

# Trusts and Equity

*Sixth Edition*

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# 1

## Foundations

The aim of this chapter is to reveal the historical and conceptual foundations of trusts and equity. If it were possible to produce a permanent, definitive floor plan of our subject we might not need to consider its foundations; we could simply enter it and find our way around according to the map, but the law of trusts and equity is constantly being extended and added to: an established wall knocked through here; an extra level added there. Only with a firm understanding of the foundations of our subject will we know whether or not the present state of the law is sound and fit for its purpose, and how, if at all, it ought to be developed further. The student who understands the historical and conceptual foundations of the law, the processes by which it develops, and the political and practical pressures that influence the form it takes, will fare much better than the one who simply takes the law as read.

The first part of this chapter is an examination of the history of the relationship between law and equity, including the historical origins of the trust. It proceeds to explain the idea of equity and the symbiotic way in which equity and the common law function. The term 'equity' can be used to describe social fairness, or a branch of morality, or even an aspect of divine justice,<sup>1</sup> and all such uses are apt to shine a critical light upon the law.<sup>2</sup> For the purpose of this book, however, the term 'equity' simply connotes an established aspect of law and legal reasoning. Nowadays, when a judge hears a case, he or she has authority to administer the common law rules with equity. Equitable remedies, doctrines, and principles (many in the form of maxims) are considered in detail in the last chapter of this book.

The second part of this chapter is a preliminary introduction to the modern trust. The trust will be contrasted with concepts such as gift and contract, with which the reader will already have some everyday, if not technical, familiarity. We will see that the trust developed in response to equity's special concern to ensure that legal rights are not used in bad conscience, but that it later became a sophisticated institution governed by established rules, with the result that most problems concerning deliberately created trusts can now be resolved without recourse to equity's flexible, discretionary approach.

<sup>1</sup> Psalm 98:9: 'he cometh to judge the earth: with righteousness shall he judge the world, and the people with equity' (The Bible, King James version).

<sup>2</sup> See, further, G. Watt, *Equity Stirring: the Story of Justice Beyond Law* (Oxford: Hart Publishing, 2009).

## Historical foundations

In the twelfth century, the royal court was largely itinerant. The majority of cases were heard locally by shire courts, hundred courts, and local lords.<sup>3</sup> Effective government required the King and his courtiers to travel the length and breadth of the realm collecting taxes, dispensing justice, and generally asserting royal authority. Thus the itinerary of Henry I took him as far afield as Carlisle, Norwich, Southampton, and Normandy, all within the years 1119–23, while still allowing time to campaign war in Wales. The King's Chancellor was one of the chief members of this travelling court. He was a learned cleric, usually a bishop, whose role was to advise the King as a member of his private ('privy') council. The Chancellor was keeper of the King's Great Seal, and beneath him were the Chancery scribes who were responsible for the King's paperwork (or parchment work, as it was then). The manuscripts of early Chancery proceedings helped to establish coherence in the law, and they also helped to standardize the English language, where previously there had been great regional variation.<sup>4</sup> Most other written material of the time was in Latin; hence Chancery became known as the English jurisdiction.<sup>5</sup> Writs bearing the royal seal were issued out of Chancery to deal with any matters of law and justice falling within the King's special concern or 'prerogative'. The *Leges Henrici Primi* (Laws of Henry I)<sup>6</sup> contain a long list of such matters, including murder, treason, governance of the forests, and such like. Most significant for us is that the King's prerogative included the power to deal with 'unjust judgment' and 'default of justice.'<sup>7</sup> Here, in the King's authority to issue writs out of Chancery to address the unjust judgments of his courts, is the seed of English equity.

By the early thirteenth century, certain royal writs could be purchased cheaply and directly from the Chancery,<sup>8</sup> and by the early fourteenth century, the forms of writ and the form of the King's common law had become very well established, even to the point of rigidity and inflexibility. In fact, as early as *The Provisions of Oxford 1258*, it was established that Chancery had no authority to issue novel writs without the prior approval of the King's council, so thereafter claimants had to show that the facts of their case fell within some existing form of writ in order to gain a remedy. Accordingly, petitions to the Chancellor became routine in the late thirteenth and early fourteenth centuries, as a way of escaping the rigidity of the common forms of writ and the judgments of the common law courts. It became an important function of the Chancellor, through his Chancery scribes, to exercise the King's prerogative of 'grace' or 'mercy' to grant special relief in particular cases. 'Mercy' Shakespeare wrote, '*is enthroned in*

<sup>3</sup> See A. Harding, *The Law Courts of Medieval England* (London: Allen & Unwin, 1973) and J. Hudson, *The Formation of the English Common Law* (London: Longman, 1996) esp. 27–31.

<sup>4</sup> It is arguable that '[t]he genealogy of modern Standard English goes back to Chancery, not Chaucer' (D. Crystal, *The Cambridge Encyclopedia of the English Language* (Cambridge: Cambridge University Press, 1995) at 41).

<sup>5</sup> F. W. Hardman, 'Equity and the Latin side of Chancery' (1952) 68 LQR 481.

<sup>6</sup> A miscellany of laws laid down c. 1100–35.

<sup>7</sup> *Leges Henrici Primi* 10.1 (L. J. Downer, ed. and trans.) (Oxford: Oxford University Press, 1972) at 108. See J. Hudson, op. cit. at 29.

<sup>8</sup> Hudson, *ibid.* at 136.

*the hearts of kings, It is an attribute to God himself; And earthly power doth then show likest God's When mercy seasons justice.*<sup>9</sup> The establishment of the Chancellor's court depended upon a simple hierarchy typical of medieval thought: the King was accountable to God for the righteousness of his laws and the Chancellor, as 'keeper of the king's conscience', would act in particular cases to admit 'merciful exceptions' to the King's general laws, to ensure that the King's conscience was right before God. By extension of this hierarchy, the basis for granting relief became concern for the personal 'conscience' of the defendant in Chancery. The defendant would not be permitted to enforce a common law right or rely upon a lack of common law formality if to do so would be 'unconscionable'.<sup>10</sup> One common form of relief was an injunction granted by the Court of Chancery against the unconscionable enforcement of a common law judgment, with the threat of imprisonment for breach of the injunction.<sup>11</sup> This inevitably produced a rivalry between Chancery and the common law courts.

By the end of the fourteenth century, the Chancellor was dispensing justice on his own authority from his base at Westminster Hall (in the middle of that century, litigation caused by the 'Black Death' had caused the common law courts to be overwhelmed). As petitions to the Chancellor grew in number throughout the fifteenth and sixteenth centuries, the Court of Chancery expanded and records of the Chancellor's decisions gradually acquired the status of a separate body of legal authority distinct from the common law. The rivalry between Chancery and the common law courts came to a head in the early seventeenth century as exemplified by *The Earl of Oxford's Case*.<sup>12</sup> Judgment had been awarded against a defendant to a common law action who had then taken the not unusual step of applying to the Lord Chancellor for an injunction to prevent the enforcement of the common law judgment. The defendant claimed that the common law judgment entered against him had been obtained by fraud. The head of the common law courts, Sir Edward Coke,<sup>13</sup> Lord Chief Justice of the King's Bench, promptly indicted the defendant, but Lord Ellesmere granted the injunction in favour of the defendant, with the result that the common law and Chancery were at loggerheads. Coke argued that the Lord Chancellor was guilty of illegally hearing appeals from common law judgments, but Ellesmere reasoned that his injunction did not offend the common law courts. He argued that it merely operated *in personam* against the conscience of the person who had been successful at common law:

The office of the Chancellor is to correct men's consciences for frauds, breach of trust, wrongs and oppressions, of what nature soever they be, and to soften and mollify the extremity of the law.<sup>14</sup>

<sup>9</sup> *The Merchant of Venice* (1597) IV:1.

<sup>10</sup> Macnair argues that unconscionability is the remnant of a test of conscience that was devised, not as a matter of principle, but as practical supplement to the shortcomings of common law processes of proof and evidence (Mike Macnair, 'Equity and Conscience' (2007) 27(4) OJLS 659).

<sup>11</sup> Even today, breach of an injunction is a contempt of court that may be punished by imprisonment. See, for example, *Patel v. Patel* [1988] 2 FLR 179. A further example is *Shalson v. Russo* [2003] EWHC 1637 (Ch), in which a fraudster was imprisoned for two years for breaching an equitable injunction that had frozen his assets.

<sup>12</sup> (1615) 1 Ch Rep 1.

<sup>13</sup> Pronounced 'Cook'.

<sup>14</sup> (1615) 1 Ch Rep 1 at 6, 7.

According to Lord Ellesmere, Chancery leaves the common law judgment in peace and is only concerned with the corrupt conscience of the party.

In 1616, the dispute between the Chief Justice and the Lord Chancellor was finally referred to King James I. On the advice of his Attorney General, Sir Francis Bacon, the King resolved the matter in favour of Lord Ellesmere.<sup>15</sup> The real reason underlying the King's decision to side with Chancery was not jurisprudential, but political. Bacon was a firm defender of the royal prerogative over the common law, whereas Sir Edward Coke favoured the supremacy of the common law over the royal prerogative. So Chancery, like that other peculiarly English institution, the Church of England, traces its independence and pre-eminence as much to a clash of political wills as to any doctrinal dispute. Coke was dismissed from office shortly after *The Earl of Oxford's Case* and, the following year, Bacon succeeded Lord Ellesmere as Lord Chancellor. Less than 30 years after *The Earl of Oxford's Case*, the issue of royal prerogative was to become a prime cause of the English Civil War.

Confident in its new status, equity matured through the seventeenth century like a good port wine of the sort so popular at the time. One of the Chancellors of this period was Sir Heneage Finch, Earl of Nottingham,<sup>16</sup> who has rightly been called the father of modern equity.<sup>17</sup> The doctrine of clogs on the equity of redemption, which enabled borrowers to redeem their mortgaged land free from unconscionable conditions, and the modern rule against perpetuities<sup>18</sup> find their source in his judgments. However, it was a frequent criticism of Chancery in the sixteenth and seventeenth centuries that the Chancellor's discretion to dispense justice ad hoc on the ground of 'conscience' produced justice that varied markedly in quality from one Lord Chancellor to the next. Thus one sixteenth-century lawyer asked whether '*it be meet that the Chancellor should appoint unto himselfe, and publish to others any certaine Rules & Limits of Equity*'.<sup>19</sup> In the mid-seventeenth century, such criticism had become a standing joke, hence John Selden's famous observation that the official measure of justice might as well be the foot, because it varies according to the length of the Chancellor's foot.<sup>20</sup> In fact, even that assessment may have been overgenerous in so far as it suggests that each Chancellor always acted consistently with his own previous judgments. In truth, the imprint of the Chancellor's foot would frequently vary from case to case.

