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LEGAL EFFECT OF CONTRACTS TO DEVISE OR BEQUEATH PRIOR TO THE DEATH OF THE PROMISOR: II*

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Nature of the Relationship and the Promisor's Right to Rescind

AFTER there has been a contract to make a will it is often said that the promisor is a trustee of the property for the use of the promisee.[152] This statement is usually offered as a reason for or an explanation of the relief granted in a particular case, without any indication as to how such a premise was arrived at and without any consideration of other possible results that might flow from the designation of the relationship as a trust.

The assertion that the promisor is a trustee, though often repeated, sometimes heavily relied upon,[153] and rarely ever questioned, cannot mean any more than that some of the characteristics of a trustee are imposed upon him.[154] There are many reasons why he cannot in fact be a trustee. There is no intent to create a trust. The usual duties of a trustee are not incumbent upon him. He has a personal interest in the property. He is entitled to all the use, rents, and profits from the property. All these things are true whether the contract is for specific property or for an indefinite amount depending upon the size of the

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152 Child v. Smith, 225 Iowa 1205 at 1217, 282 N.W. 316 (1938); Baker v. Syfritt, 147 Iowa 49 at 62-63, 125 N.W. 998 (1910); Lewis v. Lewis, 104 Kan. 269 at 272, 178 P. 421 (1919) (dictum to the effect that the promisor holds bare legal title and that equitable title is in the promisee); Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917) (as a basis for jurisdiction the court relied upon a statute giving equity jurisdiction of trust cases); Rastetter v. Hoenninger, 214 N.Y. 66 at 74-75, 108 N.E. 210 (1915).

153 In an action brought during the life of the promisor, the court based its jurisdiction of the case upon a statute giving equity jurisdiction in trust cases. Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917).

154 No analysis of the relationship existing or remedies granted after the death of the promisor is attempted at this point. Where action has been brought after the promisor's death the trust analysis is often used, but is said to arise, not with the making of the contract, but at the death of the promisor. Thus it has been said, "By virtue of the agreement the equitable title to all of testatrix' estate, subject to the payment of funeral and administration expenses and debts, vested in [the beneficiary of the contract] as of the date of testatrix' death. . . ." Matter of Stevens, 192 Misc. 179 at 183, 78 N.Y.S. (2d) 868 (1948). Where there is a wrongful inter vivos transfer of the property and action is not brought until after the death of the promisor, the transferees are often said to hold as constructive trustees for the promisee. Whitney v. Hay, 181 U.S. 77, 21 S.Ct. 537 (1901); Lay v. Proctor, 147 Ore. 545, 34 P. (2d) 331 (1934).

estate at the promisor's death. In the case of the contract for the indefinite amount there is the further difficulty that no trust *res* can be identified. There is nothing that the promisor can hold in trust. The subject of the contract is the estate or a fractional part of the estate at death, but there is no duty to hold any item of property for inclusion in the estate and the estate is completely impossible of identification until death of the promisor.

The argument in favor of the trust relationship is not improved by the suggestion that though it is not an express trust it is a constructive trust. A constructive trust is a remedial device to prevent unjust enrichment and has very little, if any, relation to an express trust.[155] A constructive trust is merely a means of describing the relief granted when a person holding property under circumstances which make it unjust, unconscionable, or unlawful for him to do so is directed to convey it to the person who would otherwise be unjustly deprived of his property.[156] The constructive trust is the remedy for compelling the constructive trustee to surrender the property but not an establishment of the numerous fiduciary duties involved in a trust.[157] But in the contract to make a will there is no unjust enrichment so long as the promisor is continuing to hold the property. He is entitled to the property and the promisee has no right to it. There is no basis for describing the promisor as a constructive trustee. He has no property to which he is not entitled and is not securing any benefit which at law or in equity belongs to anyone other than himself.

When the promisor conveys to a third person and the conveyance is set aside or the transferee is decreed to hold subject to the contract, or when the promisor is restrained from conveying to a third person or

[155] 3 SCOTT, TRUSTS §462.1 (1939); RESTITUTION RESTATEMENT §160, comment *a* (1937).

[156] Various definitions of constructive trusts have been offered, but the essential element in all of them is to the effect that it is a remedy against unjust enrichment. According to Judge Cardozo, "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. . . ." Beatty v. Guggenheim Exploration Co., 225 N.Y. 380 at 386, 122 N.E. 378 (1919). Professor Bogert has said that a constructive trust "may be defined as the device used by chancery to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs." 3 BOGERT, TRUSTS §471, p. 3 (1946). "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." RESTITUTION RESTATEMENT §160 (1937). Although a constructive trust is often described as a remedy to prevent fraud, it seems clear that actual fraud is not necessary to a constructive trust. 3 SCOTT, TRUSTS §462 (1939).

[157] 3 SCOTT, TRUSTS §462 (1939).

from encumbering the property, there is no utility in describing the result reached in terms of trust, either constructive or actual.[158] The promisee has an equitable right[159] to receive the property at the death of the promisor. That equitable right is sufficient to entitle him to such protection during the life of the promisor as is appropriate to preserve the property to its proper function. That protection would necessarily include the privilege of restraining conveyances to third persons, setting aside conveyances already made to persons others than bona fide purchasers, enjoining willful destruction of the property during the life of the promisor, and the other remedies ordinarily granted to insure the availability of the property at the promisor's death. All these remedies may be based upon the equitable right to receive the property at the promisor's death, and analyzed on usual principles of equity jurisprudence without any reference to the extremely doubtful description of the relationship as a trust.[160]

It might be argued that while the trust analogy is not helpful in this connection, at least it does no harm. This merely confuses the issue, for to analyze any legal relation as being what it clearly is not does some harm to rational thinking, and increases the complexity of the problem involved. Once the promisor of a contract to devise or bequeath is described as a trustee, the tendency is to begin to apply the incidents of a trust to his position. One would not have to travel far in this direction to become convinced that no such fiduciary relation was contemplated by the terms of the contract, and that to impose it upon the parties would be to indulge in a fiction entirely alien to anything anticipated by them and unnecessary to the protection of any of their legal or equitable interests. One of the results which would seem to follow from referring to the relationship as a trust relation would be the power of the *cestui que trust*, under certain circumstances, to secure

[158] That the trust analysis is frequently employed to describe the position of the transferees of the property see Osborn v. Hoyt, 181 Cal. 336, 184 P. 854 (1919); Hill v. Ribble, 132 N.J. Eq. 486, 28 A. (2d) 780 (1942).

