[HIGH COURT OF AUSTRALIA.]

HUDSON . . . . . APPELLANT;
DEFENDANT,

AND

GRAY AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS AND PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 5, 6; *August* 22.

BRISBANE, *June* 23.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Will—Husband and wife—Mutual wills—Agreement to make wills in favour of each other—Exercise of power of appointment over settled property—Benefit of husband's will taken by wife—Subsequent will made by wife—Trust of settled property for beneficiaries under wife's first will—Originating summons—Jurisdiction—Wills, Probate and Administration Act 1898 (*N.S.W.*) (*No.* 13 *of* 1898), *sec.* 23 *—Married Women's Property Act* 1901 (*N.S.W.*) (*No.* 45 *of* 1901), *sec.* 7—*Equity Act* 1901 (*N.S.W.*) (*No.* 24 *of* 1901), *Fourth Schedule, r.* 1.

In 1879 a husband settled certain real and personal property on such trusts as his wife, with his consent during his life and at her uncontrolled discretion after his death, might by deed or will appoint. In 1914, pursuant to an arrangement made between them, the husband and the wife on the same day made wills identical in terms to the extent that each left his or her property to the other for life with remainder to the children and grandchildren of the marriage. The will of the husband contained a statement that the property of which he was disposing included the property over which he had a power of appointment under the settlement of 1879. The will of the wife contained a statement that she expressly refrained from exercising her power of appointment under the settlement of 1879. The husband died in 1915 without having revoked his will, and he left property valued at over £9,000 apart from any interest under the settlement. The wife died in 1923, having shortly before her death made another will by which she left all her property to one of her daughters. Up to the time of her death the wife received the income of the settled property and also of the other property left by the husband.

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On an originating summons in the Supreme Court of New South Wales taken out by the trustee of the settlement (who also was executor of the husband's will, was appointed executor of the wife's will of 1914 and was administrator with the will annexed of the wife's will of 1923) *Harvey* C.J. in Eq. made a decretal order declaring that the trustee held the property comprised in the settlement upon the same trusts as those upon which that property would have been held if the wife had died without having revoked or altered the will made by her in 1914. On appeal to the High Court,

Held, by *Isaacs*, *Higgins* and *Starke* JJ. (*Knox* C.J. and *Rich* J. dissenting), that no such declaration should have been made :—

By *Isaacs* J., on the ground that, although on the evidence the arrangement made in 1914 between the husband and the wife constituted a contract for mutual wills by reason of which, the wife having taken the benefit of the husband's will, her own property became affected by an equity in favour of the beneficiaries under her will of 1914, yet the settled property was not affected by such an equity :

By *Higgins* J., on the ground that, on the evidence of the arrangement made in 1914, the husband and the wife made no agreement that the wills they then made should be irrevocable, and without such an agreement the Court was not justified in directing specific performance or declaring any trust of the settled property ; and also on the ground that on originating summons the Supreme Court of New South Wales had no jurisdiction to make such a declaration as was made :

By *Starke* J., on the ground that the arrangement made in 1914 could not be put any higher than a promise by the wife not to exercise her power of appointment by will and that such a promise created no trust in relation to the settled property ; but on the evidence no such promise was made—the husband and the wife merely settled their property in the manner which at the moment seemed to them fair and expedient.

Dufour v. *Pereira*, (1769) 1 Dick. 419, distinguished.

Decision of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.): *Perpetual Trustee Co.* v. *Hudson*, (1926) 26 S.R. (N.S.W.) 615, reversed.

APPEAL from the Supreme Court of New South Wales.

On 25th January 1879 an indenture of settlement of certain real and personal property was executed between Lawrence Hargrave of the first part, Margaret Preston Hargrave, his wife, of the second part, and Edmund Barton, as trustee, of the third part. By the indenture Lawrence Hargrave granted, bargained, sold, aliened and released unto the trustee his executors, administrators and assigns, certain real and personal property, upon the following trusts :— " Upon such trusts and for such ends intents and purposes as the

said Margaret Preston Hargrave shall at any time or from time to time with the consent of the said Lawrence Hargrave during his life and after his decease at or in her uncontrolled discretion notwithstanding any future coverture by any deed or deeds or by will appoint and in default of and until and subject to any and every such appointment Upon trust during the life of the said Margaret Preston Hargrave for her separate use and benefit independent of and free from the debts engagements interference and control of her present or any future husband and so that her receipts alone whether covert or sole shall be good discharges and after her decease and in default of and subject to any and every such appointment by her as aforesaid Upon such trusts and to and for such ends intents and purposes as the said Lawrence Hargrave shall by any deed or deeds or by will appoint and in default of and until and subject to any and every such appointment by him as aforesaid Upon trust for the said Lawrence Hargrave during his life and after his death upon trust for the child if only one or the children if more than one of the marriage of the said Lawrence Hargrave and Margaret Preston Hargrave absolutely his her or their heirs executors administrators and assigns And in default of such child or children as aforesaid upon trust for the said Lawrence Hargrave his heirs executors administrators and assigns." On 29th October 1914 Lawrence Hargrave and Margaret Preston Hargrave, in pursuance of an arrangement between them, the nature of which is stated in the judgments hereunder, each made a will. By the will of Lawrence Hargrave he gave, devised, appointed and bequeathed all his real and personal estate, including all the real and personal estate over which he had a power of appointment by virtue of the indenture of settlement of 25th January 1879, to the Perpetual Trustee Co. Ltd. upon trust to sell and convert and to invest the proceeds and to pay the income from the investments to Margaret Preston Hargrave for life and after her death to his children during their lives and after the death of the last surviving child on trust to sell and convert and to divide the proceeds equally among the grandchildren.

By her will Margaret Preston Hargrave stated that she expressly refrained from exercising the power of appointment vested in her by the indenture of 25th January 1879, and she gave, devised and

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bequeathed all her real and personal property to the Perpetual Trustee Co. upon trust to sell and convert and to invest the proceeds and to pay the income from the investments to Lawrence Hargrave for life and after his death to her children during their lives and after the death of the last surviving child on trust to sell and convert and to divide the proceeds equally among the grandchildren. Lawrence Hargrave died on 6th July 1915 without having revoked his will of 29th October 1914 and leaving, apart from the property settled by the indenture of 25th January 1879, property valued at about £9,585. Margaret Preston Hargrave died in London on 11th October 1923, having made a will dated 18th July 1923 by which she revoked all former wills and devised and bequeathed all her real and personal estate to her daughter Margaret Hudson, whom she appointed her executrix. Besides Margaret Hudson three other children of the marriage survived Lawrence Hargrave and Margaret Preston Hargrave, namely, Helen Ann Gray (who had two children), Hilda Waller, and Brenda Olive Blackman (who had two children).

Probate of the will of Lawrence Hargrave was granted to the Perpetual Trustee Co., and also administration *cum testamento annexo* of the will of Margaret Preston Hargrave. That Company was also trustee of the indenture of settlement of 25th January 1879, and as such trustee, and also as such administrator, it took out an originating summons in the Supreme Court of New South Wales for the determination of the following questions :—

(1) Whether upon the true construction of the said indenture of settlement and in the events which have happened the defendant Margaret Hudson is entitled absolutely by way of appointment to the whole of the property the subject of the trusts of the above-mentioned indenture of settlement or whether she is only entitled thereto as tenant in common in equal shares with the defendants Helen Ann Gray, Hilda Waller and Brenda Olive Blackman :

(2) Whether by reason of the mutual wills made by the above-named Lawrence Hargrave and Margaret Preston Hargrave respectively on 29th October 1914 and by reason of the circumstances attending the execution of such wills the

said Margaret Preston Hargrave was debarred from making her later will dated 18th June 1923 so as to affect the provisions of her said earlier will:

(3) Whether in the events which have happened (a) the said Margaret Preston Hargrave was put to election to take under the said will of the said Lawrence Hargrave deceased the provision thereby made for her or to reject the will and retain her power of appointment under the said indenture of settlement; (b) If so did the said Margaret Preston Hargrave elect in favour of the will; (c) and if so was she thereby debarred from altering by her said will dated 18th July 1923 her will made 29th October 1914 so as to exercise such power of appointment:

(4) (a) Whether in the events which have happened the said Lawrence Hargrave and Margaret Preston Hargrave respectively debarred themselves by agreement for valuable consideration from revoking their said wills respectively made 29th October 1914; (b) whether if the last-mentioned question be answered in the affirmative such agreement was within the provisions of the *Statute of Frauds* (sec. 4 or sec. 7); (c) whether if the two last preceding questions be answered in the affirmative there has been a sufficient memorandum of such agreement or any part performance to prevent the operation of the *Statute of Frauds*; (d) whether if the said Margaret Preston Hargrave requested and induced the said Lawrence Hargrave to make his will in favour of her and her children upon the representation that she would not exercise her power of appointment under the said indenture of settlement and at or about the said time executed her will declaring among other things that she did not exercise such power and thereafter took the benefits conferred by the said will of the said Lawrence Hargrave she was estopped from disputing that she had released and abandoned the said power; (e) whether if by her conduct the said Margaret Preston Hargrave should be held to have released her power of appointment the

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power of appointment in favour of the said Lawrence Hargrave was accelerated and became effective when executed:

(5) Whether the said will of the said Margaret Preston Hargrave made 18th June 1923 operates as an effective appointment under the trusts of the said above-mentioned indenture of settlement.

The summons was heard by *Harvey* C.J. in Eq., who made a decretal order whereby he declared that "the plaintiff holds the property comprised in the . . . indenture of settlement after paying the creditors of the said Margaret Preston Hargrave and the funeral and testamentary expenses and probate and estate duties in her estate and other proper charges and expenses in the said estate (so far as such payments and disbursements are payable out of the said property) upon the same trusts as the said property would have been held if the said Margaret Preston Hargrave had died without having revoked or altered the will executed by her" on 29th October 1914: *Perpetual Trustee Co.* v. *Hudson* (1).

From that decision Margaret Hudson now appealed to the High Court.

