Trusts, Formalities and the Doctrine in *Rochefoucauld v Boustead*

Law of property act s53(1)

(1)Subject to the provision hereinafter contained with respect to the creation of interests in land by parol—

(a)no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;

(b)a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

(c)a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

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Constructive trust arises typically due to circumstances like wrongdoing or a promise that has not been fulfilled. (can have no formalities)

Express trusts must have formalities. (3 certainities)

In *Rochefoucauld v Boustead*,[1] the Court of Appeal allowed a trust of land to be proved by parol evidence despite an absence of written evidence to satisfy s.7 of the Statute of Frauds.[2] The justification was that the defendant was using the Statute of Frauds as an instrument of fraud. The case has attracted intense academic attention as part of a wider attempt to rationalise the growth of constructive trusts in recent decades. Academic opinion is split over whether the trust enforced was an express trust[3] or a constructive trust.[4] Those who argue that it is a constructive trust seek to draw from the case a broader principle under which other wayward and orphan constructive trusts might be sheltered.

The principal difficulty with understanding *Rochefoucauld v Boustead* is that s.7 of the Statute of Frauds is a rule of evidence. It is not directly concerned with enforceability and is totally unconcerned with validity. However, it does have an effect on the enforceability of the trust because what is not provable is not enforceable. The bridge between proof and enforceability are the rules of pleading and procedure that formed the backdrop to the fraud in *Rochefoucauld v Boustead*. Only once these rules are understood is it possible to understand how the trust was enforced in that case and arrive a general rule of enforceability. This article argues that *Rochefoucauld v Boustead* is properly understood as an express trust which is enforced because the Statute cannot be set up as a defence to bar the plaintiff's parol evidence if that would be using the Statute as an instrument of fraud.

In short, the argument is as follows. The Statute of Frauds only operates as an evidential bar in a case if it is pleaded. It has no effect on the validity of an express trust if validly created. If the statute is not pleaded as a defence, the court takes no notice of it and it plays no part in the case. When there is a trust of land not evidenced in writing, it is within the trustee's *power* to plead the statute, and the beneficiary's interest is liable to being barred by the trustee. But when the trustee acquired the land as trustee, knowing they were trustee, then if the trustee were to attempt to deny the trust by pleading the Statute in litigation equity will refuse to allow the trustee to set up the Statute, or, put more simply, the Statute is no defence. The reason is that to allow the defence would allow the trustee to use the Statute as an instrument of fraud. If the trustee acquired the land as trustee knowingly, the trustee is subject to a *disability* to plead the Statute. The beneficiary has a correlative immunity from having their express trust barred by the Statute. Immune from the statutory bar, the beneficiary is free to prove their express trust with parol evidence and the express trust is enforceable. There is no need or room for a constructive trust.

No legal defence

This article will consider 1) the nature of the equitable fraud that must be shown, 2) the procedural rules for pleading the Statute and raising the fraud argument, 3) the effect of those rules on enforceability, 4) enforceability by third party beneficiaries, and 5) the arguments against a constructive trust.

[*] I would like to thank Bill Swadling, David Foster and Andreas Televantos for their helpful comments. All errors remain my own.

[1] [1897] 1 Ch. 196.

[2] (1677) 29 Car.II, c.3.

[3] Swadling, "The Nature of the Trust in *Rochefoucauld v Boustead*" in Mitchell, *Constructive and Resulting Trusts* (2010) ch.4; Matthews, "The Words which are Not There", *id*, ch.1; Pettit, *Equity and the Law of Trusts*, 12th ed. (2012) 98; Penner, *The Law of Trusts*, 11th ed. (2019), ch.6.

[4] Elias, *Explaining Constructive Trusts* (1990) 107-13; Oakley, *Constructive Trusts*, 3rd ed. (1997) 53-9; McFarlane, (2004) 120 L.Q.R. 667; Gardner, "Reliance-Based Constructive Trusts" in Mitchell (n.3) ch.2; Liew, "*Rochefoucauld v Boustead* (1897)" in Mitchell & Mitchell, *Landmark Cases in Equity* (2012) ch.14; Allen, (2014) 34 L.S. 419.

I. The *Rochefoucauld v Boustead* Fraud

Section 7 of the Statute of Frauds, in its modern form, is found in s.53(1)(b) of the Law of Property Act 1925:

> "a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will".

By s.53(2), the modern form of s.8 of the Statute of Frauds, resulting, implied or constructive trusts are exempted from the proof requirement.

The proper interpretation of s.7 of the Statute was settled by the end of the 18th century.[5] It is concerned with evidence and proof, not validity or merits.[6] The declaration need not be in writing. It can be oral. The written evidence can be created after the date of the declaration. Indeed, it could be created by the defendant's signed Chancery answer.[7] All that is needed is that written evidence be in existence at the trial. The date of writing is immaterial.[8]

If there is no writing, the defence of the Statute would render an express trust unproveable. The practical consequence of this is that the trustee holds legal title as absolute owner. However, under *Rochefoucauld v Boustead*, equity will allow a trust to be proved by parol evidence if a specific "fraud" is made out. Lindley L.J. defined the fraud as follows:

oral or verbal statements, as well as any written statements that are not part of a formal contract

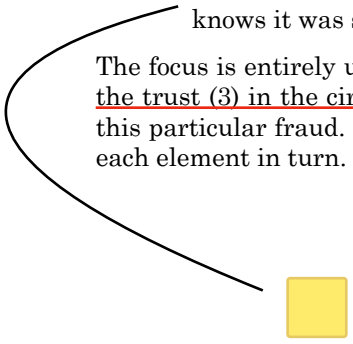
> "It is further established … that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself."[9]

This fraud, or in modern terms unconscionable or inequitable conduct,[10] is not fraud at large. It has been defined with specificity to the context of s.7 of the Statute of Frauds. Lindley L.J. makes clear there are three clear and separable elements:

> "it is a fraud on the part of a person [1] to whom land is conveyed as a trustee, and [2] who knows it was so conveyed, [3] to deny the trust and claim the land himself."

The focus is entirely upon the defendant making an unconscionable gain. The defendant's denial of the trust (3) in the circumstances (1) of which the defendant has knowledge (2) together constitute this particular fraud. If any element is not present, the fraud will not be made out. Let us consider each element in turn.