[159] That the right is an equitable one which may be cut off by the intervention of a bona fide purchaser seems to be unquestioned. Stone v. Lacy, 242 Ala. 393, 6 S. (2d) 481 (1942) (failure to allege that transferee is not a bona fide purchaser held fatal to recovery); Androscoggin County Savings Bank v. Tracy, 115 Me. 433, 99 A. 257 (1916) (absolute interest in the transferee but promisee permitted the benefit of his contract by tracing the proceeds of the sale into the hands of the promisor); Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915) (case remanded to trial court for a factual determination on the question of good faith).

[160] In cases of contracts to sell real estate at a future date these remedies are available entirely independent of any theory of transfer of equitable title to the vendee upon the formation of the contract. Stone, "Equitable Conversion by Contract," 13 COL. L. REV. 369 (1913).

the removal of the trustee and the appointment of a successor.[161] Foreign as this remedy may appear to the actual status of the parties, it seems to have been accomplished in *Lawrence v. Ashba.*[162] The promisor of a contract to will his entire estate made an improper transfer of certain property to a third person. The transfer was set aside and a trustee appointed to take charge of the entire estate, manage it during the lifetime of the promisor and pay the income to the promisor, and upon his death to turn the property over to the third party beneficiaries of the contract.[163] Such a result is obviously beyond the intention of the parties to the contract and unnecessary to the protection of any interests created by it. It is hardly imaginable that it was ever contemplated that the promisor was surrendering control of his property during his life. However, if the doctrine of the trust is accepted the result reached in the case becomes perfectly logical and in fact unavoidable.

Other cases can be found where there was a decree to the effect that the promisor held in trust for the promisee.[164] Just how far the courts would go in applying trust law to such situations is not indicated. If it is really a trust all the rules concerning trusts should be applied. If it is not a trust there is no utility in applying the term.

Another analogy sometimes used by the courts is that of life tenant and remainderman. It is said that the promisor retains a mere life estate with legal remainder in the promisee.[165] This theory creates very serious difficulties in case of contracts to will all or a fractional part of one's estate. What is there to have a life estate in and in what does

[161] 1 SCOTT, TRUSTS §107 (1939).

[162] 115 Ind. App. 485, 59 N.E. (2d) 568 (1945).

[163] That part of the decree appointing the trustee to take over the property was not objected to on appeal, and the appellate court affirmed the action of the trial court without taking any position as to the type of remedy granted. The court stated: "We are not to be understood as approving or disapproving of the judgment entered insofar as it appoints a trustee to take immediate charge and possession of, and to administer the property, and seems to limit Mr. Lawrence to the enjoyment of the income during his lifetime. The appellants have not complained of the judgment in that regard and have not suggested a reversal because of the particular character of the relief granted. We therefore do not decide any such question but leave the judgment as entered." Lawrence v. Ashba, 115 Ind. App. 485 at 494, 59 N.E. 568 (1945).

[164] Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917).

[165] A statement to the effect that the promisor has a mere life estate, though somewhat misleading, is not within itself harmful when all that is meant is that the promisor has no interest which can extend beyond his own life, as in a case where it is held that a mortgagee with knowledge of the contract does not have a lien on any interest extending beyond the death of the promisor. Ankeny v. Lieuallen, 169 Ore. 206, 113 P. (2d) 1113 (1941), affd. on rehearing, 169 Ore. 222, 127 P. (2d) 735 (1942). However, it is a step toward a decree within the promisor's life that the promisee is the owner subject to the life interest of the promisor even in a contract for indefinite property. Winchell v. Mixter, 316 Mich. 151, 25 N.W. (2d) 147 (1946).

the promisee have a remainder? The promisor may consume any or all of his property during his life or he may exchange any or all of it for other property through investment and reinvestment in business enterprises. Even if it is explained that the life estate is a life estate with a power to consume, there is the further difficulty of explaining how the future acquired property is brought within the life tenant-remainderman status. It is difficult to conceive of a relationship wherein one party owns a life estate in everything possessed by him and another owns the remainder in fee, but the life tenant is capable of disposing of any or all of the property in fee simple, and any future property coming to him immediately assumes the status of a mere life estate in him and a remainder in the other party. Not only would this be a new and unusual estate, but it would be a new and unusual estate which served no useful purpose.

Even if the above difficulties with regard to the life tenant-remainderman theory were eliminated, there are still many more fundamental problems which would exist whether specific property or indefinite property were involved. Not the least among these is the fact that the contract was never intended as a conveyance. It was a contract that the promisee should have certain property at the death of the promisor. It was not a present conveyance of a future estate. Probably the closest analogy is that of a contract to sell at a future date. A contract to sell at a future date gives the vendee an equitable right to demand a conveyance or transfer at that time,[166] but it is not a present transfer and is not intended as such. In like manner a contract to devise or bequeath gives the promisee an equitable right to demand the property at the death of the promisor but it gives him no present estate in remainder.

Courts applying the life tenant-remainderman doctrine are apparently misled by the notion that an estate which will necessarily terminate at the death of the present owner is necessarily a life estate. Of course this is fallacious, not only from the point of view of the intent of the parties, but also with regard to the rights of ownership in the property. A contracting vendor who has contracted to sell Blackacre two years from date retains a fee simple, not an estate for years, until the time for conveyance arrives.[167] Likewise the promisor of a contract

[166] The vendee gets a present equitable right to call for title on the date set for performance, not a present equitable title to the property. Stone, "Equitable Conversion by Contract," 13 COL. L. REV. 369 at 372-373 (1913).

