

## A RARE CASE OF MUTUAL WILLS AND ITS IMPLICATIONS

Uncertainties about the prerequisites for the operation of the equitable doctrine of mutual wills, and concern about the effect and limits of the trust which the doctrine spawns, have resulted in strongly-worded warnings against the use of mutual (and joint) wills. Burgess, for instance, thinks that mutual wills are to be avoided "like the plague".<sup>1</sup> Hanbury and Maudsley issues a strong plea to practitioners:

"persons who wish to leave property to each other in this way should be advised to consider most carefully the trusts on which they wish the property to be held; what property is to be included; who they wish to be trustees; what administrative powers the trustees should have; and how best the scheme desired can be carried out from an estate duty point of view. Merely to draft mutual wills and then leave the law to sort out such a host of problems is no service to a client. The law in this context, as in most other areas of constructive trusts, imposes a trust in an attempt to prevent one party obtaining an unjust benefit. It is a kind of salvage operation; a salvage of a wreck competent legal advice would have avoided in the first place."<sup>2</sup>

However, to assault the practitioners in such a way may present a rather misleading version of the story. Situations in which intending testators might wish to resort to an agreement to make mutual wills are probably extremely rare in practice. The paucity of reported cases on the area perhaps supports this supposition. Between *Re Green*<sup>3</sup> in 1951 and *Re Cleaver*<sup>4</sup> in 1981, upon which this paper initially focuses, the only notable decisions were those of the Supreme Court of Canada in *Pratt v Johnson*<sup>5</sup> and the Ontario Court of Appeal in *Re Gillespie*.<sup>6</sup> The lack of opportunity for judicial discussion of the riddles in this difficult area makes it all the more important for any judge seised of a case concerning mutual wills to range widely enough to encompass within his decision more than just an answer to the immediate issue concerning him.<sup>7</sup> Nourse J has made in *Re Cleaver* a rather brief but nonetheless competent effort at a wider-ranging examination. This paper is concerned first to establish how far his judgment takes us on issues pertinent to the doctrine of mutual wills, and then to suggest that the cases on mutual wills are, as a result of the approach taken in them, rather more important than is generally assumed to be the case to any thought about the nature and scope of the "constructive trust" as a remedy.

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1 Burgess, "A Fresh Look at Mutual Wills" (1970) 34 Conv (NS) 230, 246.

2 Hanbury and Maudsley, *Modern Equity* (11th edn 1981) 389.

3 [1951] Ch 148.

4 [1981] 1 WLR 939.

5 (1959) 16 DLR (2d) 385.

6 (1969) 3 DLR (3d) 317.

7 The area of mutual wills overlaps to a considerable degree with secret trusts, and certain cases of *inter vivos* dispositions, and possibly thus throws some important light upon the nature of a remedial constructive trust. Cf Burgess, *supra* n 1. This point about a wider-ranging judicial examination was not accepted by Latham CJ of the High Court of Australia in *Birmingham v Renfrew* (1937) 57 CLR 666, 676.

## 1 Re Cleaver — The Facts

H was 78 and W was 74 when they were married in 1967. On two occasions prior to 1974 they both made wills in essentially similar terms, although there was no evidence as to whether these early wills were made pursuant to an agreement. In February 1974 H and W made the wills upon which the case centred. H's will, after three legacies, gave the residue of his property to W absolutely, if W survived him for one month. If W did not survive him, the residue was to be divided into three equal parts for various "beneficiaries". W's will was in identical terms, *mutatis mutandis*, except that she left two legacies instead of three, and to different persons.

H died in 1975, and W proved his 1974 will. Less than three months after H's death, W made a new will, which, while naturally exorcising all references to H, was merely a repeat of her 1974 will. Six months after that, W made another will which differed from her 1974 will in that one of the "beneficiaries" received an absolute interest in place of a life interest. In 1977 W made her last will, which altered the dispositions of her property quite radically by cutting out some of the original "beneficiaries" altogether.

W died in 1978. The excluded "beneficiaries" claimed a declaration that W's executors held the estate upon trust to give effect to the terms of the 1974 will, under the doctrine of mutual wills. Nourse J held the doctrine to be applicable, and imposed the trust sought after.

## 2 Re Cleaver — Application of The Law

A rather obvious first point which needs to be expressed is that the equitable doctrine of mutual wills exists to provide a remedy for persons who claim that property going to someone else should really be coming to them. To transpose what might otherwise be regarded only as a moral claim to the property into a legally enforceable right to the property by the operation of a remedy, the claimant must satisfy the particular standard asked of him. The second point is that the law only acts to provide a remedy where there is a justification. Justification is often summarised in a maxim, which itself is the reflection, certainly in the area of equitable jurisdiction, of a particular moral standard. The machinery used, the remedy itself, will be modelled in such a way as to maintain a maximum degree of consistency with the underlying principle. The machinery should never become the master — it should always be controlled by the principle. These rather trite observations provide the ground rules for an examination of the detailed law.

A useful summary of a fairly orthodox approach to the law relating to the prerequisites to be satisfied before the doctrine of mutual wills will operate is the following extract from the judgment of Culliton JA in *Re Johnson*.<sup>8</sup>

"It appears to me that where there is a joint will, or where there are mutual wills, a trust enforceable in equity against the estate of the survivor where the joint or mutual will has been revoked by the survivor can only be established if there is found: (1) that such joint or mutual wills were made pursuant to a definite

8 (1957) 8 DLR (2d) 221, 247.

agreement or contract not only to make such a will or wills but also that the survivor shall not revoke; and (2) such an agreement is found with preciseness and certainty, from all of the evidence; and (3) the survivor has taken advantage of the provisions of the joint or mutual will.”

Where does the judgment of Nourse J take us on these matters?

### 1 *The Contract*<sup>9</sup>

There must be an agreement pointing towards legal obligation rather than mere honourable engagement. A preliminary issue is whether the agreement need only create a legal obligation to execute mutual wills, or whether the agreement needs to go further and expressly provide that the mutual wills once executed are not to be revoked.

Let us contemplate the following situation. H and W execute mutual wills pursuant to an agreement to make such wills, but the agreement contains nothing about their irrevocability. H dies, with his will unrevoked. Will the doctrine of mutual wills operate? It is suggested that it will, and that *Re Cleaver* supports this view. The absence of any term in the agreement as to irrevocability *may* be relevant in any action for breach of the contract — for example, if W revokes her will before H's death. The difficulties which surround the potential contract actions arising out of the agreement to create mutual wills are beyond the scope of this paper.<sup>10</sup> The point to notice here, however, is that once H dies, leaving the will he executed pursuant to the agreement unrevoked, a trust is imposed. The nature of this trust will be discussed herein. The imposition of this trust is based upon a justification for the doctrine of mutual wills which will also be discussed herein, and it will be suggested that this justification is operative so long as there is an agreement to execute mutual wills and is in no way dependant upon an express agreement not to revoke.