Denial of trusts + knowledge



[5] *Forster v Hale* (1798) 3 Ves. 696, 707; *Randall v Morgan* (1805) 12 Ves. 67, 74; *Smith v Matthews* (1861) 3 De G.F.&J. 139, 151.

[6] *Rochefoucauld* (n.1), 207; *Fraser v Pape* (n.26).

[7] *Hampton v Spencer* (1693) 2 Vern. 287; *Nab v Nab* (1717) 10 Mod. 404; *Cottington v Fletcher* (1740) 2 Atk. 155.

[8] *Forster v Hale* (n.5); *Gardner v Rowe* (1828) 5 Russ. 258; *Rochefoucauld* (n.1), 206.

[9] *Rochefoucauld* (n.1), 206.

[10] *Crabb v Arun D.C.* [1976] Ch. 179, 195.

First, the defendant must have received the land as trustee. Suppose A conveyed legal title to B to hold on trust for C (or A). B acquired the property subject to a trust from the start and never owned the land beneficially. If B were to deny the trust by relying on the Statute, that would be using the Statute to upgrade B's interest from the dry legal title of a trustee to an absolute ownership interest.[11] The defendant would be using use the Statute to obtain more than the defendant ever had or should have had. But suppose an absolute owner A declares a trust orally for C, but then goes back on their word. If A used the Statute to deny the trust, the practical effect is that A is returned to their original ownership. They do not gain anything they didn't previously have by relying on the Statute. There is no fraud, and the Statute is applicable.[12] So although *Rochefoucauld* is a significant exception to the Statute of Frauds, it does not wholly deprive the Statute of effect. The Statute applies where the settlor had an absolute ownership interest before the alleged creation of the trust.[13]

Secondly, the defendant must know that they received the land as trustee. Lindley L.J. states that the defendant "knowing the facts, is denying the trust…".[14] There is a slight ambiguity here whether the defendant needs to know about the trust at the moment of acquisition or the moment of denial. The better interpretation is that it is at the moment of acquisition. This would protect a defendant who received land beneficially but where someone later alleges a trust to defeat the defendant's title. If there was nothing on the facts to give the defendant knowledge that they received the land as trustee, it can hardly be unconscionable to rely on the Statute.[15]

Thirdly, the defendant must deny the trust. This is the most misunderstood element of the test. The denial of the trust is *using* the Statute of Frauds by setting it up as a defence in litigation to bar the plaintiff's case.[16] No separate act of denial in the defendant's conduct is required before that. This is made clear in the concluding sentence by Lindley L.J. quoted above: "the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance *and the statute*…"[17] and later in his judgment where Lindley L.J. says "other evidence is admissible in order to prevent the statute *from being used* in order to commit a fraud".[18] The point is made explicitly in the Law Times report of Haldane Q.C. in argument:

> "evidence is admissible, as the case is one of fraud, to prove that there was a trust, and in order to prevent the Statute of Frauds from being *raised as a defence* to the plaintiff's claim. … where the circumstances are such that it would be fraudulent to *insist upon the defence* of the Statute of Frauds, the court will not allow it *to be set up*…".[19]

The defendant must also be claiming the land themselves. This would include anyone claiming through the defendant,[20] or else trustees could commit fraud by involving third parties. It is difficult to envisage a situation where a trustee denying the trust would not be doing so to claim the land themselves. No case has refused to find fraud on the ground that the defendant wasn't claiming the land themselves. The only possible exception may be where a trustee denies the trust to claim the land for the settlor, not themselves. But if this were so, the trustee would in substance be claiming the right to choose the beneficiary of the trust. Moreover, the settlor could only claim the land under a resulting trust, and the trustee might be able to rebut the presumption of a resulting trust with evidence of the settlor's intention.[21] This shows that it is probably not possible for the trustee to deny the trust while not claiming the land themselves. For that reason, in this article the denial of the trust will be treated as including the defendant claiming the land themselves.

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[11] *Bannister v Bannister* [1948] 2 All E.R. 133, 136.

[12] *Smith v Matthews* (n.5); *Morris v Whiting* (n.49); *Organ v Sandwell* [1921] V.L.R. 622, 630; *Wratten v Hunter* [1978] 2 N.S.W.L.R. 367; Youdan, "Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*" [1984] C.L.J. 306, 325-6.

[13] Mowbray, *Lewin on Trusts*, 16th ed. (1964) 24.

[14] n.9.

[15] Youdan, (n.11), 326-7; Ashburner, *Principles of Equity*, 2nd ed. (1933) 99.

[16] *Mestaer v Gillespie* (1805) 11 Ves. 621, 627-8; *Lincoln v Wright* (1859) 4 De G.&J. 16, 22; *Re Duke of Marlborough* [1894] 2 Ch. 133, 141; *Organ v Sandwell* (n.12). See also *Bond v Hopkins* (1802) 2 Sch.&Lef. 413, 433; *Laycock v Pickles* (1863) 4 B.&S. 397, 508; *Clarke v Callow* (n.30); *James v Smith* [1891] 1 Ch. 384, 385; *Broughton v Snook* (n.29); *Steadman v Steadman* [1976] A.C. 536, 540, 558.

[17] n.9 (emphasis added).

[18] n.1, 207.

[19] 75 L.T. 502, 503.

[20] *Hodgson v Marks* [1971] Ch. 892, 908.

[21] *Bellasis v Compton* (1693) 2 Vern. 294.

II. Pleading and Procedure

defense in a legal dispute

To see exactly how the doctrine in *Rochefoucauld v Boustead* works, it is necessary to see how the Statute of Frauds was pleaded and how a case like *Rochefoucauld v Boustead* would have been litigated. This would have been assumed knowledge to 19th century judges, and this context would have underpinned their statements of principle. The procedural features explained here, particularly the nature of the plea, left their mark on the substantive doctrines of equity even after the old pleadings disappeared.[22]

Equity's response to a fraudulent attempt to use the Statute of Frauds is to refuse to allow the defendant to set up the Statute of Frauds as a defence. Without the Statute as a defence, nothing stands in the way of the plaintiff proving and enforcing their express trust.