[167] Even though an actual conveyance is made and a deed presently delivered, if it is to become effective at a future date the grantor retains a fee simple until that date arrives. 1 AMERICAN LAW OF PROPERTY §4.56 (1952); 1 SIMES, FUTURE INTERESTS §150 (1936).

to will property retains a fee simple until the time of his death. His rights of ownership are those of a fee simple owner except that he is restricted to the extent that it is necessary to protect the equitable right of the promisee to call for the property at his death. But there is nothing in the contract to devise or bequeath that can cut down the promisor's estate.[168]

The notion that a promisee of a contract to devise or bequeath is a remainderman after a life estate in the promisor has not been without its unfortunate results. In a case involving a fractional part of an entire estate the promisor has been directed to make an inter vivos conveyance of a remainder interest in that fractional part to the promisee.[169] Although the case was not clear as to the incidents it attached to the life estate remaining in the promisor, apparently the effect was to make it a true life estate at least so far as the realty was concerned,[170] thereby prohibiting the promisor from making future dispositions of it regardless of the circumstances that might arise. Other courts can be found which have decreed the promisee owner of the property subject to the life interest of the promisor.[171] In either of these situations the court is adding to the contract terms not intended by the parties and establishing a relationship not encompassed by the agreement.

Sometimes the trust theory and the life tenant-remainderman theory are combined and it is said that the promisor holds the property to his own use for his life and the remainder in trust for the promisee.[172]

[168] It has been suggested that the principal reason for making the contract to devise or bequeath rather than creating a life estate with remainder to the promisee or desired beneficiary is that of avoiding "the technical responsibilities attaching to life tenancies, with frequent accounting to the probate court. . . ." Meador v. Manlove, 97 Kan. 706 at 711, 156 P. 731 (1916).

[169] Chantland v. Sherman, 148 Iowa 352, 125 N.W. 871 (1910).

[170] Although according to the actual terms of the contract the promisee was entitled to one-half of the promisor's entire estate at death, the court directed a decree that there be an immediate conveyance of a remainder interest in one-half of the real estate existing upon the consummation of the contract, and that there be a declaration that the promisor have a right to use and control for her life one-half of the personalty existing at that time, and that at her death it should go to the promisee. The court was apparently influenced in the formulation of this decree by the fact that it was a means of restoring the parties to their situation prior to the contract. Chantland v. Sherman, 148 Iowa 352 at 361, 125 N.W. 871 (1910).

[171] Winchell v. Mixter, 316 Mich. 151, 25 N.W. (2d) 147 (1946).

[172] "Subject to the life estate . . . the property . . . may be impressed with a trust . . . for the protection and preservation of a remainder interest in fee. . . ." Matheson v. Gullickson, 222 Minn. 369 at 378, 24 N.W. (2d) 704 (1946). ". . . she had the right to all the property for her own use for life, and whatever she did not consume she held in trust for the remaindermen." Church of Christ Home for Aged v. Nashville Trust Co., 184 Tenn. 629 at 643, 202 S.W. (2d) 178 (1947).

This has been extended to include a covenant to stand seized as well.[178] Efforts in this direction serve no purpose other than to multiply the confusion. If the promisor is neither a life estate nor a trustee, it does not help the situation to say that he is both. The fact that he might have some of the characteristics of both does not make him either. It is true that he is like a life tenant in that he has no interest which will extend beyond his own life. He is also like a trustee in that the promisee can call upon his estate for a transfer of the property immediately upon his death just as a *cestui que trust* may call upon the trustee for a conveyance upon the termination of the trust. But this is about as far as the similarities go, and, as pointed out above, the differences in both cases are many.

The relations created by contracts to devise or bequeath will be better understood if there is no effort to fit them into one of the more commonly used plans for disposition of property. Legal problems cannot be solved by merely sliding them into familiar slots. It should be admitted that if the promisor had intended to create a trust he probably would have said so, and that if he had intended to transfer to the promisee a remainder interest he most likely would have done that. Since he did neither of those things he must have attempted something else. The only question then should be whether or not effect can be given to this other thing he has attempted. That effect can be given to his efforts in this respect is too well established to be subject to any further question, and there should be no further attempt to explain the result in terms of trust, life tenant-remainderman, covenant to stand seized, or any other concept obviously foreign to the relationship assumed by the parties or enforced by the courts.

When the contract is examined apart from any artificial attempt to attribute to it a relationship not encompassed by it, it is easy to see that it is merely a contract for the right to have the property of the promisor pass in a particular manner at his death. The promisee acquires the equitable right to demand the property at that time. This equitable

[178] "But the theory on which the courts proceed is to construe such an agreement . . . to bind the property of the testator or intestate so far as to fasten a *trust* on it in favor of the promisee. . . . It is in the nature of a covenant to stand seized to the use of the promisee, as if the promisor had agreed to retain a life estate in the property, with remainder to the promisee in the event the promisor owns it at the time of his death, but with full power on the part of the promisor to make any *bona fide* disposition of it during his life to another, otherwise than by will." Bolman v. Overall, 80 Ala. 451 at 455 (1886) (case concerned an action brought after the death of the promisor, but is interesting because of its effort to include the theories of trust, covenant to stand seized, and life tenant-remainderman all in the description of the relationship created by the contract).

right to demand the property includes the equitable right to restrain the promisor or those claiming under him from impairing the practical realization of the benefits of that right. In the case of specific real property this includes the right to restrict the promisor to reasonable use during his life, to enjoin conveyances which would put the property in the hands of bona fide purchasers and thus destroy the equitable right, and to obtain other decrees ordinarily available for the protection of the interest of a contracting vendee of a contract to purchase land at a future date.[174] In the case of all or a fractional part of the promisor's estate the right of the promisee includes the right to restrict the promisor to reasonableness both as to the use and the disposition of his property. The right to enjoin unreasonable gifts, improper transfers, or acts of bad faith is an essential element of the right to demand the property at the death of the promisor, and can be explained in terms of ordinary equitable principles for the protection of present rights to receive property at a future date, and without resort to the fiction of a trust or life tenant-remainderman relation. The introduction of such fictions into the picture serves no useful purpose, but, as previously indicated, results in the granting of remedies foreign to the intention of the parties and unnecessary to the protection of their rights.

