neither new nor uncommon in our law, a hurried mention of some of the well settled principles may facilitate the study of our problem.²⁴ The typical case is the promise to devise made by an aged person as consideration for a promise to support or care for him during his declining years. Though the agreement is commonly called a contract to make a will, the important and often the only promise is that the property will be devised in the manner agreed upon.²⁵ Except as the doctrine

²⁰Lewis v. Lewis, 104 Kan. 269, 178 Pac. 421 (1919).

²¹*Supra* note 19, at 86, 90 N. E. at 218.

²²That idea is rephrased in the Lewis case, *supra* note 20, at 273, 178 Pac. at 423: "How could such a will be voluntarily executed if there was no agreement or understanding that it would be made? The will itself, its terms, and its execution, are evidence that such a contract was made."

²³Menke v. Duwe, 117 Kan. 207, 217, 220, 230 Pac. 1065, 1070, 1071 (1924).

²⁴For discussions and citations see: I PAGE, WILLS (2d ed. 1926) 156-169; Costigan, *op. cit. supra* note 1, at 241; Schnebly, *Contracts to Make Testamentary Dispositions as Affected by the Statute of Frauds* (1926) 24 MICH. L. REV. 749.

²⁵Of course the subsidiary promises that he shall execute or refrain from revoking the will may exist, but their breach involves only nominal damages, as the

of anticipatory breach is applied, such a promise is broken only at death, and the Statute of Limitations starts running at that time.

The difficulty of disproving this type of contract has made perjured evidence particularly dangerous; yet only a few states have special statutes requiring a writing. However, the ordinary Statute of Frauds has generally been held to apply to promises to devise real property, although not to promises to bequeath personal property. There is considerable disagreement on such questions as the sufficiency of a will, not mentioning the promise, as a memorandum of the contract; or the efficacy of personal services as a part performance to take the promise out of the Statute in equity.

As the property promised to be devised is usually unique and the exact amount of damages difficult to ascertain, the common remedy for a breach of the promise is a bill in equity against the heirs or devisees for specific performance.²⁶ An action may be brought at law (claim filed against the estate) on the contract, or if that is

will itself is ambulatory and creates no rights until the death of the testator leaving it in force.

²⁶The statement has often been made that this is not technically specific performance, "since there is no attempt to compel the promisor to make a will". 1 PAGE, *op. cit. supra* note 24, at 192. That is merely a quibble over the definition of the legal term "specific performance". A legal term is merely a name given to a group or category created by some classification. To decide a case or to determine a legal definition by the popular meaning or etymology of the term is to put the cart before the horse. The first problem is the creation of the classification; the next is the selection of a word or words to designate each of the various groups. A classification is tested by its usefulness in practice. In selecting a name for a group, sometimes a new word is coined, but usually a familiar word that can be remembered is used in spite of the defect that the etymological or popular definition seldom exactly fits the legal group.

What classification and terminology have been or should be used here? Certainly we have a group of cases wherein the promisee gets the legal interests for which he contracted, rather than a money judgment, and the cases in that group have enough common characteristics to make it useful to have a name for them. Perhaps a better name might have been found than "specific performance", but that is the name in common use, and the names of legal categories seldom come very near to perfection. Those objecting to this broad use apparently think that this group of cases should be divided into two sub-groups, one called "specific performance", where the litigation results in exact performance, and the other called "quasi-specific performance", or one type of "constructive trust" (see *infra* note 100), where the chancellor can put the promisee only approximately in the position he would have been in if the promisor had not breached the promise. What useful purpose would be served by this classification? And where would the line be drawn between the two sub-groups? Professor Costigan, *op. cit. supra* note 1, at 244, n. 15, admits that the "quasi-specific performance" sub-group would also contain the cases where an ordinary contract for the sale of land is enforced in equity against the vendor's heirs or grantee, since the exact instrument contracted for is not executed.

barred by the Statute of Frauds, in a quasi-contractual action for the value of the services rendered. Occasionally injunctive relief is granted against the promisor himself during his lifetime if he is threatening to dispose of the property in such a way that it might reach the hands of a bona fide purchaser.

The contract, even if in writing, will require interpretation and construction by the court. There may be express conditions, including those often called "implied in fact". There may also be constructive or "implied in law" conditions, based partly upon the court's idea of justice and partly upon what probably would have been the intention of the parties if they had foreseen the subsequent events. These latter "court made" conditions are to be found in all types of contract cases, but here they commonly pass as instances where the court of equity will not give relief that would lead to unfortunately harsh results. The statement has been made that the law courts have not the power to withhold the legal remedy for such a reason.²⁷ While in some types of cases the chancellor may refuse his extraordinary relief though damages would be granted at law, yet constructive conditions may be imposed by either court to prevent a recovery that would be harsh and inequitable. Thus, if the promisor marries and refuses to accept further support from the promisee, and later dies leaving a dependent widow and small children, the law court can take care of that unforeseen situation by a constructive condition to the effect that such operative facts shall result in a discharge of the contract, with merely a quasi-contractual claim for services actually rendered.²⁸

Would it also include the cases where the decree results in a master's deed, or no deed at all? The chancellor never gives exact performance of affirmative promises; there is always at least a difference of time. LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION (2d ed. 1908) 40; also to be found in (1888) 1 HARV. L. REV. 355.

²⁷Costigan, *op. cit. supra* note 1, at 245, n. 18.

²⁸Sargent v. Corey, 34 Calif. App. 193, 166 Pac. 1021 (1917). The leading case involving only a marriage is Owens v. McNally, 113 Calif. 444, 45 Pac. 710 (1896). In Bedal v. Johnson, 37 Idaho 359, 218 Pac. 641 (1923), the defendant married the promisor without notice of the contract. After overlooking entirely the possibility of conditions, the court stated: "Uniformly such contracts as would deprive the subsequent spouse of her ordinary rights of inheritance as a widow have been declared unenforceable." Such over-broad statements, often framed as rules of law, are altogether too common. That such contracts will be enforced when not unjust, see Mayfield v. Cook, 201 Ala. 187, 77 So. 713 (1918); Rundell v. McDonald, 41 Calif. App. 175, 182 Pac. 450 (1919); Dillon v. Gray, 87 Kan. 129, 123 Pac. 878 (1912); Ruck v. Ruck, 159 Mich. 231, 124 N. W. 52 (1909); Kloberg v. Teller, 103 Misc. 641, 171 N. Y. Supp. 947 (Sup. Ct. 1918); Burdine v. Burdine, 98 Va. 515, 36 S.E. 992 (1900). On conditions in contracts, see authorities cited *infra* note 45.

ANALYSIS OF "JOINT AND MUTUAL WILLS"

In the method of conveyancing that is the subject of this article, one person promises that, at least under certain conditions, he will devise part or all of his property in a certain manner in exchange for a similar promise by one or more other persons. That is a good contract; it differs from the usual contract to devise only in that the consideration running from *each* of the parties is a promise to devise. At the time of entering into the contract the parties usually execute wills which, if left unrevoked, will carry out that agreement; but the contract and wills are separate legal acts, and the validity of each is determined by its own rules.

First a few words as to the wills. In most cases they are exactly coextensive with the contract, providing only for the promised devise. But the validity of the contract is not affected if the wills should provide for only part of those devises,²⁹ just as it is not affected by the failure to execute any wills at all.³⁰ Likewise the wills may provide for additional devises not covered by any promise not to revoke,³¹ just as there may be and often are joint or simultaneous wills when there is no contract.

Each will is governed by the rules applicable to ordinary wills, whether or not there is a contract.³² When the wills are separate,

²⁹*Meador v. Manlove*, 97 Kan. 706, 156 Pac. 731 (1916); *Lugauer v. Husted*, 228 Mich. 76, 199 N. W. 682 (1924); *Morgan v. Sanborn*, 225 N. Y. 454, 122 N.E. 696 (1919); *Torgerson v. Hauge*, 34 N.D. 646, 159 N.W. 6 (1916). See also (where contract not enforced for sufficient reasons) *Everdell v. Hill*, *supra* note 13; *In re Arland*, 131 Wash. 297, 230 Pac. 157 (1924).

³⁰Cases where wills never executed: *Eldred v. Warner*, *supra* note 12; *Mueller v. Batcheler*, 131 Iowa 650, 109 N.W. 186 (1906); *Fleming v. Fleming*, 194 Iowa 71, 174 N.W. 946 (1919); s.c., 194 Iowa 104, 180 N.W. 206 (1920); s.c., 194 Iowa 122, 184 N.W. 296 (1921), writ of error dismissed, 264 U.S. 29, 44 Sup. Ct. 246 (1924); *Green v. Whaley*, 271 Mo. 636, 197 S.W. 355 (1917); *Izard v. Middleton*, *supra* note 13; *Stuckey v. Truett*, 124 S.C. 122, 117 S.E. 192 (1923). See also *Mayfield v. Cook*, *supra* note 28; *Cox v. Hutto*, 216 Ala. 232, 113 So. 40 (1927). Also, the wills need not be simultaneous. *Chase v. Stevens*, 34 Calif. App. 98, 166 Pac. 1035 (1917); *Meador v. Manlove*, *supra* note 29; *Anderson v. Anderson*, 181 Iowa 578, 164 N.W. 1042 (1917). Nor need they be executed at the time the contract was made. *Stewart v. Todd*, 190 Iowa 283, 173 N.W. 619 (1919).

