

1955

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Max Rheinstein, "Critique: Contracts to Make a Will," 30 New York University Law Review 1224 (1955).

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CRITIQUE: CONTRACTS TO MAKE A WILL

MAX RHEINSTEIN

IN THE development of American law the role of learned writing has been constantly increasing. Such writing has become so significant that American law has reached a stage at which it no longer exhibits exclusively those traits which are characteristic of a purely judge-made law. It has assumed new aspects which reflect the systematic thought of the law teacher or the deeply cutting analysis of the scholar.¹ There is yet missing, however, a kind of writing which has for generations constituted an essential, if not perhaps the principal, part of the legal literature of the continental countries—the legal monograph. The cause is entirely external. The high cost of printing has limited the production of law books to those two types for which a wide market can be expected—the text and case book for law students, and the reference book for the practitioners. In rare cases the author of a learned inquiry into a topic of limited scope has been fortunate enough to obtain the subsidy necessary to pay for the cost of publication. As a rule, however, authorship must be adjusted to the facilities of the law reviews. If the author limits his inquiry so that the results of his investigation and thought can be condensed in thirty pages, he can expect to find his brainchild presented to the world in some one of our numerous law reviews, which are financed as educational tools rather than as organs for publication of the results of learning. If the author has chosen a topic of major scope, he must either expect that the typewritten copies of what is usually his doctoral thesis remain hidden in a university library, or he has to cut up his work in small pieces and, with much effort, distribute it over a number of law reviews. While a work published in this

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This paper is a critique of six law review articles on contracts to make a will written by Bertel M. Sparks, Professor of Law at the New York University School of Law, and a Member of the Kentucky Bar. These articles were published as follows:

Historical Development of the Law of Contracts to Devise or Bequeath, 42 Ky. L.J. 573 (1954).

Problems in the Formation of Contracts to Devise or Bequeath, 40 Cornell L.Q. 60 (1954).

Legal Effect of Contracts to Devise or Bequeath Prior to the Death of the Promisor: I & II, 53 Mich. L. Rev. 1, 215 (1954).

Enforcement of Contracts to Devise or Bequeath After the Death of the Promisor, 39 Minn. L. Rev. 1 (1954).

Contract to Devise or Bequeath as an Estate Planning Device, 20 Mo. L. Rev. 1 (1955).

¹ Cf. Rheinstein, Max Weber on Law in Economy and Society lxx (1954).

fashion is at least not entirely lost to the reading public, few readers will be able to profit from it as a coherent whole. Also, since the work does not constitute a book, it will not be reviewed.

That fact not only means that the existence of the work will not be made sufficiently known but also that it cannot fully exercise its impact upon legal learning. In a serious review of a serious book the reviewer tries to indicate those features which constitute the author's specific merits, to engage with him in a conversation of creative critique, and thus to stimulate further thought beyond the author's own contribution to learning.

It is the purpose of this critique to draw attention to a series of six law review articles by Professor Bertel M. Sparks of the New York University School of Law, which are spread over five different law reviews but which belong together as the several parts of a comprehensive monograph on the important and difficult topic of contracts to devise and bequeath. This monograph, which was written as an S.J.D. thesis presented to the University of Michigan Law School, constitutes a significant contribution to legal learning. Altogether, the six articles cover 165 pages of law review format. They should be available as a book. Since they are not, we regard it as a duty at least to review them as they would be if they had been published as a book.

The contract to devise and bequeath or, as we may call it more concisely, the contract to make a will is not among the devices favored by the bar for estate-planning purposes. But it is widely used by laymen; it has, perhaps for that reason, figured in a considerable amount of litigation; and it is, as pointed out by Sparks, an appropriate, and under certain circumstances the only available, tool to achieve a number of legitimate ends.