Although it is elementary contract law that one party cannot, in the absence of a breach by the other, rescind his obligation without incurring liability for his failure to perform, there is much discussion both in the cases[175] and among the commentators[176] of the promisor's right to rescind a contract to make a will. And although it is an elementary principle of testamentary law that a will is by its very nature

[174] Contracts to devise are often dealt with in judicial opinions in the same manner as if they were contracts to sell, the court giving no indication that there is any difference in the principles involved. Manning v. Pippen, 86 Ala. 357, 5 S. 572 (1888); Young v. Young, 45 N.J. Eq. 27, 16 A. 921 (1889). Discussions by commentators of contracts to sell can be found in which cases of contracts to devise are cited as authority without any indication that the two situations are not identical. Stone, "Equitable Conversion by Contract," 13 COL. L. REV. 369 at 373, note 18 (1913).

[175] E.g., Wright v. Wright, 215 Ky. 394 at 400, 285 S.W. 188 (1926) (stating that a party to such a contract could be "released from the agreement" by merely informing the other party of his intention not to perform); Teske v. Dittberner, 70 Neb. 544 at 550, 98 N.W. 57 (1903) (declaring that the promisor cannot rescind "after the promisee has substantially performed all things done on his part," thus implying that prior to that time he could rescind).

[176] ". . . where mutual wills have been executed in pursuance of a compact or agreement between the parties the law appears to be well settled that either party may, during the lifetime of both, withdraw from the compact. . . ." THOMPSON, WILLS, 3d ed., §34 (1947). "It is generally held that either party to a contract to make joint or mutual wills may withdraw from the contract during the lives of both parties." Hirsch, "Contracts to Devise and Bequeath," 9 WIS. L. REV. 267 at 274 (1934).

freely revocable and ambulatory until the death of the testator there is much discussion of the irrevocability of a will that has been executed in compliance with a contract.[177] Neither of these concepts has any foundation in principle nor is either of them supported by more than very meager authority. They both result from an evident failure to distinguish the effect of a will from the rights and duties created by contract.[178] Thus while the overwhelming weight of authority reaches the logical, and what seems to be the inevitable, conclusion that the contract is irrevocable except by mutual consent of both parties to it and that the will is always revocable so long as the testator is alive and *sui juris*,[179] the confusion still prevails among the commentators and in judicial dicta.

At least part of the difficulty arises out of the fact that actions to enforce contracts to devise or bequeath are often designated as actions

[177] Rolls v. Allen, 204 Cal. 604 at 607, 269 P. 450 (1928) (stating that one may "validly renounce the power to revoke his will"); Trindle v. Zimmerman, 115 Colo. 323 at 328, 172 P. (2d) 676 (1946) (to the effect that, "If the wills were not considered by Mrs. Lawrence as irrevocable her statement was foolish and her future security anchored to thin air . . ."); Powell v. McBlain, 222 Iowa 799 at 802, 269 N.W. 883 (1936) (declaring it to be a "fundamental principle" that a will made pursuant to a contract "is irrevocable"); Krcmar v. Krcmar, 202 Iowa 1166 at 1172, 211 N.W. 699 (1927) (stating that the effect of the contract was to "make irrevocable" without the consent of the promisee a codicil under consideration); REDFIELD, WILLS 183 (1864) (irrevocable in equity); 1 SCHOULER, WILLS, EXECUTORS, AND ADMINISTRATORS, 5th ed., §452 (1915); THOMPSON, WILLS, 3d ed., §34 (1947); Evans, "Concerted Wills—A Possible Device for Avoiding the Widow's Privilege of Renunciation," 33 KY. L.J. 79 (1945); Goddard, "Mutual Wills," 17 MICH. L. REV. 677 (1919).

[178] A typical example of this confusion is found in Brown v. Webster, 90 Neb. 591 at 603, 134 N.W. 185 (1912), where the court declared that a will made pursuant to a contract "was not, in equity, ambulatory or revocable," and cited as authority for that statement a quotation from the syllabus in Teske v. Dittberner, 70 Neb. 544, 98 N.W. 57 (1903) that, "A contract to leave property by will is not ambulatory or revocable. . . ."

[179] The following may be mentioned as typical of the analysis most frequently adopted, though not always so clearly expressed, by the courts: "It is contract to make joint and mutual will, and not will itself, that is irrevocable by survivor after death of one party to it." Eicholtz v. Grunewald, 313 Mich. 666 at 675, 21 N.W. (2d) 914 (1946) [quoting from syllabus of Keasey v. Engles, 259 Mich. 178, 242 N.W. 878 (1932)]. "The will was of course revocable, but the agreement to make the provision, being founded on valuable consideration, was not." Lawrence v. Prosser, 88 N.J. Eq. 43 at 51, 101 A. 1040 (1917). "All parties recognize that revocability is an essential element of a will, . . . but that is not to say that the courts will not enforce a contract to make a will. . . ." McDonald v. Polansky, 48 N.M. 518 at 520, 153 P. (2d) 670 (1944). "It should be borne in mind that it is the contract and not the will that is irrevocable." Doyle v. Fischer, 183 Wis. 599 at 606, 198 N.W. 763 (1924).

See also ATKINSON, WILLS, 2d ed., §48 (1953); 4 PAGE, WILLS, 3d ed., §1709 (1941); Eagleton, "Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing," 15 CORN. L.Q. 358 at 367 (1930); Partridge, "The Revocability of Mutual or Reciprocal Wills," 77 UNIV. PA. L. REV. 357 at 360 (1929).

to enforce wills made pursuant to contract.[180] When the will has once been made there is often a tendency to treat the rights under the will and the existing contractual rights as being identical. If the contract is thought of as a contract to pass property at death and the will thought of as a vehicle for passing the property[181] much of the confusion and apparent conflicts would disappear. The contract, not the will, gives the promisee a right to the property, and, when litigation arises, it is the contract that must always be established. Once the contractual right is established the interests of the promisee are protected whether or not a will has been executed.[182] When the will has been executed but subsequently revoked, it merely confuses the issue to talk of enforcing the will or holding that the will was irrevocable in equity. The will is not "enforced" and there is no such thing as a will which is irrevocable in equity or anywhere else. In any event where the "enforcement" of a will or the "irrevocability" of a will is used to describe a given result the question could well be asked, "Would the case have been decided in the same way if no will had ever been executed?" It is doubtful if any case could be found where that question would not be answered in the affirmative.[183] The notion of a "will made in pursuance of contract" as a separate legal concept is foreign to Anglo-American legal theory.[184] There are contracts and there are wills, and

[180] E.g., Hermann v. Ludwig, 186 App. Div. 287, 174 N.Y.S. 469 (1919), affd. 229 N.Y. 544, 129 N.E. 908 (1920) (proceeding described as "an action in equity to establish" a will made pursuant to contract but subsequently revoked). See also St. Denis v. Johnson, 143 Kan. 955 at 964, 57 P. (2d) 70 (1936), where the court assumed that the revoked will was enforced "under the guise of enforcing the contract," and indicated that the removal of such "guise" and the frank recognition of enforcement of the will would be a great contribution to legal learning.

