

University of Michigan Law School

## University of Michigan Law School Scholarship Repository

---

Articles

Faculty Scholarship

---

1909

### The Public Policy of Contracts to Will Future Acquired Property

Joseph H. Drake

*University of Michigan Law School*

Available at: <https://repository.law.umich.edu/articles/1164>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



Part of the [Civil Law Commons](#), [Contracts Commons](#), [Estates and Trusts Commons](#), and the [State and Local Government Law Commons](#)

---

#### Recommended Citation

Drake, Joseph H. "The Public Policy of Contracts to Will Future Acquired Property." Mich. L. Rev. 7 (1909): 318-29.

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](mailto:mlaw.repository@umich.edu).

## THE PUBLIC POLICY OF CONTRACTS TO WILL, FUTURE ACQUIRED PROPERTY

THE general subject of wills upon consideration seems to have given courts and jurists a good deal of trouble, not only in England and America, but also in the continental countries. The Code Napoleon appears in terms actually to prohibit the making of reciprocal or mutual wills in the same instrument.<sup>1</sup>

This has been copied in the Spanish Civil Code of 1889,<sup>2</sup> and transferred thence into the Porto Rican Code.<sup>3</sup> This provision of the Code Napoleon appears in the Louisiana Civil Code also.<sup>4</sup> In each of these cases, however, the prohibition seems to be aimed simply at the form of the will; *i. e.*, the making of a reciprocal or joint will in the same instrument, the penalty for the violation of which would be the nullity of the instrument as a will,<sup>5</sup> leaving open the question as to what legal value it might have, if any. That this is the interpretation put upon Article 1572 (1565) of the Louisiana Civil Code by the courts of Louisiana is quite evident from the several decisions on the subject of joint or reciprocal wills.

In the case of *Bernard Heirs v. Soule*,<sup>6</sup> it was held that a reciprocal will by a husband and wife, with provision for the remainder over, if any, to the heirs of both at the death of the survivor, conveyed absolute ownership to the wife on the death of the husband. The question as to the effect of the prohibition of reciprocal or joint wills in Art. 1572 (1565) was not brought up in the case, probably because the property had vested in the wife in 1790, some years before the adoption of the Louisiana Civil Code of 1808, which had borrowed this provision from the Code Napoleon. In the case of *Orelina v. Heirs of Haggerty*,<sup>7</sup> the will of John Haggerty was declared null and void because it was contrary to Art. 1565, there being incorporated in the same instrument the will of his wife. In *Wood et al. v. Roane*,<sup>8</sup> it was decided that where the will of the husband and the will of the wife, or those of any two persons, are written out by the same party on the same day, in favor of the same ben-

---

<sup>1</sup> Un testament ne pourra être fait dans le même acte par deux ou plusieurs personnes, soit au profit d'un tiers, soit à titre de disposition réciproque et mutuelle. Cod. Nap. 968.

<sup>2</sup> See Cod. Civ. 669.

<sup>3</sup> P. R. Civ. Code, 667.

<sup>4</sup> La. Civ. Code 1573 (1565). RECIPROCAL OR MUTUAL TESTAMENTS PROHIBITED. A testament can not be made by the same act, by two or more persons, either for the benefit of a third person, or under the title of a reciprocal or mutual disposition.

<sup>5</sup> Cf. Cod. Nap. 1001, 1097.

<sup>6</sup> (1841), 18 La. 21.

<sup>7</sup> (1857), 12 La. Ann. 880.

<sup>8</sup> (1883), 35 La. Ann. 865.

eficiary, and are presented by the testators separately to the required number of witnesses with the proper statement, at different times though on the same day, they constitute two disconnected, distinct, and independent acts, and are not amenable to the prohibitions contained in Art. 1572 (1565) of the Civil Code.

It is evident that neither of these cases gives us any light on the question as to how a testament made on consideration of a reciprocal testament or for other consideration, would be treated by the courts.

