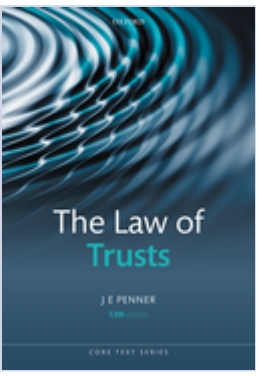

The Law of Trusts (12th edn)
J E Penner

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9. Formalities and secret trusts

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Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. The law sometimes imposes a requirement on the form of legal transactions before it will regard those transactions as valid, provable, or enforceable in court, typically a requirement that the transaction be made or recorded in writing. This chapter first discusses the formality that applies when creating a trust. It then turns to the formality for the transfer, assignment, or disposition of already existing equitable interests, that is, the existing rights of beneficiaries under a trust. It considers the specific provisions of the Wills Act 1837 that apply to trusts. In particular, it looks at secret and half-secret trusts—testamentary trusts that fail to comply with the Wills Act.

Keywords: formalities, Law of Property Act 1925, assignment of equitable interests, testamentary trusts, Wills Act 1837, secret trusts, half-secret trusts

Summary

The character and purpose of formalities

9.1 The law sometimes imposes a requirement on the form of legal transactions before it will regard those transactions as valid, or provable, or enforceable in court, typically a requirement that the transaction be made or recorded in writing. Now consider the phrase 'valid, provable, or enforceable in court': it is important to see that different formalities provisions can have very different effects. As we shall see, s 53(1)(c) of the Law of Property Act 1925 provides that if an assignment of an equitable interest is not made in writing, it is void. This is the most stringent form of writing requirement; if the transaction is not made in writing, in the eyes of the law it did not occur at all.

9.2 The next most stringent provision prevents the proof of a transaction unless there is written evidence of it. Section 53(1)(b) is a provision of this kind; it provides that a declaration of trust of land cannot be proved without written evidence. An oral declaration of a trust of land is not invalid, but merely cannot be proved in court. As we will see, the terms of this provision give rise to certain logical difficulties (**9.12**).

9.3 Finally, the least stringent sort of provision merely provides that an obligation created by a transaction
p. 200 cannot be enforced in a court of law unless there is written evidence. This was the way the old formality requirement under s 40(1) of the Law of Property Act 1925 worked: the obligations under a contract for the sale of land could not be enforced unless there was a written note or memorandum of the contract signed by the party against whom the contract was being enforced. But a party might wish to prove the existence of the contract for reasons other than enforcing it. For example, a person could prove a completed oral contract of sale of land in order to show that he was a bona fide purchaser of it (**2.56** et seq). Section 40 has now been replaced by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989, which imposes a validity formality on contracts for the sale of land; now, a contract for the sale of land must be made in writing, otherwise it is void. The law may impose formalities for different purposes, but three are of particular relevance to transactions that create or transfer equitable interests in property.

As a cautionary measure

9.4 Property rights, including equitable interests under a trust, are very valuable rights. They should not be effectively dealt with in a casual or informal way, just in case the transferor did not seriously consider the consequences of his act. The formality of writing, in particular the requirement that the transferor signs his

name, is suited to this purpose, because these days even the most benighted amongst us typically understands that when he signs his name to a document that is not a personal letter, he is generally doing something of legal consequence.

For evidential purposes I

9.5 Writing requirements provide documentary evidence that makes fraud more difficult on the presumption that it is easier to get away with lying to the court about what someone said than it is successfully to forge documents and lie to the court about their origin.

For evidential purposes II

9.6 Documentary evidence also prevents the administrative problems that might arise when the memory of oral transactions has faded. Also, when transactions are complicated, the writing down helps the parties to be clear about what they intend. Finally, in the case of trusts, the writings are useful simply as a paper record for the trustee, which ensures that he does not commit an inadvertent breach of trust by, say, paying income to a former beneficiary who has since assigned his equitable right to the income to someone else.

9.7 It is a maxim of equity that 'Equity looks to intent not form'; equity has never itself insisted on formal requirements for any transaction (which undoubtedly once had something to do with the fact that the Chancellor could subpoena parties and interrogate them in person (**1.7**)). Parliament, however, has by statute imposed formalities on the creation and transfer of equitable interests, and any court must take due regard of them. Here we will be concerned, first, with the formality that applies when creating a trust—that is, bringing into existence equitable rights—and then the formality for the transfer, or assignment, or disposition of already existing equitable interests—that is, the existing rights of beneficiaries under a trust.

