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less proven otherwise. The reception is ineffective if it is proved the legatee assumes he has ownership of the bequest or he has a lend of the testator.

Based on the explicit messages of Articles 828 and 830, it may be argued that (Talib Ahmadi, 1390AH, no. 4, p. 131) reception of the bequest and approval of the will are two different acts. The legatee's approval leads to the execution of the will, while reception of the bequest is a requisite for the will. Therefore, taking the bequest, which is the sine qua non by virtue of Article 830, shall not be deemed evidence of the legatee's approval of the will. However, there are criticisms against this argument, because the legatee's approval does not require formalities and if the legatee takes the bequest with consent based on the purport of the will, his/her action implies the approval of the will.

### Conclusions

If the legatee rejects the will following the testator's death, the will is invalidated even if the bequest has been unconsciously taken, because a will is only effective if it is approved. However, the legatee can accept or reject the will as many times as he desires before the testator's death. After the testator's death, the legatee is allowed to either accept or reject the will. Hence, the will is cancelled by rejection and the legatee cannot accept it even if the bequest has been received (Zayn al-Din al-Juba'i al'Amili, 1410AH, vol., 2, p. 95). Moreover, if the legatee accepts the will following the testator's death, he cannot reject it even if he has not received the bequest, because ownership results from the approval and rejection does not cancel the ownership.

Article 827 of the Civil Code states "ownership is not transferred by the will unless the legatee accepts the will following the testator's death". Therefore, the will is executed following the testator's affirmation and the legatee's approval after the testator's death, transferring the ownership [of the bequest] since the day the testator passes away. It is also inferred from Article 830 that reception of the bequest prevents the rejection of the will, and if the legatee accepts the will following the testator's death but does not take the bequest, he may reject the will. Therefore, it should be concluded that the will is indefinite unless the bequest is staken.

ship of the bequest is proved by accepting the will. The question is whether it is possible to draw an analogy between a will and a donation and consider “taking” the ownership condition. This doubt does not negate the aforesaid certainty, and thus “Esteshab” is necessary.

The majority of jurists also believes the rejection of a will is ineffective after the testator’s death and after approval of the will, even if the bequest has not been taken (Javaher Kalam, 1404AH, vol. 28, p. 257, Fakhr al-Mohagheghin, 1387AH, vol. 2, p. 471; Amili, 1417AH, vol. 9, p. 372, Al-Hilli, 1388AH, vol. 2, p. 262; Shahid Awwal and Zayn al-Din al-Juba’i al’Amili, 1417AH, vol. 5, p. 16; Bohrani, 1405AH, vol. 22, p. 392; Tabatabai Hakim, 1415AH, vol. 14, p. 545).

Article 830 does not explicitly determine the effect of taking [the bequest] and considers it only a barrier to rejection. It is stated “If the legatee accepts the will posthumously”. Besides, in Article 827 it is stated that “ownership does not result from the will unless the legatee accepts it after the testator’s death”. Hence, a will is executed by the testator’s affirmation and the legatee’s approval following the testator’s death, transferring ownership to the legatee following the testator’s death. It is also inferred from Article 830 that reception of the bequest prevents the rejection of the will. If the legatee approves the will following the testator’s death but does not take the bequest, he can reject the will. Hence, it should be concluded that the will is indefinite unless the bequest is taken.

Accordingly, if the legatee accepts the will following the testator’s death and passes away before receiving the bequest, the ownership of the bequest is transferred to the legatee’s heirs, who may either take the bequest or terminate the contract. This is because following the testator’s death and the legatee’s approval, the property is transferred to the heirs, and the heirs are authorized to take it.

According to the Civil Code, taking [the bequest] is the sine qua non. If the legatee rejects the will after the testator’s death, the will is invalidated even if the bequest has been taken. Therefore, the legatee can no longer accept it, because the effects of the obligation are nullified by rejection. Imāmiyya jurists have consensus over this viewpoint unless the reception of the bequest following the testator’s death reveals that the legatee has approved the will in practice. As a result, rejection of the will after taking the bequest is ineffective un-

either accept or reject the will. Hence, after rejection of the will, the will is cancelled and the legatee cannot accept it even if the bequest has been received (Zayn al-Din al-Juba'i al'Amili, 1410AH, vol., 2, p. 95).