³¹*Uniontown Reformed Church v. Wise*, *supra* note 13. Thus the contract may provide for an equal division between two sets of relatives, the survivor having power to appoint in a different manner within one or both of those groups. Was that true in *Morgan v. Sanborn*, *supra* note 29, and *Wallace v. Wallace*, 216 N. Y. 28, 109 N.E. 872 (1915)?

³²The three following paragraphs discuss some characteristics of the will which are not changed by the contract, including its revocability (see *infra* notes 36, 105). As to lapsing of legacies, see *Brown v. Brown*, 101 Kan. 335, 166 Pac. 499 (1917). As to ademption of legacies, see *Donaldson's Estate*, 11 Pa.

but few special obstacles are encountered in these rules. However, a joint will has this peculiar difficulty: one writing is the will of two persons, and as such it must be capable of taking effect at two different times. An instrument is the will of the one executing it only if it is to take effect *at his death*. Often a joint will is worded as though it were to take effect at the same time for both testators. A liberal interpretation can usually save such an instrument. If the property of each is devised as of the death of the survivor, it may be interpreted, as to the first to die, as taking effect *as his will* at his death, but with the *possession* postponed, the intervening estate for the life of the survivor going by intestacy if it is not disposed of by the will.³³ If, on the other hand, the possession of the property of each is to pass to the beneficiaries at the death of the first to die, it is possible to carry out this intention in connection with the property of the survivor by interpreting it as an attempted lease or contract, or offer for such a lease, for the period of time between the deaths of the two parties, and also as his will to take effect at his death.³⁴ In construing an instrument that might be either a deed or a will, the courts are generally anxious to carry out the ultimate intention of the maker. In joint wills, most of the recent cases have been similarly liberal, while some earlier cases were not so favorable to them.³⁵

Joint wills, and occasionally separate wills, have encountered some difficulty due to a common failure to understand clearly the

Co. Ct. 311 (1892). Since the rules as to undue influence and fraud are different, the will may be good but the contract bad. *Mullen v. Johnson*, 157 Ala. 262, 47 So. 584 (1908). Cases overlooking the distinction between the wills and the contract are discussed in connection with *Martin v. Helms*, *infra* note 114.

³³*Moore v. Samuelson*, 107 Kan. 744, 193 Pac. 369 (1920); *Graham v. Graham*, 297 Mo. 290, 249 S.W. 37 (1923); *In re Stracey and Stracey*, *supra* note 15. See also, *Cole v. Shelton*, 169 Ark. 695, 276 S.W. 993, 43 A.L.R. 1008 (1925), which is directly in point even if the opinion is correct in stating that it is not a joint will. Compare *Bright v. Cox*, 147 Ga. 474, 94 S.E. 572 (1917).

³⁴*Kirtley v. Spencer*, 222 S.W. 328 (Tex. Civ. App. 1920). The validity of such a will may arise in a contest of the instrument as the will of the first to die. It seems that the contestants would win on an interpretation that the instrument was to become effective for this testator at the death of the first to die even though the other party should actually die first. Most definitions of a will include the requirement that it is to take effect at the death of the testator, if at all. But the contest would be decided in favor of the proponents if the instrument is interpreted as suggested in the text. See *Gerbrich v. Freitag*, 213 Ill. 552, 73 N.E. 338, 104 Am. St. Rep. 234, 2 ANN. CAS. 24 (1905).

³⁵Compare cases *supra* note 33 with: *Hershy v. Clark*, 35 Ark. 17, 37 Am. Rep. 1 (1879); *State Bank v. Bliss*, 67 Conn. 317, 35 Atl. 255, 1 Prob. Rep. Ann. 578 (1896). See also *Epperson v. White*, 156 Tenn. 155, 299 S.W. 812 (1927).

difference between the wills and the contract. Each will is a unilateral act, and its execution creates no rights in the devisees, as the will is revocable (ambulatory) until the death of the testator. On the contrary, the contract is a bilateral act, and it contains the promise of each party which creates the right, in the other testator or in some third party, that the promisor shall make the promised devisees and shall not revoke them.³⁶

The validity of the will is decided when it is offered for probate. The presence of the contract does not dispense with the statutory requirements of a valid execution; nor does it take away the capacity to revoke. The instrument should not be probated if it was not properly executed, or if it was revoked. But the revocation or the failure to execute would be a breach of the promise to devise, and the promisee or beneficiary would have his action on the contract, either at law for damages, or, more commonly, in equity against the heirs or devisees for specific performance.

Because the contract creates the rights upon which those actions are based, it is much more important than the wills, which are merely the means of carrying out the promises. Before taking up the difficult problem of determining the existence and terms of the contract, the legal structure created by such a contract will be analyzed.

The most important characteristic of this conveyancing tool is its flexibility. The possible varieties of promises and conditions are innumerable; they can satisfy the most unusual wants of the parties. Two common but very dissimilar cases may serve as examples.

(1) Two spinster sisters live together. Not only is each willing to devise all her property to the other, but she wants to be certain that the other does the same for her if she is the survivor. Mutual wills can be executed in accordance with a contract containing mutual promises to devise to the other in fee, the survivor to have the

³⁶Of course such testator still has the power to revoke his will just as almost every promisor has the power to break his promise; but the contract has affected the privilege, the promisor being under a duty not to revoke. As a probating problem, the revoking instrument should be probated; the promisee's remedy is on the contract. *Allen v. Bromberg*, 147 Ala. 317, 41 So. 771, 12 Prob. Rep. Ann. 144 (1906); *In re Anderson*, *Houck v. Anderson*, 14 Ariz. 502, 131 Pac. 975 (1913); *Estate of Rolls*, 193 Calif. 594, 226 Pac. 608 (1924); *Sumner v. Crane*, *supra* note 13; *Tooker v. Vreeland*, 92 N. J. Eq. 340, 112 Atl. 665 (1921), *aff'd sub-nom.* *Tooker v. Maple*, 93 N. J. Eq. 224, 115 Atl. 255 (1921); *Matter of Keep*, *supra* note 13; *Kloberg v. Teller*, *supra* note 28; *Hermann v. Ludwig*, *infra* note 55; *In re Burke*, 66 Ore. 252, 134 Pac. 11 (1913); *In re Edwall*, 75 Wash. 391, 134 Pac. 1041 (1913); *Hobson v. Blackburn*, *supra* note 13. But see *infra* notes 106, 108.

privilege of disposing of all by deed or will as she pleases. Compare the result with that obtained by the use of wills alone or, on the other hand, deeds of conveyance. The will alone could be revoked secretly by the testatrix so that, without a contract, neither party would have the desired protection. A deed would cut down the grantor's estate so that she could not dispose of the fee even if in need. The arrangement would be inflexible, with no implied conditions to take care of unexpected subsequent events. But by the contractual wills, the complete estate is retained subject only to the duty to devise in accordance with the promise. And those promises will be tempered by constructive conditions taking care of the unexpected.

Perhaps two observations should be made on this particular type of case where the contract is merely mutual, *i. e.* for the benefit of the survivor: (a) it is in its nature a wagering, or at least aleatory, contract, and something similar to an insurable interest may be required,³⁷ and (b) often the courts have not favored such a contract and have demanded very convincing proof of its existence, perhaps because of its gambling nature.³⁸

(2) In the second example, an aged but childless couple have separate estates. Each spouse considers the other as the natural object of his bounty. But if the husband should die leaving everything to the wife in fee, her relatives would take all at her death, to the exclusion of his relatives. If he left her only a life estate, she could not dispose of the property if she found the income insufficient to live on. Powers have not proved entirely satisfactory, especially with personal property, and the use of trustees increases the cost materially. And under any such scheme the division between the two sets of heirs might result in a great inequality. Here again the most satisfactory arrangement will be the use of a contract to devise by mutual wills, which can provide that the survivor shall have all in fee, and at his death the combined estate shall be divided equally or otherwise between the two groups of kindred. Under such

³⁷See the well-considered case of *Canada v. Ihmsen*, 33 Wyo. 439, 240 Pac. 927, 43 A.L.R. 1010 (1925). This was also suggested in *Anderson v. Anderson*, *supra* note 30.