Teece K.C. (with him *K. W. Street* and *Harrington*), for the appellant. In order to affect the property of the survivor of Mr. and Mrs. Hargrave with a trust there must have been a contract between them in the full sense of the term. Anything less is insufficient to create such a trust (*In re Oldham*; *Hadwen* v. *Myles* (2); *Edson* v. *Parsons* (3)). *Dufour* v. *Pereira* (4) was a case of a will executed by husband and wife, and it was held to be a case of contract. In *Lord Walpole* v. *Lord Orford* (5) it was found that there was no binding contract, and it was held that the later will was effective. The contract must be one which can be ordered to be specifically performed (*Stone* v. *Hoskins* (6)). There must be found an intention on the part of each to impose a legal obligation upon the other not to revoke his or her will. An agreement cannot be implied on the part of either not to revoke his or her will. A mere agreement by a husband and

(1) (1926) 26 S.R. (N.S.W.) 615.
(2) (1925) Ch. 75, at p. 83.
(3) (1898) 155 N.Y. 555.
(4) (1769) 1 Dick. 419.
(5) (1797) 3 Ves. 402, at p. 415.
(6) (1905) P. 194.

wife to make wills in the same terms is not an agreement to make "mutual wills," as that term is used in *Jarman on Wills*, 6th ed., p. 41 (see *Halsbury's Laws of England*, vol. XXVIII., p. 514).

[HIGGINS J. referred to *In re Fickus*; *Farina* v. *Fickus* (1).

[ISAACS J. referred to *McBride* v. *Sandland* [*No.* 1] (2).]

There is no evidence here that the husband died relying on a promise by his wife not to revoke her will. [As to whether there was jurisdiction to make the declaration on originating summons, counsel referred to the *Equity Act* 1901 (N.S.W.), Fourth Schedule, r. 1; *Evans* v. *Evans* (3); *McDonnell* v. *Coles* (4); *In re Donaldson*; *Perpetual Trustee Co.* v. *Donaldson* (5).]

Ingham, for the respondents Helen Ann Gray, Hilda Waller and Brenda Olive Blackman. If the wills made in 1914 were intended between Mr. and Mrs. Hargrave to be effective dispositions of the whole of the property of which they could dispose, of which the settled property formed the greater part, there must have been some agreement between them. The wife must have refrained from exercising her power of appointment in consideration of the husband leaving his property to her. In view of the fact that at the time when *Dufour* v. *Pereira* (6) was decided a wife could not make a valid contract, Lord *Camden* could not, when he used the word "contract" in his judgment, have meant more than an arrangement between the husband and the wife (see *Stone* v. *Hoskins* (7); *Denyssen* v. *Mostert* (8)). The true principle is that if a husband and wife by an arrangement between themselves, not necessarily amounting to a contract, make wills conferring benefits upon one another, and those wills are unrevoked during their joint lives, the survivor who takes the benefit of the will of the deceased is bound not to revoke his or her will. The acceptance of the benefit gives rise to an equity in favour of the beneficiaries under the will made by the survivor pursuant to the arrangement. In consideration of the husband exercising his power of appointment

(1) (1900) 1 Ch. 331.
(2) (1918) 25 C.L.R. 69.
(3) (1910) 10 S.R. (N.S.W.) 594.
(4) (1923) 23 S.R. (N.S.W.) 299.
(5) (1912) 12 S.R. (N.S.W.) 148.
(6) (1769) 1 Dick. 419.
(7) (1905) P. 194.
(8) (1872) L.R. 4 P.C. 236, at pp. 252, 253.

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in a particular way and leaving his wife a life interest in all his property, she gave up her power of appointment. Her power of appointment was released by implication (see *Halsbury's Laws of England*, vol. XXIII., p. 64).

Feez K.C. (with him *Evans*), for the respondent Grizel Gray, who represented all the grandchildren of Lawrence Hargrave. The evidence shows that in 1914 Mr. and Mrs. Hargrave agreed to make mutual wills in favour of each other, and on the authority of *Dufour* v. *Pereira* (1), Mrs. Hargrave having taken the benefit of her husband's will, an equity arose in favour of the beneficiaries under her will of 1914. That case has stood for over 150 years and has been treated as being good law on many occasions (*Denyssen* v. *Mostert* (2); *Williams on Executors*, 11th ed., pp. 92, 93; *Stone* v. *Hoskins* (3); *In re Heys*; *Walker* v. *Gaskill* (4); *In re Oldham* (5); *Story's Equity Jurisprudence*, sec. 785.

[HIGGINS J. referred to *Hobson* v. *Blackburn* (6); *Busk* v. *Aldam* (7).

[RICH J. referred to *Goilmere* v. *Battison* (8).

[ISAACS J. referred to *Synge* v. *Synge* (9).]

Murray-Prior, for the respondent the Perpetual Trustee Co. referred to *In re Wilford's Estate*; *Taylor* v. *Taylor* (10); *Crosbie* v. *McDoual* (11); *Gill* v. *Gill* (12).

Teece K.C., in reply, referred to *In re Halston*; *Ewen* v. *Halston* (13); *In re Turcan* (14); *Edwards* v. *Edwards* (15).

Cur. adv. vult.

June 23. The following written judgments were delivered:—

KNOX C.J. In this case the learned Chief Judge in Equity was of opinion, and I agree, that the evidence showed that, as the result of an arrangement come to between the late Lawrence Hargrave

(1) (1769) 1 Dick. 419.
(2) (1872) L.R. 4 P.C., at p. 252.
(3) (1905) P. 194.
(4) (1914) P. 192, at p. 198.
(5) (1925) Ch., at p. 87.
(6) (1822) 1 Add. 274.
(7) (1874) L.R. 19 Eq. 16.
(8) (1682) 1 Vern. 48.
(9) (1894) 1 Q.B. 466, at pp. 470, 471.
(10) (1879) 11 Ch. D. 267.
(11) (1806) 13 Ves. 148.
(12) (1921) 21 S.R. (N.S.W.) 400.
(13) (1912) 1 Ch. 435.
(14) (1888) 58 L.J. Ch. 101.
(15) (1918) 24 C.L.R. 312, at p. 317.

and his wife, they made mutual wills in identical terms except for the interchange of the life tenancies given by each in favour of the other; each spouse leaving his or her property to the other for life with remainder to the children and grandchildren of the marriage in identical terms. He held further, and I agree in this also, that the evidence did not establish a bargain between them to make wills in identical terms in the sense that each refused to make such a will unless the other agreed to do so. On these findings I feel constrained by the authorities—*Dufour* v. *Pereira* (1) and *Stone* v. *Hoskins* (2)—to hold that he was right in the conclusion at which he arrived, namely, that the death of Mr. Hargrave without having revoked his will and the acceptance by Mrs. Hargrave of the benefits given her by his will give rise to an equity in favour of the respondents. The principle of the decision in *Dufour* v. *Pereira*, which was decided in 1769, was recognized by the Privy Council in *Denyssen* v. *Mostert* (3); and has been treated by leading text-book writers, such as the learned authors and editors of successive editions of *Williams on Executors* and *Jarman on Wills*, as wholly unshaken, and I cannot find that any Court has refused to accept it. The decision of *Astbury* J. in *In re Oldham*; *Hadwen* v. *Myles* (4), is not, I think, inconsistent with the earlier decisions to which I have referred. In that case, as the learned Judge said, if the spouses intended to do what the plaintiff suggested it was difficult to see why the mutual wills gave the survivor an absolute interest in the whole of the property of the one who died first.

For these reasons I am of opinion that the appeal should be dismissed.

ISAACS J. By deed of 25th January 1879 Lawrence Hargrave settled certain property, real and personal, on such trusts as his wife, Margaret Preston Hargrave, with his consent during his life and after his death at her uncontrolled discretion, might by deed or will appoint. Subject to such appointment Margaret had a life estate and, after her death and subject to any appointment by her, the settlor had a power of appointment; and, subject to

(1) (1769) 1 Dick. 419.
(2) (1905) P. 194.
(3) (1872) L.R. 4 P.C. 236.
(4) (1925) Ch. 75.

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that, trusts were declared for the children of the marriage. It is clear that any appointment by Margaret, either by deed or will, was to be paramount. In these circumstances events took place which give rise to the present controversy. On 29th October 1914 Lawrence Hargrave and his wife, Margaret Preston Hargrave, respectively, made their wills, by which, among other things, the testator and testatrix reciprocally gave benefits to the other for life and the remainder to their children. Mrs. Hargrave expressly stated in her will that she refrained from exercising the power of appointment under the deed of 1879. These wills were what are termed mutual wills, and were made in fulfilment of a mutual arrangement—the origin of which is immaterial, except that it was the outcome of discussions how ultimately to benefit their children and grandchildren. Its terms included the negation, acted upon by Mrs. Hargrave in her will, of any intention on her part to exercise her power of appointment. Mr. Hargrave's will remained unaltered until his death in 1915. The Perpetual Trustee Co. was, and is, his executor. Mrs. Hargrave on her husband's death, and thereafter until her death in 1923, constantly took the benefits she was given by his will, namely, the interest of £9,585 belonging to him in his own individual right. In 1923 Mrs. Hargrave, contrary to the mutual agreement, made a new will giving all her estate to her daughter, the present appellant. That will is, by law, an exercise of her general power of appointment under the deed of 1879, and is in favour of the appellant exclusively. The Perpetual Trustee Co. is the administrator with the will annexed of the estate of the testatrix. Besides the appellant there are three other children of the testator and testatrix, the three individual respondents. The question has arisen whether the appellant solely is beneficially entitled to the settled property devised and bequeathed, that is, appointed to her by her mother's will, or whether the whole of the four children are beneficiaries of that property as provided by the father's will. *Harvey* J., as Chief Judge in Equity, has held, on an originating summons taken out by the Perpetual Trustee Co., that the Company holds the property "upon the same trusts as" those upon which "the said property would have been held if" the testatrix "the said Margaret Preston Hargrave had died without

having revoked or altered the will executed by her " of October 1914. The learned Judge so held because he found there was an arrangement between the testator and the testatrix to make mutual wills, and that, the testator having died with his will unrevoked and the testatrix having accepted the benefits given her by the will, there was an equity in favour of the remaindermen after the testator's death to the property of the testatrix. This decision is now challenged.

Some discussion took place as to the procedure adopted and as to whether the more cumbrous and stately method of a regular full administration suit should not have been adopted. If the Supreme Court of New South Wales thinks it sufficient to come to a decision in a case of this nature in the more expeditious and less costly fashion and if the parties are content, I see no reason against that course being adopted. So far as it is within my province to express an opinion on the point, I strongly support the course taken by *Harvey* J. Procedure to-day in all departments of life is regarded as of secondary importance. The result is the main thing. In Courts it tends more and more to discard the trappings that often cause Justice to stumble on the way, and it moves towards simplicity, directness and economy of time and money, that leave the tribunal freer to concentrate on the real problem before it. The procedure in this case was a matter for *Harvey* J. himself to consider, but, as the matter has been the subject of discussion and it may affect the future course of practice, I have thought it fair to the learned Judge to express my entire concurrence with the view he held.