In the eighteenth century, Enlightenment philosophy helped to free equity from its early association with the royal prerogative and ecclesiastic notions of conscience, so that it became, in Enlightenment terms at least, a 'rational' feature of the law. This was followed in the nineteenth century by a period of consolidation and development,

<sup>15</sup> Hence the maxim 'where equity and law conflict equity prevails'. See Chapter 16.

<sup>16</sup> Lord Chancellor, 1675–82.

<sup>17</sup> Sir W. Holdsworth, *History of English Law* (London: Methuen, 1966) vol. VI at 547.

<sup>18</sup> See Chapter 6.

<sup>19</sup> W. Lambarde, quoted in S. F. C. Milsom, *Historical Foundations of the Common Law*, 2nd edn (London: Butterworths, 1981) at 94.

<sup>20</sup> *Table Talk of John Selden* (ed. F. Pollock, 1927) at 43.

culminating in the procedural unification of the Court of Chancery with the courts of common law (this is considered in the next section). The late nineteenth century can also be regarded as the golden age of the settlement trust.

By the twentieth century, it was generally accepted that 'equity's naked power of improvisation' had long since been 'spent'.<sup>21</sup> One judge even asserted that '[i]n the field of equity the Chancellor's foot has been measured or is capable of measurement', although his Lordship added the following caveat:

This does not mean that equity is past child-bearing; simply that its progeny must be legitimate—by precedent out of principle.<sup>22</sup>

### Reform of Chancery procedure

A victim of its own success, by the early nineteenth century, the Court of Chancery had become hopelessly busy. The creation at this time of strict rules preventing trustees from entering certain species of transaction,<sup>23</sup> which rules still survive today,<sup>24</sup> has been attributed to the fact that the courts were frantically busy, and were therefore unable to examine the rights and wrongs of individual transactions in any detail.<sup>25</sup> The appointment, in 1729, of the Master of the Rolls (the chief Chancery Master) to sit as a second judge in certain cases had done little to reduce the burden on the Chancellor, because any decision of the Master of the Rolls could still be appealed to the Chancellor. It was not until 1833 that the Master of the Rolls had a true concurrent jurisdiction. In 1813, a Vice-Chancellor was appointed to assist the Chancellor and the Master of the Rolls. Yet when, in 1816, Sir Launcelot Shadwell VC was asked by a Commission of Inquiry whether the three judges could cope, he is said to have replied: '*No; not three angels.*'<sup>26</sup>

The Chancery judges were, indeed, overworked and increasingly unable to cope with the demands made upon them. In 1616, the supremacy of equity had been established as a means of escaping the common law jurisdiction, but by the nineteenth century, because of the backlog of administration in the Court of Chancery, escape was often sought in the other direction. Even as late as 1852, it appears that claimants were attempting to avoid the queue to the Chancellor's door by asserting concurrent common law rights arising out of facts that ought to have been the exclusive concern of the Court of Chancery. Thus in *Edwards v. Lowndes*,<sup>27</sup> Lord Campbell CJ had to remind

<sup>21</sup> R. P. Meagher, W. M. C. Gummow, and J. R. F. Lehane, *Equity, Doctrines and Remedies*, 2nd edn (Sydney: Butterworths, 1984) at 68–9. <sup>22</sup> *Cowcher v. Cowcher* [1972] 1 All ER 943, per Bagnall J at 948.

<sup>23</sup> *Keech v. Sandford* (1726) Sel Cas Ch 61. <sup>24</sup> See Chapter 10.

<sup>25</sup> J. H. Langbein, 'Questioning the trust law duty of loyalty: sole interest or best interest?' (2005) 114 Yale L J 929, 987–90.

<sup>26</sup> Cited in G. R. V. Radcliffe and G. Cross, *The English Legal System*, 3rd edn (London: Butterworths, 1954) at 153, n. 1. Note that, under the Constitutional Reform Act 2005, the Vice-Chancellor is renamed 'Chancellor of the High Court'. <sup>27</sup> (1852) 1 El & Bl 81.

litigants that a trustee is accountable to the beneficiaries of his trust in equity, but not at common law:

no action at law for money had and received can be maintained against him, though he has money in his hands which under the terms of the trust he ought to pay over to the cestui que trust.<sup>28</sup>

The Court of Chancery Act 1850 and the Court of Chancery Procedure Act 1852 were early attempts to wrestle with the procedural problems in the Court of Chancery, the latter appearing in the same year as the first instalment of *Bleak House*, Charles Dickens's great satire on delays in Chancery.<sup>29</sup> However, the major step towards expediting the procedure of Chancery did not come until Lord Chancellor Selborne introduced the Judicature Act 1873 into Parliament. Ironically, it was due to administrative delays that the statute did not, in fact, come into force until 1875, when it was re-enacted with amendments. We now refer collectively to the Judicature Acts 1873–75. By these enactments, the Supreme Court of Judicature was established with concurrent jurisdiction to administer the rules of equity and law within a unified procedural system. Today, the same judges administer both law and equity.

### The historical development of the trust

The progenitor of the trust was the 'use'.<sup>30</sup> Later, we will examine the shared history of the use and the trust in detail, but in simple terms we can say that the trust of land began its life when medieval monks wished to enjoy the benefit of land without infringing their vow of poverty by actually being owners of the land.<sup>31</sup> A more colourful account suggests that the trust originated when early medieval landowners went abroad on religious crusades and pilgrimages, leaving behind their families and their lands.<sup>32</sup> Before he 'took up the cross', the crusader would make a legal transfer of his lands to a trusted friend. The trusted friend, or 'trustee', would then be the legal owner of the land, with all the legal rights and powers that entails, but he would be aware that his duty was to re-convey the land to the crusader on his return and, in the meantime, to hold the land for the benefit of the crusader's family. If the trustee, asserting his legal entitlement to the lands, refused to account to the crusader's family for rents received on the lands, or otherwise exercised his legal entitlement in bad conscience, the crusader's family

<sup>28</sup> (1852) 1 El & Bl 81 at 89. *Cestui que trust* (pronounced 'settee key trust') is an archaic description of a trust beneficiary. Translated from the medieval French, it means 'the one who trusts'. It is hard to find a case within the past 30 years in which the term has been used.

<sup>29</sup> The novel, which was published in serialized form during 1852 and 1853, was an historical critique of Chancery procedures, which had already been, in large part, reformed by the time the novel was written. See W. S. Holdsworth, *Charles Dickens as a Legal Historian* (New Haven: Yale University Press, 1928).

<sup>30</sup> See, generally, N. G. Jones, 'Uses, trusts and a path to privity' [1997] 56(1) CLJ 175.

<sup>31</sup> Holdsworth, *op. cit.*, vol. IV, at 415.

<sup>32</sup> For an interesting argument that the crusaders might have brought the idea of the trust back from the crusades see M. M. Gaudiosi, 'The influence of the Islamic law of Waqf on the development of the trust in England: the case of Merton College' (1988) 136 U Pa L Rev 1231.



(the ‘beneficiaries’ of the trust as we would call them today) had no rights at law, but could petition the King for justice in the light of the circumstances of their particular case. If he was moved to, the King would exercise his royal prerogative and order the recalcitrant trustee to do his duty, and if the trustee had wrongfully paid away the rents to a third party, the King would make an order against the third party. In every case, the order operated ‘*in personam*’ against the personal conscience of the trustee or the third party, but initially the beneficiaries of the trust had no property right in the trust assets.<sup>33</sup> We will now turn to consider the historical relationship between the trust and the use.

As early as the seventh and eighth centuries, the common law had a form of ‘use’ in relation to chattels and money, under which money had and received by A ‘for the use of B’ subjected A to common law obligations in relation to the use of the money. If A refused to account to B, B could bring an action to account which came to resemble something like a modern action for breach of trust.<sup>34</sup> This common law ‘trust’ for the payment of money was enforced long before Chancery recognized trusts of land.

It was in relation to land that [t]he use simply could not be fitted into the common law scheme of things, for the doctrine of estates and the doctrine of seisin left no place for the separation of beneficial enjoyment from legal title.<sup>35</sup> (The doctrines of estates and seisin merely contemplated the state of a feudal tenant’s legal entitlement relative to that of his overlord.) However, the Chancellor was prepared to recognize the use of land and, as early as the beginning of the thirteenth century, it was acknowledged to be a practical device for separating legal title from beneficial enjoyment. Thus if Sir Guy de Pends were about to depart for the crusades, he might choose to convey the estate in his land (the ‘feoffment to uses’) to his trusted friend Sir Richard de Livers (the ‘feoffee to uses’) ‘for the use and benefit of Lady de Pends and her children’. Sir Richard would thereby become solely entitled to the land at law, but with an obligation to exercise his entitlement for the exclusive benefit of Lady de Pends and her children, and to reconvey the land to Sir Guy on his eventual return from the crusades. The use in this form did not bind the land itself so as to confer a property right on Lady de Pends and the children; rather, it was conceived as a personal confidence reposed in Sir Richard de Livers, binding upon his conscience and the conscience of any third party (other than a bona fide purchaser of the legal estate for value without notice of the use) into whose name Sir Richard might choose to pass the legal title.<sup>36</sup> The Chancellor ensured that Sir Richard did not place unconscionable reliance upon his legal title to the detriment of Sir Guy, Lady de Pends, and their children. From the King’s point of view, there was a significant downside to the recognition of the use. The King was entitled, as supreme overlord in the medieval feudal system of land ownership, to levy valuable feudal ‘fines’

<sup>33</sup> P. Vinogradoff, ‘Reason and conscience in the fifteenth and sixteenth centuries’ (1908) 29 LQR 373, 379.

<sup>34</sup> *Taillour v. Medwe* (1320) Year Books of Edward II, 14 Edward II (London: Selden Society, 1988) vol. 104, at 39 and xi.

<sup>35</sup> A. W. B. Simpson, *An Introduction to the History of the Land Law*, 2nd edn (Oxford: Clarendon Press, 1986), esp. ch. 8 on ‘Uses and the statute’ at 175.