Trusts are usually enforced by the beneficiaries as plaintiffs/claimants. The trustee is usually the defendant. The general rule of pleading, both in old Chancery pleading and modern procedure, is that it is for the party who is to take advantage of a particular matter to plead it.[23] The plaintiff is not bound to anticipate, for as Hale C.J. vividly put it, "'Tis like leaping… before one come to the stile".[24] All the plaintiff need do is plead a case which if admitted in the answer would allow the court to make a decree.[25] The Statute of Frauds "does not go to merits, it merely deals with evidence."[26] It is not necessary for the plaintiff to allege compliance with it and it thus forms no part of the plaintiff's case. The plaintiff merely sets out the facts that give rise to a trust (i.e., a declaration of trust),[27] any breaches of trust (if needed) and prays for relief.

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The Statute of Frauds enters into the case by being raised as a defence by the defendant. The rule, then as now, is that a party wishing to rely on the Statute of Frauds must specifically plead it.[28] This rule is enormously significant. "It is not necessary for a defendant, if he does not choose, to plead the Statute, nor is it a matter of which the Court is bound to take notice…".[29] The Statute does not apply automatically as an evidentiary bar. In *Clarke v Callow*,[30] Kelly C.B., explained this in the context of s.4 of the Statute (which was required to be pleaded by the defendant in the same manner as s.7[31]):

> "If it turned out that the contract was by parol, then suppose there were no such things as pleadings in the case, no doubt the law says that such a contract, not being in writing, cannot be enforced.[32] But the case must be decided on these pleadings, and the law says that if the defendant wishes to avail himself of the defence offered by the Statute of Frauds, he must plead that statute specifically—he must allege that he intends to rely on the statute."

那麼他必須放棄它的好處"

If the defendant does not plead the Statute, Lord Eldon explains, "then he must be taken to renounce the benefit of it",[33] and nothing stands in the way of the plaintiff proving an express trust by parol evidence.[34] These pleading rules are not unique to the Statute of Frauds. The Statute of Limitations operates similarly.[35]

the plaintiff can prove that an express trust exists using verbal evidence, even if there is no written document. There are no legal obstacles preventing them from doing so.

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[22] E.g., *Pilcher v Rawlins* (1872) L.R. 7 Ch.App. 259, 268-9; *Phillips v Phillips* (1861) 4 De G.F.&J. 208, 215-16.

[23] *Stowel v Lord Zouch* (1563) 1 Plow. 353, 376; *Clarke v Callow* (n.30); Chitty, *Treatise on Pleading*, 7th ed. (1844) vol.1, 254.

[24] *Bovy's Case* (1672) 1 Vent. 217.

[25] *Wormald v De Lisle* (1840) 3 Beav. 18; *Eccles v Cheyne* (1851) 9 Hare 215, 217; *The West of England* (1866) L.R. 1 A.&E. 308

[26] *Fraser v Pape* (1904) 91 L.T. 340, 341 (Collins M.R.).

[27] *Jackson v North Wales Railway Co* (1848) 1 H.&Tw. 75, 84-5; *Greville-Murray v Earl of Clarendon* (1869) L.R. 9 Eq. 11, 18.

[28] C.P.R., Pt.16, r.16.5; Tucker, Le Poidevin & Brightwell, *Lewin on Trusts*, 20th ed. (2020), [3-011]; R.S.C. (Rev.) 1962 O.18, r.8; R.S.C. O.19, r.15; *Dawkins v Penrhyn* (n.50); *Fraser v Pape* (n.26); *Steadman* (n.16).

[29] *Broughton v Snook* [1938] Ch. 505, 511 (Farwell J.). See also Penner (n.3), [6.7].

[30] (1876) 46 L.J.Q.B. 53, 54.

[31] *James v Smith* (n.16).

[32] Section 4 of the Statute required the agreement to be *in* writing, and was concerned with enforceability; s.7 requires the declaration to be *evidenced* in writing, and is concerned with proof: *Dale v Hamilton* (1847) 2 Ph. 266, 275; Swadling (n.3), 107-8; Penner (n.3), [6.1].

[33] *Cooth v Jackson* (1801) 6 Ves. 12, 39.

[34] *Clarke v Callow* (n.30); *James v Smith* (n.16), 389; *Broughton v Snook* (n.29).

[35] *Ronex Properties Ltd v John Laing Construction Ltd* [1983] Q.B. 398, 404.

an objection granting the factual basis of an opponent's point but dismissing it as irrelevant or invalid.

Under the old system of Chancery pleading, there were three ways in which a defence could be raised in equity: by demurrer, plea or answer.[36] An answer, as the name suggests, required the defendant to answer the case in the plaintiff's bill so that the parties might join issue. The demurrer and plea, borrowed initially from common law pleadings, were used to raise legal arguments that would bring the suit to an end without requiring an answer or examining witnesses. A demurrer lay when the defendant admitted the facts on the bill but argued that the plaintiff's case failed because of a rule of law or equity. A plea was a complete defence founded on new matter raised in the plea, which admitted that the plaintiff's case was maintainable.[37] Lord Redesdale in his *Treatise on Pleadings* explained the plea as follows:

> "A plea is also intended to prevent further proceeding at large, by resting on some point founded on matter stated in the plea; and as it rests on that point merely, it admits, for the purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by facts stated in the plea. Upon the sufficiency of this defence the court will also give immediate judgment, supposing the facts stated in it to be true; but the judgment, if favourable to the defendant, is not definitive; for the truth of the plea may be denied by the plaintiff by a replication, and the parties may then proceed to examine witnesses, the one to prove the other to disprove the facts stated in the plea."[38]

The appropriate way for the defendant to raise the Statute of Frauds was as a plea in bar of the plaintiff's case.[39] If a plea was raised, the court had to determine the validity of the plea before it could examine the merits of the bill. If the plea was successful, the bill was dismissed without needing to take evidence.[40] If the plea was overruled, the matter in the plea—the Statute of Frauds—ceased to play any role in the case, and the defendant would be required to answer the plaintiff's bill.[41]

When a plea is raised, the plaintiff has two options to respond. Either the plaintiff can argue the plea is bad in law, leading to the plea being overruled, or the plaintiff can file a replication, which admits that the plea is good in law, but disputes the facts on which it is based.

