Mutual wills and *Dufour v Pereira* – of civilian influences and common law solutions

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by

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Dufour v Pereira was the first consideration in English law of a will written by two people in one instrument – a civilian form in a common law context. This presentation analyses the case from pleadings to final decree, examining how Lord Camden LC responded to the novelty of the situation. It considers the facts through the lens of 18th century matrimonial property law and what law, civil and common, was used to resolve the issues. Drawing upon precedents founded on contracts, Lord Camden clarifies lines between probate and equity, and common law and equity, and calls upon the law of trusts to avert a possible fraud. While the decision was ultimately resolved as a matter of English law, its civil law 'shadow' left questions hanging – issues to be unravelled later as common law questions.

I INTRODUCTION

I first embarked on this particular journey of discovery during a period of sabbatical leave undertaken in London in the first months of 2003. (My last sabbatical, ever!) I wanted to uncover the true history of *Dufour v Pereira* (1769) – the case that was the *fons et origo* of the doctrine of 'mutual wills', as it became known in the common law.[1] The journey took me to the reading room of the Public Record Office, in Kew, and into the wonderful mysteries of the court records. A brutalist building from the outside, inside it is a treasure trove. It was easy to be distracted by the work of others, especially those working on the Tudor Rolls, in white gloves, and serious posture, with special props and weights for these treasured tomes. The 18th century court documents I was looking at were large, vellum sheets, inscribed in at least something of a modern script.

The doctrine of 'mutual wills' as we understand it today is based upon the mutuality of obligation of two testators, usually husband and wife, each making provisions by will in return for provisions made by the other. It is typically a will making exercise with an eye to the family and its next generations – an exercise of 'family property' in a broad sense.

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1 (1769) 1 Dick 419; 21 ER 332.

The doctrine and its regular, but occasional, appearances in case law have generated a reasonable amount of academic debate, both in terms of examining the theoretical underpinnings of the doctrine, as well as analysing the elements of it.[2] I have contributed some insights to this debate drawn from a close consideration of the case which started it all, especially in two articles published in 2005, which focus more closely on the contemporary context – one in the *Melbourne University Law Review* and one in the *Sydney Law Review*, the latter looking at the intersection with family provision laws.[3] In my presentation this evening, for such a learned audience with a passion for legal history, I will focus closely on the original case and, in so doing, to show how curious a precedent, what a strange beginning, it was.[4]

The Lord Chancellor, Lord Camden, who decided the matter, was struck by the peculiarity of the case – it was the first consideration of a will of two people written in one instrument – it was joint in the physical, factual sense, but it was also expressly 'mutual' – its factual connection was substantive as well. While a regular feature of civil law, the mutual will was unknown to English law – until this case.

II DUFOUR v PEREIRA

There are two reports of *Dufour v Pereira*: one in the nominate Dickens series,[5] reproduced in the English Reports, and a more detailed report first published in 1799 by Francis Hargrave,[6] 'a great

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2 See, for example, the following and other articles cited therein: JDB Mitchell, 'Some Aspects of Mutual Wills' (1951) 14 *Modern Law Review* 136; R Burgess, 'A Fresh Look at Mutual Wills' (1970) 34 *The Conveyancer* 230; LA Sheridan, 'The Floating Trust: Mutual Wills' (1977) 15 *Adelaide Law Review* 211; TG Youdan, 'The Mutual Wills Doctrine' (1979) 29 *University of Toronto Law Journal* 390; CEF Rickett, 'A Rare Case of Mutual Wills and its Implications' (1982) 8 *Adelaide Law Review* 178; CEF Rickett, 'Mutual Wills and the Law of Restitution' (1989) 105 *Law Quarterly Review*, 534; CEF Rickett, 'Extending Equity's Reach through the Mutual Wills Doctrine?' (1991) 54 *Modern Law Review* 581; AHR Brierley, 'Mutual Wills – Blackpool Illuminations' (1995) 58 *Modern Law Review* 95; K Mackie, 'Recent Developments in the Law relating to Mutual Wills' (1998) 5 *Australian Property Law Journal* 95. See also Julie Cassidy, *Mutual Wills*, Sydney 2000; J Cassidy, 'An Equitable Agreement or A Contract in Law: Merely a Matter of Nomenclature' (2003) 27 *Melbourne University Law Review* 217 – noting that I disagree with Ms Cassidy that mutual wills do not require a formal contract, based on the expression of the doctrine by Ld Camden in *Dufour*.

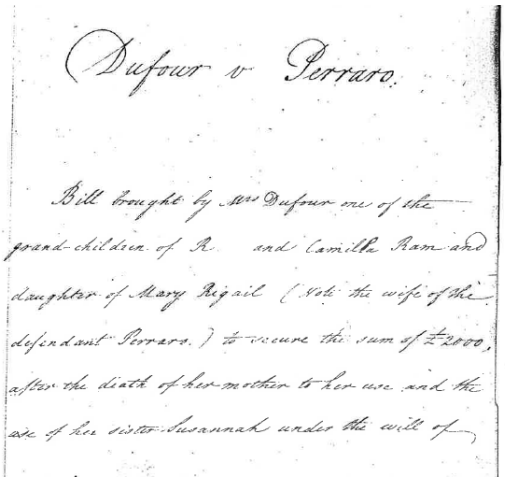
3 'Mutual wills and *Dufour v Pereira*: contemporary reflections on an old doctrine' (2005) 29 *Melbourne University Law Review* 390; 'Contracts to Leave Property by Will and Family Provision after *Barns v Barns* (2003) 196 ALR 65 – Orthodoxy or Aberration?' (2005) 27 *Sydney Law Review* 263.

4 I acknowledge that I have drawn on material produced in the two papers in n 3.

5 (1769) 1 Dick 419; 21 ER 332. *Reports of Cases Argued and Determined in the High Court of Chancery* by John Dickens Esquire, Late Senior Register of the Court (1559–1798). The reports were prepared after his death from his notes. Of them it was commented that they were 'rather loose' and were not considered 'of very high authority': JW Wallace, *The Reporters Arranged and Characterised with Incidental Remarks*, 4th ed, Boston, 1882, 476–77, citing remarks of Lord Redesdale.

6 F Hargrave, *Jurisconsult Exercitations*, London, 1811, vol 2, 100–108 ('Hargrave, *Jurisconsult*). The same note is contained in his earlier work, F Hargrave, *Juridical Arguments*, London, 1799, vol 2. The note forms part of a 'professional paper' concerning the Chancery dispute between Lord Walpole and Lord Orford, the Earl of Cholmondley, reported in 3 Ves Jun 402. The author of the paper (Hargrave?) was consulted professionally on behalf of Lord Walpole; and the paper, dated 4 May 1797, was the result: *Jurisconsult* at 73.

historical lawyer and a great collector of materials for legal history', according to Sir William Holdsworth.[7] Hargrave transcribed the case verbatim from Lord Chancellor Camden's own handwritten notebook.[8] A handwritten transcription of the notebook survives in the British Library, which may be the only surviving record of the full judgment.[9] Figure 1 shows the opening of the transcription for *Dufour*.


Dufour v Perraro.

Bill brought by Mrs Dufour one of the grand-children of R and Camille Ram and daughter of Mary Rigail (Vide the wife of the defendant Perraro.) to secure the sum of £2000, after the death of her mother to her use and the use of her sister Susannah under the will of

Figure 1: Extract of Ld Camden's handwritten notebook, *Dufour v Perraro*

There is some discrepancy in the name of the case, but this is not particularly unusual, as divergence in spelling was not uncommon at the time. In Hargrave, it is called '*Dufour v Perraro*', as seen in Figure 1; in the Chancery Bills as '*Dufour v Peraro*', differently spelled. In this paper, I will stick to the name it is given by Dickens, '*Dufour v Pereira*', for it is in this form that it has consistently been referred to subsequently.

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7 WS Holdsworth, *History of English Law,* London, vol 12, 410. (HEL).

8 Hargrave, *Jurisconsult,* at 100. Hargrave also refers to searching for the decree in the case 'at the register's office' and being disappointed to find that it was referred to 'in the wrong page of the decree book': 101. The Index book for 1769, vol A, includes the case in the list for Trinity Term of that year, but it is found in the year before. There is a manual correction in ink to this effect in the 1769 volume, ('vide A Book Trinity 1768' – not in a modern hand), with a corresponding addition to the Trinity term list of the year before. Trinity term 1768 commenced from 26 May 1769. Given the reference in Hargrave, it is possible (probable?) that the correction was made either by him or at his direction. See Index to C33 series, *Entry Books of Decrees and Orders*, at the Public Record Office (PRO), Kew, London. The final decree is found at C33/431, 583.

9 Hargrave MSS 330, 'Judgments of Lord Camden extracted from His Lordship's Note Books'. These are handwritten. In the front pages it is stated that they were copied from Lord Camden's own handwriting and that two copies were made: one for Ld Thurlow LC and one for his own private use. I could not locate Lord Camden's own notebooks, so assuming that these are no longer in existence, this handwritten transcription may be the only surviving record of the full judgments in those cases.

To piece together the factual narrative of the wills of René and Camilla Ranc, I had to use several sources, including: the will itself, as proved;[10] the surviving Chancery papers;[11] and the remarks of one of the counsel in the case, Alexander Wedderburn, who later, as Lord Chancellor Lord Loughborough, recalled aspects of the case in giving judgment in *Walpole v Orford* in 1797 – nearly three decades later.[12] An outline of the family chronology is included as Appendix One to this paper. This is the story (in simple form).

On 21 November 1745, René Ranc[13] and his wife Camilla made a joint will, expressed to be their 'mutual testament'. It is included as Appendix Two to this paper. René and Camilla appointed each other sole executor. The principal part of their testamentary scheme was to give to the survivor of them a life interest in their property and a trust of the remainder on the death of the survivor.[14] Camilla had also been left 'considerable personal estate' under the will of her aunt, Mary de Tudert, who died five years earlier, in May 1740,[15] and they wished to take this into account to ensure an appropriate scheme of distribution for their children and grandchildren.

On the death of the survivor, the whole of the residue of the estate, real and personal, was left to the trustees to pay to Mary Rigail, the daughter of René and Camilla, to her separate use,[16] an income of £150 for life for the maintenance of herself and her children 'born and to be born'. The rest of the income of the residue was to be divided in equal portions among all Mary's children to be paid at 21 years, with provision for maintenance in the meantime. There was also a substitutional gift if any of the children died before 21 years leaving issue.

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10 PROB 11/775 Sig 383, *Family Records Centre*, London (Image reference 319). The will is also set out in the pleadings of *Dufour v Vernezobre* (C12/525/5, Chancery pleadings, PRO).

