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Appeal allowed. Third, fourth and fifth findings contained in the judgment appealed against set aside. In lieu thereof enter findings for the plaintiff upon each of such issues. Set aside so much of the order as dismissed the action. Remit cause to the Supreme Court to be further dealt with according to law. Plaintiff-appellant to pay the defendant-respondent's costs of the appeal. Co-defendant to pay the plaintiff-appellant's costs of the appeal including those payable by the plaintiff-appellant to the the defendant-respondent.

Solicitors for the appellant, *Blackburn & McCann.*

Solicitors for the respondent Haevecker, *W. J. Denny & Stanley.*

Solicitors for the respondent Regnier, *Villeneuve Smith, Kelly, Hague & Travers.*

C. C. B.

[HIGH COURT OF AUSTRALIA.]

BIRMINGHAM AND OTHERS . . . . APPELLANTS; DEFENDANTS,

AND

RENFREW AND OTHERS . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 8-11.

SYDNEY, *Sept.* 2.

Latham C.J., Dixon and Evatt JJ.

Will—Mutual wills—Husband and wife—Agreement to benefit wife's relatives—Wills made by husband and wife accordingly—Death of wife—Fresh will by husband after accepting benefit—Death of husband—Action by original beneficiaries to enforce agreement—Constructive trust.

Contract—Statute of Frauds—"Contract or sale of lands"—Agreement to leave property by will—Parol agreement—Land owned at date of agreement and at date of death—Instruments Act 1928 (*Vict.*) (*No.* 3706), *sec.* 128—*Property Law Act* 1928 (*Vict.*) (*No.* 3754), *sec.* 53.

It was orally agreed between a husband and his wife that the wife should leave her property by will to the husband, and that, in consideration thereof,

the husband should make a will leaving his property to four named relatives of the wife in the event of her predeceasing him and should not revoke the will. Wills were executed by husband and wife accordingly. The wife predeceased the husband, and he took under her will. He subsequently made a will revoking his prior will and benefiting persons other than the relatives of the wife. On his death the latter will was admitted to probate. At the date of the agreement and also at her death the wife had real estate. At the time of his death the husband had real estate. It was found that the husband and wife entered into the agreement with the intention of creating binding obligations.

Held that the agreement created a constructive trust which was enforceable in equity by the wife's relatives against the husband's executors. The agreement was not within sec. 128 of the *Instruments Act* 1928 (Vict.) as a "contract or sale of lands," because it related, not to specific property, but to property of whatever character at the time of death, and therefore it could not be said, when the agreement was made, that it concerned an interest in land; and, the trust being constructive, sec. 53 of the *Property Law Act* 1928 (Vict.) did not require that it be manifested by writing.

Dufour v. *Pereira*, (1769) Dick. 419; 21 E.R. 332, applied.

Horton v. *Jones*, (1935) 53 C.L.R. 475, distinguished.

Decision of the Supreme Court of Victoria (*Gavan Duffy* J.): *Renfrew* v. *Birmingham*, (1937) V.L.R. 180, affirmed.

APPEAL from the Supreme Court of Victoria.

The respondents, Elsie Eliza Mabel Renfrew, Alexander Renfrew, Catherine Fulton Johnston and William Alexander Johnston, an infant suing by his next friend, William Johnston, brought an action in the Supreme Court of Victoria against the appellants, Gladys Amy Birmingham, Colin Birmingham, Edna Retta Birmingham, Ruby May Johnson, Annie Kate Barnes, Emily Stenhouse, Vera Smith and Alan Manson Corr. The plaintiffs were relatives of the late Grace Alexander Russell, whose husband was Joseph Russell. The defendants were relatives or friends of the husband and Alan Manson Corr being one of his executors.

On 1st April 1932 Grace Alexander Russell made a will in which, after providing for certain family legacies, she left the residue of her estate to her husband, Joseph Garrett Russell, and in the event of her husband not surviving her to Alexander Renfrew, Elsie Eliza Mabel Renfrew, Catherine Fulton Johnston and William Alexander Johnston. Though neither she nor her husband had originally any

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substantial means of their own, the estate she thus dealt with was a large one, owing to the fact that she had just become a beneficiary under her uncle's will.

On 31st March 1932 her husband, Joseph Garrett Russell, made a will in which, after providing for payment of his debts and funeral and testamentary expenses, he left the residue of his estate to his wife, and, if she should predecease him, to the same four members of her family to whom she had left her residue. On 26th July 1932 Grace Alexandra Russell died and her husband duly took both an annuity provided by her will and also the residue thereunder. Joseph Garrett Russell survived his wife for some time but eventually died having several times changed his will and leaving a final will which benefited his own relatives to the detriment of his wife's relatives who were the sole beneficiaries under his will of 31st March 1932.

The plaintiffs, being the four beneficiaries under the will of Joseph Garrett Russell of 31st March 1932, alleged that that will was made under a binding agreement with his wife so to dispose of his property, that the consideration was the making of the wife's will of 1st April 1932, and that he had accepted the benefits given him by her will. They claimed a declaration that the agreement should be specifically enforced or that the testator's executors held the testator's estate upon trust for the plaintiffs; alternatively, a declaration that the plaintiffs were entitled to be paid out of the estate of the testator the amount of the loss and damage and an order that the testator's executors pay the same to the plaintiffs, or alternatively, a declaration that the testator received and held the residue upon trust to leave the plaintiffs by will so much thereof as should not be disposed of by him during his lifetime and that the testator's executors held upon trust for the plaintiffs so much of the residue as remained undisposed of by the testator at the date of his death and all property purchased thereout, and an account of the residue.

The defendants denied that any such binding agreement as that alleged existed, and in addition said that, if any such agreement existed, it was unenforceable because of the uncertainty of the terms thereof, and they further relied upon sec. 128 of the *Instruments Act* 1928 (Vict.) and sec. 53 of the *Property Law Act* 1928 (Vict.).

Gavan Duffy J., who tried the action, held that there was an agreement between husband and wife that the wife by her will should, after giving certain legacies, leave the residue to her husband, and that in return he should leave his property to her family in the way he did in his first will. His Honour also found that before making his will the husband knew the contents of hers, at any rate with the exception of a provision concerning a mortgage then contained in the codicil, and that it was likely that the whole matter had been fully discussed between them before any visit was paid to the solicitor's office, and his Honour drew the conclusion that in executing his first will the husband was carrying into effect an agreement that in return for the exact benefits he was to receive under his wife's will, he should make a will in just such form as he in fact did; that the terms of the agreement were, therefore, not too uncertain to be enforced, that the agreement did not come within sec. 128 of the *Instruments Act* 1928 and that the present plaintiffs were entitled to enforce the agreement though they were themselves not parties to it, as it was intended by the testator to enter into it for the benefit of the plaintiffs, who thus became beneficiaries entitled to enforce their rights: *Renfrew* v. *Birmingham* (1).

