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Ceylon Coffee, the Comtesse and the Consignee: A Historical Reappraisal of *Rochefoucauld v* *Boustead*

GREGORY ALLAN

This paper examines the Court of Appeal judgment of Rochefoucauld v Boustead [1897] 1 Ch. 196 through use of archive records, rarely cited law reports and nineteenth-century academic opinion. A full and hitherto untold account of the facts of the case is presented. It is revealed that the land which was the subject matter of the dispute was sold under the direction of the Ceylon District Court, and that the plaintiff was an accomplished individual who utilized various means to frustrate her former husband's attempts to obtain the land. The Court of Appeal's rulings that the defendant was a trustee of the land for the prevention of fraud, and that the trust was to be treated as an express trust, are also analysed with the aim of establishing how these issues were understood at the time of the judgment. It is argued that both of these aspects of the judgment were regarded as uncontroversial because there was a settled concept of equitable fraud, and because trusts imposed for the prevention of such fraud were an established category of trust in their own right, separate from express, resulting or constructive trusts.

I. INTRODUCTION

Before the quality of its tea was lauded around the world,¹ Ceylon's most lucrative crop was coffee.² Therefore, when in 1857 Baron de Delmar, an ailing

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I am extremely grateful to Professors Peter Walton and Stephen Griffin for commenting on earlier drafts of this article, and to Professor Roger Gregory for his advice and encouragement. I am also indebted to Mr Kristiaan Dekesel and Mrs Virna Allan for their work translating the documents written in Dutch and French that I obtained during the course of my research for this paper. Finally, I would like to thank the two anonymous reviewers for their extremely detailed and useful comments, and for the ideas that they shared with me. Any errors are, of course, mine alone.

¹William Woodruff, *Impact of Western Man*, London, 1966, 267, describes Ceylon, along with India, as the world's 'greatest exporter' of tea. At 296, it is stated that by 1960, 85 per cent of the value of Ceylon's 'export earnings' were provided through tea.

²The scale of the coffee export industry in Ceylon in the nineteenth century is illustrated by the comment of James S. Duncan, *In the Shadow of the Tropics: Climate, Race and Biopower in Nineteenth Century Ceylon*, London, 2007, 175, that in 1870, Ceylon was 'the third largest exporter of coffee in the world'.

Prussian aristocrat,³ found himself short of capital and needing to provide valuable assets⁴ as security for substantial advances in his favour, he decided to mortgage his extensive Ceylonese coffee plantations, the Delmar Estates (hereafter referred to as 'the Estates'), to Baring Brothers (hereafter referred to as 'Barings'), a successful English merchant bank. Almost forty years later, his adopted daughter, the Comtesse de la Rochefoucauld,⁵ commenced an action in the English courts which culminated in the Court of Appeal ruling in *Rochefoucauld v Boustead*⁶ that John Boustead,⁷ to whom the Estates had ultimately been conveyed, was to account to her for his dealings with these plantations.

Rochefoucauld is a superficially straightforward case. Boustead, to whom the Estates had been conveyed by the mortgagees in an absolute form but subject to a parol agreement that he would take as trustee, was held to have taken the land on trust for the Comtesse. His defence that s.7 of the Statute of Frauds 1677, which required that declarations of trusts of land be 'manifested and proved by some Writing', had not been complied with was rejected on the ground that Boustead could not use the statute as an instrument of fraud.⁸ Boustead's other two main defences,⁹ namely that the considerable delay on the part of the Comtesse in commencing the action offended both the statutory limitation period of the day¹⁰ and the doctrine of laches¹¹ were also unsuccessful. The former was rejected on the ground that the trust fell within the exception to the limitation period that applied to express trusts,¹² and the latter because Boustead had, at some point, encouraged the Comtesse not to sue and because none of the Comtesse's actions suggested abandonment of her claim.¹³

There are several aspects of *Rochefoucauld* that are of interest from a historical perspective, not least that the precise facts of the case are difficult to ascertain. The

³In Right Honourable Sir Horace Rumbold, *Recollections of a Diplomatist*, 2 vols., London, 1903, vol.1, 42, it is explained that the Baron was Prussian, as was his title, but that he had settled in Paris in 1815. At 90–92, the Baron is described as being, by 1847, in a state of 'ill health and infirmity'. Horace Rumbold was the Comtesse's brother.

⁴The Baron's Ceylon coffee estates were clearly regarded as extremely important assets. In Benjamin Disraeli, *Letters: 1848–1851*, Toronto, 1993, 203–204, n.5, it is stated that, in 1851, the Baroness de Delmar 'referr[ed] to her husband [as] "the Baron de Delmar [with] large coffee estates in Ceylon"'.
⁵See nn.25–51 and accompanying text, below, for details of her family background.

⁶[1897] 1 Ch. 196.

⁷For biographical information regarding Boustead, see nn.106–108 and accompanying text, below.

⁸*Rochefoucauld v Boustead* [1897] 1 Ch. 196, at 206 *per* Lindley LJ.

⁹The defences mentioned in the text are the ones which were afforded significant attention by the Court of Appeal. Boustead pleaded two other defences, both of which were given short shrift by Lindley LJ. His first defence, which was rejected outright, was a flat denial that he had agreed to take as a trustee. He also argued that any beneficial interest that the Comtesse may have possessed did not survive his bankruptcy. This defence was rejected on the ground that s.49 of the Bankruptcy Act 1869 did not prohibit claims by beneficiaries against the bankrupt's estate (*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 209, *per* Lindley LJ). Additionally, he argued that the Statute did not apply in Ceylon, to which the Court of Appeal's response was essentially that as the action was being brought in an English court, then the English law applied. The case therefore provides a good example of the extra-territorial effect of equity's *in personam* jurisdiction. See *Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 206 *per* Lindley LJ.

¹⁰The position with regard to the applicability of the statutory limitation period to be applied in actions against trustees was extremely complicated. See nn.218–220 and accompanying text, below, for details.

¹¹The doctrine based on the maxim that delay defeats equity.

¹²*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 208–209 *per* Lindley LJ.

¹³*Ibid.*, at 211 *per* Lindley LJ.

law reports do not make clear exactly why, by whom, or by which legal mechanism the Estates were sold, nor is it obvious to what extent the Comtesse was a victim of circumstance or an active protagonist in securing the sale. A complicating factor is that Ceylon was, and still is, subject to Roman-Dutch law.¹⁴ The Roman-Dutch rules relating to mortgages and sales by mortgagees were very different from those in common law jurisdictions.¹⁵ In view of these difficulties, it is perhaps not surprising that several different versions of the facts have been propagated.¹⁶

The first aim of this article is to provide, for the first time, a full account and analysis of the facts and factual background of the case through the use of all extant law reports,¹⁷ contemporary newspaper reports and archive materials which have hitherto never been cited in relation to any discussion of *Roche foucauld*.¹⁸ An associated aim is to consider

¹⁴Prior to its acquisition by the British, in 1796, Ceylon had been a Dutch territory for over 100 years, and had been subject to Dutch law (R.W. Lee, 'The Fate of the Roman-Dutch Law in the British Colonies', 7 *Journal of the Society of Comparative Legislation* (1906), 357, 359). When Ceylon was set up as a Crown Colony in 1799, it was 'declared by proclamation that the administration of justice ... should henceforth ... be exercised ... according to the laws and institutions that subsisted under the ancient government of the United Provinces [of the Netherlands]'. (Lee, 'The Fate of Roman-Dutch Law', 358). This Dutch law, which was based on Roman law, ceased to operate in Holland in 1810, when a 'code of the usual Continental type' (James Williams, 'Roman-Dutch Law', 19 *Yale Law Review* (1909–10), 156, at 156) was adopted.

¹⁵See n.55 and accompanying text, below.

¹⁶The conveyance has been described as amounting essentially to an assignment from the Comtesse to Boustead subject to the parol trust in her favour (see Philip H. Pettit, *Equity and the Law of Trusts*, 10th ed., Oxford, 2006, 96; J.D. Feltham, 'Informal Trusts and Third Parties', [1987] *Conveyancer and Property Lawyer* 246, at 247), and as an assignment executed by the mortgagee in reliance on the parol agreement between the Comtesse and Boustead (see Simon Gardner, 'Reliance-Based Constructive Trusts', in Charles Mitchell, ed., *Constructive and Resulting Trusts*, Oxford, 2009, at 68; Ben McFarlane, 'Constructive Trusts Arising on Receipt of Property *Sub Conditione*', 120 *Law Quarterly Review* (2004), 667, at 674–675). It has also been described as an assignment to Boustead subject to, but executed by the mortgagee independently of, the parol agreement (see T.G. Youdan, 'Formalities for Trusts of Land, and the Doctrine in *Roche foucauld v Boustead*', 43 *Cambridge Law Review* (1984), 306, at 328–329). The author of this article has explained the transaction on the basis that the agents of the mortgagee conveyed the Estates to the mortgagees by invoking an irrevocable power of attorney which had been granted by the Comtesse as part of the security, and that the mortgagees then sold the Estates to Boustead in the manner described by Youdan (see Gregory Allan, 'Once a Fraud, Forever a Fraud: The Time-honoured Doctrine of Parol Agreement Trusts', 34 *Legal Studies* (2014), 419, at 425, n.44).

¹⁷In particular, the following reports were utilized, as they contained certain details not recorded in the ICLR report: *Roche foucauld v Boustead* (1896) 65 L.J. Ch. 794; (1896) 74 L.T. 783; [1896] All. E.R. Rep. Ext. 1911; (1896) 66 L.J. Ch. 74. The first two of these are reports of the first instance judgment of Kekewich J. Also, *De La Roche foucauld v Boustead*, *The Times*, 24 June 1896, 17 col.b–c; *De La Roche foucauld v Boustead*, *The Standard*, 28 April 1898, 3 cols.a–b were used. The following reports concerning the Comtesse de la Roche foucauld's divorce from her first husband were also used: *Cavendish v Cavendish and Roche foucauld*, *The Times*, 18 June 1866, 11 cols.c–d; *Cavendish v Cavendish and Roche foucauld* (1868) 19 T.L.R. 497. Finally this report of the liquidation of John Boustead's firm was utilized: *In Re Price, Boustead, and Co.*, *The Times*, 30 July 1879, 4 col.c.

¹⁸The Baring Archive, 60 London Wall, London, EC2M 5TQ holds many documents which are of fundamental significance to obtaining a full understanding of the facts of *Roche foucauld*. I would like to extend my gratitude to Ms Lara Webb of the Baring Archive for her unfailingly efficient, polite and helpful assistance, and for allowing me to utilize her extensive knowledge of the archive for the benefit of my research. Furthermore, Stadsarchief Amsterdam, Vijzelstraat 32, 1017 HL, Amsterdam holds some documents that are of critical importance in determining precisely what happened in respect of the Estates. This is because the Stadsarchief holds the records of the Société Générale de Commerce et d'Industrie of Amsterdam (known in Dutch as the Algemeene Maatschappij voor Handel en Nijverheid). In 1863, Barings assigned the mortgage and debt to the Société, and it was the Société which caused the Estates to be sold. For details concerning the assignment and the Société, see nn.71–89 and accompanying text,

whether the factual analysis may provide interesting examples both of the operation of nineteenth-century Roman-Dutch law, and of the practical issues which could face late nineteenth-century litigants when seeking resolution of disputes concerning more than one jurisdiction. Moreover, as the complex legal schemes of the Comtesse were played out well over a hundred years ago, it may be interesting to observe the manner in which she set about seeking to achieve her aims, bearing in mind that she was operating in what appears from a modern perspective to have been an extremely patriarchal society.¹⁹ These aspects of the article are covered in parts I. to III., below.

Certain parts of the judgment itself also lend themselves to historical analysis. Lindley LJ, who delivered the Court of Appeal's judgment,²⁰ described Boustead's laches defence as 'the most difficult part of the case'.²¹ Of the other two main defences, the Court of Appeal's judgment in respect of the applicability of s.7 is, in a modern context, regarded as the most important aspect of the case,²² whilst the limitation defence required the Court of Appeal to set a new precedent. For lawyers unacquainted with the law as it was in 1896, it may seem strange that Lindley LJ dealt with these latter two defences, both of which have attracted much academic debate, in a routine manner, and regarded the laches issue, which is today readily comprehensible, as far trickier.²³ The second aim of this article, therefore, is to ascertain, through use of historical cases and texts, as well as the facts of *Rochefoucauld* as gleaned from the archive materials, how Lindley LJ and his colleagues understood and applied in the law in 1896 and how the judgment was received, in the hope of establishing why the most enduringly significant and, from a modern perspective, complex aspects of the judgment were treated by the Court of Appeal as uncontroversial.²⁴ This limb of the article is covered in parts IV. and V., below.

II. THE FACTUAL BACKGROUND

1. The Comtesse de la Rochefoucauld's family background and divorce

Baron Ferdinand de Delmar was a Prussian whose hereditary title had originally been bestowed upon his father, a successful banker, by King Frederick William III of

below. I would also like to extend my gratitude to Mr Harmen Snel and Mr Goran Pravilovic, both of the Stadsarchief Amsterdam, for their similarly invaluable assistance, and to Mr Snel in particular for searching the archive and locating the documents most relevant to this research.

¹⁹For a summary of the extraordinarily patriarchal nature of English society 'in the 1860s and early 1870s', see Jose Harris, *Private Lives, Public Spirit: Britain 1870–1914*, London, 1994, 73–74.

²⁰*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 204 *per* Lindley LJ. Lord Halsbury LC and Smith LJ sat with Lindley LJ.

²¹*Ibid.*, at 209 *per* Lindley LJ.

²²See Youdan, 'Formalities for Trusts of Land', 328–329. For some recent examples of *Rochefoucauld* being cited, see *Crossco No.4 v Unlimited v Jolan Ltd* [2011] EWCA Civ. 1619 at para.93 *per* Etherton LJ; *De Bruyne v De Bruyne* [2010] EWCA Civ. 1519 at para.51 *per* Patten LJ; *Samad v Thompson* [2008] EWHC 2809 (Ch) at para.128 *per* Sales LJ; *Singh v Anand* [2007] EWHC 3346 (Ch) at para.144 *per* Norris J; *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch. 372 at 383 *per* Chadwick LJ.

²³The Court of Appeal's judgment in respect of the laches issue is considered at nn.181–182 and accompanying text, below.

²⁴See, for example William Swadling 'The Nature of the Trust in *Rochefoucauld v Boustead*', in Charles Mitchell, ed., *Constructive and Resulting Trusts*, Oxford, 2009, 68.

Prussia as a reward for granting unsecured loans to the Prussian crown. The baron followed his father into banking, but in 1815 he left the banking business and settled in Paris, where he enjoyed a luxurious lifestyle.²⁵ At some point before 1851, the baron acquired the Estates.²⁶ In 1857, the baron mortgaged the Estates to Barings.

The Comtesse de la Rochefoucauld, née Emily Rumbold (hereafter referred to as 'Emily', on account of her having had at least three surnames during her lifetime), was born in 1824 to affluent English parents, both of whom died prematurely.²⁷ Her paternal aunt was married to Baron de Delmar.²⁸ The Delmars adopted Emily in 1836.²⁹ In 1848, Emily married George Henry Cavendish, son of Major General Henry Cavendish.³⁰ The newlyweds eventually took up residence in Paris.³¹ In 1858, the Baron predeceased his wife, who, by virtue of his will, inherited the Estates. In 1861, the Baroness died, having bequeathed the Estates to Emily, who thereby became the registered owner of the Estates, which were still encumbered by the 1857 mortgage. It should here be noted that, in the nineteenth century, Ceylon operated a system of registration of title deeds.³² Emily, as registered owner, owned the Estates in her own right, independently of her husband.³³ The Baroness did, however, bequeath to Cavendish an annuity, to be paid out of the income from the Estates in the event that Emily pre-deceased him.³⁴

Emily's marriage to Cavendish was ultimately an unhappy one; in 1865, Cavendish filed for divorce.³⁵ The ground was 'her adultery with Count Gaston de la

²⁵Rumbold, *Recollections*, 42–44. The Baron's enjoyment of this lifestyle was tempered by the fact that, in November 1835, he became blind.

²⁶See n.4, above for evidence that, by 1851, the Baron certainly owned the Estates.

²⁷Rumbold, *Recollections*, 2–3.

²⁸*Ibid.*, 5.

²⁹*Ibid.*, 13. Emily's marriage notice in *The Times*, 18 Oct. 1848, 7 col.a, suggests that she may not have formally been adopted, as it lists her as the niece of the Delmars and the daughter of Sir William Rumbold.

³⁰*The Times*, 18 Oct. 1848, 7 col.a. Major General Henry Cavendish was the third son of George Cavendish, the first earl of Burlington: <http://thepeerage.com/p1028.htm#i10276> (accessed 3 July 2014). According to Rumbold, *Recollections*, 90–92, the wedding took place on 16 Oct. 1848, and was arranged by William Cavendish, sixth Duke of Devonshire, a distant cousin of the bridegroom. The duke apparently 'took a great interest in' this marriage.