As to the merits, though it is a rather unusual kind of litigation, the fundamental principles as to mutual wills seem to be well settled, and to be in complete accordance with ordinary law, general principles being accommodated to rare circumstances. Though my ultimate decision turns on a distinct point, these principles have been so fully argued and considered, and certainly would in any event be important if at any time it were sought to enforce the agreement by way of damages, that I proceed in the first place to express my opinion as if the appointed property were property belonging actually to Margaret Hargrave, and not merely the subject of a general power. If such had been the case I entertain no doubt that the decision of

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Harvey J. was correct and should be affirmed. The evidence as to the mutual arrangement for the wills of 1914 is not confined to the internal evidence afforded by the instruments themselves together with the surrounding circumstances, as in *In re Oldham* (1), where *Astbury* J. found no agreement for mutual wills. That necessarily ended the case, for even the survivor's acceptance of testamentary benefits would not in the absence of the necessary agreement raise any equity. The evidence of the agreement here is of a positive nature, though, in accordance with the procedure adopted, it was on affidavit. But it is not only uncontradicted; it was not even made the subject of cross-examination, though other matters were. We may therefore take it as trustworthy; and, on the assumption made, all that remains is to give to it its legal effect. It is only material here to say that the result of that evidence is that it was clearly and unequivocably agreed, *inter alia*, between husband and wife, as the outcome of considered discussion, that they should make mutual wills leaving all they respectively could leave to each other for life, with remainder to their children for life, and ultimate remainder to their grandchildren, the wife, however, agreeing not to exercise her general power of appointment. The positive evidence of that agreement, given by witnesses as to whom there appears no reason for distrust, is corroborated both by the nature of the testamentary provisions and by the fact that the wills were simultaneously so made, and remained unaltered until the husband's death, the wife's will apparently remaining unaltered until shortly before her own death, that is, for nine years.

The agreement has been variously called an "arrangement" and a "contract." That is immaterial: the word "arrangement" is perfectly appropriate for a contract (see, for example, per Lord *Cranworth* L.C. in *Maunsell* v. *Hedges* (2)). The learned primary Judge, though finding that "as a result of mutual discussion they did arrange to make mutual wills in similar terms," says that he did not think that evidence established that there was a bargain between them that they should make the wills in the sense that each refused to make a will unless the other agreed to do so. It is true there is no statement of such a refusal in terms, but where two

(1) (1925) Ch. 75.

(2) (1854) 4 H.L.C. 1039, at p. 1058.

persons agree to make "mutual wills" in similar terms, as *Harvey* J. finds, that seems to me to involve the required condition. It is not the same thing as agreeing simply to make "wills in similar terms"—say, to leave property to a charity—that would not connote "mutuality." Reciprocity of action and benefit (and therefore condition) is imported by an agreement to make mutual wills. I see no reason in the circumstances of this case, as they have ultimately transpired, for denying to the agreement now the quality of a binding and enforceable and, on the assumption predicated, a specifically enforceable contract. For the appellant it was contended that there was not a binding contract, and, as well as I could gather the argument, it was twofold. First, it was said that the evidence showed no more than that the parties arranged to make what I would term simultaneous but independent wills, reserving the complete right to act independently afterwards—in other words, an engagement trusting entirely to honourable observance. Next, it was argued that, there being no mention in the agreement as to non-revocation, then, from the very nature of a will, revocation could not be a breach of the agreement. I shall deal with these points first, because they were the only points argued as to the contract itself.

As to the first ground, it is met by the affirmative evidence, the terms of the wills and the situation of the parties, the formal way in which the agreement was carried out, and especially by the cumulative effect of all these circumstances. The wills were necessarily separate instruments, but their dual execution was one transaction springing out of a mutual agreement that was manifestly intended to be reciprocally carried out and faithfully adhered to as a binding obligation. To contemplate either or both of the parties afterwards exercising independent testamentary disposal contrary to the arrangement, would be to contemplate defeating the bargain. To apply a judicial test of Lord *Loughborough's* in *Lord Walpole* v. *Lord Orford* (1), if the parties had expressed their intention in words, is there any doubt, judging by what they did, that they would have said that, one will being made, the other was obligatory? The foundation case is *Dufour* v. *Pereira*, reported in *Dickens's*

(1) (1797) 3 Ves., at p. 419.

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Reports (1). The reports bearing that name were published in 1803 after the death of Senior Registrar Dickens and from his notes. The report of the case is confirmed and assisted by what is found in *Hargrave's Juridical Arguments*, vol. II., published in 1799, and sufficiently set out by Sir *Samuel Evans* in *In re Heys*; *Walker* v. *Gaskill* (2). The earliest account we have of the case, however, is found in *Lord Walpole* v. *Lord Orford* in 1797 (3). *Dufour* v. *Pereira* was then twenty-eight years old, and so far, apparently, had not been reported. But in *Lord Walpole* v. *Lord Orford* Lord *Loughborough* L.C., who had been counsel in the earlier case, acknowledged the accuracy of the notes read by Sir *John Mitford* S.-G. as the notes from which Lord *Camden* pronounced his judgment. From what there appears (4) it is beyond question that Lord *Camden* decided that there was a contract which was clear, and that the wife had had valuable consideration, that, *having enjoyed the benefit of that consideration*, she was bound by the condition on which she took it, that condition being the fulfilment of her promise as to the dispositions of her own will, and, although she had revoked her will and made another, her property must, in the circumstances, go according to her promise, that is, according to the terms of the mutual will. At p. 417 occurs a passage of great importance. Referring to the "mutual will" of Mr. and Mrs. Reyne, Lord *Loughborough*, speaking of the earlier case, says :—"Therefore the Court considered it not as her testament, but as a *contract* with her husband for valuable consideration; under which she *acted* for sixteen or seventeen years; that she had *taken the benefit of it for her whole life. Therefore she had accepted the terms*; and had bound herself to the conditions, under which all the property was given by the will of her husband." That is to say, the *contract*—or agreement—is ascertained as defining the conditions; and then the *acts* of the widow as *feme sole* accepting the benefits she had induced by entering into the agreement; the result being that she had by her acts elected to be bound by the considerations agreed to, and this, on a proper application of equitable remedy, made the volunteer

(1) (1769) 1 Dick. 419.
(2) (1914) P., at p. 199.
(3) (1797) 3 Ves. 402.
(4) (1797) 3 Ves., at pp. 412, 414, 416-418.

devisees trustees of the property that in strict law was theirs. Lord *Loughborough* said (1) of Lord *Camden* :—" I do not dispute his principles. They are very just, where they apply." He had then to consider the facts of the case before him. In that case he found, as *Astbury* J. found in *Oldham's Case* (2), that the only circumstances adduced—which did not include affirmative evidence such as exists here—were insufficient to lead him to conclude that the parties had entered into anything more than an arrangement resting on honourable adherence, which other circumstances, such as marriage, might make it proper to depart from. But the Lord Chancellor made it perfectly plain that, if he had found a binding obligation to have been intended to make the testamentary dispositions, he would have enforced the claim (3). And where there is such an intended obligation, which is indeed essential to every contract, the nature of the transaction, in the absence of expression to the contrary, may lead to the implication that the will, or codicil will, will not be, in fact, revoked. As to this, two passages deserve quotation. One is from *Hargrave*, as quoted in *In re Heys* (4). It is : —" Suppose he makes his will, and covenants not to revoke it. 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.*" The other passage is from Sir *John Mitford's* argument in *Lord Walpole* v. *Lord Orford* (5). He first says :—" It may be objected, that this is a contract in its nature revocable. It is not revocable at all times, but only during the joint lives with notice ; and after the death of either it becomes irrevocable." Then says learned counsel : " Lord *Camden* observes upon that, that when an instrument of this nature is executed, and there is any engagement not to revoke it, a covenant for instance, there can be no doubt, the assets would be responsible ; and where it is an engagement of a different description, if from the nature of the transaction an agreement not to revoke must of necessity be implied, it is precisely the same thing." Opposed to Sir *John Mitford* in that case was the Attorney-General, Sir *John Scott* (as

(1) (1797) 3 Ves., at p. 418.
(2) (1925) Ch. 75.
(3) (1797) 3 Ves., at p. 419.
(4) (1914) P., at p. 199.
(5) (1797) 3 Ves., at p. 412.

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he then was). No suggestion, however, of questioning *Dufour* v. *Pereira* (1) is found. On the contrary, its accuracy appears to be admitted in the argument for the defendants. *Lord Walpole's Case* (2) failed because the agreement was not, in the Court's opinion, intended to be binding. *Dufour* v. *Pereira*, besides being at that early period approved, has received constant recognition since. The principal cases are mentioned sufficiently and extracted in *Heys's Case* (3). The result of the authorities, so far as now material, may, I think, be thus formulated:—A contract for mutual wills means a contract for testamentary disposition *at death*, the consideration on each side being the actual disposition. Revocation by either party is permissible if communicated to the other with opportunity also to revoke. Otherwise, on the death of either party leaving a will as agreed, the consideration is executed, and the survivor cannot revoke so as to accept the benefits of the will on the footing of a free and unconditioned gift. Election to take the gift, but "against the will," as that is technically understood so as to introduce "compensation," is then impossible. We need not consider what remedies would at that point exist at law, if, for instance, the survivor disabled himself from devising some property of his specifically promised, or in case of other anticipatory breach. Equity, however, before it interposes with specific performance, requires the unconscientious act of the survivor taking advantage of the consideration he contracted for, and then refusing to carry out his part of the bargain. If that occurs, so much at all events is clear, that a volunteer beneficiary under the survivor's will is affected by the unconscientious act of his testator, and must give way to the intended beneficiary under the contract for the mutual will agreed upon. The declaration made by *Harvey* J. appears, so far, to be proper. The mutual will being revocable by a later will, the later will must be recognized for probate purposes. But though this would bring the property left to her into the hands of the appellant, she, claiming under the testatrix and taking only whatever the testatrix could rightly give her, is met by the superior equity of the other grandchildren of Lawrence Hargrave so far as

(1) (1769) 1 Dick. 419. (2) (1797) 3 Ves. 402.
(3) (1914) P. 192.

their shares are concerned. To that extent her own claim must yield and the contract of the testatrix be specifically performed (see *Fry on Specific Performance* (6th ed.), p. 110, citing *Synge* v. *Synge* (1), a case cited, and apparently with approval, by Lord *Parker of Waddington* for the Judicial Committee in *Central Trust and Safe Deposit Co.* v. *Snider* (2)).