From that decision the defendants appealed to the High Court.

Fullagar K.C. and *Walker*, for the appellants.

Fullagar K.C. The claim is based on two grounds, contract and trust. So far as it is based on contract the plaintiffs are volunteers and the agreement was not made as agent or as trustee for them. There was no legal or equitable obligation and the transaction was not intended to have any legal effect. The transaction comes within sec. 128 of the *Instruments Act* 1928. The evidence does not establish a trust and no case of election arises here. There can be no such thing as specific performance of an agreement to make a will. Where there is a contract for the benefit of a third party, the contract will not be enforceable by the third party unless he is a *cestui que trust* (*In re Empress*

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Engineering Co. (1)). But children of the marriage were not regarded as strangers to the consideration of marriage articles (*Underhill's Law of Trusts and Trustees*, 8th ed. (1926), pp. 39, 47-50 ; *Harmer* v. *Armstrong* (2) ; *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (3) ; *Royal Exchange Assurance* v. *Hope* (4)). The test is to look at all the circumstances. Is this a mere agreement which the parties can rescind by mutual consent ? The matter must be looked at as on the date of the making of the contract, though there may be a later declaration of trust. Here the intention of the parties was that the obligation could be released or varied at any time, and that is inconsistent with the creation of a trust (*Lloyd's* v. *Harper* (5) ; *Colyear* v. *Countess of Mulgrave* (6) ; *Gandy* v. *Gandy* (7)). In this case the parties could alter their contract at any time as they chose. It was merely a temporary disposition of their property pending a permanent settlement, and they were merely making their own arrangements which they could alter by their own acts. If they could alter the terms of the settlement without the consent of third parties, there could be no trusts in their favour. Equity can give no relief based on contract as such. The contract is to make a will and not to refrain from revoking it. This contract cannot be specifically enforced (*Stone* v. *Hoskins* (8) ; *In the Estate of Heys, Walker* v. *Gaskill* (9)). The trial judge has not considered the question of trust. There was no trust created in this case. This case differs from *McCormick* v. *Grogan* (10). [He referred to *In re Williams* ; *Williams* v. *All Souls, Hastings (Parochial Church Council)* (11) ; *Dufour* v. *Pereira* (12) ; *Lord Walpole* v. *Lord Orford* (13) ; *Denyssen* v. *Mostert* (14) ; *In re Hagger* ; *Freeman* v. *Arscott* (15).] In some of these cases there was a single will executed by both parties and disposing of their interests in the property completely. In one of them the property was all held jointly. Where a document of that kind is executed it operates from its

(1) (1880) 16 Ch. D. 125, at p. 129.
(2) (1934) Ch. 65.
(3) (1933) A.C. 70, at pp. 78, 79.
(4) (1928) Ch. 179, at pp. 185, 198.
(5) (1880) 16 Ch. D. 290.
(6) (1836) 2 Keen 81 ; 48 E.R. 559.
(7) (1885) 30 Ch. D. 57, at pp. 69, 70.
(8) (1905) P. 194.
(9) (1914) P. 192.
(10) (1869) L.R. 4 H.L. 82.
(11) (1933) Ch. 244.
(12) (1769) Dick. 419 ; 21 E.R. 332.
(13) (1797) 3 Ves. 402, at pp. 416-419 ; 30 E.R. 1076, at pp. 1083, 1084.
(14) (1872) L.R. 4 P.C. 236.
(15) (1930) 2 Ch. 190.

execution both as a will and as a settlement, and may or may not, according to its terms, be revocable during the joint lives. In those cases the survivor is given only a life interest in the property. Each party brings property in, and on the death of the first party the document is irrevocable. But these joint mutual wills stand on a different footing. The principle of *Dufour* v. *Pereira* (1) may possibly be extended, but the conditions of the possible extension are not present in this case (*In re Oldham*; *Hadwen* v. *Myles* (2); *Hudson* v. *Gray* (3); *Gray* v. *Perpetual Trustee Co.* (4)). The mere addition of a promise not to revoke is not enough to create equitable interests, because the freedom to deal with property during the life of the survivor is inconsistent with the creation of an equitable interest (*Henderson* v. *Cross* (5); *Perry* v. *Merritt* (6); *In re Jones*; *Richards* v. *Jones* (7)). There can be no case of election where there is an express gift of an absolute and beneficial interest in the property. If the wife lost her fortune and the husband acquired a fortune and died first, there could be no trust imposed on the wife.

Walker. The judge's findings were contrary to the facts. The husband gave no undertaking and the wife imposed no obligation on her husband. In any event the agreement falls within the *Statute of Frauds* (sec. 128 of the *Instruments Act* 1928) (*Horton* v. *Jones* (8); *Synge* v. *Synge* (9); *McCormick* v. *Grogan* (10)). In so far as it is a trust it falls within sec. 53 of the *Property Law Act* 1928.

Wilbur Ham K.C. and *T. W. Smith*, for the respondents.

Wilbur Ham K.C. The facts as to the making of the wills should be looked at in the light of what went before. The wife and the husband had made mutual promises that if the wife left him her property, he would make a will, and not revoke it, leaving the property to her relatives. The wife, who had the property, was doing what she wanted to do, but the

(1) (1769) Dick. 419; 21 E.R. 332.
(2) (1925) Ch. 75, at pp. 82, 85, 87.
(3) (1927) 39 C.L.R. 473.
(4) (1928) A.C. 391, at p. 400.
(5) (1861) 29 Beav. 216; 54 E.R. 610.
(6) (1874) L.R. 18 Eq. 152.
(7) (1898) 1 Ch. 438.
(8) (1935) 53 C.L.R. 475.
(9) (1894) 1 Q.B. 466.
(10) (1869) L.R. 4 H.L. 82.