Bad in law: the plea is legally insufficient (lack of legal grounds or incorrect in legal sense)

Suppose the defendant in their plea simply stated "there is no written evidence to satisfy the Statute of Frauds." The plaintiff would argue the plea is bad in law because it used the Statute as an instrument of fraud, fulfilling Lindley L.J.'s test for fraud, and so should be overruled. A plea, so far as it did not contradict the bill, admitted for the purposes of the plea that the facts stated in the bill were true.[42] The bill already avers, so it will be assumed true in argument, that the defendant 1) acquired the land as trustee, 2) with knowledge, and the plea itself is the defendant attempting 3) to deny the trust and claim the land themselves. Notice that elements 1 and 2 are already averred in the facts amounting to the declaration of trust. Element 3 is supplied by the the plea itself. The plaintiff can show fraud without needing to plead any further facts. The plaintiff does not need to add to their pleadings anything like initial reliance, intervening wrongdoing by the trustee, or anything like part performance (as was required for s.4 of the Statute[43]). The sole piece of wrongdoing is the defendant filing the plea itself. Therefore, the fraud itself cannot be analysed as generating some new trust or "equity" to avoid the Statute.

The test for fraud being established by the assumed facts, the plea is bad in law and is overruled. In substance, the Chancery was saying that, if the plaintiff's pleaded declaration of trust showed that the land was knowingly acquired by the defendant as trustee, then the Statute is no defence. The Statute of Frauds no longer plays any role in the case. To use Professor Corbin's words, fraud "take[s] the statute out of the case."[44] The defendant must answer the bill. The plaintiff is free to prove their original case with parol evidence and enforce their express trust.

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[36] Lord Redesdale, *Pleadings in Chancery*, 5th ed. (1847), 106.

[37] *Robertson v Lubbock* (1831) 4 Sim. 161, 179.

[38] Redesdale (n.36), 14-15.

[39] Redesdale (n.36), 308 (although a demurrer was tolerated: *Barkworth v Young* (1856) 4 Drew. 1).

[40] *Campbell v Joyce* (1866) L.R. 2 Eq. 377.

[41] Redesdale (n.36), 16.

[42] *Ibid*; *Plunket v Penson* (1740) 2 Atk. 51.

[43] Beames, *Pleas in Equity* (1818) 175; *Maddison v Alderson* (1883) 8 App.Cas. 467, 475, 489; *Broughton v Snook* (n.29), 151-3; *Tool Metal Manufacturing Co. Ltd v Tungsten Electric Co. Ltd* [1955] 1 W.L.R. 761, 781; *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 A.L.R. 382, [38].

[44] Corbin, *Contracts* (1950) vol.2 §420.

Obviously, a defendant would not risk raising a self-defeating plea. The defendant would raise the plea with a denial the defendant knowingly acquired the land as trustee. This supporting denial would, if true, mean there was no fraud, making the plea of the Statute good in law.[45] The plaintiff can now only win if they can prove the fact denied in the plea. The plaintiff files a replication, which admits that the plea is good in law but controverts the truth of the facts asserted in the plea. All the other facts in the bill not contradicted by the plea are assumed to be true. A narrow trial of fact now occurs on the disputed fact of whether the defendant knowingly acquired the land as trustee. If the plaintiff cannot prove that the land was knowingly acquired as trustee, the plea is good and the bill is dismissed. If the plaintiff proves the land was knowingly acquired as trustee, the plea is bad. There is no need for a further trial, because the plea so far as it did not contradict the bill assumed the bill to be true, and the sole contradicted fact has been proved by the plaintiff. So the plaintiff is entitled to an immediate decree based on the admitted truth of the original case in the bill.[46]

From this overview of the pleadings, we can see the procedural steps which show how the Statute and the fraud argument are raised and the consequences on the plaintiff's original express trust case. The correct order of the questions is important:

1. The plaintiff pleads facts showing an express trust. The Statute plays no role yet.
2. The defendant raises a plea of the Statute of Frauds. If the defendant does not do this, the Statute plays no part in the case.
3. The plaintiff argues the plea is bad because it uses the Statute as an instrument of fraud. All the facts necessary to show this are already in the bill and plea. No new facts need to be raised by the plaintiff to show fraud.
4. The plea is overruled. The Statute of Frauds is removed from the case.[47]
5. The Statute being removed from the defence, nothing stands in the way of the original case based on the express trust.

Once the pleading logic is understood, it resolves an apparent paradox in the role of fraud.[48] Suppose a plaintiff alleges an oral declaration of trust and there is no written evidence. To prove that there is fraud and avoid the Statute of Frauds it seems necessary to prove that the defendant received the land as trustee. But the Statute of Frauds prevents oral proof of the declaration of trust. The proof of the trust is logically prior to establishing fraud, so if the Statute of Frauds prevents proof of the trust it seems to prevent proof of the fraud. That paradox disappears once it is understood that the Statute of Frauds only enters into the case through the defendant's plea, and that the plea changes the order of inquiry, interposing the issue of fraud (the validity of the plea) *before* proving the bill. The order of the issues is reversed from the purely logical order. The prior question is now *whether* the Statute is a good defence, and fraud being the issue, parol evidence is let in.

Equity through these procedural steps disabled the trustee from being able to set up the Statute of Frauds as a defence, taking the Statute out of the case and leaving the beneficiary free to prove their express trust with parol evidence. Though the old procedure has disappeared, the substantive rule that underpinned the overruling of the plea remains. It can be stated as follows:

> "*Rochefoucauld v Boustead* … decide[s] that, where land has been conveyed to a person in trust for another, it is fraud for the trustee to deny the trust and claim the land as his own, and, as the Statute of Frauds was not intended to be a cloak for fraud, it is no defence in such a case."

This clear and accurate statement of the rule comes from Mathers C.J. in *Morris v Whiting*,[49] just 17 years after *Rochefoucauld v Boustead* was decided.

If statute is raised by def, focus shifted from whether the trusts existed to whether the trusts is valid — the def can use it or not.

[45] *Redesdale* (n.36), 265, 268; Beames, (n.43) 32-7, 172-5.