³⁸For an extreme case, see *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135 (1870). In that case, however, there was no insurable interest (the parties were merely friends), and in the absence of authority for refusing relief on that ground, the court took the easier but more dubious path of interpreting the facts to the effect that there was no contract, in spite of the fact that the joint and mutual will itself mentioned consideration and contained such expressions as "do mutually promise", and "this is the mutual agreement of us". For a more complete discussion of this type of case, see *infra* pp. 384-5 and notes 100-104.

a plan the survivor's needs will be taken care of by receiving the complete fee,³⁹ restricted only by the duty not to make excessive gifts or otherwise attempt to disappoint the ultimate beneficiaries.⁴⁰

The contract in this case has a quite different object than the contract in the first illustration, and it will therefore have different promises and conditions. The primary intent of the parties is to prevent the unfair distribution between the two sets of relatives that would result if the survivor revoked after receiving the bequest from the first to die. There will therefore be the promise, as survivor, not to revoke after accepting the benefits from the other's will. But there may be conditions allowing a revocation under some other circumstances. To prevent an immediate vested interest in the third party beneficiaries,⁴¹ the parties will certainly include a condition permitting a revocation of the wills and termination of the contract rights by the mutual agreement of the two. And the main object in this case will be carried out even if each testator alone retains the privilege of revoking upon giving sufficient notice for the other to revoke his will also. Perhaps the parties in this type of case usually intend that each shall be at least that free to terminate the whole agreement. At any rate, the courts have favored such

³⁹This seems so fundamental it is seldom questioned. See *Sage v. Sage*, 230 Mich. 477, 203 N.W. 90 (1925); *Roy v. Pos*, 183 Calif. 359, 191 Pac. 542 (1920); *Smith v. McHenry*, 111 Kan. 659, 207 Pac. 1108 (1922); *Phillips v. Murphy*, 186 Ky. 763, 218 S.W. 250 (1920); *Rastetter v. Honinger*, 214 N. Y. 66, 108 N.E. 210 (1915). However, a few cases contain discussions that indicate some confusion on this point. *Schumaker v. Schmidt*, *supra* note 38; *Klussman v. Wessling*, 238 Ill. 568, 87 N.E. 544 (1909); *Baker v. Syfritt*, 147 Iowa 49, 125 N.W. 998 (1910). There are also several offending cases decided by the Texas Courts of Civil Appeals, but the two cases by the Texas Supreme Court are more satisfactory. *Wyche v. Clapp*, 43 Tex. 543 (1875); *Heller v. Heller*, 114 Tex. 401, 269 S.W. 771 (1925); *cf. Ginn v. Ednundson*, 173 N.C. 85, 91 S.E. 696 (1917).

⁴⁰*Rastetter v. Honinger*, *supra* note 39; *Williams v. Williams*, 123 Va. 643, 96 S.E. 749 (1918). See also *Wright v. Wright*, 215 Ky. 394, 285 S.W. 188 (1926); *Van Duyn v. Vreeland*, 12 N.J. Eq. 142 (1858); *Bruce v. Moon*, 57 S.C. 60, 35 S.E. 415 (1899); *Harris v. Morgan*, *infra* note 77. That seems to be the intention in the usual contracts. Of course the parties can vary the contract in this respect.

⁴¹As to the rights of a third party beneficiary in case of an attempted release or rescission by the parties to the contract where there is no such condition, see 1 WILLISTON, CONTRACTS (1920) §§ 395-397. Of course, if the ultimate beneficiary is a party to the contract and is furnishing consideration (as support), there would be no such condition giving the devisors the privilege of rescinding. *Torgerson v. Hauge*, *supra* note 29. Compare (wills never executed) *Cox v. Hutto*, *supra* note 30; *Mayfield v. Cook*, *supra* note 28. For similar mutual will contracts, but involving different questions, see *In re McGinley's Estate*, 257 Pa. 478, 101 Atl. 807 (1917); *Harris v. Harris*, 276 S.W. 964 (Tex. Civ. App. 1925).

an interpretation,⁴² and apparently no objection has been made to such conditions.⁴³

Those two illustrations are only two of an almost indefinitely large number of different types of schemes of testamentary distribution, and schemes of restricting by contract the privilege of changing the devises. The problem of determining the plan of testamentary distribution is simplified by the requirement that the will, with all its conditions, must be in writing. But the contract, in spite of its greater importance, is much more difficult to interpret. In the perplexing cases that reach the appellate courts, there is often no written memorandum of the contract; and even when it is in writing there may be "implied in fact" and constructive conditions. The result is that perhaps our most difficult problem is to determine whether a contract exists, and what its promises and conditions are.

INTERPRETING THE CONTRACT

Is there a contract? And what are its terms? Those two questions might be asked separately in solving a particular case, but many of the reported opinions discuss only the first and perhaps assume that if there is a contract there can be only the unconditional promise that the wills shall not be revoked or changed. Such opinions overlook the possibilities in the contract. The promises may cover only a few of the devises in a will, or there may be promises to make important devises not mentioned in the wills. As extreme examples of those two variations between the wills and the contract, there may be joint or simultaneous wills without any contract, or there may be a contract when the wills were executed at a later time or were never executed, or even when the parties thought that wills were not necessary.⁴⁴

Not only may the promises differ from the devises in plan or in extent, but also there may be conditions in the contract which may, under some circumstances, relieve the promisor of the duty to devise in the manner provided in the will or promise. In all types of con-

⁴²The dictum of *Frazier v. Patterson*, as cited *infra* note 100, has been approved by dictum in several other cases. Also see *infra* note 104.

⁴³The objection apparently has never been raised that these conditions might make the contract illusory. Some conditions certainly would not, as the one allowing revocation by the survivor *if he renounces the bequest to him* in the will of the first to die (a choice between two detriments), or the one allowing revocation if sufficient notice is given to allow the other party a reasonable opportunity to revoke his will also. But see *infra* note 100 for a discussion of one condition that would make the promise illusory. See also Patterson, *Illusory Promises and Promisor's Options* (1921) 6 IOWA L. BULL. 129, 209.

⁴⁴*Supra* notes 29, 30, 31.

tracts perhaps the least understood problems are those dealing with conditions. Our type of contract is no exception. A condition has been defined as a fact or event which, unless excused, (a) must exist or occur before a duty of immediate performance of a promise arises (condition precedent), or (b) will extinguish such a duty after it has arisen (condition subsequent). An "express condition" is a condition that is such because a promise or agreement so provides; this includes what are often called "conditions implied in fact". No particular form of words is necessary in order to make a promise expressly conditional. Whether it is expressly conditional, and if so what the nature of the condition is, depend upon interpretation. A "constructive" or "implied in law" condition is a condition that is such because of a rule of law, rather than because of the actual intention of the parties; it is ordinarily dictated by the sense of justice of the court.⁴⁵

Often it would be an arduous task to determine, with exactness in detail, all the promises and conditions in a contract. But such a detailed interpretation is not necessary. It is enough that the court should find whether, in accordance with the intention of the parties, the particular operative facts resulted in a loss by the testator of the privilege of revoking his will or leaving his property in the way in which he did. Why should it be necessary to determine just which of the facts imposed the duty, or what would have been the result (as determined by the contract) if the facts had been otherwise?

The English cases have generally been unsatisfactory in this respect, indicating either that conditions are impossible and the contract, if any, must contain a promise not to revoke regardless of the turn of subsequent events, or that the contract should not be enforced unless it is certain in every one of its terms, whether involved in the case or not.⁴⁶ *Dufour v. Pereira*⁴⁷ is an exception,⁴⁸ but though few of the English cases escape publication, that is their only reported case enforcing such a contract.

⁴⁵For discussions of conditions in contracts, see RESTATEMENT OF THE LAW OF CONTRACTS (Am. L. Inst. Tentative Draft No. 6, March 30, 1929), c. 10; 2 WILLISTON, *op. cit. supra* note 41, §§ 663, *et seq.*; Corbin, *Conditions in the Law of Contracts* (1919) 28 YALE L. J. 739.

⁴⁶*Gray v. Perpetual Trustee Co.*, [1928] A. C. 391, 139 L. T. (N. S.) 469; *In re Oldham*, *infra* note 49; *Stone v. Hoskins*, [1905] P. 194 (1905); *Walpole v. Orford*, *supra* note 10; *cf. Denysen v. Mostert*, *supra* note 8.

⁴⁷*Supra* note 9.

⁴⁸The opinion, 2 HARG. JURID. ARG. at 308, shows that Lord Camden was not bothered by his uncertainty as to just when the survivor lost the privilege of revoking her will: "It may be revoked by joint consent clearly—by one alone, if he give notice, I can admit."

The will and surrounding circumstances in the case of *In re Oldham*⁴⁹ indicated with unusual clearness that the parties intended the wife to be bound as survivor, to devise the bulk of her husband's property to his relatives in accordance with the separate simultaneous mutual wills.⁵⁰ The court, however, expressed its "utmost regret" that it could not enforce such a promise because all the terms of the contract were not "certain and unequivocal"⁵¹ and it was possible to imagine some turns which the events might have taken (but didn't) in which neither the parties nor the court would have desired a binding contract. Said the court, "Supposing that the wife had died first, and the husband, who was at the date of the wills not yet sixty, had married again. It is difficult to believe that he agreed to a course that would prevent his making any testamentary provision for his second wife. . . It is difficult to imagine that it was the intention of the parties, when they made the mutual wills, that the survivor should in no circumstances have power to alter the trusts except by disposition *inter vivos*."

That failure to understand the possible variations in promises and conditions has resulted in a few similar cases in this country rejecting the contract as too harsh and not proved. Also there have been a few cases with an argument consisting of the same erroneous major premise: whenever there is a contract, it must contain unconditional promises that no part of the wills would be revoked; a minor premise: the evidence indicates that there was an agreement or compact (the word "contract" is often studiously avoided); and the conclusion: therefore there was a contract containing a promise which was broken by the revocation. Thus the same false major premise may lead to a decision either granting or denying specific performance. These false arguments, together with a liberal sprinkling of conflicting dogmatic rules of the *Frazier v. Patterson* variety, have resulted in the prevalent belief that the American cases are a hopeless mass of inconsistencies. However, the cases should be judged by their decisions, not by the language of their opinions.