<sup>36</sup> Simpson, *op. cit.*, at 170.

or ‘incidents’ whenever land was inherited or an owner died without an heir. The use provided a way of circumventing these feudal incidents by allowing the owner of land to place his legal title in a number of persons who could be replaced periodically, so ensuring that the land always had a living legal owner and that legal title would never be inherited or left without an heir. In the meantime, the true beneficiary of the land was able to continue in occupation of the land and to reap the benefits of the land, so that the use can be regarded as an early ‘tax avoidance scheme’. The use was also subject to the complaint that, because of it, ‘no man can know his title to any land with certainty’.<sup>37</sup> In response to these various objections to the use, Henry VIII enacted the Statute of Uses 1536.<sup>38</sup> The effect of the statute was to transfer legal title to the beneficiary of the use (the so-called *cestui que use*), thereby bringing the use to an end or ‘executing’ it. By means of this statute, Henry VIII executed a great many uses, but as with his wives, he did not execute them all. The only uses that were executed were those concerning land for which there was a single named beneficiary, usually the original absolute owner, and which therefore represented a sham device for avoiding feudal incidents. Eventually, of course, inventive legal draftsmen found creative ways of avoiding the statute entirely. One such was a ‘use upon a use’ in the generic form: ‘to A to the use of B to the use of C’. It was supposed that the effect of the Statute of Uses would be to execute the first use by vesting legal title in B, who would then be obliged to hold it to the use of the intended beneficiary, C. This supposition was confirmed by the routine enforcement in Chancery of B’s conscientious obligation to observe the use upon a use in favour of C. In the seventeenth century, the Chancellors ‘began to enforce the use upon a use as a trust’,<sup>39</sup> leading one commentator to observe that a ‘bastardly use’ had started up ‘by the true name which the use had at first—which is “trust and confidence”’.<sup>40</sup> By the end of the seventeenth century, it was not even necessary for A to be mentioned at all: Chancery was content to enforce a form of conveyance ‘to B, unto and to the use of B, in trust for C’.<sup>41</sup> Chancery was doubtless comforted in this approach by the enactment of the Tenures Abolition Act of 1660, which removed the feudal incidents that the Statute of Uses had been introduced to protect. The interest of C, the *cestui que trust*, could only be defeated by a bona fide purchaser of the legal estate for value without notice of C’s interest, and so the modern form of equitable ownership<sup>42</sup> and the modern trust were conceived.<sup>43</sup>

It is something of a mystery how and why a mere personal right against a particular defendant, based upon his possession of a thing and the corresponding burden on his

<sup>37</sup> T. Audley, *Reading on Uses* (1526) (a reading on 4 Hen. 7, c. 17) cited in J. H. Baker and S. F. C. Milsom, *Sources of English Legal History: Private Law to 1750* (London: Butterworths, 1986) at 103.

<sup>38</sup> 27 Hen. 8, c.10.

<sup>39</sup> Sir W. Holdsworth, *History of English Law*, 2nd edn (London: Methuen, 1937) vol. VI, at 641.

<sup>40</sup> H. Sherfield, *Reading on Wills* (1623) at 32. (This publication is a commentary on the Statute of Wills 1540, Hen. 8, c.1.) See, generally, M. Lupoi, ‘Trust and Confidence’ (2009) 125 LQR 253.

<sup>41</sup> Simpson, *op. cit.*, at 187–8. Baker and Milsom, *op. cit.*, at 125–6.

<sup>42</sup> *Sinclair v. Brougham* [1914] AC 398, HL, *per* Lord Parker of Waddington at 441–2.

<sup>43</sup> Sir W. Holdsworth, *A History of English Law*, 3rd edn, vol. IV (London: Methuen, Sweet & Maxwell, 1945) at 433.

conscience, became a property right in the thing enforceable by the beneficiary against the whole world, apart from the bona fide purchaser for value of a legal estate without notice. The answer may lie in the pragmatism and economy of the equity judges. As we know, there never were many equity judges in the old Court of Chancery and those few were hopelessly overburdened. They could not have failed to appreciate the savings on their time that could be achieved if, instead of having to examine the conscience of each alleged trustee or recipient of trust property on a case-by-case basis, they were to protect trust beneficiaries generally by recognizing them to have proprietary rights in the trust assets. The Chancery judges would have been familiar with the relatively efficient common law system of proprietary entitlement and, by adopting a version of it, they ‘followed the common law’. Crucially, though, equity’s idea of property was not as extensive as that of the common law; hence the recognition of the superiority of legal title by means of the ‘bona fide purchaser’ exception (according to which, the proprietary title of a mere ‘equitable owner’ does not bind the good faith purchaser of legal title who paid value and had no notice of the equitable interest). Had equitable property been made coextensive with legal title, equity would have effectively undermined the common law of proprietary title. It is because of these inherent limitations of equitable property that it cannot properly be said to confer true rights ‘*in rem*’,<sup>44</sup> although that term (somewhat unhelpfully adopted from the Roman law, which has no concept of division between legal and equitable property)<sup>45</sup> is still often used as shorthand to describe a beneficiary’s proprietary right in the trust property.

Whatever the explanation for how and why the beneficiary’s mere personal right against a particular defendant became a property right in the trust asset, it is now clear that when the absolute owner of an asset transfers it to trustees on express trusts for certain beneficiaries, the effect is to vest legal title to the property in the trustees and equitable title (also called equitable or beneficial ‘ownership’) in the beneficiaries. Of course, when we use the language of equitable ‘title’ and equitable ‘ownership’, this is just convenient shorthand to describe the most distinctive and potent feature of the beneficiaries’ interest under a trust, which is its proprietary status, i.e. its ability to bind third parties other than the trustee. One must not be confused by the shared shorthand into thinking that equitable title is the mirror-image of legal title.<sup>46</sup> Equity’s operation and proprietary effect is, as we will see, very different to that of law.

Professor Lionel Smith has suggested that the most significant and surprising step in the evolution of the use to the trust was not that the use came to bind strangers who wrongfully accepted a transfer of the feoffment from the feoffee, but that the court decided that it should bind those who had *innocently* inherited the feoffment from the feoffee. This is a strong argument, for an innocent successor commits no wrong, unless it is the wrongful *retention* of property to which someone else has better title.

<sup>44</sup> ‘In the thing.’

<sup>45</sup> D. Johnston, *The Roman Law of Trusts* (Oxford: Clarendon Press, 1988).

<sup>46</sup> This warning is reiterated in James Edelman, ‘Two Fundamental Questions for the Law of Trusts’ (2013) 129 LQR 66.

It would have been understandable had equity declined to recognize any burden on the conscience of the innocent inheritor. According to Professor Smith, the decision of the Chancery judges to enforce such a burden was the decision that transformed a personal right over a thing in the hands of the feoffee<sup>47</sup> into a proprietary right in the thing<sup>48</sup> binding on the whole world (other than innocent purchasers without notice). The crux of Smith's argument is that the step to recognizing the proprietary right was made possible because the personal right already had a *negative* proprietary aspect, in so far as every person in the world was already under an obligation not to commit any wrongful interference with the beneficiary's personal right against the feoffee.<sup>49</sup> We will return to this argument in later chapters.

## Conceptual foundations

The purpose of this section is to introduce the modern concepts of equity and trust; with a special focus on how equity relates to the common law and how the trust relates to other legal institutions, such as company and contract. The relationship of equity to common law is considered further throughout the book, and especially in Chapters 14 and 16. Chapter 16 contains a very detailed examination of equitable principles (maxims), doctrines, and remedies. The relationship of the trust to other legal institutions is considered further throughout the book, and especially in Chapter 2, where the trust is contrasted with such legal institutions as contract, corporation, and charge.

## Equity

Equity is a body of principles, doctrines, and rules, developed originally by the old Court of Chancery in constructive competition with the rules, doctrines, and principles of the common law courts, but now applied, since the Judicature Acts 1873–75, by the unified Supreme Court of England and Wales. The abolition of the old Court of Chancery and courts of common law has led to the suggestion that the distinction between law and equity is now obsolete; that the two systems of law have become 'fused'. The better view is that the common law and equity remain distinct, but mutually dependent, aspects of law.<sup>50</sup> They '*are working in different ways towards the same ends, and it is therefore as wrong to assert the independence of one from the other as it is to assert that there is no difference between them.*'<sup>51</sup>

<sup>47</sup> A *jus in personam ad rem*.

<sup>48</sup> A *jus in rem*.

<sup>49</sup> L. Smith, *Transfers in Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing, 2002) at 123.

<sup>50</sup> The term 'common law' is here used in contrast with 'equity', but it should be borne in mind that 'common law' and 'equity' are both parts of the common law, as that term is used to distinguish the English precedent-based system of law from code-based or 'civil' systems of law derived from the Roman model. To confuse matters still further, the term 'common law' can be used in a third sense, to describe English case law in contradistinction to English statutory law.

<sup>51</sup> Radcliffe and Cross, *op. cit.*, at 116.

The difficulty with asserting the independence of law from equity is inherent in Professor Ashburner's attempt to describe equity and law as different streams running in the same channel without mingling their waters.<sup>52</sup> The metaphor does not work: it is no more sensible to suppose that two streams of water could be kept separate within the same channel than to suppose that the same judges sitting in the same courts could dispense two truly independent forms of justice. However, the assertion that equity and the common law are identical is equally inaccurate. Lord Diplock was no doubt correct to observe, in *United Scientific Holdings Ltd v. Burnley Borough Council*, that the waters of Ashburner's confluent streams have mingled,<sup>53</sup> but his Lordship was surely guilty of the so-called 'fusion fallacy' if he meant to suggest that there is no longer any substantial functional difference between equity and the common law. The learned authors of the Australian textbook *Meagher, Gummow, and Lehane on Equity* took the view that their Lordships, in *United Scientific*, had been guilty of that very error, indeed they described their Lordships' decision as 'the low water mark of modern English jurisprudence'.<sup>54</sup> Professor Peter Birks took a more charitable view of Lord Diplock's intent, observing (with yet another aquatic metaphor) that:

it is dangerous, not to say absurd, almost 120 years after the Judicature Acts, to persist in habits of thought calculated to submerge and conceal one or other half of our law.<sup>55</sup>

This brings us back to our initial view, surely the correct one, that the common law and equity are mutually dependent aspects of all law:

Neither law nor equity is now stifled by its origin and the fact that both are administered by one Court has inevitably meant that each has borrowed from the other in furthering the harmonious development of the law as a whole.<sup>56</sup>

### The functional distinction between equity and law

The distinction between equity and law must be understood at the level of function, not form. The eminent legal historian, Professor J. H. Baker, has observed that:

If, for reasons of history, equity had become the law peculiar to the Court of Chancery, nevertheless in broad theory equity was an approach to justice which gave more weight than did the law to particular circumstances and hard cases.<sup>57</sup>

It is because equity is functionally distinct from the common law that both approaches to law survived the Judicature Acts, which brought about the physical and jurisdictional unification of the old Court of Chancery with the courts of common law.

<sup>52</sup> Professor Ashburner, *Principles of Equity*, 1st edn (1902) at 23.