³¹*Cavendish v Cavendish and Rochefoucauld*, *The Times*, 18 June 1866, 11 cols.c–d. at col.c.

³²See generally E.J. Taylor, 'Registration of Title Deeds under Roman-Dutch Law', 2 *Law Quarterly Review* (1886), 347.

³³It is also clear from the will of the Baroness de Delmar that Emily was to take the estates in her own right (the Baroness' will is held by the Baring Archive, HC6.3.22.3, 1859). At this time, as the Married Women's Property Act 1870 had not yet been enacted, a woman's husband, under English law, took legal title to all of her property in right of her. She could only own property in her own right under a trust. Under Roman-Dutch law, however, it was possible for a woman to retain ownership of, and control over, her property after marriage. See R.W. Lee, *An Introduction to Roman-Dutch Law*, 1st ed., Oxford, 1914, 91. It is apparent from the deed transferring the mortgage from Barings to the Société (Baring Archive, HC6.3.7, 1864) that the Comtesse had the power to deal with the estates unfettered by her husband. Although George Cavendish was a party to the deed, it is expressly stated that this is out of convention, but not out of necessity. The memorandum of agreement (23 Dec. 1863) whereby Barings agreed to transfer the mortgage and debt to the Société also describes the Emily as being the owner of the land 'for her separate use free from the Debts control or engagements of her husband' (HC6.3.7, 1864).

³⁴This appears in the will of the Baroness, Baring Archive, HC6.3.22.3, 1859.

³⁵The record of Cavendish's petition for divorce is held in the National Archives, Kew. Available online at: <http://discovery.nationalarchives.gov.uk/SearchUI/Details/AssetMain?iaid=C7973268> (accessed 3 July 2014).

Rochefoucauld',³⁶ whom she had met in 1857.³⁷ The divorce was acrimonious, and caused a minor scandal.³⁸ It was claimed that soon after the Baroness' death, Emily had persuaded Cavendish to return to England with their son, and that she had for several years been co-habiting with the Count, and her daughter by Cavendish, in Baden Baden.³⁹ She had refused Cavendish's pleas to re-join him in England on the ground that 'the coffee plantations in Ceylon which she had inherited from her uncle were involved in a litigation so complicated as to require her constant presence in Paris'.⁴⁰ Furthermore, letters purporting to have been written by the Comte Gaston de la Rochefoucauld (the same 'Count' with whom she had committed adultery, hereafter referred to as 'Gaston', rather than 'Rochefoucauld', so that he is not misidentified as the plaintiff in the case of *Rochefoucauld*) had been sent to Cavendish's father in September 1860. They were described as being 'full of the most horrible obscenity'⁴¹ and the Judge-Ordinary said that there was 'no language strong enough to describe' them.⁴² The letters also apparently implied that Cavendish's life was under threat.⁴³ It seems possible that the letters were sent by Gaston and Emily in an attempt to provoke Cavendish into filing for divorce, particularly as under the Matrimonial Causes Act 1857 it was more difficult for a wife to petition successfully for a divorce than it was for a husband to do so.⁴⁴

The Court for Divorce and Matrimonial Causes granted a decree nisi on 18 June 1866. A decree absolute was granted in December 1867.⁴⁵ Emily married Gaston on

³⁶*Cavendish v Cavendish and Rochefoucauld*, *The Times*, 18 June 1866, 11 cols.c–d. at col.c. According to the Right Honourable Sir Horace Rumbold, *Further Recollections of a Diplomatist*, London, 1904, 88, the Comte de la Rochefoucauld had served in Madrid and Washington as second and then first secretary to the French embassies in those cities. He then lived with Emily in Baden Baden, before settling with her and her daughter in Biarritz. The Comte seems to have lived a life of leisure following his diplomatic service. Rumbold, *Further Recollections*, 88–89, described the Comte as 'a most creditable specimen of those gentlemen of France, cast in an old mould which is fast being broken up, who have always served the country well at its hours of need, but for whom this Republican age no longer finds any uses'. Rumbold reports, 177, that political pressures prevented the Comte from ever resuming his diplomatic career.

³⁷*Cavendish v Cavendish and Rochefoucauld*, *The Times*, 18 June 1866, 11 cols.c–d. at col.c.

³⁸For example, the divorce was reported in *Birmingham Daily Post*, 19 June 1866, 6 col.b and *Liverpool Mercury*, 19 June 1866, col.c under the headline 'Divorce in High Life'.

³⁹*Cavendish v Cavendish and Rochefoucauld*, *The Times*, 18 June 1866, 11 cols.c–d at col.c. According to this report (*ibid.*), Emily had, whilst in Baden Baden, taken to hosting lavish social events. Allegedly, one guest was the King of Prussia.

⁴⁰*Birmingham Daily Post*, 19 June 1866, 6 col.b. Also, according to *Cavendish v Cavendish and Rochefoucauld*, *The Times*, 18 June 1866, 11 cols.c–d at col.c, Emily claimed that she needed to remain 'on the Continent until her affairs were settled'. There is no direct reference to the Ceylon Estates, although it is stated that '[t]he affairs of the Baron and Baroness were found to be very much involved'. In a letter written by Emily to Barings, dated 8 Sept. 1862, requesting further advances, she makes reference to having had to instruct 'several celebrated French Advocates' (Baring Archive, HC6.3.22, 1862). According to Rumbold, *Recollections*, 282, the Baron, in 1857, travelled to Prussia to obtain 'a large advance' 'on the royal guarantee' of the Prussian crown. The need for this loan was 'caused by heavy losses on his Ceylon property'. It is not inconceivable that the Paris litigation was concerned in some way with this loan.

⁴¹*Cavendish v Cavendish and Rochefoucauld*, *The Times*, 18 June 1866, 11 cols.c–d. at col.c.

⁴²*Ibid.*, at col.d.

⁴³*Ibid.*

⁴⁴The Matrimonial Causes Act 1857, s.45 gave the wife's adultery as a ground for divorce, whilst the husband's adultery alone was not a sufficient ground.

⁴⁵According to *Cavendish v Cavendish and Rochefoucauld* (1868) 19 TLR 497.

20 August 1870,⁴⁶ as a result of which she became Comtesse de la Rochefoucauld. It seems that, at first, Emily and Gaston did not take their position as respondents in the divorce proceedings seriously, for their counsel refused to plead because they had not been supplied by the respondents with any evidence or ‘materials for cross-examination’.⁴⁷ In addition to the decree nisi, Emily was ordered to surrender her daughter into Cavendish’s custody, as was usual for the time.⁴⁸ She failed to do this and was found to be in contempt of court.⁴⁹

Cavendish then petitioned the court to apply some or all of the property of the marriage settlement for the benefit of himself and their children. The court went further than this; on 31 July 1868, the Judge Ordinary ordered ‘certain property in Ceylon [the Estates] and in [a] Dutch company brought into the settlement by the respondent to be assigned by her to two trustees’.⁵⁰ It seems that Emily did not take kindly to the 1868 decree. Fortunately for her, she had numerous influential friends in France, the most notable of whom was the Emperor of France, Napoleon III.⁵¹ According to one report, ‘[o]n the Continent strong views were taken of the injustice of that judgment and Mrs. Cavendish was not only created Baroness Delmar in her own right, but steps were taken to put the estates outside the reach of the Divorce Court’.⁵²

Prior to analysing these ‘steps’, the nature of both the mortgage and the mortgagee to which it was assigned will be considered.

2. *The mortgage: its nature and assignment*

The Estates were mortgaged on 26 June 1857 in Ceylon for a sum of £50,000.⁵³ The mortgage agreement, which describes the security as a ‘mortgage and hypothecation’, entitled Barings to manage the Estates, and assigned all produce of the Estates arising until 30 June 1863 to Barings, to be used in repayment of the interest and capital. It was agreed that this and any further outstanding sums would be repaid by 30 June 1863.⁵⁴

⁴⁶See <http://www.thepeerage.com/p56333.htm> (accessed 25 July 2014).

⁴⁷*Cavendish v Cavendish and Rochefoucauld*, *The Times*, 18 June 1866, 11 cols.c–d. at col.d.

⁴⁸In Harris, *Private Lives*, 74, it is noted that ‘[i]n disputes over custody mid-Victorian judges almost invariably upheld the rights of a father, however reprobate, against a mother, however virtuous’.

⁴⁹*Cavendish v Cavendish and Rochefoucauld*, *The Times*, 28 Nov. 1866, 9 cols.d–e.

⁵⁰*Cavendish v Cavendish and Rochefoucauld* (1868) 19 TLR 497 at 497. The Dutch company mentioned may have been the Société. Although Emily is not listed as a shareholder in the records of the Société, she may have owned shares through a nominee, or possessed some other type of interest. Probably, the extent of any interest that she may have possessed in the Société is now impossible to ascertain.

⁵¹Although there is no evidence that the emperor personally interceded in Emily’s favour, she was seemingly on good terms with him. According to Rumbold, *Recollections*, 90–91, she first struck up ‘a considerable friendship’ with Napoleon III in 1847 in England. According to Rumbold, this friendship was long-lasting.

⁵²*De La Rochefoucauld v Boustead*, *The Standard*, 28 April 1898, 3 cols.a–b, at a.

⁵³A signed and sealed copy of the original 1857 mortgage deed is currently in the possession of the Baring Archive (Baring Archive, HC6.3.7, 1857). Richard Baring executed this instrument in Ceylon as the attorney of the Baron. Although several of the law reports state that the Estates were mortgaged for £25,000, the documentation in the Baring Archive (HC6.3.7, 1857 and 1864) makes it clear that the Baron ‘became bound to [Barings] in the sum of £50,000’. It seems that Barings also ‘lent to him the sum of £25,000’. Therefore, in total, the Baron was advanced £75,000.

⁵⁴This information appears in the recitals in the deed dated 28 Dec. 1863 transferring the debt, mortgage and power of attorney to the Société (Baring Archive, HC6.3.7, 1864). The deed states that Richard Baring was

The contemporary nature of Roman-Dutch mortgages was explained by Thomson:

In the law of Ceylon, the English mortgage, which conveys the legal estate to the mortgagee, does not exist, but is replaced by a simple deed of hypothecation, which has the effect of tacking the debt to the property, so that a creditor obtains a right to follow it through whatever hands it may happen to pass, and may obtain a decree for its attachment and sale in satisfaction and discharge of the debt; so that by a very simple deed the Ceylon mortgage obtains all the advantages of the English mortgage, but with one exception, that the Ceylon mortgage, in general, gives to the mortgagee no power of sale on failure of interest or redemption ; but he must foreclose in court.⁵⁵

Thomson was almost certainly not using the term ‘foreclose’ in the technical sense, i.e. the cancellation of the mortgagor’s equity of redemption. Rather, this was a reference to the mortgagee’s power to obtain a court-sanctioned sale of the mortgaged land. Elsewhere, Thomson refers to the only purpose of a ‘foreclosure suit’ being to obtain a ‘sale in execution’ of mortgaged land,⁵⁶ and also explains in detail the procedure for obtaining a sale in execution.⁵⁷ In England, the most common mortgagee’s remedy at the time was ‘a bill for a foreclosure’.⁵⁸ The Court of Chancery Procedure Act 1852 gave the Court of Chancery a general power to order a sale in response to a foreclosure suit.⁵⁹ Perhaps, therefore, in the second half of the nineteenth century, it was customary to refer to any suit which could result in a judicial sale as a foreclosure suit. In 1915, Lee commented that, under Roman-Dutch law, ‘[f]oreclosure is unknown, and sale cannot be effected except with the consent of the debtor. The proper and only mode of realizing a mortgage is by obtaining a judgment of the court upon the mortgage debt and taking out a writ of execution against the property’.⁶⁰ Lee’s comments appear irreconcilable with those of Thomson unless, as seems likely, Thomson was using the term ‘foreclose’ in the non-technical sense described above, whilst Lee was referring to technical foreclosures. The term ‘foreclose’ is also used in reference to the sale of the Estates in *Rochefoucauld*⁶¹ and in the correspondence of the interested parties,⁶² presumably also in this informal sense, for it was known to the Court of Appeal and the parties concerned that the Estates had been sold, and that no technical foreclosure had taken place.

authorized to act as attorney of the Baron ‘by a letter of attorney bearing date at Paris the eleventh day of April [1857]’.

⁵⁵Henry William Byerley Thomson, *Institutes of the Laws of Ceylon*, 1st ed., London, 1866, x.

⁵⁶*Ibid.*, 256.

⁵⁷*Ibid.*, 349–355.

⁵⁸Josiah W. Smith, *A Manual of Equity Jurisprudence*, 5th ed., London, 1856, 252–253.

⁵⁹*Ibid.*, 253–254.

⁶⁰Lee, *An Introduction*, 180–181.

⁶¹*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 197.

⁶²The attorneys of the Société in Ceylon, Robertsons, wrote to the Société on 22 July 1871 to explain that ‘the foreclosure of your mortgage is being proceeded with’ (Stadsarchief, Amsterdam, inventory number 20 of archive 650, 1871).

Differences in nomenclature aside, both Thomson and Lee concurred that the normal way of enforcing a mortgage in Roman-Dutch jurisdictions was to obtain a judicial sale. The wording of the 1857 mortgage agreement, which makes no mention of any power of sale, or of any conferment of legal title upon Barings, and the location in which the agreement was executed, both show that the mortgage was a Ceylonese mortgage subject to Roman-Dutch law.

On 10 October 1862, on account of there being large sums still owed to Barings, and in return for further advances,⁶³ a power of attorney was executed by Emily and Cavendish.⁶⁴ The firm of J.M. Robertson & Co. of Colombo (hereafter referred to as 'Robertsons') and its partners was appointed by Emily and Cavendish as their attorneys,⁶⁵ 'for so long as any money should remain due [to Barings]' to cultivate crops on the Estates and sell the produce thereof until satisfaction of the debts', and 'to mortgage or convey or assign the said several estates or plantations to the said Barings for further or better securing the repayment of the said several monies'. James Murray Robertson, the founding partner of Robertsons, and one of those to whom the power of attorney was granted, had been appointed in 1849 as the agent of Barings in Ceylon.⁶⁶ The firm of Robertsons acted also in this capacity.

The decision of Barings to strengthen its security by empowering Robertsons to sell the Estates may well have been brought about by concerns regarding the state of Ceylonese law. Owing to the codification of Dutch law,⁶⁷ which caused the pre-codification law that continued to apply in Ceylon to become obsolete and inaccessible, and the British propensity towards appointing British-trained legal officers in Ceylon, the Roman-Dutch law in Ceylon came to be 'mangled by the legislature, and administered in great measure by judges ignorant and sometimes frankly contemptuous of its principles'.⁶⁸ It seems that one of the areas most afflicted was the law of mortgages;⁶⁹ Ceylonese law had caused 'much hardship ... in the case of

⁶³In a letter written by Emily to Barings, dated 8 Sept. 1862, requesting further advances, she expressed her understanding that, as soon as the power of attorney was executed, Barings would provide the said advances (Baring Archive, HC6.3.22, 1862). A letter sent by Cavendish to Barings, dated 15 Jan. 1872 alludes to the fact that the advancements that Emily had sought were indeed provided by Barings (Baring Archive, HC6.3.22.13, 1872).

⁶⁴A certified copy of the deed, dated 28 Dec. 1863, by which the mortgage was assigned to the Société, is held by the Baring Archive, HC6.3.7, 1864. The recitals to this instrument reveal the details concerning the 1862 power of attorney. This instrument also emphasizes that the Estates were 'expressly limited to the said Emily Victorine Elizabeth Cavendish for her sole and separate use free from the control interference debts or engagements of her present or any future husband and the said George Henry Cavendish having been made a party to and executed this deed solely for the sake of conformity'.

⁶⁵It should be noted that, although the 1862 power of attorney seems to have been executed in Europe, the recitals to the 1863 instrument also state that 'a deed or instrument of assignment was duly executed in the said Island of Ceylon in pursuance of the said Power of Attorney.'

⁶⁶The power of attorney was granted to 'James Murray Robertson, George Christian and Henry Bois constituting the Firm of J.M. Robertson & Co. of Colombo' (Baring Archive, HC6.3.7, 1864). James Murray Robertson is described in the Baring Archive Catalogue as having, in 1849, been 'Barings [sic] agent and manager in Ceylon': Baring Archive Catalogue, HC6, Indian Sub-continent, Far East & Australia, at 11. Available online at: http://www.baringarchive.org.uk/materials/the_baring_archive_hc6.pdf (accessed 1 July 2012). It is therefore safe to assume that the firm of Robertson and Co. acted in a similar capacity.

⁶⁷See n.14, above.

⁶⁸Lee, 'The Fate of the Roman Dutch Law', 369.

⁶⁹*Ibid.*, 366.

