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THE BLESSINGS OF LIBERTY. By Zechariah Chafee, Jr. J. B. Lippincott Co., Philadelphia and New York: 1956. Pp. 350.

Professor Chafee of the Harvard University Law School spent more than forty years of his life in the championship of the basic freedoms in our country. He has lectured widely and written numerous articles and a score of books on civil liberties, and on the subjects he taught at Harvard: Equity, Negotiable Instruments, Banking, Trademarks and Unfair Competition. He was consultant for the National Committee on Law Observance and Enforcement, and was at one time a member of the United Nations Sub-Commission on Freedom of Information and the Press. He was a delegate from the United States to the United Nations Conference on Freedom of Information in Geneva in 1948. As amicus curiae, participated in several cases in the United States Supreme Court and elsewhere involving issues of civil liberties. When, therefore, Professor Chafee writes or speaks on civil liberties he does so with vast experience and great authority.

The Blessings of Liberty is, the author explains in the prefatory acknowledgments, a compendium of speeches and articles which have already appeared in various periodicals, and have been revised for this one volume publication. The style of presentation is leisurely and conversational as though the author were thinking audibly and sharing the logic of his persuasion with his listeners.

Professor Chafee charts his course in the first chapter, *Watchman, What of the Night?*: "This book is written because, so far as in me lies, I want to make my fellow-citizens care more about these ideals (fairness, sound government, happiness). No doubt, liberties sometimes have to be cut down to preserve the nation. We have been passing through very troubled years since Germany and Japan surrendered. Instead of returning to a happy period of unbroken homes and business as usual, for which everybody longed, we faced almost immediately the threat of Communist power abroad. . . . This unceasing tension in foreign affairs was aggravated by fears of Soviet sympathizers in our midst. Therefore, it is not surprising that influential persons and groups urged various kinds of abridgments of liberty. Nevertheless, I hope to let readers see how many sacrifices of freedom have taken place, and to set them questioning whether these sacrifices were all necessary to save the country. Were they wisely planned?" (pp. 17-18).

The author fears that the harvest of laws and loyalty, and security programs of state and federal governments since 1945 have resulted in a climate of emotional disturbance not unlike the hysteria which swept the nation from 1917-1920. But if the backward view seems very dark to him, he confidently looks to a brightening future for the cause of civil liberties in the next fifteen years. Even now he finds cause for consolation. Legal barriers because of color have been battered by the segregation ruling; the right to a fair trial has been better protected; the right to counsel strengthened; "third degree" abuses somewhat diminished; and religious freedom safely secured. However, he fears for the "more subtle freedoms", freedom of speech and thought, and since his trust in the Supreme Court as guardian of civil liberties falters, he appeals to the reasonableness of his readers in the hope that public opinion may be educated to the dangers to civil liberties by the statutes that have enacted in the name of national security. Chapter III, *Forty Years with Freedom of Speech and of the Press*, unfolds in four successive stages the shifting fortunes of these "subtle" freedoms. The Period of Struggle and Criminal Prosecutions of 1917-1920 recalls the wave of alarm against the critics and dissenters of the First World War, and the postwar fear of the Red Menace. Justice Holmes "clear and present danger" test in the *Schenck*[1] case of 1919 came only too tardily

1. Schenck v. United States, 249 U.S. 47, 52 (1919).

to stem the tide of persecution based on the earlier "bad tendency" norm. The Period of Growth, 1920-1930, was signalled by the assumption of the freedom of press and speech in the *Gitlow*[2] case of 1925 into the meaning of "liberty" of the fourteenth amendment. The Period of Achievement, 1930-1945, saw a broadening interpretation of the first amendment liberties highlighted by the reversal of the *Gobitis*[3] case in *West Virginia State Board of Educ. v. Barnette*.[4] The Period of Renewed Struggle and Subtle Repressions, since 1945, was presaged by the first peacetime federal sedition law, the Smith Act[5] of 1948, followed by the Internal Security Act[6] of 1950, and the Communist Control Act[7] of 1954. The author's critical analysis of our security laws and loyalty programs challenges their necessity, and their wisdom, and strongly argues that more harm than any good may issue from them.