<sup>53</sup> *United Scientific Holdings Ltd v. Burnley Borough Council* [1978] AC 904, per Lord Diplock at 924–5.

<sup>54</sup> Op. cit. at xi.

<sup>55</sup> *Civil Wrongs: A New World, The Butterworth Lectures, 1990–91* (London: Butterworths, 1992) at 55.

<sup>56</sup> *Elders Pastoral Ltd v. Bank of New Zealand* [1989] 2 NZLR 180, per Somer J at 193.

<sup>57</sup> Op. cit. at 132–3.

The function of the common law is to establish rules to govern the generality of cases; the effect of those rules is to recognize that certain persons will acquire certain legal rights and powers in certain circumstances. Legal rules allow the holders of legal rights and powers to exercise them in the confidence that they are entitled to do so. But ‘*in some cases it is necessary to leave the words of the Law, and follow that [which] Reason and Justice requireth, and to that intent Equity is ordained; that is to say, to temper and mitigate the rigor of the Law*’.<sup>58</sup> The function of equity is to restrain or restrict the exercise of legal rights and powers in particular cases, whenever it would be unconscionable for them to be exercised to the full. It is also said that equity ‘supplements’ the shortcomings of the common law, but if that is correct, it is nevertheless the case that equity only supplements the common law when, by doing so, it can prevent unconscionable reliance on the shortcomings of the common law.

‘Unconscionable’ cannot be defined in the abstract; it can only be understood in connection to the facts of particular cases.<sup>59</sup> The question is always whether it would be unconscionable to exercise *this* legal right or power in *this* factual context.<sup>60</sup> Unconscionable conduct ‘*is not by itself sufficient to found liability*’.<sup>61</sup> The most that can be said of a general nature is that unconscionability ‘*will commonly involve the use of or insistence upon legal entitlement to take advantage of another’s special vulnerability or misadventure... in a way that is unreasonable or oppressive to an extent that affronts ordinary minimum standards of fair dealing*’.<sup>62</sup>

Even the legal rights that accompany the legal title to a fee simple absolute in possession, the most complete form of ownership known to land law, are not beyond equity’s jurisdiction to restrain an unconscionable abuse. So, for example, if the legal owner of the fee simple title to land invites a stranger to build a house upon it, having raised in that stranger a legitimate expectation that the stranger will thereby acquire a beneficial interest in the land, and the stranger duly builds the house in reliance on the assurance given by the legal owner, equity restrains the legal owner from asserting the absolute quality of his legal title. The legal owner will not be able to exercise his usual legal right to evict trespassers in order to evict the stranger.<sup>63</sup>

It may be true, as Millett LJ suggested in *Jones & Sons (a firm) v. Jones*,<sup>64</sup> that the common law itself has sometimes had regard for considerations of conscience, but if the common law has ever prevented a person from placing unconscionable reliance upon a legal rule or right or power, it was then performing an equitable function.

<sup>58</sup> Christopher St German, *Dialogue in English between a Doctor of Divinity and a Student in the Laws of England etc* (London: Treverys, 1530) (ch. XVI).

<sup>59</sup> *National Westminster Bank plc v. Morgan* [1985] AC 686, per Lord Scarman at 709.

<sup>60</sup> *Royal Brunei v. Tan* [1995] 3 WLR 64, per Lord Nicholls at 76B–D.

<sup>61</sup> Sir Nicolas Browne-Wilkinson, Presidential Address of the President of the Holdsworth Club (Holdsworth Club, University of Birmingham, 1991) at 7.

<sup>62</sup> *The Commonwealth v. Verwayen* [1990] 170 CLR 394, per Deane J at 441.

<sup>63</sup> See ‘Proprietary estoppel’, discussed in Chapter 8. See, generally, E. Cooke, *The Modern Law of Estoppel* (Oxford: Oxford University Press, 2000).

<sup>64</sup> [1996] 3 WLR 703, at 710E, CA (‘It would... be a mistake to suppose that the common law courts disregarded considerations of conscience’).

Equity does not always consider it to be unconscionable for a party to take advantage of a legal right in a way that is 'sharp,' or even oppressive and unfair. So, for example, in *Liverpool Marine Credit Co v. Hunter*,<sup>65</sup> the defendants (the owners of a ship subject to a mortgage) deliberately sent the ship to Louisiana knowing that Louisiana did not recognize mortgages of ships. The plaintiff argued that the defendant had committed a positive fraud. The judge held that the defendant owed no duty to the plaintiff:

I do not... see how Equity could properly interfere to restrain the actions which, however oppressive... arose out of remedies employed by the plaintiff for the recovery of his debt, of which the law entitled him to avail himself.<sup>66</sup>

It is not uncommon for a judge to express his disapproval of the way in which a party has exercised a legal right or power and to conclude, nevertheless, that equity is powerless to do anything about it.<sup>67</sup> The court will even *insist upon* morally dubious conduct, such as breaking a non-contractual 'gentleman's agreement' entered into by a trustee, if the financial interests of the beneficiaries require it.<sup>68</sup>

The essential point is that equity is meant to regulate and supplement the general law; it is not meant to undermine the general law with exceptions. In short, 'equity follows the law'.<sup>69</sup> Having said that, the former Chief Justice of Australia, Sir Anthony Mason, is not alone in taking a different view. He has suggested that:

by providing for the administration of the two systems of law by one supreme court and by prescribing the paramouncy of equity, the Judicature Acts freed equity from its position on the coat-tails of the common law and positioned it far advances beyond its old frontiers.<sup>70</sup>

From this starting point, his Lordship contends that the neighbourhood principle in the common law tort of negligence might conceivably have been developed in equity, rather than in the common law tort of negligence.<sup>71</sup> This writer would respectfully disagree. It is not, and should not be, equity's task to determine which forms of social behaviour ought to give rise to justiciable obligations; equity should be concerned with one form of wrongful behaviour, and one only; namely, the unconscionable abuse of rights and powers established by the common law. Equity follows the law, 'coat-tails' and all. The distinction between common law and equity is predicated on an immutable distinction between their functions. The function of the common law is to lay down rules for society, generally—to regulate society one might say—whereas the function of equity is to regulate the common law.<sup>72</sup> Remove this distinction and one entirely removes any meaningful distinction between common law and equity, leaving one with

<sup>65</sup> (1868) LR 3 Ch App at 479.      <sup>66</sup> *Ibid.* at 487.

<sup>67</sup> See, for example, *Re McArdle* [1951] 1 Ch 669 at 676 (in Chapter 4).

<sup>68</sup> *Buttle v. Saunders* [1950] 2 All ER 193.      <sup>69</sup> See Chapter 16.

<sup>70</sup> 'The place of equity and equitable remedies in the contemporary common law world' (1994) 110 LQR 238 at 239.      <sup>71</sup> *Ibid.*

<sup>72</sup> 'The daily relations of man and man are governed by the common law, tempered but slightly with equity': Sir Owen Dixon, *Jesting Pilate*, at 13 (cited by The Hon. Mr Justice G. A. Kennedy, 'Equity in a commercial context', in *Equity and Commercial Relationships* (P. Finn, ed.) (Sydney: The Law Book Co, 1987) at 1).



no distinction apart from that based on the bland historical observation that equity is the form of law developed in the old Court of Chancery prior to the Judicature Acts.

### Unconscionability, morality, and social values

Chris: 'We took a contract.'

Vin: 'It's not the kind any court would enforce.'

Chris: 'That's just the kind you gotta keep.'

This dialogue between the characters played by Yul Brynner and Steve McQueen in the MGM classic, *The Magnificent Seven*,<sup>73</sup> expresses the fundamental incompetence of courts to deal with matters of private moral conscience and social obligation. Sir Anthony Mason made substantially the same point when sitting as the Chief Justice of Australia:

The breaking of a promise, without more, is morally reprehensible, but not unconscionable in the sense that equity will necessarily prevent its occurrence or remedy the consequent loss.<sup>74</sup>

Equity's concern with unconscionability is a concern for only a limited branch of immoral or antisocial behaviour—namely, the immoral or antisocial abuse of legal rights. Attempts to use equity as a vehicle for the promotion of morality and social justice must be sensitive to this limitation or they will fail. Thus Margaret Halliwell is right to observe that '*conscience, as represented by the body of law we all know as equity, contributes a key "morality" to the legal system ... general*'<sup>75</sup> and that equity '*operates as an anti-legal element via the judicial modification of existing rules of law by reference to current conditions and circumstances*'<sup>76</sup> (or '*matches established principle to the demands of social change*'<sup>77</sup> as one senior judge put it). But Halliwell overestimates equity's functional capacity when she suggests that, in the context of trust law, equity '*prescribes optimum standards of behaviour in social relationships of trust*'.<sup>78</sup> Equity doubtless exemplifies or demonstrates a legal form of trusting through its enforcement of the trust, and the legal paradigm might influence social perceptions. In fact, a person who wants to entrust assets to another will often rely on an equitable trust (the sort a court will enforce) precisely because mere moral trust will not guarantee performance of the obligation.<sup>79</sup> However, it is going too far to suggest that equity 'prescribes' standards of social behaviour. If that is a legal function, it is a function of the general law we call the 'common law'.

Caution must be exercised before notions of social and moral wrongdoing are introduced into the interpretation of unconscionability. Judges can do no more than promote

<sup>73</sup> John Sturges (dir.) *Metro Goldwyn Meyer*, 1960.

<sup>74</sup> *The Commonwealth v. Verwayen* (1990) 170 CLR 394 at 416.

<sup>75</sup> *Equity and Good Conscience in A Contemporary Context* (London: Old Bailey Press, 1997) at 1–2.

<sup>76</sup> *Ibid.* at 5. <sup>77</sup> Waite LJ in *Midland Bank v. Cooke* [1995] 2 FLR 915 at 927D.

<sup>78</sup> *Op. cit.* at 142.

<sup>79</sup> *Ullah v. Ullah* [2013] EWHC 2296 (Ch) joins a long line of cases in which an owner claimed to have trusted someone (in this case his son) but found to his cost that he had failed to create a trust that a court could recognize.



their own 'reasonable', 'objective' ideas of morality and society.<sup>80</sup> It was observed long ago that even when a judge is conscious that he has no right to '*Dictate according to his Will and Pleasure*', he will nevertheless look to his own moral ideas and perceptions of society, to what he perceives to be 'that infallible Monitor within his own Breast'.<sup>81</sup>

One should not lose sight of the relatively narrow sphere within which unconscionability and equity operate. Equity is singularly uncritical of a vast range of behaviour that might be regarded as immoral or antisocial. No court of law, not even the old Court of Chancery, is in any moral sense a court of conscience.<sup>82</sup> In 1594, a leading scholar of English law made the following telling observation:

There is a difference between Equitie and Clemencie: for Equitie is always most firmly knit to the evil of the Law which way soever it bends, whether to clemency, or to severity.<sup>83</sup>

And it is a myth to suppose that courts of law (and equity) are concerned with social justice per se. If 99 per cent of all wealth were in the hands of 1 per cent of the population, this would be a great social inequality, but equity would have nothing to say on the matter. Equity, especially in the context of trusts law, is concerned with supporting or vindicating private rights to property; it is not its business to reassess the political correctness or moral 'righteousness' of wealth.