European mortgages on coffee or other estates, and many an English investor ha[d] found cause to rue it'.⁷⁰

The next development came on 28 December 1863. By deeds executed in London and France, the debt and mortgage were assigned by Barings to the Société Générale de Commerce et d'Industrie of Amsterdam (hereafter referred to as 'the Société'), in consideration of £12,000, and a new power of attorney, which essentially mirrored the 1862 power, was executed by Barings, Emily and Cavendish in favour of Robertsons.⁷¹ Cavendish's participation was stated in the documentation to have been a mere formality.⁷²

3. *The Société and its liquidation*

Little information about the Société can be gleaned from the law reports of *Rochefoucauld*, other than that the Société was in liquidation by 1871, and that the liquidators were apparently keen to call in the security. The Dutch name of the Société was the Algemeene Maatschappij voor Handel en Nijverheid NV. Extensive records concerning the Société and its affairs are held in the Stadsarchief Amsterdam.⁷³ It was a bank founded in 1863⁷⁴ with the aim of promoting industrial development.⁷⁵ Its majority shareholder from the outset was a French bank called Crédit Mobilier.⁷⁶ The Société was not a success; it was embroiled in financial scandals almost immediately and on 24 October 1864 the Société's members received notice that its president, Alexander Mendel, had fled abroad having withdrawn substantial sums from the Société's account in dubious circumstances.⁷⁷ According to one source, part of the reason for the difficulties encountered by the Société was a 'reckless policy ... [of] over-investing in foreign securities'.⁷⁸ It is distinctly possible that the Société's purchase of the mortgage of the Estates was a result of these over-enthusiastic spending habits. On 24 October 1864, it was reported to its shareholders that the Société had accumulated huge debts, which it had little prospect of repaying.⁷⁹

⁷⁰L.B. Clarence, 'The Administration of Justice in Ceylon', 2 *Law Quarterly Review* 28 (1886), at 44.

⁷¹Baring Archive, HC6.3.7, 1864. The new power of attorney was in all material respects similar to the old one, except that the Société took the place of Barings. The power also empowered Robertsons to 'to sign and execute all such deeds or documents and so all such acts matters and things as [they] may think proper' in furtherance of securing repayment of the debts.

⁷²See n.64, above.

⁷³For details relating to the Stadsarchief Amsterdam, see n.18, above.

⁷⁴The 1863 instrument transferring the debt and mortgage to the Société explains that the Société was known in the Netherlands as the Algemeene Maatschappij vor Nijverheid en Handel [sic]. The prospectus of the company (Stadsarchief Amsterdam 650/4, 1863) makes it clear that the Société Générale de Commerce et d'Industrie of Amsterdam was also known as the Algemeene Maatschappij voor Handel en Nijverheid.

⁷⁵Michael Wintle, *An Economic and Social History of the Netherlands 1800–1920 Demographic, Economic and Social Transition*, Cambridge, 2000, 105.

⁷⁶Stadsarchief Amsterdam, 650/4, 1863.

⁷⁷Report to the Société's annual general meeting of shareholders, 29 March 1864, Stadsarchief Amsterdam, 650/4, 1864.

⁷⁸Manfred Pohl and Sabine Freitag, *Handbook on the History of European Banks*, European Association for Banking History, Aldershot, 1994, 722.

⁷⁹Report to the Société's annual general meeting of shareholders, 29 March 1864, Stadsarchief Amsterdam, 650/4, 1864.

At its annual general meeting of shareholders on 29 March 1865, the Société resolved to appoint Antide Martin as its president and Frans Müller as its 'Secrétaire de la Direction'.⁸⁰ The Société also indicated that it was to focus its operations on its affairs in the Dutch East Indies.⁸¹ No biographical information concerning Martin has been forthcoming, other than that he was apparently based in Paris.⁸² Müller was a director of the Rotterdamsche Bank, which was active in the Dutch East Indies, from 1869 to 1882,⁸³ also serving as its president. At the Société's annual general meeting on 25 March 1868, Martin and Müller were appointed as its liquidators.⁸⁴ The duration of the liquidation is difficult to ascertain for certain. The Société certainly failed eventually, and was wound up, although sources are not consistent as to precisely when this occurred.⁸⁵ In fact, it seems that the Société came out of liquidation sometime between 18 August 1872 and 15 October 1872,⁸⁶ and it certainly produced ledger entries and current account records until 1878,⁸⁷ although the scarcity of records from that period in the archive would suggest that its activities were much reduced after the commencement of the liquidation. Narula and van Hoesel report that after the Société failed, one of its subsidiaries, the *Nederlandsch-Indische Spoorweg Maatschaapij* 'was carried on by private individuals'.⁸⁸ Similarly, Pohl and Freitag report that 'a few subsidiaries survived [the Société's demise], such as the *Nederlandsch-Indische Handelsbank*, which, amongst other things, as a colonial agricultural bank, concentrated on the banking opportunities in the Netherlands Indies'.⁸⁹ It therefore seems likely that the Société's operations in Ceylon continued for several years after it entered liquidation, and that its activities in that part of the world were ultimately carried on by one or more of its subsidiaries or, indeed, by the Rotterdamsche Bank, with which the Société became very closely linked through Müller.

III. THE SALE OF THE ESTATES

The law reports give relatively little information regarding precisely how and why the sale of the Estates came about. It is variously stated that they were sold 'under a power

⁸⁰Ibid.

⁸¹Ibid.

⁸²Telegrams from Martin on 7 and 28 Aug. 1870 were sent from Paris. The tone of these telegrams strongly suggests that Martin was based there (Stadsarcheif Amsterdam, 650/20, 1870).

⁸³Nederlands Nationaal Archief 2.18.33. Available online at: <http://www.gahetna.nl/en/collectie/archief/ead/index/eadid/2.18.33/anchor/descgrp-appendices-odd/zoekterm/Leichlingen/aantal/20/open/descgrp-appendices-odd#descgrp-appendices-odd> (accessed 10 June 2014).

⁸⁴Report of the resolutions of the Société's annual general meeting of shareholders, 25 March 1868 (Stadsarcheif Amsterdam, 650/4, 1868).

⁸⁵According to Rajneesh Narula and Roger van Hoesel, eds., *Multinational Enterprises from the Netherlands*, London, 1999, 48, n.32, the Société was liquidated in 1864/67. According to Pohl and Freitag, *Handbook*, 722, the Société was wound up in 1868.

⁸⁶Photocopies of 35 letters concerning the Delmar Estates sent from J.M. Robertson & Co. to the directors of the Société between 13 May 1871 and 21 Feb. 1873 have been obtained from the Stadsarcheif Amsterdam, 650/20. The last letter addressed to the Société 'in liquidation' was sent on 18 Aug. 1872. All letters sent from 15 Oct. 1872 omit 'in liquidation' from the Société's name.

⁸⁷Stadsarcheif Amsterdam, 650/26 and 650/27.

⁸⁸Rajneesh Narula and Roger van Hoesel, *Multinational Enterprises from the Netherlands*, London, 1999, 48, n.32.

⁸⁹Pohl and Freitag, *Handbook*, 722.

of sale',⁹⁰ by the 'liquidators' of the company,⁹¹ by 'the mortgagees',⁹² and also that they were sold, but without reference to the identity of the seller.⁹³ It is also stated that Emily entered the parol agreement whereby Boustead would purchase the Estates as trustee for her because the Dutch company wished to call in the mortgage, and '[Emily was] not ... in a position to find the money'.⁹⁴ One of the reports also hints at some conspiracy, stating that 'it was a great object of the plaintiff and her friends to prevent Mr Cavendish from deriving any benefit from these estates'.⁹⁵ From various sources, it has been possible to piece together a detailed account of the circumstances preceding and surrounding the sale of the Estates and the purchase thereof by Boustead.

1. The facts leading to the sale

On 9 November 1866, a solicitor named Mr Hodgson, acting for Cavendish, wrote from London to Robertsons in Ceylon explaining that his client had presented a petition to the Divorce Court, warning that the court possessed a statutory power, 'upon Divorce being pronounced for adultery of the wife, to settle her fortune as it may think reasonable for the benefit of the innocent party, and the children'.⁹⁶ Hodgson commented that although Emily, who was at that time in Baden Baden, had refused to acknowledge service of an official copy of the petition, such a copy had been served upon the Société. He provided reassurance that the Société's rights as mortgagees would not be compromised by any order of the Divorce Court, but threatened that 'no payment made by the Society to Mrs Cavendish in opposition to the order of the Court here would be recognised in any manner'.⁹⁷ Hodgson also reminded Robertsons that 'by the ordinance of your Government dated 23rd December 1844 there will be no difficulty in carrying out the settlement whatever that may be'.⁹⁸ The tenor of this letter suggests that Cavendish expected that the Divorce Court's decree would be carried into effect irrespective of the several jurisdictions involved.

Despite Hodgson's letter, the Estates were never transferred to the English trustees in accordance with the 1868 decree. There is a wealth of correspondence from as early as August 1870, which indicates that, soon after the 1868 decree, the Société became extremely keen to realize its security⁹⁹ by causing the Estates to be

⁹⁰*Rochevoucauld v Boustead* (1896) 74 L.T. 783 at 783.

⁹¹*Ibid.*

⁹²*Rochevoucauld v Boustead* [1897] 1 Ch. 196 at 196.

⁹³*Rochevoucauld v Boustead* [1896] All. E.R. Rep. Ext. 1911 at 1914 *per* Lindley LJ.

⁹⁴*Rochevoucauld v Boustead* [1897] 1 Ch. 196 at 196.

⁹⁵*Rochevoucauld v Boustead* [1896] All. E.R. Rep. Ext. 1911 at 1914 *per* Lindley LJ.

⁹⁶Stadsarchief Amsterdam, 650/17, 1866. A copy of this letter, or the original itself, was evidently forwarded to the Société and retained for its records. The statutory provision to which Hodgson was referring was the Matrimonial Causes Act 1857, s.45.

⁹⁷*Ibid.*

⁹⁸*Ibid.*

⁹⁹The earliest references are from 7 and 28 Aug. 1870. On these dates, Antide Martin sent telegrams to Mr Pourek, his agent in Amsterdam, urging Pourek to send some signed documents to Ceylon in order that more prompt action could be taken in respect of the Estates. Martin had granted Pourek a power of attorney to act on his behalf in respect of these matters in fear of potential communication breakdowns caused by an impending crisis (Stadsarchief Amsterdam, 650/20, 1870). Given the dates, it is very likely that the crisis in question was the Franco-Prussian war.

sold.¹⁰⁰ Furthermore, sometime before 23 February 1871, Emily revoked the power of attorney that had been granted to Robertsons in December 1863.¹⁰¹ Accordingly, Robertsons informed Müller that it would now act in the exclusive interests of the Société.¹⁰²

At around this time, Emily began negotiations with a view to obtaining control over the Estates. These negotiations culminated in a written agreement of 1 July 1871 between the Société on the one hand and two gentlemen by the names of Duff and Boustead on the other.¹⁰³ Duff was a friend of Emily.¹⁰⁴ Either Duff or Emily's agent in Ceylon, Mr Sabonadière,¹⁰⁵ brought the defendant, Boustead, with whom Sabonadière had had past business dealings, into the scheme on account of his experience as a manager and consignee of coffee estates.¹⁰⁶ John Boustead was a partner in the firm Price, Boustead and Co. Although he was born in Ceylon, Boustead relocated to London, where his father co-founded the firm.¹⁰⁷ The firm managed coffee estates in Ceylon from London through agents.¹⁰⁸ The July 1871 agreement provided that the liquidators would sell the estates by auction.¹⁰⁹ If there was no tender that bettered that of Duff and Boustead, the estates were to be sold to them for an amount sufficient to discharge the mortgage. There was no mention of any beneficial interest being vested in Emily, even though she had reached an understanding with Boustead and Duff, probably through their agents in Ceylon,¹¹⁰ that they were to take as trustees for her, subject to a charge for repayment of their advances and expenses.¹¹¹

Prior to the agreement of July 1871, Duff and Boustead had planned to take an assignment of the mortgage from the Société. It was reported that Duff had objected

¹⁰⁰The first specific reference to a sale in the available documentation appears in Robertson's account, in a letter sent to the Société dated 13 May 1871 (Stadsarchief Amsterdam, 650/20, 1871), of a telegram sent by Müller to Robertsons whereby Müller had enquired urgently as to whether the sale of the Estates had been fixed.

¹⁰¹This information is contained in a telegram sent by Müller to the Société on 23 Feb. 1871. The telegram was sent at 12.12pm on 23 Feb. 1871 from Rotterdam and received at 12.17pm in Amsterdam on the same date (Stadsarchief Amsterdam, 650/20, 1871).

¹⁰²*Ibid.*

¹⁰³*Rochefoucauld v Boustead* [1896] All. E.R. Rep. Ext. 1911 at 1915 *per* Lindley LJ.

¹⁰⁴*Ibid.*, at 1914 *per* Lindley LJ. Attempts to obtain further information about Duff have been fruitless.

¹⁰⁵Sabonadière was probably William Sabonadière, author of *The Coffee Planter of Ceylon*, 2nd ed., London, 1870, who took over the management of several estates in Ceylon in the mid-nineteenth century from his brother, F.R. Sabonadière, including Delta, which was the largest and most profitable of the Delmar estates.

¹⁰⁶*Rochefoucauld v Boustead* [1896] All. E.R. Rep. Ext. 1911 at 1914 *per* Lindley LJ.

¹⁰⁷The diary (1 Aug. 1855–18 Jan. 1861) of John Boustead (snr.) is held at the National Archives, Kew. Available online at: <http://www.nationalarchives.gov.uk/A2A/records.aspx?cat=094-accession950&cid=1#-1> (accessed 3 July 2014). According to the Archives' information on this source, 'John Boustead [snr] was one of the co-founders of the firm of Price and Boustead of 33 and 34 Strand'. It is also revealed by this source that his first son, and second child, John, was born in Ceylon in 1823.

¹⁰⁸*In Re Price, Boustead, and Co.*, *The Times*, 30 July 1879, 4 col.c. This report from the Court of Bankruptcy describes the estates of the firm as being 'under the management, as regards cultivation, of agents'. Also, in *Rochefoucauld v Boustead* [1896] All. E.R. Rep. Ext. 1911 at 1915, Lindley LJ explained that Boustead 'hoped to become the plaintiff's representative in England'.

¹⁰⁹*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 198.

¹¹⁰Certainly, the business in Ceylon of Emily and Boustead was conducted by agents.

¹¹¹*Rochefoucauld v Boustead* [1896] All. E.R. Rep. Ext. 1911 at 1915 *per* Lindley LJ.

to some of the details pertaining to the mortgage transfer, which is why it was agreed that he and Boustead would instead purchase the Estates from the Société.¹¹² In fact, the Société had commenced legal action in Ceylon against Emily,¹¹³ Gaston¹¹⁴ and Cavendish, seeking a judicial sale of the Estates. Cavendish was a defendant seemingly on account of his claim to an interest in the Estates as annuitant under the Baroness' will, rather than upon the 1868 decree.¹¹⁵ The first reference to the suit in the correspondence that has been obtained for the purposes of this article appears in the letter from Robertsons of 13 May 1871.¹¹⁶

The Société's action to secure a judicial sale suggests that the agreement of July 1871 was of little legal significance. This is because, once a sale of immovable property had been ordered by the District Court, the 'fiscal'¹¹⁷ responsible for carrying into effect the court's judgment was required by law to advertise details of the impending sale 'in the Government Gazette, and in any other Ceylon newspaper'.¹¹⁸ Furthermore, 'a sale in execution [was] an assignment by operation of law',¹¹⁹ conducted by the fiscal, who was responsible for conveying the land to the eventual purchaser.¹²⁰ Therefore, any sale arising out of the Société's suit in Ceylon would be conducted not by the Société on its terms, but by the fiscal who would sell to the highest bidder after public advertisement of the sale.

By 12 February 1872, Robertsons, on behalf of the Société, had been granted sequestration of the Estates pending the final hearing.¹²¹ It should be noted that, although Robertsons regarded it as a formality,¹²² sequestration was not part of the usual procedure in a suit for a sale in execution. According to Thomson, sequestration would only be ordered if the court was persuaded that 'the defendant [was] fraudulently alienating his property to avoid payment of the debt'.¹²³ The sequestration, therefore, appears to be a sign that relations between Emily and the Société had deteriorated. This is corroborated by suggestions by Robertsons that Emily caused delays

¹¹²Ibid., at 1914 *per* Lindley LJ.

¹¹³Several of the letters from Robertsons to the Société refer to the suit being against Emily. These include letters dated 18 Aug. 1871, 27 Oct. 1871 (Stadsarchief Amsterdam, 650/20, 1871) and 7 Feb. 1872 (Stadsarchief Amsterdam, 650/20, 1872).

¹¹⁴Rochefoucauld was made a defendant merely because he was Emily's husband at the time. This is made clear in a letter from Robertsons to the Société, dated 30 Oct. 1872 (Stadsarchief Amsterdam, 650/20, 1872).

¹¹⁵Letter from Robertsons to the Société, 30 Oct. 1872, Stadsarchief Amsterdam, 650/20, 1872.