9 Youdan, “The Mutual Wills Doctrine” (1979) 29 U Toronto LJ 390, presents a thesis which concentrates on the contractual nature of the doctrine. Youdan argues that as a matter of history mutual wills agreements were enforceable because, through the use of a trust fiction (trust of the benefit of a chose in action) equity allowed the third party beneficiary to enforce a contract made for his benefit. However, the modern introduction of a harsh privity of contract notion resulted in a refusal to use trusts of the benefit of a chose in action unless such trust was expressly indicated. The mutual wills doctrine should have disappeared, but it continues, upheld now by a different justification: the prevention of fraud. Youdan argues that this justification is too wide, because cases like *Beswick v Beswick* [1968] AC 58 could be covered by it as well (but cf *infra* n 65). So, he concludes, mutual wills continue as an anachronistic remainder of the pre-privy approach to third party rights. His examination of the detail of the law is in the light of this view of the doctrine's basis. Youdan argues further that the doctrine should, because of this basis, operate in a wider context than merely agreements to execute mutual wills — it “should be applicable where two or more persons have made a contract under which they reciprocally agree that their property (or a part thereof) should devolve in a particular way or ways on their respective deaths” (402). This would include, for instance, cases where the agreement was subsequent to the execution of the wills, or where persons agreed not to make wills but to die intestate.

10 See, especially, Boughen Graham, “Mutual Wills” (1951) 15 Conv (NS) 28, 36-37; and Oakley, *Constructive Trusts* (1978) 103-104. Burgess's paper, *supra* n 1, is also relevant to these questions, as are portions of Mitchell, “Some Aspects of Mutual Wills” (1951) 14 MLR 140. Youdan, *supra* n 9 at 406-410, discusses contractual actions for anticipatory breach during the joint lifetime of the parties to the mutual trust agreement and on the death of the first to die. The general thesis he propounds (see *supra* n 9) means that he sees the issues of contractual relationships as much more intimately connected with the constructive trust doctrine than do most writers.

Burgess has pointed out that there are some difficulties in principle if an agreement not to revoke is regarded as necessary.<sup>11</sup> First, in our hypothetical example what will be the effect of a revocation of W's will after H's death by operation of law, as opposed to a voluntary revocation? If the agreement not to revoke is meaningful, it can extend only to voluntary acts of revocation. Does this mean that a revocation by operation of law of W's will makes the doctrine of mutual wills inoperative so far as W's estate is concerned? The trust which arose on the death of H, and which extended over any property left by him, must still survive, even if W received that property "absolutely". It is recognised that the obligation on W to pass on any property which came to her under H's will in accordance with the terms of mutual wills arises at the time of H's death.<sup>12</sup> It is further recognised that the obligation of W to leave her own mutual will intact arises also at the time of H's death — effectively, her property becomes trust property, although this trust has not yet crystallised and cannot do so until her own death.<sup>13</sup> The operative factor is the death of H, leaving unrevoked a will he made pursuant to the agreement to make mutual wills. How can an agreement not to revoke be relevant? What is really relevant is a contract between H and W to make wills in identical terms. To introduce as essential an agreement not to revoke followed by a breach of that agreement will mean that the recognised law in this area does not accord with principle. A revocation by operation of law does not breach the contract, but has the trust over W's property already arisen?

Secondly, what will be the result if the reason why W in our hypothetical example does not leave the property under her mutual will is not because that will has been revoked by operation of law, but because that will has not been executed properly and is thus inoperative? Will the doctrine of mutual wills operate so as to defeat the distribution of W's estate as on an intestacy? If an agreement not to revoke is necessary, this agreement has not been breached, and the doctrine would not operate on W's estate. However, this again challenges the recognised law, as indicated. If H dies leaving his will unrevoked, the trust over W's property arises, and the fact that by law the disposition of W's property on her death is under the rules of intestacy rather than by an alternative will must surely make no difference.

Thirdly, if an agreement not to revoke is essential, this would imply that the ultimate beneficiaries take because they are mentioned in W's will, rather than because they are beneficiaries under a "trust" which equity imposes on the death of H. As Burgess argues,<sup>14</sup> the beneficiaries would therefore not obtain interests until the death of W, and would never obtain interests if they predeceased W. The decision in *Re Hagger*,<sup>15</sup> where a "beneficiary" who predeceased the survivor was held nevertheless to have obtained a vested interest as from the date of the first testator's death, indicates that it is not the survivor's will which carries their interests to the ultimate beneficiaries. Clauson J held that

"on the death of the first testator the position as regards that part of the property which belongs to the survivor is that the survivor

11 Burgess, *supra* n 1 at 232-233. See also Youdan, *supra* n 9 at 404-405.

12 *Dufour v Pereira* (1769) 1 Dick 419, (1799) 2 Hargr Jurid Arg 304.

13 *Re Hagger* [1930] 2 Ch 190; *Re Green*, *supra* n 3; *Birmingham v Renfrew*, *supra* n 7.

14 Burgess, *supra* n 1 at 232-233.

15 [1930] 2 Ch 190.

will be treated in this Court as holding the property on trust to apply it so as to carry out the effect of the joint will.”<sup>16</sup>

*Re Cleaver* indicates a return to the approach taken in the pre-1925 cases to the issue of the contract. None of the important earlier cases — *Dufour v Pereira*,<sup>17</sup> *Lord Walpole v Lord Orford*,<sup>18</sup> *Denysen v Mostart*,<sup>19</sup> *Stone v Hoskins*,<sup>20</sup> *Minakshi Ammal v Viswanath Aiyar*<sup>21</sup> — establishes as a fundamental part of this contract an express agreement not to revoke. In *Stone v Hoskins*, Sir Gorrell Barnes P, after discussing *Dufour v Pereira*, stated the question in the following terms:

“If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because, by the death of the other party, the will of that party and the arrangement have become irrevocable; but that case is entirely different from the present, where the first person to die has not stood by the bargain and her ‘mutual’ will has in consequence not become irrevocable.”<sup>22</sup>

This statement establishes clearly the remedial nature of equity’s intervention, and illustrates that the existence of a bargain under which wills are to be executed to achieve the desired distributions of property on death, and the achievement of such distribution by the first to die, were the real prerequisites for the operation of the doctrine. An express term in the bargain, not to revoke the wills once executed, was *not* regarded as necessary in these early cases.