⁴⁹132 L.T. (N.S.) 658, [1925] Ch. 75, 94 L.J. Ch. (N.S.) 148, 69 Sol. Jo. 193.

⁵⁰The opinion states, at 660, [1925] Ch. at 80: "The husband and wife made dispositions of their property in practically identical terms, under what must, in my opinion, be regarded as an agreement to do so."

⁵¹As to the contract, the court said, at 662-3, [1925] Ch. 87-8: "In order to enforce the trust for which the plaintiff's counsel contend, I must be satisfied that its terms are certain and unequivocal. . . I cannot build up a trust on conjecture. . . [T]hey may have considered that the survivor could be trusted to give effect to what must have been known to be the wishes of both." As to *Walpole v. Orford*, *supra* note 10, the court added: "He [Lord Loughborough] found that there had been some agreement, but that it was impossible to ascertain precisely and certainly its terms."

Each decision is required to answer only one question: was the particular contractual intention such as to create, under the actual circumstances, the duty to devise in the manner claimed by the promisee or beneficiary? When each answer to this question is considered in the light of its own evidence, the law on this subject appears much more consistent and satisfactory than many of the opinions and writings would indicate.

The futility of an attempt to summarize those answers is apparent. Each estate is a unique estate. There are many widely differing types of arrangements, not only for devising those estates, but also for limiting the privilege of changing the devises. In addition, the main problem is to determine what contractual plan was used, and the evidence in each case is both unique and complicated. When an individual standard is applied, as here, the natural way to discuss the problem is to take each case separately. Lack of space prevents that. All that we can do here is to consider a few of the more common evidentiary facts,⁵² one at a time, keeping in mind, however, that a case of this type is never decided with the aid of only one evidentiary fact.

In the usual case there may be five general types of evidence, from a consideration of all of which the existence and terms of the contract must be determined. They are: (1) a separate written contract or other writing that satisfies the Statute of Frauds; (2) the wills, including the form and expressions of contractual intent; (3) surrounding circumstances; (4) oral statements of the parties made with reference to the contract; and (5) the scheme of distribution contained in the wills.

(1) It is unnecessary to call attention to the many advantages of a written contract stating the agreement in as much detail as possible. But such a contract is not often broken, or if there is a breach, the case seldom reaches the appellate court, and we have only a few such cases reported.⁵³

(2) The wills may state the terms of the contract as clearly as a separate writing,⁵⁴ though in the reported cases the references

⁵²"Evidence" is used in this article in a broad sense to include evidentiary facts. An "evidentiary fact" is a fact which is used for the purpose of aiding in the proof of another fact.

⁵³*Buehrle v. Buehrle*, 291 Ill. 589, 126 N.E. 539 (1920); *Uniontown Reformed Church v. Wise*, *supra* note 13. See also *Stewart v. Todd*, *supra* note 30, where the contract of survivorship was executed some time before the mutual wills. Compare *Chase v. Stevens*, *supra* note 30. For cases wherein there was a written contract of survivorship but no wills, see *Fleming v. Fleming*, *supra* note 30; *Eldred v. Warner*, *supra* note 12.

⁵⁴*Rice v. Winchell*, 285 Ill. 36, 120 N.E. 572 (1918); *Brown v. Brown*, *supra* note 32; *Warwink v. Zimmerman*, 126 Kan. 619, 270 Pac. 612 (1928); *Sage v.*

to the contract are usually rather indefinite. There may be some slight mention of "contract", "agreement", or "consideration".⁵⁵ There may be a statement that the wills or certain of the bequests are to be revocable under certain conditions, which might indicate that there was a promise not to revoke except as to those bequests and under those conditions.⁵⁶ The different types of references are innumerable; each must be given the weight it seems to deserve. The testamentary scheme, where it is of value in proving the contractual intent, might be included in this group as an implied reference, but it is discussed later as a separate type.

In addition to these references, there may be some evidentiary value in the form of the wills. *Frazier v. Patterson*⁵⁷ finds in this a basis of classification for some of its broad generalities or dogmatic rules. Thus the rules for joint wills are quite different from those for separate wills, and the reason is: "[T]here is no necessary inference that the [separate] wills were the result of any mutual or reciprocal agreement or understanding. Such [separate] wills might be executed without either party knowing that the other had executed his will; but where the parties execute their wills by the same instrument [a joint will], it is not possible that such course could be adopted without some previous understanding or agreement between them. Each must necessarily know what disposition the other has made of his property." Is that evidence of knowledge the only or even the important difference? Nearly always there is ample proof in connection with separate wills (especially if simultaneous or twin) that each knew of the provisions in the will of the other.⁵⁸ There seem to be further reasons for holding that the joint will has a greater evidentiary value. The execution of one instrument by both testators indicates, in at least a slight way, that they are thinking of a bilateral act

Sage, *supra* note 39; Robertson v. Robertson, 94 Miss. 645, 47 So. 675, 136 Am. St. Rep. 589 (1908); Harris v. Harris, *supra* note 41.

⁵⁵Schumaker v. Schmidt, *supra* note 13; Heller v. Heller, *supra* note 39. See also Rastetter v. Honinger, *supra* note 39; Hermann v. Ludwig, 186 App. Div. 287, 174 N.Y. Supp. 469 (2d Dept. 1919), *aff'd*, 229 N. Y. 544, 129 N.E. 908 (1920); Ballard v. Ballard, 26 Ohio C. C. (N.S.) 490 (1916); *In re Hoffert's Estate*, 65 Pa. Super. Ct. 515 (1917). Where the attempted testamentary dispositions were in the form of deeds and bills of sale, see Mueller v. Batcheler, *supra* note 30.

⁵⁶Such provisions were overlooked in *In re Oldham*, *supra* note 49, and *In re Rhodes Estate*, 277 Pa. 450, 121 Atl. 327 (1923). Compare Uniontown Reformed Church v. Wise, *supra* note 13.

⁵⁷*Supra* note 19, at 86, 90 N. E. at 218.

⁵⁸This is important only in that there would seldom be a contract creating the duty not to revoke such wills if each did not know the contents of the other will. But the converse does not necessarily follow.

(contract), rather than only two separate unilateral acts (wills). Also, the use of one instrument makes it more difficult for one testator to revoke his will,⁵⁹ and the parties are probably conscious of that practical restriction on revocation and may intend that either will alone shall not be revoked. The results in the American reported cases indicate that there might be a little to this distinction, but not enough to explain, much less excuse, the dogmatic rules based on it. In almost two-thirds of the joint will cases where the problem was properly raised, the contract was enforced, while that was true in less than one-half (slightly over two-fifths) of the cases where separate wills had been used.⁶⁰

The cases might be grouped into smaller subdivisions based on the form of the instrument, such as, separate wills grouped into simultaneous and non-simultaneous,⁶¹ or into similar (twin) and dissimilar;⁶² but the difference in evidentiary value appears to be small.⁶³

(3) The surrounding circumstances vary greatly from case to case, and here again sound judgment must determine the weight they should be given. As far as can be determined from the opinions, some circumstances of considerable probative value have been overlooked.⁶⁴ Some not infrequent circumstances which may be suggestive are: (a) the mutual exchange of wills, or their delivery to the third party beneficiary;⁶⁵ (b) the local custom as to use of these instruments, especially as affected by a recent case limiting their revocability; (c) the time elapsed since the execution (availability of parol evidence); (d) an outside consideration furnished by the

⁵⁹He can no longer revoke by physical act without interfering with the paper on which is written the will of the other testator.

⁶⁰See *infra* notes 78-94, 103, 104, where the types of wills are indicated.

⁶¹For non-simultaneous wills, see *supra* note 30 for cases where the contract was enforced. For similar cases, but refusing to enforce a contract in favor of the survivor, see *Gould v. Mansfield*, *supra* note 13; *Robinson v. Mandell*, *supra* note 13.

⁶²The similarity of the wills has often been considered important. See *Stevens v. Myers*, 91 Ore. 114, 177 Pac. 37, 2 A. L. R. 1155 (1918).

⁶³*In re Cawley's Estate*, *supra* note 13, and *Beveridge v. Bailey*, 220 N.W. 462, 868, 20 A.L.R. 619, 625 (S.D. 1928), considered that the joint wills in those cases had less evidentiary value because some of the similar provisions were in separate paragraphs. Compare *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N.W. 56 (1915); *Bower v. Daniel*, 198 Mo. 289, 95 S.W. 347, 12 Prob. Rep. Ann. 34 (1906); *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763, 33 A.L.R. 733 (1924).

⁶⁴See *infra* notes 65, 68.

⁶⁵*Chase v. Stevens*, *supra* note 30; *Chambers v. Porter*, 183 N.W. 431 (Iowa 1921). But this was overlooked in *Robinson v. Mandell*, *supra* note 13.

beneficiary;⁶⁶ and (e) the relative values of the considerations⁶⁷ (promised devises) of the two testators, considering not only the size of each estate, but also the probability of the other testator receiving it, as affected by their relative ages and conditions of health (life expectancies),⁶⁸ and any conditions in the wills or promises.

(4) In some cases, the law allows evidence of the oral statements of the parties with reference to the contract. There the witnesses have occasionally agreed on something of value, but more often their memories have been clouded by time, or they have seriously disagreed.

