University of Michigan Law School
University of Michigan Law School Scholarship Repository

Articles | Faculty Scholarship

1919

Mutual Wills

Edwin C. Goddard
University of Michigan Law School

Follow this and additional works at: http://repository.law.umich.edu/articles

Part of the Estates and Trusts Commons, and the State and Local Government Law Commons

Recommended Citation
Goddard, Edwin C. (1900-1935). "Mutual Wills." Mich. L. Rev. 17 (1919): 677-87.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MUTUAL WILLS.

SO LATE as 1822 Sir John Nicholl is reported to have said in *Hobson* v. *Blackburn*,[1] that a mutual, or conjoint will is an instrument "unknown to the testamentary law of this country; or, in other words, that it is unknown, as a will, to the law of this country at all. It may, for aught that I know, be valid as a compact." In *Darlington* v. *Pulteney*,[2] Lord MANSFIELD said, "there cannot be a joint will." Following these distinguished and learned judges, Jarman and Williams in their classical treatises accepted the statement of Sir John, and some early American cases refused probate to so-called "joint wills."[3]

Two reasons have been given for this view. First, it has been said that in the very nature of a will there can be no such thing as a joint will.[4] If we use the term will as meaning the desire of the testator as to the disposition of his property presently upon his death this is true, unless it be possible to have (if the paraphrase be allowed),

> "Two minds with but a single will,
> Two hearts that beat as one,"

and, incidentally, that stop beating at the same moment. But the term "will" is, and must be, used in a variety of senses. For one thing, it is continually used to designate the instrument which contains the testator's desire. We say a testator signs his "will", meaning a paper not yet signed at all, he acknowledges to the attesting witnesses the paper thus signed to be his "last will and testament," meaning the signed but not witnessed paper, and the duly executed paper is called his "will", though strictly speaking it is only the instrument in which his will is found. It seems, then, futile to quarrel with these firmly established uses of the term, and it is certain that now "joint wills" are quite universally known in testamentary law.[5] North Carolina in later cases has followed, not the decision in the *Clayton case*, but the dissenting opinion of DANIEL, J.,[6] and Ohio

---

[1] 1 Addams, 274.

[2] Cowp. 260, 268.

[3] *Clayton* v. *Liverman*, 19 N. C. 558 (1837), Daniel, J., dissenting; *Walker* v. *Walker*, 14 Ohio St. 157 (1862).

[4] Rood on Wills, quoted in Hoffert's Estate, 65 Pa. Super. Ct. 515; *Prince* v. *Prince*, 64 Wash. 552; *Hershey* v. *Clark*, 35 Ark. 17.

[5] *Bower* v. *Daniel*, 198 Mo. 289; *Carle* v. *Miles*, 89 Kan. 540, Ann. Cas. 1915 A 363, and note. See also the note of the editor in Bigelow's Jarman on Wills, p. *18, and various definitions in *Limlock* v. *Bolin*, 169 Ky. 204.

[6] *In re Davis*, 120 N. C. 9 (1897); *Ginn* v. *Edmundson* (N. C., 1917), 91 S. E. 696.

no longer finds the difficulty of probating joint wills.[7] Strangely enough they had been recognized in England, six years before Lord MANSFIELD said they could not be, in the leading case of *Dufour* v. *Poreira*,[8] per Lord CAMDEN, and later English cases have followed Lord CAMDEN and not Lord MANSFIELD and Sir John NICHOLL.

The second difficulty found with joint wills may be mentioned, before we enter a discussion of our chief topic, and that lay in the conception of a will as an instrument strictly ambulatory until the death of the maker, and hence of necessity revocable at any time. A joint instrument, therefore, the early North Carolina court thought, could not be called a will.[9] But this was answered by Judge DANIEL, in his dissenting opinion, by saying that the joint will was revocable by any of the makers. Within limits it will appear that this is a fact. Perhaps the chief interest in this discussion attaches to wills outside those limits, *i. e.*, to wills which we shall see are now held to be irrevocable after the death of one of the testators, and the probating of his will and entering into the benefits of it by the survivor or survivors.