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husband was doing what he did not want to do. *Hudson* v. *Gray* (1) shows that there must have been some evidence of agreement. The fact that the husband might dissipate the property did not prevent an equitable right arising. In the case of mutual wills equity will restrain the parties doing anything in fraud of the agreement (*Halsbury, Laws of England*, 1st ed., vol. 25, p. 543; vol. 28, pp. 514, 515). If one of the parties has dissipated the property in fraud of the agreement, the remedy would be damages (*Jones* v. *Martin* (2)). There is no such uncertainty as would prevent the equitable interests arising. The evidence is clear and consistent and agrees with the terms of the wills (*Stone* v. *Hoskins* (3)). In such cases as these, the person who has the beneficial interest can enforce the contract (*Hudson* v. *Gray* (4)). The whole doctrine of mutual wills is anomalous (*Coverdale* v. *Eastwood* (5); *Jones* v. *Martin* (6); *In the Estate of Heys*; *Walker* v. *Gaskill* (7); *Surman* v. *Surman* (8); *In re Hagger* (9); *Russell* v. *Scott* (10)). The mere fact that the wife had a power of disposition during her lifetime and the fact that the husband had a power of disposition during his life does not alter the obligation, because equity will fix on the amount that the husband had at the relevant time (*Lloyd's* v. *Harper* (11); *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Ltd.* (12); *Robertson* v. *Wait* (13); *Law Quarterly Review*, vol. 46, pp. 16, 17, 25, 26, 28, 29; *Harmer* v. *Armstrong* (14)). In *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* (15) the circumstances excluded any idea of trust. The gift of the property to the husband constituted a trust (*McCormick* v. *Grogan* (16)). The gift is not too uncertain to be enforced (*Jarman* on *Wills*, 7th ed. (1930), vol. I., p. 437; *In re Gardner*; *Huey v. Cunnington* (17); *In re Williams* (18)). Sec. 128 of the *Instruments*

(1) (1927) 39 C.L.R. 473; (1928) A.C. 391; 40 C.L.R. 558.
(2) (1798) 3 Anst. 882; 145 E.R. 1070; 5 Ves. 266n.; 31 E.R. 582.
(3) (1905) P., at p. 196.
(4) (1927) 39 C.L.R., at p. 484.
(5) (1872) L.R. 15 Eq. 121, at pp. 129, 131.
(6) (1797) 5 Ves., at p. 266; 31 E.R., at p. 579.
(7) (1914) P., at pp. 198, 199.
(8) (1820) 5 Madd. 123; 56 E.R. 842.
(9) (1930) 2 Ch. 190.
(10) (1936) 55 C.L.R. 440, at p. 453.
(11) (1880) 16 Ch. D., at pp. 308, 309.
(12) (1919) A.C. 801, at pp. 805, 806.
(13) (1853) 8 Ex. 299; 155 E.R. 1360.
(14) (1934) Ch., at pp. 82-85.
(15) (1915) A.C. 847.
(16) (1869) L.R. 4 H.L., at pp. 88, 97.
(17) (1920) 2 Ch. 523; (1923) 2 Ch. 230, at pp. 232, 233.
(18) (1933) Ch., at pp. 250, 251.

Act 1928 does not apply to such a case as this (*McCormick* v. *Grogan* (1)). The *Property Law Act* does not apply to implied or constructive trusts (*Blackwell* v. *Blackwell* (2)). It is a fraud for a person to take property on certain conditions and then to retain the property contrary to his undertaking. In *Horton* v. *Jones* (3) *Starke* J. went too far. It must appear that the contract refers to land before it comes within the *Statute of Frauds* (*McGregor* v. *McGregor* (4)).

T. W. Smith. The test is: Was the stipulation introduced for the purpose of conferring a benefit on the third party? If so, a trust of a chose in action arises.

Fullagar K.C., in reply. The intention of the parties was that this should be a mere temporary arrangement and this is inconsistent with the idea of imposing a trust (*Lord Walpole* v. *Lord Orford* (5)). If there were a contract, the plaintiffs could not enforce it, as they are volunteers. Before they could recover, the contract would have to be enforceable (*Jones* v. *Martin* (6)). This is not a case of children of the marriage trying to enforce a marriage settlement (*Jefferys* v. *Jefferys* (7); *Gale* v. *Gale* (8); *Green* v. *Paterson* (9); *Godefroi* on *Trusts and Trustees*, 5th ed. (1927), pp. 59-62). The husband's promise is not to convey property or to pay a sum of money and it is enforceable at law only in damages, if it be enforceable (*In re Wait* (10); *Fletcher* v. *Fletcher* (11)). *Dufour* v. *Pereira* (12) and *In re Hagger* (13) rest on election (*In re Oldham* (14)). No trust can attach at the time when the agreement was made.

Cur. adv. vult.

(1) (1869) L.R. 4 H.L., at p. 97.
(2) (1929) A.C. 318, at p. 336.
(3) (1935) 53 C.L.R., at p. 488.
(4) (1888) 21 Q.B.D. 424.
(5) (1797) 3 Ves., at pp. 419, 420; 30 E.R. 1084, 1085.
(6) (1797) 5 Ves., at pp. 266, 276; 31 E.R., at pp. 579, 582.
(7) (1841) Cr. & Ph. 138; 41 E.R. 443.
(8) (1877) 6 Ch. D. 144, at p. 148.
(9) (1886) 32 Ch. D. 95, at p. 107.
(10) (1927) 1 Ch. 606.
(11) (1844) 4 Hare 67, at pp. 76, 77; 67 E.R. 564, at pp. 567, 568.
(12) (1769) Dick. 419; 21 E.R. 332.
(13) (1930) 2 Ch. 190.
(14) (1925) Ch. 75.

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Sept. 2.

The following written judgments were delivered :—

LATHAM C.J. The plaintiffs (respondents in this appeal) are relatives of the late Grace Alexandra Russell, whose husband was Joseph Garrett Russell. The defendants (appellants) are relatives or friends of the husband. The executor of the husband's will is also a defendant. He has been joined as a respondent to the appeal. The plaintiffs claim specific performance and other remedies in relation to an agreement which they allege was made between the husband and the wife. The wife came into a very substantial amount of property under the will of an uncle. The husband had no property. The learned trial judge (*Gavan Duffy* J.) has found that an agreement was made between the husband and the wife according to which the wife, instead of leaving her property to the husband for life and then to certain relatives, should, after giving certain legacies, leave the residue to her husband, he in turn promising that he would leave his property to those relatives and that he would not alter the will so leaving it. Wills in the agreed terms were made; the wife died; the husband subsequently made a different will under which the appellants are substantial beneficiaries and under which the wife's relatives respectively take either no interest or a much smaller interest than under the will made in pursuance of the agreement. His last will was made in breach of the agreement but it was nevertheless effective as a will. A will " is by its very nature and in its very essence a revocable instrument " (*In the Estate of Heys* (1)). Thus probate has rightly been granted to the husband's last will, but that fact leaves for decision the question whether or not the agreement which the learned judge found to have been made can, notwithstanding the terms of the last will, be enforced.