In the case of *Fuselier v. Masse*,<sup>9</sup> the plaintiff claimed all the property of which the father and wife [the plaintiff's stepmother] died possessed in virtue of a notarial act, by which they adopted him as their child. This act appears to have been executed before the commandant of Opelousas on the first of June, 1799. The parties declare that not having children by their marriage \* \* \* they adopt the father's natural son Pierre, with all the rights which that quality can confer on him; and that they institute him their only and universal heir after their death, of all their present and future property; only requiring in return that he will assist them and not abandon them for the remainder of their lives. This instrument was revoked as to the wife's share by a subsequent will of the wife. There was an attempt to show that the donation was made on certain conditions, and that the donee had performed them, but the evidence was held insufficient to establish the contention of the plaintiff, and the devisees of the wife were given her share of the property. It is manifest that we have here a contract to leave all present and future acquired property, on consideration of the son's promise to care for the adoptive parent until her death, and that it fails *as a contract* because of the failure of the plaintiff to prove that consideration was actually executed. When an alleged contract to will all came thus squarely into conflict with a subsequent testament attempting a revocation of the contractual instrument, the will prevailed, not because of the superior strength of the testamentary instrument as such but because the compact lacked one of the essential elements of a perfect contract.

In connection with these cases from Roman-American law a case may be noted, which arising in Roman-Dutch jurisdiction (Cape of Good Hope), was transferred thence to the English Privy Council.<sup>10</sup>

A mutual will had been made by a husband and wife and, after the death of the husband, the wife attempted to revoke it so far as it affected her property. The Privy Council held that unless she had elected to take under the mutual will her revocation was good. The higher court was led to this conclusion in spite of the decision

<sup>9</sup> (1832), 4 La. 423.

<sup>10</sup> *Denyssen v. Mostert* (1872), L. R. 4, P. C. 236.

in *Dufour v. Pereira*<sup>11</sup> because this seemed to be firmly established Dutch law. The court says "Bynkershoek, indeed, speaks with strong disapprobation of abuses of the law, not infrequent in his time, whereby one co-testator, whose testamentary dispositions had been the consideration of those of the other, revoked his part of the will without communicating with his co-testator; but Bynkershoek treats the right to do this by law as clear, nor can it be doubted that that great judge and jurist would have deemed himself bound to give effect to the law as he had laid it down, whatever may have been his opinion of its policy. Their Lordships have but one duty—to declare what they deem to be the law." The well established principle of Dutch law followed in this decision was that "adiation or reception of benefits is treated as one of the conditions without which a surviving spouse is not deprived of the power of revocation." Since the widow had not elected to take under the will she might repudiate by subsequent will, after the death of her husband, the agreement in the mutual will.

In the early English cases there seems to be a wavering of opinion on the part of the courts as to whether joint wills, either for mutual benefit of the parties or for a third party, could be considered as wills at all; with, of course, varying decisions as to what force such instruments should have, if they were denied validity as wills.<sup>12</sup> The mental confusion of the courts in the earlier cases seems to depend on the fact that they put testament and contract in opposition to each other, and either explicitly argue or subconsciously feel that the two can not exist together. A will is a unilateral juristic act, a contract is essentially bilateral. The essence of a will is its revocability at the desire or whim of its maker, a contract is irrevocable by one of the parties. The legality of a will depends upon its form; of a contract, upon the consideration. Then further, while an instrument fulfilling all the characteristics of a will might be *made* jointly, the joint *operation* of the wills of the two parties incorporated in the document would be conditioned on the very great improbability, amounting to a practical impossibility of the deaths of the two parties happening at the same instant. It is this feeling of the legal incompatibility of a will and a contract that seems to be back of the statements of the courts in *Darlington v. Pultney*,<sup>13</sup> to the effect that "there can not be a joint will," and in *Hobson v. Blackburn*,<sup>14</sup> that

<sup>11</sup> Cf. *infra* Notes 15 and 48.

<sup>12</sup> See the historical note by Bigelow, in Jarman, *Wills*, Ed. 6, Vol. 1, p. 27, Note 1. Also an elaborate note by C. W. Conrad on Contracts Limiting Disposition of Property by Will, *Law Reg.* XXXIII, pp. 32-40, and an article by Mary M. Bartelme on Contracts to Make Wills, *Law Reg.* XXXIII, pp. 721-728.

<sup>13</sup> (1775), 1 *Cowp.* 268.

<sup>14</sup> (1822), 1 *Addams* 274.

