

MUTUAL WILLS: CONTEMPORARY REFLECTIONS ON AN OLD DOCTRINE

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[Mutual wills are one of a range of solutions providing for a form of family property in common law jurisprudence. The doctrine of mutual wills also operates in support of contracts for the benefit of third parties. With the settling of the doctrine of privity in 1861, some regard the survival of mutual wills as anomalous. A close analysis of the foundation case for the doctrine, Dufour v Pereira, provides insights into the relationship between probate and equity, and common law and equity, in the late 18th century. It was a common law solution laced with arguments of the civil law. While the decision was ultimately resolved as a matter of English law, its civil law 'shadow' left questions hanging. In the unravelling of those issues within the common law, the developments in equitable doctrine ultimately caught up with the 'anomaly'.]

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I THE CONTEXT FOR REFLECTION

The doctrine of 'mutual wills' dates back to the late 18th century, when it was established in *Dufour v Pereira*.¹ The case involved two people making promises about their wills to ensure that their family would benefit in a particular way after each of their respective deaths. The enforcement of the promises through

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¹ (1769) Dick 419; 21 ER 332 ('*Dufour*').

the medium of a constructive trust lay at the heart of the doctrine. In this way the doctrine functioned as a form of private ordering of property in a context which operated to the benefit of third parties. With the settling of the doctrine of privity of contract in 1861² and its exclusion of third parties who were not 'privity' to the contract, the survival of mutual wills was arguably an anomaly. Since then the law with respect to contracts has developed considerably, and, along with the expansion of equitable responses to situations that are seen as unconscionable, the status of mutual wills as anomalous requires review.

This article returns to *Dufour* to consider how mutual wills found their way into English law and how this affected the development of the doctrine to the present day. Through such an analysis, some of the elements of the doctrine may be tested, defended or questioned, and then placed into a contemporary context. The early decision in *Dufour* was curious due to the influence of civil law ideas and the language of Lord Camden's judgment, which left a series of unresolved questions — issues to be unravelled later as common law³ questions in the development of the doctrine in English, and later Australian, law. This article shows how the unravelling of those issues and the developments in equitable doctrine since the mid-19th century have ultimately caught up with, and overtaken, the anomalous status of the doctrine as a consequence of privity. It provides contemporary reflections on the old doctrine of mutual wills in order to give a more thorough and contextual understanding of how the doctrine came to be part of the common law and how it sits in present day jurisprudence.

II THE DOCTRINE OF MUTUAL WILLS

A Definitions and Differences

Mutual wills arise where two (or more) people have made an agreement as to the disposal of their property through wills and each has, in accordance with the agreement, executed a will.⁴ The doctrine is based upon the mutuality of obligations; each testator making provisions by will in return for provisions made by the other(s).

² *Tweddle v Atkinson* (1861) 1 B & S 393; 121 ER 762.

³ The term 'common law', in this sense, is used in contrast to 'civil law'. 'Common law' in this sense includes both the rules of common law and equity.

⁴ The doctrine's occasional appearances in case law have generated a reasonable amount of academic debate, both in terms of examining the theoretical underpinnings of the doctrine as well as analysing its elements: see, eg, J D B Mitchell, 'Some Aspects of Mutual Wills' (1951) 14 *Modern Law Review* 136; Robert Burgess, 'A Fresh Look at Mutual Wills' (1970) 34 *Conveyancer and Property Lawyer* 230; L A Sheridan, 'The Floating Trust: Mutual Wills' (1977) 15 *Alberta Law Review* 211; Timothy Youdan, 'The Mutual Wills Doctrine' (1979) 29 *University of Toronto Law Journal* 390; Charles Rickett, 'A Rare Case of Mutual Wills and Its Implications' (1982) 8 *Adelaide Law Review* 178; Charles Rickett, 'Mutual Wills and the Law of Restitution' (1989) 105 *Law Quarterly Review* 534; Charles Rickett, 'Extending Equity's Reach through the Mutual Wills Doctrine?' (1991) 54 *Modern Law Review* 581; M Weir, 'The Impact of Estoppel on Mutual Wills' (1991) 21 *Queensland Law Society Journal* 121; A H R Brierley, 'Mutual Wills — Blackpool Illuminations' (1995) 58 *Modern Law Review* 95; Ken Mackie, 'Recent Developments in the Law relating to Mutual Wills' (1998) 5 *Australian Property Law Journal* 95.

‘Mutual wills’ are different from ‘joint wills’ and ‘mirror wills’, although the two latter types may also be mutual. ‘Joint wills’ are wills made by more than one person but expressed in one document. As each person dies, the will (or the relevant part of it) is admitted to probate as their individual will. ‘Mirror wills’ contain reciprocal terms which mirror each other. The arrangement will be characterised as one of mutual wills, rather than reciprocal wills, if there is a specific agreement that the provisions for the distribution of property set out in the wills are to be binding. This is often expressed in terms that the wills should not be revoked.⁵ While mirror provisions can point to mutual wills, they are not enough in themselves to make the wills mutual within the doctrine.⁶ As Windeyer J of the Supreme Court of New South Wales commented in *Needham v Needham*:

It is clear that the fact that a husband and wife make what might be described as mirror wills does not in itself give rise to an inference that there is an agreement not to revoke. ... Mirror wills are one fact which with other evidence may enable the court to decide that there was an agreement not to revoke but that is all.⁷

B Elements of the Doctrine

In *Birmingham*, Dixon J described the doctrine as follows:

a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable. It is true that he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property. The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will.⁸

There are thus three elements: first, there is an agreement or contract and its terms as to the binding disposition of property; second, one of the parties survives without revoking his or her will; and third, the trust is imposed.⁹

C Why Make Mutual Wills?

A mutual wills agreement is typically a will-making exercise with an eye to the family. Mutual wills have operated as a doctrine of the ‘older and wiser’. In an

⁵ Charles Rickett argued that an express agreement not to revoke the will should not be seen as a specific doctrinal element. Rather, the essence is the mutuality of obligation: the non-revocation of the will may be a manner of expressing it, but is not an essential element of the contract: Rickett, ‘A Rare Case of Mutual Wills’, above n 4, 180–1.

⁶ *Birmingham v Renfrew* (1937) 57 CLR 666, 675 (Latham CJ) (‘*Birmingham*’).

⁷ (Unreported, Supreme Court of New South Wales, Windeyer J, 15 July 1997) 29–30. See also *Gray v Perpetual Trustee Co Ltd* [1928] AC 391, 400–1 (Viscount Haldane); *Re Cleaver (deceased)*; *Cleaver v Inley* [1981] 2 All ER 1018, 1023–4 (Nourse J) (‘*Re Cleaver*’).

⁸ (1937) 57 CLR 666, 683.

⁹ See especially Rickett, ‘A Rare Case of Mutual Wills’, above n 4; Brierley, above n 4.

era of serial monogamy, mutual wills provided a mechanism for protecting the property brought into a marriage for the benefit of selected recipients — usually children of prior relationships — while providing rights of enjoyment during the survivor's lifetime. They are often made between husband and wife, particularly in second or later marriages and where there are children from earlier relationships. It is either a dynastic exercise (usually expressing a concern to ensure that property 'stays within a family') or one that is meant to ensure provision for the surviving spouse; or both. It is an exercise of 'family property' in a broad sense. The object of mutual wills in the contemporary context is typically to give the survivor reasonably unrestrained enjoyment of the property, but to preserve assets for the children of the prior relationship, rather than have the property go to other relatives of the survivor. Although the doctrine itself is over two centuries old, it has proved remarkably adaptable to contemporary situations of stepfamilies. As the doctrine operates as a trust it lacks flexibility when families change, but this is also its strength in governing the enjoyment of property post-mortem. It provides a kind of insurance against the fickleness of changing affections. It is one of a range of solutions devised in a common law system in the absence of a notion of community of property in marriages that is typical in civil law jurisdictions.