Among aged men and women of modest means, and the vast majority of the aged are of modest means, there is a strong desire to retain ownership of what property they possess until death. There is also the desire, and it might be said the necessity, to provide care, support, and maintenance, and in many instances, companionship and society, for themselves. A contract to make a will is the only legal device through which this purpose can be achieved.²

Another purpose for which the contract to make a will is the most appropriate device is that of giving a home and the prospect of an inheritance to an infant child expected to give in return his filial devotion. The contract also lends itself well to the settlement of the mutual property rights of elderly people who are about to marry each other and are anxious to provide for the moral obligations which each

² 20 Mo. L. Rev. 1 (1955).

of them may have toward the offspring of a prior marriage, or toward other relatives or charities. For still other purposes the contract to make a will is used in property settlements made upon divorce or separation, or as a device for maintaining control of a corporation, a means for planning the disposition of partnership assets, or a method by which an employer is sometimes enabled to retain an especially valuable employee.

A contract to make a will is a contract by which one party promises the other that he will execute a will in which a devise or legacy as agreed upon will be given to the promisee or to a third party. Closely related, and consequently covered in the author's work, are the so-called mutual wills. Two testators, who have either executed separate testamentary instruments, or have expressed their testamentary dispositions jointly in one single "joint will," have made dispositions in which either provides for a benefit for the other or for third persons in whom the other is interested.

Under a view expressed in a good many cases as well as in legal writing the contract to make a will and the device of mutual wills are two separate and distinct legal institutions. The contract to make a will is a contract, *i.e.*, a transaction by which one party promises that he will perform a certain act, *viz.*, die having validly made and maintained in effect a will containing certain terms. If the promise is kept so that such a will is in effect when the promisor dies, the contract has been properly performed and the beneficiary takes the legacy or devise which is contained in his favor in the instrument. If the promisor dies without such a will being in effect at the time of his death, he has broken his contract and the promisee or third party beneficiary is thrown upon his remedies for the breach of the contract. The exact determination of these remedies has been the subject matter of much litigation and constitutes one of the major topics of Professor Sparks' work.³ To all practical effects it is recognized today that a will which has been made by the promisor in conformity with his contract is revocable like any other will. There is no special category of "will made in conformity with a contract," which would be distinguished from other wills by irrevocability. If the will is revoked the testator may be guilty of a breach of contract, and the claims arising therefrom will affect his estate, but the instrument so revoked cannot be admitted to probate, nor can probate be denied to another instrument on the ground that it is contrary to the contractual duty of the testator.

While all these propositions are almost universally recognized, it

³ 39 Minn. L. Rev. 1 (1954).

is maintained, however, in a good many cases and by several writers, that in the case of mutual wills the testamentary dispositions of the survivor become irrevocable as soon as he has accepted the benefits which have been given to him in the will of the predeceasing party. Any attempt after that moment to revoke or change the reciprocal provisions contained in the will of the survivor is, according to this view, ineffective. In spite of an attempted and otherwise valid revocation, the instrument containing the reciprocal dispositions of the survivor is to be admitted to probate, while, on the other hand, an instrument containing provisions incompatible with those of the original mutual will of the survivor is to be rejected. In two other respects special treatment has been claimed for mutual wills. He who seeks to enforce a claim based upon an alleged contract to make a will has the burden of proving that such a contract has actually been concluded in his favor, and for the proof of the conclusion of such a contract strict and convincing proof is required. For the case of mutual wills it has been maintained, however, that their mere existence raises the presumption of a contract, or even that the will becomes binding upon the survivor, independent of any contract, by the survivor's mere acceptance of the benefits given to him in the will of the predeceasing party. In apparent contradiction to this strictness it is simultaneously maintained, however, that neither party is bound as long as both are alive. Either one is said to be free unilaterally and without the other's consent to revoke his will provided only that he informs the other party of such revocation.