[181] "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." Eagleton, "Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing," 15 CORN. L.Q. 358 at 367 (1930).

[182] Keefe v. Keefe, 19 Cal. App. 310, 125 P. 929 (1912); Chehak v. Battles, 133 Iowa 107, 110 N.W. 330 (1907); Anderson v. Anderson, 75 Kan. 117, 88 P. 743 (1907); Howe v. Watson, 179 Mass. 30, 60 N.E. 415 (1901); Laird v. Vila, 93 Minn. 45, 100 N.W. 656 (1904); Crinkley v. Rogers, 100 Neb. 647, 160 N.W. 974 (1916); Matter of Stevens, 192 Misc. 179, 78 N.Y.S. (2d) 868 (1948); Kelley v. Devin, 65 Ore. 211, 132 P. 535 (1913); Estate of Soles, 215 Wis. 129, 253 N.W. 801 (1934).

[183] There is of course the possibility that in the absence of a will the heir could get the property into the hands of a bona fide purchaser before the promisee brought his action. Such a transfer would destroy the promisee's rights to the specific property, and, if the heir were judgment proof, might preclude any relief whatever. Here the existence of a will might have had the advantage of preventing the intervention of a bona fide purchaser, but in cases of this kind it is quite obvious that the question of the "irrevocability" of a will or the "enforcement" of a will is never raised.

[184] ATKINSON, WILLS, 2d ed., §49 (1953).

the fact that both may relate to the same property and both, in some cases, have the same object, does not necessitate merging the two into a single entity.

The principal area of confused thinking concerning the promisor's right of rescission centers on joint and mutual[185] wills. Numerous statements can be found that either party to a joint or mutual will is free to "revoke" the entire transaction at any time during the lives of both by giving notice to the other, but that after one party has died the other is bound.[186] Although these statements are usually very positive in their terms and are often repeated, a more misleading or ill-conceived concept could hardly be imagined. It should be clear that a joint or mutual will, like any other will, is always revocable while the testator is alive and *sui juris,* but that a valid contract is never revocable except by the consent of all the parties to it. The tendency, especially where joint or mutual wills are concerned, to speak of the will and the contract as one and the same thing has concealed, rather than provided a solution for, the problems involved. There are often discussions of the revocability of joint and mutual wills without any prior determination of whether or not there is any contract involved. Such an approach completely ignores the entire nature of the transaction. If joint and mutual wills are treated like any other wills and contracts to make joint or mutual wills treated like any other contracts the confusion and uncertainty in this branch of the law would tend to disappear.

[185] The term "mutual wills" has been used with various meanings and has been applied to many different situations. As used herein mutual wills are merely the separate wills of two or more persons, which wills, when considered together, show on their face, by their reciprocal provisions or otherwise, that they were intended as part of one integrated plan of disposition. They may or may not have been made pursuant to a contract.

[186] Although usually phrased in terms of revocation of the will and almost invariably dicta, declarations to this effect are extremely common in cases dealing with joint and mutual wills. See Robinson v. Mandell, (C.C. Mass. 1868) 20 Fed. Cas. 1027, 1033, No. 11959; Frazier v. Patterson, 243 Ill. 80 at 84-85, 90 N.E. 216 (1909); Luthy v. Seaburn, 242 Iowa 184 at 190-191, 46 N.W. (2d) 44 (1951); Campbell v. Dunkelberger, 172 Iowa 385 at 389, 153 N.W. 56 (1915); Wright v. Wright, 215 Ky. 394 at 400, 285 S.W. 188 (1926); Tutunjian v. Vetzigian, 64 N.Y.S. (2d) 140, 146 (1946), affd. 274 App. Div. 910, 83 N.Y.S. (2d) 184 (1948); Kingsbury v. Kingsbury, 120 Misc. 362, 198 N.Y.S. 512 at 515 (1923); Rastetter v. Hoenninger, 214 N.Y. 66 at 73, 108 N.E. 210 (1915); Edson v. Parsons, 155 N.Y. 555 at 566, 50 N.E. 265 (1898); Ankeny v. Lieuallen, 169 Ore. 206 at 215-216, 113 P. (2d) 1113 (1941), affd. on rehearing 169 Ore. 222, 127 P. (2d) 735 (1942); Underwood v. Myer, 107 W.Va. 57 at 59-60, 146 S.E. 896 (1929) (stating that the obligation became fixed at the death of one of the parties).

Even when legal advice is sought it appears that the parties are often told that such instruments are revocable until the death of one of the parties but thereafter irrevocable. The advice would be sound were it not for the fact that the attorneys giving it too often draft instruments which do not carry out that declared purpose. Stewart v. Shelton, 356 Mo. 258, 201 S.W. (2d) 395 (1947). But see Auger v. Shideler, 23 Wash. (2d) 505, 161 P. (2d) 200 (1945) (client properly advised).

Most of the difficulties in this particular phase of the problems concerning contracts to devise or bequeath can be traced to the unfortunate dictum of Lord Camden in the case of *Dufour v. Pereira.*[187] Although the force of the dictum is largely neutralized by the report itself[188] and appears to be completely repudiated by Hargrave's report of the case,[189] it has never ceased to harass the courts and bewilder legal writers.[190] The glib assertion that either party may revoke while both are still living but that neither can revoke after one has died with his will still in effect has been repeated down through the years with little or no analysis of the meaning or import of the statement made. Almost invariably such statements are found in decisions where there has been a contract to make joint or mutual wills, the wills were made, one party died, the survivor took the benefits of the will of the deceased and then attempted to make a disposition of his property contrary to the contract.[191] The courts give effect to the contract and then offer the completely irrelevant dictum that either party could have revoked while both were living but that neither can do so after one has died. From such decisions the statement has been extracted by commentators and treated as a rule of law.[192] Even if it could be treated as a rule of law the question of what is the rule would still remain. Does the right to revoke here refer to the revocation of the will or the contract or both?

