of appointment, the exercise of which has been unsuccessful, have distinguished cases where the appointment was direct to the appointee and cases where the appointee was made the beneficiary of a trust. As to the former, it is said that it is solely a matter of determining the intent of the donee. If he intended to take the property out of the instrument conferring the power for only the limited purpose specified, he has not considered himself the owner of the property for all purposes, and hence it passes to the heirs or administrator of the donor as if in default of appointment. *Easum v. Appleford*, 5 My. & C. 56 (1840); *Laing v. Cowan*, 24 Bea. 112 (1857); *In re Boyd*, [1897] 2 Ch. 232. If the donee has shown an intent, by his attempt to appoint or otherwise, to control the property for all purposes he will, in effect, be regarded as having appointed to himself and the property will pass by intestacy to his next of kin. *In re Davies' Trusts*, 13 Eq. 163 (1871); *Coxan v. Rowland*, [1894] 1 Ch. 406; *In re Vander Byl*, [1931] 1 Ch. 216.

Where, however, the power is attempted to be exercised through the creation of a trust, it is said that it is no longer a question of intention, but merely one of resulting trust which here would be in favor of the donee or his next of kin, since he was the creator of the trust. *In re Van Hagan*, 16 Ch. D. 18 (1887); *Chamberlain v. Hutchinson*, 22 Bea. 444 (1856); *Lefence v. Freeland*, 24 Bea. 403 (1857); *In re Pinede's Settlement*, 12 Ch. D. 667 (1879); *In re Scott*, [1891] 1 Ch. 298; *in re Marten*, [1902] 1 Ch. 314; see also 2 Jarman, Wills, (7th ed. 1931), 792–4; Gray, Rule against Perpetuities (3d ed. 1915), 443, § 504a. Though the Massachusetts court in the present case held that the property should pass to the next of kin of the donee of the power and cited English cases of the group last referred to, it placed its decision not merely on the ground that a trust had been used in the exercise of the power, but that the donee had manifested the intent to make the property his own. See *Dunbar v. Hammond*, 234 Mass. 554, 125 N.E. 686 (1920); *Bundy v. United States Trust Co.*, 257 Mass. 72, 153 N.E. 337 (1926).

Wills—Joint and Mutual—Secret Revocation—[Illinois].—H and W executed a joint and mutually reciprocal will. Later H, without notice to W, executed another will with different provisions. In a suit in equity brought after the revoking will was admitted to probate *held*, one justice dissenting, the decree requiring a distribution according to the joint will be affirmed. *Curry v. Cotton*, 356 Ill. 538, 151 N.E. 307 (1934).

A joint will is a single instrument constituting the will of two persons. If the testator has the power to revoke then the revoking instrument will be probated but because of a contract he may have lost the privilege of revoking; a bill in equity will lie to enforce the contract. *Allen v. Bromberg*, 163 Ala. 621, 50 So. 884 (1909); *Estate of Rolls*, 193 Cal. 594, 226 Pac. 608 (1924). The mere physical form of the instrument is often made the basis of presumption or even of absolute rules of law as to the existence of a contract not to revoke. Thus it is often said that a joint will is sufficient evidence of the existence of a contract while separate wills, though similar and mutual and executed simultaneously, are not. *Edson v. Parsons*, 155 N.Y. 555, 50 N.E. 265 (1898); *Kenney v. Kenney*, 45 Oh. App. 249, 186 N.E. 853; see *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909); *Wagon Blast v. Whitney*, 12 Ore. 83, 6 Pac. 399 (1895); *Gray v. Perpetual Trustee Co.* [1928] A.C. 391. Some courts, perhaps assuming the existence of a contract, have then proceeded to treat joint and mutual wills as if they were inherently different from ordinary wills with "revocation" of them effective only if made with notice while both parties are alive, or perhaps unless the survivor accepts no benefits

under the will. See *In re Lage*, 19 F. (2d) 153 (D.C. Iowa 1927); *Campbell v. Dunkelberger*, 172 Ia. 385, 153 N.W. 56 (1915); *Wright v. Wright*, 215 Ky. 394, 285 S.W. 188 (1926). Other courts have held these wills to be "irrevocable" under all circumstances. *Stevens v. Myers*, 91 Ore. 114, 177 Pac. 37 (1918); *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255 (1911). These courts also hold that if no contract can be found the "revocation" may be secret and will be effective even if the survivor has accepted benefits under the will. *Wilson v. Gordon*, 73 S.C. 155, 53 S.E. 79 (1903).

The Illinois cases, while often mentioning "compact" and "agreement" and occasionally even "contract," have stated and repeated many dogmatic rules purporting to govern the "revocability" of joint wills. The leading case has been *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216, 27 L.R.A. (N.S.) 508 (1909), which indicates that joint and mutual wills are inherently different from ordinary wills and can only be revoked according to certain set rules. Such arbitrary rules, undesirable in that they are not based on the intention of the parties, are entirely foreign to the flexible rules of contracts. Their true basis has not been satisfactorily explained. In fact the rules are slightly inconsistent, or at least differ as to the effectiveness of a secret revocation during the joint lives of the makers. *Curry v. Cotton* is the first case squarely raising this question and therefore requiring an explanation of the reasons for the rule.

Both the majority and the dissenting opinions found solace in one or more of the dogmatic rules. But both opinions abandon these rules as governing the case and reduce the issue to that of the existence of a contract. While again the court might have been clearer in stating the requirement of proving the existence of the particular promise necessary for recovery, and there might have been a better discussion of this proof from the point of view of all the available evidence, both opinions were decidedly more satisfactory than the previous opinions in this field in Illinois. It is to be hoped that *Curry v. Cotton* inaugurates in this state the modern tendency to solve these problems in the light of contract principles, and that it will supplant *Frazier v. Patterson* as the leading local case on joint and mutual wills.