In three respects mutual wills are thus said to be different from wills made in conformity with a contract to devise and bequeath, respects of such importance that mutual wills appear to constitute a legal device different from the contract to make a will. This view is vigorously opposed by Professor Sparks.⁴ He argues that the report of the English case which is commonly regarded as the fountainhead of the special doctrines of mutual will, *i.e.*, Lord Camden's decision in *Dufour v. Pereira*,⁵ is incomplete and incorrect, and that the device of an irrevocable testamentary disposition does not fit in with our system of law in which a will is by definition ambulatory. Professor Sparks' argument is correct. Hargrave's account of *Dufour v. Pereira*⁶ makes it clear indeed that in Dickens' report of *Dufour v. Pereira* an essential passage has been omitted and that Lord Camden was far from pronouncing the rule which has been ascribed to him by later judges. However, later judges have acted upon the basis of such a rule, mis-

⁴ 42 Ky. L.J. 573, 575 (1954); 39 Minn. L. Rev. 1, 2 (1954).

⁵ 1 Dick. 419, 21 Eng. Rep. 332 (1769).

⁶ 2 Hargrave, Jurisconsult Exercitations 99 (1811).

taken though they may have been about its origin. Might we not have to say that by so doing the judges have created the rule for their respective jurisdictions and have thereby created a new kind of disposition mortis causa which, in contrast to the traditional will, is rendered irrevocable by judicial fiat. After all, our legal system is one of judge-made law, and the mere fact that a judicial opinion originated in a historical misunderstanding does not deprive it of its force as precedent.

It is, of course, a different question whether it is wise to establish a new kind of disposition mortis causa which, in contrast to the traditional will, becomes irrevocable at a certain moment but, in contrast to the will made in pursuance of a contract, may, up to another moment, be unilaterally revoked by the testator without exposing his estate to claims for breach of contract. Our author does not engage in a discussion of policy. What matters is whether or not there exists a legitimate demand for a transaction of such a special kind.

In this respect comparative law can give us some clues. The Romans could do without such a transaction, and in modern Roman law it did not appear until about the same time at which it entered upon the scene in England, *i.e.*, the late seventeenth century. Just as in England, the lawyers were puzzled by the problems presented by the institution, and nearly all the problems which have arisen in our law came to be discussed in the *usus modernus Pandectarum*.⁷ Contemporary American law might indeed profit from the extensive discussions, especially those of the nineteenth century German writers.⁸ At the present time "hereditary pacts," as they came to be called in the civil law, are far from being universally recognized.⁹ As a matter of fact, in that form in which the contract to make a will has been developed since the eighteenth century in Anglo-American law, it is not recognized in the civil-law countries at all. On the contrary, a contract by which a party promises to make and maintain in effect a testamentary disposition of a certain kind is regarded as being incompatible with the great principle of freedom of testation, and thus null and void as contrary to public policy.¹⁰

But, strangely enough, in some countries the hereditary pact has been recognized in the more severe shape of irrevocability of the

⁷ See Kipp, *Erbrecht* 134 (9th ed., Coing, 1953).

⁸ See especially, Beseler, *Die Lehre von den Erbverträgen* 2 vols. (1834-1840); Hartmann, *Zur Lehre von den Erbverträgen und den gemeinschaftlichen Testamenten* (1860).

⁹ A world-wide survey is given by Rühl, *Erbvertrag, Rechtsvergleichendes Handwörterbuch* (1932).

¹⁰ French Civ. Code arts. 1130, 1389 (1804); German Civ. Code § 2302 (1896); Italian Civ. Code art. 458 (1942). But see Swiss Civ. Code art. 494 (1907).

will made in pursuance of a contract. As a matter of fact, in the German Civil Code of 1896 three different kinds of disposition *mortis causa* have been established: the testament, the hereditary pact, and the institution of mutual wills. The testament is the unilateral transaction in which a testator disposes of his assets for the case of his death. Like the last will and testament of our law it is ambulatory.¹¹ A hereditary pact, however, is a bilateral transaction by which dispositions *mortis causa* are made by one party or by both. It is not a contract by which a party binds himself to make and maintain in effect a disposition *mortis causa*, but it constitutes that disposition in and by itself. Being simultaneously a transaction agreed upon and participated in by two parties, the disposition of either is not, as a general rule, revocable without the other's consent.¹² Half way between the testament and the hereditary pact stands the institution of the joint will containing reciprocal provisions. In contrast to the hereditary pact, which may be concluded between any two or more persons, a joint will cannot be made by anyone except a husband and his wife.¹³ If in such a joint will the parties have made provisions in favor of each other or if each party has made provisions in favor of a person "who is close to the other," the provisions are presumed to have been intended as mutual.¹⁴ As long as both parties live, each is free to revoke his own dispositions, provided the other party is notified. If one party's disposition is revoked, the other party's automatically becomes ineffective. But after the death of one party, the survivor can no longer revoke his disposition if he has accepted the benefits which have been given to him under the disposition of the predeceasing spouse.¹⁵