The turning point which led to the establishment of the orthodox view as expressed by Culliton JA appears to have been the decision of Astbury J in *Re Oldham*<sup>23</sup> in 1925. A husband and wife made wills in which essentially each gave his or her property to the other absolutely with similar provisions in each will in the event of lapse. Astbury J did not apply the doctrine of mutual wills. He said:

“The defendants rightly say that the fact that the two wills were made in identical terms does not necessarily connote any agreement beyond that of so making them, and they point out that there is no evidence on which I ought to hold that there was an agreement that the trust in the mutual will should in all circumstances be irrevocable by the survivor who took the benefit.”<sup>24</sup>

These remarks of Astbury J were approved of by Viscount Haldane in delivering the opinion of the Privy Council on an Australian appeal in

16 Ibid 195.

17 Supra n 12.

18 (1797) 3 Ves 402.

19 (1872) LR 4 PC 236.

20 [1905] P 194.

21 (1909) 33 Ind LR Mad 406.

22 [1905] P 194, 197. It will be argued below that the survivor need not take a material benefit under the will of the first to die for the doctrine to operate.

23 [1925] 1 Ch 75.

24 Ibid 88-89. Although Astbury J refers to the irrevocability of the trust, this must ultimately be a reference to the will, since the trust is not express but constructive, imposed by operation of law.

*Gray v Perpetual Trustee Company*<sup>25</sup> in 1928. Viscount Haldane characterised the question asked of the Board in the following terms:

“whether the simultaneous wills . . . were mutual wills made under such circumstances that neither the husband nor the wife could revoke or modify them without the assent of the other.”<sup>26</sup>

The Board found that there was no reliable evidence of an agreement at all. In discussing *Dufour v Pereira* Viscount Haldane said:

“But the mere simultaneity of the wills and the similarity of their terms do not appear, taken by themselves, to have been looked on as more than some evidence of an agreement not to revoke. The agreement, which does not restrain the legal right to revoke, was the foundation of the right in equity which might emerge, although it was a fact which had in itself to be established by evidence, and in such cases the whole of the evidence must be looked at.”<sup>27</sup>

A reading of both reports of Lord Camden LC’s judgment in *Dufour v Pereira*<sup>28</sup> does not support the confidence of Viscount Haldane as to the need for an agreement not to revoke as such. In the later English cases of *Re Hagger* and *Re Green* there was clear evidence in the recitals to the relevant wills of an agreement not to revoke, and in both decisions the judges appeared to treat evidence of such an agreement as a prerequisite.

The approach adopted in these later English decisions differs from that of the majority in the Supreme Court of Canada in *Pratt v Johnson*. Speaking for three of the five judges, Locke J said:

“The question to be decided is, in my opinion, not as to whether there was evidence of an agreement between the husband and wife not to make a disposition of the property referred to in the joint will in a manner inconsistent with its terms, but rather whether there was evidence of an agreement between them that the property in the hands of the survivor at the time of his or her death should go to the said five beneficiaries and, since nothing was done by [the wife] to alter the terms of the joint will until after the death of her husband, the property received by her from the executor of her husband’s estate and such estate of her own of which she died possessed were impressed with a trust in favour of the five named beneficiaries.”<sup>29</sup>

Cartwright J for the minority adopted the harsher approach, gleaned from the above-mentioned English decisions:

“The question to be decided is not whether [the husband and wife] agreed to make wills in identical terms *mutatis mutandis* . . . but rather whether the evidence establishes an agreement that the wills so made should not be revoked.”<sup>30</sup>

25 [1928] AC 391.

26 *Ibid* 397. Unlike Astbury J, Viscount Haldane refers directly to the irrevocability of the wills.

27 *Ibid* 400.

28 The two reports are in (1769) 1 Dick 419, and in (1799) 2 Hargr Jurid Arg 304, the latter being the fuller. A full discussion of the case is also found in the report of *Lord Walpole v Lord Orford*, supra n 18.

29 *Supra* n 5 at 389.

30 *Ibid* 401-402.

In the Ontario Court of Appeal in *Re Gillespie* the majority followed Locke J's view, while Laskin JA in his dissent expressed no final view on this point.

What of *Re Cleaver*? It is suggested that Nourse J did not think it necessary in establishing the compact between H and W to find an express agreement not to revoke the wills once made. Although he cited dicta from *Gray v Perpetual Trustee Company*, *Re Oldham* and the Australian High Court decision in *Birmingham v Renfrew*<sup>31</sup> which imply the need for an agreement not to revoke, when he commented on these dicta he referred only in general terms to the need for "a definite agreement",<sup>32</sup> "the necessary agreement",<sup>32</sup> and evidence of a legally binding obligation rather than a mere honourable engagement.<sup>33</sup>

"It is therefore clear that there must be a definite agreement between the makers of two wills; that that must be established by evidence; that the fact that there are mutual wills to the same effect is a relevant circumstance to be taken into account, although not enough of itself; and that the whole of the evidence must be looked at."<sup>34</sup>

What was the exact agreement between H and W that Nourse J held to be established by the evidence? Nourse J found that H and W "dealt with their financial affairs on a more commercial basis than is sometimes the case with other, particularly younger, married couples".<sup>35</sup> He thought it "at least possible that [H] did do a deal with [W] at the beginning of [1974]. I think he may well have said that he would leave his estate to her if she, as survivor, would leave hers back to his children."<sup>36</sup> However, Nourse J said that without evidence of later conversations after the making of the wills in 1974, and in 1977, there would not have been enough to establish the necessary agreement. These later conversations indicated that the whole arrangement had been entered into with the tacit agreement of W.<sup>37</sup>

It should be stressed that the evidence referred to by Nourse J nowhere establishes an express agreement not to revoke the wills once entered into. The only agreement set up was one to execute mutual wills which would achieve a particular scheme of testamentary distributions of property. The intention to create a legal contract rather than a merely domestic agreement was revealed in the commercial approach taken to their financial affairs by H and W. When compared with the minimum evidence which the judges in *Re Hagger* and *Re Green* thought necessary to set up an agreement not to revoke, the evidence in *Re Cleaver* is skimpy indeed. Even Nourse J confessed some surprise in coming to his decision. The result, that the doctrine of mutual wills should operate, was contrary to his expectations at the start of the proceedings.<sup>38</sup> As it happened, the evidence produced an agreement to make mutual wills. Had an express agreement not to revoke been necessary, Nourse J must surely have gone with his initial expectation.

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31 *Supra* n 7.

32 *Supra* n 4 at 945.

33 *Ibid* 948.