### Equity hardens into rights

It has been suggested that one way of describing the difference between common law and equity is to say that common law seeks to achieve justice in the generality of cases, through certainty, whereas equity seeks to prevent injustice occurring in individual cases as a result of the application of general legal rules. Of course, such a simple statement could never be the whole story. For one thing, although equity is, in theory, unconcerned with the generality of cases, in that it does not share the common law's concern to lay down rules for the general governance of society, equity is a pragmatic and efficient system of law, and the equity judges have always been concerned to respect precedents laid down by other equity judges. So, if a judge has restrained the unconscionable exercise of a legal right in one particular case, future judges will tend to apply equity to restrain the unconscionable exercise of a legal right in every like case. Over time, this means that awarding equitable relief in certain common types of case tends to be routine. Hence the rhetorical question posed by Lord Eldon, the Lord Chancellor, in *Muckleston v. Brown*.<sup>84</sup>

Is the court to feel for individuals and to oblige persons to discover in particular cases and not to feel for the whole of its own system and compel a discovery of frauds that go to the root of its whole system?<sup>85</sup>

<sup>80</sup> See, generally, G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (Berlin, 1988); G. Watt, 'Giving unto Caesar: rationality, reciprocity and legal recognition of religion' in *Current Legal Issues: Law and Religion* (R. O'Dair and A. Lewis, eds) (Oxford: Oxford University Press, 2001) at 45–64.

<sup>81</sup> R. Francis, *Maxims of Equity* (Fleet Street: J. Stephens, 1727).

<sup>82</sup> *Re Telescriptor Syndicate* [1903] 2 Ch 174, per Buckley J at 196.

<sup>83</sup> W. West, *Symboleography* (London, 1594) section 28.

<sup>84</sup> (1801) 6 Ves Jun 52.

<sup>85</sup> *Ibid.* at 69.

When, over time, equitable relief is routinely granted to restrain unconscionability in certain types of case, it might make sense to say that the equitable claimant is *entitled* to his relief and therefore that he has an equitable *right* to a remedy. This tendency of equity to become rule-bound over time has been called the '*the decadence of equity*'.<sup>86</sup> One case in which this has clearly occurred is the recognition that trust beneficiaries have equitable proprietary rights in, or 'equitable title' to, trust property. Nowadays, with the possible exception of the constructive trust,<sup>87</sup> there really isn't very much equity in the trust, at least not that flexible equity which is functionally distinct from the common law. Bernard Rudden was correct to observe that the traditional distinction between law and equity '*provides only an historical and not a rational account of the trust*'.<sup>88</sup>

## Trust

The trust is a unique way of owning property under which assets are held by a trustee for the benefit of another person, or for certain purposes, in accordance with special equitable obligations. The trust should be contrasted with absolute ownership, because a person who is solely and absolutely entitled to an asset is entitled to the exclusive and unrestricted right to possess, use, and otherwise enjoy the asset for his *own* benefit (he is even at liberty to abuse and destroy it), subject only to limitations imposed by statute as a matter of public policy<sup>89</sup> and limitations imposed to take account of the rights of others to enjoy the assets they own absolutely.<sup>90</sup>

It is helpful to contrast the trust with other legal ideas, such as absolute gift and contract, with which the reader may already be familiar.<sup>91</sup> If the owner of this book wishes to make an absolute gift of it to one of next year's students, he or she simply has to transfer possession of the book in circumstances which indicate that an absolute gift is intended. Words such as 'happy birthday', 'this is for you', or 'I don't need this any more' will suffice. Transferring possession of an ordinary moveable asset is sufficient to transfer legal title<sup>92</sup> and, where an absolute gift is intended, the transfer of legal title also has the effect of conferring the exclusive right to the beneficial use and enjoyment of the asset on the transferee. In contrast, transfer of legal title to a transferee to hold on trust for someone else has the quite different effect of constituting the transferee a trustee of the property for the designated beneficiary. A related distinction between an absolute gift and a trust is that it is possible to create a trust for the benefit of beneficiaries who, because of some legal incapacity such as infancy or mental illness, cannot take an absolute interest in the asset in question. Land, for example, cannot be held absolutely by

<sup>86</sup> R. Pound 'The decadence of equity' (1905) 5 Columbia LR 20.

<sup>87</sup> See Chapter 8.

<sup>88</sup> 'Things as things and things as wealth' (1994) 14 OJLS 81 at 89.

<sup>89</sup> Such as the rule that a landowner is not entitled to oil and coal discovered under his land.

<sup>90</sup> Such as the common law tort of nuisance, which prevents the owner of land from using his land in a manner detrimental to his neighbour's land.

<sup>91</sup> Such comparisons occupy a significant part of Chapter 2.

<sup>92</sup> See Chapter 4.

any person under the age of 18, but it is possible to transfer land to a competent adult to hold on trust for an infant. It is even possible to create a trust for the benefit of persons who have not yet been born: there is nothing to prevent an 18-year-old from establishing a trust for his grandchildren. Nevertheless, for all of their differences, absolute gifts and trusts do have some significant features in common. Indeed, the express trust has been described as ‘*a gift projected on the plane of time and, meanwhile, in need of management*’.<sup>93</sup> Perhaps their most important common feature is the fact that the transfer of benefit is irrevocable whether made by outright gift or by trust. So if, having read it from cover to cover, the owner of this book declares that she holds it on trust for her friend, the generous student is now a trustee and is no longer entitled to use the book for her own benefit.

It has been suggested that the trust is ‘*functionally indistinguishable from the modern third-party-beneficiary contract*’,<sup>94</sup> in other words that the trust is merely a form of contract between the settlor and the trustees entered into for the benefit of the third-party beneficiary. Langbein argues that:

even in the law of donative transfers the trust functions as a deal, in the sense that what trust law does is to enforce the trustee’s promise to the settlor to carry out the terms of the donative transfer.<sup>95</sup>

It is true that a trust usually originates in the consensual disposition of the trust property by the settlor in favour of a trustee who consents to receive it,<sup>96</sup> but such consent need not be contractual. It is certainly hard to see the contractual ‘deal’ where the court appoints a trustee<sup>97</sup> or where the trust comes into effect on the testator’s death.<sup>98</sup> (The reader should note that the term ‘settlor’ is used to describe the creator of a trust—called an *inter vivos* trust—that comes into effect during the settlor’s lifetime, whereas the term ‘testator’ or ‘testatrix’ is used to describe the creator, male and female respectively, of a trust—called a ‘testamentary’ trust—that comes into effect when the creator of the trust dies.)

There are a number of reasons why it does not make sense to regard the arrangement entered into between settlor and trustee as being contractual in nature. For one thing, whereas a contracting party always has the right to enforce his contractual rights against the other party, the power of enforcing trusts lies with the beneficiaries of the trust, so the settlor of a trust has no power to enforce it against the trustees unless he happens to nominate himself to be a beneficiary or becomes a beneficiary under

<sup>93</sup> F. H. Lawson and B. Rudden, *The Law of Property*, 2nd edn (Oxford: Clarendon Press, 1982) at 55; Rudden (1981) 44 Mod LR 610 (book review of *Gifts and Promises* by J. P. Dawson).

<sup>94</sup> J. H. Langbein, ‘Contractarian basis of the law of trusts’ (1995) 105 Yale LJ 625 at 627. The quotation is followed by the even bolder assertion that ‘[t]rusts are contracts’.

<sup>95</sup> ‘The secret life of the trust as an instrument of commerce’ (1997) 107 Yale LJ 165 at 185.

<sup>96</sup> Professor Kevin Gray has observed that every trust ‘has its origins in some arrangement of consent or assent’: ‘Property in thin air’ [1991] 50(2) CLJ 252 at 302.

<sup>97</sup> See Chapter 8.

<sup>98</sup> *Re Duke of Norfolk’s Settlement Trust* [1981] 3 All ER 220, per Fox LJ at 228h–j.

a resulting trust.<sup>99</sup> Otherwise, the settlor of a trust drops out of the picture just as the donor of an absolute gift drops out of the picture when he has made his gift. Of course, many settlement trusts do not come into effect until the death of the testator, so the testator patently 'drops out' of the picture in those cases.

The most significant distinction between a trust and a contract, even a contract entered into for the benefit of a third party, is the nature of the beneficiary's rights. In some ways, the beneficiary's rights resemble contractual rights, in that they are enforceable against the trustee personally, but the beneficiary's right is not merely a personal right against the trustee; it is also a proprietary right in the asset itself. This is the feature that most clearly distinguishes the English trust from concepts that perform similar functions in other jurisdictions.<sup>100</sup> The significance of the proprietary status of the beneficiary's right under the trust is essentially twofold. First, the beneficiary's right under the trust can be enforced not only against the trustee, but also against the trustee's successors in title. This is useful where the trustee has wrongfully transferred trust property into the hands of a third party and is particularly useful if a trustee dies or becomes insolvent. At no time does the beneficiary's property become part of the trustee's personal estate, so, when a trustee dies, the beneficiary's proprietary right in the trust assets is binding on the trustee's personal representatives<sup>101</sup> and, when a trustee becomes insolvent, the beneficiary's right is binding on the 'trustee in bankruptcy' or, if the trustee was corporate (as many trustees are), on its successor in insolvency.<sup>102</sup> Second, the proprietary status of the beneficiary's right under the trust means that the beneficiary is free to alienate the property wholly (by selling it or giving it away, for example) or partially (by leasing it or subjecting it to a charge such as a mortgage, for example). It is even possible for a beneficiary to declare a trust of her equitable interest, thereby creating a sub-trust, although that possibility is somewhat controversial.<sup>103</sup>

### **Creating a trust**

The deliberate or 'express' creation of trusts, and the necessary prerequisites to constituting an express trust completely, are discussed in depth in Chapters 3 and 4. Here, we will take a brief moment to outline the basics.