I have so far dealt with the case as argued. Since the argument further questions have presented themselves, which, though naturally demanding respectful consideration, do not, in my opinion, admit of serious doubt, or in any way alter the result as I have stated it, so long as the assumption is maintained. Mrs. Hargrave in 1914 was a married woman. Having regard to the *Married Women's Property Act* 1901, No. 45, she was legally capable of contracting with respect to her separate property, and so as to bind it. On the assumption that the property, the subject of her promise, was her own, her unconscientious act is hardly to be disputed. It is really immaterial whether her promise was or was not originally enforceable. Her acts, with complete knowledge of the bargain she had made, with complete consciousness that her husband's bounty was on the express condition of her observance of her promise, are an unequivocal confirmation of that promise at a time when she was *discoverte*, and over a period of time when she was free to say yes or no to her husband's will. That was more than an election to take under his will; it was an election to affirm her agreement. Lord *Camden* declared in *Dufour's Case* (3) that the wife, after her husband's death, "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" his "bequests in the said mutual will." That, as both Lord *Camden* and Lord *Loughborough* took pains to indicate, was treating the mutual will as an agreement formulating conditions. In *Denyssen* v. *Mostert* (4) the Privy Council, after quoting the ultimate decision of Lord *Camden*, proceeded to show how their Lordships understood the matter by their reference to *Lord Walpole's Case* (5), and the phrase

(1) (1894) 1 Q.B. 466.
(2) (1916) 1 A.C. 266, at p. 272.
(3) (1769) 1 Dick. 419.
(4) (1872) L.R. 4 P.C., at p. 253.
(5) (1797) 3 Ves. 402.

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"the compact" of a mutual will. (See also the concluding words of the extract from *Williams on Executors* quoted in *Denyssen's Case* (1).) No doubt is left in my mind that the "compact," whether it be called "agreement" or "contract" or "arrangement," so long as it is intended to be binding between the parties, that is, to be adhered to in all circumstances, is an essential factor in a case like the present. It states, so to speak, the conditions on which advantage may be taken of each other's will. If advantage is so taken, it matters not whether at law the compact was originally enforceable. There has been an election in the broad sense, which equity will enforce by any appropriate remedy it possesses. The foundation of the jurisdiction in that case is, in my opinion, fraud. I mean by that, "fraud" in the sense so lucidly explained by Viscount *Haldane* L.C. in *Nocton* v. *Ashburton* (2), and I refer particularly to pp. 951 and 952. Indeed, not to fulfil the obligation incurred by the accepted condition would, in the circumstances, to my mind, be fraudulent conduct in any sense. And to counteract or prevent that fraud, equity declares a trust. (See *Heys's Case* (3), where a quotation is made from *Hargrave's Juridical Arguments*; and see also per Lord *Westbury* in *McCormick* v. *Grogan* (4), and *Lord Townshend* v. *Windham* (5).) The "acts" upon which Lord *Camden* made his decree, and which are also present here, were, as I have indicated, those of prolonged and complete enjoyment, confirming the stipulated conditions of a gift which was fully known to have been made on the basis of those conditions. On the stated assumption, therefore, specific performance would be proper, and the declaration made by *Harvey* J. would, in my opinion, be unimpeachable.

There remains, however, the vital question whether the order appealed from can be sustained in view of the fact that the property now in question was merely the subject of a general power to appoint. Until the case of *O'Grady* v. *Wilmot* (6), a case which I have found since the argument and which is as clear as it is conclusive, the true relation of a testator's estate to property appointed by his will under a general power was not fully, or, as I think, satisfactorily,

(1) (1872) L.R. 4 P.C., at p. 253.
(2) (1914) A.C. 932.
(3) (1914) P., at p. 199.
(4) (1869) L.R. 4 H.L. 82, at p. 97.
(5) (1750) 2 Ves. 1, at p. 11.
(6) (1916) 2 A.C. 231.

defined. True, in *In re Parkin*; *Hill* v. *Schwarz* (1), *Stirling* J. refused specific performance of a contract to leave property by will entered into by a mere donee of a testamentary power of appointment. But the learned Judge said that specific performance "ought not" to be decreed in such a case. And the reason given was that equity will never defeat the donor's intention. But *Stirling* J. stated that damages might be obtained for breach of agreement; and also, as to the assets available for payment of the debt for damages, added (*inter alia*) his then conclusion—though not as a final decision—that by the express terms of the donee's will she had herself made the fund in question subject to the payment of the damages as a legal "debt." In *In re Lawley*; *Zaiser* v. *Lawley* (2), however, a testamentary appointment of a fund, whereby the testator declared a first charge on the fund, was ineffectual as to the charge. But in the Court of Appeal it was said that provided the power is exercised "the estate becomes assets," that is, of the appointor. *Stirling* L.J. and *Cozens-Hardy* L.J. seemed to place the testator's inability to charge the property preferentially on the same basis as the inability to give by will a preferential charge over his own actual property. In the House of Lords (3) the majority rested on *Fleming* v. *Buchanan* (4). Lord *Lindley*, however, made some observations which in *O'Grady* v. *Wilmot* (5) were variously relied on by both the majority and the minority of their Lordships. In *Commissioners of Stamp Duties* v. *Stephen* (6) Lord *Lindley*, speaking for the Privy Council, indicated that the property disposed of by will under a general power is not legally the property of the testator "in any proper sense." But so far there was considerable obscurity surrounding the subject. It was held that the Court would not defeat the intention of the donee of the power. Nevertheless it held that an appointment to X might be defeated by payment to Y as a creditor. It was held that a contract by the donee of a general testamentary power could not be specifically performed as to the appointed property after his death, and yet the opinion was expressed that the property could

(1) (1892) 3 Ch. 510.
(2) (1902) 2 Ch. 799.
(3) (1903) A.C. 411.
(4) (1853) 3 D. M. & G. 976.
(5) (1916) 2 A.C. 231.
(6) (1904) A.C. 137, at p. 140.

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be sold to pay the damages for breach of the contract, which were the value of the property, and, of course, the other party could buy the property at the judicial sale for the amount of the judgment, or less, if there were no other bid. *O'Grady* v. *Wilmot* (1) makes the position permanently clear, and dispels what Lord *Buckmaster* L.C. termed "the darkness which surrounds the question." Property appointed under a general testamentary power is not in any sense the property of the appointor, and does not pass to his executor as such. It is not legal assets in his estate. It is equitable assets for a limited purpose, namely, the unpreferential satisfaction of debts if the estate of the appointor is insufficient to pay them, and then it is "considered" as part of his estate for that limited purpose. The history of the subject, as traced by Lord *Buckmaster* and Lord *Sumner*, and less minutely by the other Lords of Appeal, indicates the intricacy and the deviations of the doctrine as stated up to 1916. The observations of Lord *Atkinson* (2) and of Lord *Parmoor* (3) show that even *Beyfus* v. *Lawley* (4) left the question very debatable. But, in view of the law as determined by *O'Grady* v. *Wilmot*, it is self-evident that Mrs. Hargrave, though she bound herself personally, yet, never having exercised her power of appointment by deed (or by agreement for a deed, if that would have sufficed), did not bind the property at all in her lifetime, and further, she did not, by the testamentary appointment make the property assets of hers so as to bring them within the power of a Court of equity to bind them by a decree or order for specific performance, or otherwise than to treat them as if they were the testator's assets in a certain course of administration. In view of *O'Grady* v. *Wilmot* I would substitute for the words "ought not" in *In re Parkin*; *Hill* v. *Schwarz* (5), the word "cannot." It is, in my opinion, as much beyond judicial discretion to grant specific performance in such a case as if the property had been that of some utter stranger. So far, therefore, as concerns the present equitable ownership of the appointed property, it is not in the respondent daughters, but wholly in the appellant.

(1) (1916) 2 A.C. 231.
(2) (1916) 2 A.C., at p. 262.
(3) (1916) 2 A.C., at p. 279.
(4) (1903) A.C. 411.
(5) (1892) 3 Ch., at p. 517.

There nevertheless remains the equitable doctrine of interception of the property in order to prevent a violation of good faith, whereby the power may be exercised in favour of a volunteer so as to defeat the appointor's creditors (see *O'Grady* v. *Wilmot* (1)). That interception, however, must take place in the recognized way, with the customary limitations, and in the settled course of administration. The whole position is thus reconciled and placed on an understandable basis.

The appeal should, in my opinion, be allowed.

It is worth while adding that, not merely the conclusions I have stated, but, what is perhaps from the standpoint of jurisprudence more important, the process of reasoning followed, appear, as since writing my judgment, I find from the recent and comprehensive work of Mr. *Alexander* on *Wills* (1917), vol. I., chap. 4, to be approved in America. Beyond this general reference I shall not quote more than par. 88 of that work :—" Acceptance of benefits : Revocation by survivor a fraud.—Where two parties have made mutual wills in favour of each other, whether pursuant to a valid agreement or not, if the survivor receives benefits under the will of the other who has died without having revoked the same and under the belief that the will of the survivor would not be altered, the revocation by the survivor of his will would be such a fraud as equity would prevent. Such wills are in effect the separate will of each maker, and the right of revocation is undisputed except in those cases where it would be a fraud against the estate of the decedent to allow the survivor to receive a benefit or advantage under the will of the one first dying and thereafter to make a different disposition of his property. Where mutual or reciprocal wills have been made pursuant to an agreement which has been executed by one of the testators dying without having made any different testamentary disposition of this property, and the other has accepted the benefits accruing to him under the will of the deceased, the agreement becomes obligatory upon the survivor and may be enforced in equity against his estate." The final words " against his estate " are important

(1) (1916) 2 A.C., at p. 248, per Lord *Buckmaster*, and at pp. 270, 273, per Lord *Sumner*.

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and in accordance with what I have taken to be the effect of the principle enunciated in *O'Grady* v. *Wilmot* (1).

HIGGINS J. This is an appeal from an order made by *Harvey* J. under an originating summons. The learned Judge has declared, in effect, that the Perpetual Trustee Co., which is the trustee of the settlement of 1879 as well as the administrator with the will annexed of Mrs. Hargrave, holds the property comprised in the settlement not on trust for Mrs. Hudson, to whom the will of Mrs. Hargrave gives all Mrs. Hargrave's property absolutely, but on the trusts of a previous will of Mrs. Hargrave, which has not been proved in the probate jurisdiction of the Supreme Court of New South Wales, as it was revoked.