¹¹⁶Stadsarchief Amsterdam, 650/20, 1871.

¹¹⁷The fiscals were (and are) officers of the courts in Ceylon (Sri Lanka) with responsibility, *inter alia*, for conducting sales in execution of immoveable property (Civil Procedure Code, 236–250). The Royal Charter of Justice of 1801, s.19, mentioned the fiscals as being 'hereby authorized to execute all the Citations, Monitions, Summonses, Mandates, Rules, Orders, Warrants, Commands, and Process of the said Supreme Court of Judicature in the Island of Ceylon'. The fiscals retained similar powers in relation to the District Courts when the latter were established by Royal Charter of Justice of 1833.

¹¹⁸Thomson, *Institutes*, 350.

¹¹⁹Ibid., 354.

¹²⁰Ibid., 353.

¹²¹Letter from Robertsons to the Société, 12 Feb. 1872, Stadsarchief Amsterdam, 650/20, 1872. In this letter, Robertsons transcribes a telegram that was sent to Müller informing him that sequestration had been applied for, and the letter itself explains that, since the telegram, sequestration had been granted.

¹²²Ibid.

¹²³Thomson, *Institutes*, 378.

in the litigation by refusing to admit accounts of sales of produce that had been produced on the Estates.¹²⁴

Interestingly, letters sent by Robertsons to the Société in April 1872 state that Cavendish was to be unrepresented in the Ceylon suit, and that, as against him, the case would be heard 'ex parte'.¹²⁵ It seems odd that Cavendish all but abandoned his pursuit of the Estates; earlier correspondence suggests that he was intent upon securing them for himself. In letters to the Société dated 18 October and 11 November 1871, Cavendish had requested permission for his agents to inspect the Estate and also a statement as to how much was outstanding to the Société so that he could make arrangements for the repayment of the debt.¹²⁶ The liquidators did not act in accordance with Cavendish's requests, so on 1 February 1872 he wrote a furious letter to the liquidators threatening legal action and demanding that his requests be acceded to. He also referred to himself as a 'mortgagor anxious to pay off his debt', and to the Estates as 'my own property'.¹²⁷

Despite his posturing, it seems that Cavendish lacked the funds to redeem the mortgage himself. On 15 January 1872, he wrote to Barings, requesting that they take an assignment of the mortgage from the Société in order to allay his fear that 'the Estates will be irrecoverably lost to myself and my family'.¹²⁸ The threat, he wrote, derived from the fact that the Société was 'now foreclosing their mortgage' as it was 'anxious to wind up their affairs'.¹²⁹ Barings' response is unknown, but there is no evidence in either the Baring Archive or the records of the Société that Barings sought to act upon Cavendish's request, nor is there any evidence that Cavendish obtained the required funds or assistance elsewhere. It is also notable that, in his letter of 15 January 1872, Cavendish assured Barings that, should they take the mortgage, they would 'only have to deal with the Trustees appointed by the Court of Chancery, by which you will perceive that you will have no dealings whatsoever with my former wife'.¹³⁰ All evidence suggests that this was wishful thinking on his behalf.

¹²⁴Letter from Robertsons to the Société, 12 Feb. 1872, Stadsarchief Amsterdam, 650/20, 1872. Robertsons hinted that the defendants' refusal to admit the accounts was causing delays in the suit.

¹²⁵Letters from Robertsons to the Société, 14 April 1872 (one letter registered post, one letter ordinary post), Stadsarchief Amsterdam, 650/20, 1872. The letter by registered post requested urgently a list of documents required to be put before a commission on account of the fact that, as against Cavendish, the suit was to be heard ex parte.

¹²⁶Stadsarchief Amsterdam, 650/20, 1871.

¹²⁷Stadsarchief Amsterdam, 650/20, 1872 (underlining in original). Although there is no evidence that Cavendish was ever furnished with the statement that he desired, the Société did, with the acquiescence of Emily's attorney, finally permit his agents to inspect the Estates (letter from Robertsons to the Société, 12 Feb. 1872).

¹²⁸Baring Archive, HC6.3.22.13, 1872. In a letter to the Société dated 11 Nov. 1871, Cavendish had indicated that he was planning to 'make enquiries from London Firms if they will pay [the debt owed to the Société] off' (Stadsarchief Amsterdam, 650/20, 1871).

¹²⁹Ibid.

¹³⁰Ibid. This is almost certainly a reference to the trustees to whom Emily was ordered to transfer the Estates in 1868 (see n.50 and accompanying text, above). The order was made by the Court for Divorce and Matrimonial Causes. It may therefore be that Cavendish was mistaken about the identity of the court which appointed the trustees. On the other hand, the trustees in question were seemingly trustees of Cavendish and Emily's marriage settlement, so they may well have been appointed by the Court of Chancery, perhaps before the divorce.

2. *The Ceylon trial and the sale of the Estates*

The Société's Ceylon suit was heard in the District Court on 4 October 1872. Robertsons provided the Société with a detailed account of the trial.¹³¹ On the day of the hearing, Emily and Gaston 'filed an admission of the debt'. The judge gave judgment against them and ordered that the Estates be sold. Owing to some technical details, judgment against Cavendish was reserved. Three months' notice of the impending sale was given, longer than would usually be afforded, so that Cavendish and another claimant¹³² could claim any interests that they possessed. The District Court's decision in respect of the alleged annuities is unknown. As Robertsons did not report any details of any such judgment to the Société, it seems likely that either these claims were abandoned or that there was some sort of settlement reached.

The Estates were sold on 18 and 19 February 1873. Again, a detailed account of the auctions was provided to the Société by Robertsons.¹³³ The actions were advertised and public,¹³⁴ and were conducted by 'the fiscals ... under the authority of the court'.¹³⁵ The sales were thus conducted in line with Thomson's account of the process of sales in execution.¹³⁶ On the date of the auctions, Robertsons took the debt to stand at £56,200.¹³⁷ The Société was interested in purchasing the Estates at the auction;¹³⁸ Robertsons was authorized by the Société to bid up to £56,200. Although the auctions were well attended,¹³⁹ Robertsons reported a paucity of bidders,¹⁴⁰ attributing this to uncertainty surrounding the nature of Cavendish's claim and rumours, which Robertsons regarded as unfounded,¹⁴¹ that the children of Emily and Cavendish were planning to claim as beneficiaries of 'an alleged settlement'.¹⁴² Although Robertsons had valued the Estates at £70,000,¹⁴³ they were all

¹³¹This account appears in a letter from Robertsons to the Société, 30 Oct. 1872, Stadsarchief Amsterdam, 650/20, 1873.

¹³²The correspondence makes reference to a Mrs Arabin, who claimed an annuity under the will. Presumably, this came to nothing, as there is no mention of it in any of the other sources that have been consulted for the purposes of this article. According to Rumbold, *Recollections*, 139, Emily's paternal aunt, Maria, married an Admiral Arabin. As Maria Arabin lived until after the sale of the Estates, it is likely that she was the Mrs Arabin referred to in the correspondence. According to Rumbold, *Further Recollections*, 87, Maria Arabin died in 1875.

¹³³This account appears in a letter from Robertsons to the Société, 20 Feb. 1873 (Stadsarchief Amsterdam, 650/20, 1873). Robertsons also sent a letter to the Société dated 19 Feb. 1873 with a brief account. The letter of 19 Feb. also reveals that, on that date, a telegram was sent to Müller to inform him that the Estates had been sold.

¹³⁴*Ibid.*

¹³⁵Letter from Robertsons to the Société, 13 Nov. 1872, Stadsarchief Amsterdam, 650/20, 1872.

¹³⁶See n.55 and accompanying text, above.

¹³⁷£53,700 plus £2,500 that Robertsons thought may have been claimable by Mrs Arabin owing to her annuity. This is explained in a letter from Robertsons to the Société, 20 Feb. 1873, Stadsarchief Amsterdam, 650/20, 1873.

¹³⁸Note that, according to Thomson, *Institutes*, 354, '[i]f the party who issued execution purchases any of the property, the amount is allowed in reduction of his claim; and if it exceed his claim, he only pays the residue ...'. Therefore, it would seem that the Société's desire to purchase the Estates was not unusual.

¹³⁹Letter from Robertsons to the Société, 20 Feb. 1873, Stadsarchief Amsterdam, 650/20, 1873.

¹⁴⁰*Ibid.* Each of the individual estates which together comprised the Estates were auctioned in individual lots.

¹⁴¹*Ibid.*

¹⁴²*Ibid.*

¹⁴³Letter from Robertsons to the Société, 24 Dec. 1872, Stadsarchief Amsterdam, 650/20, 1872.

sold for £57,942 to Sabonadière, who purchased as agent of Boustead. There was considerable competition for just one of the Estates, the Delmar Estate,¹⁴⁴ which was sold to Boustead for £13,700, even though Robertsons had valued it at £8,200.¹⁴⁵

At some point prior to the purchase, Duff had pulled out due to ill health and Boustead, wishing 'to become the representative of the plaintiff Comtesse in England and the consignee of the produce of her estates',¹⁴⁶ had agreed that he would proceed alone. The Court of Appeal, being satisfied that Boustead had taken the Estates on the understanding that he was trustee for Emily, did not deem it necessary to decide whether there was any written evidence signed by Boustead sufficient to satisfy s.7, but Lindley LJ seems to have considered it likely that there was.¹⁴⁷ He was probably correct. There was no obvious advantage to avoiding writing altogether; so long as there was no mention of the trust in the deeds that were registered,¹⁴⁸ Cavendish could not have discovered Emily's beneficial interest.

A final point to note is that Sabonadière informed Robertsons that Boustead had purchased the Estates for Emily.¹⁴⁹ This information may not have been considered by Robertsons or the Société as overly significant, for a telegram was sent by Robertsons to Müller on 19 February detailing the price for which each estate had been sold, and assuring him that the debt had been discharged,¹⁵⁰ but the true identity of Emily as purchaser was only reported to the Société by letter. Furthermore, the wording used by Robertsons to impart this information to the Société suggests that it was not known to Robertsons or the Société until the time of the auction. In the letter of 20 February 1873, Robertsons wrote that the Estates had been 'bought for £31.100 by Mr J.R. Sabonadiere [sic] nominally for Mr. John Boustead but really (so Mr J.R. Sabonadiere informs us), for Mrs. Cavendish'.¹⁵¹

3. *Analysis of the facts surrounding the sale*

The archive materials have provided much significant information. References in the law reports to the mechanism of the sale are at worst inaccurate, and at best insufficiently specific. The sale was a sale in execution, and the Estates were sold and conveyed by the fiscals under the authority of the Ceylon court.

The reason why the Estates were sold cannot be ascertained with certainty. There is much evidence suggesting that the sale represented a genuine attempt by the Société to realize its security. The general tenor and contents of the letters from Robertsons

¹⁴⁴Note that this was one of the estates collectively referred to as the 'Delmar Estates'. Others included Delta, Alwick, Kudnoya, Maguhapittia and Pahalateme (letter from Robertsons to the Société, 20 Feb. 1873, Stadsarchief Amsterdam, 650/20, 1873.).

¹⁴⁵Letter from Robertsons to the Société, 20 Feb. 1873, Stadsarchief Amsterdam, 650/20, 1873.

¹⁴⁶*Rochefoucauld v Boustead* (1896) 66 L.J. Ch. 74 at 77.

¹⁴⁷*Rochefoucauld v Boustead* [1897] 2 Ch. 196 at 206.

¹⁴⁸Notably, the standard wording for deeds of conveyance in Ceylon contained no scope for declarations of trust; see Taylor, 'Roman-Dutch Law', 352.

¹⁴⁹Letter from Robertsons to the Société, 19 Feb. 1873, Stadsarchief Amsterdam, 650/20, 1873.

¹⁵⁰*Ibid.* In this letter, Robertsons transcribed the contents of the telegram in question.

¹⁵¹Letter from Robertsons to the Société, 20 Feb. 1873, Stadsarchief Amsterdam, 650/20, 1873. Similar wording was used in the letter of 19 Feb. 1873: 'Mr Sabadoniere gave the name of John Boustead of London as the purchaser. He has intimated to us that the Estates are to be taken for the ultimate benefit of Mrs. Cavendish and her family'.

indicate strongly that the Société was much concerned with realizing the security. There are numerous mentions of valuations, accounts and potential trial dates, but nothing is said of any arrangements with Emily, and Boustead is not mentioned until after the auctions. Furthermore, the communications by telegram with Müller and Martin are all concerned with when the security might be realized and for what value, suggesting, at the very least, indifference as to Emily's interests. It is also relevant that there were apparently hostile acts by Emily towards the Société and vice versa. The most obvious interpretations of Emily's revocation of the 1863 power of attorney, the suit against Emily and the sequestration are that they are indicative of relations between the parties having deteriorated. Also, the Société's authorization of Robertsons to bid for the Estates calls into question the extent to which the Société was concerned whether Emily obtained them. Finally, if the sale of the Estates was arranged by Emily with the Société in order to throw Cavendish off the scent, this was a very risky strategy. Owing to the extent to which sales in execution were regulated, there is little that Emily and the Société could have done to have ensured that Boustead was the successful bidder at the auction.

This evidence notwithstanding, the possibility that Emily, perhaps through her influential friends on the continent, engineered the sale, or at least the transfer of the mortgage from Barings, cannot be ruled out. She may, for example, have had some means by which she could influence the Société's French holding company, and she could have induced the Société to take the mortgage from Barings in anticipation of her divorce, although, significantly, Cavendish seems to have acquiesced in the transfer of the mortgage.¹⁵² Furthermore, the apparent hostility between Emily and the Société may be interpreted in a different manner. Her original solution, of having Duff and Boustead take an assignment of the mortgage, is likely to have been unsatisfactory to her as mortgages were required to be registered in Ceylon, and were thus open to public inspection.¹⁵³ Therefore, a judicial sale would probably have suited her needs. Her revocation of the 1863 power of attorney may have been intended to prevent Cavendish from obtaining a court order against Robertsons requiring them to comply with the 1868 decree and convey the Estates to the trustees. It is also possible that the suit and/or the sequestration were part of an elaborate (and expensive) ruse designed to convince Cavendish that the Estates were lost. A point worth noting is that the French Second Empire fell in 1870. It is possible that Emily had sufficient influence to procure the transfer of the mortgage to the Société in 1863, but that by 1871, when the Société took steps to enforce its security, her political support had fallen away, at least in France.¹⁵⁴

¹⁵²See n.64 and accompanying text, above.

¹⁵³Taylor, 'The Fate of the Roman-Dutch Law', 349, 351 and 354–355.

¹⁵⁴It seems that her husband's influence was much reduced after the advent of the Third Republic (see n.36, above). Of course, France's defeat in the Franco-Prussian war brought about the fall of her friend Napoleon III and the Second Empire. Through her connection with the Baron and the Prussian Crown (see n.39, above) Emily is likely to have had influential friends within the upper echelons of the society of the victors of that war.

One development that has not been mentioned thus far is that, according to one of the law reports, immediately upon obtaining the Estates free from the original mortgage, Boustead re-mortgaged them to the Société for £53,000.¹⁵⁵ His initial outlay was therefore £4,942. It seems odd that the Société, having just sued Emily, and knowing that Boustead had agreed to purchase the Estates for her, would lend £53,000 to him and become mortgagees of the Estates. The re-mortgaging may thus be interpreted as evidence that the judicial sale was engineered by Emily and the Société in order to thwart Cavendish's designs. It is possible, however, that the re-mortgaging was motivated by genuine business considerations. The Société had seemingly come out of liquidation by 1873, and it continued trading for another five years. It is also very probable that, subsequent to the Société's demise, its business interests in Ceylon were continued by subsidiaries or associated banks. The colonial interest rates were very favourable for lenders at the time,¹⁵⁶ and the estates were capable of producing revenues of approximately £10,000 per year.¹⁵⁷ Also, the Société was a mortgagee in possession prior to the sale to Boustead.¹⁵⁸ After the sale, Boustead remained in possession (through agents) and managed the Estates. Therefore, the Société, having re-mortgaged to Boustead, would have been able to claim the revenues from the Estates without the trouble of managing them. Therefore, it is not inconceivable that a short-term, high-interest loan, secured by a mortgage granted on its own terms, rather than those of Barings, was an attractive business prospect for the Société. It should also be noted that, by 1878, Boustead had mortgaged the Estates to mortgagees other than the Société for more than £70,000.¹⁵⁹ This strongly suggests that the mortgage granted by Boustead to the Société was a short-term one, because had any significant sums been outstanding on the 1873 mortgage, there would have been insufficient equity in the Estates for them have been mortgaged for any sum approaching £70,000.

Emily's admission of debt at the last minute seems extraordinary. One can only speculate as to her motives. Of course, the debt *was* outstanding, and the mortgage was indisputably valid, so she must have known that, had she not filed the admission, the court would almost certainly have found against her, presumably with increased costs. But she could have co-operated with the Société at the outset, and acquiesced in a sale of the Estates,¹⁶⁰ thus avoiding what must have been a costly court action, and

¹⁵⁵*Rochefoucauld v Boustead* [1896] All E.R. Rep. Ext. 1911 at 1915 *per* Lindley LJ.