There was evidence which, if believed, justified the learned judge in finding that the existence of the agreement in the terms already stated was established. 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. Perhaps most husbands and wives make wills " by agreement," but they do not bind themselves not to revoke

(1) (1914) P., at p. 197.

their wills. They do not intend to undertake or impose any kind of binding obligation. The mere fact that two persons make what may be called corresponding wills in the sense that the existence of each will is naturally explained by the existence of the other will is not sufficient to establish a binding agreement not to revoke wills so made (*In re Oldham* (1); *Gray* v. *Perpetual Trustee Co.* (2); and see *Lord Walpole* v. *Lord Orford* (3), where attention is directed to many considerations which may go to show that in a particular case no binding agreement was intended). The judgment of the learned trial judge shows that he was fully aware of all the relevant considerations and I can see no reason for disturbing his decision on the facts.

The difficulty in this case does not arise upon the facts, but, it is urged, upon the law. There are obvious prima facie difficulties in giving effect to an agreement of this kind at the suit of those who may be called the disappointed beneficiaries. Their case depends upon a contract to which they were not parties and upon which, therefore, prima facie, they cannot sue (*Tweddle* v. *Atkinson* (4); *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* (5); *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (6)). The contract made between the husband and wife did not purport by its terms to create a trust, and it is urged that there is therefore no justification for applying the principles stated in *Lloyd's* v. *Harper* (7); *Gandy* v. *Gandy* (8); *Harmer* v. *Armstrong* (9). 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 (*In re Jones* (10)).

(1) (1925) Ch. 75.
(2) (1928) A.C. 391.
(3) (1797) 3 Ves. 402; 30 E.R. 1076.
(4) (1861) 1 B. & S. 393; 121 E.R. 762.
(5) (1915) A.C., at p. 853.
(6) (1933) A.C. 70.
(7) (1880) 16 Ch. D. 290.
(8) (1885) 30 Ch. D. 57.
(9) (1934) Ch. 65.
(10) (1898) 1 Ch. 438.

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In my opinion, however, it is not necessary for any court at the present day to concern itself with the difficulties in legal theory which the simultaneous recognition of these principles may involve. The law was stated with robust simplicity in 1769 by Lord *Camden* in *Dufour* v. *Pereira* (1), where, speaking of a mutual will made by husband and wife he said :—" It might have been revoked by both jointly; it might have been revoked separately, provided the party intending it, had given notice to the other of such revocation. But I cannot be of opinion, that either of them, could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another will. It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the court afterwards permit the other to break the contract? Certainly not." In that case it was declared that the wife, " having possessed all his personal estate, and enjoyed the interest thereof during her life, hath by those acts bound her assets to make good all her bequests in the said mutual will; and therefore let the necessary accounts be taken " (2). This case was very fully discussed in *Hargrave's Juridical Arguments* (1799), vol. II., and what that learned author said has been recognized as law on a number of occasions and as applying to cases of separate wills made by two persons. I have already referred to *Gray* v. *Perpetual Trustee Co.* (3). See also *Stone* v. *Hoskins* (4), where the following passage is quoted from *Hargrave* :—" Though a will is always revocable, and the last must always be the testator's will; yet a man may so bind his assets by agreement that his will shall be a trustee for performance of his agreement. . . . These cases are common, and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke it. This court does not set aside the will; but makes the devisee heir or executor trustee to perform the contract." See also *In re Williams* (5).

(1) (1769) Dick. 419, at pp. 420, 421; 21 E.R. 332, at p. 333.
(2) (1769) Dick., at p. 421; 21 E.R., at p. 333.
(3) (1928) A.C. 391.
(4) (1905) P., at p. 197.
(5) (1933) 1 Ch., at p. 250.

In this case it is not contended that all the necessary parties are not before the court. Upon the basis of the law as declared in the authorities mentioned and upon the findings of fact made by the learned judge, an order was made declaring that Grace Alexandra Russell entered into the alleged agreement as trustee for and on behalf of the plaintiffs and that the agreement is binding upon and enforceable against the executors of the husband. In my opinion this order is appropriate in its terms.

The only other matter which it is necessary to consider arises upon the *Statute of Frauds*. At the time when the agreement was made and also at the time of her death Mrs. Russell owned real estate. Her husband owned real estate at the time of his death. The agreement was verbal. It is said that therefore no action can be brought upon the agreement because it is a contract or sale of or concerning land within the meaning of the *Instruments Act* 1928, sec. 128 (*Statute of Frauds*, sec. 4), and further that the alleged trust cannot be created because the declaration of trust is not manifested and proved by writing or by the husband's will (*Property Law Act*, sec. 53 (*Statute of Frauds*, sec. 7)). These are questions upon which I have been unable to discover any definite authority which can be regarded as directly applicable to the present case. *Horton* v. *Jones* (1) is perhaps the case which is nearest in its facts, but in that case the promise which was sued upon was a promise to leave the plaintiff by will a specified interest, namely, the interest which a son had under his deceased father's will. That interest consisted of an interest in land and the promise, therefore, at the time when it was made, clearly applied to an interest in land so as to fall within the *Statute of Frauds*. In the present case the promise by the husband was a promise to leave his property to certain persons by will, including such property as his wife might leave to him by her will, less, as my brother *Dixon* has explained in some detail in his judgment, such amount of that property as he might have bona fide disposed of during his lifetime.

Although the *Statute of Frauds* has been in force for over 200 years and has perhaps been more explained, or, as many would say, explained away, by judicial decisions than any other statute, this

(1) (1935) 53 C.L.R. 475.

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appears to me to be a case of first impression. In my opinion, 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. If the position is that subsequent events may bring about the result that the contract turns out to be a contract of such a character that, if the contract had in terms applied to the events which have actually happened, the contract would have been within the statute, the contract ought not, I think, for this reason to be held to be within the statute. In the case of contracts not to be performed within a year from the making thereof it has been established by a series of decisions that a contract does not fall within the statute unless it appears from the terms of the contract itself that it is incapable of performance within the year (*Peter* v. *Compton* (1)). The fact that performance may possibly or even probably extend beyond the period of one year does not bring the contract within the statute (*McGregor* v. *McGregor* (2)). (The established view is that this general principle is not inconsistent with the other recognized rule that the inclusion in a contract otherwise within the statute of a term providing for possible determination of the contract within a year does not exclude the operation of the statute (*Hanau* v. *Ehrlich* (3)).) By parity of reasoning it appears to me that it should be held that a contract which does not in its terms concern an interest in land ought not to be held to be within the *Statute of Frauds* because a particular set of circumstances may bring about the result that the performance of the contract may involve some disposition of an interest in land. In the present case the husband's promise did not contain any reference to land. It was not a promise to leave by will either the property which he then had, or which his wife had, or which he might thereafter from time to time happen to have. It was a promise to leave by will to specified persons the property, whatever it might be, of which he should die possessed. That property might or might not have included an interest in land. The applicability of the statute could not, it seems to me, properly be determined by considering what in fact was the character of the

(1) (1694) Smith's Leading Cases, 13th ed. (1929), vol. I., p. 350.