I shall assume for the present, as counsel assume, that there is jurisdiction to make such an order on originating summons; but I shall have to refer to that matter later on.

The settlement was made on 25th January 1879, after the marriage of Mr. and Mrs. Hargrave. The husband thereby gave certain real and personal property to a trustee to hold upon such trusts as the wife should, with the consent of the husband during his life, and after his decease at her discretion, appoint. Subject to any such appointment, the trust was to pay the income to the wife for life for her separate use; and after her decease and subject to any such appointment by her the property was to be held on such trusts as the husband should by deed or by will appoint; and, subject to any appointment by him, upon trust for the husband for life and for the children afterwards.

On 29th October 1914 Mrs. Hargrave made a will, which she prefaced by a statement—"I expressly refrain from exercising the power of appointment vested in me by virtue of the indenture of settlement"; and she gave all her real and personal property on trust to pay the income to the husband for life and upon his decease to pay the income equally between all the children surviving from time to time (or their respective issue surviving), and after the death of the last of the children to divide the proceeds between all the grandchildren in equal shares (with provision for substitution

(1) (1916) 2 A.C. 231.

of issue of grandchildren who should have died). On the same day, the husband made a will with the same limitations precisely—to the wife for life (the wife already had the income for life of the settled property by virtue of the settlement), and afterwards to children and grandchildren and issue. But Mr. Hargrave expressly exercised the general power of appointment which he had under the settlement—the general power which he had *subject* to any appointment by his wife. This appointment by Mr. Hargrave cannot take effect if the wife's superior power to appoint is exercised.

The husband died shortly after the two wills of October 1914—on 6th July 1915 ; and probate was granted to the Perpetual Trustee Co., the trustee of the settlement. He left some £9,585 not included in the settlement, and Mrs. Hargrave lived on until 11th October 1923, receiving not only the income of the settled property and of her separate property but also the income of Mr. Hargrave's own property. But she made a will on 18th July 1923, in England, revoking all her former wills, and devising and bequeathing all her real and personal estate whatsoever and wheresoever to one of her daughters, Mrs. Hudson, absolutely, and appointing her sole executrix. This will has been proved in New South Wales by the same trustee company as administrator with the will annexed of the testatrix, under power of attorney from Mrs. Hudson. There is not one word in this will as to the settlement or as to any appointment thereunder ; but under sec. 23 of the *Wills, Probate and Administration Act* 1898 of New South Wales (which copies sec. 27 of the English *Wills Act* of 1837) a general devise of real estate of a testator and a bequest of the personal estate of a testator must be construed to include any real estate and any personal estate " which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, *unless a contrary intention appears by the will.*" It is quite probable that Mrs. Hargrave had no actual intention to exercise her power of appointment under the settlement ; that she thought her husband's will had completely adjusted all rights as to the property in the settlement ; and that she herself had merely to say who should get her own property. She probably did not know of sec. 23 of the Act ; and her solicitor in London may not have known of the settlement ; but no contrary

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intention appears *by the will* of 1923 ; and her devise and bequest of all her own property would seem therefore, to operate as an exercise of her general power of appointment. The provisions of sec. 23, even if they aid the actual intention in most cases, in this and other cases may defeat the intention. But the Courts have to follow the provisions of this Act even when it is clear, from the facts extrinsic to the will, that there was no actual intention to exercise the power of appointment (see *Airey* v. *Bower* (1), &c.). At all events, I shall assume, as counsel assume, that the Act applies. But the sisters of Mrs. Hudson, with their children, claim that they are entitled to share equally with Mrs. Hudson in the settlement property by reason of the two wills of husband and wife dated 29th October 1914.

The declaration of the learned Judge is that the trustee company holds the property comprised in the indenture of settlement (after certain payments immaterial to the present purpose) " upon the same trusts as the said property would have been held if the said Margaret Preston Hargrave had died without having revoked or altered the will executed by her " on 29th October 1914. There is *no declaration as to Mr. Hargrave's* £9,585 *not included in the settlement* or as to the income thereof received by Mrs. Hudson. Mrs. Hudson appeals from the declaration made.

The earliest case cited to us in support of the claim of the three daughters is a case of 1769, *Dufour* v. *Pereira* (2) ; the most recent case referred to in the judgment is *In re Oldham* (3). The latter case is remarkably similar in most respects. In 1907 a husband and wife made wills on the same day, giving his and her property to the other absolutely. The husband appointed his wife sole executrix ; but he provided that if his wife should die in his lifetime, A. and T. should be executors and trustees and hold his property in trust for his children who attain twenty-one. In default of children, he gave certain legacies to relatives and friends, *nominatim* ; and the remainder was to be divided into twenty parts, nineteen of which were to go to his own relatives (*nominatim*), leaving one to be dealt with as he should direct. The wife's will as to her property was,

(1) (1887) 12 App. Cas. 263.
(2) (1769) 1 Dick. 419.
(3) (1925) Ch. 75.

substantially, an exact replica ; the husband taking the whole if he survived, and A. and T. to divide as above, but leaving one-twentieth to be dealt with as she should direct. The husband died in 1914, and the wife got his estate. In 1921 the wife married O., who was thirty-five years younger than herself, and she made a will giving O. a life interest in a large portion of her estate, and, subject thereto, practically all to her own relatives. The wife died in 1922. The plaintiff, who was entitled under the second part of the mutual wills, brought an action for a declaration that the executors of the wife held the estate on the trusts of that second part. *Astbury* J., after reviewing the cases, decided that there was no evidence on which he ought to hold that there was an agreement that the trust in the mutual wills should in all circumstances be irrevocable by the survivor who took the benefit ; and " with the utmost regret " dismissed the action.

In that case, *Dufour* v. *Pereira* (1) was critically examined. In addition to the report in *Dickens*, the Judge used the fuller statement of the case in *Hargrave's Juridical Arguments*, vol. II., p. 304. He points out that that case " is all based on Lord *Camden's* finding of fact that a certain and unequivocal trust was agreed to and created by the two parties who executed this mutual will " (2). There was there only one document executed as a joint will by the two spouses, who lived abroad ; and for aught we know, there may have been words of agreement in that document. At all events, the judgment was based " on the fact that such an *agreement* was actually come to " (2) ; and the learned Judge had nothing to satisfy him that in the case before him " there was an *agreement* that the trust in the mutual will should in all circumstances be irrevocable by the survivor " (3).

Now, in the present case, the vital point is one of fact—was there an agreement for irrevocability ; and, at the very most, there is evidence, though unsatisfactory, that the two wills should be made, not that they were never to be revoked. The strongest evidence in favour of the alleged agreement—I might say the only *direct* evidence—is that of Mr. Bennett, an officer of the trustee

(1) (1769) 1 Dick. 419. (2) (1925) Ch., at p. 85.
(3) (1925) Ch., at pp. 88, 89.

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company, who says in his affidavit: "Mrs. Hargrave expressed the wish that the children should only be given life interests in the property so that the Perpetual Trustee Co. Ltd. should have the management of the property during their lives and that then their children could be provided for. After considerable discussion of this question, Mr. Hargrave agreed to Mrs. Hargrave's view, and *so far as I can remember something was said between them to the effect* that *if he made a will* leaving everything to her for life with remainder to the children for life and then to their children *would she do the same*, and she *said that she would*."

This conversation is said by Mr. Bennett to have taken place in the presence of his superior officer, Mr. Douglass; but Mr. Douglass, on his cross-examination, says that he cannot say whether Mr. Bennett is correct: "he speaks of things which I cannot remember." Mr. Douglass confines the alleged agreement to the spouses "individual estates." There is not even in the conversation, stated so hesitatingly by Mr. Bennett, any reference to the exercise of any power to appoint; and yet it is only the settled property, the property as to which there were the two powers to appoint, that is the subject of the decree or in dispute. The conversation may, on its face, have referred only to the separate property of husband and of wife. There has been no argument put before us as to the effect of the *Statute of Frauds* on the enforcement of the alleged agreement; although the settlement comprised real estate as well as personal, and although the originating summons contains two questions on the subject. But, even if the statute be ignored, the alleged agreement has not that certainty which is required in equity for the purpose of ordering specific performance; it is "too vague too uncertain too obscure to enable the Court to act with safety or propriety" (in the words of *Knight Bruce* L.J.), and especially as both parties are dead, and the case may involve breach of faith on the part of the deceased lady. But, apart from the weakness of this evidence, even if it be accepted in full in the absence of evidence to the contrary, it does not amount to an agreement not to revoke. In my opinion, wills being in their nature ambulatory, revocable until death, if parties agree merely to make wills with the same limitations, the agreement must be

taken to mean to make wills with their ordinary characteristics of revocability—unless the contrary be clearly stipulated.

As for the case of *Dufour* v. *Pereira* (1), the judgment has been called by Lord *Loughborough* L.C. " ingenious and eloquent " (*Lord Walpole* v. *Lord Orford* (2)); by *Astbury* J. " alluring " (*In re Oldham* (3)): but the abbreviated report in *Dickens* hardly enables us to appreciate these epithets. It has never been overruled; but no instance has been produced to us of a trust being actually established on its authority. We get to know more about the case by the words of Lord *Loughborough*, who was engaged as counsel in it, and by *Hargrave's* book. It appears, from Lord *Loughborough*, that the will prayed specific performance—that is, specific performance of a contract. The word " contract " is actually applied to the transaction by Lord *Camden* himself, according to the report in *Dickens*: " It is a contract between the parties, which cannot be rescinded, but by the consent of both." In the case of *Lord Walpole* v. *Lord Orford*, where Lord *Loughborough* was asked to follow *Dufour* v. *Pereira*, he said he must find that the parties meant to impose on one another " a legal and binding obligation "—not a mere honourable engagement. With all respect to *Harvey* J., I do not think that anything short of a contract is enough. At first, I could not understand how there was a contract in *Dufour* v. *Pereira*. Under the law of England at the time a husband and wife could not usually contract with each other. The wife became entitled under an aunt's will to a legacy (or residue ?) which had not been reduced into possession by the husband. But the explanation is to be found in Lord *Camden's* words: " as the husband by the mutual will assents to his wife's right, and makes it *separate* " —that is to say, her separate property. *Astbury* J. also takes this view of *Dufour* v. *Pereira* — that it was " personal property secured to her separate use " (4); and as to this separate property there was an agreement. It is " all based on Lord *Camden's* finding of fact that a certain and unequivocal trust was *agreed* to and created by the two parties who executed this mutual will. It is true he came to that conclusion from the contents of the document itself, but he

(1) (1769) 1 Dick. 419.
(2) (1797) 3 Ves. 402.
(3) (1925) Ch. 75.
(4) (1925) Ch., at p. 84.