¹⁵⁶See *Rochefoucauld v Boustead* (1896) 66 L.J. Ch. 74 at 75.

¹⁵⁷According to the accounts of the 1870–71 season (sent by letter dated 18 Aug. 1872 by Robertsons to the Société, Stadsarchief Amsterdam, 650/20, 1871), the net profits were £9600. Cavendish's letter to Barings (15 Jan. 1872, Baring Archive, HC6.3.22.13, 1872) also states that the profits from the Estates for 'the last 3 years' were 'about £10000 per annum'. In the letter, Cavendish states that he had received this information from Mr Christian. According to the recitals in the deed dated 28 Dec. 1863 transferring the debt, mortgage and power of attorney to the Société (Baring Archive, HC6.3.7, 1864), George Christian was a partner in Robertsons.

¹⁵⁸The letter from Robertsons to the Société of 12 Feb. 1872 (Stadsarchief Amsterdam, 650/20, 1872) refers to the Société as 'already being in possession as mortgagees'.

¹⁵⁹*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 198.

¹⁶⁰According to Lee, *An Introduction*, 181, 'The mortgaged property may be sold without an order of Court with the consent of the debtor; but an agreement for extra-judicial sale contained in the mortgage deed will not be enforced if the debtor afterwards objects'.

also the risk of losing the Estates at a public auction. Her record in respect of dealings with the English courts suggests a disdain for court orders; she may therefore have failed to take the suit seriously until the day of the trial. The suspicion remains, however, that she wanted the sale in execution to be ordered, as this would be an especially effective means of convincing Cavendish that the Estates were lost. This view is strengthened by the fact that Emily retained the services of the Deputy Queen's Advocate of Ceylon from at least as early as 1871 until her admission of debt, at which time his services were released to the Société. This suggests that she did in fact take the proceedings in Ceylon seriously from the outset, and shows that she was prepared to pay for expert legal advice until the outcome that she desired had been ensured. Furthermore, assuming that she followed her advocate's advice, it is difficult to believe that there was no compelling reason for leaving the admission of debt until the trial.¹⁶¹

A final point to make is that Emily is the person who stood to gain the most from the rumours which deterred bidders at the auction. There is no evidence that Cavendish was a bidder, and the Société was seemingly concerned only with repaying the debt. Furthermore, the rumours were essentially without foundation. Cavendish's annuity was not large, and could only have been claimed had he out-lived Emily. As for the alleged claims of the children, they were probably founded on the 1868 decree, and most likely could not have been pursued against an outsider purchaser under a judicial sale.¹⁶² Therefore, the possibility that Emily, perhaps through Sabonadière, was responsible for propagating these rumours cannot be ruled out.

Overall, there is no direct evidence that the Société, when obtaining the sale in execution, was motivated by anything other than a genuine intention to recall its security. It is submitted that the most likely explanation is that Emily was a clever and determined opportunist. She had for many years assisted in managing the financial affairs of the Baron and Baroness, so she had much experience dealing in legal

¹⁶¹In a letter from Robertsons to the Société of 18 Aug. 1871 (Stadsarchief Amsterdam, 650/20, 1871), it is stated that the Deputy Queen's Advocate, Mr Cayley, had been retained by Emily. Furthermore the letter from Robertsons to the Société of 30 Oct. 1872 (Stadsarchief Amsterdam, 650/20, 1872), which contains a detailed account of the trial, states that 'The Countess Rochefoucauld having in the meantime confessed judgment- the services of the Queen's Advocate, who had until then been retained on her behalf, were thereby released to us'. As the 'Queen's Advocate' is referred to as Mr Cayley, it is clearly the same person who was identified as the 'Deputy Queen's Advocate' in the letter of 1871. Note also that in January 1872, Cavendish feared that, if what he thought of as the foreclosure (i.e. the sale in execution) did go ahead, his claim would be extinguished. See n.128 and accompanying text, above. As Emily was obviously a party to the marriage settlement, he would have been able to pursue his claim under the 1868 decree against her had she openly purchased the Estates at the auctions. He almost certainly had no rights against any other purchasers, however. Hodgson's letter of 9 Nov. 1866 (Stadsarchief Amsterdam, 650/17, 1866) makes it clear that the Société's rights as mortgagees would not be compromised by any order of the Divorce Court. Also, Thomson explains that 'a sale in execution is an assignment by operation of law, and the purchaser must take the property, subject to the same conditions and liable to the same forfeitures as it was subject and liable in the hands of the original owner' (Thomson, *Institutes*, 354). Given what Hodgson wrote, and that the mortgage pre-dated both the 1868 decree and the Baroness' will, it is difficult to see how a claim by Cavendish founded on either the 1868 decree or the Baroness' will could have succeeded against any outsider purchaser.

¹⁶²For the reasons explained above, it is most unlikely that the children could have pursued their claim against any purchaser of the Estates other than Emily herself.

and financial matters.¹⁶³ Thus, she may well have directly or indirectly engineered the transfer of the mortgage to the Société. When, after its change in management, the Société made clear its intentions to realize the security, Emily likely saw this as an opportunity to put an end to Cavendish's attempts to obtain the Estates and to obtain control of them free from his interference.

IV. THE AFTERMATH OF THE SALE

1. *Cavendish abandons his claim*

The sale of the Estates to Boustead seems finally to have extinguished Cavendish's hopes of acquiring them. Of course, the fact that no trust appeared in the deed of conveyance to Boustead means that, even if he had inspected the title deeds in Ceylon, he would not have discovered the trust. In 1874, Emily and Cavendish reached a compromise, and the 1868 decree was lifted, at least in respect of his claim.¹⁶⁴ He lived until 1889.¹⁶⁵ There is no evidence that, after the sale, Cavendish sought to pursue his claim to the annuity. It is possible that he forfeited this interest under the 1874 compromise.¹⁶⁶ As has been indicated, however, the annuity was relatively insignificant, and it is quite possible that all of Cavendish's threatened and actual claims based on the annuity and the 1868 decree amounted to a bluff, particularly given that he seems not to have possessed the finances necessary to pursue any of his claims outside of England.

2. *Boustead's betrayal and the fate of the Estates*

Emily's plans began to unravel soon after the sale to Boustead. The law reports provide detailed information here, which is based on correspondence to which the court had access. Boustead mortgaged the Estates on three occasions, in 1876, 1877 and 1878, for a sum of over £70,000.¹⁶⁷ In 1879, Boustead and Co. was liquidated, and Boustead was declared bankrupt.¹⁶⁸ Although he was discharged in 1880, some parts of Estates were, in that year, conveyed to his trustee in bankruptcy and subsequently sold. It seems that other parts of the Estates had, by this time, already

¹⁶³See *Cavendish v Cavendish and Rochefoucauld*, *The Times*, 18 June 1866, 11 cols.c–d. Furthermore, in Rumbold, *Recollections*, 92, Emily is described as having been Baron Delmar's 'most trusted private secretary'.

¹⁶⁴*Rochefoucauld v Boustead* [1896] All ER Rep Ext 1911 at 1914 *per* Lindley LJ.

¹⁶⁵See <http://thepeerage.com/p1028.htm#i10276> (accessed 25 July 2014).

¹⁶⁶It should also be noted that, according to *Rochefoucauld v Boustead* [1896] All. E.R. Rep. Ext. 1911 at 1911, the Baron also 'covenanted with the trustees of the marriage settlement [of George and Emily Cavendish] for the payment to them of £20,000 after the death of the Baron and his wife'. That this was mentioned in the report suggests that Cavendish may have had some interest in the Estates as a result of the covenant. There is, however, no evidence in any of the reports or documentation that has been studied for the purposes of this article that any of Cavendish's claims were actually founded on this covenant to settle.

¹⁶⁷*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 198.

¹⁶⁸*Rochefoucauld v Boustead* [1896] All. E.R. Rep. Ext. 1911 at 1913. In *In Re Price, Boustead, and Co.*, *The Times*, 30 July 1879, 4 col.c, it is reported that the firm's application for liquidation was granted.

been sold by mortgagees.¹⁶⁹ The parts which were retained were sold at some time after 1882.¹⁷⁰ The precise point at which Boustead decided to abandon the parcel arrangement cannot be pinpointed, but it does seem that he initially recognized Emily's interest. The two remained in communication throughout the 1870s, and Boustead made regular payments to Emily out of the profits of his firm, prior to its liquidation, despite his having mortgaged the Estates without her knowledge or consent.¹⁷¹ After Boustead's bankruptcy, Emily wished to claim the Estates from his trustee in bankruptcy,¹⁷² but was persuaded by her solicitor and by Boustead that it might be better to avoid any potentially expensive litigation and instead wait and see whether Boustead could reach some sort of settlement with his creditors and retain the parts of the Estates that had not already been sold.¹⁷³ Although Boustead was initially optimistic that such a settlement could be reached, on 25 November 1892 he wrote to Emily telling her that his previous advice not to 'despair' was no longer appropriate.¹⁷⁴ Other than a letter that Emily sent, dated 17 December 1887, to Boustead's solicitor claiming ownership of the Estates, there were no further developments until 24 October 1894, when Emily commenced the action in the English courts.

3. *The coffee rust fungus*

Boustead's behaviour must be understood in the context of a biological catastrophe which ravaged Ceylon's coffee plantations. In 1869, a fungus which attacks coffee plants was discovered in Ceylon. This 'coffee rust fungus', *Hemileia vastatrix*, intermittently devastated Ceylonese coffee plantations during the early 1870s.¹⁷⁵ The fungus initially affected some estates to a far greater extent than others, and had the peculiar quality of appearing to die out only to return and check the recovery of the crops. Thus, entrepreneurs continued to purchase tracts of rainforest for conversion into coffee plantations, and in 1873, the year of the sale to Boustead, new land was selling at 'unprecedented prices',¹⁷⁶ whilst at the same time, 'planters were expressing grave concern about the impact of the disease on their crops'.¹⁷⁷ As the 1870s progressed, the fungus took hold, and by the mid-1880s the coffee industry in Ceylon had been almost completely annihilated.¹⁷⁸

¹⁶⁹In *Rochefoucauld v Boustead* [1896] All. E.R. Rep. Ext. 1911 at 1913, it is stated that the plaintiff's case was that 'defendant had committed various breaches of trust between 1876 and 1879 in having, unknown to her, mortgaged or sold the Delmar estates, or parts of them, without having accounted for the mortgage money or proceeds, and also, in 1880, in having conveyed to the trustee of his bankrupt estate so much of the estates as remained unsold'.

¹⁷⁰*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 210.

¹⁷¹*Ibid.*, at 198.

¹⁷²This is evidenced by a letter written by Emily on 9 Aug. 1880 to the trustee in bankruptcy, claiming the Estates were hers. The letter was cited in *Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 198.

¹⁷³*Rochefoucauld v Boustead* [1896] All. E.R. Rep. Ext. 1911 at 1918, *per* Lindley LJ.

¹⁷⁴*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 199. The letter was quoted from in the Court of Appeal.

¹⁷⁵See generally Duncan, *In the Shadow*, chapter 7, entitled "Landscapes of Despair: The Last Years of Coffee".

¹⁷⁶*Ibid.*, 172.

¹⁷⁷*Ibid.*

¹⁷⁸*Ibid.*, 175. In his letter of Nov. 1882, Boustead referred to 'the terrible blight of leaf disease [that] would so extend throughout Ceylon as in effect to utterly destroy the coffee enterprise'. In his letter of Dec. 1882,

The fungus, which was the root cause of Boustead's bankruptcy and the collapse of his firm,¹⁷⁹ was apparently slow to inflict terminal damage upon the Estates, but the consequences were devastating when it finally took hold. In Boustead's letter of November 1882, he explains that, by then, the fungus had 'reduce[d] the annual yield from the 50,000 tons at which it once stood to 14,000 tons estimated for the coming year'.¹⁸⁰ Given the initially unpredictable nature of the fungus, it may well have been that Boustead mortgaged the Estates in the second half of the 1870s in the hope that the Ceylon coffee industry would recover and, even after his bankruptcy, it may not have been unreasonable for him to have hoped for an improvement. Once the gravity of the catastrophe finally became clear to Boustead, it may well have been that he decided to keep for himself whatever funds he had managed to salvage from the bankruptcy and the liquidation of his firm.

4. *Emily's delay*

In 1894, Emily commenced an action to recover the proceeds of sale of the Estates from Boustead, whose presence in London provides a ready explanation as to why she sued in the English courts. It seems at first odd that Emily, having fought so hard to keep the Estates from falling into Cavendish's hands, abandoned her claim for many years. Her reasons were addressed by Lindley LJ in response to Boustead's defence of laches. Lindley LJ concluded that Emily had been encouraged until at least 1882, in part by Boustead, to refrain from litigating in the hope that he could retain the Estates.¹⁸¹ He also held that Emily had done nothing to suggest that she had abandoned her right, and that, because lapse of time alone would not permit the court to invoke the doctrine of laches and deny relief, there was no need to examine her 'excuses ... for not instituting proceedings sooner'.¹⁸² Her counsel claimed that in '1884 the Comtesse could not get solicitors to take up the case on account of her impecunious position'.¹⁸³ It may well have been that she had other reasons, however. It is perhaps significant to note that Cavendish died in 1889.¹⁸⁴ Despite the Divorce Court's decree having been lifted in 1874, Cavendish may still have possessed the right to the annuity if he outlived Emily. Additionally, it is not inconceivable that he might have commenced some legal action against Emily if he had discovered the manner in which she had deceived him into thinking the Estates lost. It would therefore have been prudent on Emily's part to refrain from suing, particularly in the English courts, until after 1889. It is also worth noting that Emily's daughter, Princess Pignatelli d' Aragon,¹⁸⁵ was a co-plaintiff in the action. There is no evidence that the 1868 decree was lifted in respect of the claims of Emily's children. Furthermore, it

Boustead stated that, on the Estates, 'the yield of the coffee trees has ceased' (both quotes taken from *Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 199).

¹⁷⁹*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 198-199.

¹⁸⁰*Ibid.*, at 199.

¹⁸¹*Ibid.*, at 210.

¹⁸²*Ibid.*, at 212 *per* Lindley LJ.

¹⁸³*Ibid.*, at 203.

¹⁸⁴See <http://thepeerage.com/p1028.htm#i10276> (accessed 25 July 2014).

¹⁸⁵The Princess was known as Ida Cavendish. She married Prince Louis Pignatelli d' Aragon in May 1877 (Rumbold, *Further Recollections*, 126-127).

was noted in one of the law reports that the Princess ‘was interested in a sum charged on the Comtesse’s interest in the estates by order of the Divorce Court’.¹⁸⁶ It is therefore not inconceivable that the Princess became aware that her mother was, or claimed to be, the beneficial owner of the proceeds of sale of the Estates and either requested to join as co-plaintiff or pressured her mother to sue.

V. THE JUDGMENT: THE ENFORCEMENT OF THE TRUST FOR THE PREVENTION OF FRAUD

I. Lindley LJ on the enforcement of the trust

Although much has been written concerning the place of *Rochefoucauld* in the modern law as an authority concerning the recognition of parol trusts for the prevention of fraud, little has been written regarding how the Court of Appeal saw the issue in 1896.

The fact that circumstances antecedent to, and surrounding, the sale of the Estates were not reported fully in the law reports suggests that much of what has been explained here was unknown to the judges involved. It may however be that the judges had more awareness of what happened than is revealed in the reports, but considered that some of the details were unimportant to their decision-making process.¹⁸⁷ Furthermore, at first instance, Kekewich J ruled that some evidence which Emily had wished to adduce, which was to be provided by Duff’s solicitor, concerning the negotiations involving Duff and Boustead, was privileged.¹⁸⁸ This may account in part for the lack of detail in the reports.¹⁸⁹

The Court of Appeal famously justified the enforcement of the trust against Boustead on the ground 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’.¹⁹⁰ The existence and legitimacy of the principle that the Statute of Frauds could not be used as an instrument of fraud was extremely well established by 1896.¹⁹¹ Other than stating that the case was ‘one of fraud’,¹⁹² Lindley LJ declined to elaborate on what sort of conduct amounted to fraud. This is interesting, particularly as Kekewich J had, at first instance, held that he was bound by the previous authority of *Bartlett v*

¹⁸⁶*Rochefoucauld v Boustead* (1896) 66 L.J. Ch. 74 at 75.

¹⁸⁷In *Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 205, Lindley LJ commented that ‘the circumstances under which the Delmar estates were conveyed to the defendant are to be gathered from the verbal testimony of the plaintiff, the defendant, and Mr. Duff, and a mass of correspondence both before and after the conveyance’. In *De La Rochefoucauld v Boustead*, *The Times*, 24 June 1896, 17 col.b–c, at b, it is reported that ‘there was a vast amount of correspondence, which had been gone into at great length’. It is perhaps unlikely that this correspondence did not refer to the nature of the sale.