From the fact that joint wills are now everywhere recognized by the courts it does not follow that their course has been, or is now altogether smooth. Rather more than other wills they seem to have been the cause of uncertainty, long litigation, and often of failure to realize the undoubted intentions of the makers. Of such a fate they have, however, no monopoly, for between the efforts of the statutes to safeguard from fraud and knavery the final intentions of mankind, as to the after-disposal of the property they owned in life by requiring a valid will to be so executed that it cannot easily be attacked, and the ignorance of mankind, and often of their lawyers it must be confessed, of how to comply with such requirements, it too frequently happens that the evident intentions of testators painfully fail of realization.[10] This is to the lawyer mere commonplace, to the laity a scandal charged up against the law. So great has been the uncertainty of the fate of joint or mutual wills that the learned annotator, presumably Mr. FREEMAN, of *Robertson* v. *Robertson*,[11] in 136 A. S. R. 592, closes his elaborate and valuable discussion of what he calls "multi-wills" with a word of advice. The best way to

[7] *Belts* v. *Harper* (1884), 39 Ohio St. 639.

[8] 1 Dick. 420.

[9] *Clayton* v. *Liverman*, 19 N. C. 558. The Civil law prohibits reciprocal wills in one instrument. See 7 Mich. L. Rev. 318.

[10] See, for example, the fate of the will of the great and wise legal writer Sugden, Lord St. Leonards, *Sugden* v. *Lord St. Leonards*, 1 P. D. 154, which was so carefully guarded by the testator that it was never found, and Goods of Gunstan, 7 P. D. 102.

[11] 94 Miss. 645.

make one is—not to do it. Deeds, with reservations to the grantors of life interests are so much more simple, and, he thinks, adequate that the inquirer is advised against experiments with new devices. But deeds are deeds and cannot be recalled. If they can be they are not deeds. And wills are wills and may be changed, at least until the death of the first of two or more joint or mutual makers, and it often happens that husband and wife, and sometimes brothers and sisters, desire to make reciprocal provisions that shall provide for sudden, and perhaps simultaneous, death. Often this can be done by mutual wills, joint or separate, more fully and more effectually than by deeds. Lawyers naturally cling to the old, but there are times when the new is required, and the profession should be capable of using it safely, at least after so much of experiment as has already been made with joint and mutual wills.

Two illustrations taken from recent cases may illustrate their adaptability to needs. Charles Fowles and Frances, his wife, being about to sail on the Lusitania, and being reminded of the uncertainty of this life, made wills to provide for the disposal of their property in case they "should die simultaneously, or under such circumstances as to render it impossible or difficult to determine who predeceased the other", and still to provide for Frances if Charles should die and she survive. Their fears were realized. They were lost at sea on that memorable May 7, 1915, and there was no evidence as to who survived the other. They had in their wills told the courts what they wanted done in such case, and the courts did it, and fully carried out their desires. If Frances had survived she would have been provided for, and if she had died and Charles had lived he would still have had full control of his property. They had successfully provided for every contingency. They did not make mutual wills, and their provisions had a narrow escape, a vote of 4 to 3, in getting by the New York Court of Appeals.[12] They might safely have made mutual wills that in view of previous New York decisions could scarcely have been questioned. *Edson* v. *Parsons*[13] would have furnished a safe guide.

The other illustration will be taken from a case decided December 31, 1918, by the Supreme Court of Oregon.[14] George and Sally Myers, starting with youth and energy as their assets, by their joint labor and mutual abilities accumulated a substantial fortune, and raised to young manhood and womanhood a son and daughter,

[12] *Matter of Fowles*, (1918), 222 N. Y. 222.
[13] 155 N. Y. 555.
[14] *Stevens* v. *Myers*, 177 Pac. 37.

George and Georgia. Though both children were named after the father he had the deepest love for his wife, and the greatest admiration for her business ability. He consulted her in all things, and regarded their accumulations as due fully as much to her efforts as to his. Until her death in 1902 the Myers were a prosperous and a very happy family. Differences as to the medical care of the mother in her last illness resulted in bitter feeling and estrangement between the father and daughter, and at his death to litigation between the brother and sister extending from December, 1907, until December, 1918. The case was before the Supreme Court in February and July, 1912, on the question of the testamentary capacity of the testator when he made wills in 1902, practically disinheriting his daughter. She lost in this contest, and then attacked the wills of 1902 on the question of interest here, *viz.*, their validity in view of the previous mutual wills, not joint, of George and Sally. Beaten below, she appealed and evenly divided the Supreme Court on argument in June, 1915, and rearguments in September, 1917, and November, 1918, no decisions resulting. On December 31, 1918, one justice still dissenting, the Court decided for the contestant on the ground that the mutual wills of George and Sally, made in 1896, were based upon a valid agreement, the promise of each being consideration for that of the other, and after her death, the probate of her will, and his entering into enjoyment of the property under her will, he could not make another will and defeat their mutual provisions for the son and daughter.[15] Those who feel that he should not have been allowed after her death to defeat the provisions they had agreed upon will be impressed with the value of the mutual will for effectuating such a natural purpose. Those who would not see his hands so tied should study the case to see how easy it would have been to leave the survivor free had they so desired. The lessons of the case were costly to the litigants, but are *free to others confronted with similar problems.* It is hoped in the discussion to follow to show that, though the law in this field has been confused, it has now been sufficiently clarified so that there need be no more uncertainty in making mutual wills than in any others.