"an instrument of this nature [a mutual or conjoint will] is unknown to the testamentary law of this country." The subsequent cases that follow these as precedents simply repeat their reasoning on the intrinsic antagonism of the two concepts.<sup>15</sup>

In the line of cases upholding the joint or mutual wills, beginning in the middle of the eighteenth century,<sup>16</sup> the decisions all rest upon the assumption that when the will and the contract come into conflict, the latter must prevail, and the variations in the findings, if they appear at all, depend upon the nature of the contract itself or its method of enforcement. If the terms of the agreement are clear, certain and fair, it will be enforced as a contract and the method of its enforcement will depend not upon the testamentary character of the instrument but upon its contractual nature. In other words, the statements in the older English decisions about the invalidity of mutual or joint wills mean just what the provision in the continental codes upon the subject mean; namely, that while documents purporting to be joint or mutual wills may be unenforceable as testaments they may be enforced as contracts, if they meet contractual requirements. "The unsettled state of the law in regard to joint and mutual wills and contracts to make wills" spoken of in some comparatively recent cases or recent text-books<sup>17</sup> does not exist in any such general sense as was one time the case, and the attempt will be made in the further progress of this paper to show that the few minor points in this field as to which the courts are still in apparent conflict, may be settled by further progress along the logical line that has been followed in the past.

The two points upon which the courts are still in conflict are: (1) Is a contract to will all property [future acquired as well as presently held] valid? (2) To what extent will the Statute of Frauds interfere with the operation of such contracts? This question usually presents itself in one of two forms: (a) What is sufficient part-performance by the plaintiff to take the case out of the statute? (b) Is a will such a writing as will satisfy the statute?<sup>18</sup>

The contracts to will *all* seem to have been called in question for reasons similar to those that in the earlier litigation made contracts to will simply of doubtful expediency, but they have been decided

<sup>15</sup> See the discussion of *Hershey v. Clark*, post; and *Clayton v. Liverman* (1837), 2 Dev. and Bat. 558; reversed in *In re Sutton Davis's Will* (1897), 120 N. C. 9.

<sup>16</sup> Cf. *Dufour v. Pereira* (1769), 1 Dick. 419. *Isard v. Middleton* (1785), 1 Desau (S. C.) 115, is sometimes quoted as sanctioning mutual wills, but the mutual agreement to make wills was not enforced in that case because of lack of sufficient proof. The case depends upon the Statute of Frauds, as is shown by the citation in *Turnipseed v. Serrine* (1899), 57 S. C. 577.

<sup>17</sup> Cf. *Schouler, Wills*, § 457.

<sup>18</sup> The first question will be discussed in the present paper, reserving the consideration of the second question for a later issue.

usually in accordance with the general principles of contract. An agreement to make mutual wills of all property held by the contracting parties has been declared good in New York and Arizona<sup>19</sup> simply because they were good as contracts. They have been held bad in New York, in District of Columbia and in Texas,<sup>20</sup> for the reason that the contract as such was not adequately proved. The contract to will all may be implied.<sup>21</sup> Such contracts have been denied validity because of lack of certainty in their terms in New York, Pennsylvania, South Carolina and Missouri.<sup>22</sup> In the case of *Ripson v. Hart*, the court, by DUNWELL, J., does to be sure say that such a contract has not been supported by the courts of equity in New York because "it permits deceased to possess, control and absolutely dispose of his property so as to divest himself of all title thereto, during his life if he saw fit, leaving it uncertain whether he would have any property at his death." The case, however, was not decided on the score of its uncertainty in any such general sense, but because of its specific uncertainty arising from the fact that the evidence was not sufficient to establish the contract. On the other hand, the courts of South Carolina and of Indiana have upheld the validity of contracts of a character identical with those above cited which were, however, certain in their terms and proved by sufficient evidence.<sup>23</sup>

The evidential value of the fact of possession by the promisee as proof of the agreement has the same value in the contracts to will all as in ordinary contracts; *i. e.*, the fact of possession is evidence of part performance of parol agreement to leave real estate.<sup>24</sup>

The difficulty in acknowledging the validity of contracts to will all seems to have been more prominent in those cases in which disposition was made of future acquired as well as of presently held property, but the tendency of the decisions is pronouncedly in favor of such contracts.<sup>25</sup>

<sup>19</sup> *Everdell v. Hill* (1899), 58 N. Y. Supp. 447; *Eldred v. Warner* (1875), 1 Ariz. 175.

<sup>20</sup> *Edson v. Parsons* (1898), 155 N. Y. 555; *Coveney v. Conlin* (1902), 20 App. D. C. 308; *Wyche v. Clapp* (1875), 43 Tex. 245.