¹⁸⁸*Rochefoucauld v Boustead* (1896) 65 L.J. Ch. 794 at 794.

¹⁸⁹Note that this point was not contested in the appeal to the Court of Appeal.

¹⁹⁰*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 206 per Lindley LJ.

¹⁹¹Lindley LJ makes this point himself (*ibid.*, at 206). See also Arthur Underhill, *A Practical and Concise Manual of the Law Relating to Private Trusts and Trustees*, 4th ed., London, 1894, 12; Smith, *A Manual of Equity Jurisprudence*, 76–77; Joseph Story and Melville Bigelow, *Commentaries on Equity Jurisprudence as Administered in England and America*, 2 vols., 13th edn., Boston, 1886, vol.2, 264 and 271.

¹⁹²*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 207 per Lindley LJ.

Pickersgill (1759),¹⁹³ which was factually similar to *Rochefoucauld*,¹⁹⁴ to apply s.7 of the Statute of Frauds rather than the instrument of fraud principle.

During the nineteenth century and earlier, the most commonly occurring cases concerning parol trusts and the instrument of fraud principle were secret trusts cases.¹⁹⁵ These judgments tend to place strong emphasis on the premise that in order to prove the fraud, it was necessary to demonstrate that the party who disposed of the property (the testator) had been induced to do so by the promise of the other party to the parol trust (the secret trustee) to perform that trust. For example, in *McCormick v Grogan* (1869), Lord Hatherley explained that secret trusts could only be enforced in ‘cases in which the Court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform’.¹⁹⁶

In *Rochefoucauld*, neither Kekewich J nor the Court of Appeal considered in detail whether the conveyance to Boustead was in effect a conveyance from the Société or from Emily. The facts, as explained above, demonstrate that the conveyance of the Estates was a conveyance by operation of law, executed by the fiscal. In no sense was it a conveyance from Emily. Had Boustead indicated to her that he planned to purchase the Estates for himself, in defiance of the parol agreement, there is little that she could have done. Lacking the funds to redeem the mortgage, she could not have prevented the suit against the will of the Société, and once the court had ordered the sale, she could not have prevented the Estates from being sold at auction even with the Société’s acquiescence. Of course, as has been established, Emily *did* want the sale to Boustead to go ahead. She clearly relied on the parol agreement with Boustead as crucial to her designs. But unlike the secret trusts cases, it cannot be said that she transferred the land to Boustead in reliance on the parol agreement. Nor can it be said that the Société conveyed the land in reliance on the agreement. The evidence suggests that the sale was procured by the Société in order to realize its security and, in any case, neither the auction nor the sale were conducted by the Société. That Lindley LJ did not address this issue at

¹⁹³(1759) 1 Eden. 515. In fact, in *James v Smith* [1891] 1 Ch. 384, Kekewich J had already held himself bound by *Bartlett*, albeit *obiter*.

¹⁹⁴Property was sold by a vendor to Pickersgill subject to an oral agreement made between Bartlett and Pickersgill that Pickersgill would hold the property on trust for Bartlett. Henley LK held that because the defendant had provided the purchase money, there could be no resulting trust and that as the mere refusal by the defendant to perform the parol agreement did not amount to a fraud, s.7 of the Statute of Frauds prevented the oral agreement from being enforced. The plaintiff attempted to file a supplemental bill after the defendant was convicted of perjury in relation to his denial of the parol agreement. Henley LK refused, however.

¹⁹⁵Examples from the second half of the nineteenth century include *Briggs v Penny* (1851) 3 M. & G. 546; *Wallgrave v Tebbs* (1855) 2 K. & J. 313; *Lomax v Ripley* (1855) 3 Sm. & G. 48; *Tee v Ferris* (1856) 2 K. & J. 357; *Moss v Cooper* (1861) 1 J. & H. 352; *Sweeting v Sweeting* (1863) 33 L.J. Ch. 211; *Cullen v Attorney General for Ireland* (1868) L.R. 3 Ch. App. 362; *Jones v Badley* (1868) L.R. 3 Ch. App. 362; *McCormick v Grogan* (1869) L.R. 4 H.L. 82; *Norris v Frazer* (1873) L.R. 15 Eq. 318; *Rowbotham v Dunnnett* (1878) 8 Ch. D. 430; *Re Fleetwood* (1880) 15 Ch. D 594; *Re Boyes* (1884) 26 Ch. D. 531; *Re Spencer’s Will* (1887) 57 L.T. 519.

¹⁹⁶*McCormick v Grogan* (1869) L.R. 4 H.L. 82 at 89 *per* Lord Hatherley. See also at 97–98 *per* Lord Westbury.

all suggests strongly that he simply did not consider the precise nature of the transaction important in determining that Boustead's conduct amounted to a fraud.

Another matter upon which the Court of Appeal did not elaborate is the question of whether Boustead intended at first to honour the parol agreement, or whether he had designs upon obtaining the Estates for himself from the outset. Again, it may be inferred from the Lindley LJ's silence on this point that he did not view it as significant. In fact, Costigan, writing in the early twentieth century, noted that in cases concerning parol trusts of land, contrary to the position in most US states, '[t]he English cases seem to make no distinction between the case of actual fraudulent intent at the time of conveyance and the case where there is an actual fraudulent intent only at the time of refusal to perform, and seem to regard the refusal to perform when coupled with retention of the property as necessarily fraudulent enough.'¹⁹⁷ *Rochefoucauld* was one of the cases that he cited in support of this proposition.¹⁹⁸

In summary, the judgment of the Court of Appeal indicates that Lindley LJ and his colleagues considered it a routine finding that Boustead's conduct amounted to a fraud. It was not important to consider from whom he in reality received the land, nor was it necessary to consider his intentions at the time at which he agreed to be a trustee.

2. *Authorities existing in 1896 concerning the enforcement of parol trusts for the prevention of fraud*

Lindley LJ cited several authorities in support of his assertions regarding the fraud issue, and to demonstrate that *Bartlett* was no longer good law. Analysis of these judgments sheds light on the Court of Appeal's concept of fraud in 1896. Interestingly, in *Booth v Turle* (1873),¹⁹⁹ *Davies v Otty (No.2)* (1865),²⁰⁰ *Haigh v Kaye* (1872)²⁰¹ and *Re Duke of Marlborough* (1894),²⁰² unlike *Rochefoucauld*, the party claiming the benefit of the parol trust was the party who had conveyed the land to the alleged trustee. Lindley LJ explained that these authorities were cases of fraud because, prior to the conveyance, the plaintiff and the defendant had orally agreed that the plaintiff would take the beneficial interest in the land upon completion of the conveyance. The fraud lay in the defendant knowingly reneging upon the agreement after having taken the conveyance.

In all of those cases, and in *Rochefoucauld* itself, *Lincoln v Wright* (1859)²⁰³ was expressly followed. In this case, the plaintiff's land was sold to Wright by a mortgagee in exercise of a power of sale. The mortgagee had been threatening to exercise the power, so Wright and the plaintiff had orally agreed that Wright would buy the

¹⁹⁷G.P.J. Costigan, 'Classification of Trusts as Express, Resulting and Constructive', 27 *Harvard Law Review* (1914), 437 at 460-461, n. 45.

¹⁹⁸*Ibid.*

¹⁹⁹(1873) L.R. 16 Eq. 182.

²⁰⁰(1865) 35 Beav. 208.

²⁰¹(1872) L.R. 7 Ch. 469.

²⁰²[1894] 2 Ch. 133.

²⁰³(1859) De. G. & J. 16.

land and subsequently allow the plaintiff to remain in possession and retake title once the purchase money had been repaid to Wright. The defendant, Wright's next of kin, sought to evict the plaintiff. It was held that the parol agreement between the plaintiff and Wright amounted to an equitable mortgage, notwithstanding that the formality requirements of the Statute of Frauds had not been complied with.²⁰⁴ Turner LJ stated that:

the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between the Plaintiff and Wright the transaction should be a mortgage transaction, it is in the eye of this Court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud.²⁰⁵

Turner LJ's judgment is striking in its similarity to that of Lindley LJ, particularly in respect of the routine manner in which the defendant's conduct, in similar circumstances, was deemed a fraud.²⁰⁶ It seems to have been widely understood in the nineteenth century that entering into a parol agreement of this nature prior to the conveyance and knowingly reneging thereupon after the conveyance amounted to a fraud.²⁰⁷

In addition to the cases cited by Lindley LJ, there are several earlier authorities which are consistent on the point of fraud. In *Young v Peachy* (1741),²⁰⁸ for example, the plaintiff, in similar circumstances, was 'relieved under the head of fraud'.²⁰⁹ Other early examples include *Hutchins v Lee* (1737)²¹⁰ and *Cripps v Jee* (1793).²¹¹ A slightly anomalous authority is *Wilkinson v Brayfield* (1693).²¹² In this case, the defendant had taken a conveyance from the plaintiff subject to a parol agreement for a trust which he later sought to renege upon. The trust was

²⁰⁴Equitable mortgages (except for those created by deposit of title deeds) fell within the scope of s.4 of the Statute of Frauds, and therefore were required to be agreed in writing and signed by the grantor.

²⁰⁵*Lincoln v Wright* (1859) De. G. & J. 16 at 22 *per* Turner LJ. Note that Knight Bruce LJ upheld the parol agreement on the grounds that it had been partly performed, but he also suggested (at 21) that, were it not for the part performance, the Statute still would not have applied.

²⁰⁶Although Knight Bruce LJ held that the agreement could be enforced pursuant to the doctrine of part performance, he also agreed with Turner LJ that the defendant could not rely on the Statute of Frauds because his conduct amounted to 'an unjustifiable attempt to defeat or evade a fair agreement'.

²⁰⁷Swadling argues (in 'The Nature of the Trust', 106) that the fraud in *Rochevoucauld* was not Boustead 'reneging on his promise', but his 'reliance on the statute'. *Rochevoucauld* itself and the other authorities cited in this section suggest otherwise. Boustead's conduct amounted to a fraud, and the statute could not be utilized as a tool to legitimize this fraud.

²⁰⁸(1741) Atk. 254.

²⁰⁹*Ibid.*, at 257 *per* Lord Hardwicke.

²¹⁰(1737) 1 Atk. 447.

²¹¹(1793) 4 Bro. CC. 472. See also *Leman v Whitley* (1828) 4 Russ. 423. This is a case where property was transferred from a son to his father for no consideration so that the father, whose financial position was more secure than that of the son, could raise money for the son by mortgaging the land. It was agreed that the father would eventually re-convey. The land was never actually mortgaged and, after the father's death, the son claimed the beneficial interest in the land. The court refused, on the ground, *inter alia*, that there was no fraud in the case and that therefore the Statute of Frauds applied. This case was not mentioned in *Rochevoucauld*. It was held in *Marlborough* to have been overruled by *Haigh*, so it cannot be considered to be of any real importance to the discussions here.

²¹²(1693) 2 Vern. 307.

enforced because the conveyance was held to have been ‘fraudulently obtained’.²¹³ This may suggest that in the decades after the enactment of the Statute of Frauds, it was thought that the fraud lay in the plaintiff having been persuaded by the parol agreement into surrendering her land to the defendant. According to *McCormick*, such views persisted into the nineteenth century in respect of secret trusts. The other authorities concerning *inter vivos* dispositions subject to parol trusts do not follow *Wilkinson* on this point, however.

It is therefore submitted that the authorities considered above overwhelmingly suggest that, by 1896, it was well established that conduct such as that of Boustead, at least in cases involving *inter vivos* transactions, amounted to equitable fraud. This fraud did not depend on the perpetrator having deceived the plaintiff into conveying his or her land, or on the plaintiff having deceitful designs at the time of the parol agreement.

3. *The reception of Rochefoucauld in respect of the fraud issue*

The routine nature of the decision in *Rochefoucauld* and the apparently settled conception of equitable fraud in similar cases probably explains why the aspects of the decision dealing with these matters were not subjected to a great deal of analysis by legal scholars and commentators at the time. For example, probably the earliest comment on the case does not even mention fraud.²¹⁴ In *Lewin on Trusts*, *Rochefoucauld* was added to a footnote to text explaining the operation of the instrument of fraud principle.²¹⁵ Other cases such as *Haigh*, *Marlborough* and *Davies* were also cited. Similarly, Underhill simply included *Rochefoucauld* on a footnoted list of authorities in support of the instrument of fraud principle, alongside the above-mentioned cases, plus some secret trusts cases.²¹⁶

Comments in the *Solicitors’ Journal* on *Rochefoucauld* soon after the judgment, whilst recognizing that it was not ground-breaking, do serve to corroborate many of the conclusions reached in this section regarding how equitable fraud was understood and applied in the nineteenth century:

The Statute of Frauds is not allowed to be made an instrument of fraud, and the court, in its tenderness for *cestuis que trust*, has said that the denial of a trust created by parol is in itself a fraud, for which the protection of the statute will be sought in vein. This, at least, is the later view ... although formerly some actual fraud, in addition to the mere denial of the trust, was required.²¹⁷

Cases cited in support of the ‘later view’ were *Lincoln*, *Haigh* and *Marlborough*.

²¹³*Wilkinson v Brayfield* (1693) 2 Vern. 307 at n.1.

²¹⁴*The Times*, 30 Dec. 1896, 10 col b.

²¹⁵Thomas Lewin and Cecil C.M. Dale, *A Practical Treatise on the Law of Trusts*, 10th ed., London, 1898, 157, n.(d).

²¹⁶A. Underhill, *The Law Relating to Trusts and Trustees*, 7th ed., London, 1912, 79, n.(u).

²¹⁷*Solicitors’ Journal and Reporter*, 2 Jan. 1897, 150 (vol.41).

4. Summary

Given the complex facts of *Rochefoucauld* and the uncertainties surrounding the motives and actions of some of the protagonists, it may at first seem surprising that the Court of Appeal's conclusion that Boustead's conduct amounted to fraud was so readily reached. The evidence from nineteenth-century sources points to the fact that the Court of Appeal was simply applying well-established principles, however. The conception of equitable fraud and the rule that equity will not allow a statute to be used as an instrument of fraud, as applied to *inter vivos* transactions made subject to parol agreements, were long-established and well known. When this is appreciated, it does not seem surprising that, in this respect, the decision in *Rochefoucauld* was not considered ground-breaking, either by the courts or by contemporary commentators.

VI. THE JUDGMENT: THE LIMITATION DEFENCE AND THE CLASSIFICATION OF THE TRUST

1. A new precedent

Boustead's defence, which was based on the statutory limitation period, raised, for the first time in the English courts, the question of whether a parol trust imposed pursuant to the instrument of fraud principle should be classified as an express or constructive trust. By virtue of the Trustee Act 1888, s.8(1)(a), the limitation period of six years²¹⁸ applied to actions against trustees. The provisions of s.8 did not apply, *inter alia*, to claims 'to recover trust property or the proceeds thereof, still retained by the trustee'.²¹⁹ Because this was a claim against a trustee to recover the proceeds of the sale of the estates, s.8 did not apply, and the Court of Appeal applied the law which had been developed prior to the enactment of the 1888 Act, the relevant statutory provision being the Judicature Act 1873, s.25(2), which stipulated that no limitation period applied to claims by beneficiaries 'for any property held on express trust, or in respect of any breach of such trust'.²²⁰

²¹⁸The statutory limitation period which applied in respect of trusts was six years. The means by which this came about was rather complex. The original source of the six-year period was the Limitation Act 1623, s.3. Although this subsection did not expressly apply to actions in respect of trusts, the Courts of Equity, having reached the view that the general intention of parliament was that stale claims were not to be permitted, held that, by analogy with the Limitation Act, the limitation period of six years applied in respect of claims against trustees, although not express trustees. Eventually, the Trustee Act 1888, s.8(1) provided statutory confirmation that the limitation period prescribed in the Limitation Act 1623 should apply to trustees. See *Taylor v Davies* [1920] A.C. 626 for a general explanation.

²¹⁹Trustee Act 1888, s.8(1).

²²⁰The law of limitations as applied to trustees in the nineteenth century was complex. It seems that s.8 of the 1888 Act partially repealed s.25(2) of the Judicature Act because the limitation period could, after the enactment of s.8, clearly be relied upon by all trustees in respect of claims for breach of trust. As s.8 did not apply to claims to recover 'trust property, or proceeds thereof' from the hands of trustees, it seems that, in respect of actions to recover trust property, s.25(2) remained in force. This is the view taken in Arthur Reginald Rudall and James William Greig, *The Law of Trusts and Trustees under the Trustee Act 1888, The Trust Investment Act 1889, The Trustee Act 1893, Amendment Act 1894, and the Judicial Trustees Act 1896*, 2nd ed., London, 1898, 7. Section 25(2) appears to have been enacted as mere confirmation of a rule to the same effect, developed by the Court of Chancery (see Rudall and Greig, *The Law of Trusts and Trustees*, 5, for further detail on this point), whereby time would run against constructive trustees

It was held in *Rochefoucauld* that '[t]he trust which the plaintiff has established is clearly an express trust within the meaning of that expression as expressed in *Soar v Ashwell*'.²²¹ Although the Court of Appeal was setting a new precedent on this point, Lindley LJ's judgment suggests that the Lords Justices regarded the issue as straightforward. Without analysing the state of the law in the late nineteenth century and earlier, it is difficult to see why this was so. Also, it is not immediately apparent whether Lindley LJ regarded the trust as an express trust or a trust that was not an express trust but was to be treated as such.