### Approval of the Will after Testator's Death and before Taking the Bequest

If the legatee accepts the will after the testator's death, he cannot reject it even if the bequest has not been received. This is because ownership results from the approval and it is not invalidated by rejection. The role of rejection in testation is similar to the role of rejection in other possessory contracts. In other words, after the transfer of ownership, rejection cannot cancel the resulting ownership (Ibid).

Accordingly, when ownership is transferred, it can only be canceled by a cause that can transfer it and this cause is nonexistent. Moreover, if the rejection raises doubts about that cause, the nonexistence of the cause will also be questionable.

It is said that if taking delivery of the bequest determines the validity of a will similar to a donation, the legatee can reject the will provided that he/she accepts the will but does not take the bequest. Hence, the rejection of the will prior to the reception of the bequest is right and the will is also cancelled by pre-reception rejection.

This claim is disproved for several reasons.

- A) Firstly, analogy is prohibited. In Islam, it is not possible to make an analogy between a contract and another type of contract or between a religious phenomenon and any other phenomenon. It is not possible to generalize the effects and outcomes of one institution to another. Hence, due to the prohibition of analogy, it is not possible to draw an analogy between a will and a donation.
- B) The other reason is the lack of cancelation of the resulting ownership proved through analogy.
- C) The third reason is "Esteshab", which suggests the persistence of the acquired and approved ownership. This principle is useful when it is known a decree or a point was valid in the past but its current existence is not known.

Concerning testation, which is the focus of our discussion, these two pillars and elements are existent, because the legatee's owner-

sentences used in these sayings, which are promoted by the opponents, is dubious. This is because Imam's words were vague and unclear. Perhaps "it's not important" means that the legatee's death does not harm the will and the will remains effective, while the right to accept or reject is transferred to the legatee. The evidence of the common viewpoint is solely the aforesaid saying, but the expedient rules and regulations contradict it. This is because the affirmation results in the transfer of the property to the legatee rather than his/her heirs. Hence, the legatee himself/herself and no one else shall accept the will. The explanations provided by some jurists to support the common viewpoint are almost baseless. The "right" to accept is also questionable, and it is probably a "decree" rather than a "right". Secondly, even if we accept as a right, it is impossible to approve of the transfer of these rights (which solely belong to the legatee) to the legatee's heirs (Mohaghegh Damad, 1377AH, p. 55).

Article 825 of the Civil Code states "If the transfer is hindered by a crime, the bequest is transferred to the heirs unless the crime prevents the transfer of the bequest".

This article is the best evidence of the theory that holds: if the heirs of a legatee, who dies before accepting the will, benefit from the will, the bequest is transferred to them by law (Jafari Langeroudi, 1384AH, p. 124).

### **Role of Taking in Testation**

According to the Civil Code, one of the contracts influenced by taking is a will (testament). The taking of the bequest leads to the dominance of the legatee over the property. The legatee can take the bequest even if the bequest is not taken in practice. By virtue of Article 830 of the Civil Code, as long as the bequest is not taken by the legatee, the legatee can back down on his right to the will.

**Rejection of the Will after the Testator's Death and Before Its Approval despite Reception of the Bequest**

If the legatee rejects the will following the testator's death, the will is invalidated even if the bequest has been unconsciously received, because a will is only effective if it is approved. However, the legatee can accept or reject the will as many times as he desires prior to the testator's death. After the testator's death, the legatee is allowed to

The testator's affirmation in a possessory will is a unilateral obligation, and its legal effect is a financial effect known as "ملك ان يملك". In fact, the "ملك ان يملك" is the right inherited by the heirs and not the right to accept the will (Jafari Langeroudi, 1384AH, vol. 1, pp. 35 and 36).

### Arguments for Inheritance of the Right to Accept or Reject

The majority of Imāmiyya jurists believe that the right to accept or reject [a will] is transferred to the legatee's heirs. To prove their point, they have referred to several sayings such as the following.