(2) (1888) 21 Q.B.D. 424.

(3) (1912) A.C. 39.

property which he then had or might thereafter acquire or might have when he died. A contrary view would lead to strange results in some cases. For purposes of illustration let it be supposed that a husband and wife who each owned only personal property made promises with respect to their wills such as were made in the present case. It is obvious that either of them might thereafter have become possessed of land and that the performance of the contract by one or both of them might involve a dealing by will with an interest in land. If the principle upon which the argument for the defendants in the present case is based is to be accepted, the result would be that such a contract would be unenforceable by reason of the *Statute of Frauds* even though in fact the parties had never thought of making any promises in relation to land and even though no interest in land was ever in fact affected by the promises. It would still be true that the performance of the contract might have involved dealing with an interest in land, but in my opinion neither this circumstance, nor the fact (if it turned out to be a fact) that the performance of the contract actually involved such dealing, can be accepted as a criterion for determining the applicability of the statute.

It should, I think, be remembered in dealing with the *Statute of Frauds* that it is quite possible for there to be an action upon a contract before the time for performance has arrived. A repudiation of a promise by one party may give rise to a right of action before performance is due (*Synge* v. *Synge* (1)). In such a case it would be necessary to determine, at the time when the action was brought, whether or not it was possible, consistently with the statute, for the court to entertain the action. It would not be possible to wait until the time for performance had actually been reached in order to consider whether or not, as events had turned out, the promise had actually operated in relation to a subject matter which fell within the provisions of the statute. Thus I think that it is not possible to hold that the applicability of the statute is to be determined as at the time when it falls due for performance. If then that is not the relevant time, the only alternative view appears to me to be that it must be possible to determine the applicability of the statute at any time at which an action could conceivably be brought

(1) (1894) 1 Q.B. 466.

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—and that the decision must be the same in relation to the same contract at whatever time the question arises. If this be so then it must be possible to determine at any moment after the contract is made whether or not the statute is applicable. If this rule is applied in the present case it brings about the result that it was not possible definitely to show, at the time when the contract was made, that the contract would or could affect any interest in any land. It is for the defendant to establish that the contract sued upon fell within the statute. If he is unable positively to establish this proposition, the defence should not succeed. In the present case, if the question of the applicability of the statute is considered as at the moment after the contract has been made, the defendants are unable to show that the contract was a contract of or concerning any interest in land. Therefore, in my opinion, the defence of the *Statute of Frauds* should fail.

The defendants also relied upon the provision of the *Property Law Act*, sec. 53, requiring trusts of land to be manifested in writing. This section, however, does not apply to constructive trusts (sub-sec. 2), and for this reason it cannot be relied upon as a defence to this action. The trust relied upon in this case is not an express trust which the husband created. The only trust alleged is a trust which is declared by the law to affect the conscience of his executor and of the volunteers who are devisees or legatees under his will. Further, I think that sec. 53 of the *Property Law Act*, which is also taken from the *Statute of Frauds*, should be applied according to the principles which I have stated as applying to sec. 4 of the statute as embodied in sec. 128 of the *Instruments Act*.

I am therefore of opinion that the appeal should fail and that the order of the Supreme Court should be affirmed. That order reserves liberty to apply, and it does not appear to me that there should be any difficulty in working out the order in such a way as to secure the performance of the contract which the learned trial judge found to have been established by the evidence.

DIXON J. The question at issue upon this appeal is whether the distribution of a testator's estate is governed or controlled by an agreement said to have been made between himself and his wife,

who predeceased him, as to their testamentary dispositions. The property in dispute came almost entirely from her late uncle under whose will she succeeded to what amounted to a competence. She and her husband had no children, but each of them had collateral relatives. On her side she had a brother, a sister, a sister-in-law and a nephew who seem to have attracted her interest. Her husband had no property of his own. She died on 26th July 1932, while she and her husband were upon a visit to England. Her last will was dated 1st April 1932 and was made within four days of her departure from Melbourne. By this will she bequeathed an annuity of £500 to her husband and annuities to her own brother, sister, sister-in-law and cousin and to another lady, annuities together amounting to about £546. Subject to these, and some other gifts of no importance, she devised and bequeathed her residuary estate to her husband if he should survive her. If he should not be living at her death, then she directed that her residue should be divided into four equal parts. A fourth part each was bequeathed to her brother, her sister, her sister-in-law and her nephew already mentioned. Her husband made a will, bearing date as of the previous day, 31st March 1932, by which he devised and bequeathed his estate to his wife, should she survive him, and if she should predecease him, then he directed a division into four parts and distributed the fourth parts as his wife's will did, namely, one to each of the same four of her relatives. After his wife's death he revoked this will, and on his death, which occurred on 20th March 1935, it was found that under his testamentary dispositions his own sisters benefited largely and that what provision he made in favour of members of the family to which his wife belonged was quite different from and much less favourable than that contained in the wills which he and his wife made together. The four persons who would have taken a fourth part each in residue had he died leaving unaltered the will he made on that occasion set up an agreement between husband and wife by which, in consideration of her making her will, he agreed to make his corresponding will and, if he should be the survivor, to leave it unrevoked. 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

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affecting and possibly defeating testamentary dispositions of valuable property. The circumstances of the present case, however, invest the story told on the part of the respondents with some probability. The testatrix had succeeded to a large amount of property in consequence of some predilection in her favour on the part of an uncle who might have spread his gifts more widely among the members of the family. Some difficulties had arisen in the administration of his estate which worried her and made it appear inexpedient to make her husband tenant for life under her will and bequeath her estate in remainder to the four respondents. The time had come when she considered that she ought to make a will. And it was natural that she should wish to be sure that the relatives of her late uncle and of herself would succeed to the estate which he had left to her. Witnesses deposed to a circumstantial account of discussions between the wife and one or other of the intended beneficiaries. They narrated how the wife definitely stated in his presence the terms of the arrangement made with the husband and how he assented to her statement. The evidence, if believed, could leave no doubt that the wife made her will upon the faith of assurances on the part of her husband that he would leave his will unrevoked should she die first and that he made his will as part of the arrangement under which she made hers. This evidence was corroborated by evidence, taken on commission, of statements made by the spouses while abroad. One of the respondents wrote letters which formed the basis of some criticism of his testimony. But, read as a whole, they do not substantially detract from its credibility. *Gavan Duffy* J. found that an agreement had been made, and I do not think that his finding can be set aside. He found, too, that the arrangement was not of a character leaving legal relations unaffected. So far as this is a question of fact, I think he was fully justified in taking the view that the wife meant to obtain from her husband a promise and meant that it should be communicated to the intended beneficiaries in order the better to ensure its fulfilment. I think the legal result was a contract between husband and wife. The contract bound him, I think, during her lifetime not to revoke his will without notice to her. If she died without altering her will, then he was bound after her death not to revoke his will at

all. She on her part afforded the consideration for his promise by making her will. His obligation not to revoke his will during her life without notice to her is to be implied. For I think the express promise should be understood as meaning that if she died leaving her will unrevoked then he would not revoke his. But the agreement really assumes that neither party will alter his or her will without the knowledge of the other. It has long been established that 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.