[46] Langdell, *Summary of Equity Pleading*, 2nd ed. (1833) 110.

[47] For an illustration of these preceding steps in the context of s.4 of the Statute of Frauds, see *Taylor v Beech* (1749) 1 Ves.Sen. 297.

[48] Youdan (n.12), 325; Liew (n.4), 444.

[49] (1913) 15 D.L.R. 254, 257.

III. The Rule in terms of Enforceability

Section 7 of the Statute of Frauds is a rule of evidence. A declaration of trust must be "manifested and proved" in writing. The section is entirely unconcerned with validity—in fact, it presumes there is a valid trust. However, it does have an effect on the enforceability of the trust because what cannot be proved cannot be enforced. But to get from a rule of proof to a rule of enforceability it is necessary to take account of how the rule of proof actually applies in litigation. The critical rule is that the Statute cannot operate unless it is pleaded. As Lord Cairns explains:[50]

> "The Statute of Frauds must be pleaded, because it never can be predicated beforehand that a Defendant who may shelter himself under the Statute of Frauds, desires to do so."

The Statute is not self-executing. It will only apply if successfully set up as a defence. Assuming that the Statute is available as a defence, all that can ever be said is that the trustee has a *power* to plead the Statute to bar the beneficiary's case. The trust can therefore never be said to be definitely unenforceable without making an assumption that the trustee will exercise that power.

It is, however, possible to identify circumstances when an express trust is definitely enforceable. That is because *if* the trustee were to plead the Statute, equity would refuse to allow it to be set up as a defence. The conditions are given by Lindley L.J.'s test for fraud. It is a fraud for a trustee who 1) acquired the land as trustee, 2) knowing they were trustee, 3) to deny the trust and claim the land themselves. Elements 1 and 2 are present at the very moment the trust is created. Element 3 occurs when the defendant pleads the Statute. That very act of pleading the Statute immediately completes the requirements for fraud, and equity will refuse to allow the defendant to do the very thing they are trying to do: set up the Statute. Therefore, the act of pleading the Statute is superfluous in terms of enforceability. When elements 1 and 2 are present, element 3 cannot successfully occur. The trust is enforceable from the moment the trustee knowingly acquired the land as trustee because, from then onwards, *if* the trustee were to plead the Statute as a defence, that would automatically fulfil the test for fraud, and the Statute would no longer be a defence. The trustee is under a *disability* to set up the Statute in those circumstances, and the beneficiary has a correlative immunity from having their express trust barred for want of written proof.

The rule in *Rochefoucauld v Boustead* can therefore be stated in terms of enforceability as follows:

> An express trust of land is enforceable despite lack of written evidence to satisfy s.7 of the Statute of Frauds if the trustee knowingly acquired the land as trustee.

IV. Implications for Third-Party Beneficiaries

It is uncontroversial that where A transfers land to B to hold on trust for A, the doctrine in *Rochefoucauld* can apply and A can enforce the trust. Where A conveys land to B to hold on trust for C, there is an academic controversy as to whether C can enforce the trust, or whether there should be a resulting trust to A only.[51] However, recent authority suggests C can enforce.[52]

The argument that C cannot enforce assumes that the Statute would be applicable in favour of C, leaving A with an interest under a resulting trust. However, this incorrectly assumes that the Statute is self-executing. The reason C can enforce their interest is because if and when B pleads the Statute, it is a fraud, and equity refuses to allow the Statute to be set up. B is simply disabled from relying on the Statute and it ceases to play a role in the case. Either the Statute is a defence or it is not. That turns solely on whether the test for fraud is made out. Equity's sole focus is preventing the trustee from using the Statute to gain absolute title. Lindley L.J. simply states that the defendant must have received the land as trustee. He does not state that the defendant needs to have received the land as trustee *from the beneficiary*.

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[50] *Dawkins v Penrhyn* (1878) 4 App.Cas. 51, 58.

[51] Youdan, (n.12) 334-6; Feltham, [1987] Conv. 246; Youdan, [1988] Conv. 267.

[52] *Staden v Jones* [2008] 2 F.L.R. 1931; Glister & Lee, *Hanbury and Martin's Modern Equity*, 21st ed. (2018), [6-006].

Meaning of resulting trusts: even though B is the legal owner of the land, the beneficial ownership of that land belongs to A due to certain circumstances surrounding the transfer of the property.

Moreover, it is not clear that a court could always reach the result that B holds the land on resulting trust for A. A parted with the legal title to B. How can A get it back? A cannot prove an express trust against B because there was no intention to create a trust for A. A cannot necessarily prove a resulting trust, because there is authority that the Statute of Frauds does not prevent B giving parol evidence of A's intention to benefit C in order to rebut the presumed of a resulting trust in favour of A.[53] The only way the settlor should be able to assert a resulting trust is if the trustee agreed not to rebut the presumption of a resulting trust.[54] But that would be dependent on the caprice of the trustee. If equity will not allow C to enforce the trust, and A cannot claim a resulting trust without the defendant agreeing not to rebut the presumption of a resulting trust, then the trustee is free to claim the land themselves. That is the very fraud Equity wishes to prevent. The only remedy is to disallow the trustee to set up the Statute as a defence, allowing the beneficiary's to prove the express trust.

V. Arguments Against a Constructive Trust

The positive case in favour of the express trust analysis has been set out above. It is now necessary to explain why *Rochefoucauld v Boustead* is not a constructive trust. The constructive trust assume that s.7 of the Statute of Frauds operates automatically, so that lack of compliance means the trust was not properly created.[55] This is an incorrect assumption. The Statute does not operate automatically; it only operates if set up in litigation.[56] An express trust is only unenforceable in proceedings to enforce the trust if the trustee successfully sets up the Statute. That will not occur if the trustee omits to plead the Statute or equity refuses to allow it to be set up. This all means that the constructive trust, which must arise automatically, is an awkward fit with the Statute, and cannot provide a satisfactory explanation of the plaintiff's rights before the Statute is pleaded, or if the Statute is never pleaded or allowed to be set up.