- Mohammadun Thalath has quoted in his book from Imam Muhammad Baqer (PBUH): "رجل اوصى لآخر و الموصى له غائب فتوفى الموصى له - قال و من اوصى لاحد شاهدا الذى اوصى له قبل الموصى ، قال الوصيه لو ارث الذى اوصى له - قال و من اوصى لاحد شاهدا كان او غائبا - فتوفى الموصى له قبل الموصى فالوصيه لو ارث الذى اوصى له الا ان يرجع فى وصيته قبل موته", which means "if a testator bequeaths an absent or present legatee, and if the legatee passes away before the testator, the will is transferred to the legatee's heirs unless the legatee rejects the will prehumously" (Al-Hurr al-Aamili, 1409AH, vol. 19, p. 333; Qomi, Sadooq, 1413AH, vol. 4, p. 2110).

- Sabeti states: I asked Imam Baqer (PBUH) "عن رجل اوصى الى و" "about a man who had asked me in his will to annually donate to his paternal uncle, but his paternal uncle has passed away. Imam replied: Donate it to his heirs." (Al-Hurr al-Aamili, 1409AH, vol. 19, pp. 335, Kulayni, 1407AH, vol. 7, p. 13).

### Arguments against Transfer of the Right to Accept and Reject

Muhammad ibn Muslim says "سئل عن رجل اوصى لرجل فمات الموصى له قبل" "I asked Imam about a testator who bequeaths someone a property, but the legatee passes away before the testator's death. He answered: It's not important" (Al-Hurr al-Aamili, 1409AH, vol. 19, p. 335, Tusi, 1407AH, vol. 9, p. 231) The opponents of the transfer of the right to accept to the legatee's heirs have argued based on Imam's words that the will is invalidated in this case.

Given the contrasts between the opponents and advocates' viewpoints, some jurists believe that the first group of sayings is, undoubtedly, preferred. This is because the second group of sayings is rejected by the majority of jurists, casting doubt on their validity, and these sayings are also almost unreliable. Hence, the validity of the

- 2- Some have claimed that the will is invalidated by the legatee's death.
- 3- A third group believes that if the legatee passes away before the testator's death, the will is invalidated. However, if the legatee dies after the testator's death, the will is not invalidated and the right to accept it is inherited by the heirs.
- 4- It is more strongly argued that if the testator's specifies the legatee, the will is invalidated if the legatee passes away before accepting it; otherwise, it is not invalidated and it remains effective.

Shahid Awwal approved of the first viewpoint, but Zayn al-Din al-Juba'i al'Amili approved of the fourth viewpoint in his description of "Lam'eh" (meaning: light; dry land). He claimed that Shahid Awwal approved of the last viewpoint in "Al-Doroos" (Zayn al-Din al-Juba'i al'Amili, 1388AH, p. 229).

In Tahrir al-Wasilah, Imam Khomeini (RIP) writes: "If the legatee passes away without accepting or rejecting the will before or after the testator's death, the right to reject or approve the will is inherited by his heirs. Hence, they can own the bequest by accepting the will. It is similar to inheritance provided that the testator does not cancel the will" (Imam Khomeini, 1425AH, vol. 3, p. 167).

A lawyer asks in his book "If the legatee passes away before accepting a possessory will, is the right to accept the will, which is granted by virtue of the will to the legatee, transferred to the legatee's heirs?" In the previous sections, it was proved that a possessory will is a unilateral obligation. A unilateral obligation is also a favor. In other words, a unilateral obligation is favor-driven unlike a divorce, which is not favor-driven. Thirdly, the legal outcome of this unilateral obligation is "ملك ان يملك", which means the testator permits the legatee to own the bequest by expressing his approval of the will.

Therefore, "ملك ان يملك" is a right with a financial effect and it is potentially available by virtue of being inherited. Hence, nothing prevents the transfer of this right to the legatee's heirs through inheritance. The same viewpoint is advocated by Imāmiyya jurists regardless of the legatee's death before or after the testator's death.

cancel the will prehumously even if the legatee has already accepted it. In addition, the legatee may reject the will following the testator's death, even if he has approved it before the testator's death. This rule is explained in Article 829 of the Civil Code and the beginning of Article 830. It shall not be assumed that the provisions in Article 829 and the beginning of Article 830 are contradictory to the contents of the end of Article 830. This contrast is nonexistent. The reason for the invalidity of the prehumous approval is that the testator is authorized to cancel his will or the legatee is authorized to reject the will (Mohaghegh Damad, 1378AH, pp. 49-50).