However, much of the rationale and validity of the author's evaluation and perspective is dependent in great measure on some of his prepossessions which this reviewer does not find acceptable. To begin with, the parallel drawn between the climate of emotional disturbance during the two World Wars loses the force of logic before the evidentiary disclosures of actual infiltration of subversives in government office, their real influence upon our foreign policy in China and Korea, the betrayal of secret and vital defense information to foreign governments, the commission of United States Treasury plates to the Russians during the occupation of Germany, and all the shocking disloyalties which the names of Judith Coplon, Alger Hiss, Harry Dexter White, the Rosenbergs, Nathan G. Silvermaster, Harold Glasser, William L. Ullman, Frank Coe, and Greenglass bring to mind, not to mention the revelations of ex-Communists Louis Budenz, Whittaker Chambers, Elizabeth Bently, Bella Dodd, and others.

The author computes the danger of subversion in terms of numbers. Undoubtedly, large numbers of subversives would necessarily be a factor in the actual overthrow of our government. But in the deflection of our foreign policy, in the loss of a peace treaty, in the betrayal of secrets, and in the transmission of reports by subordinates in the Department of State to superiors who must base their decisions accordingly, very few would be needed in key government positions. The author cites J. Edgar Hoover on the relatively small number of active Communists in our country, but he does not heed the same authority's repeated warnings that the danger of conspiratorial communism is real and far beyond the numerical quotient.

Designating government informants as "informers" and "spies", the author applies child psychology and discipline to adult responsibilities. "One of the earliest lessons learned by children is, as I have already said, that talebearing on one's comrades is a dirty business. No doubt, there are several long-recognized crimes very harmful to the community, like counterfeiting, where convictions would often be hard to obtain without stool pigeons and spies." To compare the much needed service and grave responsibilities of government informants to children's talebearing is much too facile a misconstruction. Professor Chafee is wholly silent on the duty to government; such service as an expression of patriotic duty. Besides, the author's analogy wobbles badly. Surely even a child is expected to report the dangers of fire, theft, etc., reports which adults then may check for themselves. Mr. Hoover has publicly acknowledged the real and indispensable service of Elizabeth Bentley, Louis Budenz, *et al.*, and to speak

2. Gitlow v. New York, 268 U.S. 652 (1925).
3. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).
4. 319 U.S. 624 (1943).
5. 18 U.S.C.A. § 2385 (1951).
6. 50 U.S.C.A. §§ 781-96, 798 (1951).
7. 50 U.S.C.A. §§ 781-96, 798 (Supp. 1956).

of them as stool-pigeons, spies, renegades, and informers is to distort *a good* with editorializing adjectives. Some, like Whittaker Chambers, have seen their whole private lives exposed to public view because they persevered in their patriotic duty to help root out subversives from government service.

The author is quite disparaging of congressional investigating committees on subversion which, he says, have failed to send to prison "a single person for spying or sabotage or urging revolution." (p. 223). While that may be technically true, it may be fair to acknowledge the number of witnesses, even those in government service, who invoke the Fifth Amendment, as well as to point out that these committees have brought to the surface, since Congressman Nixon pried open the Hiss case, a network of potential espionage and disloyalty in government service with a consequent reform in industrial, military, and civil service loyalty requirements. James Burnham's *Web of Subversion*[8] is a one volume contraction of all the congressional hearings on national security, and a fair antidote to Professor Chafee's minimizing evaluation of our congressional investigatory committees.

Chapter VII, *The Right Not To Speak*, is strangely silent on the classic article by C. Dickerman Williams, *Problems of the Fifth Amendment*,[9] in spite of the fact that the Ford Foundation distributed some fifteen thousand copies as a companion piece to Dean Griswold's *The Fifth Amendment Today*,[10] to which the author does allude. Professor Chafee quotes Wigmore on the potential dangers of abuse inherent in ". . . any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof. . . ." (p. 187). But the author does not quote Wigmore's classic exposition of the rights and extent of non-judicial investigatory powers of government:

"For three hundred years it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. We may start, in examining the various claims of exemption, with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional and are so many derogations from a positive general rule: . . . This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-requited favor. It is a duty, not to be grudged or evaded. Whoever is impelled to evade or resent it should retire from the society of organized and civilized communities, and become a hermit. He is not a desirable member of society. He who will live by society must let society live by him, when it requires him to. . . . From the point of view of society's right to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole—from justice as an institution, and from law and order as indispensable elements of civilized life. . . .

". . . All privileges of exemption from this duty are exceptional, and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. . . ."[11]

8. Burnham, Web of Subversion (1954).

9. 24 Fordham L. Rev. 19 (1955).