2. *The trust cannot have been an express trust*

There is an obvious objection to the view that Lindley LJ classified the trust as an express trust in the ordinary sense of the phrase as it was understood in the nineteenth century. Underhill, in 1894, defined an express trust as 'a trust created by words evincing an intention to create a trust'.²²² Similarly, Smith defined an express trust as one 'which is clearly expressed by the author thereof, or may fairly be collected from a written document'.²²³

In *Rochefoucauld*, the Court of Appeal held that 'the plaintiff has proved that the estates in question were conveyed to the defendant on May 27, 1873, upon trust for her'.²²⁴ This means that the trust, if an express trust, must have been declared before legal title was vested in Boustead. Lindley LJ stated that in order for s.7 of the Statute of Frauds to be complied with, 'it is sufficient if the trust can be proved by some writing signed by *the defendant*'.²²⁵ This shows that the only potential settlor of the trust, if it was express, was Boustead.

At the time at which Boustead made the declaration of trust, he had no title to the Estates. He thus lacked the capacity to settle the Estates on trust. According to the version of events accepted by the Court of Appeal, he indicated to Emily that *when* he obtained legal title to the estates, he *would* hold them on trust for her. The Court of Appeal held that the trust arose as a result of this agreement, which was reached prior to Boustead obtaining the Estates.²²⁶ There are no authorities to suggest that written evidence created *before* the alleged trustee obtained title to the

but not express trustees. It seems that Lindley LJ applied the law in this manner. He stated (*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 208) that Boustead was 'not able to claim the benefit of s.8 of the Trustee Act, 1888 ... and the statute which is applicable is the Judicature Act, 1873 ... s.25, sub-s.2'. The Trustee Act 1888 was certainly in force at the time of the judgment, for s.8(3) of the same Act stipulated that the provisions were to 'apply to actions or other proceedings commenced after the First day of Jan., One thousand eight hundred and ninety'. The Comtesse's action was originally commenced in 1894.

²²¹*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 208 *per* Lindley LJ.

²²²Underhill, *A Practical and Concise Manual*, 12.

²²³Smith, *A Manual of Equity Jurisprudence*, 100.

²²⁴*Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 205 *per* Lindley LJ.

²²⁵*Ibid.*, at 206 *per* Lindley LJ. (italics added).

²²⁶This is made clear in *Rochefoucauld v Boustead* (1896) 66 L.J. Ch. 74 at 76. Note that one of Emily's assertions was that the correspondence between Boustead and her after the conveyance provided sufficient written evidence to satisfy s.7. Lindley LJ, whilst conceding that this could well have been the case, found it unnecessary to make any definitive ruling on this issue because of the fraud. The circumstances in which he took the conveyance meant that for him to take other than as a trustee would have been fraudulent. Section 7 could not have been used to facilitate such fraud; hence, Boustead's defence that no trust had ever been evidenced in writing so as to satisfy s.7 was not accepted.

property could satisfy s.7.²²⁷ For this reason, it is unlikely that Lindley LJ regarded the trust as an express trust in the usual sense of the phrase. Although Swadling argues that, when read as a whole, Lindley LJ's judgment can only reasonably be read as recognizing the trust as an express trust,²²⁸ it should be noted that Lindley LJ described the case as an 'express trust' at only one other point in his judgment, and this was only after he had qualified the use of this term by explaining what he meant by an express trust within the context of the considerations in the case.²²⁹

3. *How were parol trusts recognized under the instrument of fraud principle classified in 1896?*

In fact, nineteenth-century judges did not ordinarily deem it necessary to categorize trusts such as the one in *Rochefoucauld* as either express, constructive or resulting. There are no authorities in which any parol trust enforced for the prevention of fraud was held to be an express trust.²³⁰ Nor are there any authorities from before the twentieth century in which any such trusts were held to be constructive trusts. Although there are vague references to resulting trusts in some of the cases,²³¹ no trust enforced pursuant to the instrument of fraud principle was expressly classified as a resulting trust.²³²

In fact, it appears that trusts recognized as a result of application of the instrument of fraud principle were simply classified as trusts imposed for the prevention of fraud.²³³ Because the prevention of fraud was a ground for equitable intervention and an established reason for the recognition and enforcement of a trust, no further

²²⁷The circumstances in which s.7 could be satisfied are covered comprehensively in Lewin and Dale, *A Practical Treatise*, 56.

²²⁸Swadling, 'The Nature of the Trust'.

²²⁹*Rochefoucauld v Boustead* [1896] 1 Ch. 196 at 212. It might also be noted that Lindley LJ observed (at 196) that the instrument of fraud principle allowed 'proof of a fraud' (described as proof of the trustee having knowingly taking subject to the trust and then denying it), as opposed to proof merely of the trust. This is not consistent with his having viewed the trust as a normal express trust. The instrument of fraud principle was explained in the same terms, as allowing proof of the fraud, by Turner LJ in *Lincoln v Wright* (see n.205 and accompanying text, above).

²³⁰This is so even if the secret trust cases are included.

²³¹E.g. *Re Duke of Marlborough* [1894] 2 Ch. 133.

²³²*Davies v Otty (No 2)* (1865) 35 Beav. 208 is an equivocal decision. The plaintiff had conveyed his land to the defendant because he thought (erroneously) that he faced conviction for bigamy, and he feared having to forfeit his land as a result of such a conviction. Romilly MR (at 213) enforced the trust on the ground that it 'came within the 8th section of the Statute of Frauds' because no real consideration had been given. Counsel for the plaintiff argued (at 211) that 'that the 7th section of the Statute of Frauds was inapplicable, there being a part performance and a fraud, and that these were sufficient grounds for taking the case out of the statute, for Courts of Equity never allow the Statute of Frauds to cover a fraud. But that if the case were within the statute, it came within the 8th section, there being a constructive trust in favour of the plaintiff, who had never received the alleged purchase money'. Although Lindley LJ regarded *Davies* as an authority for the enforcement of a parol trust pursuant to the instrument of fraud principle, it seems that Romilly MR enforced what would today be regarded as a resulting trust due to the aforementioned lack of consideration. Counsel's references to constructive trusts (also mentioned in the same context by counsel for the defendant at 212) seem to be references to what would today be regarded as resulting trusts. See nn.270 and 271 and accompanying text, below, for examples of nineteenth-century ambiguities and inconsistencies in nomenclature regarding resulting and constructive trusts.

²³³This comes across very strongly upon reading cases such as *Hutchins v Lee* (1737) 1 Atk. 447, *Booth v Turle* (1873) L.R. 16 Eq. 182, *Haigh v Kaye* (1872) L.R. 7 Ch. 469 and *Re Duke of Marlborough* [1894] 2 Ch. 133, alongside the secret trusts cases referred to in n.195, above.

classification was required. This was explained in detail by Lord Hardwicke LC in *Young v Peachy*.²³⁴ In this case, a daughter and son-in-law were persuaded by her father to convey the daughter's interest in some land to him, on the understanding that he would then declare a trust of the interest for the daughter's own use.²³⁵ Having received the conveyance, the father was declared bankrupt. The plaintiffs²³⁶ claimed that the father's assignees held the interest for them by way of 'a trust resulting by operation of law'.²³⁷ Lord Hardwicke explained that: 'the question is, whether ... here is either a trust resulting by operation of law for the benefit of the daughter ... or whether there is not a ground ... to direct that the assignees, under the commission of bankruptcy ... shall execute a reconveyance under the head of fraud'.²³⁸

Lord Hardwicke held that 'there was no such trust [resulting by operation of law]',²³⁹ but that the plaintiffs 'had proper ground to be relieved under the head of fraud'.²⁴⁰ The Statute of Frauds could not be relied upon by the defendant because 'if that objection should be allowed, the statute would tend to promote frauds rather than prevent them'.²⁴¹ The defendant was therefore found to be a trustee²⁴² and ordered to convey the relevant property to the plaintiffs.

4. Further classification of trusts like *Rochefoucauld* was unnecessary: the narrow interpretation of ss.7 and 8 of the Statute of Frauds.

If parol trusts such as those in the cases discussed above were not express trusts, it may seem odd that the courts did not classify them as constructive trusts so as to fall within the ambit of s.8 of the Statute of Frauds, which exempted from the effect of s.7 'a Trust or Confidence [which] shall or may arise or result by the Implication or Construction of Law or bee [sic] transferred or extinguished by an act or operation of Law'.

The courts, however, did not interpret s.8 as applying to constructive trusts.²⁴³ Rather, s.8 only exempted some of the types of trusts which would now be now

²³⁴(1741) 2 Atk. 254.

²³⁵The aim was to protect her interest in the event of the son-in-law's bankruptcy.

²³⁶The next of kin of the daughter, who was by this time deceased.

²³⁷*Ibid.*, at 256.

²³⁸*Ibid.*, at 257.

²³⁹*Ibid.*, per Lord Hardwicke LC.

²⁴⁰*Ibid.*, at 257 per Lord Hardwicke LC.

²⁴¹*Ibid.*, at 258 per Lord Hardwicke LC.

²⁴²It should be noted that the only ground upon which the Court of Chancery could order a party to convey land to another was that the former had been held to be a trustee. This was explained by Grant MR in *Beckford v Wade* (1805) 17 Ves. Jun. 87, at 96, when he rhetorically asked '[u]pon what grounds is a Court of Equity ever called upon to direct one man to convey a real estate to another, except upon the ground of a trust, either actual or constructive?'

²⁴³It is arguable that the draughtsmen of the Statute of Frauds intended s.8 to cover all trusts which are not express, especially when it is borne in mind that one of the subsection's chief architects, Lord Nottingham, stated in *Cook v Fountain* (1676) 3 Swan. 585 at 591 that 'all trusts are either, first, express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of law; again, express trusts are declared either by word or writing'. Lord Nottingham's role as a draughtsman is explained in W.S. Holdsworth, *History of English Law*, 17 vols., London, 1925, vol.6, 384. In Paul Matthews, 'The Words Which Are Not There: A Partial History of the Constructive Trust', in Charles Mitchell, ed., *Constructive and Resulting Trusts*, Oxford, 2009, 11–13, however, Matthews argues convincingly that, when Lord Nottingham's comments in *Cook* are read within their historical context, it becomes

classified as resulting trusts. This limited interpretation of s.8 was implied in early cases,²⁴⁴ and was stated expressly by Lord Hardwicke in the leading authority of *Lloyd v Spillit* (1740).²⁴⁵

in that Statute there is an Exception of Trusts arising by Operation of Law. But his Lordship said, that those have been but of two Kinds, either where the Conveyance has been taken in the Name of one Man, and the Purchase Money paid by another, or where the Owner of an Estate has made a voluntary Conveyance of it, and made a Declaration of the Trust with regard to one Part of the Estate, and has been silent with regard to the other Part of it.²⁴⁶

The Lord Chancellor went on to explain, however, that '[w]here there has been a Fraud in gaining a Conveyance from another, that may be a Reason for making the Grantee in that Conveyance to be considered merely as a Trustee'.²⁴⁷

This restrictive interpretation of s.8 needs to be explained in light of the Statute of Uses 1536. Prior to the Statute, the Court of Chancery recognized that certain transactions, such as purchases of land in the name of a third party, would give rise to a resulting use. In such instances, the third party would take legal title for the use of the true purchaser. The Statute of Uses converted such resulting uses into legal estates by automatically vesting legal title in the true purchaser.²⁴⁸ Once trusts came to be recognized by the Court of Chancery, the circumstances that would have given rise to resulting uses at common law were recognized by the Court of Chancery as giving rise to trusts by 'strict analogy to the rule of the *common law*'.²⁴⁹ It is thus likely that Lord Hardwicke interpreted s.8 of the Statute of Frauds, with its use of the phrase, 'by the Implication or Construction of law [*italics added*]' to extend only to those trusts that were recognized in equity by analogy with common law, as opposed to trusts other than express

clear that what are now regarded as resulting trusts were probably considered by Lord Nottingham to be a species of express trust, and that Lord Nottingham considered 'implied trusts' to be amongst the types of trusts which would now be regarded as constructive trusts. Matthews further argues that, on this basis, s.8 was only in fact intended to cover what are now regarded as constructive trusts. Matthews (at 13), however, explains, with specific reference to Lord Hardwicke's comments in *Lloyd v Spillit* (1740) Barn. Ch. 334 (see nn.245–246 and accompanying text, below) that Lord Nottingham's construction 'is not how judges and commentators saw the phrase'.

²⁴⁴E.g. *Kirk v Webb* (1698) Prec. Cha. 84; *Bellasis v Compton* (1693) 2 Vern. 294.

²⁴⁵(1740) Barn. Ch. 334. Note that this case is also reported as *Lloyd v Spillet* (1740) 2 Atk. 148.

²⁴⁶*Lloyd v Spillit* (1740) Barn. Ch. 334 at 388 *per* Lord Hardwicke.

²⁴⁷*Ibid.*, at 388 *per* Lord Hardwicke.

²⁴⁸The process whereby uses became legal estates is explained in Francis Williams Sanders, *Essay on Uses and Trusts, and on the Nature and Operation of Conveyances at Common Law, and of Those Which Derive Their Effect from the Statute of Uses*, 1st US from 4th UK ed., Philadelphia, 1830, 86. See also William Roberts, *A Treatise on the Statute of Frauds as it Regards Declarations in Trust, Conveyances and Contracts, The Execution of Surrenders, Proof of Wills and Codicils*, New York, 1807, 91–96.

²⁴⁹George Spence, *The Equitable Jurisdiction of the Court of Chancery*, 2 vols., Philadelphia, 1850, vol.1, 512. See also Story and Bigelow, *Commentaries on Equity Jurisprudence*, vol.2, 531. Note that this statement was originally made in *Dyer v Dyer* (1788) 2 Cox 92 at 93 *per* Eyre CB. The italics were added by Spence.

trusts which arose according to the doctrines of equity.²⁵⁰ Early jurists, Fonblanque, Roberts and Lewin,²⁵¹ for example, were in agreement that Lord Hardwicke interpreted s.8 in this manner, although Sanders appears to have disagreed at least to some extent with this construction, as he included trusts such as that in *Keech v Sandford*²⁵² in his section on ‘trusts, arising from the operation or construction of equity’ which fell within the ambit of s.8.²⁵³

The fact that numerous types of trusts of land other than those identified by Lord Hardwicke were recognized without written evidence is difficult to reconcile with his Lordship’s interpretation of s.8. Fonblanque therefore disagreed with Lord Hardwicke’s interpretation, explaining that his ‘construction of [s.8] of the Statute of frauds restrains it to such trusts as arise by operation of law, except in cases of fraud, whereas it clearly extends to such as are raised by construction of equity’.²⁵⁴ Roberts, on the other hand, considered that ‘[s]ome other words probably accompanied this observation of the Lord Chancellor’.²⁵⁵

It is submitted, however, that the most convincing interpretation of the meaning of s.8 is that of Lewin.²⁵⁶ He thought that Fonblanque and Roberts had erred in assuming that the ‘seventh or enacting clause embraces all trusts indiscriminately, and that such as arise by operation of law are only saved from the act by virtue of the subsequent language contained in the eighth section’.²⁵⁷ Lewin noted that s.8 referred only to

²⁵⁰I would like to express my gratitude to one of the anonymous reviewers of an earlier draft of this article for pointing out to me this possible interpretation of Lord Hardwicke’s view of the meaning of ss.7 and 8 of the Statute of Frauds (1677).

²⁵¹John Fonblanque, *A Treatise of Equity with the Addition of Marginal References and Notes*, 2 vols., Dublin, 1793, vol.1, 121; Roberts, *A Treatise on the Statute of Frauds*, 96; Thomas Lewin and Frederick Albert Lewin, *A Practical Treatise on the Law of Trusts by (the Late) Thomas Lewin, Esq. From the Eighth English Edition*, 7th ed., London, 1879, 176–179.

²⁵²(1726) Sel. Cas. Ch. 61.

²⁵³Sanders, *Essay on Uses*, 228, n.(c).

²⁵⁴John Fonblanque, *A Treatise of Equity with the Addition of Marginal References and Notes*, 2 vols., Dublin, 1793, vol.1, 121. See also Roberts, *A Treatise on the Statute of Frauds*, 96.