D *Origins of the Doctrine*

Prior to a consideration of the doctrine in operation, it is instructive to consider its foundational elements as articulated by Lord Camden in the first mutual wills case, *Dufour*.¹⁰ It was a curious and novel case, and as a result a number of obiter comments were made that have set puzzles for later judges to solve or to trip over, as the case may be. These will be considered in this article. *Dufour's* novelty lay in the fact that it used a civilian form of will unknown to the common law: the will of two testators written in the one instrument (a joint will).¹¹ *Dufour's* challenge was to solve problems raised by the facts of the case within the context of the common law.

Lord Camden was struck by the peculiarity of the case. It was the first consideration in English law of a joint will, but it was also 'mutual'; the connection was substantive as well as physical. While a regular feature of civil law, the mutual will was unknown to English law until this case.¹²

¹⁰ There are two reports of this case: (1769) Dick 419; 21 ER 332, and a more detailed report first published in 1799 by Francis Hargrave: *Jurisconsult Exercitationes* (1811) vol 2, 100–8 ('*Jurisconsult*'). See also Lord Camden, *Juridical Arguments* (1799) vol 2, 306. The note forms part of a 'professional paper' concerning the Chancery dispute between Lord Walpole and Lord Orford, the Earl of Cholmondley, reported as *Lord Walpole v Lord Orford* (1797) 3 Ves Jr 402; 30 ER 1076. Hargrave notes that he was writing from a manuscript in his possession containing five judgments of Lord Camden, 'carefully copied from his own handwriting' in Lord Camden's personal notebook: Hargrave, *Jurisconsult*, 100. I am grateful for the assistance provided at both the Family Records Centre and the Public Record Office in London in locating the Probate and Chancery papers relevant to *Dufour*.

¹¹ (1769) Dick 419, 420; 21 ER 332, 332 (Lord Camden LC).

¹² Hargrave, *Jurisconsult*, above n 10, 102.

René Ranc and his wife Camilla both made their joint will, expressed to be their ‘mutual testament’, dated 21 November 1745.¹³ They were French-speaking (the will was in French) and they had come to England from France or Geneva.¹⁴ Camilla Ranc had been left, as she described it in this instrument, ‘considerable personal estate’ under the will of her aunt, Mrs Mary de Tudert, who died in May 1740.¹⁵ It seems that they wished to take this into account to ensure an appropriate scheme of distribution for their children. The principal aspects of their testamentary scheme were the gift of a life interest in each other’s property to the survivor of them and a scheme for the disposition of the remainder on trust upon the death of the survivor. The principal part of the litigation focused on the right of Camilla Ranc, who survived her husband, to leave her property contrary to the mutual will. The Lord Chancellor clearly recognised that it was an important case: the Final Decree stated that his Lordship took time to consider it;¹⁶ and it was one of only five written judgments that he left in his court books.¹⁷

The civilian form of will was apparently familiar to the Rances, but it was also written in terms that reflected English law: it established a trust, appointed trustees,¹⁸ and ensured that the provision for their married daughter was for her separate use.¹⁹ Both these aspects of the will reflected English law: the trust was the creature of common law (as distinct from civilian) jurisprudence; and the need for the creation of ‘separate’ property in equity was a reflection of the law concerning married women’s property in England.²⁰ Therefore the will was, in a sense, a hybrid: a combination of civilian form with common law structures.

Examining the doctrine in operation, aspects of the decision in *Dufour* provide both the stakes marking out the doctrine, but also some curious stumbling blocks in obiter dicta that are largely explicable as echoes of civilian doctrine that seem

¹³ Family Records Centre, London, PROB 11/775 Sig 383 (Image reference 319). It was written in French and translated into English in Doctors’ Commons for the grant of probate in the Prerogative Court of Chancery in 1749 on René Ranc’s death. The will is also set out in the pleadings of *Dufour v Vernezobre*: Public Record Office, Kew (UK), Chancery Pleadings C12/525/5. The original will is held as PRO 10/2070, obtainable through the Public Record Office.

¹⁴ In *Lord Walpole v Lord Orford* (1797) 3 Ves Jr 402, 418; 30 ER 1076, 1084, Lord Loughborough recollected that they had lived in Geneva.

¹⁵ See the Probate of Mary de Tudert’s will: Family Records Centre, London, PROB 11/702 (Image reference 447).

¹⁶ Public Record Office, Kew (UK), Chancery Orders C33/431, 583, 586: ‘His Lordship Did Declare he w^d take time to Consider this matter & then give his opinion’. See also Hargrave, *Jurisconsult*, above n 10, 101.

¹⁷ Hargrave, *Jurisconsult*, above n 10, 108. Holdsworth noted that Lord Camden had a keen memory and seldom wrote his judgments: Sir William Holdsworth, *A History of English Law* (1903–1966) vol 12, 308. The eloquence of the judgment struck both Hargrave and a later Lord Chancellor, Lord Loughborough, who, as Alexander Wedderburn, had also been one of the counsel in the case: Hargrave, *Jurisconsult*, above n 10, 107; *Lord Walpole v Lord Orford* (1797) 3 Ves Jr 402, 416; 30 ER 1076, 1085.

¹⁸ Using the nearest equivalent in the French will — ‘*fideicommis*’: Family Records Centre, London, PROB 11/775 Sig 383 (Image reference 319).

¹⁹ ‘[E]t pour son Seul propre et séparé usage, independemment et sans la participation de son dit Mari’: *ibid*.

²⁰ Even if the *fideicommis* may not be considered to be precisely the same thing as a common law trust, the use of the designation of separate estate clearly located the will in English law.

to have found their way into Lord Camden's judgment.²¹ Hypothesising that they are echoes assists in evaluating their significance in the development of contemporary doctrine. These will be explored in the next section.

III THE DOCTRINE IN OPERATION

A *The Probate versus Equity Effects of the Doctrine*

The impact of probate and equity must be distinguished in relation to mutual wills. The cases often involve the revocation of the will by the survivor in contravention of the agreement. From a probate point of view, a will, as a document, cannot be made irrevocable — its revocatory character is of its very nature.²² The property a person owns can, however, be affected by a trust.²³ Therefore, if a will is revoked and a later one made in its place, the latter will must be admitted to probate. But the disposition of the estate may be bound by the terms of the agreement through the imposition of a constructive trust, regardless of the terms of the last will itself.²⁴ Despite the inelegant direction of the final order in *In the Marriage of Garside* that, inter alia, the wife make an 'irrevocable will',²⁵ there is no such creature *as a will*. A person can contract/covenant not to change a will — not to revoke it — but the consequence, if the obligations are mutual, is not that the will is technically irrevocable, but that the obligation is binding by force of the contract and enforceable through the intervention of equitable remedies, such as the constructive trust.

B *Ability to Revoke the Will*

Issues such as the timing, methods and consequences of revocation are key aspects of the doctrine. Stringent standards have to be met in order to prove that the contractual obligations are binding. The claim can only be established by clear and satisfactory evidence, although the standard is assessed on the balance of probabilities.²⁶

As the trust does not arise immediately, the agreement still rests in contract during the joint lives of the parties, and so any ability to alter the terms of their agreement is necessarily contractual. However, in the foundation case of *Dufour* it was said that during their joint lives either party may revoke separately,

²¹ This subject has been given serious consideration by Professor Maurizio Lupoi of the University of Genoa, Italy. Professor Lupoi unravels what he sees as the distinctly civilian roots of much of what Lord Camden pronounced in his judgment in *Dufour*: M Lupoi, *I Trust nel Diritto Civile* (2004) ch 3. I am grateful to Professor Lupoi for the discussions we have had upon this subject and for providing me a copy of this work.