In the paper on the *Walpole Case* (*Lord Walpole* v. *Lord Orford* (1)), contained in vol. II. of *Hargrave's Juridical Arguments* (1799), which Viscount *Haldane* in *Gray* v. *Perpetual Trustee Co.* (2) calls a book of authority, there is a passage fitting, as I think, the circumstances of this case, circumstances of which a brief account only has been given above. He says (at p. 285) :—" In these circumstances, there is such a combination, that it seems to me impossible to deny the existence of compact between the two testators. A mutual pledging is inferable from the beginning to the end of the transaction ; is inferable from the two instruments themselves ; is inferable from every thing preceding and every thing accompanying the actual execution of them. The whole transaction speaks the language of mutual engagement most emphatically in every part. The evidence of the engagement is the thing itself. Except on the idea of mutual concession and mutual engagement, the transaction is unintelligible. Nor is the nature of the compact less apparent. Both of the instruments being equally revocable, it is plain, that the contracting parties did not mean absolutely to exclude themselves from making new

(1) (1797) 3 Ves. 402 ; 30 E.R. 1076. (2) (1928) A.C., at p. 399.

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arrangements. Had that been their meaning, instead of mutual wills, which are in their nature revocable, they would have made mutual irrevocable deeds of settlement. On the other hand, it is in my opinion as plain, that the two contracting parties did not mean that one should have more liberty of revocation than the other. Consequently they must have intended, that during their joint lives neither should revoke secretly and clandestinely; and that after the death of one without revoking the right of revoking should cease to the other. Upon any other footing, it would have been a transaction of mutual wills, with a licence to both parties to impose upon each other at pleasure; and instead of a fair honorable and equal bargain, it would have been one of a kind the most hollow deceptive and ensnaring."

This passage contains the reason for implying a condition that neither party should revoke his or her will without notice to the other. The learned author then gives in a sentence the principle upon which the enforcement of such compacts in favour of the beneficiaries proceeds (at pp. 286, 287): "Here, therefore, the simple question is, whether a court of equity shall suffer this breach of the compact to be available; or whether, under its jurisdiction of compelling specific performance, the court shall not declare the earl's devisees deriving under a breach of contract to be mere trustees for those against whom that breach operates."

The special application of the principle he supports by a citation of cases not only in Chancery but at common law. He begins this citation by saying (at p. 289):—"Upon such a case, if it was ever so new in its particular terms, I should not doubt its being relievable in equity. I should think the undeniable jurisdiction of equity over agreements, and the undeniable practice of exercising that jurisdiction by decreeing specific performance, sufficient to ground myself upon, without the aid of precedents of exactly the same description of compact. Indeed, not only mutual wills are very rare compacts amongst us; but even testamentary compacts of any kind are not very frequent. However our printed books are not wholly without precedents applicable to the present case, as I have now put it upon the ground of a testamentary compact. I do not mean, that the precise and literal case of a mutual will is to be

found in *print*. At least, after very anxious research for the purpose of the present case, I have not been able to find a precedent in *print* of any mutual will literally. But I meet with several cases in print and in manuscript, and both at law and in equity, having considerable resemblance." Then, after stating the effect of several very interesting cases at law, he turns to equity and gives the facts of *Chamberlaine* v. *Chamberlaine* (1). This case is notable for the language ascribed to Lord *Nottingham* :—" But it was decreed by lord chancellor *Nottingham*, that let the assets be what they would, the eldest son having solemnly undertaken payment of the legacies in case his father would not alter his will, and *his father dying in peace upon the said promise*, the eldest son should pay the plaintiffs his sisters their legacies, without regarding whether any part of the £2,500 should be drawn out in aid ; and that point was left to be decided on another bill, which was depending between the eldest son and his younger brothers. And Lord *Nottingham* said, ' It is the constant course of this court to make such decrees upon promises made, if the testator would not alter his will ' " (at pp. 292, 293).

He concludes the citation of authority :—" From these various cases of law and equity, the plain inference seems to be, that compacts or agreements, upon the faith of which wills or settlements are either made or forborne to be made, are enforceable by both jurisdictions : and that as at law damages are recoverable by those injured by the breach ; so in equity a more perfect relief is given, by decreeing specific performance, and for that purpose, whenever the case requires, converting the party promising and all volunteers deriving under him into mere trustees of the property in question. So anxious also do our courts of equity appear to have been in exacting the performance of such compacts, that even *verbal* promises have had enforcement ; the *Statute of Frauds* having been refined upon, to prevent the requisition of writing from operating ; and entering into such engagements and then refusing to perform them having for that purpose been classed, as a fraud upon the testator or other party influenced in his conduct by the particular promise " (at pp. 294, 295).

(1) (1680) 2 Eq. Cas. Abr. 415 ; 22 E.R. 352 ; 2 Freem. Ch. 34, 52 ; 22 E.R. 1041, 1053 ; cf. Pr. Ch., at p. 4.

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In *Dufour* v. *Pereira* or *Parara* (1), more fully stated in *Hargrave*, vol. II., pp. 306-312, Lord *Camden* says (at p. 308) :—"A mutual will is a revocable act. It may be revoked by joint consent clearly. By one only, if he give notice, I can admit. 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. The mutual will is in the whole and every part mutually upon condition, that the whole shall be the will. There is a reciprocity, that runs throughout the instrument. The property of both is put into a common fund, and every devise is the joint devise of both. This is a contract. If not revoked during the joint lives by any open act, he that dies first dies with the promise of the survivor, that the joint will shall stand. It is too late afterwards for the survivor to change his mind : because the first dier's will is then irrevocable, which would otherwise have been differently framed, if that testator had been apprized of this dissent."