11 The pleadings are found principally in the 'C12' series, *Various Six Clerks, Series II*, PRO. The pleadings for *Dufour v Pereira* are found at C12/1010/4 (catalogued as '*Dufour v Peraro*'); and C12/525/5 (catalogued as '*Dufour v Vernezobre*'). Some other information relevant to the chronology is found in the 'C33' series, *Entry Books of Decrees and Orders*. These will be referred to hereafter as 'Chancery orders, PRO' with their 'C33' reference. The Final Decree repeats the key pleadings: C33/425, Chancery orders, PRO, 583.

12 (1797) 3 Ves Jun 402.

13 Described as 'Rancer' in the report in Dickens and as 'Reyne' by Lord Loughborough in *Walpole v Orford* (1797) 3 Ves Jun 402 who appeared as counsel in *Dufour*. The probate document and the Chancery papers give the name as 'Ranc'. The name 'Rance' also appears in the probate of Camilla Ranc's codicil to her will dated 3 November 1763: PROB 11/914 (Image reference 371). (Note the PRO-online catalogue incorrectly gives the name as 'Rane', where the index to the PROB 11 series gives the name as 'Ranc').

14 John Sullin, Peter Tollet and Daniel Vernezobre were appointed as trustees. The spelling is not entirely legible in the Probate document. One of the Bills refers to 'Vernezobre' (C12/525/5), while Hargrave uses the name 'Vernezobie': Hargrave, *Jurisconsult*, 100. They were also appointed executors after the death of the survivor.

15 PROB 11/702 (Image reference 447). In *Walpole v Orford* (1797) 3 Ves Jun 402, 417, a reference is made to stock left to Camilla Ranc by 'Mr Detudor'. This appears to be a reference to the will of Mrs de Tudert.

16 See Appendix 3 on married women's property.

At the time of the joint will, Mary had two children, named after their grandparents, Camilla and René. Another child, Susanna,[17] was born after the date of the will. However, because René Rigail died without issue,[18] the only surviving children of Mary who would be entitled to the remainder gift in the joint will were her daughters Camilla and Susanna.

René Ranc died in September 1749. His widow Camilla then proved the joint will as sole executrix in December that year.[19] She then transferred all the stocks into her name and 'possessed herself of the rest of the estate and enjoyed it during her life'.[20]

Notwithstanding the joint will, on 5 May 1760, some 11 years after René had died, Camilla made a new will, followed by a codicil dated 3 November 1763. She revoked all prior wills, appointed her daughter Mary an executor, and left legacies to her grand-daughter Susanna Rigail and her daughter Mary's second husband, Anthony Peraro; £600 South Sea Annuities to her grand-daughter Camilla, now the wife of William Dufour; and the residue of her estate to her daughter Mary, 'for her own proper and absolute use and benefit'. The principal effect of this new scheme was to cut out the residuary gift to the grandchildren set out in the joint will.

The principal question in the litigation in *Dufour v Pereira* was whether Camilla Ranc could leave her property contrary to the mutual testament, and its consequences. This was, as Hargrave said, the 'great point of the case'.[21] The principal argument for Camilla and Susanna was that the mutual will was 'a good and firm will' and that it could not be revoked after the death of the first of their grandparents to die: that it was 'strongly irrevocable' by their grandmother after the death of their grandfather René Ranc.[22] (Reading between the lines, perhaps they were concerned about their stepfather and whether he might end up with it all.) Mary Peraro (their mother) responded that a will was in its nature revocable.[23]

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17 Who, as an infant, appeared 'by her next friend' in *Dufour v Peraro* (C12/1010/4 Chancery pleadings, PRO), and who, with Camilla Rigail (now Dufour), are described as the two children of Mary Rigail, now Peraro (her first husband, Philip Rigail, having died in August 1761). Hargrave calls her 'Susannah' as well as 'Susanna'. The Chancery papers describe her by both spellings as well.

18 Chancery pleadings, PRO, C12/525/5.

19 PROB 11/775 (Image reference 319). Probate was granted on 27 December 1749.

20 C12/525/5, Chancery pleadings, PRO.

21 Hargrave, *Jurisconsult*, 102.

22 C12/525/5, Chancery pleadings, PRO.

23 She also argued that her mother, Camilla Ranc, as a married woman, had no power to make a will during her marriage: C12/525/5, Chancery pleadings, PRO, 7 August 1766, pencilled page 7, Joint Answer by the Peraros and two other named defendants.

IV THE NOVELTY OF THE CASE

In formulating his judgment in *Dufour v Pereira*, Lord Camden clearly recognised that it was an important case. For one who was known for his keen memory and seldom wrote his judgments,[24] it was one of only five written judgments that he left in his court books.[25] Ld Camden stated that he took time to consider all the evidence;[26] and Hargrave said that it was written 'with apparent anxiety to express the reasons of his judgment strongly, and in a manner which shews that he called forth his best energies to impress conviction'.[27] The eloquence of the judgment struck both Hargrave and Lord Loughborough, in speaking of it in *Walpole v Orford*.[28]

Lord Camden described the case as one of 'novelty' – mutual wills being, as he said, 'unknown in this country'.[29] The fact that it was novel raises several questions to the later observer and legal historian. First, what generated the novelty – why, for example, did the Rancs use this form of will – the joint, 'mutual testament'? Secondly, how does such a will fit within the context of matrimonial property law at the time? Thirdly, how did Lord Camden analyse the issues before him, as the Lord Chancellor, head of the Chancery court.

1. The form of the will

The fact that the form of a joint, 'mutual' will was used, and that it was in French, might give some clues as to its novelty. The opening passage of the will is seen in Figure 2. It was translated into English in Doctors' Commons for the grant of probate on René's death – included as Appendix Two to this paper.

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24 HEL, vol 12, 308.

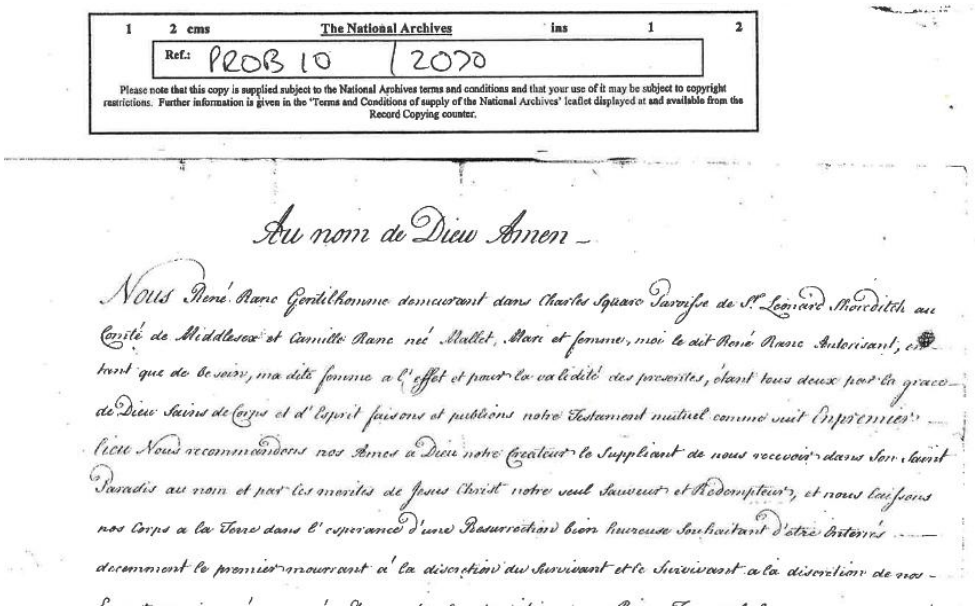
25 Hargrave, *Jurisconsult*, 108.

26 C33/431, Chancery orders, PRO, 583, at 586: 'His Lordship Did Declare he w^{d} take time to Consider this matter & then give his opinion'. See also Hargrave, *Jurisconsult*, 101.

27 Hargrave, *Jurisconsult*, 108. Acknowledging the importance of the judgment for Lord Camden, Hargrave reports it verbatim from his Lordship's own notes.

28 Hargrave, *Jurisconsult*, 107; *Walpole v Orford* (1797) 3 Ves Jun 402, 416. Hargrave also described it as 'energetic', where Loughborough used the term 'ingenious'.

29 Hargrave, *Jurisconsult*, 102.



Au nom de Dieu Amen –

Nous René Ranc Gentilhomme demeurant dans Charles Square Paroisse de St Leonard Shoreditch au Comté de Middlesex et Camille Ranc née Mallet, Mari et femme, moi le dit René Ranc Autorisant, etant que de besoin, ma dite femme a l'effet et pour la validité des presentes, étant tous deux par la grace de Dieu Sains de Corps et d'Esprit faisons et publions notre Testament mutuel comme suit Premierement Nous recommendons nos Ames a Dieu notre Createur le Suppliant de nous recevoir dans Son Saint Paradis au nom et par les merites de Jesus Christ notre seul Sauveur et Redempteur, et nous laissons nos Corps a la Terre dans l'esperance d'une Resurrection bien heureuse Souhaitant d'être Enterrés decemment le premier mourrant a la discretion du Survivant et le Survivant a la discretion de nos –

Figure 2: Extract of the will of René and Camilla Ranc, forming part of the Probate records

In the pleadings it was recited that the Rancs were born 'in parts beyond the seas', where they had 'resided many years'; that they were 'used to the customs of those parts';[30] and that it was 'usual in foreign countries' to use the form of the joint and mutual will.[31] (By 'foreign countries' is implied those in continental Europe – across the English Channel). It was also witnessed by a Notary Public echoing the civil law manner.[32] That Lord Loughborough (who had been counsel in *Dufour*) recalled this specific detail in speaking of his recollections of the case nearly 30 years later, suggests that this was unusual, or at least noteworthy.[33]

Loughborough also recalled that the Rancs had lived in Geneva.[34] They were likely to have been part of the wave of Protestants that left Europe, fleeing persecution, from the late 17th century. Many went to The Netherlands, Germany, Switzerland, England and across the Atlantic. At the time of their will, the Rancs lived in Charles Square, Shoreditch, a neighbourhood that attracted many French Huguenot silk weavers during the 17th and 18th centuries, for example.[35] There are other indications of this Protestant connection in Mary de Tudert's will, in bequests to the Dutch Reformed Church among others, and in

30 C12/525/5, Chancery pleadings, PRO.
31 C12/525/5, Chancery pleadings, PRO.
32 Grotius states that a will could be made before a notary and two witnesses: H Grotius, *The Jurisprudence of Holland,* 11, xvii, 17–18. The joint will was made before a notary public and one witness.
33 *Walpole v Orford* (1797) 3 Ves Jun 402, 416.
34 *Walpole v Orford* (1797) 3 Ves Jun 402.

the joint will, in the gift to the French Church in Threadneedle Street, which was a Huguenot church. It seems then that the Rancs used this form of will because it was familiar and perhaps, given their background, it was expected.