This joint and mutual will, as established by the German Code, has exactly the same features which have been claimed for mutual wills in this country. The institution was not provided for in the draft of the Code, which had been prepared with great care over a period of thirteen years. It was inserted at a late stage of the legislative process upon the argument that its recognition was necessary to correspond to a widely felt need.¹⁶ Even today, more than fifty years

¹¹ German Civ. Code §§ 1937-40, 2253 (1896).

¹² *Id.* §§ 1941, 2278, 2290-92. Under the French Code such a transaction can be made only in connection with an antenuptial settlement; under art. 1091 et seq. binding dispositions can be made by the parties to the future marriage in favor of each other or of their future issue; according to art. 1082 binding dispositions in favor of the future spouses or their future issue can also be made, as a part of the antenuptial settlement, by a third party. See also, Austrian Civ. Code §§ 249-254 (1811).

¹³ German Civ. Code § 2365 (1896).

¹⁴ *Id.* § 2270.

¹⁵ *Id.* § 2271.

¹⁶ Cf. Kipp, *op. cit.* supra note 7, at 115.

after the adoption of the Code, occasional skepticism is expressed as to the actuality of the need.¹⁷ The institution seems to be widely used, however, and it does not appear to have given rise to dissatisfaction. This German experience might well be pondered before we cut off, for reasons of mental symmetry, an institution which the courts have set out to develop in apparent response to a demand of the public. How urgent this demand is and whether its satisfaction justifies the birth pains which have been connected with the new institution of the mutual will might also be found out, to some extent at least, through experienced American probate lawyers and judges, especially those who are familiar with the legal needs of people of modest means.

In the first of his articles¹⁸ Professor Sparks traces the history of the institution insofar as it has found expression in published judicial opinions. He is unquestionably correct in his insistence that *Dufour v. Pereira*¹⁹ has been misunderstood and that a great many difficulties and controversies which have appeared in the American cases could have been avoided if the courts had analyzed the institution with greater clarity. Professor Sparks' own presentation has the great merit that the legal concepts which have gone into the making of the contract to make a will are used in a clean and consistent fashion. In such a craftsmanlike approach the questions are asked in the proper fashion and the right answers consequently follow with necessity.

The contract to make a will, we are told with apt insistence, is a contract. It is neither a will, nor a conveyance of a remainder interest with the reservation of a life estate in the grantor,²⁰ nor the creation of an express trust.²¹ The will executed in pursuance of the contract is a will like any other rather than one of a peculiar kind. For the conclusion of the contract all regular requirements of the law of contracts must be fulfilled, such as offer and acceptance, consideration, and compliance with the Statute of Frauds, wherever by its content a particular contract to make a will falls under Section 4 or Section 17 of the Statute.²² No remedy can be granted upon the contract unless its conclusion is proved clearly and convincingly.²³ Indeed, the evidentiary requirements must be particularly strict because the party against whose estate claims are made is dead and thus unable to

¹⁷ *Ibid.*

¹⁸ 42 Ky. L.J. 573 (1954).

¹⁹ 1 Dick. 419, 21 Eng. Rep. 332 (1769); see *supra* p. 1227.

²⁰ 53 Mich. L. Rev. 215, 219 (1954).

²¹ *Id.* at 215.

²² 40 Cornell L.Q. 60, 73 (1954).