But first some clarifying definition will help clarify the law. Joint, double, reciprocal, mutual, are terms loosely used and much confused. A joint will has been defined as one in which the same instrument is made the will of two or more persons and is jointly signed by them.[16] It may be called double if it is merely the two or more

[15] *Stevens* v. *Myers* (Oregon, 1918), 177 Pac. 37.
[16] *Campbell* v. *Dunkelberger*, 172 Ia. 385; *Frazier* v. *Patterson*, 243 Ill. 80.

independent wills of the makers united in a single instrument. Such a will may be separately probated as the single will of each maker as he dies, provided he has not meantime made another will, or otherwise revoked this. It is treated like so many separate wills, and calls for no further notice.[17] Reciprocal wills, whether executed jointly or in separate instruments, are wills in which the makers dispose of the whole, or a portion, of their property for the benefit of the survivor, or survivors, either absolutely, or for life with remainder over to other persons named.[18] Such wills are commonly referred to as mutual, but it will help the present purpose to use the term "mutual wills" only in those cases where the devises are made, one in consideration of another, upon a "compact", as Lord CAMDEN called it. It is believed that such a distinction between wills that are reciprocal only and those based upon a mutual compact is not merely useful, but if it had always been made it would have saved much confusion. The cases it must be admitted use mutual to cover both classes,[19] which are here distinguished as respectively reciprocal and mutual. Joint and mutual are often spoken of as convertible terms,[20] and joint wills are said to make testamentary disposition of property held in common after the analogy of joint deeds,[21] or of property held jointly.[22] There seems to be no reason why any of these wills may not be used to dispose of property held in any manner, though if one party had no property at the time of executing the will it could not become effective as his will until he had property upon which it could operate. In the case of joint ownerships, as the property by law goes to the survivor, the will would have no effect on such property as the property of the one first dying.

Passing now to wills that are merely reciprocal, and not made under any compact, and for convenience considering that they are made by two parties, it is to be noted that such wills may be in two separate instruments, or they may be joint. In either case there may be probate upon the death of A as to his property, and if each has left all to the survivor, the second will falls for lack of a beneficiary.[23] The effect of such a will by husband and wife would be that if the survivor made no later will, then upon his or her death

[17] *Campbell* v. *Dunkelberger, supra. In re Cawley's Estate,* 136 Pa. 628; *Bower* v. *Daniel,* 198 Mo. 289.

[18] *Rastetter* v. *Hoenninger,* 214 N. Y. 66.

[19] *Bower* v. *Daniel supra; Deseumeur* v. *Rondel,* 76 N. J. Eq. 394; *Campbell* v. *Dunkelberger, supra.*

[20] *Hobson* v. *Blackburn,* 1 Add. 274; *Hershey* v. *Clark,* 35 Ark. 17.

[21] *In re Cawley's Estate,* 136 Pa. 628.

[22] *Deseumeur* v. *Rondel, supra.*

[23] *Anderson* v. *Anderson* (Ia., 1917), 164 N. W. 1042.

the whole property would be intestate and go exclusively to the heirs of the survivor, and this would certainly be the result if both die simultaneously, or substantially so, with the added embarrassment that it might be like the case of the Fowles on the Lusitania, and no one could know who survived. If they leave children as heirs this might be quite satisfactory, but if not it seems very unfair, especially when, as in the case of George and Sally Myers, he was the survivor, while the property from which they got their start came from her side of the house. The question did not arise there because they left children. The cure for this is for both to make identical disposition of the property to take effect upon the death of the survivor. However, they must not try to provide that the will shall not be effective until the death of both, for then it is the will of neither,[24] for a will must take effect presently upon the death of the maker, and cannot be put off till the death of some other person.