²² See, eg, *Estate of Heys v Gaskill* [1914] P 192, 197 (Evans P); *Estate of Masters* (1994) 33 NSWLR 446, 455 (Mahoney JA).

²³ *Birmingham* (1937) 57 CLR 666.

²⁴ McPherson J in *Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11, 13 ('*Bigg*') gives a useful summary of the probate/equity distinction.

²⁵ (1978) 34 FLR 367, 374 (Wood SJ).

²⁶ See, eg, *Birmingham* (1937) 57 CLR 666, 681 (Dixon J); *Re Newey* [1994] 2 NZLR 590, 594 (Hammond J).

provided notice of revocation was given to the other party.²⁷ The other party then acquired an opportunity to change her or his will, and the ground on which a trust was raised ceased to exist. This therefore provided for unilateral revocation, provided notice was given to the other party. Dixon J referred to this concept in the leading Australian case on mutual wills, *Birmingham*, where he stated that ‘neither party should revoke his or her will without notice to the other’.²⁸ This comment was obiter in both cases as there was no notice given. There are two issues to consider further with respect to the requirement of notice: first, how it came to be part of the doctrine, and second, the timing of the relevant notice.

The statement of principle is now clearly part of the doctrine, but how it came to be included is in part attributable to the influence or discussion of civilian authorities in Lord Camden’s deliberations in *Dufour*.²⁹ It can be seen to be one of the echoes of civilian doctrine that have found their way into the modern law and, as such, may lead to a re-evaluation of it within the context of contract doctrine.

Discussion of mutual wills within civil law was located in laws concerning husband and wife, and particularly the way that property was affected by marriage. Under Roman-Dutch law,³⁰ for example, marriage created a community of goods, unless stipulated otherwise in an antenuptial contract.³¹ There was no separate property of either husband or wife, but rather the community introduced by marriage. Whatever was not expressly stipulated by antenuptial contract remained subject to the community of goods upon marriage.³² The contract had to be made before marriage because gifts between husband and wife were not permitted.³³

On the death of either husband or wife, the community came to an end and the property was divided in half; one half going to the surviving spouse and the other half going to the heirs of the first spouse to die.³⁴ Once married, the husband and wife could not alter their succession plans as agreed in the antenuptial contract by making a will in contravention of those plans unless the other spouse knew of

²⁷ (1769) Dick 419, 422; 21 ER 332, 333 (Lord Camden LC); Hargrave, *Jurisconsult*, above n 10, 104.

²⁸ (1937) 57 CLR 666, 684.

²⁹ Lord Camden indicated that ‘counsel were driven to resort to foreign authors, where these testaments are in use’: Hargrave, *Jurisconsult*, above n 10, 102. We know that the discussion of foreign law and its reasonableness played an important role in the proceedings. Lord Loughborough recollected that it ‘occupied a considerable part of the argument’: *Lord Walpole v Lord Orford* (1797) 3 Ves Jr 402, 418; 30 ER 1076, 1084.

³⁰ The main sources referred to here are Hugo Grotius, *The Jurisprudence of Holland*, first published in Dutch in 1631, which went into many editions and ‘at once took rank as a legal classic’: R W Lee, ‘Preface’ in Hugo Grotius, *The Jurisprudence of Holland* (R W Lee trans, 1926 ed) vii, vii [trans of: *Inleiding tot de Hollandsche Rechtsgeleertheyd*]; and Johannes Voet, *Commentary on the Pandects*. Voet’s compilation of Roman law with commentaries was available in Latin editions from the end of the 17th century (the edition referred to here is Johannes Voet, *The Selective Voet Being the Commentary on the Pandects* (Percival Gane trans, 1956 ed) [trans of: *Commentarius ad Pandectas*]).

³¹ Grotius, above n 30, 121, 125.

³² *Ibid* 125.

³³ *Ibid* 307, 309.

³⁴ *Ibid* 123.

the proposed changes and consented to them.³⁵ An example of this was through the making of a mutual will as a consensual instrument.³⁶ It provided an avenue for overcoming the antenuptial agreement.

At the time of *Dufour*, however, the degree of revocability of such mutual wills was a matter of debate amongst civilians.³⁷ The 18th century Roman-Dutch doctrine, for example, gave considerable scope to revocability, even after the death of the first to die, and therefore did not require notice to the other spouse during their joint lives. Although counsel in *Dufour* cited some authority in support of the proposition that where two people had made a mutual will either of them might revoke secretly,³⁸ Lord Camden rejected such authority, saying that:

The equity of this court abhors the principle ... The law of these countries then must be very defective, and totally destitute of the principles of equity and good conscience: for nothing can be more barbarous, than a law, which does permit in the very text of it one man to defraud another.³⁹

Although Lord Camden anchored the English doctrine in contract, he did not articulate the question of notice in terms of what the parties did, or did not, agree. From his Lordship's perspective, mutual wills could only be clearly revoked by joint consent or unilaterally revoked 'if [one party] give[s] notice'.⁴⁰ Such comments, however, are expressed in terms of his refutation of an aspect of civilian doctrine. Did they, however, establish revocation on notice as a specific element of the doctrine of mutual wills? Or is it rather that as the doctrine was located in contract, the notice issue had to be considered as part of the analysis of the mutual wills agreement as a contract? The civilian 'imprint' needed to be tested in application. Two situations need to be considered: first, where the first party dies without revoking the will and the survivor revokes his or hers; and second, where the first party dies having revoked his or her will. A further question is whether there needs to be a specific term that the wills not be revoked.

³⁵ Voet, above n 30, 232.

³⁶ See Grotius, above n 30, 129, 131; *ibid* 233.

³⁷ In civilian jurisprudence, there were varying authorities with respect to the revocability of an antenuptial agreement made to vary the community of property regime that would otherwise apply. For example, the leading Roman-Dutch author Johannes Voet referred to the divergence of views on the point of revocability as being 'beyond doubt that the survivor cannot revoke the last will of his or her deceased spouse when made on the same tablet', but noted that there was a 'noteworthy variation of decision upon this question' because of the 'very many circumstances of wording and of fact': Voet, above n 30, 688. Johannes van der Linden's work, *Institutes of the Laws of Holland*, was published a few years after *Dufour* in 1806: Johannes van der Linden, *Institutes of the Laws of Holland* (J Henry trans, 1828 ed) [trans of: *Rechtsgeleerd, Practicaal en Koopmans Handboek*]. It provides further guidance as to the civilian law at the time of *Dufour*. Van der Linden also noted the differences referred to in Voet; his own view was that the mutual will 'has merely the force of a last will, and may, therefore, be revoked by both or even one of the parties': book 1, s 5.

³⁸ Given the reference in the next paragraph of Lord Camden's judgment to the defective nature of 'the law of these countries', the authority was evidently civilian: Hargrave, *Jurisconsult*, above n 10, 103.

³⁹ *Ibid*.

⁴⁰ *Ibid* 104.

1 *The First Party Dies Leaving the Will Unrevoked*

The case of *Birmingham* provides a useful frame of reference.⁴¹ On 31 March 1932, Joseph Russell made a will by which he left the residue of his estate to his wife Grace Russell and, if she should predecease him, to four of his wife's relatives (two Renfrews and two Johnstons).⁴² On 1 April 1932, Grace made a will in which, after providing for certain family legacies, she left the residue of her estate to her husband, Joseph, and in the event that he did not survive her, to two Renfrews and two Johnstons (relatives of hers). She died on 26 July 1932.⁴³ On the face of it, her whole estate went to her husband without reservation. Joseph's estate would go to Grace's relatives if his will remained the same. It didn't. The destination of Grace's estate had become important because she had inherited a large estate from her uncle. Joseph changed his will several times after his wife's death and his final will benefited his own relatives, not Grace's.