<sup>21</sup> *Burdine v. Burdine* (1900), 98 W. Va. 515; *Teske v. Dittberner* (1903), 70 Neb. 544, 98 N. W. 57; *Wright v. Wright* (1894), 99 Mich. 170, 23 L. R. A. '96, 58 N. W. 54; *Edson v. Parsons*, *supra*.

<sup>22</sup> *Ripson v. Hart* (1901), 64 N. Y. App. Div. 593; *Wilson v. Heath* (1898), 23 Misc. 714; *In re Eldred's Estate* (1900), 9 Pa. Dis. R. 420; *McKegan v. O'Neil* (1884), 22 S. C. 454; *Steele v. Steele* (1901), 161 Mo. 566.

<sup>23</sup> *Bruce v. Moon* (1900), 57 S. C. 60, 35 S. E. 415; *Garard v. Yeager* (1900), 154 Ind. 253; *Cf. also Sutton v. Hayden*, 62 Mo. 101.

<sup>24</sup> *Best v. Grolapp* (1904), 96 N. W. 641; (Nebraska) affirmed on rehearing 99 N. W. 837; *Leonardson v. Hulin* (1887), 64 Mich. 1; *McCabe v. Healy* (1902), 138 Cal. 87, 70 Pac. 1008; *Schmitt v. Missionary Society* (1886), 41 N. J. Eq. 115, 3 Atl. 398; *Sutton v. Hayden* (1876), 66 Mo. 101; *Tuitt v. Smith* (1890), 137 Pa. St. 35, 20 Atl. 579.

<sup>25</sup> *Hanly v. Hanly* (1905), 93 N. Y. Supp. 864, 105 App. D. 335; *Heath v. Heath* (1896), 42 N. Y. Supp. 1087, 18 Misc. Rep. 521; *Johannes v. Martin* (1897), 48 N. Y. Supp. 102, 22 App. Div. 561; *In re Wescott*, 54 N. Y. Supp. 545, 34 App. Div. 239;

The Minnesota court in the case of *Kleeberg v. Shrader*, supra (Note 25), went so far as to say that under a contract to dispose of all of an estate remaining at the death of the promisor, personal property to which she became entitled after the making of such contract will pass, though not distributed at the time of her death nor in contemplation of the parties when the contract was made. The Pennsylvania court, in the case of *In re Lewallen's Estate*, supra, (Note 25), held that a contract should be enforced, by which a father agreed to will all to his daughters on consideration of their giving up their interest in their mother's estate. On the other hand, the cases in which the courts have refused to enforce contracts to leave subsequently acquired property have really been decided on some other score than the unadvisability of binding the contracting parties in regard to future acquisitions. For example the case of *Austin v. Davis*<sup>26</sup> goes off on a question involving the Statute of Frauds. *Emery v. Burbank*<sup>27</sup> in a similar manner involves the Massachusetts Statute of Wills. The Missouri court in the case of *Davis v. Hendricks*<sup>28</sup> holds an alleged contract of this nature unenforceable, but simply because of failure of evidence to prove the contract.

In the practical decision of hard cases; *i. e.*, cases in which there is a conflict between previously enunciated law or its logical application and the feeling of what is just under the particular circumstances, the courts of the present day are apt to invoke the *deus ex machina* of "public policy" just as those of a past generation appealed to "natural law," and it may be worth while to examine the cases in detail in which "public policy" has been called to the aid of the courts, to determine, if possible, whether the decisions may be put on some less equivocal basis.

One of the strongest cases holding that the contract to will all is unobjectionable is the recent case of *Howe v. Watson*.<sup>29</sup> A woman 85 years old offered in writing to give her sister all the property she would leave at her decease, if the sister and her daughter would come and stay with her during the remainder of her life. The younger sister accepted, and came with her daughter from Florida to Massachusetts. They stayed with the older sister until her death which occurred only thirty-eight hours after their

---

*In re Lewallen's Estate* (1905), 27 Pa. Sup. Ct. 320; *Kleeberg v. Shrader* (1897), 72 N. W. (Minn.) 59; *Svanberg v. Fosseen* (1899), 75 Minn. 350, 78 N. W. 4; *Laird v. Vila* (1904), 100 N. W. (Minn.) 656; *Nowack v. Berger*, 133 Mo. 24, 34 S. W. Rep. 489, 31 L. R. A. 810; *Kofka v. Rosicky* (1894), 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207; *Whiton v. Whiton* (1899), 179 Ill. 32, 53 N. E. 722.