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nevertheless bases his judgment on the fact that such an agreement was actually come to " (1). We do not know the terms of the document. It was one single document signed by both parties. It was proved as the will of the husband only, as the English law does not recognize joint wills, but it was also " a *contract* " made by her " for valuable consideration " (so Lord *Loughborough* says in *Lord Walpole* v. *Lord Orford* (2)).

Dufour v. *Pereira* (3) was referred to by the Judicial Committee of the Privy Council in *Denyssen* v. *Mostert* (4). This was an appeal from South Africa, where Roman-Dutch law prevails; and the solution of the case depended on authorities on that law in force in the colony. *Dufour* v. *Pereira* was mentioned as showing, with *Williams on Executors*, the state of the analogous English law; but it did not influence the decision. So also with the case of *Dias* v. *de Livera* (5), an appeal from Ceylon, where Roman-Dutch law prevails also; it follows *Denyssen* v. *Mostert*. The case of *Stone* v. *Hoskins* (6) was that of a claim for probate to the will of a wife, dated 1904. The husband opposed; he propounded a will made by her in 1900, and *proved* that there had been an " agreement or arrangement " under which he left all his property to his wife and his wife left all (except £50) to him. *Gorell Barnes* P. quotes from *Hargrave* more of Lord *Camden's* judgment in *Dufour* v. *Pereira*, where *Hargrave* explained that a survivor may not legally recall his (or her) *contract*, after his (or her) death, or secretly during the other's life. " 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 " (*sic*) " for performance of his *agreement* " (Lord *Camden*, as quoted by *Hargrave*). The President refused to grant to the husband the declaration which he sought.

Perhaps it is unnecessary to add that this is not a case of " mutual wills " in the sense of the term as usually applied by British lawyers —where two persons each make a will by which he leaves all his property to the other (*Jarman on Wills*, 6th ed., p. 41). But the

(1) (1925) Ch., at p. 85.
(2) (1797) 3 Ves. 402.
(3) (1769) 1 Dick. 419.
(4) (1872) L.R. 4 P.C. 236.
(5) (1879) 5 App. Cas. 123.
(6) (1905) P. 194.

jurisdiction of the Court as to mutual wills rests, as I have shown, on contract; there may have been an enforceable contract where there are no mutual wills; and if it were distinctly established here that the husband agreed with his wife to execute in a certain way his power to appoint on the condition that she undertook not to exercise her superior power to appoint, I assume that such an agreement, being for valuable consideration, would be a proper subject for specific performance, or declaration of trust, as in the case of strictly mutual wills. I am assuming, because of the authorities as they exist, that if such an agreement were satisfactorily proved it would be enforced against the wife and volunteers claiming under her. The exception to the rule laid down in *In re Parkin* (1) does not apply, as in this case before us the power of the wife is not confined to appointment by will: it may be exercised by deed or will. My view is that nothing in the nature of such an agreement has been proved; that there is no such agreement proved as would justify us in directing specific performance or in declaring any trust as to the settled property.

Originating Summons.—I come now to the question as to the power, the jurisdiction, to make any such order as this under appeal on an originating summons. It startled me to find that under the New South Wales practice a trustee can obtain under an originating summons an order declaring that the property comprised in a revoking will, which has been proved, is to be held on the same trusts as if the testator had died without revoking his previous will. The last will tells the administrator *cum testamento annexo* to give all the property to Mrs. Hudson; the will of 1914 gives it all to four daughters and their children or issue. The relief sought is not *under* the terms of the will of 1923, but *against* its terms.

The rules of Court for originating summons are set out in the Fourth Schedule to the New South Wales *Equity Act* 1901; and they seem to follow precisely the words of the English Judicature Rules, Order LV., r. 3, as they stood in 1901. Under r. 1 the executors, &c., of a deceased person may take out as of course an originating summons returnable in chambers for such relief as is specified, for a *determination without an administration* of the estate

(1) (1892) 3 Ch. 510.

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or trust of (*inter alia*) (*g*) "the determination of any question arising in the administration of the estate or trust." As *Cotton* L.J. said, in *In re Giles*; *Real and Personal Advance Co.* v. *Michell* (1), "that clause only relates to questions arising *in the administration* of an estate as between trustees and their *cestuis que trust*" (though other persons may have to be served). The question asked was as to priority as between two mortgages, one of which was held by the trustees in their private capacity. The holders of the other mortgage were outside the trusts of the will. *North* J., the Judge of first instance, held that the summons should be dismissed without deciding the priority; and his decision was affirmed by the Court of Appeal. *Cotton* and *Lopes* L.JJ. held that it was a question of jurisdiction—that the Judge had no jurisdiction to decide the point. *Lindley* L.J. was not sure that on a summons *for administration* of the estate there might not be an inquiry as to priorities. That this is a matter of jurisdiction, see also *In re Davies*; *Davies* v. *Davies* (2); *In re Royle*; *Royle* v. *Hayes* (3). A resulting trust cannot be enforced under Order LV., r. 3 (*In re Amalgamated Society of Railway Servants*; *Addison* v. *Pilcher* (4)). In that case the trusts declared by an instrument were found to be void for illegality, and the settlor claimed the funds by way of resulting trust in his favour; but it was held that the settlor was not a "*cestui que trust under the trust* of" the "instrument," and that he could not enforce the resulting trust by an originating summons under Order LV., r. 3. So no order was made on the summons, but it was intimated that an action might be brought. In *In re Royle* it was held that a question between an executor and a person who holds money which the executor claims to belong to the estate could not be determined on summons. There is no jurisdiction to decide adversely to the person holding the money even in a suit for administration of the estate (per *North* J. in *In re Davies*; per *Fry* L.J. in *In re Royle*; and see *In re Carlyon*; *Carlyon* v. *Carlyon* (5)). It is very significant that in the recent

(1) (1890) 43 Ch. D. 391, at p. 398.
(2) (1888) 38 Ch. D. 210.
(3) (1889) 43 Ch. D. 18, at p. 21.
(4) (1910) 2 Ch. 547.
(5) (1886) 56 L.J. Ch. 219.

case of *In re Oldham* (1), already cited, an action was brought although there was an existing summons for administration.

I need not point out the unfitness of the procedure of originating summons, with its affidavit evidence, for the trial of an issue in which so much turns on the precise words used in the discussion by the parties to the wills. The only evidence adduced was evidence of officers of the trustee company, which was neutral; whereas if there were an action, and distinct issues joined, the position might well be very different. But I do not treat this point as going to the jurisdiction.

Nor do I presume to say that the New South Wales practice of serving originating summonses out of the jurisdiction, and proceeding even if the persons served had not appeared, is not justified. My brother *Rich* has informed me that the practice has been treated as sanctioned by sec. 30 of the *Equity Act*. In England, until 1909, and at the time that the *Equity Act* was passed (1901), it is clear that leave could not be given to serve such a summons out of the jurisdiction (*In re Busfield*; *Whaley* v. *Busfield* (2)). The point has not been argued, and I say no more.

What I do say is that nothing has been shown that gives to the Judge on an originating summons jurisdiction to decide such a question as the present, between defendants—between the sole beneficiary under the last will of Mrs. Hargrave and those who would be beneficiaries if the last will had not been revoked, and had been proved. The true situation is obscured by the fact that the Perpetual Trustee Co. holds the position of trustee of the settlement, executor of Mr. Hargrave's will, named executor of Mrs. Hargrave's will of 29th October 1914, and administrator *cum testamento annexo* of Mrs. Hargrave's will of 1923. This is not the fault of the Company; but it affords no ground for the Company to take out as plaintiff a summons to have all its difficulties under conflicting instruments summarily adjusted. If the daughters other than Mrs. Hudson, and their children, think that they have a good cause of suit against Mrs. Hudson, they could bring an action against her claiming, in one aspect, specific performance of the alleged contract, or, in another aspect (as they are not parties

(1) (1925) Ch. 75.

(2) (1886) 32 Ch. D. 123

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to the contract), a declaration of trust, and making the Company a co-defendant. It is the duty of a Court to be all the more vigilant as to jurisdiction if the parties and their counsel have no interest in disputing the jurisdiction in the particular case before the Court.

If the order made by the learned Judge is to be treated as within his jurisdiction, and if we have to reverse the order on the merits, the result will be a glaring injustice—an injustice not done by Mrs. Hargrave, but by sec. 23 of the *Wills, Probate and Administration Act*. There is no ground, except in the provisions of the Act, for thinking that Mrs. Hargrave ever thought that by her last will she was exercising her general power of appointment under the settlement, or taking away the rights given to her children and grandchildren under her husband's appointment. Of course I do not know what Mrs. Hudson will see fit to do under the circumstances; but if there should be negotiations for a settlement it would be well to bear in mind the strong possibility that some of the limitations contained in the will of 29th October 1914 are void for perpetuity, and that, so far as they are void, the property would seem to be divisible under the settlement directly among the children of the spouses.

In my opinion the proper course is to discharge the whole order and to dismiss the summons, without prejudice to any suit that the respondents or any of them may bring. But if this view be not accepted by my learned brothers, I think that the appeal must be allowed.

RICH J. In New South Wales the *Married Women's Property Act* was first enacted in 1879; sec. 52 of the English *Conveyancing Act* of 1881, did not become law until 1919, and the provisions of sec. 77 of the English *Fines and Recoveries Abolition Act* 1833 (3 & 4 Wm. IV. c. 74), by which a married woman is enabled by deed acknowledged to release or extinguish a power were never transcribed (see *Re McBrien*; *Woods* v. *McBrien* (1); *Postle* v. *Stephens* (2)). The rival claims in this case are founded upon the testamentary exercise by a wife and by a husband respectively of powers conferred upon them alternatively by a post-nuptial settlement made 25th

(1) (1908) 9 S.R. (N.S.W.) 18. (2) (1915) 16 S.R. (N.S.W.) 9.

January 1879. This instrument assured to a trustee certain freehold chattels real and chattels personal and declared trusts as follows: first, such trusts as the wife might, during his lifetime with her husband's consent and afterwards in her uncontrolled discretion, appoint by deed or will; second, subject to this power, for the wife for life for her separate use; third, after her death, subject again to her power of appointment and in default of its exercise, such trusts as the husband should by deed or will appoint; fourth, subject to his power and in default of its exercise, for him for life and after his death for children of the marriage and in default of children to him for an absolute interest. In October 1914 husband and wife were minded together to arrange their affairs and accordingly sought the assistance of the officers of the plaintiff trustee company. The children of the marriage were four daughters and there were some grandchildren. The husband was possessed of substantial property outside the settlement but the wife does not appear to have had any unsettled property.