[187] In what appears to be a failure to distinguish the will from the contract or to indicate whether the will or the contract was being discussed, Lord Camden stated: "It 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 cannot be of 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." Dufour v. Pereira, 1 Dick. 419 at 420, 21 Eng. Rep. 332 (1769).

[188] The sentence following the quotation cited in note 187 above stated that, "It is a contract between the parties, which cannot be rescinded, but by the consent of both." Dufour v. Pereira, 1 Dick. 419 at 421, 21 Eng. Rep. 332 (1769).

[189] Hargrave's report states that, "Though a will is always revocable, and the last must always be the testator's will; yet a man may so bind his assets by agreement, that his will shall be a trustee for the performance of his agreement." 2 HARGRAVE, JURISCONSULT EXERCITATIONS 105 (1811).

[190] No actual count has been made, but it is estimated that this decision has been cited by at least half the American courts dealing with joint and mutual wills, but very few of them show any indication of having read beyond the declaration that "it" could have been revoked by either party by giving notice but that the survivor could not revoke after one party had died. The very next sentence that, "It is a contract between the parties, which cannot be rescinded, but by the consent of both," appears to have been forgotten.

[191] This was precisely the nature of Dufour v. Pereira, 1 Dick. 419, 21 Eng. Rep. 332 (1769), the case containing the dictum which gave rise to the doctrine.

[192] 1 SCHOULER, WILLS, EXECUTORS, AND ADMINISTRATORS, 6th ed., §720 (1923); THOMPSON, WILLS, 3d ed., §34 (1947); Goddard, "Mutual Wills," 17 MICH. L. REV. 677 at 684 (1919) (offering as a reason lack of consideration, apparently meaning that mutual promises could not be consideration until one party had fully performed); Hirsch, "Contracts to Devise and Bequeath," 9 WIS. L. REV. 267 at 274-275 (1934).

Unless that question is answered it seems that the usual generalities found in the cases are meaningless.

Where a joint or mutual will has been revoked by one of the testators, whether before or after the death of the other, the first inquiry should be whether or not there is a contract. If there is no contract, the case is an ordinary case of revocation of a will and should be dealt with as such. If there is a contract the terms of the contract should be ascertained and the rights of the parties determined in accordance therewith. Occasionally it might be found that the relationship is merely one of mutual offers for a unilateral contract whereby each party offers to devise or bequeath his property in accordance with the joint or mutual will if the other party will do so.[193] When such a relationship exists there is of course no contract until one party accepts the offer by performance and the only means of performance is dying with the will still in effect. In such a situation the offer could have been withdrawn at any time before acceptance but could not be withdrawn after acceptance because after it had been accepted a contract had been formed. This result arises out of ordinary contract law concerning offer and acceptance and has nothing to do with the revocability or non-revocability of a will or with any peculiar nature of a contract to make joint or mutual wills.

There is also the possibility that the contract is one that the property of both parties shall go to the survivor but no attempt is made to control the property in his hands. In such cases the parties usually execute either joint or mutual wills by which each of them gives the other his property absolutely. When this is done and when the contract is of this nature it necessarily follows that the survivor takes the absolute title and is free to make any disposition, either inter vivos or testamentary, that he chooses. The contract by its own terms is at an end immediately upon the death of the first to die. An interesting situation arises when the survivor, apparently believing that the entire

[193] Lally v. Cronen, 247 N.Y. 58, 159 N.E. 723 (1928), reargument den. 247 N.Y. 575, 161 N.E. 188 (1928). See Canada v. Ihmsen, 33 Wyo. 439, 240 P. 927 (1925) (actually decided on the question of the statute of frauds but then discussed as though the statute were not involved); Minor v. Minor, 15 Ohio Dec. 264 (1904) (finding that the contract was not consummated until the death of one of the parties). The difficulties here as elsewhere are multiplied by the fact that the parties usually fail to use express language in stating their intentions. Whether it is a contract or mere mutual offers for a unilateral contract usually must be inferred from the circumstances. Of course, if the mutual promises to devise are clearly expressed and are intended as binding obligations, they are sufficient consideration for each other, and the contract is formed immediately. Hermann v. Ludwig, 186 App. Div. 287, 174 N.Y.S. 469 (1919), affd. 229 N.Y. 544, 129 N.E. 908 (1920); Turnipseed v. Sirrine, 57 S.C. 559, 35 S.E. 757 (1900).

transaction is spent and of no further effect, dies without ever revoking his will, and there is in effect anti-lapse legislation providing for the disposition of gifts to legatees and devisees who predecease the testator. If the will is given effect the property goes to the heirs or next of kin of the first to die to the exclusion of the heirs and next of kin of the survivor, a result probably not anticipated by either of the parties. There is nothing in the contract to affect this situation either one way or the other. The contract was that the survivor should have the property. The will of the first to die gave him the property. The survivor then had the privilege of leaving any legal will he chose. This would include the privilege of leaving in effect the will he had previously executed. Courts faced with this situation, however, have refused to give effect to the will of the survivor,[194] and their conclusion has apparently received at least the passive approval of the commentators.[195] This is not based on a theory of any rights arising out of the contract, but rather on the theory that the evidence of the contract and of both wills may be admitted as part of the circumstances of the execution to show that the instrument offered as a will is in fact conditional in character and that the condition which was to have given it effect has not materialized.[196] The legal question involved is one concerning

[194] Maloney v. Rose, 224 Iowa 1071, 277 N.W. 572 (1938); Maurer v. Johansson, 223 Iowa 1102, 274 N.W. 99 (1937); Anderson v. Anderson, 181 Iowa 578, 164 N.W. 1042 (1917); In re Reed, 125 W.Va. 555, 26 S.E. (2d) 222 (1943); Wilson v. Starbuck, 116 W.Va. 554, 182 S.E. 539 (1935).