²³ *Id.* at 61.

contradict the factual allegations of the claimant.²⁴ The typical dead man's statute is regarded as an insufficient protection against spurious claims.²⁵ Although it appears that some meritorious claims may be thwarted by such evidentiary strictness, the author could have found support for his position in those provisions of the laws of France, Germany, and Switzerland which require for a hereditary pact the special solemnity of conclusion before and recordation by an officially patented conveyancing counsel (*notarius*) or judge.²⁶

That a contract to make a will is a contract in the ordinary sense is of special importance in the case of its breach, which consists in the promisor's failure to have in effect at the time of his death a will corresponding to the terms of his promise. The ordinary remedy for such breach is an action at law for damages, to be prosecuted against the estate of the promisor-decedent in the same manner as any other claim sought to be enforced against a decedent's estate, which means, among other things, that it is not to be paid out of assets of the estate unless it has been filed within the period of the statute of nonclaims.²⁷

Where the remedy at law is insufficient, equitable relief can be had as in all other cases.²⁸ This remedy is particularly useful where the promisee seeks to follow into the hands of a third party a particular asset which the decedent had promised to devise or bequeath to him, and also where the promisor was to leave to the promisee the promisor's entire estate or a fraction thereof. In that latter case the remedy at law is insufficient because the court of law does not have adequate machinery to ascertain, and safeguard the payment of, those debts, taxes, administration expenses, and possible other claims which must be satisfied before the claim of the promisee. In order to achieve these results it is neither necessary nor helpful to speak of the imposition of a trust, constructive or otherwise; the common rules on the grant of equitable remedies in the case of inadequacy of the remedy at law suffice for all legitimate purposes.

Awareness of the fact that we are dealing with a contract also enables us to grant the promisee all those remedies which he may need during the promisor's lifetime to protect himself against possible frustration of his expectation by the promisor.²⁹ Like any other contract the contract to make a will must be interpreted, and in the

²⁴ Id. at 62.

²⁵ Id. at 72.

²⁶ German Civ. Code § 2276 (1896); French Civ. Code arts. 1084, 1394 (1804); Swiss Civ. Code art. 512 (1907).

²⁷ 39 Minn. L. Rev. 1, 10, 45 (1954).

²⁸ Id. at 17.

²⁹ 53 Mich. L. Rev. 1, 215 (1954).

interpretation we must pay attention to the ends pursued by the parties. It is the characteristic feature of a contract to make a will that one party is to be compensated for a present performance, such as his taking care of the needs of the other party, by a future act of the latter. This latter party promises that he will see to it that upon his death the other will receive a certain sum of money, a specific piece of land, chattel, or chose in action, or the totality or a fraction of his estate. Except for the last named, these purposes might also be achieved by a present promise of money to become payable, or a present transfer to become effective, upon the grantor's death. However, such devices would deprive the grantor of all possibility of using for his own purposes the assets affected by the contract. Here we encounter the special reason why parties may resort to the contract to make a will. It is designed to permit the grantor to sell or otherwise dispose of his assets insofar as he needs them for the satisfaction of his normal needs of life.

He is not supposed, however, to thwart the expectation of the promisee by squandering his assets irresponsibly or by making gifts of them to other persons. The promisor maintains his *power* to dispose of his assets, but he has no *right* to do so in a manner which will frustrate the purposes of his contract. Courts have found it difficult both to find a basis for this obligation of the promisor and to define its scope. Influenced by the term contract to make a will, they have at times been at a loss to see how there could be any duties before the promisor's death. Professor Sparks demonstrates that the existence of such duties simply follows from the principle of good faith, which, as he shows by examples, requires in contracts of sale, lease, services, and other types, the promisor to do a good deal more than is indicated by the literal meaning of the bare words of his promise.³⁰

These statements of Professor Sparks constitute a neat example of what has long been known in the civil law as the doctrine of auxiliary contractual duties. There is rarely a contract in which the promisor would have to do no more than literally perform the terms of his promise. In the infancy of a legal system a seller may just have to obtain the goods without being under the additional duty to protect them against loss up to the time of delivery. Nowadays we require the seller of a business within reasonable limits to refrain from competing with the buyer, the employee to safeguard the employer's business secrets, and the landlord of an apartment building to keep the entrance and the stairs reasonably safe for the tenants' use. Especially in German legal doctrine and practice much attention has been devoted to this determination of contractual auxiliary duties

³⁰ 53 Mich. L. Rev. 1, 6-15.