#### Legatee's Death and Transfer of the Approval or Rejection Right to Legatee's Heirs

It is noteworthy that the disagreement as to whether a will is a contract or a unilateral obligation and the disagreement about the role of approval in the acquisition of ownership significantly influence the subrogation of the legatee's heirs. Those who believe a will is a unilateral obligation believe that the legatee's death after the testator's death is negligible, because following the testator's death, the legatee's right is enforced and the bequest becomes part of the legatee's assets and is subsequently inherited by the legatee's heirs. However, if the legatee passes away prior to the testator, there are doubts about the consequences, because the right is suspended and it has also not been enforced to be considered a legacy. Therefore, if the legatee dies after the testator, it is not believed the legatee's rights are transferred to the heirs. It is believed that the bequest shall be distributed in accordance with the inheritance law among the legatee's heirs. However, according to those who believe a will is a contract, the legatee's death voids one of the two prerequisites for a will, and they thus resort to Imams' traditions. Since Muhammad ibn Qays explicitly discussed the legatee's death prior to the testator's death, this hypothesis is accepted. Therefore, the legatee's death after the testator's death and his subsequent inability to accept the will are thrown into doubt (Katouzian, 1369AH, p. 358). Whenever the legatee passes away before accepting or rejecting the will, jurists have several viewpoints on whether the right to accept or reject is transferred to the heirs.

- 1- It is famously said that before and after the testator's death, the right to accept the will is transferred to the legatee's heirs if the legatee dies before approving the will

more, as suggested by the first viewpoint (i.e. approval is an integral part of the will), a will is a contract. However, the other viewpoints suggest that a will is a unilateral obligation. The legislator addresses this issue in brief in Article 827 of the Civil Code, yet it is not known which of the three viewpoints has the legislator's approval (Mohaghegh Damad, 1378AH, pp. 35-36). Moreover, testation is an action that is desired by the testator, and unlike a contract it does not stand on two pillars (i.e. acts of selling and buying). It only has one pillar, which is the action originating from the testator's determination, and thus it is most probably a unilateral obligation. Although the legatee's ownership of the bequest depends on his/her consent and approval, the approval is not a determinant of the execution of the will or does not complete it. Rather, it influences the transfer of the ownership of the bequest to the legatee (Ibid, p. 41).

### Time of Approval

There is a disagreement among the jurists on the time of approval of a will. It is not exactly known whether the approval should be granted after the testator's death or prior to the testator's death. Some jurists such as the author of "Mostamsek al-Orva al-Vosqa" believe that the "approval" must be granted only following the testator's death and an approval given prior to the testator's death is void and invalid (Tabatabai, 1416AH, vol. 14, p. 539).

Most jurists believe that the legatee's approval [of the will] before the testator's death is valid and effective. To wit, if the legatee approves the will prior to the testator's death, there is no need for re-approval posthumously. The Civil Code, however, favors the belief of the majority of jurists as it is put in Article 829: "The legatee's approval prior to the testator's death is not effective and the testator may cancel the will even if the legatee has taken the bequest." Article 830 of the Civil Code also states "The legatee may reject or accept the will posthumously. Hence, if the legatee rejects the will before the testator's death but accepts it after the testator's death and receives the bequest, he can no longer reject the will. However, if the legatee accepts the will prior to the testator's death, there is no need for posthumous re-approval."

Although prehumous approval is valid, it does not hinder the cancellation of the will by the testator or legatee, and the testator may

Most jurists believe approval is one of the main pillars of wills (Jaziri, 1419AH, vol. 3, p. 373). Shahid Awwal states “the approval of a will is reflected by one’s satisfaction and consent” (Zayn al-Din al-Juba’i al’Amili, 1417AH, vol. 8, p. 222).