10. Griswold, The Fifth Amendment Today (1955).

11. 4 Wigmore Evidence § 2192 (2d ed. 1923).

The author reviews at some length the *Lilburn*[12] case of 1637 supposedly to show that the privilege of the fifth amendment had its origins in the abuses of the interrogations of the Court of Star Chamber. But the precise meaning of that case is that Lilburn's protest was against interrogation in the absence of a formal accusation, not against interrogation as such, and consequently the significance of this historic reference as related to the fifth amendment is still restricted to the possibilities of disclosing self-incriminatory evidence. Professor Chafee correctly sums up the predicament of the witness who must decide for himself whether to answer a given question or not with the alternate dangers of being cited for contempt or of risking the danger of waiving the privilege by answering a question. The Immunity Statute of 1954,[13] which was enacted to foreclose federal criminal prosecution by prior grant of immunity on evidence disclosed, still leaves open the possibility of prosecution under state laws, despite the recent Supreme Court ruling[14] which invalidated a Pennsylvania statute on the grounds that Congress intended to preempt the field of subversion. This assumption on the part of the high tribunal is questionable since there is nothing in the legislative history of the statute to give reason for such a holding. Professor Chafee writes as if constitutional history was slowly advancing an enlarged intention for the fifth amendment. Actually, vigorous attacks were made upon it during the nineteenth century in England and America. At the turn of the century, in *Twining v. New Jersey*,[15] the Supreme Court held that the privilege as a human right was "definitely second class." In *Palko v. Connecticut*,[16] a "liberal" Court expressed sympathetic agreement with the "students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope." The author does not notice the shift in the "liberals" and "intellectuals" who once cried against the use of the privilege by big-business interests at the time of the Teapot Dome-Daugherty investigations, and who have now become the staunch supporters of its extensive invocation before committees investigating potential subversion and sabotage in our country. Earl Jowitt, Lord Chancellor of Great Britain under the Labor Government, made these observations in his book *The Strange Case of Alger Hiss:*

"The principle [of self-pleading self-incrimination] does seem to me to have been carried to ridiculous lengths. For instance, Ullman, a friend of Harry Dexter White, when asked whether he played tennis, answered that he objected to answer on the ground that he might be incriminated—at which there was laughter in the committee room. There was more laughter when Pressman was asked whether he was a member of the American Legion and declined to answer on the same ground. It is right that a judge should not probe too deeply into the reasons which prompt a witness to say he fears self-incrimination, but I cannot imagine any judge in this country allowing this objection to prevail to such a ridiculous extent."[17]

Professor Chafee's insistence that no derogatory inference be drawn from silence, and that a witness should not incur any less consequent reflections than are attendant upon the candidness of the innocent were seriously rebuffed in *Brown v. Walker*.[18] It is difficult to ask that a protestation of love of country and loyal service might be submerged beneath a legal technicality by the innocent against the spontaniety which, humanly

12. 3 How. St. Tr. 1316 (Star Chamber, 1637).
13. 18 U.S.C.A. § 3486 (Supp. 1956).
14. Pennsylvania v. Nelson, 350 U.S. 497 (1956).
15. 211 U.S. 78 (1908).
16. 302 U.S. 319 (1937).
17. Jowitt, The Strange Case of Alger Hiss 142 (1953).
18. 161 U.S. 591 (1896).

speaking, underlies our threefold love of God, of family, and of country. The author makes the most of the cavalier witness who cares not a whit for himself but does for his friends. Might not the author have considered a citizen's obligations of fidelity to his "national" friends, his countrymen?

On loyalty and security programs, the author's position is identical with that of Alan Barth's *The Loyalty of Free Men*,[19] to which he contributed a thirty-two page foreword. The moot question is whether confrontation of accused and accuser should not be required in loyalty board hearings. It is interesting to recall that recently the Association of the Bar of the City of New York (with whose activities and positions the author has expressed occasional appreciation as compared with his criticism of the American Bar Association) recommended in its report of its study of the federal loyalty-security program, released July 8, 1956, that confrontation and the provision of accusatory evidence be accorded only "so far as consistent wtih the requirements of national security,"[20] and therefore leaves both confrontation and the presentation of adverse evidence completely to the discretionary judgment of the hearing board. The most trusted and responsible government officials have held for the necessity and wisdom of secrecy as to the names of informants. Every administration, however critical of its predecessors, has acted consistently on this matter.