But they had come to England before they married and continued to live in England for the rest of their lives.[36] The terms of the will were also very much anchored in English law. Apart from the fact that it was made in England and the testators both lived and died in England, it established a trust and appointed trustees;[37] and it ensured that the provision for the married daughter was for her separate use.[38] Both these things reflected English law: the trust was the creature of the common law; and the need for the creation of 'separate' property in equity was a reflection of the law concerning married women's property in England.[39] So the will was, in a sense, a hybrid: a combination of civilian form with common law structures.

2. The context of matrimonial law

In the context of issues concerning married women's property in England in the 18th century, the outstanding facts of *Dufour v Pereira* are that the mutual will involved both a will of a married woman and a contract between husband and wife. Camilla Ranc, as a married woman, only had limited power both to contract (and especially with her husband) and to make a will under English law. I have included in Appendix 3 a detailed analysis of the relevant law.

Lord Camden was clearly familiar with this area of the law,[40] and whatever discussion there was on this issue, suffice it to say that it caused no problem for him in this case. 'I must first clear it', he said, that with respect to the inheritance from Mary de Tudert, Camilla Ranc was 'possessed of this residue as her separate estate'. In addition, he stated that the acknowledgment of her power to devise in the mutual will itself, confirmed this analysis.[41]

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35 A bit of trivia, Shoreditch Church (officially known as St Leonard's, Shoreditch) is is featured in the famous line 'when I grow rich say the bells of Shoreditch', from the nursery rhyme 'Oranges and Lemons'.

36 Referred to in the 'Joint Answer' of the Peraros and others in C12/525/5, Chancery pleadings, PRO, page 7 of the set.

37 Using the nearest equivalent in the French will – '*fideicommis*'.

38 '*et pour* son *Seul propre et separé usage, independemment et sans la participation de son dit Mari'*.

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

40 Both Lord Camden and Lord Loughborough were familiar with the law in this area – for example they were both involved in *Earl of Kintoul v Money* (1767) 3 Swans 202, a married woman's property case – Lord Camden as Chancellor and Lord Loughborough as counsel (Alexander Wedderburn as he was at the time).

41 From the handwritten notebook, p 86.

3. Lord Camden's analysis

Lord Camden acknowledged that the mutual will was 'so new' a situation in his court and examined the issues closely, recognising that he was formulating new principles. The doctrine he articulated was clearly based in contract. A mutual will was, he stated, 'a mutual agreement': it was a contract.[42] Not only did he state, 'This is a contract',[43] but in the handwritten transcription of his own notebook this passage is underlined and appears in a line on its own, as shown in Figure 3:[44]

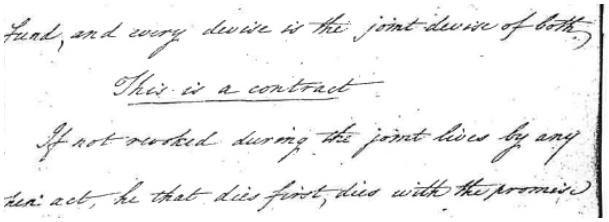
Funds, and every devise is the joint devise of both.)
This is a contract
If not revoked during the joint lives by any
deed act, he that dies first, dies with the promise

Figure 3: extract of Camden's handwritten notebook

Lord Camden found the evidence of the agreement in the instrument itself and the consideration for the agreement was the reciprocity of provisions – each set of dispositions was made in consideration of the other. Having established that there was a binding agreement, the next question focused on revocability: the extent to which either René or Camilla Ranc could make a new will.[45]

Lord Camden distinguished between the will as a document *for probate purposes* and the will as an expression of an agreement, or 'compact'. With respect to the probate aspect, he concluded: 'a will is always revocable, and the last must always be the testator's will'.[46] So the fact that Camilla Ranc had made a new will after René's death, meant that this later will *was* admissible to probate. At the time she made it she was a *feme sole*, a widow, and her will, *as a will*, was properly admissible to probate. The grant of probate to Mary Peraro with respect to the later will was therefore a valid grant. While there had also been a grant of the joint will, it was in effect revoked, with respect to Camilla Ranc, by the later will.

The critical question for the Lord Chancellor, however, was not whether Camilla Ranc's later will was admissible to probate, but rather what was the *effect in equity* of the agreement embodied in the earlier mutual will? He concluded that although the mutual will, *as a will*, or more specifically, as Camilla's

42 Hargrave, *Jurisconsult,* 104.

43 *Jurisconsult*, 104. The Dickens report states simply: 'It is a contract…' (1769) 1 Dick 419, 421. The Hargrave version is more emphatic. The handwritten notebook makes this absolutely clear.

44 Hargrave British Library MSS 330, 91 or 38 (top and right hand side of the page numbering respectively).

45 Hargrave, *Jurisconsult,* 103.

will, might be revoked, the *agreement* itself would be effective: 'the first dier's will is then irrevocable', but only in the sense that 'a man may so bind his assets by agreement, that his will shall be a trustee for performance of his agreement', the court making the devisee, heir or executor 'trustee to perform the agreement'.[47]

This was an important and critical first step in the articulation of the doctrine in the common law. The later will, though made in breach of any agreement was, nonetheless, properly admissible to probate. The mutual will was 'revocable' in a probate sense, but not in the sense of the obligations effectuated in equity.[48]

Although the case of mutual wills was novel, the area was not without some authority upon which Lord Camden could draw. There were agreements about binding assets – whether by making a promise to make a will; or making a will and promising not to revoke it; or not making a will on the promise of the heir to make provision for his siblings; and covenants to settle or leave property to a wife or daughter were described as 'common'.[49]

One such case expressly referred to by Lord Camden was *Chamberlaine v Chamberlaine* (1678).[50] Here the heir had promised his father that he would pay the legacies provided in his father's will, if the father left the will unrevoked. Such cases were directly analogous to the facts in *Dufour v Pereira*, there being 'no difference between promising to make a will in such a form, and making his will with a promise not to revoke'. In *Chamberlaine*, as Lord Camden noted, the Chancery court 'bound the will with the promise, and raised a trust in the devisee'.[51] 'This court does not set aside the will', he said, 'but makes the devisee heir or executor trustees to perform the contract'.[52] The case of mutual wills 'stands upon the very same principle'.[53] In the context of the promises in the mutual will, Lord Camden said:

> [H]e, that dies first without altering the will, does by his death carry the agreement on his part into

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46 Hargrave, *Jurisconsult,* 104, 105.

47 Hargrave, *Jurisconsult,* 104, 105.

48 The nature of a joint will so far as probate is concerned was clarified 86 years later in the case of *In the Goods of Stracey and Stracey* (1855) Deane 6. In this case Sir Josias Henry Stracey and his wife Diana made a joint will. Diana died in June 1854; her husband in November 1855. After Sir Josias' death, an application for probate of the will as Diana's will was made; as well as an application for probate of the will as the will of Sir Josias. Both grants were made as requested. Sir John Dodson commented, however, that 'the paper should have been proved' as Diana's will when she died – and probate not delayed, therefore, until her husband's death).

49 Hargrave, *Jurisconsult,* 105. Cases cited by Lord Camden included *Thynn v Thynn* (1684) 1 Vern 296; *Devenish v Baines* (1689) 2 Prec Ch 3; *Chamberlaine v Chamberlaine* (1678) 2 Freem 34.

50 *Chamberlaine v Chamberlaine* (1678) 2 Freem 34.

51 Handwritten notebook, 92, 39 (right hand top corner number).

52 Handwritten notebook, 93, 39 (right hand top corner number).

53 Handwritten notebook, 95, 40 (right hand top corner number).

> execution. If the other then refuses, he is guilty of a fraud – can never unbind himself – and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him.[54]

As he explained rather poetically, that the Chancery court 'is never deceived by the form of instruments', '[t]he actions of men here are stripped of their legal clothing, and appear in their first naked simplicity'.[55]

> Good faith and conscience are the rules, by which every transaction is judg'd in this court; and there is not an instance to be found since this jurisdiction was established, where one man has ever been released from his engagement after the other has performed his part.[56]

Lord Camden decreed that Camilla Ranc had bound her assets to make good all the bequests in the mutual will of her husband and herself. The residue of the personal estate of René and Camilla was to be divided into two equal parts ('moieties') and was declared to belong to the grand-daughters – as agreed in the mutual wills agreement.[57]

The compact – the agreement – bound her whole estate as at the date of her death in equity. The property affected was all the property held by Camilla at her death. There was no distinction made between property acquired at the date of René's death or thereafter. The property was 'put into a common fund' by the joint testators and the trust reflected this.[58]

V THE INFLUENCE OF CIVIL LAW

The decision, as narrated above, was located in English law and based on English precedents, but it is also tantalising to the civilian influences in *Dufour v Pereira*. This becomes particularly important in considering the application of the various elements of the doctrine as suggested by Lord Camden, and subsequently tested in other cases. I am indebted to Professor Maurizio Lupoi of the University of Genoa, Italy, an outstanding comparative legal historian and comparative lawyer, who shared with me his unravelling of what he sees as the distinctly civilian roots of much of what Lord Camden pronounced in his judgment in *Dufour v Pereira*.[59] As Lupoi said, the *jus commune*, the common principles of civil law, had developed a theory of mutual wills that was well attested by 1769.

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54 Hargrave, *Jurisconsult,* 106. Handwritten notebook, 95, 40 (right hand top corner number).
55 Handwritten notebook, 96, 41 (right hand top corner number).
56 Handwritten notebook, 96, 41 (right hand top corner number).
57 Hargrave, *Jurisconsult,* 107. The Final Decree is found in C33/431, Chancery decrees, PRO, 583.
58 Hargrave, *Jurisconsult,* 104.
59 M.Lupoi, 'L'affidamento nel superstite: i testamenti concordati', in *I Diritti Reali 2 – I Trust Nel Diritto Civile,* part (e), 'L'origine civilistica di *Dufour v Pereira*'. I am grateful to Professor Lupoi for the discussions we have had upon this subject and for providing me a copy of this work. See also M Lupoi, 'Trust and Confidence' (2009) 125

From the facts of *Dufour v Pereira* it is clear that the Rancs were using a *form* of will familiar to the civil law, but in an English context. The *idea* of foreign law is also strongly evident in the pleadings and in references in the reports of the judgment. Lord Camden indicated that 'Counsel were driven to resort to foreign authors, where these testaments are in use'.[60] Indeed, Lord Loughborough later recollected that the discussion of foreign law and its reasonableness 'occupied a considerable part of the argument'.[61]

We get no clue directly from the judgment or the pleadings as to what 'foreign authors' were cited. But we do know that reference *was* expressly made to civilian writings. Moreover, Lupoi sees evidence in textual correspondences between the words used by the Lord Chancellor and *jus commune* sources to allow us to identify the civilian texts he read and, as he urges, 'to convince us that he based his judgment on them'.[62] So the next part of this presentation is based on educated conjecture.