Some lawyers believe that a will is a unilateral obligation (Ja’fari Langeroudi, 1992, p. 5). In addition, Article 827 of the Civil Code states “ownership does not take place by virtue of the will unless the legatee accepts the will following the testator’s death”. The legislator has given a brief description and it is not known whether the legislator believes a will is a contract or a unilateral obligation. However, the legislator believes posthumous approval is a clarifying condition rather than a transferring condition, because ownership is considered to be contingent upon the posthumous approval. This viewpoint is in line with the general viewpoint offered by jurists. Therefore, the viewpoint suggesting the will a contract is preferred. However, the explicit message of Article 827 of the Civil Code cannot be ignored. Since the actualization of ownership is contingent upon the legatee’s approval, it posthumously signals the violation of its cause following the composition of the will. This is because if the will is the cause of complete ownership, it has legal validity, and it brings about the composer’s effect. Hence, it must be acknowledged that the cause in Article 827 of the Civil Code is contingent upon necessity and approval, and this will shall be considered a contract although it does not have the other characteristics of a contract (Katouzian, 1382AH, pp. 63-64).

There are five viewpoints on whether a will is a contract or a unilateral obligation.

- Approval is an integral part of the will, without which the will is void.
- Approval is the transferring condition.
- Approval is the clarifying condition.
- Approval lacks validity but rejection is prohibitive.
- Approval and rejection are both ineffective and a will is a means of transfer by force. (Mohaghegh Damad, 1378AH, p. 35)

According to the above viewpoints, except for the last two viewpoints, approval is effective and a requisite for ownership. Further-

834 of the Civil Code that “a contractual will is not contingent upon the legatee’s approval”, because a contractual will is a unilaterally terminable agreement and only the executor is authorized to reject the contractual will to avoid excessive hardship. However, there is a disagreement on the legal nature of possessory wills among jurists and lawyers, and they have seemingly failed to reach consensus on this notion. Some believe that a possessory will is a contract, whereas some others believe it is a unilateral obligation. The Civil Code has not favored one of these two viewpoints and has remained silent.

Zayn al-Din al-Juba'i al'Amili believes that jurists have three viewpoints on the approval of a will: “ و انما الخلاف فى ان القبول الموصى له هل هو معتبر فى انتقال الملك اليه بالموت بمعنى كونه شرطا فى الملك ام تمام السبب المعتبر فيه، فلا يحصل الملك بدونه اصلا او يعتبر فى الجملة اعم مما ذكر او لا يعتبر اصلا بل ينتقل اليه الملك على وجه القهر كالارث لا بمعنى استقراره له كذلك، بل بمعنى حصوله متزلزا فيستقر ”بالقبول و يبطل استمراره بالرد و ينتقل عنه به الى ورثه الموصى ؟ فهذه اقوال ثلاثة which means “Is the legatee’s approval of the transfer of a estate effective following the death of the testator? Or is the estate transferred by force treated similar to a legacy? Or is it that although it is not valid, the transfer is undermined and its success is contingent upon the approval? Is it also invalidated by rejection and the estate is transferred to the testator’s heirs?” (Zayn al-Din al-Juba'i al'Amili, 1413 AH, vol. 6, p. 117)

In the above descriptions, jurists do not make a distinction between possessory wills and contractual wills. They insist on the necessity of approval and suggest that the will is a contract.

Unlike the aforementioned jurists, Seyyed Muhammad Kazem Yazdi classifies wills into contractual and possessory wills and states “الوصية العهديه لا تحتاج الى قبول و كذا الوصيه بالفك كالعنق و اما التمليك فالمشهور على انه يعتبر فيها القبول جزءا و عليه تكون من العقود او شرطا على وجه الكشف او النقل فيكون من الايقاعات و يحتمل قويا عدم اعتبار القبول فيها بل يكون الرد مانعا و عليه تكون من الايقاع الصريح “: “For a contractual will and a redeeming will there is no need for approval similar to emancipation. Most jurists believe that approval is necessary for possessory wills and is an integral part of these wills. Therefore, the will is considered a contract or a condition that is approved. This condition is either a transferring condition or a clarifying condition, in which case it is considered a unilateral obligation. Approval is probably not necessary but rejection is prohibitive, in which case the will is still considered unilateral agreement.”

the release of a property or contract belonging to others or a contract belonging to the testator. An example of these wills is a will dictating the testator's funeral" (Yazdi, 1409AH, vol. 2, p. 876).