And now we come to the wellsprings from which much of the author's reflections draw their inspiration and direction, namely, that Communism, against which the federal and state security laws and loyalty programs are directed, is a political party and as such can claim the same legitimacy as any other political profession and program. There is no need to refute such an intellectual perspective which the President of the United States, Congress, the courts, and the nation at large, the F.B.I., and academicians have set down as conspiratorial. No cognizance, for example, is taken by the author of Sidney Hook's *Heresy, Yes! Conspiracy, No!*[21] In this consists the author's chief weakness—he does not single out the strongest opponents of his own position, and therefore avoids the fruitful occasion of satisfying the reader that his perspective is all-embracing.

Academic freedom is freedom of speech and press considered within the academy. There is no question here of the necessity, propriety, and vast advantages in the study of Communism. But rather the question is whether Communist agents or sympathizers can be fair teachers of Communism or of anything else in the schools. The author's position coincides with that of the American Association of University Professors which, in its special report, *Academic Freedom and Tenure in the Quest for National Security* issued March 21, 1956, held that neither the invocation of the fifth amendment nor the admission of membership in the Communist party should disqualify the teacher from the lecture room. The A.A.U.P. took three important positions: Communist party membership is not conclusive evidence of "unfitness to teach because of incompetence, lack of scholarly objectivity, or integrity"—not unless the member is caught in an overt attempt to win his students to Communism. The use of the fifth amendment as refusal to testify regarding possible Communist activities, even when "legally indefensible," is not necessarily "morally or academically blameworthy." The third position is this: "To maintain a healthy state of thought and opinion in this country, it is desirable for adherents of Communism, like those of other forms of revolutionary thought, to present their views, especially in colleges and universities. . . . How also are Americans to know the nature of the ideological currents in their world?" These three positions

19. Barth, The Loyalty of Free Men (1951).

20. The Federal Loyalty Security Program, Association of the Bar of the City of New York (1956).

21. Hook, Heresy, Yes! Conspiracy, No. (1953).

are a fair summation of what Professor Chafee in an independent opus holds. The first position on fitness is best illuminated by the party's own declaration in 1937 that Communist teachers must take advantage of their positions, without exposing themselves, to give their students, to the best of their ability, working class instruction; that only when teachers have really mastered Marxist-Leninism will they be able skillfully to inject their teaching at the least risk of exposure. Whatever may be the motive for invoking the fifth amendment, and allowing probable justifying reasons for the sake of argument, the question of usefulness is seriously impaired. President Lewis Webster Jones of Rutgers University, in ousting two fifth-amendment professors from his faculty, defended his action by saying that academic freedom is not a negative freedom to be silent, but the positive freedom to perform the traditional functions of research and teaching in the spirit of truth. For members of a university faculty to refuse to give a rational account of their position on vital community issues cuts the ground out from under academic freedom. A minimum responsibility would seem to be that teachers state frankly where they stand on matters of such deep public concern, and of such relevance to academic integrity, as membership in the Communist party. Integrity is required in other professions: medicine and law for example, will not tolerate quacks amongst them. Why should the teachers?

In 1953, the Association of American Universities said officially that invocation of the fifth amendment placed upon a professor a heavy burden of proof of his fitness to hold a teaching position. So, conspiratorial dedication strikes at any claim of fitness, and a misconception of academic freedom casts serious doubt on academic usefulness. As for the third position the confusion of teaching Communism and indoctrinating is patent.

The reviewer is motivated by deep conviction that academic freedom should not be entrusted to those who would work for its destruction and which they deny wherever they are in dominant control. Further, positive academic freedom which explores all possible avenues of knowledge to ever deeper and broadening horizons of truth is not within the concept of "scholarship" of communist intellectuals. Perhaps, the root difficulty with Professor Chafee is not only his failure to appreciate—there is an occasional (though rare) nod to the conspiratorial nature of Communism—but also the absence of a conviction that there are substantive truths which no academic freedom may disparage. His emphasis on freedom, on the open-market of ideas theme, is on the primacy of the procedural—anything goes provided it is done peaceably. But we submit that dissent is intelligible only within the context of assent, for the purpose of knowledge is the good of man, a life of virtue and happiness, in the possession and choice of truth. Herbert Brownell in an address to Lafayette College, October 22, 1955 said: "A Communist teacher forfeits the privileges of academic freedom because his training, purposes and design are all at odds with it. He starts off with the intention, not of teaching, but of twisting and torturing the truth."[22] Samuel Eliot Morison, in his book, *Freedom in Contemporary Society* writes:

"The scientific community has too much taken for granted that a scientist's political and social beliefs are irrelevant to his professional competence. [They are] . . . under the impression that these matters of belief were nobody's business. They had better make it their business. . . ."[23]

In conclusion, we feel that Professor Chafee has not done justice to all aspects of the problem of human freedoms and the endeavor of our government to work out lawful protection for these very civil liberties by providing preventive measures for the sake of our national security. Security and freedom to be realized must complement each other. A free order is the effect of an ordered freedom. The author lays much stress on the

22. N.Y. Times, Oct. 23, 1955, § 1, p. 42, col. 1.

23. Morison, Freedom in Contemporary Society 139 (1956).

overt act or an act directly related to the criminal subversion of our government to the disproportionate deemphasis on subversive *influence* in the classroom, particularly in elementary and secondary schools where teacher and students are unevenly matched and doubts about the validity of the American heritage may be easily instilled. Why should a people be expected to *pay* for such education? The author does not take a full view of the dangers to our foreign policy in China, Korea, and Europe, and its deflection by a few men situated in key positions. It took Whittaker Chambers ten years to alert the Department of State on the betrayal of vital information to an alien government which would destroy us if it could and when it can. The emphasis on numbers and the focusing on the overthrow of our domestic government are much too narrow a perspective. We think it an unwarranted license to refer (passim) to our government's efforts to ensure freedom with security as the techniques of police state nazism and totalitarianism. We respectfully submit that even when we falter we may yet merit blame far less odious. It is not easy for a freedom-loving America to find perfect legal formulas to circumvent the deviousness of such a morally uninhibited conspiracy as atheistic Communism.

But surely it is unfair to ask for complete indefectibility on the part of our government and allow an absolute exercise of civil liberties without corresponding responsibilities.

It is the custom to refer to our civil liberties as an Anglo-American heritage. It is therefore not amiss to quote certain passages from an extremely balanced and wholesome study of national security. After the shock of the Burgess-Maclean case, the British government improved its security system. The British Home Secretary, Lloyd-George, said in a debate in the House of Commons on March 21, 1956:

". . . one of the main dangers to security is presented by the Communist whose faith overrides his normal loyalties to his country, and induces the belief that it is justifiable to hand over secret information to the party or to a Communist foreign power. . . . Communists and those associated with them are not [to be] employed in the Civil Service where they are in a position to get hold of secret information. . . . It is a very understandable reaction to question the need for measures, some of which are certainly alien to our liberal tradition. . . . We cannot sit back and do nothing while our security is imperiled by a menace, the existence of which is accepted on all sides. . . . While some of our countermeasures, it is true, are alien to our liberal tradition, so is the menace which they set out to circumvent. . . . This new creed thinks it loyal to be disloyal and has no scruple about betraying his own country. We are, therefore, driven into adopting steps which we take only because of protecting the liberal traditions that we in this country hold dear. . . . Sometimes [it is] necessary to refuse to employ a man on secret duties because . . . [doubts about his reliability remain] . . . it is right to continue the practice of tilting the balance in favor of offering greater protection to the security of the state rather than in the direction of safeguarding the rights of the individual . . . . Nor can we afford to neglect the danger of a man who, *himself completely innocent,* constitutes a risk to security because, for example, he has relatives behind the Iron Curtain . . . [also] to watch the risk to security which may be caused by the man under the influence of a close relative who is a Communist . . . [those too] who came to serious trouble because of serious defects. . . . many of the finest spies were chosen because they were the type of person who might encourage character defects . . . there can be blackmailing of a person who was not exactly a spy . . . . It is obvious, of course, that there is a great deal of information which cannot in any circumstances be disclosed."[24]

24. U.S. News and World Report, April 20, 1956, pp. 102-03.

Far reaching restrictions were placed on the rights of individuals in a country once critical of United States security methods. Professor Chafee has given us a manual for debaters who wish to bone-up on one side. It is not to be counted amongst his more scholarly publications.

JOSEPH F. COSTANZO, S. J.†

CONTRACTS TO MAKE WILLS. By Bertel M. Sparks. New York University Press, New York: 1956. Pp. 230.