### ***Declaring oneself to be a trustee***

The simplest way to create a trust is for the absolute owner of an asset to declare that he holds the asset for the benefit, at least in part, of someone else. He might say: 'See this book I am holding? I declare that I hold it with immediate effect on trust for my room-mate.' Such a 'declaration of trust' will make the original absolute owner a trustee for his room-mate. The room-mate will be the sole beneficial owner or 'equitable' owner of the

<sup>99</sup> See Chapter 5.      <sup>100</sup> Compare, for instance, the French law of *La Fiducie* (see later).

<sup>101</sup> Officers, such as executors and administrators, who administer a deceased person's estate.

<sup>102</sup> The 'administrator', the 'administrative receiver', the 'liquidator', or the 'provisional liquidator', as the case may be (Insolvency Act 1986, ss. 234–236).

<sup>103</sup> See Chapter 6.

book and, as such, she is entitled, assuming that she is a competent adult, to insist that the book be transferred to her.

### ***Transferring property to trustees on trust***

The more usual method of creating a trust is slightly more complicated. It arises when an absolute owner does not retain legal title to the asset, but instead transfers it to a trustee to hold on trust for a designated beneficiary. Of course, a trust may have several trustees<sup>104</sup> and several beneficiaries. Under a traditional settlement trust, the trustee would typically hold the asset on trust for one beneficiary, for the duration of that beneficiary's life, and for another beneficiary after the first has died. The first beneficiary is called the 'life beneficiary' or 'life tenant' and has an immediate interest in the benefit of the asset, which means that she can possess it, take income from it, and so on, whereas the second beneficiary is called the 'remainderman' or 'remainder beneficiary', because she is primarily interested in what remains of the trust assets when the first beneficiary has died. The interest of the life beneficiary is said to vest 'in possession' the moment the trust is created, whereas the interest of the remainder beneficiary merely vests 'in interest' at that point and does not vest in possession until the death of the life beneficiary. Naturally, there may be several life tenants, followed by several remaindermen. No remainderman will be entitled to an interest in possession until all of the life tenants have died. Settlement trusts of this sort are typically created by will. The life tenant will usually be the settlor's surviving spouse and the remaindermen are typically the children of the marriage.

### **The right of beneficiaries to terminate the trust**

When the absolute owner of certain assets subjects them to a private (as opposed to a charitable) trust, absolute ownership of the assets is not so much destroyed as postponed. There are even rules designed to limit the period of the postponement.<sup>105</sup> Eventually, the trust will terminate and the asset will be owned absolutely once again. If a trust is established 'for A for life and B in remainder', B will become the absolute owner of the asset when A dies. Of course, until the trustee actually transfers legal title into B's name, there will still be a form of trust, but, assuming that B is an adult, the trustee's only duty under such a 'bare trust' is to transfer the trust property to B and, in the meantime, to account to B for any income arising from the trust property. By extension of this principle, once A has died B can demand the trust property even if her interest is subject to a contingency that has not yet been met. The trust might have been established 'for A for life and B in remainder when B reaches the age of 30'. If, when A dies, B is a competent adult and is solely entitled to the benefit of the trust property, she is entitled to demand that the trustee transfer the property to her even though she has not yet reached the age of 30. This rule was laid down in the case of *Saunders v. Vautier*.<sup>106</sup>

<sup>104</sup> Subject to certain limits, see Chapter 11.

<sup>105</sup> The rules against perpetuity are considered in Chapter 6.

<sup>106</sup> (1841) 10 LJ Ch 354.

The fact that B must be ‘absolutely entitled’ means that the property can only be transferred to B if (continuing our example) any person expressed to be entitled to the trust property in the event of B’s death before the age of 30 consents.<sup>107</sup> It is also required that the trustees have power to transfer the particular assets which make up the fund.<sup>108</sup> By extension of the so-called ‘rule in *Saunders v. Vautier*’, it is now established that a trust can be terminated even if there is more than one beneficiary interested in it,<sup>109</sup> as would be the case if a trust were established ‘for my nephews’. If all the nephews are of full age and between them absolutely entitled to the trust property, they can agree to bring the trust to an end. The rule can also be relied upon to terminate a trust under which competent adult beneficiaries are entitled to successive interests, as in a trust for ‘A for life, to B in remainder’, even though A has not yet died.<sup>110</sup> However, the rule has no application where potential beneficiaries (e.g. ‘grandchildren’) do not yet exist, even if their interests are remote and might be unlikely ever to vest.<sup>111</sup>

The principle underlying the rule also lies behind the statutory provision that allows adult beneficiaries to change the trustees of the trust without actually bringing the trust to an end,<sup>112</sup> although the beneficiaries are not permitted to dictate to the trustees how they should conduct trust business in the meantime.<sup>113</sup> The statutory jurisdiction to vary beneficial interests under a trust without bringing the trust to an end is also based on the principle behind the rule in *Saunders v. Vautier*.<sup>114</sup> The principle is simply this, that ‘[f]idelity to the settlor’s intention ends where equitable property begins’.<sup>115</sup> In the USA, by way of contrast, the courts have taken quite a different approach to the problem of balancing the settlor’s intentions against the beneficiaries’ proprietary rights. The rule in *Saunders v. Vautier* failed to acquire a foothold in the USA, so the rule there is that no trust may be terminated or modified by the beneficiaries if termination would defeat a ‘material purpose’ of the settlor or testator.<sup>116</sup>

### Trust assets

A trust asset does not have to be a tangible thing such as a plot of land or a book; it can be an intangible asset such as a debt, a trademark, or the right to the proceeds of an

<sup>107</sup> *Gosling v. Gosling* (1859) Johns 265.

<sup>108</sup> Where ‘the subject matter of the trust is a non-assignable contract and there are outstanding obligations to be performed by the trustee’ the trustee cannot assign it to the beneficiary, even though the beneficiary wishes to compel the assignment: *Barbados Trust Co Ltd v. Bank of Zambia* [2006] EWHC 222 (Comm); *Don King Productions Inc v. Warren* [2000] Ch 291; *Re Brockbank* [1948] Ch 206.

<sup>109</sup> *Re Smith* [1928] Ch 915.

<sup>110</sup> *Brown v. Pringle* (1845) 4 Hare 124.

<sup>111</sup> *Thorpe v. Revenue and Customs Commissioners* [2009] EWHC 611 (Ch).

<sup>112</sup> Trusts of Land and Appointment of Trustees Act 1996, ss. 19–20. See Chapter 11.

<sup>113</sup> *Stephenson (Inspector of Taxes) v. Barclays Bank Trust Co Ltd* [1975] 1 All ER 625, per Walton J at 637e–f.

<sup>114</sup> Variation of Trusts Act 1958, see Chapter 9.

<sup>115</sup> J. W. Harris, *Variation of Trusts* (London: Sweet & Maxwell, 1975) at 2.

<sup>116</sup> *Clafin v. Clafin* (1889) 20 NE 454; American Law Institute, Restatement of the Law of Trusts (3rd) §65(1), and Uniform Trust Code (2000), s. 411(b). In *Tod v. Barton*, 20 February 2002, Chancery Division (unreported), the difference between the English and US approaches gave rise to a dispute over governing law. The case concerned the will of an Englishman who had died when domiciled in the USA.

insurance policy. Of course, even in the case of a book or a plot of land, the true asset is not the thing itself, but the intangible right to benefit from the use and enjoyment of the thing. Usually, the trust ‘property’—or the ‘estate’ as it is sometimes referred to in the case of traditional settlement trusts—consists of a number of different assets that together make up a ‘fund’. Eventually, the trust fund must be distributed to the beneficiaries, or the proceeds of sale of the fund must be distributed, but, in the meantime, the fund must be managed and invested.<sup>117</sup>

### Equitable rights under a trust

An equitable proprietary right under a trust does not ‘bind the whole world’ in quite the same way that legal title is binding on the whole world or in quite the same way that *in rem*<sup>118</sup> property rights in a civil (Roman law-based) jurisdiction are binding on the whole world (*erga omnes*).<sup>119</sup> The most important limitation on the binding nature of equitable proprietary rights under a trust is the fact that a bona fide (‘good faith’) purchaser for value of a legal estate will not be bound by any beneficial interest under a trust affecting the vendor’s legal title unless the purchaser had, or ought reasonably to have acquired, notice of the equitable interest.<sup>120</sup> (‘Notice’ is not quite the same thing as ‘knowledge’, but that distinction can wait until later.)<sup>121</sup> The bona fide purchaser for value of a legal estate without notice is sometimes, even today,<sup>122</sup> referred to as ‘equity’s darling’, because a beneficiary’s equitable interest under a trust cannot be enforced against him. In fact, the bona fide purchaser for value without notice is, in reality, the darling of the common law, because the reason equity does not enforce its property rights against the innocent purchaser of legal title without notice is that it would undermine the common law rules for acquiring ‘good title’ to property if it did.<sup>123</sup>

### Separation of legal and equitable ownership

It is this writer’s contention that the separation of legal title to an asset from equitable property *in the same asset* will always produce a trust in English law, even though a trust might conceivably be produced without separation of legal and equitable ownership. In other words, separation of legal and equitable ownership is a sufficient, but not a necessary, feature of trust creation. Separation does not require that different persons hold the legal and equitable ‘titles’: it is sufficient to create a substantial separation of legal and equitable ownership for certain persons to hold legal title on trust for themselves, provided that they have distinguishable interests under the trust. The equitable proprietary interest may be divided sequentially, as in the case of a trust ‘for A for life and B

<sup>117</sup> See Chapter 12.      <sup>118</sup> See earlier.

<sup>119</sup> *Webb v. Webb* [1994] 3 WLR 801, European Court of Justice, per Mr Advocate-General Darmon at 816B.

<sup>120</sup> *Pilcher v. Rawlins* (1872) LR 7 Ch App 259, per Sir W. M. James LJ at 268–9.

<sup>121</sup> See Chapter 15.

<sup>122</sup> See, for example, *Griggs Group Ltd v. Evans* [2005] EWCA Civ 11, CA, per Jacob LJ at para. 7.

<sup>123</sup> J. Hackney, *Understanding Equity and Trusts* (London: Fontana, 1987).



in remainder' or contemporaneously, as in the case of a traditional trust 'for A and B for life.'

### Separation of legal and equitable ownership without a trust

It cannot be denied that my claim (that a trust is necessarily created whenever legal title is separated from equitable property in the same asset) conflicts with Lord Browne-Wilkinson's observation (made obiter in *Westdeutsche Landesbank Girozentrale v. Islington LBC*) that '[e]ven in cases where the whole beneficial interest is vested in B and the bare legal interest is in A, A is not necessarily a trustee'.<sup>124</sup>

His Lordship's best examples in support of that statement are the example of land acquired by estoppel against a legal owner and the example of a mortgagor who has fully discharged the mortgage debt. It is respectfully submitted that neither example truly supports his Lordship's point of view.