34 *Ibid* 945.

35 *Ibid* 948.

36 *Ibid* 948-949.

37 *Ibid* 940-941, 948-949.

38 *Ibid* 949.

It is an arguable proposition that to call for an *express* agreement not to revoke is to insist upon a first step that is inconsistent with the whole justification for equity's remedial intervention through the doctrine of mutual wills. It is to require a detail which defeats the purpose. This will become more obvious when the justification itself is discussed herein. It is quite consistent with, indeed the reason for, intervention, however, to look for an agreement to distribute property according to a particular scheme, the consideration for which is a correlative obligation. When that distribution has occurred at the behest of one party, the obligation of the other should be performed, or, if not performed voluntarily, then enforced. This is the point of the doctrine, as the discussion on the justification will establish. In any case, if one wishes to tie in the notion of an agreement not to revoke, it is unnecessary to look for an expression of such a term. It is suggested that an agreement not to revoke is to be *implied* in every case where an agreement to make mutual wills is entered into. Does not the expressed agreement to order a particular distribution of property in the event of death carry with it the rather obvious corollary that such an agreement be not altered unilaterally, that is that nothing be done voluntarily to alter the mechanisms established to fulfil the purpose of the contract, unless the contract itself is bilaterally altered? This point was accepted by Kelly JA who delivered the majority judgment in *Re Gillespie* in the Ontario Court of Appeal. The will in question there was actually a joint will, but the reasoning on this particular point seems apt also in cases of separate mutual wills where the evidence, above and beyond the mere existence of similar documents, establishes the common desire which Kelly JA presumes to exist in the case of a joint will by virtue of the document alone.

“Since the same document was signed by both testators each was fully aware of its contents and was aware that the other was a signing party. It expresses a common desire that the property of both follow a common plan of distribution: having in mind these facts and the words contained in the joint will the only possible inference is that the document was the result of an agreement subscribed to by both testators that the survivor should during his or her lifetime enjoy the use of the real and personal property of the one first dying and that the ultimate distribution of the property of both of the parties, that of the one first dying and that of the survivor, should be as was set out in the remainder provisions in the joint will.

Such an agreement by necessary implication embodied an agreement that the disposition settled upon should not be revoked as revocation by either party would completely frustrate the scheme upon which they had agreed.”<sup>39</sup>

## 2 *The benefit to the survivor*<sup>40</sup>

It is unlikely that in practice a case will arise where mutual wills are executed which do not provide for some material benefit for the survivor from the will of the first to die. However, is the taking of a benefit by the survivor under the will of the first to die a prerequisite for the operation of the doctrine?

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<sup>39</sup> *Supra* n 6 at 320-321.

<sup>40</sup> See Mitchell, *supra* n 10 at 138-139, and Oakley, *supra* n 10 at 104-105.



Nourse J did not have to face this issue directly in *Re Cleaver*. Nevertheless, when discussing the basis of the equitable doctrine he said:

“If he attempts to [deal with the property inconsistently with the agreement] *after having received the benefit of the gift* equity will intervene by imposing a constructive trust on the property.”<sup>41</sup>

Nourse J also referred to the survivor as the “donee” of the property.<sup>41</sup> It is suggested that the justification for the doctrine to be discussed below does not require as a prerequisite any material benefit to the survivor, and further that essentially Nourse J recognised this in his correct interpretation of that justification.

It should be noted that nothing said in *Dufour v Pereira* indicates unambiguously the need for a material benefit to the survivor,<sup>42</sup> and in *Re Hagger* Clauson J said:

“As I read Lord Camden’s judgment in *Dufour v Pereira* [the doctrine of mutual wills would apply], even though the survivor did not signify his election to give effect to the will by taking benefits under it.”<sup>43</sup>

In *Re Oldham* Astbury J’s interpretation of *Dufour v Pereira* is consistent with this view, although for his own part he appears to have regarded benefit as necessary.<sup>44</sup> In *Stone v Hoskins*, Sir Gorrell Barnes P stated *obiter* that benefit was necessary<sup>45</sup> and benefit is clearly a prerequisite in Roman-Dutch law.<sup>46</sup>

In *Re Gillespie*, however, Kelly JA did not treat as a prerequisite the existence of a material benefit in the survivor, and it is worth citing his comments in full:<sup>47</sup>

“It is unnecessary to decide whether the trust imposed on the husband’s property arose upon the death of the wife, or upon and by reason of the husband having elected to take benefits under the joint will. Here, as in *Re Hagger*, both events occurred: while, if it were necessary to do so, I would hold on the authority of *Dufour v Pereira*, referred to by Clauson J in the *Hagger* case, that by reason of the death of the wife the trust became binding on the husband’s property ‘even though the survivor did not signify his election to give effect to the will by taking benefits

41 Supra n 4 at 947. Emphasis supplied.

42 See, especially, Mitchell, supra n 10 at 138-139. The most pertinent statement of Lord Camden LC on this point, as reported by Hargrave, is clearly far from establishing as a prerequisite a material benefit for the survivor, since it is concerned rather with an alternative ground for the decision: “if it could be doubtful, whether after the husband’s death this wife could be at liberty to revoke her part of the mutual will, it is most clear, that she has estopped herself to this defence, by an actual confirmation of the mutual will, — not only by proving it, but by accepting and enjoying an interest under it. She receives this benefit, takes possession of all her husband’s estates, submits to the mutual will as long as she lives, and then breaks the agreement after her death.” (1799) 2 Hargr Jurid Arg 304, 310. Youdan, supra n 9 at 416, after an examination of *Dufour v Pereira*, also concludes that the case is not authoritative on the issue of benefit.

43 Supra n 15 at 195.

44 Supra n 23 at 89.

45 Supra n 22 at 197.

46 See *Denysen v Mostart*, supra n 19 at 253 per Sir Robert Collier.

47 Supra n 6 at 321-322.

under it'. The fact that the husband accepted probate of the joint will on his wife's death makes it unnecessary to go further than to say that thereafter his property became subject to trusts in the terms of the joint will.

...

The real and personal property of which the wife was possessed at her death (included in which was her interest as tenant in common in the Baby Point property) devolved upon her personal representative to be administered according to the terms of the joint will: the husband never had any beneficial interest in such property other than the life interest created by that will.