<sup>26</sup> 128 Ind. 473.

<sup>27</sup> 168 Mass. 326.

<sup>28</sup> 99 Mo. 478.

<sup>29</sup> (1901), 179 Mass. 30.

arrival. She died intestate, leaving real property to the amount of about \$4,000 and personalty to the amount of about \$2,000. The court held that this contract was fair and equitable in all respects, and specific performance of the contract was allowed in spite of the impossibility of mutuality in the enforcement of that right, owing to the death of one of the parties, on the principle that actual performance is as good as an obligation to perform. There is no hint in the opinion of the court in this case that the enforcement of such a contract is in any particular contrary to public policy, but the positive statement that "it is competent for a party to stipulate for the disposition of his property at the time of his decease." The same court had gone even further in *Krell v. Codman*<sup>30</sup> saying there that the enforcement of such a covenant under seal, though without consideration "is not contrary to the policy of our laws."<sup>31</sup> The Alabama court<sup>32</sup> says there is "nothing repugnant to public policy" in a written instrument purporting to be a will by which decedent agreed to pass all her property to the plaintiffs "in consideration of past and future treatment." The New York court<sup>33</sup> attempted to avoid this bugaboo of public policy, in a case where the intestate with the consent of his wife had entered into an agreement to make the child of a widow his heir and to "give him the same interest which a son would have in whatever property he owned or might have at the time of his decease." Intestate had no children or descendants living at his death. The court in deciding this case said that this contract was "not obnoxious to the criticism that it was against public policy," because as a matter of fact it did not require the decedent to give all his property to the plaintiff to the exclusion of his own children. There was a like implied argument against the public policy of such contracts in the case of *Ripson v. Hart*, supra, but the case went off on another point.

The cases of *Owens v. McNally* and *Hershey v. Clark*<sup>34</sup> are ordinarily quoted<sup>35</sup> as denying the validity of contracts to will all property to be held at the death of the decedent, but a careful examination of these cases shows that the first can hardly be quoted as authority for this proposition, and in the second case the argument of the court is based on some of the older cases, in which the logical

<sup>30</sup> (1891), 154 Mass. 457.

<sup>31</sup> Cf. also *Jenkin v. Stetson* (1864), 9 Allen (Mass.) 128, 132; *Wellington v. Apthorp*, 145 Mass. 69; *Schmitt v. Missionary Society*, 14 Stew. 115. But see *Richardson v. Ortho* (Or. 1901), 66 Pac. 925.

<sup>32</sup> *Bolman v. Overman* (1886), 80 Ala. 451.

<sup>33</sup> Cf. *Gates v. Gates* (1898), 34 App. Div. 600, 54 N. Y. Supp. 454.

<sup>34</sup> (1896), 113 Cal. 444; (1879), 35 Ark. 17.

<sup>35</sup> *Rood, Wills*, § 53, Note 18; Cf. *Underhill, Wills*, § 292, Note 3; *Schouler, Wills*, § 459, Note 6; also p. 506, Note 1.



confusion of contract and will influenced the decision. In the first case an uncle made a parol contract with his niece to come "and live with him and care for him," on condition that he would bequeath to her all the property which he might own at his death. He married before his death, his wife being ignorant of the contract. The court said that this contract was not so "definite and certain and just" as to call for specific performance. In arguing the question of public policy the court said "this contract was not void as against public policy at the time it was entered into." That is, a contract to will all property to be held at death is not, as such, obnoxious to public policy. But in the further argument of this point the court says, "it must have been within the contemplation of the parties that Lawrence McNally should marry, for the contract could not have been designed as a restraint on marriage, or it would be void. If it was within their contemplation, and the contract embraced the taking of the deceased's entire estate to the exclusion of any future wife or child, then we have no hesitation in saying that the contract was void as against public policy."

It should be noted here that the "public policy" to which this contract is obnoxious is not the public policy which forbids the contract to will all, but it is that familiar public policy which prohibits a contract tending to act as a restraint on marriage.