The civil code is based on the jurists' consensus and there is a reference to the word "free of charge". In other words, the ownership shall be transferred for free and the testator shall not charge the legatee for the possession; otherwise, the possessory will is void. Therefore, if the testator enters into an exchange contract by virtue of the will, the will is invalidated.

Another point about the definition provided in the Civil Code is that the legislator did not use the adverb "freely" in the definition of the contractual will, whereas this adverb was used in the definition of the possessory will. Hence, some lawyers believe that one of the differences between the contractual and possessory wills is that in the contractual wills the executor may charge the legatee.

However, it should this conclusion sounds inaccurate, because charging the legatee is a consequence of execution of the will rather than its nature, and the nature of the will nature is unchangeable. Moreover, if the testator assigns the executorship of the will to the executor in exchange for money, the contractual will is not free of charge and thus it is void (Mohaghegh Damad, 1999, pp. 27-29).

Without proposing a definition of wills, the Civil Code classifies wills into two categories in Article 825: possessory wills and contractual wills. In this article, it is stated: "There are two types of wills: possessory and contractual". Article 826 of this law also states "A possessory will is a will whereby the testator posthumously and freely transfers the ownership of his property or a privilege to another person."

A contractual will is a will by which a person assigns one or several people a task or other acts of delivery. The composer of the will is called the testator, the person benefiting from the possessory will is the legatee, the subject of the will is the bequest and the person guarding one-third of the bequest or an underage/insane legatee is called the executor.

### **Legal Nature of Testation**

There is no disagreement among the jurists and lawyers on the legal nature of a contractual will. It is explicitly mentioned in Article

greement and contrast. This is because in most wills, such as in wills for which the testator assigns an executor, he has no responsibility towards him. The executor is obliged to execute the will duly. However, in a possessory will, it does not seem right to assume that the act of taking, which directly results in "ownership", is an obligation. On the other hand, the meaning of "Vasl" (connection) applies to the will and does not include other possessions. It also applies to different types of wills (Katouzian, 1990, p. 24).

Shahid Awwal defines a will as follows " وفي الشرع هي تملك العين او "منفعه او تسليط على تصرف بعد الوفاه", which means "testation is the posthumous disposal of a property or a benefit or announcement of the dominance of someone over a possession." (Shahid Awwal, 1417AH, vol. 2, p. 295) Zayn al-Din al-Juba'i al'Amili criticizes Shahid Awwal's definition of will as follows: "This definition does not apply to a will of emancipation, which does not cause the possession of a property or benefit or dominance over a possession. A will about freedom from a debt or an obligation is not also included due to the lack of generality of this definition" (Zayn al-Din al-Juba'i al'Amili, 1410 AH, p. 263).

The early jurists have not provided an inclusive definition of wills that applies to all people as well as all forms of will (including possessory wills and contractual wills). All of the definitions proposed by all jurists are flawed (Foroohi and Atayi, 1391AH, no. 12 and 13, p. 191).

The recent jurists classify wills into possessory and contractual wills before presenting their definitions of wills in their books. Since the contractual and possessory wills also do not include all examples of wills, some jurists have added other categories and have grouped them. Imam Khomeini (RIP) writes in Tahrir al-Wasilah: "A will is a possessory will if the testator bequeaths a bequest to increase the legatee's financial possessions. Besides, a form of testation that leads to dominance over a right is considered a possessory will. A contractual will is also a will whereby a property is left for hajj or prayers, and such. Finally, there is the redeeming will, whereby a property or person is freed" (Khomeini, 1425AH, vol. 3, p. 163). In this regard, the late Seyyed Muhammad Kazem Yazdi said: " وهي اما تملكه او عهديه و بعبارة اخرى اما تملك العين او منفعه او تسليط على حق او فك ملك او عهد متعلق بالغير او عهد متعلق بنفسه كالوصيه بما يتعلق بتجهيزه", which means "wills are classified into the possessory and contractual categories. To wit, a will either results in the possession of a property (or benefit) or dominance over a right or



## Introduction

Sometimes a person is willing to make posthumous arrangements to bequeath his/her properties. The law and religion enable people to meet this desire. For the attainment of this goal, the religion has introduced an institution named "will", which enables every person to bequeath one third of his/her properties posthumously.