The property which became impressed with the trust which arose on the acceptance by the husband of probate was therefore the real and personal property of which the husband was possessed at the date of the death of the wife, including an [his] interest as tenant in common in the Baby Point property."<sup>48</sup>

To say that a material benefit in the survivor is not essential does not, of course, entail that there is in the operation of the doctrine of mutual wills no advantage to the survivor. Because the doctrine operates upon the death of the first to die where the latter has carried out, now irrevocably, his side of the bargain struck with the survivor, the survivor obtains the "benefit" of the deceased's performance of his contractual obligations. It is possible therefore to find a meaning for Culliton JA's third prerequisite, as expressed in *Re Johnson* and cited earlier, that "the survivor has taken advantage of the provisions of the joint or mutual will".<sup>49</sup>

### 3 *The justification of the doctrine*<sup>50</sup>

The trust which the doctrine of mutual wills spawns is a constructive trust. This is established clearly by the judgments in *Birmingham v Renfrew*, and by Nourse J in *Re Cleaver*. Its categorisation results from the justification for equity's intervention. Its exact nature and limits will be noted in the last section of this paper.

In *Re Cleaver* Nourse J referred to the report of the argument of Mr EG Nugee<sup>51</sup> before Brightman J in *Ottaway v Norman*,<sup>52</sup> which he

<sup>48</sup> It is suggested that, in declining to accept a material benefit for the survivor as a prerequisite, Kelly JA does not mean to look to acceptance of probate by the survivor as an alternative.

<sup>49</sup> This approach echoes Oakley, supra n 10 at 105: "However, dicta in *Dufour v Pereira* and *Re Oldham* suggest that it is immaterial whether or not the survivor takes any benefit. This view is undoubtedly in accordance with principle since whenever the first party to die leaves a will made in accordance with the agreement the survivor will have obtained the benefit for which he contracted (the disposition of the property under the will) whether or not he obtains any material benefit." Youdan, supra n 9 at 416, says much the same when discussing the issue whether the doctrine will operate if the survivor disclaims the benefits conferred on him by the will of the first to die: "I suggest that the survivor should not be able to provide himself with a defence against an action by a third party beneficiary by disclaiming the benefits under the will of the first to die. He should be treated as having received the benefit of performance by the first to die if he has allowed the latter to die fulfilling his part of the agreement in the belief that the survivor would honour his part."

<sup>50</sup> Cf Youdan, supra n 9.

<sup>51</sup> Now Mr EG Nugee QC.

<sup>52</sup> [1972] Ch 698.

described as “helpful and interesting”.<sup>53</sup> Mr Nugee had lumped together mutual wills and secret trusts with certain types of *inter vivos* transactions, and stated that all these were

“cases in which a court of equity will not permit a person to whom property is transferred, whether by deed or by will, on the faith of an agreement or understanding that it is to be dealt with in a particular way for the benefit of a third person, to commit a fraud on that third person by treating the property as his own . . . The ‘fraud’ referred to in some of the cases consists in the donee (or those claiming under him) claiming to treat the property as belonging absolutely to the donee; and it is not necessary to show that the donee was guilty of deliberate and conscious wrongdoing.”<sup>54</sup>

Nourse J, although referring with approval to the classification of these cases together, himself appears not to have adopted this reasoning as to justification *in toto*:<sup>55</sup>

“The principle of all these cases is that a court of equity will not permit a person to whom property is transferred by way of gift, but on the faith of an agreement or clear understanding that it is to be dealt with in a particular way for the benefit of a third person, to deal with that property inconsistently with that agreement or understanding. If he attempts to do so after having received the benefit of the gift equity will intervene by imposing a constructive trust on the property which is the subject matter of the agreement or understanding.”<sup>56</sup>

These statements indicate two different approaches. The first, as adopted by Mr Nugee, is that equity intervenes in order to protect the third person who is intended to be the ultimate “beneficiary”. Equity prevents the commission of a fraud on that third person, by imposing a constructive trust on the property, thus binding the legal owner to a particular trust disposition of that property. This approach has recently found favour as the explanation of the doctrine of secret trusts.<sup>57</sup> It may indeed at first sight explain secret trusts, in that but for the promise of the legatee (or intestate successor) to the deceased the third person would no doubt (?) have acquired by some direct gift from the deceased an interest in property the disposition of which the deceased controlled from the first. Nevertheless, it does not explain the three cases of *inter vivos* dispositions which Mr Nugee attempted to include within its ambit:

“Besides the secret trust and mutual wills cases, other examples of the principle can be found in *inter vivos* transactions. Thus if A conveys property to B for the limited purpose of enabling B to raise money by mortgaging it, but the conveyance on the face of it is absolute, B cannot claim the absolute ownership in fraud of A: *In re Duke of Marlborough* [1894] 2 Ch 133. Similarly if A sells his house to B on the faith of an agreement by B that A

53 *Supra* n 4 at 947.

54 *Supra* n 52 at 701-702.

55 *Supra* n 4 at 947.

56 As pointed out earlier, the justification inherent in this statement of Nourse J indicates that he does not regard material benefit to the survivor as a prerequisite.

57 See Hodge, “Secret Trusts: The Fraud Theory Revisited” [1980] Conv 341.

shall be permitted to live in it for the rest of his life, and the conveyance contains no mention of this agreement, equity will hold B to be a constructive trustee for A in the terms of the agreement: *Bannister v Bannister* [1948] 2 All ER 133. Again if A buys as trustee for B, but there is no declaration of trust in writing sufficient to satisfy the Statute of Frauds, the Court may still hold A bound by a constructive trust: *Rochevoucauld v Boustead* [1897] 1 Ch 196.”<sup>58</sup>

In these cases there is no third person present, and they are better explained under the second approach to be discussed below. More importantly, however, for present purposes, it is suggested that this approach does not explain the doctrine of mutual wills. Let us assume that H and W execute mutual wills each leaving their property to the other of them for life, with remainder to B. If H dies first, no constructive trust is needed so far as his property is concerned. W acquires a life interest, and B an interest in remainder. However, the doctrine of mutual wills operates to fasten a trust on W’s property, from the date of H’s death.<sup>59</sup> B acquires an interest immediately, and the property reaches him ultimately under W’s will or under a constructive trust if W has altered her mutual will.<sup>60</sup> How can that trust which arises over W’s property on H’s death be justified on the basis of preventing a fraud on the third person B? If W promises H to receive H’s property on trust for B, then it is possible to argue that B is defrauded if W claims beneficial ownership, since H would no doubt have given B the property directly without going through W had W not made the promise. This situation is akin to a secret trust. If W promises H to leave *her* property by will to B, how can it be said that she is defrauding B if she refuses to leave it to B? The choice must ultimately be hers and not H’s.<sup>61</sup> It is impossible to say that B would have received W’s property any more directly than from W herself! What W is doing, of course, is breaching her agreement with H.