Constructive trust upon a "reneging"? 對"背叛"的建設性信任？

The central difficulty with finding a constructive trust is ascertaining when it arises. What facts will the claimant need to plead to support a constructive trust if that is the correct explanation of *Rochefoucauld v Boustead*? Since it is fraud that justifies the enforcement of the beneficiary's rights, then a constructive trust could only arise in response to fraud when the three elements constituting the fraud identified by Lindley L.J. have occurred. In *Westdeutsche Landesbank Girozentrale v Islington L.B.C.*, Lord Browne-Wilkinson explained:

> "Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen *in the past*."[57]

An institutional constructive trust can only arise when the last fact necessary to create it occurs. In a *Rochefoucauld* case, the claimant will plead, as part of the facts showing a declaration of trust, that the defendant knowingly acquired the land as trustee. Two elements of Lindley L.J.'s test are complete by the creation of the express trust. The remaining fact necessary to constitute fraud is that the defendant deny the trust and claim the land themselves.

What if the defendant never pleads the Statute? As explained above, the denial of the trust, properly understood, occurs when the Statute is pleaded as a defence in litigation. If the defendant neglects to plead the Statute, then the court takes no notice of it and the claimant can prove an express trust with parol evidence. There was never any denial and so no constructive trust can arise.

Equity does not allow C to enforce the trust primarily because there is insufficient evidence of A's intention to create a trust in favor of C

SO, WHEN

1. No Express Trust: There is no express trust because A did not clearly declare an intention to create a trust for C. Without a formal declaration of trust (and possibly lacking written evidence as required by the Statute of Frauds), there is no enforceable express trust in favor of C.

2. No Resulting Trust: There is also no resulting trust for A because the legal title has passed to B

—> B can argue that they are entitled to the land

[53] *Bellasis v Compton* (n.21).

[54] *Roe v Popham* (1778) 1 Doug.K.B. 25.

[55] E.g., McFarlane, (n.4) 674; Liew, [2016] C.L.J 528, 538.

[56] Above nn.28-30.

[57] [1996] A.C. 669, 714.

What if the defendant does plead the Statute? The constructive trust can only come into being at the moment the defendant pleads the Statute in their defence. Suppose the beneficiary is suing to obtain a remedy for breaches of trust, those breaches will have occurred before the litigation. The breach pre-dates any possible date of creation of the constructive trust. It is logically impossible to breach a trust that is created in the future. As Browne-Wilkinson J. said in *Re Sharpe*:[58]

> "Even if it be right to say that the courts can impose a constructive trust as a remedy in certain cases—which to my mind is a novel concept in English law—in order to provide a remedy the court must first find a right which has been infringed. … it cannot be that the interest in property arises for the first time when the court declares it to exist. The right must have arisen at the time of the transaction in order for the plaintiff to have any right the breach of which can be remedied."

An alternative would be to treat the denial of the trust as having occurred before the trustee attempts to set up the Statute. The denial is then some independent act done by the trustee. This is sometimes expressed instead as "reneging" on the "oral undertaking or agreement".[59] This would mean the trustee had denied the trust before the litigation occurred, so a constructive trust can precede any breach of trust, or perhaps arise because of a breach of trust. But this has its own difficulties. On many sets of facts it would be impossible or extremely artificial to find a moment when the trustee decided to deny the trust. True, the trustee might flat out refuse to execute the trust. But many breaches of trust are by their nature an affirmation of the trust,[60] such as an inadequate exercise of a power,[61] which shows the trustee was *performing* the trust, not denying it. Or there may be no breach of trust at all, such as where the beneficiary seeks access to information,[62] or a common account as of right.[63] It would be impossible in these situations to identify any independent act of reneging, so no constructive trust could arise before the litigation. Even if there is a reneging, it seems strange that the beneficiary's priority would be dependent on when the trustee reneged. Perversely, the earlier the trustee reneges, the better for the plaintiff's priority because the constructive trust would arise earlier. An honest trustee might severely prejudice the beneficiary.

Both trustee and defendant might need to rely on the terms of the trust to give legal colour to acts occurring before the date of any potential reneging. If the beneficiary was seeking an account, how could the account cover transactions that occurred before the reneging generated the constructive trust? Would the beneficiary be unable to keep payments of rent made before the constructive trust? Would the trustee be able to claim indemnities and expenses? Similarly, would a request for information only require information from after the date of the reneging, or the whole period? The account and information rights would be meaningless unless it covered the whole period from the date of the declaration, not some later date when a reneging takes place.

What if there is never a reneging? If there was never any breach of trust, and never any need to sue the trustee, no reneging could be identified and no constructive trust could arise. Does it follow that the beneficiary has no rights when the trustee commits no breaches of trust? That would have startling tax and insolvency implications for both beneficiary and trustee.

These questions show that a constructive trust cannot arise at the moment the Statute is pleaded, nor can it arise at some uncertain moment of reneging, which may never come. The only possible sensible answer is that a trust must have come into existence the moment the trustee acquired the land on trust: either an express trust, or a constructive trust from the start.

No Breach, No Trust: A constructive trust typically arises in response to a breach of duty, wrongdoing, or unjust enrichment. If there is no breach or wrongful conduct, there is no basis for imposing a constructive trust. The trust exists to rectify situations where one party would otherwise unjustly benefit at the expense of another.

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[58] [1980] 1 W.L.R. 219, 225.

[59] Oakley (n.4), 53-4; McFarlane, Hopkins & Nield, *Land Law: Texts, Cases and Materials*, 4th ed. (2018) ch.11, §5.5.1 ("reneging" probably comes from *Lyus v Prowsa Developments Ltd* [1982] 1 W.L.R. 1044).

[60] *Hitch v Stone* [2001] S.T.C. 214, [68] Conaglen, "Sham Trusts" [2008] C.L.J. 176, 193-7.

[61] *Pitt v Holt* [2013] 2 A.C. 108.

[62] *Schmidt v Rosewood Trust Ltd* [2003] 2 A.C. 709.

[63] *Partington v Reynolds* (1858) 4 Drew. 253; *Re Fish* [1893] 2 Ch. 413; *Libertarian Investments Ltd v Hall* (2013) 16 H.K.C.F.A.R. 681.

Constructive trust from the start?