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Declarations of trusts in land: Law of Property Act 1925, s 53(1)(b)

9.8 Section 53(1)(b) of the Law of Property Act 1925 provides:

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

Section 53(1)(b) applies only to land. There is no similar provision with respect to personalty: therefore, an oral declaration of a trust of personalty can be proven on the facts in a court without further ado. Thus, you can orally declare that you hold your copy of this book on trust for your mother, and if you mean it, then you do, and this oral declaration, if proven, allows your mother to enforce this trust against you.

9.9 Importantly, the section must be pleaded by the party wishing to rely upon it (*James v Smith* (1891), 389; Douglas (2021)). An oral declaration of trust can be proved on all admissible evidence if it is not. In particular, the court is not entitled to invoke the section of its own motion if neither side chooses to plead it.

9.10 Section 53(2) of the Act provides:

> *This section does not affect the creation or operation of resulting, implied or constructive trusts.*

To the extent that resulting, implied, and constructive trusts arise by operation of law (**2.6**), this provision is strictly speaking unnecessary, or inserted *ex abundanti cautela* (out of an abundance of caution), because there can be no formality requirements for trusts that arise by operation of law; these trusts are not 'declared' by anyone. We shall consider this provision in **Chapters 10** and **17** which concern these types of trust.

9.11 The person 'able to declare such trust' under s 53(1)(b) will be the settlor, of course. A problem arises however if A transfers land to B on an oral trust for C. Is there any writing which can be provided after the fact which satisfies s 53(1)(b)? Youdan (1984) argues that B, the legal owner, may sign the writing as the one who would be beneficial owner if there were no trust. In *Gardner v Rowe* (1828), an oral express trust was enforced against the trustee (so as to avoid claims by his creditors in bankruptcy); although the trust was evidenced by a post-transfer writing by the trustee, the case turned on the doctrine enunciated in *Rochefoucauld v Boustead* (**9.14**), not on the writing point, so it does not decide the issue.

9.12 But in any case, the words of s 53(1)(b) itself make it difficult to find that any post-oral declaration signed by anyone would be an effective writing. The point is a simple, logical one. The writing, according to the subsection, must be 'signed by some person able to declare such trust'; but once the trust is orally declared, it is a perfectly valid trust; s 53(1)(b) is a *proof*, not a *validity*, formality. And so, once the trust has already been
p. 202 declared, then there just is no 'person able to declare such trust', for the trust already exists. A is not any such person; as the settlor, he is out of the picture; the property is no longer beneficially his. B, the trustee, has no power to declare any trust over property he already holds on trust (**2.14**, **2.91**), and C, the beneficiary, has a power to declare a sub-trust over his equitable title, but no power to declare the very trust under which he is already a beneficiary; if the subsection is ever reformulated in a review of statutory formalities, attention should be paid to this point. Even so, it is submitted that, however logical this all is, and it is perfectly logical, as a second best, the court should entertain a post-declaration writing by B in order to allow proof of the trust in at least some cases, by analogy with the writing requirement in the now-repealed s 40(1); under that section the writing had to be by the person against whom the contractual obligation was sought to be enforced; by parity of reasoning, it is the trustee's trust obligation that is sought to be enforced, so it is his writing which should be required.

9.13 Two cases, however, have not followed this approach, both giving effect to post-declaration writings *of the settlor*. The Singaporean case *Lai Min Tet v Lai Min Kin* (2004) concerned land which a father purchased and had placed in the names of two of his sons. Subsequent to the purchase the father on numerous occasions in personal letters stated that the land was to be held on trust for all of his four sons in equal shares, and these letters were held to satisfy the Singaporean equivalent of the section. In *Ong Jane Rebecca v Ong Siauw Ping* (2017), the UKCA held that a letter written by the settlor, two and half years after a trust of a house was supposedly declared (on very unsatisfactory evidence), a letter in which the settlor purported to 'cancel' the trust, was sufficient to satisfy the section.