This brings us to the second approach which, it is suggested, is that adopted by Nourse J. Equity, it is said, intervenes to compel the second party to an agreement or undertaking to perform his part of that agreement after the first party has performed his part. This might be characterised as the prevention of a fraud on the first party, or as the action of the court “under its jurisdiction of compelling specific performance”.<sup>62</sup> Burgess has combined these characterisations and has argued most persuasively that this is the most satisfactory explanation for the doctrine of mutual wills.<sup>63</sup> It is suggested that such reasoning also provides the best justification for the doctrine of secret trusts and the

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58 Supra n 52 at 701.

59 *Birmingham v Renfrew*, supra n 7.

60 *Re Hagger*, supra n 13.

61 Subject, of course, to the availability of a decree of specific performance for H.

62 *Lord Walpole v Lord Orford*, supra n 18 at 402 per Lord Loughborough LC.

63 Burgess, supra n 1. Cf Youdan, supra n 9 at 416-417: “It is the orthodox view that when one party to the mutual wills agreement dies leaving a will in accordance with the agreement, a trust arises at that time in favour of third party beneficiaries of the agreement. It is my view that this trust arises from the fact that the mutual wills agreement is enforceable in equity by the third party beneficiaries once the survivor of the mutual wills agreements has received the benefit of performance . . . [see supra n 49] by the first to die of his part of the bargain. The relief given by equity in this situation is specific relief, akin to specific performance.”

three instances of equity's intervention in *inter vivos* dispositions referred to earlier.

First, equity acts consistently with one of its established doctrines, the specific performance of agreements. Hence the need for a contract or undertaking to be clearly established. When one party has performed his side of a bargain, the other party must do the same. In the case of mutual wills a decree of specific performance is not possible, and so a trust is imposed on the survivor to achieve the same result as specific performance. Like specific performance, the trust is a remedy, and must not be regarded at the outset as necessarily an institution in the same way as a private trust, with various prerequisites to be established. More will be said of this later. Secondly, the contract need only be a contract to ensure the particular devolution of property on death. Once one party has carried out his side of the bargain, the other must also do so. There is no need that the contract be one expressly not to revoke any wills made pursuant to the agreement about particular devolution. Such a requirement denies the consistently remedial character of equity's intervention. It is not revoking of the survivor's will which is relevant — it is, rather, the fulfilment by the deceased of his part of the bargain. Thirdly, the contract need not include provision for the passing of a *material* benefit to the surviving party. When the first party has performed irrevocably his side of the bargain (by his death leaving intact his own mutual will), the survivor does acquire an advantage or benefit for which he has contracted, that is the particular disposition of the deceased's property. It is on this point that one can say Nourse J went wrong in his statement of the justification, quoted earlier. Fourthly, as in all cases where the doctrine of specific performance might apply, one contracting party is defrauded, or at least because of his willingness and desire to perform his obligations stands to be defrauded, and so equity provides a remedy to prevent this fraud by ensuring that the willing party also receives the benefit (in the wide sense) for which he has contracted. It is clear of course that wherever a survivor takes a material benefit under the mutual will of the deceased, there is an obvious case of equitable fraud. However, as Burgess has argued, "inherent in every mutual wills case there is another circumstance of equitable fraud which is anterior in point of time" to the obvious case of equitable fraud.

"This is the fraud on the first deceased to allow him to die in the belief that the survivor would comply with the terms of the agreement, and then subsequently to attempt to dispose of his property elsewhere on his death."<sup>64</sup>

In this sense, then, the prevention of fraud provides a justification for equitable intervention in cases of secret trusts, mutual wills, and the three *inter vivos* situations (and others which arise, such as the actual position in *Ottaway v Norman*). The other side of this particular coin is the desire to enforce the expressed wishes and expectations of testators and donors.<sup>65</sup>

<sup>64</sup> Burgess, *supra* n 1 at 236.

<sup>65</sup> See Rickett, "Secret Trust or Moral Obligation? — A Question of Evidence" (1979) 38 CLJ 260. Youdan, *supra* n 9, indicates that prevention of fraud goes further than merely justifying constructive trusts in cases of mutual wills and secret trusts, and would justify equitable intervention in cases like *Beswick v Beswick*. This is true, but it does not mean that prevention of fraud ceases to be an adequate explanation for the mutual wills doctrine. What should perhaps be highlighted is that equitable

It will be recalled that I stated earlier that 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 obligations under the agreement. Equity will prevent fraud, thus reflecting a particular moral standard.

It is possible now to continue with a discussion of two points — issues of evidence, and the nature of the remedial trust imposed — keeping in mind the other ground rule referred to in my earlier statement, that the principle or justification should be master of the remedial machinery.

#### 4 *Binding agreement or honourable engagement? — the evidential test*

Loose reference to equitable action on the basis of fraud has often been a cause of confusion. There appear to be two approaches to fraud. On the one hand, an essentially penal approach can be taken, where the object is rather more the punishment of the fraudulent party than the provision of a remedy. Here, because punishment has as an obviously inherent factor a judgmental aspect, there needs to be extremely clear evidence before equity will act. On the other hand, if enforcement of a person's undertaking, or the prevention of a fraud on the party who has already performed his undertaking, is the purpose of equitable action, the evidential test need not be so harsh, since there is no inherent judgmental aspect. An ordinary accepted standard of proof will suffice.

In the area of secret trusts a failure to grasp that equity acts (at least in that area, as in this) on the latter basis is, it is suggested, the reason for the unhappy distinction drawn by Megarry V-C in the recent case of *Re Snowden*<sup>66</sup> between "types" of secret trusts and the respective evidential tests. Megarry V-C said:

"If a secret trust can be held to exist in a particular case only by holding the legatee guilty of fraud, then no secret trust should be found unless the standard of proof suffices for fraud. On the other hand, if there is no question of fraud, why should so high a standard apply? In such a case, I find it difficult to see why the mere fact that the historical origin of the doctrine lay in the prevention of fraud should impose the high standard of proof for a case in which no issue of fraud arises . . . I therefore hold that in order to establish a secret trust where no question of fraud arises, the standard of proof is the ordinary civil standard of proof that is required to establish an ordinary trust."<sup>67</sup>

This particular judgment has received some strong criticism to the effect that the ordinary civil standard should apply in *all* cases of secret trusts.<sup>68</sup>

65 *Cont.*

intervention differs in its forms in the two cases, in mutual wills by a remedial trust, and in *Beswick* by a grant of specific performance to the administratrix of the estate of the promisee. Perhaps some of the problems associated with remedial trusts could be avoided by recourse to specific performance; alternatively, perhaps these problems could be banished by a restructuring of the remedial trust. Whatever happens, the basic point remains: there are many instances where equity intervenes to prevent fraud, but the intervention does not always involve the same remedy.