While Lord Camden himself was an eminent common lawyer, he was also well versed in the civil law. In his biography of Camden, Lord Campbell said that

> his mind was deeply imbued with the general principles of jurisprudence: he had studied systematically the Roman civil law, – he was acquainted with the common law of England in all its branches, the most familiar and the most abstruse, … he had acquired the habit of deliberately investigating great questions …– he had taken infinite pains to make himself master of Equity doctrines and practice, – and for some years he had been first in business, as well as in rank, at the Chancery bar.[63]

If he needed extra help, he could also have sought it out, as it was the practice at times to seek opinions from foreign lawyers or English doctors of civil law.[64] At the time of *Dufour v Pereira*, Doctors' Commons was in its heyday, receiving its charter of incorporation in 1767.[65] This society of civil lawyers specialised in ecclesiastical and admiralty law, and had a healthy library of civilian works within easy reach.[66] Professor John Baker, an eminent legal historian, has also suggested that, at least in

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Law Quarterly Review 253. Lupoi argues that the modern law of trusts in England was developed from a set of principles drawn from continental learning.

60 Hargrave, *Jurisconsult,* 102.

61 *Walpole v Orford* (1797) 3 Ves Jun 402, 418.

62 M Lupoi, 'Trust and Confidence' (2009) *Law Quarterly Review* 253, 276.

63 Campbell, *Lives of the Lord Chancellors*, vol 5, 262.

64 See, for example, the study of JH Baker, 'Ascertainment of Foreign Law: Certification to and by English Courts Prior to 1861' (1979) 28 *International and Comparative Law Quarterly* 141, 146–148. One example, for instance, was in *Scammell v Wilkinson* (1802) 2 East 552, the first stage in the proceedings later known as *Stevens v Bagwell* (1808) 15 Ves Jun 139, where the court referred, at 557, to 'the argument of one of the learned civilians who assisted us by the information he gave'.

65 HEL, vol 4, 235.

66 FH Micklewright, 'Doctors' Commons: A Study of the Ecclesiastical Courts Falling under this Jurisdiction from the Eighteenth Century until 1857', PhD thesis, University of London (UCL), 1977, 610, refers to it as 'a magnificent library' containing 6,000 volumes. The collection was augmented by gifts from time to time and from the

the context of commercial matters, English courts relied heavily on European legal sources – either directly from books, or by consultation.[67] Roman-Dutch authors as well as Roman law were regularly cited on a range of matters.[68] Lord Camden was certainly prompted by the discussion about 'foreign authors' to 'think more upon the subject' to see if it was necessary 'to call in this extra learning' to his assistance.[69]

Lord Camden himself would have been adept in considering the arguments and was familiar with civil law. Apart from the joint document being a familiar civilian *form*, there are two particular areas that stand out that spoke of civilian roots: the consideration of the revocability of the will and the treatment of the property between husband and wife as a common fund.

1. *Civil law concerning husband and wife*

In the civilian context, discussion about mutual wills was located in laws concerning husband and wife, and particularly the way that property was affected by marriage.[70] I will refer to common sources to illustrate. Marriage created a community of goods. On the death of either husband or wife, the community came to an end, and the property was divided in half, one-half going to the surviving spouse

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contribution which every bishop was expected to subscribe for the purchase of books on his consecration: ibid. 26. See also GD Squibb, *Doctors' Commons. A History of the College of Advocates and Doctors of Law*, Oxford, 1977, ch vi, 'The Library'. There is a nice summary piece about Doctors' Commons by Kevin Tang, 'Doctor's Commons' [2018] (Autumn) *Bar News 76.*

67 JH Baker, 'Ascertainment of Foreign Law: Certification to and by English Courts Prior to 1861' (1979) 28 *International and Comparative Law Quarterly* 141, 147.

68 Some contemporary examples include: *Ward v Turner* (1752) 2 Ves Sen 431(Roman law and Voet considered in the context of a *donation mortis causa*); *Franks v Martin* (1759) 1 Eden 309 (Grotius referred to re Jewish marriage and settlement); *Robinson v Bland* (1760) 12 Blackstone W 234 (Grotius cited – re gambling debt, won in France, recoverability in England; Blackstone was one of the counsel in the case); *Pillans v Van Mierop* (1765) 3 Burrow 1663 (Grotius and Puffendorf referred to in context of bill of exchange); *Collins v Balntern* (1767) 2 Wilson King's Bench 347 (cites Grotius, Puffendorf, Justinian and Vinnius – on unlawful contracts). Andrew Lewis demonstrated how knowledge of Roman law doctrines was pervasive and is 'to be found throughout the history of the Common law down to modern times': A Lewis, '"What Marcellus says is against you": Roman law and Common law', in ADE Lewis and DJ Ibbetson, eds, *The Roman Law Tradition*, Cambridge, 1994, 1. See also DJ Seipp, 'The Reception of Canon Law and Civil Law in the Common Law Courts before 1600' (1993) 13 *Oxford Journal of Legal Studies* 388

69 The court would also have had access, for example, to the 17th and 18th century writers of Roman-Dutch law who led not only the wave of revived interest in the reception of Roman law, but also the development of legal science in general, harmonising Roman law with national and local laws: See D Ibbetson and A Lewis, 'The Roman law tradition', in ADE Lewis and DJ Ibbetson, eds, *The Roman Law Tradition*, Cambridge, 1994.

70 The main sources referred to here are Hugo Grotius's *Introduction to the Jurisprudence of Holland,* first published in Dutch in 1631, went into many editions and 'at once took rank as a legal classic': R W Lee, 'Preface' to H. Grotius, *The Jurisprudence of Holland*, trans by R W Lee (Oxford, 1926), vii; and Johannes Voet, *Commentary on the Pandects.* Voet's compilation of *Roman* law with commentaries was available in Latin editions from the end of the 17th century (the edition referred to here is *The Selective Voet being the Commentary on the Pandects*, tr P Gane (Durban: Butterworth & Co, 1955)).

and the other half going to the heirs of the first spouse to die.[71] Such an outcome could only be varied by antenuptial contract.[72] The contract had to be made before marriage because gifts between husband and wife were not permitted.[73]

The antenuptial contract was the mechanism for altering the default position of the community of goods and its distribution. Once married, husband and wife could not alter their succession plans as agreed in the antenuptial contract by making a will in contravention of those plans, *unless the other spouse knew of the proposed changes and consented to them*.[74] An example of this is through the making of a mutual will – referred to both by Grotius and Voet.[75] The mutual testament provided an avenue of overcoming the antenuptial agreement.

But could they then revoke the mutual will?

2. Revocability

At the time of *Dufour,* the degree of revocability of such mutual wills was a matter of debate amongst civil lawyers.[76] There were authorities in different directions. Counsel in *Dufour*, for example, cited 'an authority' in support of the proposition that where two had made a mutual will either of them might change their will in the lifetime of the other, even secretly.[77] Lord Camden, however, rejected such authority as applicable in English law, saying that '[t]he equity of this court abhors the principle':

> The law of these countries then must be very defective, and totally destitute of the principles of equity and good conscience: for nothing can be more barbarous, than a law, which does permit in the very text of it one man to defraud another.[78]

Professor Maurizio Lupoi demonstrated that, in rejecting the idea of secret revocation, Lord Camden was, in fact, preferring another of the prevailing continental views on the matter. He sees in

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71 Grotius, II, chapter xi, 13.

72 Grotius, II, chapter xii, 11; chapter xi, 7, 8; xii, 5.

73 Grotius, III, chapter ii, 9.

74 Voet, xxiii, tit 4, s 63.

75 Grotius, II, chapter xiv, 24; Voet, xxiii, tit 4, s 63.

76 The leading Roman-Dutch author Johannes Voet, for example, referred to the divergence of view on the point of revocability: Voet stated that it was 'beyond doubt that the survivor cannot revoke the last will or his or her deceased spouse when made on the same tablet', but noted that there was a 'noteworthy variation of decision upon this question' because of the 'very many circumstances of wording and of fact': xxviii, tit, 3, s 11. Johannes Van der Linden's work, *Institutes of the Laws of Holland*, was published a few years after *Dufour v Pereira,* in 1806: J. van der Linden, *Institutes of the Laws of Holland*, Amsterdam, 1806, trans into English by J Henry (London: J and WT Clarke, 1828). It provides further guidance as to the civilian law at the time of *Dufour*. Van der Linden also noted the differences referred to in Voet, his own view was that the mutual will 'has merely the force of a last will, and may, therefore, be revoked by both or even one of the parties': book 1, s 5.

77 Given the reference in the next paragraph of Ld Camden's judgment to the defective nature of 'the law of these countries', the authority was evidently civilian: *Jurisconsult,* above n 11, 103.

Ld Camden's use of the phrase 'this court abhors the principle', a direct reference to the Dutch jurist Cornelius van Bynkershoek who used the phrase '*abominor hos mores*' (these ways are abhorrent).[79]

Then, where Lord Camden suggested that the mutual will could be revoked, 'if he give notice',[80] Lupoi identified that Camden was referring to 'another continental view, propounded by several authors', based on a 1591 judgment by the Parlement de Paris.[81] There were limits however, and if such a revocation were attempted when the other was on their deathbed, it was regarded as '*frauduleuse*'.[82]

Lupoi said that the opinion, according to which revocation was not possible after the death of one of the testators, 'hinged on the mainly Dutch notion of a common patrimony'.[83] Lupoi points to the work of the Roman-Dutch authors Simon van Leeuwen and Johannes Voet and provides the precise reference in each as sitting behind Ld Camden's statement that 'the property of both is put into a common fund, and every devise is the joint devise of both'. Where Lord Camden concludes that 'the first that dies, carries his part of the contract into execution', Lupoi said he was echoing solemn French case law and the prevailing continental view.[84]

While this was a decision based in English law, civilian authorities were very much present: they were raised and relied upon in argument, prompting Lord Camden to think deeply on the matters before him, and a choice was made between competing approaches.

Lord Camden's point about the possibility of revocation during the joint lives of the parties, '*if he give notice'*,[85] was restated by the High Court of Australia in *Birmingham v Renfrew*, where Dixon J stated that 'neither party should revoke his or her will *without notice to the other*'.[86] Dixon J expressed it in doctrinal terms, that it was the failure to give notice during the lifetime of the first testator (Grace, the wife in that case) that attracted the trust. This was obiter in both cases as there was no notice given. But *mentioning* notice set up a question for future cases: is the notice point part of the doctrine; and, if so,

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78 Hargrave, *Jurisconsult,* 103.