Where the contract is not in writing, the question of the Statute of Frauds is immediately raised if real property is involved. A few cases have held that the will was a sufficient memorandum, even though the contract was not expressly mentioned and even though the wills were separate.⁶⁹ This possibility has been denied⁷⁰ or ignored by most of the cases. There has been further disagreement in deciding what amounts to sufficient performance to take the contract out of the Statute in equity. Most courts have held that the death of one leaving his will in force is sufficient as against the survivor.⁷¹

⁶⁶Mayfield v. Cook, *supra* note 28; Cox v. Hutto, *supra* note 30; Chase v. Stevens, *supra* note 30; Chambers v. Porter, *supra* note 65; Torgerson v. Hauge, *supra* note 29; Duvale v. Duvale, *supra* note 12; Corcoran v. Kennedy, 177 App. Div. 63, 163 N.Y. Supp. 703 (3d Dept. 1917); *In re McGinley's Estate*, *supra* note 41.

⁶⁷Rolls v. Allen, 204 Calif. 604, 269 Pac. 450 (1928); Buchanan v. Anderson, 70 S. C. 454, 50 S.E. 12, 10 Prob. Rep. Ann. 175 (1905); Walpole v. Orford, *supra* note 10; cf. Rice v. Winchell and other cases *infra* note 97.

⁶⁸Corcoran v. Kennedy, *supra* note 66; Turnipseed v. Sirrine, *supra* note 12. But this was not discussed in *In re Oldham*, *supra* note 49, nor in Klussman v. Wessling, *supra* note 39.

⁶⁹*Joint will*: Larrabee v. Porter, 166 S.W. 395 (Tex. Civ. App. 1914).

Separate wills: Brown v. Johanson, 69 Colo. 400, 194 Pac. 943 (1920); Brown v. Webster, 90 Neb. 591, 134 N.W. 185, 37 L.R.A. (N.S.) 1196 (1912); Harris v. Morgan, 157 Tenn. 140, 7 S.W. (2d) 53 (1928).

See Schinebly, *op. cit. supra* note 24, at 779, n. 78, 79; Falk v. Fulton, 124 Kan. 745, 262 Pac. 1025 (1928); Cantrell v. Brannon, 16 S.W. (2d) 400 (Tex. Civ. App. 1929).

⁷⁰Gould v. Mansfield, *supra* note 13; Canada v. Ihmsen, *supra* note 37; *In re Edwall*, *supra* note 36.

⁷¹Brown v. Johanson, *supra* note 69; Meador v. Manlove, *supra* note 29; Carmichael v. Carmichael, *supra* note 12; Lugauer v. Husted, *supra* note 29; Stuckey v. Truett, *supra* note 30; Larrabee v. Porter, *supra* note 69; Doyle v. Fischer, *supra* note 63. But see the discussion in Everdell v. Hill, *supra* note 13, and the Statute in *In re Weir*, 134 Wash. 560, 236 Pac. 285 (1925). In *Near v. Shaw*, 76 Misc. 303, 137 N.Y. Supp. 77 (Co. Ct. 1912), the Statute was held to be a good defense, though performance by the first to die was not mentioned.

This partly accounts for the fact that a larger percentage of the contracts have been enforced when the suit was brought by the third party beneficiary after a revocation by the survivor, than when brought by the survivor after a revocation by the first to die. Certainly, in this latter case, the mere execution of the wills was not sufficient part performance. However, one court has held, as against the representatives of the first to die, that the survivor had performed sufficiently to avoid the statute by keeping her will in force during the joint lives, the first to die having the benefit of the risk, which was as valuable as a life insurance policy. Other courts have denied that this was sufficient part performance.⁷²

(5) The scheme of distribution may be of some value in determining the existence of the contract. As to one such scheme, *Frazier v. Patterson*⁷³ states that "a joint will which is not reciprocal is simply the individual personal will of each of the persons signing the same and is subject to the same rules that would apply if the wills were several", apparently meaning that there could not be, or at least ordinarily would not be, a contract. Either interpretation is startling. A promise to devise to a third person is good consideration; there clearly *could* be a contract. And as for evidentiary value, the courts appear to be more liberal in enforcing the third party beneficiary provisions than the mutual ones. In fact, *Frazier v. Patterson* itself contains three separate rules stating categorically that, while the provision for the ultimate beneficiaries may be enforceable against the survivor, the mutual provision is unenforceable, and each testator (including the first to die) has the privilege of revoking during their joint lives.⁷⁴

There seems to be only one case where neither will contained a provision for the other, and there the dictum of *Frazier v. Patterson* was rejected and the contract was enforced.⁷⁵ That case, moreover,

⁷²"It will not do to say that she received no benefit, as the plaintiff did not die, any more than it would lie in the mouth of a man who had paid his premium of insurance with a note to say that there was a failure of consideration, as he did not die, or his property was not burned." *Turnipseed v. Sirrine*, *supra* note 12, at 577, 35 S.E. at 759. This was approved in *Hermann v. Ludwig*, *supra* note 55. But *contra*, that it may be good consideration but not part performance of the type to take it out of the Statute, see *Gould v. Mansfield*, *supra* note 13; *Gooding v. Brown*, *supra* note 13; *Hale v. Hale*, *supra* note 13; *In re Edwall*, *supra* note 36; *Canada v. Ihmsen*, *supra* note 37.

⁷³*Supra* note 19, at 84, 90 N.E. at 217.

⁷⁴*Infra* notes 100, 101, 103, 104 to the effect that these rules, so far as they purport to be absolute rules of law, are unsubstantiated and unsound.

⁷⁵*Williams v. Williams*, *supra* note 40, at 649, 96 S.E. at 751. *Frazier v. Patterson* was cited in a written opinion by the lower court as an authority for the

illustrates a type of distribution that does tend strongly to prove a contract existed. One testator, the husband, owned a large farm, his wife owned a small one, and the two owned a third small one jointly. In their joint will, the wife devised her farm to one grandchild, they devised their farm to another grandchild, and the husband devised his large farm to their other issue. If their affections were not abnormal, that arrangement would indicate clearly that each was preferring some of their descendants only because the other had promised to prefer the others.⁷⁶

A recent Tennessee case⁷⁷ overcame a strong obstacle in the form of prior decisions on the Statute of Frauds in order to enforce a contract where the scheme of distribution was cogent evidence of the contract. Two brothers and two sisters owned a farm in common, and lived on it together. Only one, Elijah, was married, and he had one daughter, the complainant. The four brothers and sisters executed separate simultaneous wills, each devising his interest in the farm to the survivors in fee, or if he should be the survivor, then to the children of Elijah. Elijah was the first to die, and the other three received the devise of his interest to them. Later they threatened to revoke their wills and dispose of the property in such a way as to defeat the complainant's expectancy. The court strongly sympathized with the claim that there was a contract. Would Elijah have devised his whole interest in the property to his brother and sisters, excluding his own daughter, if they had not promised to leave their interests, according to the wills, to that daughter and any other children he might have? True, there might have been a condition that any of the others might withdraw from the agreement in case of marriage, but such an event did not occur.

enforcement of the contract, and it seems clear that the defendant strongly contested that, and probably cited the dictum here being discussed. The Supreme Court, though admitting that that case involved a mutual will, insists that it "may be safely regarded as an authority for the proposition that where reciprocal testamentary provisions are made for the benefit of a third party, there is a sufficient consideration for the contractual element in the will (assuming that the contract itself is established) to entitle the beneficiary to enforce the same in equity." Compare *Robinson v. Mandell*, *supra* note 13; *McGuire v. McGuire*, *supra* note 12.

⁷⁶For a similar case and very good opinion, see *Doyle v. Fischer*, *supra* note 63. See also *McGuire v. McGuire*, *supra* note 12; *Carmichael v. Carmichael*, *supra* note 12; *Larrabee v. Porter*, *supra* note 69; *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255 (1911). But see *In re Weir*, *supra* note 71, controlled by a local statute.

⁷⁷*Harris v. Morgan*, 157 Tenn. 140, 7 S.W. (2d) 53 (1928).

FAIRNESS AND EQUALITY IN DISTRIBUTION

In each of these two cases, the fairness of the distribution under the original wills and the unfairness of the attempted change may indicate more that the testator who died first should have insisted on a contract than that he did; but even if that is true, the conscious or unconscious influence on the court is certain to be great. We all like fairness and equality; it is notoriously easy to find witnesses who can remember important conversations to prove oral contracts reaching those results; and it would be surprising if the sympathy of the court were not also aroused.

In the cases brought by the ultimate beneficiaries to enjoin or nullify a revocation by the survivor, the scheme of final distribution is only one item affecting the natural sympathy of the court or entering into the determination of the decision. But some light may be thrown upon its importance by grouping these cases according to the plans of disposition at the death of the survivor and then noting the decisions in the cases in each group.