66 [1979] 2 All ER 172.

67 *Ibid* 178-179.

68 See Rickett, *supra* n 65; Hodge, *supra* n 57; and note on *Re Snowden* by Crane, [1979] Conv 448-450.

What is the type of evidence needed to establish the agreement to make mutual wills? Before *Re Cleaver*, the clearest statements on the evidential test in such cases came from the High Court of Australia in *Birmingham v Renfrew*, although the court was there concerned to establish an express agreement not to revoke rather than merely an agreement to make mutual wills.<sup>69</sup> Latham CJ said:

“Those who undertake to establish such an agreement assume a heavy burden of proof. It is easy to allege such an agreement after the parties to it have both died, and any court should be very careful in accepting the evidence of interested parties upon such a question.”<sup>70</sup>

Dixon J echoed this:

“Such an agreement can be established only by clear and satisfactory evidence. It is obvious that there is great need for caution in accepting proofs advanced in support of an agreement affecting and possibly defeating testamentary dispositions of valuable property.”<sup>71</sup>

In *Birmingham v Renfrew* an oral agreement was held to exist on the basis of extrinsic evidence produced before the trial judge.

The evidence produced in *Re Cleaver* would clearly not have satisfied the test for fraud as perceived by Megarry V-C in *Re Snowden*. However, Nourse J made some observations on this issue which are, it is suggested, in the light of the established justification for equitable intervention in this area, correct.

“It is clear from [*Birmingham v Renfrew*], if from nowhere else, that an enforceable agreement to dispose of property in pursuance of mutual wills can be established only by clear and satisfactory evidence. That seems to me to be no more than a particular application of the general rule that all claims to the property of deceased persons must be scrutinised with very great care. However, that does not mean that there has to be a departure from the ordinary standard of proof required in civil proceedings. I have to be satisfied on the balance of probabilities that the alleged agreement was made, but before I can be satisfied of that I must find clear and satisfactory evidence to that effect.”<sup>72</sup>

The application of the ordinary civil standard of proof is manifestly consistent with the established justification.

### 3 The Remedial Trust, and Some General Observations Thereon<sup>73</sup>

Those who disapprove of the use of mutual wills give as one of their strongest reasons for this disapproval the problems concerned with the exact scope and limits of the constructive trust imposed. Although the

69 The High Court of Australia was bound on this point by the Privy Council decision in *Gray v Perpetual Trustee Company*, supra n 25. Cf now *Viro v R* (1978) 18 ALR 257.

70 Supra n 7 at 674.

71 Ibid 681-682.

72 Supra n 4 at 947-948. The ordinary civil standard of proof was also applied in *Ottaway v Norman*, supra n 52.

73 See, further, Sheridan, “The Floating Trust: Mutual Wills” (1977) 15 Alberta LR 211.

trust is imposed *as* a remedy, is it in *itself* a remedy, with its scope and limits — its characteristics — defined by the principle upon which it is imposed? Alternatively, does the trust automatically attract to itself the characteristics associated with the basic and orthodox trust institution? Although the grounds for providing a remedy exist, will the remedy nonetheless not be imposed because the prerequisites of the basic trust institution are not satisfied? Will the trust, if it can be imposed, extend so far as to create property rights in the “beneficiaries” in just the same way as a basic orthodox trust? Will these property rights affect third parties in the same way as property rights acquired under a basic orthodox trust?

These and related questions are the causes of the concern expressed particularly by academic commentators, not only in the actual area of mutual wills, but more generally over the whole area of constructive trusts, especially in recent times with regard to those constructive trusts which are imposed to frustrate conduct which is merely “inequitable”, as opposed to fraudulent or unconscionable.<sup>74</sup> Criticisms of these equitable interventions are usually based on the assumption that such “constructive trusts” carry with them all the characteristics of the basic orthodox trust. As the criticisms mount, and take on an overwhelming posture, an inevitable attitude of retrenchment develops. This is unfortunate, because academics, having pointed out the difficulties of using as a remedy a trust which attracts the characteristics of orthodox trusts, should then concentrate on two issues. First, is the expressed or generally accepted justification for any particular equitable intervention adequate, and if not is there or is there not an alternative justification? Secondly, in view of whichever justification is accepted, what should be the precise type and characteristics of the remedy provided?<sup>75</sup>

It is not just academics, however, who often miss the point. The point might actually be easier for academics to appreciate if judges were to say something more about the exact scope and limits of the remedies they impose. It is really not sufficient in a common law system to impose a remedy which deals with the particular problem between the parties, and to refer to this remedy in a loose way as a “trust”, without further elaboration on the similarities and dissimilarities of that remedy with the basic trust which carries with it so many already firmly established properties.<sup>76</sup>

Sometimes, however, judges do themselves seem to indicate that they are applying a remedy which does carry with it all the usual characteristics of the basic orthodox institutional trust. In *Re Cleaver Nourse J* appears to have had this aim in mind when he said:

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74 The work of Oakley is the most obvious and recent example of this disapproving approach — see his *Constructive Trusts* (1978). One commentator “on the other side” has attempted to expose a basic flaw in the philosophy of the disapprovers — see Brady, “Legal Certainty: The Durable Myth” [1973] *The Irish Jurist* (NS) 18.

75 See, for an illuminating discussion on alternative remedies in cases at present covered by constructive trusts, Davies, “Informal Arrangements Affecting Land” (1979) 8 *Syd LR* 578; and Davies, “Constructive Trust, Contract and Estoppels: Proprietary and Non Proprietary Remedies for Informal Arrangements Affecting Land” (1980) 7 *Adel LR* 200.

76 The constructive “trust” is used, of course, because the trust *obligation* is a very familiar and powerful form of legal obligation.



"I would emphasise that the agreement or understanding must be such as to impose on the donee a legally binding obligation to deal with the property in the particular way and that the other two certainties, namely, those as to the subject matter of the trust and the persons intended to benefit under it, are as essential to this species of trust as they are to any other."<sup>77</sup>

Now, as will become apparent below, in the mutual will constructive trust, in one important sense, those certainties are and possibly have to be satisfied, but in another sense it is simply defeating the purposes of the remedy from the outset to insist upon certainty of subject matter. As Burgess has pointed out, the doctrine of mutual wills is based upon the specific performance of a contract, but the remedy cannot be an orthodox decree of specific performance.