The husband, in their joint consultation with the trustee company's officer, expressed the desire that after the death of himself and his wife their property should be divided equally among their children absolutely. The wife stated her opinion that, if the property were left to the children absolutely after their deaths, it would only lead to disputes as to the division, because the property was held in various forms of investment, and insisted that the children should only have life interests in the property which should be managed by the trustee company during the children's lives and that afterwards the grandchildren should be provided for. They were at some stage told that if the wife exercised her power of appointment the settled property would be chargeable with probate duty in her estate, whilst in any event upon the husband's death it would be dutiable under secs. 49 and 58 of the New South Wales *Stamp Duties Act* 1898. At length they agreed that each would make a will the effect of which should be that the survivor would take all the settled and unsettled property for life and after the survivor's death the income thereof should be divided among the children for their respective lives. Upon the death of each child its children were to receive their parent's share of income and upon the death

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of the last surviving child there should be a distribution among grandchildren. Each agreed to appoint the trustee company executor and trustee, and the power of appointment was to be exercised by the husband and not the wife. Solicitors were instructed to prepare wills to carry this arrangement out, for each of them to execute.

Wills were prepared accordingly and executed by husband and wife respectively on 29th October 1914. The wife's will stated that she expressly refrained from exercising the power of appointment conferred upon her by the settlement, and the husband's that he did exercise the power conferred thereby upon him. The husband died on 6th July 1915 without making any further testamentary disposition or otherwise disturbing the arrangement he and his wife had made. The wife continued in the enjoyment of her life interest in the settled property and entered into the enjoyment of her life interest under her husband's will in his unsettled property. But in July 1923 she made another will, by which she revoked all prior wills or testamentary dispositions and devised and bequeathed all her real and personal property whatsoever and wheresoever to one of her daughters (the appellant) absolutely. On 11th October 1923 she died leaving this as her last will.

The question in the case is whether this will operates as an effective exercise of the power of appointment under the settlement so that the appellant takes the settled property. The will, of course, does operate as an exercise of any general power exercisable by the testatrix at her death. Was the power conferred by the settlement then exercisable by her so as to pass the interest in the settled property? The first step in answering this question is to determine what was the true understanding between the husband and wife when they executed their respective wills. This inquiry is not made easier by the mode in which the parties chose to bring the matter before the Supreme Court. The suit was brought by originating summons, and evidence was given by affidavit and then not always by direct testimony. There was some meagre cross-examination. The decretal order, however, was made by the Court itself (not by a Judge in Chambers), and no question of jurisdiction can arise. The parties have concurred in the procedure,

and it is not for us to question its propriety. On the materials before us it is clear enough that husband and wife were, at the time of the arrangement, alive to the fact that they possessed alternative powers of appointment over the settled property. Presumably they knew the wife's was superior and could displace the husband's and render its exercise inoperative. During his life she could not exercise it against his will, and, if he survived her without having consented to any exercise of her power, he would have a full power of disposition over the settled property. On the other hand, if, because of his want of consent or for any other reason, she made no appointment but survived him, she could defeat any appointment he might have made under his power. But in any event he had complete dispository power over the unsettled property. When, therefore, he made his last will in such a way that, if it was the effective disposition of settled and unsettled property, it would be enjoyed by their children and grandchildren in succession in the manner which she had insisted upon (and of which no doubt he approved), did he or she understand that, on the one hand, if he survived he was to be at liberty to subvert the arrangement made with her, or, on the other hand, if she survived she might defeat his testamentary disposition so far as it related to the settled property ? The inference seems plain enough that each acted upon the faith of the other leaving his or her will undisturbed and allowing the dispositions agreed upon to take effect in the manner arranged.

The result is that the husband died having made and leaving unrevoked a will bequeathing to her a life interest in his unsettled property and disposing of the settled property himself in a manner which she desired (and might and probably would herself have effectually accomplished by irrevocable deed, if either had distrusted the other) ; all on the faith (as she knew) that there would be no exercise of her power of appointment. If the property in dispute had devolved upon the wife as a result of such a transaction, the jurisdiction in equity founded upon fraud would have fastened upon her a trust. In *In re Gardner* ; *Huey* v. *Cunningham* (1), *Romer* J. describes it as " a long established principle, that if the owner of property makes a gift of it on the faith of a promise by

(1) (1923) 2 Ch. 230, at pp. 232, 233.

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the donee that he will deal with the property in a particular way, an obligation so to deal with it is placed upon the donee and can be enforced in these Courts if the donee becomes entitled. Most of the cases where the principle has been applied are cases where the gift has been made by a will; but the principle operates whether the gift is made by settlement *inter vivos*, or by will, or where the owner of property refrains from making a will and so allows the property to pass to the donee as on an intestacy." Many of these authorities will be found collected in the same case (1). But here the wife took only a life estate in the unsettled property: and what the real and substantial thing upon which the husband relied was the continued non-exercise of her superior power of appointment. Yet it must not be forgotten that the long established principle formulated by *Romer* J. rests upon conduct which Courts of equity considered fraud and illustrates the application of the equitable doctrine of constructive trust as a means of working out the rights resulting from that conduct.

The power of appointment which the wife ought not, but is said, to have exercised, is an equitable power. It did not enable her to appoint or assure any legal interest in the property. The title of the appointees depends upon the exclusive jurisdiction of chancery. The power, by its very character, is alternative with that of the husband. During their joint lives she is given a choice of exercising her own with his consent or allowing him to exercise his, although if she survives she has an independent and superior power. The extinguishment of her power would necessarily operate to render his absolute and no longer defeasible. There can be little doubt, therefore, that but for her status as a married woman her equitable power would have ceased (see per Sir *William James* V.C. in *Isaac* v. *Hughes* (2); the judgment of *Neville* J. in *In re Sugden's Trusts*; *Sugden* v. *Walker* (3), and Lord *Cozens-Hardy* M.R. (4), and *Warrington* L.J. (5); and see *Hodkinson* v. *Quinn* (6), the first ground given by *Page Wood* V.C.). In discussing the last-mentioned case in his book on *Powers* (3rd ed., pp. 15, 16) *Farwell* L.J. said:—"The implied

(1) (1920) 1 Ch. 501; (1920) 2 Ch. 523.
(2) (1870) L.R. 9 Eq. 191, at p 199.
(3) (1917) 1 Ch. 511, at pp. 516, 518.
(4) (1917) 2 Ch. 92, at p. 96.
(5) (1917) 2 Ch., at p. 99.
(6) (1860) 1 John. & H. 303.

power of executors to sell real estate before the statute was merely an equitable power: the question, so far as cases of that kind are concerned, would generally be one of equities."

But it is commonly said that "before the Act for the abolition of fines and recoveries a married woman could not release or extinguish a power except by a fine or recovery" (*Sugden on Powers*, ch. III., sec. v. (22)); and accordingly that before sec. 52 of the English *Conveyancing Act* 1881 she could only do it by deed acknowledged. Sec. 77 of the *Abolition of Fines and Recoveries Act* (3 & 4 Wm. IV. c. 74) is not restrictive, but enabling (*Thomas* v. *Ormond* (1)). The abolition of fines and recoveries in New South Wales, without the enactment of this section in its full form, would not diminish the effect to be attributed to the wife's conduct. Was it then impossible for the wife's power to become no longer exercisable unless a fine were levied or recovery suffered? An examination of the cases upon which the statement that a married woman could only thus release a power suggests that they relate only to dealings by a wife in the nature of alienations of her right to appoint considered as a *jus ad rem*. Her incapacity at common law seems to have left her no means but this of releasing a legal power. An equitable power was in general considered only thus releasable probably in some measure because equity followed the law. But the doctrine of the separate use doubtless afforded an additional reason. It required the protection of the married woman in this particular, and the statute *Modus Levandi Fines* provided: "And if a woman covert be one of the parties, then she must be first examined by four of the said justices; and if she doth not assent thereunto the fine shall not be levied" (*Coke*, 2 Inst. 510). But, whatever may be the reason of the application of the rule to equitable powers, it is nowhere laid down that if by her conduct the married woman creates real equities against the exercise of such a power she can nevertheless validly appoint under it. On the contrary, *Sugden* follows the passage from which his language has been already quoted by the statement: "And she may still bind her interest by election without a deed acknowledged."

(1) (1889) 15 V.L.R. 365; 11 A.L.T. 91.

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Similarly in *Macnaghten* v. *Paterson* (1) Lord *Macnaghten*, speaking for the Privy Council, says: "It seems to their Lordships under the circumstances contrary to equity that the wife, having misled her husband and having induced him to alter his position and refrain from taking the steps pointed out by the deed, can now turn round and claim payment of money under an obligation from which, if he had not been put off his guard, he could have relieved himself." And in *Barrow* v. *Barrow* (2) *Page Wood* V.C., in denying the universal application of the doctrine that in equity a married woman's property in land could not be affected "without complying with those formalities, which, for the protection of married women, the law has required to be performed and has made indispensable, for the purpose of a valid alienation," said: "On the contrary, there is abundant authority to show that this Court can and does deal with the interests of married women where there is an equity by which their consciences can be affected." In *Cahill* v. *Cahill* (3) Lord *Selborne* says: "Her conscience, as well as that of her husband, might be affected by personal frauds, so as to enable the Courts to adjudge what otherwise would have been hers to the defrauded party." And Lord *Blackburn* (4) and Lord *Fitzgerald* (5) take the same view. In considering whether a transaction between a married woman and her husband amounts to an extinguishment of her power, the special doctrines of the Court of Chancery in relation to separate estate must fully be taken into account. But here the wife definitely and finally resolved to carry through the arrangements she desired to make for the succession to the property over which she and her husband had powers of disposition by means of the alternative power given to him, to which hers was superior, and allowed him at his death to leave his testamentary dispositions in the agreed condition under which she benefited upon the faith of the non-exercise of her power. By so doing she created equities which overreach the equity upon which her power depends. It was thus extinguished in equity and no interest in the settled property passed to the appellant under

(1) (1907) A.C. 483, at p. 493.
(2) (1858) 4 K. & J. 409, at pp. 418-419.
(3) (1883) 8 App. Cas. 420, at p. 426.
(4) (1883) 8 App. Cas., at pp. 436, 437.
(5) (1883) 8 App. Cas., at p. 440.

the wife's last will. Upon the ground, therefore, that the settled property was appointed by the husband's and not by the wife's last will, and not by reason of any doctrine relating to the contractual effect of mutual will-making, I think the appellant fails in substance. The decretal order made below should, of course, be expressed in very different form to give effect to this view. But upon the facts of this case, inasmuch as the will of the wife revoked by her last will refrained from exercising her power of appointment, the same practical result is achieved.