The subsequent use of the decision in this case by the California court makes plainer its true meaning. The California court says in a later decision,<sup>36</sup> "there is no question but that a man may make a valid agreement binding himself to dispose of his property by last will and testament in a particular way, and a court of equity will under certain circumstances enforce such an agreement," quoting in this connection *Owens v. McNally*, supra. This court also held that the former adjudication<sup>37</sup> against the enforcement of the contract by the uncle to will property to the niece, was not a bar to the enforcement of the executed gift of land made to her by the uncle in his life time. The same court quotes the original decision in *Owens v. McNally* as authority for the enforcement of a contract made by an intestate, entitling a claimant under this contract to all the property remaining in the hands of the administrator after paying the debts of the deceased.<sup>38</sup> In the final stage of this litigation in regard to Healy's estate the court held that, "if the deceased Matthew Healy, for an adequate consideration, agreed to leave a will upon his death, by its terms giving all of his estate to the plaintiff, and he died without

<sup>36</sup> *Russel v. Agar* (1898), 121 Cal. 398.

<sup>37</sup> *Owens v. McNally* (1899), 124 Cal. 30; Cf. *Owens v. McNally* (1896), 113 Cal. 444.

<sup>38</sup> *Estate of Healy* (1902), 137 Cal. 478.

leaving such a will; and, if plaintiff can not be placed *in statu quo*, and the failure of the deceased, Healy, to leave the will as agreed works a fraud upon the plaintiff, and the granting of equitable relief to the plaintiff would not work a gross injustice upon innocent third parties, then a court of equity will enforce Healy's agreement by declaring his heirs constructive trustees of the title cast upon them by reason of his dying intestate."<sup>39</sup> In a dissenting opinion to this last case VAN DYKE, J., says that this case is distinguished in the majority opinion, from the McNally case, by the "fact that McNally married and Healy did not \* \* \* and that though the court was right in denying specific performance there, the contract should be specifically enforced here."<sup>40</sup>

It is evident from an examination of these later California cases that this court is in accord with the majority of other courts in holding that a contract to will all is not as such contrary to public policy, but may be specifically enforced, if as a contract it has in other respects the characteristics which justify specific enforcement. In a very recent California case<sup>41</sup> an agreement by the deceased to convey "all the property of which she might die seised or possessed" was upheld by the Supreme Court, although some of the property had neither actual nor potential existence at the time of the agreement.

This practically leaves the Arkansas court<sup>42</sup> alone in the statement that "it is unreasonable and against public policy, that one should be allowed by an irrevocable contract, \* \* \* to denude himself \* \* \* of all he may afterwards acquire," and an examination of this decision will show that owing to the facts of the case and the peculiar basis upon which the argument of the court proceeded, the case can hardly be taken as establishing the principle in the broad form in which it is stated.

Abram and Aaron Clark, two brothers, both unmarried, entered into a mutual obligation under seal, of the following form: "Wherefore the said Abram Clark, for the consideration hereinafter mentioned, hereby gives and grants to the said Aaron Clark, at the death of the said Abram (should the said Abram die before the said Aaron), all his property, real and personal, which he may now have, or which he, the said Abram, may have at the time of his death, to have and to hold the same to his heirs forever." Aaron on his part, and in like language, conveyed all his interest present and prospective;

<sup>39</sup> McCabe v. Healy (1902), 138 Cal. 85.

<sup>40</sup> McCabe v. Healy (1902), 138 Cal. 96; Cf. Bell v. Wyman (1905), 147 Cal. 515.

<sup>41</sup> Stewart v. Smith (1907), 91 Pac. (Cal.) 670.

<sup>42</sup> See Hershey v. Clark (1879), 35 Ark. 17.

to Abram, in case the latter should survive. The instrument was signed and sealed by the two parties, and attested by two witnesses, but not in the form usually adopted in the attestation of wills. Abram died first and Aaron took possession of the property. He persuaded his mother to convey to him all her interest in Abram's estate. When Aaron died he willed all his property, real and personal, to his mother and his sister Sarah. Sarah and her mother later executed a joint will in proper form containing certain "bequests and devises" and bequeathing the balance of their property to trustees for charitable purposes. The plaintiff claims as one of the heirs of her brother Abram, and as heir and distributee of her mother Nancy. The court said that "the joint instrument between Abram and Aaron Clark, and the joint will of Nancy and Sarah Clark, should both have been disregarded." The reason assigned for disregarding the joint will is that JARMAN, WILLS, Vol. I, p. 27, says that "a joint or mutual will is said to be unknown to the testamentary law of England" and cites *Clayton v. Liverman*.<sup>48</sup> It should be noted that the Arkansas case of *Hershey v. Clark* decides two points, namely, that (1) "the joint instrument between Abram and Aaron Clark and (2) the joint will of Nancy and Sarah Clark should both have been disregarded." The first point is decided on the score of public policy, the second on the authority of *Clayton v. Liverman*, and this double headed decision brushes aside both testamentary instruments in favor of the intestate succession. The majority decision in the case of *Clayton v. Liverman* is based on the statement of Sir JOHN NICHOLL in *Hobson v. Blackburn*<sup>49</sup> to the effect that such an instrument [*i. e.* a mutual or conjoint will] "is unknown to the testamentary law of this country."