Except for various "how to do it" pamphlets published by such organizations as the Practising Law Institute and the Committee on the Advancement of Legal Education, monographs on legal subjects are difficult to come by these days. The great majority of those available are designed to impart specific information in specialized fields to the busy practitioner without any serious attempt at scholarly analysis of the subjects involved. The law review remains the main vehicle for comprehensive and critical discussions of specific legal topics, but because of space limitations it is often impossible to have a full treatment of the subject to be discussed within the confines of a single issue. This being so, it may be necessary to break a monograph down into several different law review articles and thereby lose some of the impact on the reader that would be felt if the entire study were available to be pondered over as a whole.

Professor Spark's *Contracts To Make Wills* is a monograph, which prior to its publication as such, appeared in substantially the same form by way of separate articles in five different law reviews.[1] In book form it now becomes available to practitioners who otherwise would have to have access to several reviews, and can be read and studied as a unified whole.

The concept of a contract to make a will may suggest some inconsistencies. A will involves a unilateral testamentary disposition of property and its essential feature is its ambulatory nature. On the other hand, a contract imposes mutual obligations on the parties and may not be terminated unilaterally. Does the contract to bequeath property make a will executed in accord with the terms of the agreement irrevocable? Does the contract which calls for the execution of a revocable instrument thereby become revocable itself? A conceptual approach to these problems without an understanding of what parties to such agreements bargain for has led various courts to peculiar and untenable results.

The recurring theme of *Contracts To Make Wills* is that the interests created by contracts to devise and bequeath must be analyzed in terms of contract principles. The owner of the property promises to perform such acts as may be necessary to transmit the property to the promisee at his death. The author finds it difficult to see why a contract to make a will should be treated any differently than a contract to be performed at a future time, whether that time be definitely fixed or on the death of the promisor. The emphasis is placed on the promise to pass property to the promisee, and

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1. 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, Parts I and 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).

the manner of doing so by will is merely incidental. The failure of some judges to arrive at the real understanding and expectation of parties to contracts to devise and bequeath has led to many unfortunate decisions that Professor Sparks undertakes to refute. He shows that the tendency on the part of some courts to treat contracts and wills as acquiring new characteristics when there is a contract to make a will has led to such theoretically improper results as the following: a will executed in performance of such contract is irrevocable; contracts to make joint and mutual wills may be terminated unilaterally; probate should be denied a will not disposing of property according to the terms of an agreement; an injunction may be granted against the revocation by the promisor of a will pursuant to the contract; the promisor in such a contract is the equivalent of a trustee or a life tenant of property.

The author, realizing that it would be impossible to develop theory regarding the validity and effect of contracts to devise and bequeath by attempting to harmonize the language used by the courts, skillfully shows that most of the results arrived at fall into a pattern consistent with the law of wills and contracts. Confusion is often brought about by the court's failure to limit its discussion to the particular issue before it and by going on to make broad and often inaccurate generalizations on theory. In the first chapter, serving as an historical introduction to the subject, the effect of loose talk by judges on the development of theory in subsequent cases is forcefully recorded. The meager reporting of *Dufour v. Pereira*[2] (considered one of the leading cases in this field) in the reports which were most relied upon by the subsequent courts, is the prime example of the misleading generalization leading to inaccurate theory. If later courts had Hargrave's report[3] of the same case before them, it is probable that much of the confusion might have been avoided.

In Professor Sparks' analysis of the contract to make a will, the parties to such an agreement are primarily concerned with the transmission of property at the date of death of the promisor. The promisor remains the owner until his death but is under an obligation to do all acts necessary to pass the property to the promisee when he dies, and to refrain from so acting during his lifetime as to render the fulfillment of the bargin impossible. Where the owner fails to perform by failing to execute a will, by leaving an inconsistent will, or by making wrongful inter vivos transfers, the available remedies should be in law or equity according to the prevailing theories of proper remedies in view of the nature of the contract and its subject matter. No new remedy need evolve because the anticipated manner of performance may call for the execution of a will. Although most of the cases having to do with contracts to make wills appear in equity, it is the result of the subject matter being land or a unique chattel, or the remedy at law being inadequate. Equity should not have any priority simply because performance is to be by will.

Chapters IV and V, dealing with the interests of the promisor and promisee during the lifetime of both, are probably the most original and useful discussions of the real nature of contracts to dispose of property on death. The author's approach is to first clarify the expectations of each party to the agreement before making an analysis of rights and remedies. It is pointed out that in these arrangements the parties rarely express themselves clearly and often have no "intent" with respect to the matters that lead to controversy. But, as in other instances involving the construction of instruments, the court should approach the problem from what the reasonable person who enters into such a transaction would have desired had he anticipated the issue. Even though it is conceivable that there might be a valid contract if the promisor agreed to bequeath and

2. 1 Dick. 419, 21 Eng. Rep. 332 (Ch. 1769).