The doctrine of *Rochefoucauld v Boustead*

9.14 As we have seen, s 53(1)(b)'s use of the words 'manifested and proved by some writing', indicates not that a purported declaration of trust is void without such a writing, but that it is not provable in a court of law, with the result that an oral trust of land cannot be enforced against the trustee; the express trust exists and binds the parties, but the beneficiary cannot invoke the assistance of the court to make the trustee carry it out since he cannot prove that it exists. In *Rochefoucauld v Boustead* (1897), however, the CA did enforce the oral express trust. The plaintiff, the Comtesse de la Rochefoucauld, had mortgaged her estates in Ceylon, and the mortgagee demanded payment of the mortgage debt. She had insufficient funds following her divorce, and her friend Boustead orally agreed to buy the estates from the mortgagee at a price sufficient to cover the mortgage debt and expenses, and hold the estates on trust for her, subject to her paying off the purchase price and further expenses. Since Boustead purchased the beneficial title from the mortgagee, which he impressed with the trust in the plaintiff's favour, he should have signed the necessary writing. The rationale for the CA's enforcement of the trust is what we now call the 'doctrine of *Rochefoucauld v Boustead*': 'Equity will not allow a
p. 203 statute enacted to prevent fraud to be used as an instrument of fraud', and so the court will allow parol (ie oral) evidence to prove the express trust, despite s 53(1)(b) (or, in the case of *Rochefoucauld*, s 7 of the Statute of Frauds 1677, the forerunner of s 53(1)(b)).

9.15 Although there is no doubt that the CA in *Rochefoucauld* enforced the oral express trust despite the statutory formality provision (Swadling (2010); Douglas (2021)), the principle has been obscured. In *Bannister v Bannister* (1948), an elderly woman conveyed two cottages to her brother-in-law at a below market price on the understanding that she should be able to live rent-free in one of them for the rest of her days. When he tried to evict her, the CA declared that he held one of the cottages on trust to give effect to the agreement. It did not matter that the brother-in-law had no fraudulent intent when the property was transferred; the fraud consisted of relying upon the absence of writing when the sister-in-law tried to enforce her beneficial interest. So far, so much in keeping with *Rochefoucauld*. Yet Scott LJ described the trust as a constructive trust rather than the oral express trust which he was clearly enforcing despite s 53(1)(b), without, however, giving any reasons for this classification. In any event, no good reasons have been given to treat the trust as constructive (Douglas (2021), 138–143).

9.16 Some commentators appear to favour the constructive trust classification because it gives an identical result without appearing to disregard the statute, since constructive trusts are specifically exempted from formality requirements by s 53(2); in this way, then, the court appears not to be disapplying the statute. But the reasoning is fallacious. One cannot both give effect to an express declaration of trust in its very terms for the very reason that not to do so would give rise to a fraud, and then say the trust is constructive, arising by operation of law. As Douglas (2021) puts it (at 143):

> *The constructive trust theory responds by using the same evidence to generate a facsimile copy of the trust —with an identical date of creation, identical trustee powers and duties, identical beneficial interest and identical remedies—but calling it a constructive trust. It is hard to see how [this approach] is appreciably less respectful [of the statute] than [the approach taken in* Rochefoucauld*].*

9.17 *Rochefoucauld* and *Bannister* were both two-party cases, in which the defendant acquired property under an agreement to hold it on trust for the claimant. In both cases it might be said that the claimant in some sense relied on the defendants keeping their word to hold the property on trust. But what should the result be in a 'pure' case of self-declaration of trust, where A gratuitously declares a trust over an asset of his for B? Douglas (2021) argues (at 130) that the essence of the defendant's fraud is his attempt to secure himself an unconscionable gain by using the statute to deny the trust over property he *received on trust*. In the case of a gratuitous self-declaration, Douglas reasons:

> *But suppose an absolute owner A declares a trust orally for C, but then goes back on their word. If A used the Statute to deny the trust, the practical effect is that A is returned to their original ownership. They do not gain anything they didn't previously have by relying on the Statute. There is no fraud, and the Statute is*
> p. 204 *applicable. So although* Rochefoucauld *is a significant exception to the Statute of Frauds, it does not wholly*
> ↵ *deprive the Statute of effect. The Statute applies where the settlor had an absolute ownership interest before the alleged creation of the trust.*

9.18 In a three-party case, where A transfers land to B to hold on trust for C, how should the doctrine apply? HHJ Matthews considered this question in *Solomon v McCarthy* (2020) ([43], original emphasis) and held:

> *The problem is whether, where A conveys to B on trust for C, the trust for C can be established without compliance with the statute. In my judgment it cannot. It is not necessary to enforce such a trust in order to defeat a fraud by A. It is only necessary that there be* a trust *rather than an absolute gift. And to allow the trust for C to be enforced would leave the statutory requirement without effective scope.*