79 M Lupoi, 'Trust and Confidence' (2009) *Law Quarterly Review* 253, 276–277. Lupoi refers to *Opera omnia* (1767), p 389. Complete editions of van Bynkershoek's works (*opera omnia*) were published in Geneva in 1761 and Leiden in 1766.

80 Id, 104.

81 Lupoi, 277.

82 Lupoi, 277.

83 Lupoi, 277.

84 Lupoi, 277.

85 Hargrave, *Jurisconsult,* 104; (1769) 1 Dick 419, 421.

86 (1937) 57 CLR 667, 684 (Dixon J). Dixon J refers to Hargrave's paper on the *Walpole case.*

what is the relevant timing of the notice? I tease out some of these contemporary issues in my article in the *Melbourne University Law Review.*[87]

However, as a matter of contract law, the question should be what is the nature of the agreement itself: did the parties contemplate revocation on notice or not? Canadian lawyer, Timothy Youdan, has argued that Lord Camden's comments about revocation on notice during the joint lifetimes of the parties should not be read as a general rule of law.[88]

In *Dufour*, it was *dicta* in any event, but it opened the door for the issue to be raised in later cases. The fact that the comment was made by Lord Camden, however, was prompted by the discussion of the degree of revocability of mutual wills in the civilian context. A throwaway line, perhaps, but confusing for later cases.

Another echo of civil law is seen in the passage where Lord Camden included a reference to 'accepting benefits' under the will:

> First, how far the mutual will shall operate as a binding engagement, independent of any confirmation by accepting the legacy under it.
>
> Secondly, whether the survivor can depart from this engagement, after she has accepted a benefit under it.[89]

While acceptance of benefit under the will of the first to die was established as an element of civilian doctrine,[90] what place did it (does it) have in the common law doctrine of mutual wills? In the Final Decree in *Dufour*, it was an element of the reasoning, where it was declared that:

> Camilla Ranc having proved the mutual will of her and her husband René Ranc after her husband's death *and having possessed all his personal estate and enjoyed the interest thereof during her life* she *by those acts* bound her assets to make good all her bequests in the mutual will.[91]

But whether acceptance of benefits was an *essential* aspect of the doctrine did not need to be decided in *Dufour*. Mrs Ranc had not only proved René's will, but had also accepted and enjoyed her interest under

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87 R Croucher, 'Mutual wills and *Dufour v Pereira*: contemporary reflections on an old doctrine' (2005) 29 *Melbourne University Law Review* 390, 398–402.

88 TG Youdan, 'The Mutual Wills Doctrine' (1979) 29 *University of Toronto Law Journal* 390, 407. See also LA Sheridan, 'The Floating Trust: Mutual Wills' (1977) 15 *Adelaide Law Review* 211, 219.

89 Hargrave, *Jurisconsult,* 103.

90 Voet said that the spouse who wished to 'cleave to the dotal agreements' *against* the mutual will, could do so by not receiving any benefit under it: Voet, xxiii, tit 4, s 63. The continuation of this in Roman-Dutch law is evident for example in *Denyssen v Mostert* (1872) Law Rep 4 PC 236, on appeal from the Cape of Good Hope, 257 (Sir Robert Collier).

91 C33/431, Chancery orders, PRO, 583, at 586; (1769) 1 Dick 419, 421, final paragraph.

it, she had 'estopped' herself from being able to change her will (in the sense of the agreed dispositions).[92]

For the subsequent consideration of the doctrine, the introduction of the element of benefit left two particular questions: was it *necessary* for the survivor to benefit; and was it open for the survivor to renege on the agreement so long as they did not 'accept a benefit' under the will of the first to die? Whether acceptance of benefits was an essential aspect of the doctrine did not need to be decided in *Dufour*; nor in the *Birmingham v Renfrew*. In my *Melbourne University Law Review* article it is another 'thread' of this story that I consider in the contemporary context.[93]

The mere fact that the concept of acceptance of benefit was included by Lord Camden at all seems to be another example of the influence of civilian authorities.[94] Timothy Youdan has argued that when seen in this light, acceptance of benefit under the will of the first to die should not be regarded as an essential element of the *common law* doctrine.[95] The references that arise in texts or judgments that retain a notion of 'election' fail to grasp this point. And they do not sit well when the civilian background to this aspect of Lord Camden's judgment is properly understood.[96]

If the common law doctrine of mutual wills is to be seen as just that – namely, a *common law doctrine* – then the relevance of acceptance of benefit, or any other action in response to the agreement, needs to be considered through the filter of common law and the context of equity jurisprudence. The key elements in this context are captured in the following part of Lord Camden's judgment, which I repeat:

> he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course.[97]

This is an entirely different context from that surrounding the civilian doctrine of mutual wills.

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92 Hargrave, *Jurisconsult,* 107.

93 R Croucher, 'Mutual wills and *Dufour v Pereira*: contemporary reflections on an old doctrine' (2005) 29 *Melbourne University Law Review* 390, 402–404.

94 For example, it seems to have elements of the scope of revocability as referred to in Voet, where the spouse who wished to 'cleave to the dotal agreements' against the mutual will, could do so by not receiving any benefit under it: Voet, xxiii, tit 4, s 63. The continuation of this in Roman-Dutch law is evident for example in *Denyssen v Mostert* (1872) Law Rep 4 PC 236, on appeal from the Cape of Good Hope, 257 (Sir Robert Collier).

95 TG Youdan, 'The Mutual Wills Doctrine' (1979) 29 *University of Toronto Law Journal* 390, 416.

96 See also JDB Mitchell, 'Some Aspects of Mutual Wills' (1951) 14 *Modern Law Review* 136, 138−139; GB Graham, 'Mutual Wills' (1951) 15 *Conv (NS)* 28, 35−36. CEF Rickett, 'A Rare Case of Mutual Wills and its Implications' (1982) 8 *Adelaide Law Review* 178, 186ff notes, in passing, that 'benefit is clearly a prerequisite in Roman-Dutch law', citing *Denyssen v Mostart* (1872) Law Rep 4 PC 236. Rickett focuses on finding a 'justificatory principle' for the doctrine within the logic of equitable jurisprudence, and, in this context, material benefit to the survivor is not a necessary doctrinal element.

97 Hargrave, *Jurisconsult,* 106.

Revocability in the civilian context and revocability in the English context generated entirely different results. In the former, it *restored* an arrangement entered into by prior agreement (and which was probably more beneficial to the surviving spouse), hence the ability to revoke 'on notice' and even after the death of the first, provided no benefit had been enjoyed always referred back to the antenuptial agreement. In English law, it had no such reference point. In English law the mutual will provided a vehicle for securing the destination of property between husband and wife in the context of the *absence* of separate property and a matrimonial property regime which swallowed up the wife's property to a large extent and made it entirely subject to the husband's control. Where the family wealth lay principally in personal property, the only aspect of English law that provided some kind of safeguard to the married woman was the doctrine of separate estate in equity. Without it, the wife was dependent on the goodwill of her husband.

3. The common fund

In the approach to categorising the nature of the obligation on the survivor, once more we can see the echoes of civilian doctrine plus the challenge of finding an appropriate 'solution' within common law.[98] In *Dufour,* the couple treated their property as a 'common fund' in which they only had life interests,[99] reflecting continental law. The solution reached of the division of the property into halves, without particular examination of any of the property that comprised it, echoes the distribution of the community of goods in the civilian context. In common law, however, this left hanging the question of the implications of this 'common fund' both for the survivor and the intended beneficiaries of the agreed succession plan reflected in the mutual will. It begs questions such as whether a trust is the appropriate solution (*in rem* or *in personam*?); when does the trust come into effect; and what property is subject to it, particularly when the survivor is left an apparently absolute interest in the property?

In the decision of the High Court of Australia in the case of *Birmingham v Renfrew* in 1937, Dixon J introduced the idea of the 'floating obligation',[100] and judicial and academic commentators have battled long and hard in resolving the niceties of this notion in trust law.[101] The absence of a notion of community of property has created, in this particular context, stumbling blocks requiring the filtering of

98 R Croucher, 'Mutual wills and *Dufour v Pereira*: contemporary reflections on an old doctrine' (2005) 29 *Melbourne University Law Review* 390, 404–405.

99 Hargrave, *Jurisconsult,* 104.

100 (1937) 57 CLR 666, 689.

questions through doctrines based on the separate property of spouses in the common law. But it has also meant that the doctrine could apply regardless of whether the parties were in fact husband and wife. In common law, mutual wills, as a trusts doctrine, can apply more widely and have done so, broadly operating as a device in a dynastic context: seeking, for example, to secure a family succession plan that excludes females,[102] or to arrange the destination of family property as among siblings.[103]

By allowing contracts and trusts into this field, the doctrine of mutual wills was creating a notion of family property. It enabled the creation of a common fund of property and a scheme of family succession akin to the community property of marriage in the civilian context as well as its fixed entitlement for children; and it enabled the determination of the ultimate beneficiaries in advance and not through the vagaries of testamentary freedom. Where, in the civilian context, the notion of revocability was, in a sense, to prevent fraud on the surviving spouse and provide him or her the ability to be better provided for under the antenuptial agreement, in the English context the notion of revocability – or rather the absence thereof after the death of the first to die – was to prevent fraud in another sense. The background of community of property in marriage defines the civilian doctrine; the *absence* of community of property defines the common law one. This disjunction of context was commented upon by JDB Mitchell in 1951, when he wrote:

> [the] difficulties really arise from the fact that the concept of mutual wills is an importation from the Civil Law and exists here without the background of community of property for which it was designed.[104]

VI CONCLUSIONS

The case of *Dufour v Pereira* provides significant insights into the relationship between probate and equity ideas – the interface of the jurisdiction of the then Ecclesiastical (Prerogative) and the Chancery Courts, as well as that between Chancery and courts of common law – and it provides the basis of a distinct, and *common law* (as in non-civilian), doctrine in its own right. But civilian doctrine has left its mark, in shadows of civil law in the judgment, leaving questions for later authorities to consider and resolve.

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101 See for example the analysis and discussion of authorities in TG Youdan, 'The Mutual Wills Doctrine' (1979) 29 *University of Toronto Law Journal* 390, 410–415; LA Sheridan, 'The Floating Trust: Mutual Wills' (1977)15 *Adelaide Law Review* 211–242.

102 *Walpole v Orford* (1797) 3 Ves Jun 402.

103 *Hobson v Blackburn* (1822) 1 Add 277.