(vertragliche Nebenpflichten),³¹ and the basis for them is being found in exactly that provision of the Civil Code which tells a promisor that he is to keep his contract as is "required by good faith and fair dealing and in view of general custom."³²

In this context the reference to general custom is as important as that to good faith and fair dealing. In every type of contract certain terms are implied as normal, although not as invariable. In a contract of sale it is normally implied that the seller has to deliver within a reasonable time and at his place of business, that he warrants the absence of certain defects of quality and title, etc. All these terms can be varied for a particular contract by express agreement of the parties; but unless they are so varied, they are regarded as impliedly agreed upon. In a similar way terms regarded as being normally implied have, over the course of time, been worked out for other types of contract such as partnership, lease, contract for services, bailment, loan, etc. In the civil law this process has been carried on more consciously and systematically. For each type of contract the Post-Glossators and their successors have come to work out those terms which, as so-called *naturalia negotii*, are regarded as binding the parties unless they have, in an individual transaction, been contracted out or replaced by special terms of the parties' own choosing. Unless so excluded, the type terms apply as the law of the contract, which, however, as it can be eliminated by the parties' own terms, is called "dispositive law" (*ius dispositivum*), in contrast to those norms which, as for instance those of the Statute of Frauds, apply without regard to any individual party's wishes and are thus called norms of strict or cogent law (*ius strictum, ius cogens*). As the rules of dispositive law apply only insofar as they have not been replaced by the contracting parties' own particular terms, we can also say that they have the function of filling in those gaps in the scheme of a transaction for which the parties have not made their own rules, so that we may also refer to the *ius dispositivum* as stop-gap law.³³

The general theory of *ius dispositivum* has been highly developed in the civil law,³⁴ and awareness of its function may be of use in connection with our institution, the contract to make a will. That institution has now existed in our law long enough to allow us to formulate those terms which are to be understood to be meant in the

³¹ Cf. Lehmann, *Recht der Schuldverhältnisse* 16 (14th ed. 1954); Siebert, *Annotations to § 242 in Soergel, Bürgerliches Gesetzbuch* 569 (8th ed. 1952).

³² German Civ. Code § 242 (1896).

³³ Cf. Rheinstein, *Law of Decedents' Estates* 381, 473 (2d ed. 1955); Wright, *Opposition of the Law to Business Usages*, 26 *Col. L. Rev.* 917 (1926).

³⁴ Cf. Nipperdey, *Lehrbuch des bürgerlichen Rechts, Allgemeiner Teil* 132 (13th ed. 1931).

normal case by the normal parties who have neither chosen to supplant them by their own terms expressly, nor have given to their transaction such an unusual shape that the normal terms cannot well be regarded as being fit for their case. The terms normally to be implied in a contract to make a will are exactly those which define the extent of the right to which the promisor is allowed to make use of his power of disposition of his assets. What is that "normal course of events" within which the promisor may consume or otherwise use his assets? Does he breach his contractual duty when he makes any donation, or is he allowed to make certain donations, for instance those which are expected of a man of his status in life by custom and good mores? Or is the contract broken only when the promisor makes a donation with the specific intent to frustrate the promisee's expectation? Also, under what circumstances may the promisor be allowed to rescind the contract upon such grounds as failure of consideration or basic change of circumstances? All these problems have given rise to much litigation; cases are faithfully reported by our author, and he accompanies his account with much clarifying and critical comment.³⁵

The time would seem to have come, however, at which it might be possible to state the *naturalia negotii* of the contract to make a will. It follows from the nature of the situation that the results reached in the decisions of our courts essentially correspond to those rules of dispositive law which are expressed in the German and Swiss Civil Codes,³⁶ whose time-tested rules might be suggestively used in the articulation of those of our law. Professor Sparks' careful analysis of the problems as they have appeared in the case material constitutes the welcome base for this next step. Professor Sparks has already gone far in his own formulation of such a set of rules. The manner in which they have been stated by him will be found helpful and will meet with approval in most respects.