The principles upon which *Hargrave* bases his argument have passed into the modern law. It is true that they date from a period when neither at law nor in equity was the view firmly applied that no one but a party to a contract could enforce it. Indeed this proposition never became true in equity ; for, if a contracting party made himself a trustee for others of the benefit of the obligation and it was a contract enforceable by equitable remedies, then the beneficiaries of the trust could obtain those remedies in a properly framed suit in which the contracting party so making himself a trustee was joined. Since the *Judicature Act*, it is possible for the beneficiaries of a purely legal chose in action to enforce it in a similar manner (Cf. *Harmer* v. *Armstrong* (2) ; *Royal Exchange Assurance* v. *Hope* (3) ; *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (4)). But in a contract for corresponding or "mutual" wills, the equities arise from a combination of considerations. In the first place, the obligations of the survivor under such a contract have always been regarded as enforceable in Chancery. Necessarily

(1) (1769) Dick. 419 ; 21 E.R. 332.
(2) (1934) Ch. 65.
(3) (1928) Ch. 179.
(4) (1933) A.C. 70.

the remedy could not be the same as that by which executory contracts are specifically performed. In such cases the party is compelled to carry out his contract according to its tenor. But the relief was specific and was framed to bring about the result intended by the contract. The general principles to which Lord *Parker* refers in *Central Trust and Safe Deposit Co.* v. *Snider* (1) therefore apply. His Lordship is dealing with the judgment under appeal, that of the Chief Justice of Ontario. He says :—" The learned Chief Justice refers to the case of *Fremoult* v. *Dedire* (2) as having decided that a covenant to settle lands makes the covenantor but a trustee for the parties who would be interested if the covenant were performed, and to a passage in *Lewin* on *Trusts*, 12th ed., pp. 160, 161, where it is stated that if a person agrees for valuable consideration to settle a specific estate he becomes a trustee of it for the intended objects, and all the consequences of a trust will follow. *Fremoult* v. *Dedire* (2) was undoubtedly a sound decision, and there is little fault to find in the statement in *Lewin* on *Trusts* as to the general equitable principle. But it must be remembered that this principle is but the logical consequence of the power of a court of equity to grant, and its practice in granting, specific performance of a contract to convey or settle real estate. It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would in a court of equity be enforced specifically."

It is to be noticed that his Lordship speaks of the person covenanting to settle land becoming a trustee for the objects in whose favour the settlement is made. It may be that Lord *Parker* did not mean to go beyond cases of legitimate children and wives who have been regarded in equity as within the meritorious consideration of such a covenant (*Colyear* v. *Countess of Mulgrave* (3)). But the point he actually makes is that the equitable obligation to fulfil the contract attaches to the property the subject of the contract and converts

(1) (1916) 1 A.C. 266, at pp. 271, 272.
(2) (1718) 1 P.Wms. 429 ; 24 E.R. 458.
(3) (1836) 2 Keen, at p. 89 ; 48 E.R., at p. 562.

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the party into a trustee for the objects to be benefited. It must not be forgotten that Lord *Thurlow* was able to say (*Legard* v. *Hodges* (1)) that it was a maxim which he took to be universal that "wherever persons agree concerning any particular subject, that in a court of equity as against the party himself, and any claiming under him voluntarily or with notice, raises a trust." The application of this view to contracts for "mutual" or corresponding wills is affected by the second of the considerations to which I have referred as combining to give rise to the equities in question. That consideration consists in the death of one of the parties leaving a will in the form agreed. The result is a disposition of property made upon the faith of the survivor's carrying out the obligations of his contract. It is an element which brings such a case under the equitable jurisdiction for the prevention of fraud. The best known example of fastening equities upon property because of a testamentary disposition made in reliance upon an understanding or promise is that which is very clearly stated by Lord *Warrington* in *Blackwell* v. *Blackwell* (2) :—"It has long been settled that if a gift be made to a person or persons in terms absolutely but in fact upon a trust communicated to the legatee and accepted by him, the legatee would be bound to give effect to the trust, on the principle that the gift may be presumed to have been made on the faith of his acceptance of the trust, and a refusal after the death of the testator to give effect to it would be a fraud on the part of the legatee. Of course in these cases the trust is proved by parol evidence, and such evidence is clearly admissible."

Of this rule Lord *Westbury* says in *McCormick* v. *Grogan* (3) :—"The jurisdiction which is invoked here by the appellant is founded altogether on personal fraud. It is a jurisdiction by which a court of equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud." A little later, he says : "And if an individual on his deathbed, or at any other time, is persuaded by his heir-at-law, or his next of kin, to abstain from making a will, or if the same individual, having made a will, communicates the disposition to

(1) (1792) 1 Ves. Jun. 477, at p. 478; 30 E.R. 447.

(2) (1929) A.C., at p. 341.

(3) (1869) L.R. 4 H.L., at p. 97.

the person on the face of the will benefited by that disposition, but, at the same time, says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends on the disponee to carry into effect, and the disponee assents to it, either expressly, or by any mode of action which the disponee knows must give to the testator the impression and belief that he fully assents to the request, then, undoubtedly, the heir-at-law in the one case, and the disponee in the other, will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud " (1).

There is a third element which appears to me to be inherent in the nature of such a contract or agreement, although I do not think it has been expressly considered. The purpose of an arrangement for corresponding wills must often be, as in this case, to enable the survivor during his life to deal as absolute owner with the property passing under the will of the 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 crystallize into a trust. 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.

In *Gray* v. *Perpetual Trustee Co.* (2), when it was before this court (3), *Higgins* J. said that *Dufour* v. *Pereira* (4) had never been overruled, " but no instance has been produced to us of a trust being actually established on its authority." Many modern cases, however, recognize the principle as undeniably sound. For instance, in *Stone* v. *Hoskins* (5) Lord *Gorell* said of the case before him :

(1) (1869) L.R. 4 H.L., at p. 97.
(2) (1928) A.C. 391 ; 40 C.L.R. 558.
(3) (1927) 39 C.L.R., at p. 499.
(4) (1769) Dick. 419 ; 21 E.R. 332.
(5) (1905) P., at p. 197.

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"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." (Cp. *In the Estate of Heys* (1); *In re Oldham* (2).) And since *Higgins* J. made the observation *Clauson* J. has acted on *Dufour* v. *Pereira* (3) and declared a trust based upon a mutual will (*In re Hagger* (4)).

In *In re Oldham* (2) *Astbury* J. pointed out, in dealing with the question whether an agreement should be inferred, that in *Dufour* v. *Pereira* (3) the compact was that the survivor should take a life estate only in the combined property. It was, therefore, easy to fix the corpus with a trust as from the death of the survivor. But 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*. On the contrary, as I have said, it seems rather to provide a reason for the intervention of equity. The objection that the intended beneficiaries could not enforce a contract is met by the fact that a constructive trust arises from the contract and the fact that testamentary dispositions made upon the faith of it have taken effect. It is the constructive trust and not the contract that they are entitled to enforce.