104 JDB Mitchell, 'Some Aspects of Mutual Wills' (1951) 14 *Modern Law Review* 136, 143.

In marking out the elements of the doctrine of mutual wills in English law – the agreement, the binding nature of it on the death of the first, the trust that arises in consequence – the decision in *Dufour v Pereira* was both a development of previous law, but also the application, and in some respects, a distortion, of a civilian model in an English context.

It was the location of the English doctrine of mutual wills as a contract enforced in equity through the medium of a trust that transformed any remnants of a civilian doctrine into an English one. It was at this point that the civilian doctrine, in Professor Lupoi's words, became 'Anglicised'.[105]

It was a curious precedent: because of the look and 'feel' of civil law produced by the facts and, in some respects, the articulation of the doctrine in the judgment. The civilian doctrine was relevant to the development of the common law response, but in the English context the connection of mutual wills with dynastic transactions took it out of the civil law of mutual wills. In the English context mutual wills could function as instruments with an eye to the family beyond husband and wife. Being connected to trusts law, and not matrimonial property, their potential was much bigger.

Whether one considers the place of mutual wills in civilian jurisprudence, or the role they have played in common law, the field of engagement is the same, and the issues continuing, namely what are the common law 'rules' of family property: what is the balance between the individual and the State in terms of initiating or qualifying provision for family members. *Barns v Barns* (2003) threw a further spanner in the works of the private ordering represented by arrangements like mutual wills when the High Court held, as a matter of construction, that property the subject of a contract to make a will in a particular way, could be caught within the reach of family provision as 'estate'— at least in South Australia.[106] There is a lot to be discussed there: conversations for another day.

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105 Comment made at the 2002 meeting of the International Academy of Estate and Trust Law, Rome, May 2002.

106 (2003) 196 ALR 65. See my consideration of this in 'Contracts to leave property by will and family provision after *Barns v Barns* [2003] HCA 9—orthodoxy or aberration?' (2005) 27(2) *Sydney Law Review* 263.

Appendix One – Ranc family chronology

1740, 28 April	Will of Mary de Tudert (Camilla Ranc's aunt)
1740, May	Death of Mary de Tudert
1740, 22 May	Grant of Probate of Mary de Tudert's will (PCC)
1745, 21 November	Mutual will of René and Camilla Ranc
1749, September	Death of René Ranc
1749, 27 December	Grant of Probate of René Ranc's will to Camilla Ranc (PCC)
1760, 5 May	Second will of Camilla Ranc
1761, August	Death of Philip Rigail
1762-63, Prior to 3 Nov	Mary Rigail marries Anthony Peraro
1763, 3 November	Codicil to second will of Camilla Ranc
1764, 21 August	Dufours file first bill against Peraros (*'Dufour v Peraro')*
1764, September	Death of Camilla Ranc
1765, 19 June	Agreement between Dufours, Peraros and Vernezobre about grants and litigation
1765, 17 December	Grant of probate of new will of Camilla Ranc to Mary Peraro (PCC)
1765, 20 December	Grant of probate of mutual will to Daniel Vernezobre (PCC)
1766, 15 February	Leave to amend bill
1766, February	New bill filed (*'Dufour v Vernezobre')*
1769, 18 July	Lord Chancellor Camden delivers his Final Decree

'PCC' – Prerogative Court of Canterbury

Appendix Two – Transcription of the Probate of the Will of René and Camilla Ranc

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In the Name of God Amen –

We René Ranc Gentleman living in Charles Square in the Parish of St Leonard Shoreditch in the County of Middlesex and Camilla Ranc born Mallet Husband and Wife I the said René Ranc impowering as far as occasion requires my said Wife to the end and for the Validity of these presents both of us being by the Grace of God of sound Bodys and Mind do make and publish this our mutual Testament as followeth

In the first place we recommend our Souls to God our Creator beseeching him to receive us in his Holy Paradise in the Name and by the Merits of Jesus Christ our only Saviour and Redeemer and we leave our Bodies to the Earth in hopes of a blessed Resurrection desiring to be decently buryed the first dying at the Discretion of the Survivor and Survivor at the Discretion of our Executors hereafter named

and Coming to the disposition of our Worldly Goods we declare as follows that is to say first I the said René Ranc do Name and appoint my said Wife Camilla Ranc Sole Executrix of this my Testament I desire that my said Wife may give my Linnen and my Cloaths or apparel to such Person or Persons as she shall think Proper

Item I give bequeath and leave to my said Wife Camilla Ranc the Interest and Income of all and every my Estates and Effects Real and Personal for and during her natural life and after her death the Capital or Principal of my said Estates and Effects shall go for the use of the Trust by me and my said Wife hereinafter established

Item I the said Camilla Ranc do Name and appoint my said Husband René Ranc Sole Executor of this my Testament I give to my Daughter Mary Rigail the Wife of Philip Rigail all and every my Cloaths Linnen and apparel and Whereas I have belonging to me a Considerable Personal Estate which was given to me by the Will of Mrs Mary de Tudert which I have the Power and Liberty to dispose of I therefore do now give bequeath and leave to my said Husband René Ranc the Interest and Income of all my said Personal Estate for and during his natural life and after his death the Capital or Principal of my said Personal Estate shall go for the use of the Trust by me and my said Husband hereinafter created

Item we the said René Ranc and Camilla Ranc do by these Presents mutually declare that the Survivor of us two shall have the Disposition of all and Singular the Household Goods Utensills and Furniture Portraits Pictures Stamps Prints gold and Silver Plate and Household Linnen in such manner soever as they shall belong to us or to one of us at the time of the death of the Survivor of us two and not sooner what shall remain thereof shall be given by our Executors and Trustees herein after appointed to our said Daughter Mary Rigail

Item at the death of the first dying of us two the Survivor shall Pay to Mr Fargue who keeps School in the Haberdashers Hospital the Sum of Ten Pounds Sterling to be laid out towards the Support of the French Church in his School Provided that Church shall Exist at that time and not otherwise

Item at the Death of the Survivor of us two our said Trustees shall Pay to the Deacons of the French Church in Threadneedle Street in London the Sum of one hundred Pounds Sterling for the use of their Poor but if the Survivor of us should think Proper to Pay that Sum in his or her Lifetime he or she shall have the Liberty so to do and in that Case our said Trustees shall be discharged of the Payment of the same

Item at the death of the first dying of us two the Survivor shall pay ten Pounds Sterling for the use of the Poor of the Parish in which the first dying shall be Interred

Item at the death of the survivor of us two we give to our Godaughter and Godson Camilla Rigail and René Rigail the Children of our said Daughter Mary Rigail to each of them the Sum of three hundred Pounds Sterling which shall be paid them by our said Trustees at their respective ages of Twenty one years and in the mean while the Interests or Income which shall arise therefrom shall be laid out by our said Trustees for their use But if one of them shall happen to dye before that age the Six hundred Pounds Sterling shall totally belong to the Survivor and if both of them shall happen to dye before that age then the said six hundred Pounds Sterling shall go to the use of the Trust hereafter set forth

and now coming to Create the said Trust we Name and appoint Messieurs John Anthony Sullin, Peter Tollet and Daniel Vernezobre our Trustees and Executors of this Testament after the death of the Survivor of us both and not sooner or otherwise and we do desire them to accept of Twenty five Pounds Sterling which we give to each of them for the Care and Trouble they shall take in the Execution of the said Trust and we expressly order that if one of the said Trustees shall happen to dye the two Survivors jointly with our said Daughter Mary Rigail or in her Default the Guardian of her Children shall choose and name a new Trustee in the Room of the deceased and thus at all such times as the Case shall happen and each new Trustee shall have the like Sum of Twenty five Pounds Sterling for his trouble

and after discharging our lawful Debts Funeral Expenses those of the Execution of this our Will and of the Legacies hereabove we give bequeath and leave by these Presents all the rest and Residue of our Estates and Effects real and personal which the Survivor of us two shall leave at the time of his or her death to our said Trustees in Trust and Confidence that they shall pay out of the Interest or Income of the said rest and residue to our said Daughter Mary Rigail to herself upon her own proper Acquittances and for her own Sole Proper and Seperate use independently and without the Participation of her said Husband the yearly Income or Sum of one hundred and Fifty Pounds Sterling to be paid by Moietys every Six Months for and during her natural Life to be laid out towards the Maintenance of our said Daughter and of her Children born and to be born the first payment of which being Seventy five Pounds shall Commence and be made Six Months after the death of the Survivor of us both and the rest of the Income of the said residue of our Estate and Effects shall be by our said Trustees placed out in Capital in order to be by them divided by equal Portions between the said Camilla Rigail and René Rigail and all the other Children born and to be born of our said Daughter Mary Rigail at their respective ages of Twenty one years and the Interests of that Capital shall be added to the Capital in order to Create as large a one as possibly may be until the First of the said Children shall attain to the age of twenty one years at which time the portion of the said Capital shall be paid to him or her and after the Interests of the remainder of the said Capital shall be likewise added until the Second Child shall attain the same age and so even to the last and immediately after the death of our said Daughter Mary Rigail our said Trustees shall pay and lay out the said yearly Income or Sum of one Hundred and Fifty Pounds towards the Maintenance and Education of the said Camilla Rigail and René Rigail and all the other Children born and to be born of our said Daughter Mary Rigail until they shall have attained the said age of Twenty one years and as soon as they shall have arrived at that age our said Trustees shall pay them their Portion of the Capital which shall have been created out of the Income of the said one Hundred and Fifty pounds and if one or more of the said Children born and to be born of our said daughter Mary Rigail shall happen to dye without leaving lawful Issue before the said age of twenty one years the Portion or the Portions of such dying shall go among the Survivors even to the last of them but if they dye before that age and leave lawful Issue such Issue shall have the Portion of his or her Father or Mother and if they all shall happen to dye before the said age of Twenty one years without lawful Issue then after the death of our said Daughter Mary Rigail who in that case shall have the Intire Income of the said Residue during her Life the Capital or Principal of the said Residue together with what shall have been added thereto shall go to the Person or Persons in favour of whom we or one of us shall hereafter dispose thereof by a seperate writing we expressly order by these Presents that the Survivor of us two shall not under any pretext whatsoever be obliged to make or give in any Inventory of our Goods or Effects but that those who shall have a Right thereto after the death of the Survivor shall be obliged to take them in the Condition they shall be then found

and we declare that if we shall hereafter think Proper to make Pecuniary Legacys or give Rings and dispose of our Plate gold Watches Jewells and Trinketts we shall make the same by a Writing seperately signed by us both we intirely Confiding in the Survivor to put the same in Execution as we shall Explain ourselves without being obliged to Produce that writing to any one whomsoever.