Reciprocal wills, then, whether joint or separate, are purely ambulatory, may be revoked by either party at any time, and if not so revoked are probated in turn as the single will of each, provided of course, there is any beneficiary named who may take upon the death of the last. The cases are so far agreed.[25] If the parties desire that the survivor shall be quite free to change the dispositions by making a new will, or by revoking the reciprocal will, then reciprocal wills either joint or separate, and in identical language except for the names of the makers, are admirably suited to the purpose. They should be so drawn as to negative upon their face the idea that they are on a compact to make mutual wills, the promise of each being consideration for the other. Proof of this should not be left to parol or to extrinsic evidence.

We now turn to consideration of mutual wills, as heretofore defined. Here is always a compact, and the evidence of this compact should be, but often is not, a clear statement in the will itself. Failure to make such a statement in the will caused the dissenting views of the judges in *Stevens* v. *Myers*, and possibly defeated the intentions of the testators in a large portion of the cases in which it seems probable, but not certain, that the parties did mutually agree to make the dispositoins in their reciprocal wills.[26] That it is lawful to contract to make a will is undoubted, and equity will enforce such agree-

[24] *Re Raine*, 1 Sw. & Tr. 144; *Gerbrich* v. *Freitag*, 213 Ill. 552; *Hershey* v. *Clark*, 35 Ark. 17. But a will vesting all in the survivor on the death of the first, with full power of disposition, and upon the death of the survivor in trustees for 15 years is good. *Brown* v. *Brown*, 101 Kan. 335.

[25] *Hoffert's Estate*, 65 Pa. Super. Court, 515.

[26] See *Edson* v. *Parsons*, 155 N. Y. 555; *Rasteller* v. *Hoenninger*, 136 N. Y. S. 961, aff. 142 N. Y. S. 962, and dissenting opinions, *Wanger* v. *Marr*, 257 Mo. 482.

ments, and impose a trust upon the property upon the death of the promissor.[27] And that such agreements may be contained in joint and mutual wills is no longer doubted, as will appear from the cases about to be discussed.

The effect of making mutual wills, upon a valid and mutual consideration for the agreement, is that after one party has died, the mutual wills being still in force, and the other has probated the will of the deceased and accepted benefits under it, and the facts are proved by competent evidence, the wills become irrevocable by the survivor, and upon his death equity will enforce the agreement on behalf of a third party who is a beneficiary under the mutual wills.[28] Acordingly, in *Stevens* v. *Myers*,[29] the daughter was decreed to be entitled to one-half the estate left by George T. Myers, and the decree of the court below in favor of his later will was reversed, BURNETT, J., dissenting, not on this principle of law, but on the lack of sufficient evidence in the case. "The first that dies carries his part of the contract into execution. Will the court afterwards permit the other to break the contract? Certainly not." So said Lord CAMDEN, in *Dufour* v. *Pereira*,[30] and so say the courts generally, when a compact is shown.[31] Having left such a will clearly worded, the one first to die may rest peacefully content, knowing that no after events can deprive of the benefits of the mutual wills those who have been objects of the solicitude of the makers. Only the will must on its face, show the compact. If proof of this rests on extrinsic evidence, the estate may be spent in litigation and the beneficiaries be long deprived of the benefits intended, because the makers of the wills left to the unreliability of the memories of witnesses and the uncertainties of trials of facts the determination of what should have appeared in plain language on the paper they executed.

Death by one and acceptance by the survivor of the benefits under the will is part performance taking the promises out of the Statute of Frauds.[32] But an oral promise to make mutual wills is within the Statute so long as both parties are alive. Hence either party may revoke such mutual will by making a second will.[33] More-

[27] *Gordon* v. *Spellman*, 145 Ga. 682, Ann. Cas. 1918 A 852, and note; *Carmichael* v. *Carmichael*, 72 Mich. 76; *Howe* v. *Watson*, 179 Mass. 30; *Rasteller* v. *Hoenninger*, 214 N. Y. 66, 7 Mich. Law Review, 318.

[28] *Frazier* v. *Patterson*, 243 Ill. 80; *Campbell* v. *Dunkelberger*, 172 Ia. 385.

[29] 177 Pac. 77.

[30] 1 Dick. 419.

[31] *Edson* v. *Parsons*, 155 N. Y. 555; *Campbell* v. *Dunkelberger*, 172 Ia. 385; *Prince* v. *Prince*, 64 Wash. 552; *Bower* v. *Daniel*, 198 Mo. 289.

[32] *Carmichael* v. *Carmichael*, 72 Mich. 76; *Larrabee* v. *Porter*, (Tex. Civ. App.) 166 S. W. 395.