There are many verses in the Noble Quran that explicitly or implicitly approve of testation and testaments (wills). For instance, the verse "كتب عليكم اذا حضر احدكم الموت ان ترك خيرا الوصيه للوالدين و الاقربين" states that "you are required to bequeath your parents and relatives every financially valuable property [you have] before death, and the pious humans shoulder this responsibility (Al-Baqara, verse 180). In addition, it is stated in Quran that "... من بعد" and "وصيه يوصى بها او دين" which means "after testation and fulfillment of the responsibilities" (An-Nisa, verse 11).

There are also many accounts showing that Muslims have been encouraged to bequeath and leave their properties in their wills. This emphasis is sometimes so strong that some jurists have been convinced of the necessity of testation. For instance, it is quoted from Prophet Muhammad (PBUH) that "من لم يحسن وصيه عند الموت كان نقصا في" or "مروته و عقله", or "whoever does not leave a will before his death lacks reason and kindness" (Shaykh Tusi, 008, vol. 3, p. 308).

## Definitions and Types of Wills

There is a disagreement among lexicographers on the root of the Arabic word "Vasiyat" (English: will, testament), and the same disagreement exists among jurists. Some of them believe "Vasiyat" is the gerund of "Vasi", "Yasi", and "Siah", meaning "connecting and attaching". In other words, it connects something to another (Vaseti Zobeidi, 1414AH, vol. 20, p. 269). In his "Kitab al-Mabsout", Shaykh Tusi writes: "الوصيه مشتقة من وصى، يصى، و هو من الوصل و معناه انه يصل تصرفه" which means the word "Vasiyat" is a derivative of "Yasi" and "Vasi". This word suggests that a "Vasiyat" (English: a will) connects the posthumous possessions to the prehumous possessions (Tusi, 1387AH, vol. 4, p. 3).

In Tadhkirat al-Fuqahā, Al-Hilli puts: "هي مشتقة من قولهم وصى اليه بكذا" وصيه صيه اذا وصل به و ارض واصيه اى متصل النبات فسَمي هذا التصرف وصيه لما فيه من

**Abstract:-**

According to the Civil Code, one of the contracts influenced by taking the property is a will. Taking delivery of the bequest leads to the dominance of the legatee over the property. The legatee can seize and take the bequest even if the bequest has not been taken in practice. By virtue of Article 830 of the Civil Code, as long as the bequest is not taken by the legatee, the legatee can back down on his right to the will.

If the legatee rejects the will following the testator's death, the will is invalidated even if the bequest has been unconsciously taken, because a will is only effective if it is approved and accepted. However, the legatee can accept or reject the will as many times as he desires before the testator's death. In addition, if the legatee accepts the will after the testator's death, he cannot reject it even if the bequest has not been taken, because the ownership arises from the approval and it is not invalidated by rejection.

**Keywords:** will , taking , validity condition , sine qua non.

**المخلص:-**

أحد العقود التي يعتبره القانون المدني مؤثراً في إصدار القبض هو الوصية و القبض عبارة عن استيلاء الموصي له على المال الممتلك حيث يمكنه التصرف فيه وإن لم يتصرف فيه بعد فعلا. وبموجب مادة ٨٣٠ من القانون المدني الايراني يستطيع الموصي له أن ينصرف عن قراره السابق ما لم يتم قبض موضوع الوصية. وإن انسحب الموصي له عن الوصية بعد موت الموصي وتم قبض الوصية صدفة أو عند لاوعي، فتبطل الوصية لأن القبض دون القبول لا أهمية له. لكن عند ما يكون الموصي على قيد الحياة فبوسع الموصي له أن يقبل الوصية ولو بعدة مرات أو يرفضها. إن قبل الموصي له الوصية بعد موت الموصي فإنه لم يعد يستطيع رفضه وإن لم يقبض الموصي، لان الملكية نتجت بفضل القبول ولا يبطله الرفض.

**الكلمات المفتاحية:** الوصية - القبض - شرط الصحة - شرط الملازمة.

# The Role of Taking in Testation

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