The difficulties identified in the previous section show that the only possible time a constructive trust can have arisen is at the moment the trustee received the legal title to the land. But at the moment of acquisition of the property by the trustee, the test for fraud stated by Lindley L.J. is not made out. If the constructive trust is to respond to this test, how does it arise before the fraud occurs?

Professor McFarlane suggests that a constructive trust arises at the moment of receipt, because there is the potential for the trustee to commit a fraud:

> "On the constructive trust analysis, the trust does not arise simply because the former owner of the property so intended; rather, the trust arises *to prevent* [the trustee] reneging on the understanding subject to which he received the property."[64]

This is where the difference between enforceability and validity becomes important. The Statute does not apply automatically. The defendant normally has a *power* to plead the Statute. As explained in Part III above, it is possible to say that upon the defendant knowingly acquiring the land as trustee they come under a *disability* to setting up the Statute against the beneficiary. It is a disability because when the first two elements of the fraud test are present, if the defendant attempts to set up the Statute (fulfilling the third element) the fraud is complete by the defendant's very act, and equity simply disallows the thing the defendant is trying to do. Equity takes away the trustee's usual power to plead the Statute and converts it to a disability. Powers and disabilities are prospective. They regulate potential conduct. But it is quite another thing to say that equity imposes an *interest* on the trustee in order to remove the power of pleading the Statute.[65] A constructive trust requires the conscience of the recipient to be affected.[66] It subjects the trustee to duties and liabilities, not merely a disability. In the absence of a pre-existing proprietary right or provable fiduciary relationship, if the defendant has not yet done anything wrong, how can their conscience be affected?

McFarlane argues that the principle is that the defendant made an undertaking to confer rights on the beneficiary, and "acquired an advantage in relation to the acquisition of that property." But the defendant can only acquire an advantage *if* the defendant pleads the Statute successfully (assuming for the purposes of argument that the Statute could be set up). If the defendant chooses not to, then there is no advantage and thus no occasion for a constructive trust. It seems excessive to impose a constructive trust on the legal title holder merely because there was the *potential* to commit unconscionable conduct. At any rate, upon a proper analysis of *Rochefoucauld v Boustead*, the Statute affords no defence when the trustee knowingly acquired the land as trustee, so a constructive trust is simply unnecessary to correct the defendant's conscience. As Lord Radcliffe said:[67]

> "Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines."

To adapt Occam's razor, equities should not be multiplied unnecessarily.

Note that the argument that a constructive trust should arise to take away an advantage gained by the defendant works in a situation where the facts are insufficient to establish an express trust, as where perhaps the interest to be taken by the beneficiary is insufficiently precise[68] or there was no intention to hold on trust.[69] If there is no express trust that equity can make enforceable by disabling the trustee from relying on the Statute, then the defendant definitely has gained an advantage by obtaining the legal title, and a constructive trust is warranted. McFarlane's argument can work for other types of constructive trusts, just not *Rochefoucauld v Boustead*.

Constructive trusts is an equitable remedy.

If there is no express trust in place, and a beneficiary would otherwise benefit from the legal title held by a trustee unlegally, a constructive trust can be imposed by the court.

Appropriate

In legal contexts, it means that when faced with competing theories or explanations, one should prefer the simplest one that accounts for all the facts.

[64] McFarlane, (n.4) 675.

[65] Pettit, (n.3), 99.

[66] *Westdeutsche* (n.57), 705.

[67] *Commissioner of Stamp Duties (Qld) v Livingston* [1965] A.C. 694, 712.

[68] *North v Wilkinson* [2018] 4 W.L.R. 41. E.g., *Pallant v Morgan* [1953] Ch. 43.

[69] *Richards v Delbridge* (1874) L.R. 18 Eq. 11. E.g., *Binions v Evans* [1972] Ch. 359.

Other academics[70] argue that the true principle is that a constructive trust arises based on reliance by the beneficiary. Perhaps the facts of *Rochefoucauld v Boustead* and similar cases could be made to fit this test. But this explanation strays too far from what *Rochefoucauld v Boustead* actually decided, and discards Lindley L.J.'s test for fraud altogether. A decision is only authority for what it actually decides, not what it could have decided.[71] The fact that a case could be decided on another ground does not deprive the actual ground of decision of effect.[72]

Lindley L.J.'s actual statement of facts is not reported in the official reports (which, according to the usual practice in this period, contains a statement of facts written by the reporter instead) and can instead be read in the Law Times report.[73] In short, the Comtesse, Emily, was registered proprietor of coffee plantations in Ceylon, subject to a mortgage. The mortgagee wanted to sell the land. Emily wished to hide the land from any potential claims from her ex-husband under their divorce orders. A plan was devised by a Mr Duff, a friend of Emily's, between Emily, the mortgagee, Duff and Boustead for Duff and Boustead to purchase the land at a collusive auction[74] unless some higher bidder intervened. Boustead was a professional coffee estate manager who was in the business of running coffee estates under trusts for London clients. Being trustee was a valuable commercial opportunity for his business as he would have the management of the estates and be the exclusive sales agent of the coffee. Duff withdrew from the plan before it was put into action. That plan developed and changed in minor respects over a few years until it was put into action (notably, Duff withdrew before it was completed). However, the conveyance in substance went ahead in accordance with the plan. Boustead took over the estates, ran them, and remitted regular payments to Emily, as well as sending her many letters which treated her as the beneficial owner of the estate, almost up to the date of the litigation. The evidence before the date of conveyance (the plans) and the evidence after the date of conveyance all point to Boustead having purchased the land with the intention of holding it on trust. It is clear that Lindley L.J. regards the intention of Boustead at the moment of purchase, as shown by the plans before and the conduct after the date of purchase, to be the critical fact. He concludes:

> "[I]t is, in our opinion, clear beyond all doubt that the proposed sale to Duff and Boustead was not intended to be a sale to them for their own benefit. *It was intended to be a sale to them for the benefit of the plaintiff*, but subject, of course, to the repayment of Duff's advances. This is quite plain from Duff's evidence and from the correspondence. It is also clear that the plaintiff's name was kept off all formal documents in order to prevent her first husband from discovering that she had any interest in the estates, and to lead him to suppose that they had passed into the hands of strangers. It is further quite clear that the conveyance to the defendant grew out of the arrangement which he and Duff were to have carried out, and *was made for precisely the same purpose.* There is not in the whole correspondence a line to show that the price which the defendant paid had any reference to the value of the estates, *nor to show or suggest that the conveyance to the defendant was intended to be to him for his own benefit*. The history of the transaction is wholly inconsistent with any such intention."[75]