[33] *McClanahan* v. *McClanahan*, 77 Wash. 138.

over, apart from the Statute of Frauds, it is undoubted law that for lack of consideration either may revoke while both are alive, provided notice be given to the other party.[34] The purpose of notice is to give the other party opportunity to alter his will also. It follows that when there is no prejudice to the other either may revoke without notice.[35] Accordingly if one secretly revoke his will, and die first, this is a good revocation because the survivor still is free to revoke likewise.[36] In Arizona, under the statute making marriage a revocation of a prior will, it has been held that a second marriage of the survivor revokes his mutual will made under an agreement with his first wife.[37] This seems doubtful construction of the statute. Would the same result follow if he had made a contract to make a certain will?[38] Certainly, if the will be reciprocal merely, and not based on a compact, either may revoke his will while both are alive, and the survivor after the death of the first.[39]

The seeming confusion in the cases on mutual wills is due principally to one of two causes: (1) Dissent as to what circumstances establish a compact. (2) Disagreement as to the remedy for breach of the compact.

1. The case of *Stevens* v. *Myers,* well illustrates the first. In this case the wills were not joint, but the separate wills of Mr. and Mrs. Myers were identical except for transposition of their names, and the nouns "husband" and "wife" and the pronouns referring to them. Did they make these reciprocal wills upon mutual promises and a compact? The language of the wills does not expressly say. The only evidence is the fact of the wills themselves, and the lawyers' recollection, after 16 years, of their instructions to him as to the drawing of the wills. This amounted to little more than that they told him they had talked it over and come to the agreement to make the wills, each leaving all to the survivor, and then to the son and daughter equally. The daughter, Georgia, contended that the wills were mutual, and that upon the death of the mother, and the probate of her will and the taking under it by the surviving husband his will became irrevocable. The majority of the court held that the mere making of two such wills, under all the circumstances

[34] *Rastetter* v. *Hoenninger,* 214 N. Y. 66; *Anderson* v. *Anderson* (Ia., 1917), 164 N. W. 1042; *Dufour* v. *Pereira,* 1 Dick. 419.

[35] *Stone* v. *Hoskins,* 1905, P. 194.

[36] *McClanahan* v. *McClanahan, supra.*

[37] *Estate of Anderson,* 14 Ariz. 502.

[38] *In re Anderson,* 16 Ariz. 185 seems to impress the property taken by the survivor with the trusts of the will, and largely neutralizes 14 Ariz. 502, by admitting the joint will to probate as the will of the first wife.

[39] *Ginn* v. *Edmundson* (N. C., 1917), 91 N. E. 696.

of this case and the relationship of the parties, was sufficient evidence of the compact to make them. BURNETT, J., dissented because he thought the facts failed to establish such a compact.[40] In *Frazier* v. *Patterson*,[41] it was held that a joint and mutual will by husband and wife, leaving property to the survivor for life, and, after the decease of both, to their daughter and her heirs, proved a compact to make a will, each for and in consideration of the will of the other. What better evidence could there be than "what the parties did?" After the husband's death the wife attempted to make another will. The court held that she could not then revoke the mutual will.

Bower v. *Daniel*[42] has been supposed to stand for the same doctrine as to proof of compact, but this is expressly disapproved in *Wanger* v. *Marr*,[43] on the ground that wills being in their nature ambulatory and revocable at any time during the life of the testator, an agreement not to revoke must be established by the most clear and satisfactory evidence, for it goes in the face of the writing and is inconsistent with its nature.[44] LAMAR, J., in concurring in the result well says that if the rule upon this point in the *Bower-Daniel case* was obiter, then this is obiter against obiter, for it is not a case of a joint will at all. This obiter, therefore, avails nothing. In the leading case of *Edson* v. *Parsons*,[45] the court points out that it might be inferred from the making of similar wills that the sisters had such a common interest and purpose that they simultaneously executed their wills to carry out those purposes, or that they made these wills under a mutual contract to do so. (Truly it might.) But they might have made them with no idea of a compact. Whether they did the one or the other is not a question of law, but of fact, and the proponent of the will must make a conclusive case of agreement. Equity will not enforce without full and satisfactory proof. To argue that the fact that the wills are similar (identical?) shows that they are mutual begs the question.

It is certainly a highly technical view, and reason is with the *Frazier-Patterson case*, especially when the wills are joint, and also when they are separate, but the evidence is clear that both parties were fully cognizant of the identical and reciprocal provisions of the

[40] Compare dissenting opinions in *Rastetter* v. *Hoenninger*, 136 N. Y. S. 961, aff. 142 N. Y. S. 962, and 214 N. Y. 66.