Indeed, there are only two points where some doubt should be expressed. Professor Sparks disagrees with those courts and authors who maintain that under certain circumstances the promisor can, without committing a breach of contract, revoke the will which he has made in pursuance of his contractual obligation.³⁷ Sparks is, of course, right in maintaining that the promisor's right unilaterally to rescind his contract cannot be deduced from his power to revoke his will. He is also right in stating that "it is elementary contract law that one party cannot, in the absence of a breach by the other, rescind his

³⁵ 53 Mich. L. Rev. 1, 4-5.

³⁶ German Civ. Code §§ 2286-88 (1896); Swiss Civ. Code arts. 494, 515-16, 534 (1907).

³⁷ 53 Mich. L. Rev. 215, 222-24 (1954).

obligation without incurring liability for his failure to perform."³⁸ However, it is also elementary contract law that in a contract the parties may agree that under certain circumstances one of them shall have the right unilaterally to terminate the contract. Such a term need not always be stated in express words. The parties may regard it as self-evident that under certain circumstances one or the other is to have a power of rescission. Consequently, they may regard it as unnecessary to insert in their contract an express revocation clause. Again a look at the German Civil Code may be instructive. According to Section 2294 the party whom we would have to call promisor is, unless otherwise agreed upon, regarded as entitled to rescind the contract if the party in whose favor he is to devise or bequeath has made himself guilty of serious misconduct against the promisor. The same power exists under Section 2295, where the promisee has undertaken to take care of the promisor's needs for the rest of the promisor's life and such duty of the promisee is for some reason terminated before the promisor's death.

As in other contracts the mutual rights and duties of the parties, including third party beneficiaries, are defined by the intention of the contracting parties as determined by interpretation and, as one would like to add, by stop-gap law. In addition, there is also the strict law which cannot be affected by the parties' determination. It has been established by the legal order once and for all in order to carry out certain policies in which the community is interested to such an extent that they cannot be overridden by private individuals. One of these community policies which has a bearing upon contracts to make a will is that of protecting a surviving spouse against disinheritance. This policy is implemented by the two institutions of dower (and curtesy) and the indefeasible share.³⁹ If Mr. Husband dies he cannot, by his will, defeat his wife's interest of dower or her power to renounce the will and take that minimum share in his estate to which the statute of the jurisdiction declares her to be entitled. What cannot be defeated by will should also not be capable of being defeated by a contract to make a will. Assume Mr. Husband (*H*), before marriage, has, by contract, promised to his brother that he is to make a will by which the brother (*B*) is to receive Blackacre and the entire personal estate. Assume also that *H* has made such a will but that shortly thereafter he marries. Under the law of most jurisdictions the will is thereby revoked. However, under his contract with *B*, *H* is bound at the time of his death to have in effect a will which corresponds to the terms of his contract. He is thus bound after his

³⁸ *Id.* at 222.

³⁹ *Cf.* Rheinstein, *op. cit. supra* note 33, at 62.

marriage to make a new will, and if he fails to do so, his estate is liable to *B* for *H*'s breach of contract. But does this liability exist to the full extent of the original contract, even if under the law of the jurisdiction a surviving spouse acquires a dower interest in real estate and an indefeasible share of one-third, or one-half, in the personal estate? It might be argued that these rights of the surviving spouse should not affect the rights of the promisee under the contract, so that *H* would be bound at law to pay *B* damages corresponding to the value of her indefeasible share in the personal estate and that in equity she would be bound to release her dower interest to *B*. This indeed is Professor Sparks' answer.⁴⁰ It is reached by him upon the argument that a contract to devise or bequeath is a special transaction to transfer property and that after the conclusion of the contract the property in question is affected by it.