As to the *Statute of Frauds*, it appears from a passage I have already cited from *Hargrave's* opinion, that before his day courts of equity had "refined upon" it "to prevent the requisition of writing from operating," on the ground that the refusal to perform the promise on the faith of which the deceased had made his last will amounted to a fraud. But, in the present case, I do not think that the promise was a contract or sale of land. For although the property of the testatrix included land at the time of the promise, the contract was to make a will which would operate not on any specific property or fund, but simply on whatever assets she had

(1) (1914) P. 192.
(2) (1925) Ch. 75.
(3) (1769) Dick. 419; 21 E.R. 332.
(4) (1930) 2 Ch. 190.

at her death. The case is not, in my opinion, like *Horton* v. *Jones* (1), where the contract related to a share in a specific trust fund the then present form of which included land. The subject matter there was specific and at the time of the making of the contract it involved an interest in land. It was true that, before the time for performance of the contract arrived, it was conceivable that the form of the trust fund might have changed. In the judgment of *Rich* J. and myself the ground for deciding that the *Statute of Frauds* applied is expressed as follows :—" The contract is to leave property by will whatever form it may be in. At the time of contracting, it involved an interest in land. It is therefore a contract to leave that interest or the proceeds thereof if thereafter called in and invested in some other form of security or distributed. It appears to us that this is a contract which relates to an identifiable asset or assets which have the character of an interest in land, although consistently with the contract and before its performance is complete, they may have lost that character. Such a contract at its inception relates to an interest in land and promises a disposition of that interest or its proceeds. The alternative expressed in the words ' or its proceeds ' does not make the contract fail to answer the description of " a contract or sale of lands (2).

In the present case the difference is that the subject matter is unascertained. It is, perhaps, worth noting that in *Ridley* v. *Ridley* (3) the promise was to leave to nephews by will as much as they would get under the will of their father. It was not contended that this related to an interest in land but that it was a promise not to be performed within the space of one year. *Romilly* M.R. decided that the promise fell outside the statute.

In my opinion the appeal should be dismissed.

Evatt J. The cases which have been referred to in the judgments of the Chief Justice and my brother *Dixon* make it clear that a court of equity should specifically enforce such an agreement for " mutual " wills as that alleged by the plaintiffs in the present action, that the fact that the present plaintiffs were not made

(1) (1935) 53 C.L.R. 475. (2) (1935) 53 C.L.R., at p. 487.
(3) (1865) 34 Beav. 478 ; 55 E.R. 720.

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parties to the agreement between the husband and wife is no answer to the action and also that the absence of a written memorandum of the agreement sued upon is no bar to the enforcement of the agreement. But the implications of these legal propositions are so serious and far reaching that it is incumbent upon the court to be quite satisfied that the agreement alleged was entered into for the purpose of creating binding obligations.

In the present case, moreover, *Gavan Duffy* J. seemed to hesitate a doubt as to the precise agreement, his finding being thus expressed :

> "I am prepared on all the evidence to find that there was an agreement between husband and wife that the wife by her will should, after giving certain legacies, leave the residue to her husband, and that in return he should leave his property to her family in the way he did in his first will" (1).

The main difficulty I have felt about the case is whether the plaintiffs have satisfactorily proved that, on or about March 31st, 1932, Grace Alexandra Russell and her husband entered into an agreement by which her husband agreed, not only to make a will disposing of his property to four named relations of his wife, but bound himself that he would not revoke such will.

It is proved that, consistently with such an agreement as that alleged, the husband made a will on March 31st, 1932, which remained unaltered until after his wife's death on July 26th, 1932. Subsequently the husband made substantial alterations in his will, as a result of which two of the four named relatives of his wife received nothing.

It is also established that the wife had been left a large sum of money and that she was desirous that such money should ultimately find its way into the hands of her relatives rather than into those of her husband. But such a general desire is quite consistent with an intention that the obligation imposed upon the husband is only a moral responsibility, his wife trusting him that he would treat her relatives both fairly and justly. Generally, the relationship existing between husband and wife makes the latter arrangement much more probable than a contract intended to create binding obligations over an indefinite period, although unexpected circumstances might require modification or adaptation in carrying out the wishes both of husband and wife.

(1) (1937) V.L.R., at p. 185

Gavan Duffy J. largely based his ultimate judgment in favour of the plaintiffs upon the evidence of the Renfrews, husband and wife. But a curiously worded letter was written on December 14th, 1932, by Alexander Renfrew to one P. J. Palmer, whose wife was a sister of Mr. Renfrew. This was nearly five months after the death of Mrs. Russell, who died when upon a visit abroad with her husband and who stayed with the Palmers in England. In the letter, Renfrew said that the two wills made before Mrs. Russell's departure from Australia were made " in such a hurry " that " poor Grace did not know what she had to leave in a will made three days before she sailed." At first, according to the letter, Mrs. Russell made certain provisions to benefit her relatives, but owing to certain difficulties arising out of her B.O.N. store property " she decided to make a will in the manner she did until she saw how she stood." Renfrew added : " Anyway, Percy, if we never receive any more we will have enough to live on." He also referred to Mrs. Russell's desire that the property should ultimately come to her four relatives, including the two Renfrews, and explained : " She did not wish the estate to go out of the Renfrew family, *She is trusting Jack as to that.*" Later he said : " If he carries out Grace's wishes the money will remain in the family."

It should also be noted that Mrs. Palmer gave evidence on commission in the course of which she said :—

" Q. She was very devoted to her husband ? A. Very devoted, very devoted indeed.

" Q. She wished him to have everything he wanted ? A. Yes, and she trusted him you see that he would do what was right."

The contention of the defendants is that the " mutual " wills are to be explained by the sudden decision to travel abroad, and that the wife intended that there should be alterations in her own will. And it was also contended that, in the event of her husband whom she loved and trusted surviving her, although she expected him to benefit her relations, she had no idea whatever of binding him down by the creation of an enforceable legal obligation.

It cannot be denied that there was and is much to be said in support of this interpretation of the facts of the case for, when contemporary documents are rare, they are of very great significance.

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The evidence of the solicitor, Mr. Corr, also strengthens doubts which one cannot help entertaining upon the facts.

But, on the whole, I think that, fulfilling the duties of an appellate court which has not seen the witnesses, we should not upset the learned judge's finding of fact. Almost everything depended upon the credibility of the two Renfrews. The fact that, by the husband's last will, they are large beneficiaries makes them less biassed than would otherwise be the case. In the plainest terms, they proved the exchange of binding promises the extraction of which can only be explained upon the hypothesis of a common intention to create enforceable obligations. The learned judge finally accepted their evidence and so must we.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants, *Bernard Nolan.*

Solicitors for the respondents, *Malleson, Stewart, Stawell & Nankivell.*

H. D. W.