[41] 243 Ill. 80, 27 L. R. A. (N. S.) 508, and extended note. See also *Campbell* v. *Dunkelberger*, 172 Ia. 385.

[42] 198 Mo. 289.

[43] 257 Mo. 482.

[44] Citing the leading case of *Edson* v. *Parsons*, 155 N. Y. 555, and other cases.

[45] 155 N. Y. 555.

two wills. That two such wills should have been so drawn, at the desire of both parties, except in carrying out an agreement seems most unlikely. There being nothing in law or public policy against the making of such wills, they should when made be readily enforced like other agreements, and upon the same quantum of proof.[46] Of this supposed essential quality of wills more will be said presently.

2. The second cause of confusion as to upholding mutual wills is due to the distinction, of which many courts make much, between probating a paper as a will, and in equity giving a remedy for breach of a compact evidenced by a paper testamentary in its nature. Even in *Hobson* v. *Blackburn*,[47] in which Sir John NICHOLL said a joint will was unknown to testamentary law, he admitted that there might be a valid "compact." Most courts have preferred to give the equitable remedy, possibly because of the separation between courts of probate and of equity, with a separating of questions that could be raised in each which is largely modified in the United States where appeal commonly lies from probate courts to the ordinary courts of law and equity.[48]

This is a needless beating about the bush, and doing by indirection what might better be done directly. Why send the party out of the probate court into equity when he has a will that equity will protect as a compact? If the will cannot be revoked, why not probate it, and refuse probate to the later instrument? Is the irrevocable instrument not the "last will", the only "legal will"? It seems done only to save the doctrine that wills are essentially revocable.[49] And so they are unless the testator has legally bound himself not to revoke. A power of attorney is in its nature at the will of the principal, and revocable at his whim, but he may so bind himself that the law will not permit him to exercise his whim in his life, nor will his death effect a revocation.[50] So of a will. Why should not the law say, when a testator has legally agreed not to make another will, that that will is his last will, and the one to be probated, and no other is his will?[51] Such seems to be the view of the *Frazier-Patterson case* and it seems very good sense. However, a majority of the courts still prefer some equitable remedy, such as impressing a trust upon

[46] As to the friendly attitude of courts toward such wills see *Larrabee* v. *Porter* (Tex. Civ. App., 1914), 166 S. W. 395, affirming a judgment of the trial court admitting the mutual will to probate; *Moore* v. *Moore* (Tex. Civ. App., 1917), 198 S. W. 659; *Carle* v. *Miles*, 89 Kan. 540.

[47] 1 Add. 274.

[48] See *Rastetter* v. *Hoenninger*, 214 N. Y. 66, and the note in 27 L. R. A. (N. S.) 508.

[49] *Dick* v. *Cassels*, (1914), 100 S. C. 341. The South Carolina Courts have made much of this.

[50] *Hunt* v. *Rousmaniere*, 8 Wheat. 201.

[51] *Baker* v. *Syfritt*, 147 Ia. 49, 56, 57.

the property,[52] or making the heir or executor of the later will a trustee,[53] but deny the right of probating the will.[54] As enforcement is a matter of equity equitable principles govern, and a mutual will cannot be enforced against the survivor if the consideration was inequitable, unjust and inadequate.[55]

This review of the cases seems to show that it is no longer true that there is much confusion about mutual wills, except when there is confusion in the wills. If they clearly, in terms, express whether they are mutual, or reciprocal merely, the courts everywhere recognize them, and either in probate or in equity carry them out. To carry out the purpose of George and Sally Myers, and of many others similarly situated, nothing seems so fully suited as mutual wills, and if they had expressly stated whether they were to be mutually binding the court would not have divided and a decision would have been reached on the first hearing. Mutual wills, whether joint or separate, may fairly be said to have passed the experimental stage. They are now as fully recognized, and as safe as instruments for the realization of testamentary desires as other wills, and if properly worded, they enable the one first dying to make sure that after-events shall not deprive of benefits those who are the objects of the love and solicitude of the testator. They deserve a more liberal attitude on the part of legal advisers and of the courts.

EDWIN C. GODDARD.

University of Michigan.

[52] *Rastetter* v. *Hoenninger*, 214 N. Y. 66, aff. on this, 142 N. Y. S. 962.
[53] *Stone* v. *Haskins*, 1905 P. 194. See also *Prince* v. *Prince*, 64 Wash. 552.
[54] *In re Sandberg's Will*, 134 N. Y. S. 869.
[55] *Rice* v. *Winchell* (Ill., 1918), 120 N. E. 572.