It was argued by Grace's relatives that Joseph's will of 31 March 1932 was made under a binding agreement with Grace to dispose of his property according to its terms, in consideration for which Grace made the will she did on the following day.⁴⁴ The Renfrews and the Johnstons sought a declaration that the agreement should be specifically enforced or that the testator's executors held the estate on trust for them (and a number of variants).⁴⁵ Joseph's relatives denied that there was a binding agreement or, alternatively, argued that it was too uncertain to be enforced.⁴⁶

It was held that if Grace died without revoking her will, then Joseph was bound after her death not to revoke his will at all. The obligation on the survivor to the mutual wills agreement was specifically enforceable. If the survivor changed his will, the obligations remained. As Dixon J remarked, 'the doctrines of equity attach the obligation to the property'.⁴⁷ Therefore, when Grace died without having revoked her will (that is, she had performed her part of the contract), Joseph was bound by a constructive trust to give effect to their agreement. Dixon J described it as a 'floating obligation, suspended, so to speak, during the lifetime of the survivor' which then descended on the assets upon the death of the survivor to 'crystallize into a trust'.⁴⁸

⁴¹ This case included a discussion on a number of issues with respect to mutual wills and is the starting point in many respects for a consideration of the Australian law. In this article I touch upon the aspects of the decision relevant to the key points under discussion.

⁴² *Birmingham* (1937) 57 CLR 666, 667 (Dixon J).

⁴³ *Ibid* 668.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*.

⁴⁶ They also pleaded the *Statute of Frauds*, namely the requirement that contracts relating to land be in writing in order to be enforceable. At the time of the agreement and at the time of her death Grace owned real estate. Was this therefore a contract to dispose of an interest in land within the relevant statute? Latham CJ stated in *Birmingham* that 'before it can be held that any contract falls within the statute, it should be possible, as soon as the contract is made, to predicate definitely of it that it falls within the terms of the statute': *ibid* 678. If it is only subsequent events that bring land within it, this does not bring the contract within the statute.

⁴⁷ *Birmingham* (1937) 57 CLR 666, 683.

⁴⁸ *Ibid* 689.

2 *The First Party Dies Having Revoked His or Her Will*

What if one party changes his or her will, but the other party does not know of this until the person has died? This places the issue of revocation ‘on notice’, as suggested in *Dufour* and then *Birmingham*, in the spotlight. Does the doctrine of mutual wills involve notice, and, if so, what are the relevant aspects of it? Or is there some other approach appropriate to the circumstances? These questions were to become central in the English case of *Stone v Hoskins*.⁴⁹

In *Stone*, Mr and Mrs Hoskins entered into an arrangement as to the disposal of their property and executed mutual wills. Mrs Hoskins changed her mind and secretly made another will reducing the benefits to her husband. Mr Hoskins, as the survivor, sought a declaration that the promised assets were held on trust for him under the mutual wills doctrine.

This case was distinct from other mutual wills cases in that the one who changed the will died first. What effect did the mutual wills agreement have in such a case? Barnes P applied the principle as suggested in *Dufour*. His Lordship held that where the first party to die had revoked his or her will, this amounted to notice to the other, the ‘only object’ of which was ‘to enable the other party to the bargain to alter his or her will also’.⁵⁰ It was ‘entirely different’ from the case where the first had died without revoking his or her will.⁵¹ The result was that the surviving husband could not assert a trust in his favour as he was released from his own obligation and could alter his own will.⁵² Hence the obligation not to revoke ceased if the first to die unilaterally altered his or her will.⁵³ In *Pratt v Johnson*, Locke J made obiter comments to similar effect.⁵⁴ Both these cases applied the element of notice as a doctrinal element and assumed that notice was effectively given on the death of the first to die (having revoked his or her will).

Even if notice is accepted as a doctrinal element, it may be queried whether it was applied correctly in these cases. In Lord Camden’s judgment in *Dufour*, the emphasis was on the avoidance of ‘cheating’ the other.⁵⁵ His Lordship expressly rejected civilian authority cited to him which suggested that either party might make ‘a secret will to disappoint the joint disposition’.⁵⁶ Further, although the focus of his Lordship’s judgment was on revocation by the survivor, the emphasis appeared to be on notice during the joint lives of the parties:

⁴⁹ [1905] P 194 (*Stone*).

⁵⁰ *Ibid* 197.

⁵¹ *Ibid*.

⁵² Rickett points out that the failure of the trust claim needs to be seen in the context of the fact that this was a probate action. Mr Hoskins was seeking to propound the earlier will made pursuant to the mutual wills agreement, and claimed in the alternative that the executors of the later will should be directed to hold the property of the testatrix in trust according to the agreement. Rickett notes that ‘nothing Sir Gorrell Barnes P actually said went to a denial of a potential claim for a breach of contract’. This would, as he states, have required a separate action: Rickett, ‘Extending Equity’s Reach’, above n 4, 584.

⁵³ See consideration of this and other mutual wills cases in Mackie, above n 4.

⁵⁴ [1959] SCR 102, 109. The remarks were obiter as the first to die had left his will unrevoked.

⁵⁵ Hargrave, *Jurisconsult*, above n 10, 103.

⁵⁶ *Ibid*.

But to affirm, that the survivor (who has deluded his partner into this will upon the faith and persuasion that he would perform his part) may legally recall his contract, *either secretly during the joint lives*, or after at his pleasure, I cannot allow.⁵⁷

Hence, if the notice element *requires* notice during the joint lives of the parties, as Lord Camden's statements seem to imply, then *Stone* was not decided correctly and the reasoning of Barnes P is open to criticism.⁵⁸

In Australia, some 80 years after *Stone*, a different conclusion was reached in *Bigg*. Here, Mr and Mrs Bigg executed mutual wills. However, unknown to Mr Bigg, Mrs Bigg revoked her will and made several others. The interest to him under her will was now no more than a life interest. After Mrs Bigg's death, Mr Bigg claimed that her executor held the estate on trust for him and, in the alternative, he claimed damages for breach of contract. Mr Bigg had made investments in his wife's name in the belief that the mutual wills still existed. Therefore, was this a case for the application of the mutual wills doctrine? On the analysis in *Birmingham*, the intervention of the equitable doctrine of mutual wills arises on the performance of his or her contractual obligations by the deceased (that is, the first to die). How could the doctrine be applied against the deceased by the survivor?

McPherson J held that, quite apart from any remedies that Mr Bigg might have at law for damages for breach of contract, the defendant executor held the estate on constructive trust for Mr Bigg.⁵⁹ This has raised some interesting questions for analysis. Was the constructive trust in this case a consequence of the mutual wills doctrine, or some other principle? Either the doctrine can be reviewed or another basis for relief found. With respect to the doctrinal point, it might be argued, on the one hand, that the mutual wills doctrine would not apply at all once the first to die revoked his or her will thereby putting the survivor on notice, or that the notice of revocation may only be given during the joint lives of the parties.⁶⁰ On the other hand, it might also be argued that the notice point is not a necessary doctrinal element at all, and that the real issue is exactly what the parties agreed to in their contract.