Estoppel is considered in depth in Chapter 8, but suffice to say that estoppel is a cause of action that prevents the legal owner of an asset from asserting his absolute beneficial ownership of the asset and which, having been raised, must be satisfied by a final remedial award in favour of the claimant. It is true that, before the award is made, there can strictly speaking be no trust, but by the same token, neither is there any split in beneficial ownership before the remedial award is finally made. It might turn out that the estoppel can be remedied by a simple award of damages, leaving the defendant's beneficial ownership of the asset unaffected. The most that can be said is that the legal owner is not permitted to act as if he were entitled to 100 per cent of the beneficial ownership, because it might turn out that he is not. If, in the event, the estoppel is satisfied by recognizing the claimant to have a beneficial ownership interest in the defendant's asset, the defendant will, from that moment, be a trustee. In short, there is no point in the process of raising and satisfying an estoppel when the claimant has an established equitable interest without there being a trust.

The second example, of the landowner who has repaid a loan secured by mortgage over his land, is also unconvincing. It is true that so long as the mortgagee (lender) holds the legal title to the mortgage, the mortgagor (borrower) is said to have an equitable interest in his land, known as the 'equity of redemption'.<sup>125</sup> Crucially, though, the mortgagee's legal title is in the mortgage charge and the mortgagor's equitable interest is in the estate subject to the charge, so there is no sense in which there is any division between legal and equitable ownership of the *same* asset. Perhaps his Lordship had in mind the old form of mortgage, in which legal title to the land was actually placed in the

<sup>124</sup> *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 at 707A. Followed in *Don King Productions Inc v. Warren* [2000] Ch 291, 295, Ch D, per Lightman J at 317 (affirmed by the Court of Appeal [2000] Ch 291, 327), but doubted by Lord Millett writing extra-judicially, 'Restitution and constructive trusts' (1998) 114 LQR 399 at 403: 'a trust exists whenever the legal title is in one party and the equitable title in another'.

<sup>125</sup> For an argument that it is unhelpful to regard the so-called 'equity of redemption' as a distinctive equitable estate, see G. Watt, 'The lie of the land: Mortgage law as legal fiction' in *Modern Studies in Property Law* (E. Cooke, ed.) (Oxford: Hart Publishing, 2007) vol. IV at 73.



name of the mortgagee until it was redeemed, with the mortgagor retaining an equity of redemption in the meantime. In such a case, it is true, as his Lordship observes, that the mortgagor's action to recover the mortgaged property takes the form of an action for redemption and not an action for breach of trust,<sup>126</sup> but it does not follow that the split between the mortgagee's apparent formal ownership of the land and the mortgagor's beneficial ownership of the land is not a trust—merely that there is no need to refer to it as such, the usual remedy for redemption of the mortgage being sufficient. We can say that, in the old form of mortgage by conveyance and reconveyance, there was a trust as a matter of property, but a mortgage as a matter of obligation. A comparable case is the trust that arises when X formally contracts to purchase land from Y. Equity is prepared to grant specific performance of such contracts almost as a matter of course and, because equity sees as done that which ought to be done, the result is that X becomes the equitable owner of Y's land from the moment of contract. Y's legal title does not pass to X until the completion of a deed in favour of X, so, in the meantime, Y holds his bare legal title on trust for the sole beneficial owner, X. There is a trust, but it is rarely referred to as such precisely because there is a contract between the parties and the primary cause of action between the parties will be for breach of the contractual terms. We will see in the next chapter that it is perfectly possible to conceive of a trust running alongside (or underneath) a contractual relationship such as a debt. Provided that the contractual remedies are adequate to fulfil the parties' intentions, there may never be a need to refer to the underlying trust. To put it another way, whenever there is a split between legal and beneficial ownership there will inevitably be a trust as a matter of *property law*, but as a matter of *obligations law*, the parties will frequently be bound by sets of obligations, whether established by contract or statute, more sophisticated than the crude obligation of a bare trustee to account to his beneficiary for the trust property on demand.

The creation of trusts must be distinguished from their effects on third parties. The separation of legal title from equitable property necessarily creates a trust—it might be helpful to picture trust creation as the process of splitting the formal/external legal title from the beneficial/inner equitable interest, as if one were peeling the skin off a banana. It does not follow, however, that the mere passing of bare legal title to a third party will make them a trustee. That would be an unfair presumption, since legal title brings powers and responsibilities without the benefits that equitable property brings (bare legal title is in this respect like a banana skin: one can slip up on it, but one can't eat it). This means that there might be cases in which a third party might come to hold bare legal title without being a trustee. In such a case, whether or not A can be called a trustee cannot be determined without an inquiry into A's state of knowledge or notice of the pre-existing trust.<sup>127</sup>

<sup>126</sup> *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] 2 WLR 802 at 707A.

<sup>127</sup> These issues are considered in Chapters 14 and 15. See, also, the discussion in *Allan v. Rea Brothers Trustees Ltd* [2002] EWCA Civ 85, Court of Appeal, *per* Robert Walker LJ at paras 43–6. See, generally, G. Watt, 'Personal liability for receipt of trust property: allocating the risks' in *Modern Studies in Property Law* (E. Cooke, ed.) (Oxford: Hart Publishing, 2005) vol. III at 91.

### Trusts without separation of legal and equitable title

It is possible for a person to hold an asset subject to a fiduciary duty, and even as a trustee, without any separation of legal and equitable title to the asset.

#### *The administration of estates*

When property comes to an executor under a will for the purpose of carrying out the functions and duties of administering the estate of a deceased person, the property comes to him 'in full ownership, without distinction between legal and equitable interests'.<sup>128</sup> It follows that residuary legatees, who may or may not receive something from the deceased's estate after payment of specific gifts from the estate and payment of debts and tax owed by the estate, do not have a beneficial interest in the assets in the executor's hands during the course of administration. Nevertheless, although the whole property belongs, in theory, to the executor, he does not hold it for his own benefit: he holds it subject to a fiduciary duty to distribute it in accordance with the will. In a sense, then, he is a trustee subject to:

trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries.<sup>129</sup>

The same principle applies as well to administrators of intestate estates as it does to executors of wills.<sup>130</sup>

#### *Discretionary trusts*

In a discretionary trust, which is a trust in which the trustees are required to exercise a discretion to appoint beneficiaries from a given class and to determine the size of the beneficiaries' respective entitlements: the beneficiaries' interest in the income is more than a mere speculative hope (a *spes*), but it is not a beneficial proprietary interest until the trustees actually exercise discretion in the beneficiaries' favour.<sup>131</sup> So a discretionary trust is somewhat analogous to the trust binding an executor or an administrator of an estate, in that it binds the property in the trustees' hands, but without immediately conferring equitable title on the ultimate beneficiaries of the distribution. A discretionary trust can therefore be regarded as a trust in which legal and equitable titles are separate, in the sense that the trustee is legally, but not beneficially, entitled, but without being separate in such a way that it is possible to identify the true beneficial owner prior to the trustees exercising their discretion in her favour.

#### *Beneficial joint tenancy of land*

The beneficial joint tenancy of land is a theoretically and socially significant form of trust under which two or more persons jointly own land at law and in equity, with

<sup>128</sup> *Commissioner of Stamp Duties (Queensland) v. Livingston* [1965] AC 694, PC, per Viscount Radcliffe at 707. See, further, Chapter 2.

<sup>129</sup> *Ibid.* Followed in *Marshall (Inspector of Taxes) v. Kerr* [1995] 1 AC 148, HL.

<sup>130</sup> *Eastbourne Mutual Building Society v. Hastings Corporation* [1965] 1 All ER 779.

<sup>131</sup> *Gartside v. IRC* [1968] AC 553, HL.

identical interests and no notion of separate individual shares. Under this arrangement, which is common when a husband and wife acquire land as a matrimonial home, the ownership of each 'beneficial joint tenant' is so joined to the ownership of the other that neither is able to dispose of a share of the property by their will when they die. Instead, the last surviving joint tenant becomes the sole absolute owner of the land by 'right of survivorship'. Statute provides that there is a trust whenever land is held under a beneficial joint tenancy, despite the total absence of any separation of ownership, because each joint tenant has the option of severing his or her equitable share of the asset in their lifetime simply by giving the appropriate form of notice to the other joint tenants.<sup>132</sup> Once severed, a share can be left by will.

### **Trusts in civil jurisdictions**

Civil jurisdictions, which base their law upon the model of the Roman civil law code, have little difficulty with the idea of a trust of property, provided that it does not involve the distinction, quite alien to the Civilian mind, between legal and equitable title.<sup>133</sup>

*Dans le trust, le droit de propriété est éclaté suivant une division inconnue des systèmes civilistes.*<sup>134</sup>

So, for example, our close neighbours, the Scots, have a Civilian system of law and they have a form of trust, but in the Scottish trust, the beneficiary's right is purely personal against the trustee. The Scottish solution to the problem of insolvency is to treat the beneficiary's property as a 'special patrimony' in the hands of the trustee, so it does not become available to the trustee's creditors in the event of his insolvency.<sup>135</sup> As the Scottish example shows, the tendency of Civil jurisdictions is to employ distinct laws to fulfil different functions, each of which is performed automatically by the English trust.<sup>136</sup> Germany provides another example. The German idea of holding property faithfully for another (*Treuhanderschaft*)<sup>137</sup> belongs to a quite different branch of law to

<sup>132</sup> Law of Property Act 1925, s. 36(1), (2).

<sup>133</sup> See D. Hayton, 'When is a trust not a trust?' (1992) 1 J Int Planning 3. The European Court of Justice has held that a beneficiary's interest under a trust is not a 'real' right: *Webb v. Webb* [1994] ECR I-1717.

<sup>134</sup> 'In the trust, the right to property is split in a manner unknown to Civil systems of law.' J.-P. Béraudo, *Les Trusts Anglo-Saxons et Le Droit Français* (Paris: LGDA, 1992) at 8, para. 18. As of 19 February 2007, France has at last admitted a form of trust into its Civil Code, albeit one that does not contain the defining feature of the English trust, i.e. division of the property right. The new law 'de la fiducie' is inserted as 'titre XIV' in book III of the Code Civil (LOI n° 2007-211 du instituant la fiducie). See also F. H. Lawson, *A Common Lawyer Looks at the Civil Law* (Ann Arbor: University of Michigan Law School, 1953) at 201. Cited in George L. Gretton, 'Trusts without equity' (2000) 49 ICLQ 599.