DANIEL, J., dissented from this opinion and in his argument says that, the case of *Hobson v. Blackburn* simply lays down this principle: "That mutual or conjoint wills *irrevocable* by either of the supposed testators is unknown to the testamentary law of this country." Joshua Hobson and two of his sisters had made a mutual will. Joshua died in 1794 and his sister Martha afterwards, in 1820, made a separate will. The allegation, (propounding the will of 1794) proceeded upon the notion of the irrevocability of the instrument which it propounded as the will of the deceased. Sir John NICHOLL, presiding over the Prerogative Court said, "Why this very circumstance destroys its essence *as a will* and converts it into a *con-*

<sup>48</sup> *Supra*, Note 15. It should be noted that the court here quotes from an old edition of Jarman's Wills. The corresponding note in the later edition shows the growth of the modern doctrine.

<sup>49</sup> 1 Addams, Eccles. Reports, 274.

*tract*; a species of instrument over which this court has no jurisdiction." But says Judge DANIEL, "The Court of Equity by its extraordinary power might restrain the revocation, or declare a revocation of it in the court of probate a nullity," and cites with approval the opinion of Lord CAMDEN in *Dufour v. Pereira*.<sup>50</sup>

This decision in *Dufour v. Pereira* is the leading case mentioned above (Note 16) upon which the line of cases rests which hold to the validity of joint instruments for the disposal of property after death. Lord Camden's decision in this case is as follows: "It [the mutual will] might have been revoked by both jointly; it might have been revoked separately, provided the party intending it, had given notice to the other of such revocation. But I can not be of the opinion that either of them, could during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another will. It is a contract between the parties, which can not be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the Court afterward permit the other to break the contract? Certainly not."

In a recent North Carolina decision,<sup>51</sup> the decision in *Clayton v. Liverman* was reversed in the following words, "DANIEL, J., in his able dissenting opinion combats the whole argument of the court and insists that the court misapprehended the Judge's opinion in *Hobson v. Blackburn*, supra. On a close reading of the case we think the court did misconceive the question at issue in Hobson's case, and we approve the conclusion in the dissenting opinion. As the question was so ably discussed in *Clayton v. Liverman*, supra, we are not disposed to repeat it, but only give the conclusion."

We have then this rather curious state of things in regard to the relations of these several decisions:

*Hershey v. Clark* passed the property to the intestate claimant on two grounds: (a) Because the joint instrument between the two brothers was invalid; (b) because the joint will of mother and daughter was invalid. Now it should be noted that the second point (b) was decided on the basis of *Clayton v. Liverman*. But *Clayton v. Liverman* has been reversed in *In re Sutton Davis' Will*. In the case of *In re Sutton Davis' Will*, the North Carolina court adopts *in toto* the argument of the dissenting opinion in *Clayton v. Liverman*. Furthermore this dissenting opinion presents the decision in *Dufour v. Pereira*, which, in its turn, decides that a joint instrument for the disposition of property after the death of the parties is: (a) A contract between them which can not be rescinded except by the con-

<sup>50</sup> 1 Dickens Rep. 420. Cf. also Note 16.

<sup>51</sup> *In re Sutton Davis' Will*, 120 N. C. 13.

sent of both; (b) That the death of one of the parties carries his part into execution and the court will not permit the other party afterward to break the contract.

If now a case should arise in Arkansas on a state of facts identical with those in *Hershey v. Clark*, the Arkansas court, if it followed the authority which it adopted before, would necessarily reverse its findings as to the invalidity of the joint will of the mother and daughter; and, furthermore, if it followed the reasoning of its authority to the logical conclusion, it would also reverse its finding on the first point, and declare the joint instrument between the brothers Abram and Aaron Clark a good contract.

JOSEPH H. DRAKE.

UNIVERSITY OF MICHIGAN.