If indeed the notice point continues to be regarded as a doctrinal element, then an alternative basis for analysis can be found to explain the result in *Bigg*. Several commentators see the decision as explained by estoppel, rather than by mutual wills.⁶¹ Charles Rickett has made significant contributions to the subject through a series of articles prompted by mutual wills cases in the United Kingdom, Canada and Australia.⁶² He made a particular study of the *Bigg* case.⁶³ Rickett argued that the constructive trust remedy invoked by McPherson J revealed 'conceptual confusion' between breach of the agreement and concluded

⁵⁷ Ibid 104 (Lord Camden LC) (emphasis added).

⁵⁸ One of the anonymous referees of this article was certainly of this view.

⁵⁹ [1990] 2 Qd R 11, 13.

⁶⁰ Ibid 15–16 (McPherson J). See also Rickett, 'Extending Equity's Reach', above n 4, 584–5.

⁶¹ Rickett, 'Extending Equity's Reach', above n 4, 586; Mackie, above n 4, 97–9; Weir, above n 4.

⁶² Rickett, 'Mutual Wills and the Law of Restitution', above n 4; Rickett, 'Extending Equity's Reach', above n 4.

⁶³ Rickett, 'Extending Equity's Reach', above n 4.

performance of the agreement.⁶⁴ Only the latter would give rise to a constructive trust.⁶⁵ This did not mean that proprietary remedies would never be appropriate, but rather ‘an equitable proprietary remedy should be imposed for a unilateral breach of agreement only when a very clear justificatory principle exists’.⁶⁶ He explained that the constructive trust was imposed in a standard mutual wills case ‘because an equitable obligation, in the nature perhaps of a fiduciary relationship, has come into being, superimposed on the contractual relationship between the parties’.⁶⁷ The ‘justificatory principle’ Rickett identified was to prevent an unjust enrichment, as ‘[t]he trust in *Bigg* was not being imposed because of the unilateral breach of agreement, but rather as a remedy to prevent a clearly identified unjust enrichment or in recognition of an equitable estoppel’.⁶⁸

Similarly, Ken Mackie analysed the case on the basis of estoppel:

Although not specifically mentioned by McPherson J all the elements of estoppel established by the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher* ... appeared to have been present on the facts, including expectation, reliance and detriment. There was no prejudice in *Stone v Hoskins*, and the case is thus distinguishable on that basis.⁶⁹

Seen in this light, *Bigg* was not a case to illustrate the mutual wills doctrine at all.⁷⁰ It was rather an illustration of an equitable remedy being found to respond to a situation in which a promisor was considered to have acted unconscionably. But *Bigg* was a mutual wills case, and is only excluded from consideration within the doctrine of mutual wills if the doctrine is examined narrowly. The mutual wills agreement in *Bigg*, as in *Birmingham*, sits within that zone of private ordering of property in marriages referred to at the outset and, as such, encounters responses from the law of separate property through contract and through the broad and growing range of equitable doctrines.

The fact that the notice point is seen to be a ‘civilian echo’ gives added weight to the need to focus on the mutual wills doctrine as a matter of contract, rather than assuming that the notice point is a necessary doctrinal element. When the focus is upon what the parties have agreed, then another point that has arisen in various cases is also more clearly understood, namely whether there needs to be an express provision not to revoke the wills made pursuant to the mutual wills agreement.⁷¹ Given that the essence of the agreement for mutual wills is an agreement to leave property in a particular way amongst an agreed set of beneficiaries, the issue of a contractual term not to revoke the will is not so

⁶⁴ Ibid 583

⁶⁵ Ibid.

⁶⁶ Ibid 584.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Mackie, above n 4, 98–9 (citations omitted). See also Weir, above n 4, 124–5.

⁷⁰ See Rickett, ‘Extending Equity’s Reach’, above n 4, 587.

⁷¹ Rickett argued that it is not necessary to find an express agreement not to revoke; that this was a doctrinal embellishment introduced in *Re Oldham* [1925] Ch 75: Rickett, ‘A Rare Case of Mutual Wills’, above n 4, 181–5.

important: it is consequential, but not essential with respect to whether the obligation will be fulfilled through equitable remedies.⁷²

As a matter of contract law, the question in such cases should be as to the nature of the agreement itself. Did the parties contemplate revocation at all, and if so, could the agreement be revoked on notice? The parties may agree expressly that revocation may only take place with the written consent of the other party.⁷³ The parties may also agree that the wills are not to be revoked at all, even on notice. As the English academic Professor L A Sheridan commented, '[a]s contracts not to revoke wills are valid and enforceable in general, there is no reason to believe that a contract for mutual wills could not exclude the right of one party to revoke on notice to the other'.⁷⁴

This found application in the New South Wales case of *Aslan v Kopf*.⁷⁵ Gleeson CJ suggested that it could be possible to find an unconditional prohibition against revocation at any time as part of the contractual undertaking. In the absence of such prohibition, however, the general rule that the will was revocable provided notice was given to the other party or parties to the mutual wills agreement applied.⁷⁶ In this case, notice was given to the other parties.

The argument here is about what is doctrinal and why. Understanding how 'revocation on notice' became an arguably unnecessary doctrinal element enables us to consider the doctrine within its true context of the common law — with contractual principles and equitable doctrines as the relevant framework for constructing, developing and analysing the force of a mutual wills agreement today.

C Is Benefit to the Survivor Necessary?

In his analysis in *Dufour*, Lord Camden formulated two issues:

First, how far the mutual will shall operate as a binding engagement, independent of any confirmation by accepting the legacy under it.

Secondly, whether the survivor can depart from this engagement, after [the survivor] has accepted a benefit under it.⁷⁷

For the later consideration of the doctrine, two particular questions arose: was it *necessary* for the survivor to benefit, and was it open for the survivor to renege on the agreement so long as he or she did not 'accept a benefit' under the will of the first to die? Such questions prompt us to consider again the development of the doctrine itself. What were the essential doctrinal elements as initially conceived, and what are the necessary doctrinal elements when considering the doctrine as part of the common law?

⁷² Rickett, 'A Rare Case of Mutual Wills', above n 4, 185.

⁷³ See, eg, *Barns v Barns* (2003) 214 CLR 169, 174 (Gleeson CJ).

⁷⁴ Sheridan, above n 4, 219.

⁷⁵ (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995).

⁷⁶ *Ibid* 6.

⁷⁷ Hargrave, *Jurisconsult*, above n 10, 103.

The mere fact that the concept of acceptance of benefit was included by Lord Camden at all seems to be another example of the influence of civilian authorities.⁷⁸ Timothy Youdan has argued that when seen in this light, acceptance of benefit under the will of the first to die should not be regarded as an essential element of the common law doctrine.⁷⁹ The references that arise in texts or judgments that retain a notion of ‘election’ appear to fail to grasp this point. They do not sit well when the civilian background to this aspect of Lord Camden’s judgment is properly understood.