He went on to hold that (emphasis added):

> *the true transfer to the claimant not being a sale or a gift, but being a transfer on trust which has* failed for want of statutory formality, *the claimant must hold [the property] on a resulting trust for the transferor, the defendant.*

But as we have seen, the trust doesn't *fail* for want of compliance with s 53(1)(b), it simply cannot be proved. Whilst the result in this case seems defensible, it must be based not on any failure of the express trust but by a policy limitation of the *Rochefoucauld* doctrine, which seems to be that to prevent the transferee's fraud imposing a constructive trust for the transferor is all that is necessary, which seems to be the idea HHJ Matthews expresses in the first passage.

Disposition of subsisting equitable interests: Law of Property Act 1925, s 53(1)(c)

9.19 Section 53(1)(c) of the Law of Property Act 1925 provides:

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

The section refers to a 'disposition' of an existing equitable interest. We shall be concerned almost entirely with what counts as a disposition for purposes of the section. 'Equitable interest or trust' refers to equitable interests in both land and personalty (*Grey v IRC* (1960)). Notice also that by this section, unlike s 53(1)(b), a disposition must be in writing—if not in writing, it is absolutely void, not merely unprovable.

9.20 The section might be interpreted either broadly or narrowly. The predecessor section in the Statute of Frauds 1677 upon which it was based required writing for 'grants and assignments' of equitable interests; if that were taken as the intended meaning of 'disposition', then the section would not apply, for example, to
p. 205 surrenders or releases of one's equitable interest (**9.61**), because there the beneficiary merely gives up his interest; he does not grant or assign it to another. In *Grey v IRC* (1960), the HL unanimously held that 'disposition' was to be given its natural meaning, which would appear to cover every transaction by which any individual deals with his equitable interest under the trust.

9.21 It has been the object of some criticism of this decision that the definition sections of the Law of Property Act 1925, which give a broad meaning to 'disposition' (s 205(1)(ii)), but which defines 'equitable interest' in terms of interests in land only (s 205(1)(x)), were neither cited to the court nor referred to in their Lordships' judgments. But the better view is that s 53(1)(c) should not be restricted to equitable interests in land; the section specifically mentions land in parts (a) and (b), and does not in (c), so the obvious interpretive conclusion to draw is that clause (c) is not to be confined to land. In any case, the interest in a trust is an interest in a fund (**2.48** et seq), not in whatever properties constitute it. Many trusts contain both land and personalty as investments, and it would be silly to make the application of s 53(1)(c) depend upon whether, at the time any assignment is made, there happened to be some investment of the trust in land, such that an assignment would be invalid on 24 June, the day before the trustee sold an investment in land, but valid if it were made on 26 June, the day after. Beneficiaries are not expected to track the trustee's investments from day to day, after all.

9.22 On a very broad construal of 'disposition', one could attempt to apply s 53(1)(c) not only to every act of the beneficiary by which he somehow deals with his interest but also to the exercise by anyone of any power, such as discretion to distribute property under a discretionary trust, or the exercise of a power of appointment, which might affect the beneficiary's 'equitable interest'. So, for example, where trustees exercise their discretion under a discretionary trust for Fred and Mabel, and distribute property to Fred, such an act would be a disposition of both Fred's and Mabel's equitable interests, and therefore subject to s 53(1)(c). Such a wide meaning might also conceivably capture a decision of the trustee in the course of exercising his discretion to invest the trust property because by investing in one way or another he would to some degree inevitably be enhancing the interests of the income beneficiaries over the capital beneficiaries, or vice versa (**8.3**).

9.23 This wider meaning of disposition is misconceived, practically and conceptually. It is misconceived as a matter of practice because it would subject to the rigours of s 53(1)(c)—remember, a transaction that does not comply with it is absolutely void—almost every exercise of any discretion by the trustee. Trustees must, of course, keep the trust accounts and therefore must record their decisions in any case, but to render void, perhaps years afterwards, perfectly sound decisions made in the course of administering the trust for failure to be put in writing at the time of the transaction, where the writing down of the particular transaction itself provides no further assistance in determining whether the trust was carried out than do the trust accounts (recording payments of money and so on) seems to be a recipe for injustice.