Where a husband and wife merely make separate wills by which each of them gives his or her entire property to the other, without any contractual relationship, if the survivor fails to revoke his will, it may be probated, and in such case the property will pass as provided in the anti-lapse statutes to the exclusion of the heirs of the survivor. In Matter of Werkman, 122 W.Va. 583, 13 S.E. (2d) 73 (1940) (referring to and expressly approving Wilson v. Starbuck, supra).

[195] ATKINSON, WILLS §70, p. 175 (1937); 1 PAGE, WILLS, 3d ed., §109 (1941).

[196] "It may be conceded that extrinsic evidence is inadmissible to vary or change the terms of a will or to make another and different will for the testator, but this does not mean that evidence may not be admitted to show the circumstances which accompanied or attended the making of the instrument, or to identify the papers or writings which in fact constitute the will of the deceased. . . . And this is especially true where . . . it is claimed that two or more writings made at or about the same time are part of a single transaction. . . . In such case, resort may be had to all papers of a testamentary or contractual character which entered into the transaction, if any, out of which or in pursuance of which the will was made. . . . Under that rule, it was entirely competent . . .to show . . . the execution of both wills, and the circumstances, if any, tending to show their mutual or contractual nature. That such testimony tends not to destroy the will of the deceased or to change or vary its terms, but rather to designate and identify the entire instrument, is obvious." Anderson v. Anderson, 181 Iowa 578 at 582, 164 N.W. 1042 (1917).

". . . we refrain from a construction of Reed's will as the language thereof is clear and admits of no construction, but the lack of ambiguity therein does not preclude an inquiry whether his will . . . remained in force after his wife's death. This inquiry calls for a discussion of the circumstances surrounding the execution of the wills. . . ." In re Reed, 125 W.Va. 555 at 559, 26 S.E. (2d) 222 (1943).

the admission of extrinsic evidence to show the conditional character of a will unconditional on its face, and is, therefore, beyond the scope of a discussion of the relations created by a contract to make a will. But the conclusion reached appears to be open to serious question on the very ground upon which it is based since it is a rather generally accepted rule that to constitute a conditional will the condition must appear on the face of the instrument.[197]

Another principle sometimes confused with a notion of unilateral rescission is the privilege of the parties to a contract to terminate[198] or modify[199] the agreement by mutual consent. Of course the two parties to a contract for a joint or mutual will may agree to rescind the contract at any time they desire. This possibility ceases when either party dies, because the consent of a dead man cannot be obtained either to the making or the rescission of a contract. These cases have no application where the right of one party to the contract to rescind at his own election is being considered.

Some courts have emphasized the benefits accruing to the survivor through the will of the first to die as a basis for the rule that a contract to make joint or mutual wills cannot be rescinded after the death of one of the parties.[200] Emphasis at this point gives the appearance of a theory of estoppel and the result has sometimes been so described.[201] It is doubtful if the doctrine of estoppel can contribute anything to a clarification of the problems involved. If there is in fact a contract the denial of the privilege of rescission (of the contract) to the sur-

[197] ATKINSON, WILLS, 2d ed., §83 (1953); 1 PAGE, WILLS, 3d ed., §92 (1941). An opposite view is suggested in Evans, "Conditional Wills," 35 MICH. L. REV. 1049 (1937), although no reference is therein made to the situation herein considered.

[198] Kingsbury v. Kingsbury, 120 Misc. 362, 198 N.Y.S. 512 (1923), is a case of this kind and one which well illustrates the erroneous interpretation often placed upon contracts to make mutual wills. The action really failed for lack of sufficient evidence to prove the contract. The court then discussed the question on the assumption that there was a contract and found that the contract, if it ever existed, had been revoked. The evidence of revocation consisted of discussions between the parties, indicating a mutual rescission. (See 198 N.Y.S. at 515-516.) The case has since been cited for the proposition that "either party to a contract to make joint or mutual wills may withdraw from the contract during the lives of both parties." Hirsch, "Contracts to Devise and Bequeath," 9 WIS. L. REV. 267 at 274, note 50 (1934).

[199] Phelps v. Pipher, 320 Mich. 663, 31 N.W. (2d) 836 (1948).

[200] Child v. Smith, 225 Iowa 1205 at 1217, 282 N.W. 316 (1939); Bower v. Daniel, 198 Mo. 289 at 324-328, 95 S.W. 347 (1906); Deseumeur v. Rondel, 76 N.J. Eq. 394 at 403-404, 74 A. 703 (1909); Schramm v. Burkhart, 137 Ore. 208 at 213, 2 P. (2d) 14 (1931); Popejoy v. Boynton, 112 Ore. 646 at 654-655, 229 P. 370 (1924), modified 112 Ore. 655, 230 P. 1016 (1924).

[201] Campbell v. Dunkelberger, 172 Iowa 385, 153 N.W. 56 (1915); Sherman v. Goodson's Heirs, (Tex. Civ. App. 1920) 219 S.W. 839. See also Barr v. Ferris, 41 Cal. App. (2d) 527, 107 P. (2d) 269 (1940) (estoppel doctrine applied where promisee had fully performed, but no joint or mutual will involved).

vivor can be based squarely on orthodox contract law that one party cannot rescind without the consent of the other. If it is admitted that there is no contract between the parties there is no basis for any obligation upon the survivor which would prevent him from making any disposition of his property he chooses. Discussions of estoppel in this connection tend toward the view that the mere existence of reciprocal testamentary provisions, without any contractual relation, constitutes a sufficient basis for reliance by each testator on a belief that the other will not change his will, that upon the death of either the other is estopped from altering his testamentary intentions. Although the statement of such a proposition would seem to constitute its own refutation at least one case has been found which seems to support it.[202]

As previously stated the declarations that either party to a contract to make a joint or mutual will may rescind by giving notice during the life of both parties are usually found in cases dealing with actions where one party has already died and the survivor is attempting to avoid the effect of the contract. Only a few cases involving an attempted rescission by the first to die have come before the courts, but those few have almost invariably reached the conclusion that there was never a right of unilateral rescission from the moment the contract was entered into.[203] Cases which appear to reach the opposite

[202] The real basis for the decision is difficult to discover. The court emhasizes the presence of a contract and the lack of a contract in the same paragraph where it is declared: "The fact that the will was executed in that form conclusively evidences an agreement by the participants to do what was actually done by them. The will became irrevocable after the death of one, not because it was made in pursuance of a previous contract, but because the survivor, after ratifying and accepting the benefits conferred, became estopped to repudiate the will." Sherman v. Goodson's Heirs, (Tex. Civ. App. 1920) 219 S.W. 839 at 841.