We revoke make void and annul all other former Testaments and Dispositions and declare this our last Will In Witness whereof we have Signed and Sealed the same at Charles Square aforesaid the Twenty first Day of November in the year of Grace one thousand Seven hundred and forty five

René Ranc

C Ranc

Signed and Sealed

Pronounced and declared by the said René Ranc and Camilla Ranc to be their last Will and Testament in the presence of us who have signed in the presence and at the Request of the said Testators

Ben. Bonnet Not. Pub. 1745

Sam Giles

Faithfully Translated out of French at Doctors Commons London this Seventh of December 1749 by me

P. Crespigny NP (signed)

This will was proved at London the Twenty Seventh day of December in the year of our Lord one thousand seven hundred and forty nine before the Worshipful Charles Pinfold Doctor of Laws Surrogate of the Right Worshipful John Bettesworth also Doctor of Laws Master Keeper or Commisary of the Prerogative Court of Canterbury lawfully Constituted by the Oath of Camilla Ranc born Mallet Widow the Relict of the deceased and Sole Executrix named in the said Will to whom administration was granted being first Sworn duly to administer etc

There is a marginal note on the final page of the Probate as follows:

> Proved at London the 20th December 1765 before the Worshipful William Compton Doctor of Laws and Surrogate by the Oath of Daniel Vernozobre one of the surviving Executors substituted in the said Will to whom administration was granted having been first sworn to duly administer power reserved of making the like grant to John Anthony Cullen the other surviving Executor substituted in the said Will when he shall apply for the same The probate of the said will granted in the month of December 1749 to Camilla Ranc born Mallet Widow the Relict of the said deceased and sole Executrix named in the said Will being ceased and expired by reason of her Death

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Notes:

- Prior to the commencement of the will, it is noted: 'Translated out of the French'. The text runs on without paragraph breaks. Breaks have been inserted in the transcription where the text includes the term '**Item**'. Other breaks have been inserted marking the commencement of different bequests. A break was also inserted prior to the revocation and attestation clause at the end of the will. The opening word or words has been placed in bold type.
- The signatures of the testators and the witnesses have been aligned right to distinguish them from the text of the will which otherwise runs continuously in the Probate document.
- The 'ff' as used in the Probate document has been transliterated to 'F' as it signified in documents the upper case of the letter 'f': EE Thoyts, *How to Read Old Documents,* London, Phillimore & Co, 1980 (first published 1893), p 134.
- The will is also recited in the pleadings in the case now known as *Dufour v Pereira* (1769) 1 Dick 419: see *Dufour v Vernezobre* (1766) C12/525/5 at the Public Record Office, London. Some of the difficulties in deciphering spellings of proper names in particular are assisted by the recitation of the will in these pleadings and the probate documents of relevant people cited in them (eg Mary de Tudert).

Appendix 3: The position of married women in England[107]

In the mid-18th century, William Blackstone described the effects of marriage in regard to a woman's status in the following manner:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything ...Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.[108]

The 'one person' of which he wrote was the husband, and the legal personality of the wife, the '*feme covert'*, was thereby subsumed within her husband's during the period of her marriage – her 'coverture'. From this basic principle of the suspension of the married woman's legal existence were defined her property rights, and, in consequence, her contractual and testamentary capacity.

The law that applied to René and Camilla Ranc, as a matter of English law, was that, on marriage, all Camilla's personal property was vested absolutely in her husband, and all personal property acquired thereafter during coverture likewise.[109] René, therefore, would have had the power to dispose of it during his lifetime or by his will, as *his* property, as described, simply, in the following passage from *A Treatise of Feme Coverts*, first published in 1732: 'If the Wife have Goods, and take an Husband, the Husband dies, the Executors of the Husband shall have the Goods'.[110]

In relation to her chattels real (mainly leaseholds), the husband had a more qualified interest. He had a power of alienation during the marriage; and they survived to him if he survived her. If she survived her husband, however, they survived to her.[111] A woman's choses in action (such as debts owing to her) were vested in her husband conditionally on his reducing them into his possession during his lifetime; otherwise they survived to her.[112]

The effect of marriage in regard to a woman's real property was more limited, although based on the same concept of unity. The husband's interest in his wife's real estate has been described as a 'developed form of profitable guardianship',[113] rather than that of absolute owner. He had complete

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107 See for example, relatively contemporary summaries of the disability of married women in RSD Roper, *A Treatise on the Law of Property arising from the relation between Husband and Wife*, London, Butterworth, 1820, 2 volumes ('Roper'); JE Bright, *A Treatise on the Law of Husband and Wife, as Respects Property*, London, 1849 ('Bright'), vol 2, ch xxiv.

108 *Commentaries on the Laws of England,* London, 1765–1769, vol 1, Book I, 'The Rights of Persons', Dawsons of Pall Mall Reprint Facsimile edition 1966, ch 15, 430 (hereafter '*Bl. Comm.*').

109 *Coke upon Littleton*, 19th ed, 1932, 300a; H Swinburne, *A Treatise of Testaments and Last Wills*, London, 1590, facsimile edition, New York and London, 1978 ('Swinburne'), 48; 'Baron and Feme' 1 Eq Cas Abr 57; *Bl Comm*, vol 2, 498; *A Treatise of Feme Coverts: or, the Lady's Law,* London, 1732; facsimile edition New York and London, 1978 ('*Treatise of Feme Coverts*'), 54; Bright, vol I, 34; Roper, vol 1, 166.

110 *Treatise of Feme Coverts*, 54. Her claim at common law was only as a legatee under her husband's will and to her '*bona paraphernalia*' (her personal clothes and ornaments). Even these, however, were liable for her husband's debts, on a deficiency of assets in his estate (with the exception only of 'necessary apparel'): *Tipping v Tipping* (1721) 1 P Wms 729; *Bl. Comm.,* vol 2, 435–6; *A Treatise of Feme Coverts*, 80.

111 Bright, vol I, 94–5.

112 Bright, vol I, 36, 41.

113 HEL, vol III, 525.

control of her freehold interests during the marriage, which extended to an interest for his life, called 'curtesy', if there had been a child born of the marriage who was capable of inheriting.[114]

The married woman's contractual capacity was also defined by coverture. She could not enter contracts or bring claims in court except with the consent and assistance of her husband.[115] An example of the latter is seen in *Dufour v Pereira*, where Camilla Dufour, the grand-daughter of Camilla Ranc and the intended remainder beneficiary under the mutual will, could not sue in her own right, but had to join her husband, William Dufour, as plaintiff[116] with her.

If a married woman purported to enter a contract, it was only valid through the device of the law of agency.[117] The husband's consent was implied with respect to contracts concerning 'the necessaries of the household'.[118] The proscription on capacity arising from the concept of unity of husband and wife meant also that a husband and wife could not contract with each other – such contracts were void.[119] There were two exceptions to this latter principle: the married woman could contract with respect to property that was her 'separate estate';[120] or where the contract between husband and wife was supported by valuable consideration.[121]

Could a married woman make a will? The general rule applied here as well, denying to a married woman testamentary capacity. The limited exceptions were summarised by Tindal CJ in *Inman v Tucker* in 1842:

> First, …the rule does not apply where the will is made with the assent of the husband, in which case the spiritual court is allowed to entertain the question whether made with his assent or not. Another exception is, where the wife takes in character of executrix, and her will is confined to matters and things which she takes in that character, in which case she may make the testament without the husband's assent, and the ecclesiastical court may grant administration. A third class of exceptions is, where the will of a married woman is made in pursuance of an agreement with the husband before marriage, or an agreement with consideration after marriage.[122]

She could make a will with her husband's consent; with respect to property held as executrix (in '*auter droit*'); or pursuant to an agreement (supported by consideration if made after marriage). One further exception lay in equity, where a married woman was entitled to make a will with respect to her separate

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114 The widower was called the '*tenant per legem Angliae*'. Littleton used the expression '*tenaunt per le curtosie Dengleterre*'. *Coke upon Littleton*, s 35 and s 52 analyses the details of '*curtesie*'; and see FE Farrer, 'Tenant by the Curtesy of England' 43 *Law Quarterly Review* (1927), 87. The widower's curtesy extended to equitable interests of his wife: *Watts v Ball* (1708) 1 P Wms 109; *Morgan v Morgan* (1820) 5 Madd 408. Contrast the widow's dower rights which did not extend to equitable interests. The husband, however, could not affect the inheritance of the land. A woman's realty remained the property of herself and her heirs after her husband's death, although during the marriage she could not make a will in respect of it, having been expressly denied that right in the *Act for the Explanation of the Statute of Wills* 1542 (34 H VIII c.5). The inheritance of it was thus not defined by her, but by the rules of intestate succession to land and subject to the widower's right of curtesy.

115 Bright, vol 2, 5; ch xxiv, s 6.

116 Called 'orator' and 'oratrix' in the pleadings.

117 *Montagu v Benedict* (1825) 6 B & C 635. See Bright, vol 2, ch xxii, s ii.

118 Ibid.

119 *Coke upon Littleton* 112a; *Stoit v Ayloff* (1632-33)1 Chan Rep 60; *Phillips v Barnet* (1876)1 QBD 436, Blackburn J at 439, Lush J at 440.

120 *Hudson v Carmichael* (1854) Kay 613, 621-22, Sir W Page Wood, VC.

121 *Hewison v Negus* (1853) 16 Beav 594, 911, Sir John Romilly, MR.

122 (1842) 4 Man & G 1049, at 1076–1077.

estate.[123] The effect of the will made either through the common law exceptions, or in equity, however, was a very particular thing.

Consider the will made with the consent of the husband, where he survived his wife. To the extent of the property he was entitled to by virtue of the marriage, the assent he was giving to his wife to make a will effectively amounted to a waiver of his claims to it.[124] He was giving his wife permission to give away what was now *his* (though formerly hers). The wife's executor could therefore claim such articles of her personal estate which, by his consent, he permitted her to give by her will.[125] Because the validity of the will derived from the husband's consent, however, it only operated in respect of the particular will and the consent could be given or revoked by him until probate had been granted, and, thus, even after the death of the testatrix.[126] The 'will' of a married woman made in this way was, therefore, a very different will from that of her husband: as said in an early 17th century case, it was 'not properly a will ... but a writing in nature of a will'.[127]

But what if the wife survived her husband? The effect of a will made by her during coverture with her husband's consent was limited and very particular. Such a will only operated to the extent of the property over which her husband could give her permission – with respect to the property he acquired from her by virtue of the marriage and his own property whereby his will he gave her power to dispose of it by her testament either in his lifetime or afterwards.[128] Her will could not apply to property that she might acquire after her husband's death – namely to apply to the residue of her property as at her own death;[129] nor to interests that had not been reduced into possession during her husband's lifetime (and therefore vested in her husband by virtue of the marriage).[130] To have this more general operation, the woman, as widow, had to perform a new testamentary act, either by making a new will or republishing the will made during coverture.[131] Unless it were republished in this way, the will was void against her next of kin to the extent not covered by her husband's permission.[132]

What, then, did a wife/widow get out of this? She was 'protected'; she was a 'favourite', in Blackstone's words;[133] she was also entitled to her rights of dower in relation to her husband's real estate. Dower[134] operated to qualify the will of a woman's husband through the operation of law, by providing to the widow a life interest in one-third of the realty of her deceased husband, which their issue might inherit.[135] Dower acted to qualify the husband's power of disposition in regard to real estate, at least to the extent of his wife's lifetime.