Whether acceptance of benefit was an essential aspect of the doctrine did not need to be decided in *Dufour*, nor in *Birmingham*. The issue can arise, for example, where the agreement does not involve any benefit to the survivor because the benefit is destined for other beneficiaries. Just such a question arose in the English case of *Re Dale; Proctor v Dale*.⁸⁰

In *Re Dale*, the husband and wife executed mirror wills in 1988, in which their respective estates were left to their children in equal shares. The husband died leaving his will as promised. The wife changed her will leaving the bulk of her estate to their son. One argument was that the mutual wills doctrine had no application in such a case because the survivor took no benefit under the will of the first to die. Morritt J rejected the argument that benefit to the survivor was a necessary element in the doctrine, on the basis that the doctrine was concerned with the prevention of fraud. Hence, where the survivor benefits, the doctrine applies; however, this is not exclusive of all other examples. As Morritt J concluded:

I am unable to see why it should be any less a fraud on the first testator if the agreement was that each testator should leave his or her property to particular beneficiaries, eg their children, rather than to each other. ... In each case there is the binding contract. In each case it has been performed by the first testator on the faith of the promise of the second testator and in each case the second testator would have deceived the first testator to the detriment of the first testator if he, the second testator, were permitted to go back on his agreement. I see no reason why the doctrine should be confined to cases where the second testator benefits when the aim of the principle is to prevent the first testator from being defrauded. A fraud on the first testator will include cases where the second testator benefits, but I see no reason why the principle should be confined to such cases.⁸¹

By tying the doctrine into contract and fraud on the contract, Morritt J anchored his analysis within the common law. The notion of benefit was an unnecessary element to introduce into established equitable doctrine. It was another echo of civilian doctrine which, in contractual terms, was irrelevant as a

⁷⁸ *Dufour* (1769) Dick 419, 421; 21 ER 332, 333. For example, it seems to have elements of the scope of revocability as referred to in Voet, where the spouse who wished to ‘cleave to the dotal agreements’ against the mutual will could do so by not receiving any benefit under it: Voet, above n 30, 233. The continuation of this in Roman-Dutch law is evident, for instance, in *Denysen v Mostert* (1872) LR 4 PC 236.

⁷⁹ Youdan, above n 4, 415–16.

⁸⁰ [1994] Ch 31 (*‘Re Dale’*).

⁸¹ *Ibid* 48–9.

doctrinal element. In principle, the issue was one of fraud — fraud in equity and fraud in refuting contractual obligations. These were not only familiar notions but also the correct concepts.⁸²

D *Nature of the Obligation on the Survivor*

What is the position of the survivor, like Joseph in *Birmingham*, during the remainder of his lifetime after his wife Grace's death? In cases such as this, where the survivor is left the whole estate, the purpose is often to enable the survivor during his or her life to deal as absolute owner with the property passing under the will of the party first dying. The object is to put the survivor in a position to enjoy the full ownership for his or her own benefit, but when he or she dies, the person is to bequeath what is left in the manner agreed upon. It is a form of 'dead hand' control, making provision for extended matrimonial enjoyment of property.

In the approach to categorising the nature of the obligation on the survivor, the echoes of civilian doctrine and the challenge of finding an appropriate 'solution' within common law are once again encountered. In *Dufour*, the couple themselves treated their property as a 'common fund' in which they only had life interests.⁸³ This is reflective of the position under laws like those discussed by Grotius and Voet rather than the position under English law. The solution reached, namely the division of the property into halves without particular examination of any of the property that comprised it, echoes the distribution of the community of goods in the civilian context. In the common law, this left hanging the question of the implications of this 'common fund', both for the survivor and the intended beneficiaries of the agreed succession plan reflected in the mutual will. It leads to questions such as whether a trust is the appropriate solution (in rem or in personam) when the trust comes into effect and what property is subject to it, particularly when the survivor is left an apparently absolute interest in the property.

Since Dixon J introduced the idea of the 'floating obligation' in *Birmingham*,⁸⁴ judicial and academic commentators have battled long and hard in resolving the niceties of this concept in trust law.⁸⁵ The absence of a notion of community of property has created, in this particular context, stumbling blocks requiring the filtering of questions through doctrines based on the separate property of spouses in the common law. But it has also meant that the doctrine could apply regardless of whether the parties were in fact husband and wife. In common law jurisdictions, mutual wills as an equitable doctrine can apply more widely and have indeed done so, broadly operating as a device in a dynastic context. This

⁸² See, eg, Rickett, 'A Rare Case of Mutual Wills', above n 4, 186 fn 46. Rickett notes in passing that 'benefit is clearly a prerequisite in Roman-Dutch law', citing *Denyssen v Mostert* (1872) LR 4 PC 236. Within the context of Rickett's 'justificatory principle', material benefit to the survivor is not a necessary doctrinal element.

⁸³ Hargrave, *Jurisconsult*, above n 10, 104.

⁸⁴ (1937) 57 CLR 666, 689.

⁸⁵ See, eg, Youdan, above n 4, 410; Sheridan, above n 4, 211.

has helped those seeking, for example, to secure a family succession plan that excludes females,⁸⁶ or to arrange the destination of family property among siblings.⁸⁷

The nature of this trust was not simply the imposition of what may be described as an institutional trust, but rather a truly remedial constructive trust. As Dixon J himself explained,

I do not see any difficulty in modern equity in attaching to the assets a constructive trust which allowed the survivor to enjoy the property subject to a fiduciary duty which, so to speak, crystallized on his death and disabled him only from voluntary dispositions *inter vivos*.⁸⁸

Charles Rickett concluded that Dixon J's judgment can be seen as an illustration of 'shaping the remedy to meet the circumstances'.⁸⁹

Does the survivor have any freedom? During his or her lifetime, the survivor does have some power of disposition, but it is qualified. As Dixon J explained, gifts and settlements 'calculated to defeat the intention of the compact' could not be made.⁹⁰ The limitations on the survivor's freedom of action depend on the nature of the promises made. In *Birmingham*, the survivor was given an absolute interest and therefore had considerable freedom to dispose of the property. Joseph could not make another will, but he could deal with the property in the ordinary course. It was, however, not an unqualified power. What are gifts 'calculated to defeat the intention of the compact'? Instruments similar to wills, such as settlements on the settlor for life with remainder interests, particularly if coupled with a power of revocation, would meet this description.⁹¹

E *Third Parties*

What is the position of the third parties who are intended to benefit from the mutual will, apart from the parties to the promise? They are enforcing the trust, not the contract. As equitable doctrine has expanded and, indeed, outstripped the limitations of privity, the challenge is to consider the location of the doctrine of mutual wills within a broader jurisprudential framework. Rickett made an insightful analysis of the doctrine of mutual wills in a 1982 article,⁹² seeking to

⁸⁶ *Lord Walpole v Lord Orford* (1797) 3 Ves Jr 402; 30 ER 1076.

⁸⁷ *Hobson v Blackburn* (1822) 1 Add 274; 162 ER 96.

⁸⁸ (1937) 57 CLR 666, 690.

⁸⁹ Rickett, 'A Rare Case of Mutual Wills', above n 4, 196; see also Brierley, above n 4, 99–101.

⁹⁰ *Birmingham* (1937) 57 CLR 666, 689.

⁹¹ Like the transaction in *Russell v Scott* (1936) 55 CLR 440 (joint bank account with life interest reserved for the testator). Although not a mutual wills case, the transaction is illustrative. *Healey v Brown* [2002] WTLR 849 did involve mutual wills, the terms of which were breached by the survivor in transferring the property the subject of the agreement into joint names with another. See *Palmer v Bank of New South Wales* (1975) 133 CLR 150, 159 (Barwick CJ):

A transaction by which the promisor has placed his property in the name of another and for the benefit of that other on his death, whilst really retaining it for himself in his lifetime, is for the purpose in hand a testamentary transaction which would be in breach of a promise to leave by will ...

See also *Re Cleaver* [1981] 2 All ER 1018, 1023 (Nourse J).