"Instead the courts impose a 'trust' on the surviving testator to achieve the same effect, . . . It will be seen at once that this 'trust' is purely and simply a remedy which was, in effect, a type of specific performance of the obligation entered into prior to the death of the first deceased."<sup>78</sup>

In fact, in accepting the views of the High Court of Australia on the nature of the mutual will constructive trust, Nourse J was himself being inconsistent in demanding certainty of subject matter as a prerequisite.

The judicial elaboration of the mutual will constructive trust by Dixon J in *Birmingham v Renfrew*, in statements which Nourse J cited with approval in full in *Re Cleaver*, provides an excellent example of the type of discussion which is needed from judges when they impose remedies which they refer to as "trusts".

Let us apply some of this elaboration to the facts of *Re Cleaver*. When H died in 1975, W became a constructive trustee, not only of the property she received "absolutely" under H's will, but also (there being nothing expressly to exclude such a result<sup>79</sup>) of her own property. She was under an obligation to dispose of the property in a will which contained the dispositions she had agreed upon. From her own death, the constructive trust remedy (should it be needed on her failure to leave a will in the agreed form) would provide for an institution of the same nature as an express trust, and the various prerequisites of certainties would probably have to be satisfied.

But what of the period between H's death and W's death? To insist upon trusteeship under an orthodox institutional trust raises numerous problems. How can such trusteeship be consistent with an absolute gift? Will the after-acquired property of W be caught by the trust? It was to deal with these sorts of problems, which could not be adequately dealt with if the trust were institutional, that Dixon J in *Birmingham v Renfrew* elaborated as follows on the scope and limits of the constructive trust remedy:

"The purpose of an arrangement for corresponding wills must often be . . . to enable the survivor during his life to deal as absolute owner with the property passing under the will of the

<sup>77</sup> *Supra* n 4 at 947.

<sup>78</sup> Burgess, *supra* n 1 at 235. Cf Youdan, *supra* n 9.

<sup>79</sup> Cf *Re Green*, *supra* n 3.

party first dying. That is to say, the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership so that, for instance, he may convert it and expend the proceeds if he choose. But when he dies he is to bequeath what is left in the manner agreed upon. It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallise into a trust.”<sup>80</sup>

Nothing in this characterisation of the remedy prevents the ultimate “beneficiaries” from acquiring “interests” in the property (of both H and W) from the date of H’s death, and thus having *locus standi* to enforce the obligations of W concerning the ultimate (and interim) dispositions of the property. Further, although W is to be entitled, as provided in the agreement with H, to participate in the property of H beneficially, that participation, and the use of her own property, is no longer unfettered, but is subject to the purpose of the agreement. Such subjection to the purposes of the agreement is quite consistent with the justification for equitable intervention and shows clearly the moulding of the remedy to suit that justification. Dixon J continued:<sup>80</sup>

“No doubt gifts and settlements, *inter vivos*, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, *inter vivos*, is therefore not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor’s own benefit and advantage upon condition that at his death the residue shall pass as arranged.”<sup>81</sup>

This point was discussed by Barwick CJ, also in the High Court of Australia, in *Palmer v Bank of New South Wales*:

“When . . . Dixon J spoke . . . of ‘gifts and settlements, *inter vivos* . . . calculated to defeat the intention of the compact’ he no doubt had in mind gifts and settlements which were either testamentary in nature or which were in contravention of the terms of the particular contract, spelled out of the expressions actually used, bearing in mind the circumstances in which it was made.”<sup>82</sup>

Nourse J in *Re Cleaver* thought Dixon J was

“clearly referring only to voluntary dispositions *inter vivos* which are calculated to defeat the intention of the compact. No objection could normally be taken to ordinary gifts of small value.”<sup>83</sup>

80 *Supra* n 7 at 689. See, also, Youdan, *supra* n 9 at 410-415, 416-419; Sheridan, *supra* n 73 at 230-240. For American authorities on this issue see Sparks, *Contracts to Make Wills* (1956) Ch 5.

81 Latham CJ was more cavalier in his approach to this issue; *ibid* 675: “Further, it is conceded by those seeking to enforce the agreement that it does not have the effect of preventing the husband from dealing during his lifetime with property which he received from his wife, so that any trust which was created can only be a kind of floating trust which finally attaches to such property as he leaves upon his death. *Prima facie*, where property is given by will or otherwise to a person and he can do what he likes with it, a gift by the testator or donor of what that person shall happen to leave at his death does not limit or qualify the absolute gift to him which is the effect of such a disposition.”

82 (1975) 7 ALR 671, 679.

83 *Supra* n 4 at 947.

In summary, Dixon J characterised the remedy he imposed in *Birmingham v Renfrew* as “a constructive trust which allowed the survivor to enjoy the property subject to a fiduciary duty which, so to speak, crystallised on his death and disabled him only from voluntary dispositions *inter vivos*.”<sup>84</sup> This particular remedy as characterised thus found favour not only with Nourse J in *Re Cleaver*, but also in a different context with Brightman J in *Ottaway v Norman*. For present purposes, the importance of the decision in *Birmingham v Renfrew* is its position as an illustration of a judge, having first established an adequate justification for a remedy, not simply “imposing a constructive trust”, without even attempting to outline the real nature of this particular remedy which he calls a constructive trust, but actually shaping the remedy to meet the circumstances.

In other situations, even those where the justification for equitable intervention is the same, the actual remedy may need to be differently defined. This is a task which judges, and academics, should not avoid. It is the essence of the equitable jurisdiction. We should look to the doctrine of mutual wills not merely as an aspect of constructive trusts with only amusement value, but as a part of the law on equitable intervention where the issue of justification and the nature of the remedy have been judicially discussed in a manner which provides a good model for general adoption. It is to be hoped that this model approach will be more widely adopted, particularly in the area of the troublesome inequitable conduct constructive trusts.<sup>85</sup>

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84 Supra n 7 at 690. See also Youdan, supra n 9 at 410-415. In examining cases on a similar point, including *Palmer v Bank of New South Wales* (see supra n 82), Youdan concludes that the equity to nullify a transaction *inter vivos* which is not of itself a breach of contract to leave property by will does not arise simply because the promisor enters into that transaction intending or desiring to deplete the estate which might pass under the will. Rather, in the absence of provisions in the contract to the contrary, the promisor is free to dispose of his property during his lifetime by any means except by a transaction which in substance, even if not in form, is testamentary. See *Fortescue v Hennah* (1812) 19 Ves 67.

85 Academics might well learn from Davies – see his articles cited supra n 75. Judges might well learn from Mahon J, late of the New Zealand High Court – see his judgment (in the Supreme Court as it then was) in *Avondale Printers and Stationers Ltd v Haggie* [1979] 2 NZLR 124. See also Sheridan, supra n 73.