In effect, a contract to make a will would thus be a contract not to marry. Such a contract would be frowned upon by our society. Freedom of marriage is too important to society to be capable of being limited by a contract designed to protect certain property interests of other persons. Entering upon a marriage can thus not constitute a legally recognizable breach of the contractual duty to make and maintain in effect a certain will. Once the marriage is concluded, its incidents should not be capable of being affected by a contract, even an earlier one, made between one of the spouses and a third party. Dower interests and rights to an indefeasible share can, it is true, be excluded by a marriage settlement fairly concluded between the parties to the marriage. But it would be strange if the public interest in protecting a surviving spouse against disinheritance would have to yield to the private interest of a third party with whom the spouse who later happens to be the predeceasing one has, before or after marriage, concluded a contract to make a will. It is of the very essence of such a contract that the promisor can make normal use of his assets. It is also essential that he can continue to live a normal life. He is neither bound to starve nor to remain celibate, and if he is free to marry, he is free to marry with all the normal incidents of marriage, including the right and duty to sell assets in order to feed his wife, and the right of his wife to receive at his death that minimum interest in his estate to which the law declares that she is entitled. The interest of society to maintain such freedom and protection is so essential that it must also be irrelevant whether or not the existence of the contract to make a will was known to the surviving spouse at the time of the marriage.

In the last one of his six articles Professor Sparks discusses the

⁴⁰ 39 Minn. L. Rev. 1, 33 (1954).

"Contract to Devise or Bequeath as an Estate Planning Device."⁴¹ In addition to a useful summary of the earlier part of the work, this article is mainly devoted to the statement of the purposes of the contract as we have summarized them above.⁴² There is a brief warning that the "contract to make a will is not a proper instrument to use unless the promisor is ready to make a final and irrevocable commitment."⁴³ This warning might well have been spelled out. Professor Sparks' lucid presentation is likely to popularize the contract to make a will with the legal profession, whose members have been traditionally skeptical towards it. The contract can turn out to be very cumbersome, however, if it is used indiscriminately. Even if the courts hold the contract to be incapable of defeating the statutory protection of a surviving spouse, it will be more difficult or even impossible to protect the interests of the children of a later marriage. The temptation is great for married people to conclude a contract to make mutual wills or simply to make such wills. Parties to such a transaction should know that they might well debar themselves from future re-marriage.

In the article on the contract to make a will as an estate planning device one would also like to find some reference to the tax problems. There are some strange cases holding that a state statute taxing the transfer of property by intestacy or under a will does not apply to the acquisition of property upon the basis of a will made in compliance with a contract to make a will.⁴⁴ Estate planners do not seem yet to have made extensive use of this marvelous opportunity to avoid state inheritance taxes. Other problems which one would like to see discussed are those which arise in the field of conflict of laws. In many respects it appears to be more appropriate to determine problems arising in connection with a contract to make a will under that law which applies to the distribution and descent of the decedent's estate, *i.e.*, the law of his residence at the time of death or, in the case of immovables, the law of the situs, than the law by which one generally determines problems of the law of contracts.⁴⁵ The intricate problems which may arise in such connection have never been systematically investigated. However, we must be grateful to Professor Sparks for that clear and comprehensive presentation which should go far to eliminate those confusions which have so often plagued the courts in their treatment of contracts to make a will.

⁴¹ 20 Mo. L. Rev. 1 (1955).

⁴² *Supra* pp. 1225-26.

⁴³ 20 Mo. L. Rev. 1, 12 (1955).

⁴⁴ *Estate of Rath*, 10 Cal.2d 399, 75 P.2d 509 (1937); *In re Estate of Johnson*, 389 Ill. 425, 59 N.E.2d 825 (1945); *Bente v. Bugbee*, 103 N.J.L. 608, 137 Atl. 552 (Cl. Err. & App. 1927); *Matter of Orvis*, 223 N.Y. 1, 119 N.E. 88 (1918); *Will of Koeffler*, 218 Wis. 560, 260 N.W. 638 (1935).

⁴⁵ See, e.g., *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895).

NEW YORK UNIVERSITY LAW REVIEW

Published eight times a year, November through June, by the Members of the
New York University Law Review

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