3. 2 Hargrave, Jurisconsult Exercitations 99 (1811).

devise that which he did not give away in his lifetime, it is reasonable to believe that the average person who is a party to such an agreement would expect something more substantial. He would expect some restrictions upon the use of the property by the promisor during his lifetime.

Where the promisor agrees to leave specific property by will, it is clear that there must be some restraint on his use and disposition of the property during his lifetime. Of course, available remedies by way of injunction or damages for anticipatory breach may vary in different jurisdictions, but the remedy should be one looking foward to the future effect of the lifetime act of the promisor. A more complicated question arises where there is a contract to bequeath all or a fractional part of the estate. The author expresses dissatisfaction with the tendency on the part of the courts to regard inter vivos transfers in derogation of the contract as testamentary dispositions where but for the contract they would not be so treated. Those who enter into such an agreement expect that the owner of the property may make use of the property and even transfer some of it to others in his lifetime. The test should be one of reasonableness; how would one handle his property in the normal course of his affairs when he intends that his estate continue as a going concern. The promisor may even make gifts provided that they be reasonable for one with his wealth and of his station in life and if such transfers do not substantially alter his estate. If a gift is made with the intent to evade the obligations imposed by the contract it should be set aside. The promisee has no right to beneficial enjoyment of the property prior to the death of the owner of the property. However, it is essential that he have some remedy in the lifetime of the promisor because there may be the threat that all of the promisor's property may get into the hands of a bona fide purchaser for value before his death.

A major part of the litigation involving contracts to make wills has to do with the question of proof of the existence of such agreements. Since these arrangements are usually entered into without professional advice and guidance, it is easy to see how the parties will not express themselves precisely. It is pointed out by Professor Sparks that courts are often swayed by their feelings of what is morally just and find the contract to exist on tenuous and equivocal evidence. Moral "oughtness" should not be considered the equivalent of a manifestation of intent to create enforceable obligations. Since it is not unusual for a property owner to make equivocal references as to his desire to leave his wealth to others, especially to those who have rendered him services and acts of kindness, one should be more astute in finding that a binding arrangement is contemplated. Moreover, when the time for litigation comes about, the promisor is usually not available to present his side of the case, and credibility of witnesses may then become the main concern of the fact finder.

As a safeguard against spurious claims that contracts to make wills have been entered into, the law has developed the proposition that evidence to sustain such a contract must be clear and convincing. The intended effect of the rule, however, is often disregarded by a tendency on the part of courts to accept broader and more indefinite offers and acceptances than in other kinds of contracts. The task of the fact finder becomes more burdensome because many of the cases must be decided on oral testimony as to the existence of the contract. The traditional Statute of Frauds would be applicable only in a limited situation where the agreement is to devise realty. The author does not specifically recommend the enactment of any new legislation, but it would appear that the type of statute that exists in some states requiring all contracts to make wills to be in writing would help mitigate the problem of proof to a great extent. Such legislation would aid in deterring fabricated claims of disappointed friends and relatives of the decedent, and preserve the real nature of the transaction from misunderstanding due to failing memories.

Lawyers seem to be reluctant to utilize contracts to make wills as major estate planning tools, probably partly because of lack of familiarity with the law on such arrangements and partly because there are so many other tried and tested dispositive devices that bring about many of the desired results that such contracts achieve. The lawyer is much more often consulted by persons of at least moderate wealth than by those of less affluent circumstances. He can usually put together a plan designed to bring about the desired objectives by making use of trusts and successive estates. The contract to devise and bequeath, however, is an extremely useful estate planning technique where the property owner is a person of little or moderate wealth who has to retain ownership of the property to continue to live in some comfort. He can make use of such contracts to obtain services which he ordinarily could not afford because of the lack of any liquid funds to pay for them.

The last chapter of the book, dealing with the contract to bequeath as an estate planning device recites the various uses to which it might be put. The many specific objectives that this arrangement can achieve in the disposition of estates of all kinds and sizes gives it so great a potential as a planning technique that the practitioner would do well to give it more consideration. This extremely well written, compact but comprehensive monograph of Professor Sparks should go a long way in giving the bar the understanding of the nature of and the uses of the contract to make a will so as to encourage its further employment in drafting estate plans.

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