⁹² Rickett, 'A Rare Case of Mutual Wills', above n 4. This article was prompted by the decision in *Re Cleaver* [1981] 2 All ER 1018.

find an appropriate ‘justificatory principle’ for the doctrine within equitable jurisprudence.⁹³ He continued this pursuit in later articles which were prompted by new cases on mutual wills.⁹⁴

Where a constructive trust arises, the third parties’ rights lie in trust as beneficiaries of such a trust. However, as Rickett argued, ‘[i]ts categorisation results from the justification for equity’s intervention’.⁹⁵

the law only provides a remedy where there is justification for doing so. In the case of mutual wills, where there exists an agreement to do something which is performed by one party to the advantage of the other party, a remedy will lie in the event that that other party now attempts to secure that advantage without performing his own obligation under the agreement. Equity will prevent fraud, thus reflecting a particular moral standard.⁹⁶

He pointed out that the use of trust in the context of mutual wills was not necessarily the only approach possible to deal with the particular problems involved. He emphasised the remedial way in which the trust is used here: ‘Although the trust is imposed *as* a remedy, [it is] in *itself* a remedy, with its scope and limits — its characteristics — defined by the principle upon which it is imposed’.⁹⁷

Rickett subjected the mutual wills cases to a restitutionary analysis, and found in Dixon J’s description of the ‘floating obligation’ a characterisation of the fiduciary obligation imposed to prevent fraud on the promisee.⁹⁸ He argued that when the promisee dies, leaving his or her will unrevoked in fulfilment of the promise, an obligation arises in the promisor to fulfil his or her part of the agreement:

The promisor can be characterised further, however, as owing to him who must ultimately benefit from the fulfilment of his (the promisor’s) obligation to the promisee (or, more accurately, the promisee’s estate) — ie the third party — a responsibility of ‘trust’, which can be characterised in equity as a fiduciary obligation.⁹⁹

This relationship, he concluded, was ‘truly independent of the contract’ and enabled the third party to acquire rights in personam against the fiduciary promisor. In a ‘very loose sense’, these rights could be described as ‘interests’ or ‘mere equities’ in the property from the date of the promisee’s death.¹⁰⁰

Ford and Lee argue that it is possible to equate the third party beneficiary to a taker in default of appointment, so as to be regarded as having, from the date of the first to die, an interest which is vested but liable to be divested.¹⁰¹ This analysis is akin to that of Rickett and translates into accessible terms the nature

⁹³ Rickett, ‘Extending Equity’s Reach’, above n 4, 584.

⁹⁴ See *ibid*; Rickett, ‘Mutual Wills and the Law of Restitution’, above n 4.

⁹⁵ Rickett, ‘A Rare Case of Mutual Wills’, above n 4, 187.

⁹⁶ *Ibid* 191.

⁹⁷ *Ibid* 192–3 (emphasis in original).

⁹⁸ Rickett, ‘Mutual Wills and the Law of Restitution’, above n 4, 538–9.

⁹⁹ *Ibid* 538.

¹⁰⁰ *Ibid* 539.

¹⁰¹ H A J Ford and W A Lee, *Principles of the Law of Trusts* (2nd ed, 1990) 1038.

of the ‘floating obligation’.¹⁰² Hence, the third party beneficiaries may have an equitable claim, but not a specific equitable interest in particular assets. This would allow the beneficiaries to complain about particular transactions that fly in the face of the mutual wills agreement, but do not require the beneficiaries to have specific interests in particular property.¹⁰³

The ultimate beneficiaries can assert their claim during the lifetime of the survivor — the earliest time at which the third parties can derive equitable rights on their own behalf. Moreover, in support of their equitable interest they have a right to lodge a caveat with respect to a claim in particular real property.¹⁰⁴

The basis of the relationship, while initially necessarily annexed to contract, may find a basis in a more extensive doctrinal landscape, based on a broader principle.

IV CONTEMPORARY REFLECTIONS

A Basis in Contract

Is it necessary to find a binding obligation, in the sense of a binding contract *at law*, for the doctrine to arise? In a broader sense, is it ‘contractual’ or ‘agreement’ based? For example, Julie Cassidy argued that it was ‘erroneous’ to regard a formal contract between the testators as necessary.¹⁰⁵ She maintained instead that ‘[t]here must simply be an agreement, understanding or intention to execute mutual wills’.¹⁰⁶ In 2001, the Victorian Court of Appeal in *Osborne v Estate of Osborne*¹⁰⁷ deflected the question contained in Cassidy’s observation, considering that whether mutual wills were based on contract or looser arrangements such as agreements, undertakings or promises was ‘merely a matter of nomenclature’.¹⁰⁸ They did not tackle the question as one of substance.

The question of the characterisation of the transaction that gives rise to the obligation can be seen both in terms of the doctrine as it began in *Dufour* and how it might operate today. The doctrine as articulated by Lord Camden in 1769 was clearly anchored in contract. Not only did his Lordship state, ‘[t]his is a contract’,¹⁰⁹ but in the handwritten transcription of his own notebook this passage is underlined and appears in a separate line.¹¹⁰ Cases after *Dufour* did not doubt that the contract requirement was essential. In *Lord Walpole v Lord*

¹⁰² *Ibid.*

¹⁰³ See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, 1989) 339.

¹⁰⁴ Although they would not have standing to file a caveat with respect to the application for probate of a will made in contravention of the mutual wills contract: see *Nowell v Palmer* (1993) 32 NSWLR 574.

¹⁰⁵ Julie Cassidy, *Mutual Wills* (2000) 11.

¹⁰⁶ *Ibid.*

¹⁰⁷ [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001).

¹⁰⁸ *Ibid* [18] (Winneke P). See Julie Cassidy, ‘An Equitable Agreement or a Contract in Law: Merely a Matter of Nomenclature?’ (2003) 27 *Melbourne University Law Review* 217.

¹⁰⁹ Hargrave, *Jurisconsult*, above n 10, 104. The Dickens report states simply: ‘It is a contract’: *Dufour* (1769) Dick 419, 421; 21 ER 332, 333.

¹¹⁰ This is an apparent transcription from the original: Francis Hargrave, British Library MSS 330, 91 or 38 (top and right-hand side of the page numbering respectively).

Orford, the next major case after *Dufour*,¹¹¹ it was the lack of certainty in the contract itself that defeated the claim based on the alleged mutual wills agreement.¹¹² The requirement of a contract was not in issue.¹¹³

Throughout the history of the cases thereafter, the central issue has been one of the certainty of the obligation undertaken and particularly whether the wills were truly mutual and the obligations intended to be irrevocable. The reference point was the contract; a contract *at law*. The notion of contract may have been a different thing from contract after the establishment of the doctrine of privity,¹¹⁴ but it was clearly expressed in contract, equity only providing the remedy through specific performance of promises or through fraud for unconscientious behaviour with respect to contractual obligations. Therefore, it is incorrect to suggest that it is 'erroneous' to regard mutual wills as requiring a formal contract, at least in terms of the historical expression of the doctrine as pronounced by Lord Camden.

While the doctrine *began* in contract, it can also be asked whether it needs to *stay* in contract or whether there are other doctrinal developments which can be placed alongside and complement the doctrine of mutual wills. At times this has been argued and rejected.¹¹⁵ The point of Rickett's 'justificatory principle' was to seek connections within a broader framework. There is further room for this. What became important in the later development of equitable doctrine and which linked to the underlying principle in mutual wills doctrine as articulated by Lord Camden, was the avoidance of fraud. Doctrines like proprietary estoppel and the so-called 'common intention' constructive trust, are linked in that respect with mutual wills.

For the moment, it is still correct to say that a contract is required for the doctrine of mutual wills to apply in its orthodox sense. However, the difference between this and some other kind of agreement is perhaps more apparent than real, when placed in the context of the development of other equitable remedies. A contract will sound in damages at law, but this is *not* what is sought in mutual wills cases. What the intended beneficiaries generally want is the property, not its value. What a party to a mutual wills agreement, or at least the first party to die, wants is for the property to go to the intended beneficiaries. As a trust is the vehicle for achieving it, it matters less how the obligation that gave rise to it is characterised. Whether through constructive trust or estoppel, or by being trustees of the benefit of the contract, all that is required is that the obligation or property itself be attached in some way in favour of the intended beneficiaries,

¹¹¹ The judgment in this case was delivered by Lord Loughborough as Lord Chancellor. As Alexander Wedderburn, prior to his appointment as Lord Chancellor, he had been counsel in *Dufour*.