For these reasons the appeal should be dismissed.

STARKE J. The decretal order made by *Harvey* J. on 29th October 1926 cannot, in my opinion, be supported. That order only affects property comprised in an indenture of settlement dated 25th January 1879. Under the settlement certain real and personal property were granted unto trustees to hold upon such trusts, for such ends, intents and purposes, as Mrs. Margaret Preston Hargrave might at any time, with the consent of her husband, Lawrence Hargrave during his life, and after his decease at her own uncontrolled discretion, notwithstanding any future coverture, by deed or will appoint, and in default of and until and subject to any and every such appointment upon trust during the life of Mrs. Hargrave for her separate use, and after her decease and in default of and subject to any and every such appointment by her upon such trusts as Lawrence Hargrave might by any deed or will appoint, and in default of and subject to any and every such appointment by him upon trust for Lawrence Hargrave for life, and after his death upon trust for the child or children of the marriage of Lawrence and Margaret Hargrave and in default of such child or children upon trust for Lawrence Hargrave absolutely.

In 1914 Mr. and Mrs. Hargrave resolved to make their wills in terms which are conveniently set forth in a memorandum in writing signed by the husband :—" (1) Each leaves all to the survivor. (2) The survivor leaves all to the children. (3) Each leaves the Perpetual Trustee Co. executors. (4) The executors are to divide the income equally among the children. (5) When each child dies his or her child or children gets the parent's share of the income.

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(6) On the death of the last child the capital is divided among the grandchildren. The Perpetual Trustee Co. being trustees of minors till they become of age." A question arose as to the manner in which the property subject to the settlement should be dealt with, and it was agreed that Mrs. Hargrave should refrain from exercising her power of appointment under the indenture of settlement, whilst the husband should exercise the power of appointment given to him by the settlement. Wills were accordingly prepared and executed by Mr. and Mrs. Hargrave, but in her will the wife declared, "I expressly refrain from exercising the power of appointment vested in me by virtue of the indenture of settlement made between the said Lawrence of the first part myself of the second part and Edmund Barton of the third part dated 25th January 1879, registered No. 742, Book 187." The husband died in 1915. By his will he devised and bequeathed to his trustees, the Perpetual Trustee Co., all his real and personal property and all estates real and personal over which he had any power of appointment by virtue of the indenture of settlement, upon trust to sell and convert and invest the proceeds and to pay the interest dividends and annual income arising therefrom to his wife Margaret Preston for her life and upon her decease upon certain trusts for children and grandchildren which may be found in the will and are in accordance with the memorandum mentioned. Hargrave at the time of his death was possessed of assets to the net value of about £9,585 apart from the appointed property. Mrs. Hargrave was entitled to and received the income on this sum of £9,585 under her husband's will until her death in 1923, but otherwise she obtained no benefit under the will. In 1923 she made a will whereby she revoked all former wills made by her and devised and bequeathed all her real and personal property to her daughter Margaret Hudson absolutely. This will operates, I apprehend, as an execution of her power of appointment under the indenture of settlement (*Wills, Probate and Administration Act* 1898, sec. 23; *Stone* v. *Hoskins* (1)). It is said, however, that the doctrine of *Dufour* v. *Pereira* (2) (*Hargrave's Juridical Arguments,*

(1) (1905) P. 194.

(2) (1769) 1 Dick. 419.

vol. II.), recognized in *Denyssen* v. *Mostert* (1) and other cases, compels her to make good the arrangement with her husband as to the disposition of their property by will.

It must be observed that Mrs. Hargrave made no disposition by her will of 1919 of the property subject to the settlement of 1879; she declared no trusts in respect of the property and expressly refrained from exercising her power of appointment. The arrangement with her husband, cannot be put higher than a promise that she would not exercise her power of appointment, by will. Such a promise, in my opinion, creates no enforceable or any trust in relation to the settled property, and no agreement giving to any person or persons any legal or equitable interests in the settled property. Even if it did, a promise so to create legal or equitable interests by will could not, I apprehend, be specifically enforced or its contravention restrained (*In re Parkin* (2); *In re Lawley* (3)). The decision in *Dufour* v. *Pereira* (4) shows, I think, that the decretal order must necessarily be founded upon some trust or upon some agreement to create such a trust. How otherwise could the beneficiaries claim enforcement of the promise (*In re Oldham*; *Hadwen* v. *Myles* (5))? The acceptance by Mrs. Hargrave of benefits under the will of her husband carries the position no further. If it amounts to a confirmation of her promise, still that promise creates no legal or beneficial interests in the settled property; even if it did, *In re Parkin* shows that it could not be specifically enforced or its contravention restrained.

It is said, however, that equity would compel her to make good the promise out of her separate estate. Now, no doubt, the property subject to Mrs. Hargrave's power of appointment under the indenture of settlement became assets liable for the payment of her debts and other liabilities (*Married Women's Property Act* 1901, sec. 7; *In re Parkin* (2); *In re Lawley* (3)). But the general engagement of a *feme covert* does not create a charge upon her separate property though it falls to be satisfied out of her separate

(1) (1872) L.R. 4 P.C., at p. 253.
(2) (1892) 3 Ch. 510.
(3) (1902) 2 Ch. 673, 799; (1903) A.C. 411.
(4) (1769) 1 Dick. 419.
(5) (1925) Ch. 75.

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estate (*Sawyer* v. *Sawyer* (1); *Pike* v. *Fitzgibbon* (2)). Such a claim is not contemplated by, nor is it within the ambit of, the originating summons and might be shortly disposed of on this ground, but I think it proper to add that, in my opinion, no such promise was ever made. It requires strict proof and the facts are by no means conclusive. One cannot ignore the fact that both the husband and the wife had power to appoint by *deed* as well as by will; nothing apparently was arranged whereby the powers to appoint by deed were given up or negatived. Yet the exercise of the power of appointment by deed by either husband or wife might render the whole arrangement as to their wills nugatory and useless. That shows, I think, that the husband and wife were not making stipulations binding in law or in equity but were settling the division of their property in the manner which seemed fair and expedient to them at the moment. It is to be noted too that the failure of the wife to exercise her power of appointment was not rested on any contract or obligation in the nature of a contract, but rather upon a desire to save probate duty. Finally, the documents, correspondence and conversations detailed in the transcript suggest no bargaining on the part of the husband and wife for legal and equitable rights and obligations, but a trustful confidence in each other to do what was best for the interests of themselves and their family.

Some suggestion was made during the argument that the arrangement between husband and wife, and the wills made by them pursuant to that arrangement, operated as a release of the wife's power of appointment (*Farwell on Powers*, 3rd ed., p. 19; *In re Evered*; *Molineux* v. *Evered* (3)). But Mrs. Hargrave could not, in that manner, release her power over the real estate subject to the indenture of settlement (*Farwell on Powers*, 3rd ed., p. 22; *Re McBrien*; *Woods* v. *McBrien* (4)). The *Conveyancing Act* 1919 (N.S.W.), sec. 148, did not come into force until 1919. In my opinion, it cannot be imputed to Mrs. Hargrave that she released her power over the personal estate and not over the real estate subject to the indenture of settlement.

(1) (1885) 28 Ch. D. 595, at p. 599.
(2) (1881) 17 Ch. D. 454, at p. 460.
(3) (1910) 2 Ch. 147.
(4) (1908) 9 S.R. (N.S.W.) 18.

The cases cited in *Lush's Law of Husband and Wife*, 2nd ed., p. 34, for the proposition that the Court will not permit a married woman to take advantage of her own fraud in dealing with her property have, I think, no bearing upon this case. The arrangement between the husband and wife did not enable any Court to adjudge any of *her* property to any defrauded party. Further, I am unable upon the facts of this case to accede to the view that the wife was guilty of any personal fraud affecting her conscience or her property in a Court of equity.

Finally, reliance was placed upon the principle that a person cannot take both under and against the same instrument; in other words, that Mrs. Hargrave could not "accept a benefit" under her husband's will "without at the same time conforming to all its provisions, and renouncing every right inconsistent with them" (*Codrington* v. *Codrington* (1); *Pitman* v. *Crum Ewing* (2)). The difficulty, however, in applying these cases is that Mrs. Hargrave had, and under her husband's will took, no proprietary interests in the settled property over which she had a general power of appointment (*Ex parte Gilchrist*; *In re Armstrong* (3)). True it is that the *Married Women's Property Act* 1901 or the exercise by her of the power of appointment made the settled property assets in her estate liable for the payment of her debts, but on her husband's death she had, and her husband's will gave her, no proprietary interest in the property subject to her power of appointment. She had no claim, and asserted none, to any property, subject to her power of appointment, which was given to another or otherwise disposed of by her husband's will. In these circumstances the case does not fall within the principle relied upon.

The following formal order was pronounced:—

Aug. 22.

Appeal allowed. Strike out the declaration in the decretal order and substitute the following declarations: (1) *That the said Margaret Preston Hargrave was entitled to revoke the said will executed by her on 29th October* 1914 *and to make the said will executed by her on 18th*

(1) (1875) L.R. 7 H.L. 854, at pp. 861-862.
(2) (1911) A.C. 217.
(3) (1886) 17 Q.B.D. 521.

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July 1923; (2) *that the will of the said Margaret Preston Hargrave executed on* 18*th July* 1923 *is a good execution of the power of appointment contained in the above-mentioned indenture of settlement dated* 25*th January* 1879; (3) *that the respondent Trustee Company holds the property comprised in the said indenture of settlement as well as the property of the said Margaret Preston Hargrave not so comprised upon trust for the appellant absolutely but subject to the payment of all charges and expenses properly payable out of the estate of the said Margaret Preston Hargrave and the costs hereinafter mentioned. Costs of this appeal to be paid or retained out of the funds subject to the said indenture of settlement, those of the respondent Trustee Company as between solicitor and client.*

Solicitors for the appellant, *Cohen & Linton.*
Solicitors for the respondents, *Ebsworth & Ebsworth.*

B. L.