²⁵⁵Roberts, *A Treatise on the Statute of Frauds*, 96. It should be noted at this point that in *Lloyd v Spillet* (1740) 2 Atk. 148 at 151, Lord Hardwicke’s words regarding the relevance of trusts arising for the prevention of fraud to the exception in s.8 for trusts resulting by operation of law were reported slightly differently from those in Barnadiston’s report: ‘I do not know in any other instance besides these two where this court have declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on *mala fide*’. It seems very unlikely that Fonblanque, Roberts and Lewin did not have access to this report, but they all seemingly preferred the report at Barn. Ch. 334, for they all took the view that Lord Hardwicke only regarded trusts resulting by operation of law as falling within s.8 (see n.251, above). Roberts apparently did not consider the passage cited in this note to be relevant ‘other words’. This suggests, perhaps, that Atkyns’ report of *Lloyd* was not regarded as being as authoritative or accurate as was Barnadiston’s. Certainly, the view expressed in Atkyns’ report that Lord Hardwicke regarded trusts raised for the prevention of fraud as being trusts resulting by operation of law is incongruous with the views that his Lordship expressed in *Young v Peachy* (1741) 2 Atk. 254 and *Willis v Willis* (1740) 2 Atk. 71. On this basis, Barnadiston’s report has been followed for the purposes of this article. It is also perhaps relevant that, in *Muckleston v Brown* (1801) 6 Ves. Jun. 52, doubt was cast by counsel for the plaintiffs, including ‘Mr Fonblanque’, at 61, and by Lord Eldon LC at 67–68 on the accuracy of Atkyns’ report of *Adlington v Cann* (1744) 3 Atk. 141. In light of this, it is may be unfortunate that both *Willis* and *Young* seem only to have been reported by Atkyns. For an account of the reputation of Atkyns’ reports, see J.G. Martin, *Legal Bibliography or a Thesaurus of American, English, Irish, and Scotch Law Books*, Philadelphia, 1847, 76.

²⁵⁶See Lewin and Lewin, *Law of Trusts*, 176–179.

²⁵⁷*Ibid.*, 177–178.

‘conveyances’, whilst resulting trusts were routinely imposed on devises. He therefore concluded that s.7 only applied to those trusts capable of being manifested and proven by writing, and that ‘[t]he aim of the legislature [in enacting s.7] was, not to disturb such trusts as were raised by maxims of equity’.²⁵⁸ The reason, according to Lewin, for the enactment of s.8 was simply to confirm that resulting trusts arising by analogy with law upon apparently absolute conveyances (for example, when an apparently absolute conveyance is deemed to be subject to a resulting trust) did not need to comply with s.7.

Lewin’s explanation sits well with other observations by Lord Hardwicke, such as, for example, his acceptance in *Young v Peachy* of a trust imposed for the prevention of fraud as an alternative to a ‘trust resulting by operation of law’.²⁵⁹ In *Willis v Willis* (1740),²⁶⁰ his Lordship stated that the Statute of Frauds ‘requires that all declarations of trusts should be in writing, otherwise absolutely void, except such as arise by operation or construction of law’, but also that ‘[t]here is another way of taking a case out of the statute, and that is by admitting parol evidence within the rules of this court’.²⁶¹ Lord Hardwicke’s view, therefore, appears to have been that trusts arising according to the rules of equity fell outside of the ambit of s.7 without needing to be saved by s.8.

This provides an explanation for the otherwise curious fact that s.8 of the Statute of Frauds was cited in numerous early authorities concerning what are now regarded as resulting trusts,²⁶² but not in cases concerning that would now be described as constructive trusts.²⁶³ It can therefore be seen that there was no need in the nineteenth century and earlier for the courts to classify parol trusts of land arising under the instrument of fraud principle as constructive trusts. They were recognized under an established head of equity, and no added legitimacy would have been gained by recognizing them as constructive trusts of land because the latter were also understood to arise under established rules of equity, and not by virtue of s.8.

5. Attempts by nineteenth-century jurists to classify trusts arising under the rules of equity

There were numerous attempts by commentators to further classify these trusts, with decidedly inconsistent results. For example, Spence included as examples of constructive trusts those arising in cases such as *Keech v Sandford* (1726)²⁶⁴ and purchases of land with notice, but he also included purchases ‘by a man, or by his directions, and with his own money, the conveyance in fact being take in the name

²⁵⁸*Ibid.*, 178.

²⁵⁹*Young v Peachy* (1741) 2 Atk. 254 at 256 per Lord Hardwicke LC.

²⁶⁰(1740) 2 Atk. 71.

²⁶¹*Ibid.*, at 71 per Lord Hardwicke LC.

²⁶²See, for example, *Gascoigne v Thwing* (1685) 1 Vern. 366; *Kirk v Webb* (1698) Prec. Ch. 84; *Lloyd v Spillit* (1740) Barn. 384; *Ryall v Ryall* (1739) 1 Atk. 59; *Davies v Otty* (No.2) (1865) 35 Beav. 208.

²⁶³See, for example, *Pye v George* (1710) 2 Salk. 680; *Marlow v Smith* (1723) 2 P.W. 198; *Mackreth v Symmons* (1808) 15 Ves. Jun. 239; and *Saunders v Dehew* (1892) 2 Vern. 271. These are cases concerning purchasers with notice. See also *Keech v Sandford* (1726) Sel. Cas. Ch. 61 and *Palmer v Young* (1864) 1 Vern. 276 for examples of cases of fiduciaries renewing leases in their own name.

²⁶⁴(1726) Sel. Cas. Ch. 61

of another'.²⁶⁵ Meanwhile, Story regarded 'implied trusts arising from the presumed intention of the parties'²⁶⁶ as resulting trusts, which he viewed as distinct from 'those implied trusts (or perhaps, more properly speaking, those constructive trusts) which are independent of any such intention and are forced upon the conscience of the party by the mere operation of law'.²⁶⁷ Lewin followed a similar classification to that of Story.²⁶⁸ Hill, on the other hand, contrary to Spence, Story and Lewin, and contrary to the authorities, classified parol trusts arising for the prevention of fraud as constructive trusts.²⁶⁹ Perhaps the inconsistency is epitomized by the fact that Underhill stated in his 1894 edition that '[r]esulting trusts ... are clearly constructive',²⁷⁰ whereas in 1912 the same author explained that 'resulting trusts ... are sometimes constructive, and sometimes express in the sense of being intentional'.²⁷¹ Perhaps this discombobulation is not surprising. As Alexander explained, the last quarter of the nineteenth century was a period in which the classification of trusts was only just beginning to be viewed seriously by commentators,²⁷² and considerable changes, which eventually culminated in something akin to the modern classification system, were beginning to take shape.²⁷³ One matter upon which most commentators agreed, however, was that parol trusts enforced pursuant to the instrument of fraud principle were not constructive trusts.²⁷⁴

6. *Judicial definitions of constructive trusts in respect of the limitation period*

The inconsistency amongst commentators notwithstanding, by the time of *Rochefoucauld*, a relatively clear judicial definition of constructive trusts had emerged from the courts as a result of the need to classify trustees for the purposes of applying the limitation period. Most of the authorities are concerned with the distinction between express and constructive trusts; perhaps resulting trusts were, on the whole, so readily distinguishable from express trusts as to obviate the need for litigation.²⁷⁵ The leading late nineteenth-century authority on the classification of trusts for limitation purposes is *Soar v Ashwell* (1893),²⁷⁶ in which the Court of Appeal considered

²⁶⁵Spence, *Equitable Jurisdiction*, vol.1, 510.

²⁶⁶Story and Bigelow, *Commentaries on Equity Jurisprudence*, vol.2, 604.

²⁶⁷Ibid.

²⁶⁸See Lewin and Lewin, *Law of Trusts*, 130 and 165.

²⁶⁹James Hill, *A Practical Treatise on the Law Relating to Trustees: Their Powers, Duties, Privileges, and Liabilities*, 1st ed., London, 1845, 122–123 and 141.

²⁷⁰Underhill, *A Practical and Concise Manual*, 13.

²⁷¹Arthur Underhill, *The Law Relating to Trusts and Trustees*, 7th ed., London, 1912.

²⁷²Gregory S. Alexander, 'The Transformation of Trusts as a Legal Category, 1800–1914', 5 *Law and History Review* (1987), 303, 338. Alexander noted that, prior to 1875, 'legal scholars paid virtually no attention to [the] topic [of classification]'. For further examples of the inconsistent labelling by nineteenth-century commentators of the different categories of trusts other than express trusts, see Matthews, 'The Words', 13–14.

²⁷³As Alexander ('The Transformation of Trusts', 342–439) pointed out, the transformation culminated in Costigan's classification of trusts, according to which trusts such as that in *Rochefoucauld* fell squarely within the category of constructive trusts. Alexander was referring to Costigan, 'Classification of Trusts', 461, n.45.

²⁷⁴Only Hill dissented on this point. See n.269 and accompanying text, above.

²⁷⁵Although not all the commentators necessarily saw it this way (see n.243, above).

²⁷⁶[1893] 2 Q.B. 390.

whether a trustee *de son tort* was, for the purposes of the limitation period, to be treated as an express or constructive trustee.²⁷⁷ Bowen LJ explained that '[a] constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour'.²⁷⁸ Similarly, Lord Esher MR stated that when a 'breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a Court of Equity, the defendant a trustee for the plaintiff, the Court of Equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust'.²⁷⁹ According to these definitions, which roughly equate to those of Story and Lewin, rather to that of Hill, parol trusts which were recognized to prevent the Statute of Frauds being used as an engine of fraud were clearly not constructive trusts.

7. *A category of trusts which were neither express nor constructive*

The Court of Appeal in *Soar* recognized that the dividing line between express and constructive trusts was not always easy to ascertain. Accordingly, it was held that there was a group of trusts which were neither express trusts, nor trusts where the trustees ought to be permitted to avail themselves of the limitation period. The reason why the limitation period applied to claims against constructive trustees was essentially one of policy. As Bowen LJ explained, in actions seeking, after a period of many years, to have a person declared a constructive trustee, 'conflicts of evidence are possible or probable, and to deny to the person to be charged the shelter or benefit of a period of limitation would be obviously dangerous and unjust'.²⁸⁰ Where a person had knowingly taken the property as a trustee, or knowingly assumed the role of trustee, the dangers highlighted by Bowen LJ would not apply. This explains Bowen LJ's statement that '[i]t has been established beyond doubt by authority binding on this Court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property'.²⁸¹ Note here that Bowen LJ did not quite state that such trusts *are* express trusts. Rather, he qualified his classification by use of the words 'dealt with as'. Lord Esher MR, after having defined express and constructive trusts in similar terms to those used by Bowen LJ, summed up the prevailing standpoint by stating that:

[t]here are cases not falling strictly within either of those thus enunciated, some of which have been treated by the Courts of Equity as within the class in respect of which a Statute of Limitations will not be allowed to be vouched, and some within the class in respect of which such a statute may be vouched.²⁸²

²⁷⁷It was held that the trustee *de son tort* was to be treated as an express trustee.

²⁷⁸*Soar v Ashwell* [1893] 2 Q.B. 390 at 396 *per* Bowen LJ.

²⁷⁹*Ibid.*, at 393 *per* Lord Esher MR.

²⁸⁰*Ibid.*, at 396 *per* Bowen LJ.

²⁸¹*Ibid.*, at 397 *per* Bowen LJ.

²⁸²*Ibid.*, at 393–394, *per* Lord Esher MR.

8. *A summary of the state of the law when the Court of Appeal considered Boustead's limitation defence*

To recap, when the Court of Appeal came to consider what type of trust bound Boustead, so as to determine the applicability of the limitation period, the state of the law was as follows:

1. there were numerous types of trusts arising according to the rules of equity that were routinely imposed on realty without any need for written evidence;
2. such trusts were recognized and enforced not because they fell within the exemption in s.8, but because they were not the type of trusts which were regulated by s.7;
3. some such trusts had been defined as constructive trusts for the purposes of applying the limitation period;
4. other such trusts were treated as express trusts for the purposes of the limitation period because, although they were trusts which had not been created in the usual manner in which express trusts were created, the trust property had been deposited in the defendant as a trustee;
5. there was no authority regarding whether trustees of parol trusts imposed for the prevention of fraud could avail themselves of the limitation period;
6. it had long been recognized that the prevention of fraud was sufficient reason for the court to declare that a defendant, who had knowingly obtained a conveyance of land subject to a parol trust, had taken that property in a fiduciary capacity as a trustee.

9. *An uncontroversial precedent*

In light of the above, it is no surprise that the Court of Appeal reached the conclusion that the trust in *Rochefoucauld* was 'an express trust within the meaning of that expression as expressed in *Soar v Ashwell*'.²⁸³ That it was not a true express trust, but one arising for the prevention of fraud, was no bar whatsoever to this conclusion; the Court of Appeal had ruled only three years previously that certain types of trusts that were not express trusts should be treated by the courts as express trusts when adjudicating upon the applicability of the limitation period. Thus, although *Rochefoucauld* provided a new precedent on this point, it is suggested that this aspect of the case was not controversial or difficult.

The contemporary reception of *Rochefoucauld* also suggests that the judgment was not considered ground-breaking on this issue. The first comments, in *The Times*, devoted little attention to the issue of the classification of the trust, rather vaguely describing the case as 'a strong decision of the Court of Appeal the other day, enforcing after a very long interval a trust which was, indeed, express, but extremely inferential'.²⁸⁴ These comments are not easy to reconcile with the judgment; nowhere does the Court of Appeal's judgment refer to inferring the trust. The *Solicitors' Journal and Reporter*, on the other hand, stated that 'the trust, although not

²⁸³ *Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 208 per Lindley LJ.

²⁸⁴ *The Times*, 30 Dec. 1896, 10 col b.

declared in writing, was nevertheless an express trust in the sense that at the time of the sale to the defendant both he and the plaintiff understood that a trust was to be created, and against such a trust the Statute of Limitations (save by virtue of the Trustee Act, 1888, which in the present case did not apply) does not run'.²⁸⁵ This is consistent with what this paper has argued regarding how Lindley LJ and his colleagues probably viewed the trust in *Rochefoucauld*. It is also notable that, as was the case in *The Times*, the *Solicitors' Journal* devoted only a small part of its commentary on *Rochefoucauld* to the question of the classification of the trust.

VII. CONCLUSION

The research undertaken here has revealed that the facts of *Rochefoucauld* were reported rather imperfectly. Perhaps the most significant finding is that, contrary to what was reported, the Estates were sold by officers of the District Court in Ceylon as a result of the Société having successfully sued Emily for a sale in execution. The evidence shows that, although Emily probably did not instigate the sale, she was able to use the Société's suit to her advantage in order to prevent Cavendish from obtaining the Estates for himself. After more than ten years of bitter manoeuvrings between Emily and Cavendish, throughout which he had the English Divorce Court on his side, Emily was able to gain the upper hand, thus more than justifying Kekewich J's description of her as 'a thoroughly capable woman'.²⁸⁶

The story unearthed here is therefore of interest because it demonstrates not just how a woman, albeit a woman who moved in illustrious circles, was able prevail in a nineteenth-century matrimonial dispute, but also the great lengths to which this impressive character needed to go in order to achieve her triumph.²⁸⁷ Cavendish's failure to obtain the Estates also demonstrates that it could be problematic for litigants who had obtained favourable judgments in the English courts to have those judgments enforced in foreign jurisdictions, even within the Empire. In addition, the materials accessed here present an unusual picture, seen from the perspective of the litigants and other interested parties, of the workings of Roman-Dutch law in respect of mortgages of foreign-owned land.

The full account of the facts of *Rochefoucauld*, coupled with analysis of contemporary and earlier case law and academic input, has assisted in placing the legal reasoning from the case within the context of the time of the judgment. Kekewich J's first instance decision notwithstanding, it seems that there was, amongst judges and commentators, a clear and consistent understanding not only of the principle that equity will not permit a statute to be used as an engine of fraud as it applied to parol trusts of land, but also of the type of conduct that was considered to amount to fraud. Furthermore, although the Court of Appeal set a new precedent regarding the classification of trusts such as those in *Rochefoucauld* for the purposes of applying

²⁸⁵41 *Solicitors' Journal and Reporter* (1896–97), 2 Jan. 1897, 149 at 150.

²⁸⁶*De La Rochefoucauld v Boustead*, *The Times*, 24 June 1896, 17 col.b–c, at b.

²⁸⁷It should be reiterated here how patriarchal English society was during the period concerned. See above, nn.19, 44 and 48 and accompanying text.

the limitation period, the decision in this respect represented a relatively minor and predictable development of the law in this area, despite the classification of trusts generally being in some disarray, at least amongst jurists. Once this is appreciated, it can be seen why, in respect of Boustead's fraud and the classification of the trust, the judgment was seen by Lindley LJ and his colleagues, as well as by contemporary commentators, as entirely uncontroversial.

A final observation is that certain aspects of cases, even leading authorities, that were regarded as largely straightforward at the time at which they were decided may eventually come to be seen as controversial. This may occur when the full facts are not easy to ascertain, leaving aspects of the judgment open to misinterpretation. Furthermore, the evolution of legal doctrines and terminology may cause judicial statements to be construed by modern authorities in a manner other than that which was originally intended. It is hoped that this paper has demonstrated how seeking to understand cases in their original context can serve to heighten appreciation of the history and development of important legal principles.