There are eighteen cases involving wills by a husband and wife which would produce an equal, or nearly equal, distribution among all their children. In sixteen of these, a contractual right in the beneficiaries was found and enforced.⁷⁸ One of the other two permitted the survivor, who remarried, to revoke as to one-third of his property and to leave that part to his second wife, with whom he lived six years;⁷⁹ the other was similar to this except that the bulk of the estate was devised to the second wife.⁸⁰

Where the husband and wife had no children, there are eight cases involving wills which would give each set of relatives about one-half

⁷⁸Cases involving *joint* wills: *Frazier v. Patterson*, *supra* note 19; *Campbell v. Dunkelberger*, *supra* note 63; *Lewis v. Lewis*, *supra* note 20; *Bower v. Daniel*, *supra* note 63; *Rastetter v. Honinger*, *supra* note 39; *Moore v. Moore*, 198 S.W. 659 (Tex. Civ. App. 1917); *Larrabee v. Porter*, *supra* note 69; *Williams v. Williams*, *supra* note 40; *Doyle v. Fischer*, *supra* note 63. Compare *Gerbrich v. Freitag*, *supra* note 34, holding a questionable instrument to be a good will.

Cases involving *separate* wills: *Brown v. Johanson*, *supra* note 69; *McGuire v. McGuire*, *supra* note 12; *Carmichael v. Carmichael*, *supra* note 12; *Stephen v. Myers*, *supra* note 62; *Prince v. Prince*, *supra* note 76; *Allen v. Boomer*, *supra* note 12 (two sets of children). Compare *Kellogg v. White*, 103 Misc. 167, 169 N.Y. Supp. 989 (Sup. Ct. 1918), modified in 186 App. Div. 911, 172 N.Y. Supp. 548 (3d Dept. 1918), where the problem was not properly raised, but the court held, by way of dictum, that there was no contract.

Wills not executed in fulfillment of contract: *Stuckey v. Truett*, *supra* note 30 (beneficiaries were foster children with strong equities in their favor).

⁷⁹*Separate* wills: *In re Arland*, *supra* note 29.

⁸⁰*Separate* wills: *Cooke v. Burlingham*, 105 Misc. 675, 173 N.Y. Supp. 614 (Sup. Ct. 1919), *aff'd*, 189 App. Div. 911, 178 N.Y. Supp. 885 (2d Dept. 1919).

of the total estate (the distribution within each group not necessarily being even). Of these, six enforced a contractual right in the beneficiaries.⁸¹ One held that the survivor (wife) could still renounce and take her statutory share, which was large because most of the land was held jointly.⁸² The other permitted the survivor to make a new distribution among each set of relatives, though apparently the equal division was retained.⁸³

Summarizing, in the twenty-six cases of equal distribution, the contracts were enforced in twenty-two; the contracts were rejected in only four, and in perhaps all of these the elements of equality were counterbalanced by elements of unfairness. Compare the decisions in those cases with the decisions in the cases in which the distribution among the ultimate beneficiaries was unequal.

In the cases of wills by husband and wife, only two provided for an unequal distribution among their children; but in both cases the favored son was a party to the contract and furnished a valuable consideration. For that reason the contracts were enforced.⁸⁴

There were four cases involving spouses, one or both of whom had children by another marriage, and in at least three of these cases the wills would result in an uneven distribution. The claimants were unsuccessful in all four.⁸⁵

When there were no children, there are seven cases in which the distribution was grossly unequal between the two sets of collateral heirs. In five of these, the claim was rejected as not proved;⁸⁶ in one, the contract was recognized;⁸⁷ and in the other, the beneficiary

⁸¹Joint wills: Robertson v. Robertson, *supra* note 54; Deseumeur v. Rondel, 76 N.J. Eq. 394, 74 Atl. 703 (1909).

Separate wills: Meador v. Manlove, *supra* note 29; Tooker v. Vreeland, *supra* note 36; Morgan v. Sanborn, *supra* note 29; Minor v. Minor, 2 Ohio N.P. (n.s.) 439 (1904).

⁸²Joint will: *In re Rhodes Estate*, *supra* note 56.

⁸³*Separate* wills: Wallace v. Wallace, *supra* note 31.

⁸⁴Joint will: Torgerson v. Hauge, *supra* note 29. *Separate* wills: Phillip v. Phillip, 96 Misc. 471, 116 N.Y. Supp. 624 (Sup. Ct. 1916).

⁸⁵Joint wills: Sargent v. Corey, *supra* note 28 (child born to survivor); Rolls v. Allen, *supra* note 67; *In re Hoffert's Estate*, *supra* note 55. Compare Epperson v. White, *supra* note 35, where the court refused probate to an instrument purporting to be a joint will of this type.

Separate wills: Wanger v. Marr, 257 Mo. 482, 165 S.W. 1027 (1914) (entire will not given).

⁸⁶Joint wills: Menke v. Duwe, *supra* note 23; Beveridge v. Bailey, *supra* note 63.

Separate wills: Klussman v. Wessling, *supra* note 39; Rice v. Winchell, *supra* note 54; Sappingfield v. King, 49 Ore. 102, 89 Pac. 142, 90 Pac. 150, 8 L.R.A. (n.s.) 1066, 12 Prob. Rep. Ann. 607 (1907).

⁸⁷Mueller v. Batcheler, *supra* note 30 (no wills executed).

had furnished consideration, and the court directed that, in a new trial, the existence of the contract should be left to the jury.⁸⁸

There are six cases involving wills by near relatives, such as sisters, which would produce an unequal distribution among their common relatives and perhaps friends. In only one of these was a contract enforced,⁸⁹ the claim being disallowed in the other five.⁹⁰

Again summarizing, in the nineteen cases of unequal distribution, the contracts were rejected in fourteen; a direction was made that the problem be left to the jury in one; the contracts were enforced in only four, and in at least two of them, the elements of inequality were counterbalanced by elements of fairness.

There are ten other cases,⁹¹ but they can not readily be grouped under factual headings. Three would naturally attract considerable sympathy, and contracts were enforced.⁹² The other seven are rather neutral, or their provisions are doubtful; two were enforced,⁹³ and five were not.⁹⁴

The high correlation between the natural sympathies and the decisions is significant. In many of these cases it seems that, on cold analysis, the plan of distribution has little probative value; yet apparently it has a strong influence.

⁸⁸*Separate* wills: *In re McGinley's Estate*, *supra* note 41.

⁸⁹*Joint* will: *Sherman v. Goodson's Heirs*, 219 S.W. 839 (Tex. Civ. App. 1920).

⁹⁰*Joint* will: *In re Cawley's Estate*, *supra* note 13.

Separate wills: *Edson v. Parsons*, *supra* note 13; *Everdell v. Hill*, *supra* note 13; *Near v. Shaw*, *supra* note 71; *Wilson v. Gordon*, 73 S.C. 155, 53 S.E. 79, 11 Prob. Rep. Ann. 606 (1905).

⁹¹An effort has been made to include all cases that can fairly be classed in this group of cases wherein the final beneficiaries were seeking to prevent or nullify a revocation by the survivors. At any rate, enough cases have been found to warrant their mention here.

⁹²*Separate* wills: *Chase v. Stevens*, *supra* note 30 (survivor had received money from brother for support, after giving him her will devising all she did not use to his heirs); *Lugauer v. Husted*, *supra* note 29 (foster child v. heirs in Germany); *Harris v. Morgan*, *supra* note 77 (discussed in this connection). See also (no wills were executed, and contracts were with beneficiaries rather than with each other) *Mayfield v. Cook*, *supra* note 28; *Cox v. Hutto*, *supra* note 30.

⁹³*Joint* wills: *Baker v. Syfritt*, *supra* note 39 (children by prior marriage of first to die [wife] v. second wife of survivor); *Kirtley v. Spencer*, *supra* note 34 (a charity as claimant).

⁹⁴*Joint* will: *Buchanan v. Anderson*, *supra* note 67 (relationship not stated).

Separate wills: *Allen v. Bromberg*, 163 Ala. 621, 50 So. 884 (1909) (contest between charities); *Uniontown Reformed Church v. Wise*, *supra* note 13 (apparently a charity as claimant); *Flower v. Flower*, 166 N.E. 914 (Ohio App. 1928) (relationship not stated); *In re Weir*, *supra* note 71 (either decision would favor one or the other child).

The direction of this influence must not be overlooked, or the wrong inference drawn from that analysis of the cases. We can not say that the scheme of distribution at the death of the survivor is almost final in determining whether there was a contract. Each case involved more than the mere question whether there was a contract; it decided whether this particular survivor was under a contractual duty to this particular third party beneficiary to devise the property in question to him under these particular circumstances. True, if a duty was found to exist, that necessarily involved the existence of a contract. However, a decision that no such duty existed might mean that there was no contract, or it might mean that there was a contract, but that there was a condition in the contract which under the particular operative facts, relieved the survivor of the duty not to revoke. It is therefore necessary to determine, not only whether a contract exists, but also what the promises and conditions are.

In addition to the promise to devise, there will be the subsidiary promise not to defeat the plan by making excessive gifts.⁹⁵ In the case of husband and wife, there might also be a promise not to renounce and demand dower or the statutory share in lieu thereof.⁹⁶ However, the survivor ordinarily will not attempt to renounce unless the devise to him is less than his statutory share. In such a case the consideration is apt to seem inadequate, and then it is very difficult to convince the court of the existence of a contract that would bind this survivor in this way.⁹⁷

CONDITIONS IN THE CONTRACT

There may also be conditions in the contract; but the part they play in these cases, though important, is often a silent one. In a number of cases, some event, such as marriage by the survivor,⁹⁸ has occurred after the execution of the will and made its revocation

⁹⁵See cases *supra* note 40.

⁹⁶*Prince v. Prince*, *supra* note 76.