<sup>135</sup> W. A. Wilson and A. G. M. Duncan, *Trusts, Trustees and Executors*, 2nd edn (Edinburgh: W. Green & Sons, 1995) paras 1-42 to 1-51; *Sharp v. Thompson*, 1995 SLT 837, 857; cf. at 867-8. A. Honoré, 'Obstacles to the reception of trust law? The examples of South Africa and Scotland' in A. M. Rabello (ed.), *Aequitas, and Equity: Equity in Civil Law and Mixed Jurisdictions* (Jerusalem: Hebrew University of Jerusalem, Sacher Institute, 1997) 793 at 812.

<sup>136</sup> See, generally, M. Lupoi, *Trusts: A Comparative Study* (Cambridge: Cambridge University Press, 2000).

<sup>137</sup> For an historical account, see Oliver Wendell Holmes, 'Early English equity' (1885) 1 LQR 162 and R. H. Helmholz and R. Zimmerman (eds), *Itinera Fiducia: Trust and Treuhand in Historical Perspective* (Berlin: Duncker & Humblot, 1998).

the German idea of special property set aside for a particular purpose (*Sondervermögen*). There are some Civilian devices that might be said to be true hybrids of property and obligation—the Swiss *substitution fideicommissaire* is a candidate<sup>138</sup>—but there is none that involves a genuine split in ownership of the subject matter of the obligation. The result has been a recognition in certain Civil jurisdictions that the commercial utility of the English trust has given common law systems a commercial advantage over their Civilian counterparts.<sup>139</sup> Ironically, it is in Italy—source of the original Civil law—that the need for a form of trust has been most keenly appreciated. One result is a growing body of Italian scholarship on trusts that has sought to express the English idea in Civilian terms.<sup>140</sup> The benefit to English scholars is a perceptive and critical insight into ideas that we thought we understood: ‘What knows he of English trusts that only English trusts knows’ is the new version of an old motto.

### **Bailment**

It is arguable that, in the idea of ‘bailment’,<sup>141</sup> the English common law developed its own version of the trust without equity being involved at all. It is notable that bailment was itself conceived using arguments and authorities adopted from the Civil law.<sup>142</sup> Bailment and trust are compared in the next chapter.

### **The paradox of property and obligation**

[A] trust is a matter which is difficult to define, but which essentially imposes an obligation to deal with property in a particular way on behalf of another person.<sup>143</sup>

Richard Nolan argues that beneficiaries have a right to require performance from their trustees and a distinct type of right to prevent interference by third parties.<sup>144</sup> Paul Matthews has observed that, if the beneficiary’s personal rights against the trustee had remained purely personal, the law of trusts might today lie firmly within the law of obligations.<sup>145</sup> Whatever theory we settle on, it is clear that the trust is a hybrid of property and obligations. The result is paradoxical: what began as a human relationship of trust established in connection with certain property, usually land, has become, in effect, a

<sup>138</sup> A. Dyer and H. van Loon, ‘Report on trusts and analogous institutions’, in *Actes et Documents of 15th Session of Hague Conference on Trusts*, vol. II, para. 177.

<sup>139</sup> See, for example, G. Ll. H. Griffiths and M. Ganado, ‘The Malta Trusts project: the genesis of a new trusts act in a civil law jurisdiction’ in *Contemporary Perspectives on Property, Equity and Trust Law* (M. Dixon and G. Ll. H. Griffiths, eds) (Oxford: Oxford University Press, 2007) 203–17.

<sup>140</sup> See M. Lupoi, *Trusts: A Comparative Study* (Cambridge: Cambridge University Press, 2000).

<sup>141</sup> See Chapter 2.

<sup>142</sup> *Coggs v. Bernard* (1703) 2 Lord Raym 909, although there is some evidence that it has earlier, purely English, origins. *Williams v. Lloyd* (1628) W Jones 179; cf. Blackburn J in *Taylor v. Caldwell* (1863) B & S 826.

<sup>143</sup> *Staden v. Jones* [2008] EWCA Civ 936, *per Arden LJ* at para. [25].

<sup>144</sup> R. C. Nolan, ‘Equitable property’ (2006) 122 LQR 232.

<sup>145</sup> P. Matthews, ‘The new trust: obligations without rights?’, in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) at 1.

propertized form of relationship. Today, *'the trust... is the same as the land'*.<sup>146</sup> James Penner reaches a similar conclusion:

The trustee is not a person with whom [the beneficiaries] have any personal relationship of any substance—he is the personification of the trust agreement, and it is that which really settles how the gift is to work. He is like a human instrument.<sup>147</sup>

The frequent lack of any meaningful personal relationship between trustee and beneficiary produces another paradox: that the trust relationship becomes a relationship of mistrust instead of trust, social trust having been replaced by trust mediated through the terms of the trust and the general law. No theory can perfectly encapsulate and explain the long and complex history of the trust and any theory designed to control its future development should strive to appreciate, rather than to resolve, the paradox of property and obligation which gives the trust its theoretical and practical dynamism.

The way to understand the trust is not to force it into the preconceived categories of 'obligation' and 'property' that are much cherished in the codes of Civil lawyers,<sup>148</sup> but to accept that it is something of a law unto itself. In short, to understand the trust, one must appreciate that it does not make perfect sense. After all, the true value of the trust, like the true value of a case-based common law system of law, is to be found, not in conformity to logical absolutes, but in flexibility and functional utility: '[T]he life of the law has not been logic; it has been experience.'<sup>149</sup>

## Perspectives

As we progress through the remaining chapters of this book, it will be useful to bear in mind that laws and legal decisions can be viewed from a number of different perspectives, each of which provides a unique critical insight into the subject matter of our study. Four perspectives that are always worth bearing in mind are precedent, principle, policy, and pragmatism. When a judge is presented with a legal problem, the judge is bound to look first to statutory law and judicial precedent for a solution, but, if it appears to the judge (rightly or wrongly) that there is no clear solution in precedent, the judge should, in theory, seek to produce a solution that is consistent with principles derived from precedent. Maxims, such as 'equity follows the law',<sup>150</sup> are one species of principle, but other principles may commend themselves to judges even though they have not acquired the status of a maxim. It is important to appreciate, however, that

<sup>146</sup> Lord Mansfield in *Burgess v. Wheale* (1759) 1 123 W Bl at 162.

<sup>147</sup> *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) at 125.

<sup>148</sup> Gretton, *op. cit.*, tries to sidestep the problem by attempting to place the trust within the civil law of persons, arguing that '[t]he trust itself is not a person. A special patrimony never is. But a special patrimony operates very like a person, as an autonomous, quasi-personal, fund' ((2000) 49 ICLQ 599 at 614).

<sup>149</sup> Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown & Co, 1923), quoted by Lord MacMillan in *Read v. J. Lyons & Co Ltd* [1947] AC 156, HL.

<sup>150</sup> The list of major equitable maxims is considered in depth in Chapter 16.

judges do not reach their decisions in a logical vacuum: judges are very often acutely aware of the impact that their decisions might have upon the wider community or society at large. They are therefore sensitive to what we might call ‘policy considerations’, or considerations based on the public interest. One such policy is the need to maintain certainty in dealings with property rights;<sup>151</sup> another is the need to maintain certainty in commercial transactions; yet another is the policy underlying the Insolvency Acts (the statutes that determine how the claims of various interested persons and groups should be balanced fairly in the event of a party’s insolvency).

Policies often conflict and, as with principles, there is no easy way to determine when one policy should take priority over another. The express trust has always had to tread carefully between the policy that a beneficial owner of property should be permitted to use and dispose of his or her property as he or she thinks fit, and the policy that imperative conditions attached to dispositions (sometimes from beyond the grave) must be obeyed even to the diminution of a beneficial owner’s freedom.<sup>152</sup> In short, the freedoms of the present owner of property must be balanced against the like freedoms of past owners of the same property. Trusts, express and non-express, have also had to tread carefully between the policy that the trustee should be under an obligation to hold the trust property for the benefit of the beneficiaries and the policy that the trustees’ personal creditors should be entitled to enforce their legitimate claims against any assets in the trustees’ hands. Last, but by no means least, above all considerations of principle and policy—and sometimes even above precedent—judges are concerned to achieve a solution that works in practice and which will not bring the entire judicial process into disrepute. The judicial process is nothing if not pragmatic. As Lord Goff of Chieveley has observed:

It is a truism that, in deciding a question of law in any particular case, the courts are much influenced by considerations of practical justice, and especially by the results which would flow from the recognition of a particular claim on the facts of the case before the court.<sup>153</sup>

Precedent, principle, policy, and pragmatism are blended subtly in the mind of the judge. Nevertheless, the task of students in this, as indeed in any area of law, is to attempt to discern the true basis for decisions and to distil, from the subtle blend, the fractions of precedent, principles, policy, and pragmatism in the purest form they can. It is the task of the textbook writer to help in this distillation process, to which end, the reader will hopefully see that a special attempt has been made throughout this book to bring all four perspectives to bear upon the subject. We will discover that decisions that seem

<sup>151</sup> See Chapter 8 on the institutional nature of constructive trusts.

<sup>152</sup> R. Cotterrell, ‘Trusting in law: legal and moral concepts of trust’ (1993) CLP 75.

<sup>153</sup> *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] 2 WLR 802 at 810G. His Lordship has made the same observation extra-judicially: Sir Robert Goff, ‘Judge, jurist and legislature’ [1987] Denning LJ 79 at 80. See, generally, R. Cotterrell, *The Politics of Jurisprudence* (London: Butterworths, 1989); P. S. Atiyah, *Pragmatism and Theory in English Law, The Hamlyn Lectures* (London, 1987); P. S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (Oxford: Oxford University Press, 1978).

to be unprecedented and to make no principled sense can sometimes make sense from the perspective of policy, or as an attempt to find a pragmatic workable solution to a novel problem.

## Further reading

In addition to the following print sources, the Online Resource Centre accompanying this book contains web links to further reading as well as guide answers to assessment questions relevant to this chapter.

- BAKER, J. H., 'The Court of Chancery and Equity' in *An Introduction to English Legal History*, 4th edn (London: Butterworths, 2002), ch. 6.
- BURROWS, A. S., *Fusing Common Law and Equity: Remedies, Restitution and Reform—Hochelaga Lectures 2001* (Hong Kong: Sweet & Maxwell Asia, 2002).
- DICKENS, *Bleak House* (1852–53).
- DOUPE, M. and SALTER, M., 'Concealing the past? Questioning textbook interpretations of the history of equity and trusts' (2000) 22 Liverpool L R 253.
- DUGGAN, A. J., 'Is equity efficient?' (1997) 113 LQR 601.
- GOODHART, SIR WILLIAM, QC, 'Trust: law for the twenty-first century' (1996) 10(2) TLI 38.
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