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123 *Fettiplace v Gorges* (1789) 1 Ves Jun 46; *Goods of Rebecca Smith* (1858) 1 Sw & Tr 126.

124 Ibid. See summary in Bright, vol II, 65; Roper, 166.

125 EV Williams, *A Treatise on the Law of Executors and Administrators*, 6th ed, London, 1867, vol 1, 52.

126 Swinburne, 48; *A Treatise of Feme Coverts*, 79–80; Roper, 166. To prove the will, it had to be shown that the husband had consented to that particular will: *R v Bettesworth* (c.1730) 2 Strange 891; *Henley v Phillips* (1740) 2 Atk 48 at 49.

127 *Tylle v Peirce* (1610) Cro Car 376.

128 *Stevens v Bagwell* (1808) 15 Ves Jun 138, Sir William Grant, MR at 154. Roper, 167–8.

129 *Stevens v Bagwell* (1808) 15 Ves Jun 138 (for previous proceedings in the same matter see *Scammell v Wilkinson* (1802) 2 East 552).

130 *Scammell v Wilkinson* (1802) 2 East 552, 556.

131 *Price v Parker* (1848) 16 Sim 198; *Braham v Burchell* (1826) 3 Add 243, 264 (Sir John Nicholl).

132 *Stevens v Bagwell* (1808) 15 Ves Jun 138, 156; *Price v Parker* (1848) 16 Sim 198.

133 *Bl Comm*, vol 1, 433.

134 On the subject of the law of dower, a detailed and thorough work was produced in 1819 by JJ Park (1795–1833), entitled *A Treatise on the Law of Dower*.

135 The detail of dower is described in Sir R Megarry and HWR Wade, *The Law of Real Property*, 5th ed, London, 1984, 544–546; Bright, vol 1, ch xix.

The picture at common law was unforgiving. The picture in equity was more expansive, recognising the concept of the married woman's 'separate estate' in equity. In regard to such property, she was treated as a *feme sole* and accorded a power of disposition and testation.[136]

What was the analysis that could have been made and what effect did this have on Camilla's part of the joint will? There is no mention of particular real property, so the analysis treats all the property as personal property. Camilla Ranc embarked upon the mutual will with the benefit of the property that had been left to her by her aunt, Mary de Tudert.[137] Among other gifts, Mrs de Tudert directed that the £1,500 she had 'at the Exchequer' be placed in the names of two named trustees 'for the uses following and to distribute the product thereof' as set out. There was provision for pensions for her staff for life and then to be divided equally among three named people, one of whom was 'Camilla Mallet wife of René Ranc'.

Mrs de Tudert also directed that £2,000 South Sea Annuities be placed in the names of named trustees on trust to pay the income to Camilla Ranc and after her death to her husband if he survived her. After the death of both of them, the money was then to be put in the hands of trustees for 'Mary Ranc wife of Philip Rigail' and her children. The residue of her estate after the payment of debts and funeral and other expenses she gave to Camilla Ranc 'to enjoy and dispose of as she shall think proper'.

The principal gift under the de Turdert will to Camilla was the gift of residue. This was the 'considerable personal estate' to which Camilla referred in the joint will. What was the nature of this gift – was this a gift to her absolutely or was it under a trust, by way of separate property? As the two other gifts listed above were each given on trust and the trustees were different in each case, it could be construed that where specific trusts were established under the will they were done so expressly. Could a gift of the residue to her separate use be implied? This was a matter of construction in each case. Phrases in wills to the effect of 'solely and for her own use and benefit,[138] 'for her own use and benefit notwithstanding coverture',[139] were considered sufficient to indicate the intention of excluding the husband from his rights at law as they were 'incompatible with the existence of the husband's right'.[140] There had to be no doubt of the intention to exclude the husband.[141] So, for example, a gift to a wife 'to her own use and benefit',[142] a gift to be made to a married woman 'into her own proper hands, to and for her own use and benefit',[143] and 'to be under her sole control'[144] were not considered sufficient.[145]

Applying this to the words in Mary de Tudert's will, would the words 'to enjoy and dispose of as she thinks proper' suffice? Possibly. The notion that she might dispose of the property herself might be considered sufficiently clear to exclude the husband's right. But, conversely, this sits in the context of two other express trusts. So, while Hargrave's account of the case stated that she had some personal property 'secured for her separate use', he may or may not have been referring to the residuary gift

136 *Fettiplace v Gorges* (1789) 1 Ves Jun 46; *Goods of Rebecca Smith* (1858) 1 Sw & Tr 126.
137 PROB 11/702 (Image reference 447).
138 *Inglefield v Coghlan* (1845) 2 Coll 247.
139 *Glover v Hall* (1849) 16 Sim 568.
140 Williams, vol 1, 706. See the summary of authorities in EHT Snell, *The Principles of Equity*, 2nd ed, A Brown, London, 1880, 349.
141 Snell, 349.
142 *Kensington v Dollond* (1834) 2 My & K 184.
143 *Tyler v Lake* (1831) 2 Russ & M 183.
144 *Massey v Parker* (1834) 2 My & K 174.
145 See Snell, 349.

under the will of Mary de Tudert.[146] In the Dickens report there is, however, a brief reference to the residuary gift and Lord Camden's comment that he did 'not find the cases go so far, as to consider a legacy to a wife, as excluding the husband by implication'.[147] This seems to suggest that the terms of Mary de Tudert's will did not go far enough. In *Walpole v Orford*, Lord Loughborough states his recollection, albeit of some 18 years previously, that the property left under that will was not to Camilla's separate use – that it was the property of René.[148]

There is some argument by the Peraros in their pleadings that Camilla Ranc as a *feme covert* did not have any power to make a will, 'no such power being reserved to her previous to her marriage (to the knowledge and belief of the defendants)'.[149] Hargrave's report from Lord Camden's notes suggests that it was held that Camilla had the power 'notwithstanding coverture' to make a will of some personal property secured for her separate use.[150] Neither report analyses this in detail nor comments at all on the question of the contractual capacity of Camilla..

But then in the verbatim section of the report as given by Hargrave, right at the beginning, there is the following statement: 'I must clear it, by declaring, that Camilla Ranc was possessed of this residue as her separate estate'.[151] What is not clear, however, is what Lord Camden is referring to – is 'this residue' the residue under the will of Mary de Tudert? The remark follows the first sentence in the verbatim section: 'The next point arises under the mutual will', so the context suggests that 'this residue' is that being referred to under the will itself. The Dickens report includes the comment that 'the husband by the mutual will assents to his wife's right, and makes it separate'.[152] Perhaps what this suggests is that the mutual will also operated as a deed to give her the power to act over the property as separate estate. This would be an important point to have made; that it was not analysed more fully is surprising.

If we assume that all Camilla Ranc's property (including the entitlement under the will of Mary de Tudert) was secured to her separate use, then she did not need René's permission to make a will of such property during coverture. She did not need his permission for her part of the joint will to the extent that it affected that separate property and she *could* contract with René in respect of it. If we assume that her property (or some of it) was not, however, secured to her separate use, then she did need his permission. Whether she did, or did not, need his permission, he clearly gave it in the mutual will by 'impowering [her] as far as occasion requires' to make the will.[153] The argument of the Peraros that she had no power to make a will because of her coverture was met by the express consent of René set out in the will itself. In the part of Hargrave's report which is given verbatim, Lord Camden stated that '[t]he acknowledgment of her power to devise by the mutual will has put this question out of doubt'.[154] The joint will also empowered her to appoint the property that he had left her by his part of the joint will.

If there had been no further wills by Camilla, to what extent could probate have been granted of the joint will, as Camilla's will, and what property would it cover? The will would have been effective to dispose of any property held as separate estate – independently of René's consent – and applicable to all

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146 In the pleadings the property of René and Camilla as at the date of the mutual will is particularised – there is a correspondence to some extent with the property left to Camilla under Mrs de Tudert's will: Chancery pleadings, PRO, C12/525/5.

147 (1769) 1 Dick 419 at 420.

148 (1797) 3 Ves Jun 402, 417.

149 'Joint Answer' by the Peraros and others, C12/525/5, Chancery pleadings, PRO, page 7 of the set.

150 Hargrave, *Jurisconsult,* 101.

151 Hargrave, *Jurisconsult,* 102.

152 (1769) 1 Dick 419 at 420.

153 See the opening clause of the will, Appendix Two.

154 Hargrave, *Jurisconsult,* 102.

property so held by Camilla at the date of her death. The will would also have been effective to the extent of the permission given by René – and this was all spelled out in the joint will itself. The will would not have been effective to cover any choses in action reduced into possession or otherwise acquired *after* René's death – and it seems that some of the benefit under Mary de Tudert's will had not at that time been reduced into possession.[155] It was certainly alleged that Camilla died with 'divers large capital sums of money' in her own name as well as many valuable chattels.[156] Unless such property were regarded as separate property and covered by her ability to contract or make a will with respect to it, then to cover such property the will would have to have been republished or a new will made.

All of this is quite apart from the effect of the contract. It is only about what property was actually affected by the wills themselves, viewed as wills in the context of married women's property. In the absence of the contract, her new will and codicil, made in her widowhood, would be effective as the will of a *feme sole*.

What, then, was the effect of Camilla Ranc's contract with her husband as embodied in the joint will? Such a contract could clearly be effective with respect to any property, if any, that was her separate estate. Then there was the final class of exception referred to in *Inman v Tucker* – the ability to enter into a contract with her husband for valuable consideration.[157] If Camilla and René were considered as entering into a contract for valuable consideration then, it seems, such a contract would have been enforceable in equity, notwithstanding coverture.

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155 *Walpole v Orford* (1797) 3 Ves Jun 402, 417, Lord Loughborough refers to the argument that such interests comprised a chose in action not reduced into possession.

156 C33/431, Chancery decrees, PRO, 583 (as set out in the review of the pleadings set out in the Final Decree).

157 (1842) 4 Man & G 1049, 1076–77, quoted *supra.*