⁹⁷*Klussman v. Wessling*, *supra* note 39; *Rice v. Winchell*, *supra* note 54; *Menke v. Duwe*, *supra* note 23; *In re Rhodes Estate*, *supra* note 56; *cf.* *Rolls v. Allen*, *supra* note 67; *In re Hoffert's estate*, *supra* note 55; *Buchanan v. Anderson*, *supra* note 67.

⁹⁸For ordinary contract to devise cases see *supra* note 28. See also *Sargent v. Corey*, *supra* note 28; *Baker v. Syfritt*, *supra* note 39; *Lewis v. Lewis*, *supra* note 20; *Deseumeur v. Rondel*, *supra* note 81; *Near v. Shaw*, *supra* note 71; *Cooke v. Burlingham*, *supra* note 80; *In re Arland*, *supra* note 29; *cf.* *Kloberg v. Teller*, *supra* note 28; *Fleming v. Fleming*, *supra* note 30. For an interesting compromise, involving community property, see *Larrabee v. Porter*, *supra* note 69; *Wagon v. Wagon*, 16 S.W. (2d) 366 (Tex. Civ. App. 1929).

desirable; yet the evidence was such that a contract would have been found to exist if the subsequent events had taken a different turn. If the promise was not enforced in the actual case, the reason given for such a decision should be that a contract existed, but that it contained an express or constructive condition excusing the performance of the promise. This true reason is seldom clearly stated.⁹⁹ Sometimes, it is true, the opinion admits that there was a contract, and refuses to enforce it because it would work a hardship under the facts in the case. That is another way of stating that there is a constructive condition. More commonly, the opinion insists that there was no contract, usually adding that such a contract must be proved by clear and convincing evidence. Such a case lacks either clearness of perception or intellectual honesty, but it does not cause serious legal confusion as it is based upon the interpretation of the facts in a field in which identical cases do not occur. However, material improvement would result from an understanding of the problems of conditions in contracts and a clear opinion explaining the decision as based on such a condition.

In some cases the court has realized that, if the evidence is fairly interpreted in harmony with other cases, a contract should be found to exist. Yet the court has not wished to enforce the contract in that case, or has not wished to establish a precedent for enforcing such a contract under any intervening circumstances. Instead of saying that in accordance with a condition in the particular contract certain operative facts would relieve the promisor of the duty to perform, some courts have apparently failed to understand the possibility of conditions and have reached the result desirable in that case by stating, as a rule of law, that various facts would relieve the promisor in every case.

Some of the rules of *Frazier v. Patterson* have resulted from such a failure to understand the law of contracts. Thus, when that case states that a joint and mutual will "becomes irrevocable after the death of one of them [the testators] if the survivor takes advantage of the provisions made by the other," it means that there is a condition in the contract that a duty on the part of the survivor to devise his estate in accordance with the will shall arise only upon the occurrence of those operative facts, *i.e.*, death of the other and acceptance of the bequest. Curiously enough, this case approves two

⁹⁹Perhaps the clearest case on the problem is *Canada v. Ihmsen*, *supra* note 37, at 449, 240 Pac. at 930, wherein it is stated: "It is not impossible, or even improbable, that some conditions were attached to the contract. The decedent might have reserved the right to change her will upon change of circumstances. . ."

other and somewhat inconsistent rules covering this same situation: in the first, the final operative fact creating the duty is the death of one of them keeping his will in force, regardless of acceptance by the survivor, "on the theory that the first that dies carries his part of the contract into execution"; in the second, the final operative fact is the death of one before either has notified the other of an intent to revoke, as "neither of them could, during their joint lives, revoke it secretly."¹⁰⁰

These three rules agree that, in general, the survivor is to be bound, but either party is to have the privilege of revoking during the joint lives. That may be the usual intent when the main object is to make sure that the gift to the survivor, followed by his revocation, does not result in an uneven distribution at his death. But there is certainly no rule of law requiring such a condition. In fact, in the one case involving this type of mutual wills, the contract was enforced against the first to die (at the suit of the ultimate beneficiary who, it is true, had supported the testators for fifteen years as consideration) even though both testators had attempted to revoke.¹⁰¹

These rules permitting either testator to revoke during the joint lives are perhaps worded broadly enough to apply also to the wills that are only reciprocal and contain no provision for a distribution at the death of the survivor. As in such a case the survivor is not to be bound, the mutual devise in his will having lapsed,¹⁰² these

¹⁰⁰*Supra* note 19, at 85, 90 N.E. at 218, for all three citations. The condition covered by the second rule (either could revoke secretly during the joint lives), if it existed, would make the promises illusory during the joint lives (see *supra* note 43). The analysis of this article will not suffer if this one condition were held to be an improper one. However, the courts seem to have considered it a proper condition. The theory on which it is done is perhaps not important. If the arrangement is treated as mutual offers for unilateral contracts (each testator offers to devise his property in a certain way, as survivor, if the other accepts by dying with his will in force), we have the question whether the death of the offeree can be made the final operative fact for the acceptance of the offer. Professor Costigan, *op. cit. supra* note 1, at 251, *et. seq.*, in a similar type of case, calls the remedy a "constructive trust". However, a trust will not be created here or an election required unless there was a promise. *Gray v. Perpetual Trustee Co.*, *supra* note 46. It seems enough that the promise is enforced, and that it may contain conditions of the type herein discussed. See *Chase v. Stevens*, *supra* note 30.

¹⁰¹*Torgerson v. Hauge*, *supra* note 29. Compare the cases cited *supra* note 30. The failure to execute the will may be a breach of the promise similar to the revocation of the will, and in these cases also the contracts were enforced.

¹⁰²This is true though the will was not revoked and a statute raised a presumption against lapsing. *Anderson v. Anderson*, *supra* note 30; *cf. Bynum v. Bynum*, *supra* note 13; *Sappingfield v. King*, *supra* note 86.

rules would here be equivalent to a statement that there could be no contract. That is not true; the most that can be said is that there is a prejudice against this type of contract because of its gambling nature, or that the Statute of Frauds often prevents recovery. In twenty-nine cases the survivor attempted to enforce such a contract; he was successful in only twelve,¹⁰³ and unsuccessful in seventeen.¹⁰⁴

SUMMARY AND CONCLUSIONS

The problems arising under these multi-wills have been discussed as two separate problems: (1) the effect of the instruments as wills, to be determined by the ordinary law of wills, and (2) the effect of the arrangement as a contract, to be determined by the ordinary law of contracts. That is certainly the way the subject matter has been handled by the vast majority of the courts. Since the validity of the instruments as authorized types of wills has been established, the problems nearly always arise upon a consideration of the effect of a revocation. This is the contract problem, and it is usually raised on a bill or cross-bill for specific performance, or other bill setting up the equities under the contract. In order to emphasize the separation between the two problems, the statement is often made that the wills are revocable, but a revocation may be a breach of the contract.¹⁰⁵ In other words, the testator has the power to

¹⁰³Joint will: *Hermann v. Ludwig*, *supra* note 55.

Separate wills: *Stewart v. Todd*, *supra* note 30; *Chambers v. Porter*, *supra* note 65; *Wright v. Wright*, *supra* note 40; *Brown v. Webster*, *supra* note 69; *Corcoran v. Kennedy*, *supra* note 66; *Kloberg v. Teller*, *supra* note 28; *Turnipseed v. Sirrine*, *supra* note 12. See also *Duvale v. Duvale*, *supra* note 12.

No wills executed: *Eldred v. Warner*, *supra* note 12; *Green v. Whaley*, *supra* note 30; *Fleming v. Fleming*, *supra* note 30 (but not effective to reduce wife's statutory share).

¹⁰⁴Joint wills: *Schumaker v. Schmidt*, *supra* note 13. The leading English case is *Stone v. Hoskins*, *supra* note 46.

Separate wills: *Robinson v. Mandell*, *supra* note 13; *Coveney v. Conlin*, 20 App. D.C. 303 (1902); *Gould v. Mansfield*, *supra* note 13; *Howells v. Martin*, 101 N.J. Eq. 275, 137 Atl. 565 (1927); *Drishler v. Van Den Henden*, *supra* note 13; *Gooding v. Brown*, *supra* note 13; *McLean v. Clark*, 118 Misc. 284, 193 N. Y. Supp. 113 (Sup. Ct. 1922); *Blaine v. Richardson*, 193 N. Y. Supp. 612 (Sup. Ct. 1922); *Kingsbury v. Kingsbury*, 120 Misc. 362, 198 N. Y. Supp. 512 (Sup. Ct. 1923); *Lally v. Cronen*, 247 N. Y. 58, 159 N. E. 723 (1928), rehearing denied, 247 N. Y. 575, 161 N. E. 188 (1928); *Dicks v. Cassels*, 100 S.C. 341, 84 S.E. 878 (1915); *Hale v. Hale*, *supra* note 13; *McClanahan v. McClanahan*, 77 Wash. 138, 137 Pac. 479 (1913); *In re Edwall*, *supra* note 36; *Canada v. Ihmsen*, *supra* note 37.

No wills executed: *Izard v. Middleton*, *supra* note 13.