[203] Trindle v. Zimmerman, 115 Colo. 323, 172 P. (2d) 676 (1946); Curry v. Cotton, 356 Ill. 538, 191 N.E. 307 (1934) (giving considerable attention to the lack of notice to the survivor prior to the death of the deceased but also emphasizing that where the wills are made pursuant to a contract neither can withdraw "with or without notice, without the consent of the other testator"); Stewart v. Todd, 190 Iowa 283, 173 N.W. 619 (1919), modified, 190 Iowa 296, 180 N.W. 146 (1920) (pointing out that, "As it takes the mutual consent of both to make a contract, so it takes the mutual consent of both to rescind" it); Chambers v. Porter, (Iowa 1921) 183 N.W. 431; St. Denis v. Johnson, 143 Kan. 955, 57 P. (2d) 70 (1936) (enforcing the contract without any discussion of a possible right of rescission); Brown v. Webster, 90 Neb. 591, 134 N.W. 185 (1912); Hermann v. Ludwig, 186 App. Div. 287, 174 N.Y.S. 469 (1919), affd. 229 N.Y. 544, 129 N.E. 908 (1920); Corcoran v. Kennedy, 177 App. Div. 63, 163 N.Y.S. 703 (1917); Tigglebeck v. Russell, 187 Ore. 554, 213 P. (2d) 156 (1949) (other consideration in addition to promise of a mutual will was involved); In re Fischer's Estate, 196 Wash. 41, 81 P. (2d) 836 (1938) (enforcing the contract against the estate of the first to die without even suggesting a right of rescission). *Contra,* Stone v. Hoskins, [1905] P. 194.

result have usually been decided on other grounds. Typical among these are the cases where the contract is unenforceable because it is an oral contract and is within the statute of frauds.[204] The fact that these contracts might have been enforced against a survivor if one party had died carrying his part of the contract into effect rests upon the fact that such an event would have constituted full performance by one party and would thereby have taken the case out of the operation of the statute.[205] It has nothing to do with the theory that either party is free to rescind while both are still alive but the survivor is bound after one has died. Of course if the first to die breaches the contract the survivor should then have the privilege of rescinding rather than seeking enforcement of the contract if he so elects.[206]

Probably the greatest source of confusion concerning the joint and mutual wills arises out of the fact that the execution of these wills is so closely associated with the formation of the contract that the distinct concepts of will and contract tend to become blurred. Evidence of the contract is often found in the wills and the courts move from a description of the will as evidence of the contract to a reference to the will as a contract.[207] When it is said that a will has been revoked as a will but is still good as a contract, all that is meant, or at least all that should be meant, is that the will is revoked, but that the contract which the will was intended to carry out is still in effect and may be enforced.[208] Unfortunately this meaning does not always clearly appear in the discussions of the problem, and it is more often

[204] In re Edwall's Estate, 75 Wash. 391, 134 P. 1041 (1913); McClanahan v. McClanahan, 77 Wash. 138, 137 P. 479 (1913) [cited in 17 MICH. L. REV. 677 at 684 (1919), for the proposition that "if one secretly revoke his will, and die first, this is a good revocation because the survivor still is free to revoke likewise"].

[205] Although the problem of the statute of frauds is not being dealt with at this point, it might be mentioned that an occasional decision can be found which seems to hold that mere execution of a will made pursuant to contract is such performance as will take the case out of the operation of the statute. Johnston v. Tomme, 199 Miss. 337, 24 S. (2d) 730 (1946).

[206] See Puckett v. Hatcher, 307 Ky. 160, 209 S.W. (2d) 742 (1948).

[207] Even when properly treating contracts and wills as two separate entities, the language used often leads to confusion. Where joint or mutual wills have been made pursuant to a contract, there is a tendency, when speaking of the transaction as a whole, to say: "As a will it is revocable. As a contract it is enforceable. . . ." Menke v. Duwe, 117 Kan. 207 at 216, 230 P. 1065 (1924). This is obviously a substantial improvement over the definitely erroneous references to "irrevocable wills" and "revocable contracts," but it seems that there is less danger of misunderstanding when it is said that *the* will is revocable but *the* contract is enforceable, thus clearly indicating that there are two separate concepts rather than two aspects of one concept.

[208] 4 PAGE, WILLS, 3d ed., §1709 (1941).

obscured in the joint and mutual will cases than anywhere else.[209] Whether a case concerns joint and mutual wills or whether it concerns an ordinary bilateral contract to devise or bequeath, if the concept of will and that of contract are always kept distinct from each other, little difficulty is experienced in dealing with the problem. It is only when the separate ideas are blended as though the two were one that serious doubts begin to arise. If this fusion of ideas should be accepted it would mean that a new legal concept would come into existence, but it is doubtful if the courts, either consciously or unconsciously, are bringing about any such result. With the exception of the relatively few situations herein discussed as erroneous decisions (and, it is submitted, decisions contrary to the intent of the parties concerned) the cases can be analyzed in terms of established legal theory without the aid of any new or artificial device created for this special function.

[209] Professor Page, one of the most careful writers on the subject, has, after making the point that the will is always revocable regardless of the contract, said the following with regard to joint and mutual wills: "An instrument which can not be revoked is not a will whatever else it may be. . . . Conveyance by one of the parties to the other does not prevent such other from revoking his will, in the absence of contract." 1 PAGE, WILLS, 3d ed., §108 (1941). Consideration of his work as a whole clearly indicates that the author did not consider the existence of a contract as in any way preventing a revocation (id., §71; 4 id., §1709), and his qualifying phrase, *in the absence of contract,* used in this connection merely confuses the issue.