¹¹² (1797) 3 Ves Jr 402, 421; 30 ER 1076, 1085 (Lord Loughborough LC).

¹¹³ The contract starting point was often expressly stated, for example: *Gray v Perpetual Trustee Co Ltd* [1928] AC 391, 400 (Viscount Haldane); *Birmingham* (1937) 57 CLR 666, 682–3 (Dixon J); *Re Dale* [1994] Ch 31, 38 (Morritt J); *Re Cleaver* [1981] 2 All ER 1018, 1028 (Nourse J); *Re Goodchild* [1997] 3 All ER 63, 70 (Leggatt LJ).

¹¹⁴ Established in *Tweddle v Atkinson* (1861) 1 B & S 393; 121 ER 762.

¹¹⁵ *Gray v Perpetual Trustee Co Ltd* [1928] AC 391, 398–9 (Viscount Haldane), referring to the judgment of Harvey J at first instance. In *Re Goodchild* [1997] 3 All ER 63, 69–70, Leggatt LJ refers to the argument of counsel, Mr Gordon, that it was sufficient to show a 'common understanding'.

the third parties, in some way. A constructive trust pursuant to a contract is the clearest way, but it is not necessarily the only way.

Given the developments more broadly in equity jurisprudence over the last century, it may well be that the solutions that may arise in the context of situations in which the doctrine of mutual wills is invoked are seen now as based less in contract and more in the arena of the remedial constructive trust or, as in Rickett's analysis, in restitution for breach of fiduciary duty.¹¹⁶ In that sense it may be time to define a new and broader contemporary theoretical framework for mutual wills.

B *An Anomalous Doctrine?*

Privity of contract rendered the doctrine of mutual wills anomalous,¹¹⁷ and yet it survived. Where the third party rule itself has been reconsidered, the anomaly in contractual terms is being removed. The doctrine became accompanied, in time, by other related doctrines such as secret trusts, equitable (proprietary) estoppel, and the remedial constructive trust, leading to a re-evaluation of the doctrine of mutual wills in the context of the evolution of other equitable doctrines.¹¹⁸ In this way the old doctrine may indeed be seen in new places and in new ways. Or, as Charles Rickett concluded, looking at the analytical challenges from the perspective of the developments in equity jurisprudence, '[t]he law of restitution is fast coming of age, providing amongst other things new ways of understanding old doctrines'.¹¹⁹

C *From Civilian Doctrine to Common Law*

While there are echoes of civilian doctrine in *Dufour*¹²⁰ which help to explain why issues such as revocability on notice and benefit to the survivor were included in Lord Camden's judgment and subsequently picked up in later cases, the problem in *Dufour* and the doctrine it established were, ultimately, a matter solely for English law.

The civilian doctrine was relevant to the development of the common law response, but in the English context the connection of mutual wills with dynastic transactions took it out of the civil law of mutual wills. By allowing contracts and trusts into this field, the doctrine of mutual wills was creating a notion of family property in English law complementing the strict settlements which had been used for landed estates and the law of dower which was fast disappearing. It enabled the creation of a common fund of property through wills and a scheme of family succession akin to the community property of marriage in the civilian context as well as its fixed entitlement for children. Furthermore, it enabled the determination of the ultimate beneficiaries in advance and not through the

¹¹⁶ Rickett, 'Mutual Wills and the Law of Restitution', above n 4, 539.

¹¹⁷ See, eg, *Re Goodchild* [1997] 3 All ER 63, 76 (Morritt LJ); *Palmer v Bank of New South Wales* [1973] 2 NSWLR 244, 254 (Hutley JA).

¹¹⁸ See, eg, J C Ross, S Bridge and M Oldham, *Theobald on Wills* (16th ed, 2001) 111–12; Burgess, above n 4; Rickett, 'Mutual Wills and the Law of Restitution', above n 4, 534–9.

¹¹⁹ Rickett, 'Mutual Wills and the Law of Restitution', above n 4, 539.

¹²⁰ (1769) Dick 419, 422; 21 ER 332, 333 (Lord Camden LC).

vagaries of testamentary freedom. Where in the civilian context the notion of revocability was, in a sense, to prevent fraud on the surviving spouse and provide him or her with the ability to be better provided for under the antenuptial agreement, in the English context the notion of revocability — or rather the absence thereof after the death of the first to die — was to prevent fraud in another sense. The background of community of property in marriage defines the civilian doctrine, whereas the absence of community of property defines the common law one. This disjunction of context was commented upon by J D B Mitchell in 1951, when he wrote that '[t]he difficulties really arise from the fact that the concept of mutual wills is an importation from the Civil Law and exists here without the background of community of property for which it was designed'.¹²¹

It was the location of the English doctrine of mutual wills as a contract, enforced through the medium of a trust, which transformed any remnants of a civilian doctrine into an English one. And, in the English context, mutual wills could function as instruments with an eye to the family beyond husband and wife. Mutual wills are functionally similar to the old common law doctrines of 'dower' and 'curtesy', abolished during the 19th century, and are a reflection of the private ordering of family property in a system based on separate property of husband and wife. In the absence of a properly developed law of family property, the common law has devised its own solutions. Being connected to trusts law and not matrimonial property, however, the potential of the doctrine was, and is, much bigger. Having found a new 'home' in the broader expression of equity in doctrines concerning the prevention of fraud, mutual wills may be considered as leaving behind any anomalous status they may once have had. In this new context they also have much greater potential. While the civilian doctrine of mutual wills is located in family law; the common law doctrine is not.

V CONCLUSION

The challenges for the future of the doctrine of mutual wills will not only be the location of the practice of mutual wills in the broader framework of equitable jurisprudence, but also the extent to which the property affected by such wills agreements can remain sacrosanct or untouched by challenges through other avenues. In a system in which the foundations of property law are those of separate property, and not community of property, binding obligations entered into during one's lifetime may affect property on death, in that they can affect the composition of the property that forms part of a deceased person's estate. Once the doctrine of mutual wills is considered as effectively binding property through obligations entered into inter vivos, then this may also remove it from an estate for inheritance purposes. This, too, is under challenge.¹²²

¹²¹ Mitchell, above n 4, 143.

¹²² See *Barns v Barns* (2003) 214 CLR 169 and the consideration of this case in Rosalind Croucher, 'Contracts to Leave Property by Will and Family Provision after *Barns v Barns* (2003) 196 ALR 65 — Orthodoxy or Aberration?' (2005) 27 *Sydney Law Review* 263. New South Wales, for example, included specific provisions to enable the overriding of contracts to leave property by will in the 'notional estate' provisions included in the *Family Provision Act 1982* (NSW) ss 22–9. In *Barns v Barns* (2003) 214 CLR 169, 207, the High Court decided that it did not need

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Whether one considers the place of mutual wills in civilian jurisprudence or the role they have played in common law, the field of engagement is the same. Some issues are yet to be resolved, namely the details of the common law ‘rules’ of family property and the balance between the individual and the state in terms of initiating or qualifying provision for family members. The doctrine of mutual wills — old and new — is merely part of this much bigger question.

a legislative amendment to intrude upon a contract to make a will in a particular way through the vehicle of family provision legislation. The decision considered the South Australian legislation in which there were no provisions such as those in New South Wales. The Court confronted the validity of the reasoning and the decision in *Schaefer v Schuhmann* [1972] AC 572 and turned the tables on that decision in holding that the contract to leave property by will (in this case expressed in a mutual wills agreement) was subject to family provision legislation.