¹⁰⁵See *supra* notes 32, 36. Compare *Allen v. Bromberg*, *supra* note 36, and *Estate of Rolls*, *supra* note 36, with *Allen v. Bromberg*, *supra* note 94, and *Rolls*

revoke, but because of the contract he may not have that privilege; he is under a duty not to revoke. Where the transactions are intelligently treated in this manner, the intention of the parties is carried out and a very desirable high degree of flexibility is obtained, as the public policy limitations on types of promises in contracts are relatively few.

The civil law of some parts of Europe has tended to crystallize in this field of the law. Definite rules have often been developed, sometimes as absolute rules of law, and sometimes as presumptions. Since the evidence is usually not very convincing, the effect of either has been to limit the types of promises permitted in the contract. At the same time the two problems have often been mixed, resulting in a type of will whose revocability, as a probate problem, is determined by rules differing from those applied to the ordinary will. That gradual degeneration has led the courts away from a sound inquiry into the intention of the parties, and has taken away the most valuable characteristic, flexibility.

A start in the same direction can be seen in the cases from a few of the states. One cause may be the lack of a sound understanding of the law of contracts, especially as regards conditions. Another cause may be the type of relief given in some states. The usual decree merely requires the heirs or devisees to convey to the promisee or beneficiary. In one variation from the normal, the decree enjoins the probating of the revoking instrument. This is done in Illinois and has been done in California.¹⁰⁶ While this may be a short cut and merely a matter of form, it is significant that Illinois has been the leader in dogmatism and confusion, producing both *Frazier v. Patterson* and *Martin v. Helms*.¹⁰⁷ Pennsylvania handles the problem in a still more unfortunate manner. There the two problems are treated as one and solved by the probate court.¹⁰⁸ While this has the claimed advantage of being still more of a short cut,¹⁰⁹ it has the distinct disadvantage of confusing the issues and perhaps

v. Allen, *supra* note 67. See *Brown v. Brown*, *supra* note 32, applying the doctrine of lapsed legacies. Compare *In re Lage*, 19 F. (2d) 153 (N. D. Iowa, 1927), holding that after the death of one of the testators the rights of the ultimate beneficiary were still contingent and would not pass to his trustee in bankruptcy.

¹⁰⁶*Frazier v. Patterson*, *supra* note 19; *Klussman v. Wessling*, *supra* note 39; *Rice v. Winchell*, *supra* note 54; *Chase v. Stevens*, *supra* note 30. But compare *Estate of Rolls*, *supra* note 36; *Rolls v. Allen*, *supra* note 67.

¹⁰⁷319 Ill. 281, 149 N.E. 770 (1925). See discussion *infra* p. 388.

¹⁰⁸*In re Cawley's Estate*, *supra* note 13; *In re McGinley's Estate*, *supra* note 41; *Sherman v. Goodson's Heirs*, *supra* note 89. See *Lewis v. Lewis*, *supra* note 20.

¹⁰⁹See *Goddard*, *op. cit. supra* note 1, at 686.

of leaving the problem to a common law jury. It is feared that a spread of these methods of handling the problems might result in a gradual tendency toward crystallization in line with the dogmatic rules of *Frazier v. Patterson*. The best antidote for this is a better understanding of conditions as applied to the contracts. It must be admitted that a court confronted by a problem new to that jurisdiction is more apt to be attracted by the apparent certainty of the dogmatic rules than by a confused discussion of the contract with not even a hint that the case involves a condition.

The distinction between the will and the contract must be kept clearly in mind in considering conditions. It is common to imply conditions in contracts. But in wills the condition must be expressly stated in the will. The confusion of the two has led the Illinois and Oklahoma Courts into a radical departure from settled will and contract principles in two very recent cases.

Perhaps the forerunner of these cases was *Peoria Humane Society v. McMurtrie*.¹¹⁰ In that case, the joint will, executed by a mother and her son, contained an express condition: at the death of the survivor, the property of *both* was to be disposed of in a certain manner only "if no individual will has been made". The son married, *executed a new will*, and died. Later the mother died, never having revoked the joint will. That will was refused probate as her will, the opinion clearly stating that the will was expressly conditional and the condition did not happen. That case agrees with well settled testamentary law.¹¹¹ However, it has been cited for the proposition that marriage by one party to a joint will revokes not only his own but also the other testator's will.¹¹² That is clearly a misinterpretation of the case, and is unsound law.¹¹³

¹¹⁰229 Ill. 519, 82 N.E. 319 (1907).

¹¹¹For other conditional joint wills, see *American Trust & Safe Deposit Co. v. Eckhardt*, 331 Ill. 261, 162 N.E. 843 (1928); *Rogers v. Mosier*, 121 Okla. 213, 245 Pac. 36 (1926) (same will as in *Burkhart v. Rogers*, *infra* note 115). Wills only reciprocal are in effect conditional; each is to be the will of that testator only if he dies before the other testator. *Supra* note 102. Compare *In re Raine*, 1 Swa. & Tr. 144, 6 W.R. 816 (1858), where the testators owned property jointly, and the "joint will" was to be only the will of the survivor.

¹¹²1 PAGE, *op. cit. supra* note 24, at 155, n. 12; COSTIGAN, *CASES ON WILLS* (2d. ed. 1929) 352, n. 34. But see a correct discussion by this latter author in *op. cit. supra* note 1, at 248, n. 21.

¹¹³*In re Anderson*, 16 Ariz. 185, 141 Pac. 723 (1914); *Lansing v. Haynes*, 95 Mich. 16, 54 N.W. 699, 35 Am. St. Rep. 545 (1893); *Matter of Goldsticker*, 123 App. Div. 474, 108 N.Y. Supp. 489 (1st Dept. 1908), *aff'd*, 192 N.Y. 35, 84 N.E. 581, 18 L.R.A. (n.s.) 99, 15 ANN. CAS. 66 (1908); *Hinckley v. Simmons*, 4 Ves. Jr. 160, 31 Eng. Repr. 83 (1798). See also *Underwood v. Myer*, 146 S.E. 896 (W. Va. 1929). Compare the cases where the survivor remarries, *supra* note 98.

Next came another Illinois case, *Martin v. Helms*.¹¹⁴ There a joint will was drawn for a husband and wife, providing only that all the property of the first to die should go to the survivor. The husband properly executed the will, but an innocent technical error was committed which rendered the wife's attempted execution invalid. The husband died first, and when his heirs opposed the probate of the joint will, the court upheld their contention that the error in execution by the wife rendered the will invalid as to the husband. From the *Peoria Humane Society* case is quoted the statement: "It is clear [from the express terms of the will] that the makers intended that the portion of the will in question should take effect as the will of both or neither." With the aid of the rules of *Frazier v. Patterson*, this is corrupted into the remarkable statement: "Joint, mutual, and reciprocal wills are made pursuant to an agreement and understanding and must take effect as to both parties or neither."

Those cases are sufficient authority for the Oklahoma court to hold, in *Burkhart v. Rogers*,¹¹⁵ that where the joint will of one of the testators would not have been entirely effective (as a will) had he been the first to die, because of a forced pretermitted heir, it was invalid as the will of the other.

Where the *Peoria Humane Society* case enforces an express condition in the will, these cases *imply* a condition and enforce it. This was not necessary to reach substantial justice in either case. If the testators did not intend a contract requiring that the property be disposed of according to the proposed wills, the failure to execute the will would seem to be no worse than a secret revocation. If, as the court held, there was an enforceable contract to devise, the failure to execute a will effective to carry out the promised devise was merely a breach of the contract, and the other testator is adequately protected by the contract, the same as if there had been a good execution followed by a secret revocation.¹¹⁶ But each of the opinions indicate that either an ineffective execution or a secret revocation

¹¹⁴*Supra* note 107, at 287, 149 N.E. at 771.

¹¹⁵134 Okla. 219, 273 Pac. 246 (1928).

¹¹⁶*Bynum v. Bynum*, *supra* note 13. For cases enforcing such a contract, see cases *supra* note 103. A forced pretermitted heir will take subject to such a contract right. *Torgerson v. Hauge*, *supra* note 29. For cases enforcing the contract though the wills had not been executed, see *supra* note 30. The court, in *Burkhart v. Rogers*, *supra* note 115, based its decision on the existence of a contract. Why can not the defeated proponents of the will now ask for specific performance of the contract? The same question might be asked in *Martin v. Helms*, *supra* note 107.

by one testator would result in a revocation of the will of the other. The law seems too well settled to justify such opinions,¹¹⁷ but they may be one development of a crystallized law of joint and mutual wills ignoring the intention of the parties as well as the law of both contracts and wills.¹¹⁸ Let us hope that a clearer understanding of the law of contracts as applied to these cases will check the tendency in this direction.

¹¹⁷*Bynum v. Bynum*, *supra* note 13; *In re Cole's Will*, 171 N.C. 74, 87 S.E. 962 (1916). Compare the claim in *Underwood v. Myer*, *supra* note 113. See cases and notes cited *supra* notes 105, 116.

¹¹⁸Compare 3 GA. ANN. CODE (Park, 1914) § 3830 (3256): "Mutual wills may be made either separately or jointly, and in such case the revocation of one is the destruction of the other." For other statutes, see Bordwell, *Statute Law of Wills* (1928) 14 IOWA L. REV. 1, 34. It would seem that, except for the Georgia Code, these statutes merely state the common law. But see *Rolls v. Allen*, *supra* note 67.