What is being emphasised there is the intention of the parties. Lindley L.J. ends by explicitly rejecting Boustead's argument by Renshaw Q.C., which was:

> "The Delmar estates were acquired by the defendant as beneficial owner, and not as trustee for the plaintiff: *There is nothing to show any intention to create a trust.*"[76]

Read in light of that argument, it is clear that Lindley L.J. was rejecting Renshaw's submission as to intention, and finding that the defendant purchased with the intention to hold it on trust for Emily. A trust came into existence at the moment of purchase because of the intent of the acquirer.[77] Lindley L.J.'s narration of the fact constantly emphasises the intention of the parties, showing that the trust was an express trust. He does not narrate or emphasise any fact in a way that suggests that reliance was in issue. Nor is there any hint of reliance in the argument of Haldane Q.C. for Emily.

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[70] Gardner, Liew and Allen (n.4).

[71] *Victoria v Commonwealth* (1996) 187 C.L.R. 416, 484-5.

[72] *Gartside v I.R.C.* [1968] A.C. 553, 624.

[73] n.19.

[74] The Statement of Claim (National Archives: J.54/910), [11], reveals that this was chosen because an ordinary deed of conveyance would have required the recitals to state her husband's interest in the land under the divorce settlement.

[75] n.19, 505 (emphasis added).

[76] n.19, 503 (emphasis added).

[77] *Re Kayford Ltd* [1975] 1 W.L.R. 279, 282.

Disrespect for the Statute?

A supporting argument frequently advanced is that a constructive trust better respects the legislative authority of the Statute of Frauds.[78] No doubt the doctrine in *Rochefoucauld v Boustead* is a significant exception to the literal operation of the Statute. But statutes are regularly given a construction that cuts down a literal interpretation to bring it into accord with the Statutory purpose.[79] That is all that equity claims to be doing here. As Professor Hanbury put it:

> "[A]t first sight it seems as if equity is claiming to override, practically to repeal, a statute. But equity has never claimed to do this; in fact, for equity to make such a claim would be unthinkable. Its attitude is this—it desires not to hinder, but to help, the statute in its aim, and is better equipped for doing so by reason of its jurisdiction to relieve in hard cases."[80]

Both the express trust and constructive trust theory respond to the trustee's attempt to use the Statute as an instrument of fraud. The express trust theory responds by refusing to allow the Statute to be set up as a defence, allowing the express trust to be proved. The constructive trust theory responds by using the *same* evidence to generate a facsimile copy of the trust—with an identical date of creation, identical trustee powers and duties, identical beneficial interest and identical remedies—but calling it a constructive trust. It is hard to see how one is appreciably less respectful than another. The whole argument puts one in mind of Oscar Wilde:[81]

> "Cecily Cardew: This is no time for wearing the shallow mask of manners. When I see a spade I call it a spade.
>
> Gwendolen Fairfax: I am glad to say that I have never seen a spade. It is obvious that our social spheres have been widely different."

Conclusion

This article has sought to demonstrate that the Statute of Frauds cannot be understood without seeing how it operates in litigation. Properly understood, the doctrine in *Rochefoucauld v Boustead* prevents the trustee from setting up the Statute in litigation if it would be fraudulent to do so. Where a trustee received land as trustee knowing they were trustee, they are disabled from pleading the Statute to deny the trust and claim the land themselves. That means that the beneficiary can prove an express trust with parol evidence. It is an express trust being enforced. There is no need for a constructive trust, and at any rate it is impossible to find a satisfactory way in which a constructive trust could arise. Moreover, to do so would risk obscuring the true basis of the doctrine. Equity does not respond to detrimental reliance, but rather to the misuse of the Statute of Frauds in litigation in a way that inverts the policy of the Statute. The Statute of Frauds cannot be used an instrument of fraud, so it forms no defence in the circumstances.

Express Trusts:
1. Refusal of Statute as a Defense:
When a trustee tries to claim that an express trust cannot be recognized because it lacks written documentation (as required by the Statute of Frauds), the express trust theory argues that the statute should not be allowed as a defense.

This is based on the principle that allowing the trustee to use the statute in this way would facilitate fraud—where the trustee knowingly acquired property intending to benefit another but then seeks to evade their responsibility by relying on the lack of written evidence.

2. Proving the Trust:

In cases like Rochefoucauld v Boustead, evidence such as parol (oral) testimony about the parties' intentions can be used to establish the existence of an express trust despite the absence of a written document.
The court recognizes the trust based on the clear intention of the parties involved, thus allowing the express trust to be enforced even in the face of the Statute of Frauds.

Constructive Trusts:
1. Creating a Facsimile of the Trust: (replicate the essential features of an express trust)
The constructive trust theory responds to the same scenario by asserting that if the trustee wrongfully claims ownership of the property, a constructive trust can be imposed.

This trust does not require the same formalities as an express trust. Instead, it can be created based on the conduct of the parties and the circumstances surrounding the transaction, essentially treating the situation as if an express trust had existed.
—> A person's knowledge as they are a trustee — act like a trustee

2.Identical Characteristics:
Although it is termed a "constructive" trust, it mirrors the characteristics of the express trust:
Date of Creation: It is treated as having the same date of creation as the original intended express trust.
Trustee Powers and Duties: The trustee retains the same responsibilities they would have had under the express trust.
Beneficial Interest: The beneficiary holds the same rights and interests as if the express trust had been properly documented.
Remedies: The remedies available to the beneficiary remain the same.

—> normally argued after trustee's breach of duty

Shift of statute focus

[78] n.4: Elias, 104; Gardner, 68; McFarlane, 676.

[79] See, e.g., *Skandinaviska Enskilda Banken A.B. v Conway* [2020] A.C. 1111, [101].

[80] Hanbury, *Modern Equity*, 8th ed. (1962), 122.

[81] *The Importance of Being Earnest*, Act II.