9.24 Take another rather horrible practical example, one that clearly points to why this wide reading is bad.
p. 206 Consider a gift of Blackacre 'to Maria for life but if she takes up residence outside the UK, then to Priscilla'. By acting to take up residence in, say, Portugal, Maria defeats her equitable interest in Blackacre, and so her act 'disposes' of her subsisting equitable interest. So, in order for her disposition not to be void under s 53(1)(c), she must take up residence in Portugal in writing. Eh? Something has gone wrong conceptually because, obviously, not every act that an individual can take under the terms of a trust that will affect the interests, ie the overall position, of the beneficiaries under the trust can even be done 'in writing'.

9.25 Consider again the section. It refers to a disposition of a subsisting equitable interest or trust. It must therefore refer to an existing interest under a trust. It therefore must refer to an existing interest under the specific trust under which it exists, which contours the interest in whatever ways it does. The interest, in other words, is defined by the trust, and so the interest is itself subject to whatever effects, whether positive or negative, it may be subject to under the terms of the trust. In short, the interest is whatever interest it is under the trust, warts and all. Therefore any acts by individuals rightly taken under the terms of the trust that merely affect a particular beneficiary's position, like investment decisions, or exercises by the trustee of his discretion which in various ways give effect to his interest; they do not dispose of it. They are actions that either affect or give effect to his interest, even if they put him in a worse position, because those possible negative effects are part and parcel of the interest he has.

9.26 Thus, a person who takes in default of appointment who loses any chance of taking because the power is exercised has not had his interest disposed of; having a defeasible interest under the terms of the trust, the possibility was realised, and it was defeated. His interest, such as it was, was fulfilled in one of the ways it might have been, and the fact that it's hard cheese on him that it was fulfilled to his detriment does not alter that. Similarly with a trustee's exercise of any of his discretions under the trust in ways that will affect the beneficiaries' positions. The effects of these exercises of discretion are part and parcel of having a discretionary interest. And this proper interpretation must logically extend to the possible defeat of the beneficiary's interest, either because the interest is defeasible, as with Maria's life interest in Blackacre, or because the interest is subject to a power, such as a power of appointment. Indeed, a trustee may have the power under the trust to add or delete beneficiaries *tout court* (**4.1**), and any beneficiaries subject to this power of deletion must likewise regard the effect of the power as part and parcel of their interest.

9.27 Thus, the better interpretation of the subsection is this: A 'disposition' of an equitable interest must refer to the act of someone who is capable of disposing of the interest as it is under the terms of the trust, that is, as a property right of a particular kind. The only person who can do that is the owner of the property right or, as

the section contemplates, his agent. Thus the subsection applies to any dealing by the beneficiary with his interest under the trust.

9.28 Not only does the cautionary purpose (**9.4**) apply in any such case, but the purpose called 'evidential II' (**9.6**) does also: trusts can be extremely complicated, and a paper record of various transactions concerning
p. 207 the equitable interests is vitally important, so important that it would be justified if the law insisted upon writing as the price of their validity (see Green (1984)). The point here is that, since the beneficiary's interest is his own, he can deal with it without any consultation or even notice to the trustee, and the trustees being able to insist upon seeing a writing before treating a beneficiary's assignee as now entitled to the interest is a secondary valuable consequence of the subsection's application. The cases, however, do not reveal such a straightforward approach, ie applying the section to any dealing by the beneficiary with his interest. We shall consider the different possible transactions in turn.

Assignments

9.29 Assignments (**2.43** et seq, **6.10**) are clearly caught by s 53(1)(c): if A, for example, holds an equitable income interest under a trust, and wishes to assign it to X, he must do so in writing; a purported oral assignment is absolutely void.

Declarations of trust

9.30 It is generally accepted that where a beneficiary declares a trust of his equitable interest, creating a sub-trust, s 53(1)(c) does not apply. If the equitable interest is in land, the declaration should be evidenced in writing by s 53(1)(b) in order to ensure it can be proved in court. The reasoning for this is straightforward: whilst the declaration of the sub-trust does have the effect of extinguishing the beneficiary's beneficial interest in the trust, either in whole ('I declare that I hold my income interest on trust for Tim, Tom, and Tammy, in such proportions as I see fit') or in part ('I declare that I hold my income interest on trust for Trevor for life and then for myself absolutely'), and so in that sense is a disposition, it is not a disposition in the relevant sense given that the beneficiary must retain his entire equitable title in order to give effect to the sub-trust. Thus, in the same way that a legal owner of property does not dispose of some 'pre-existing' equitable interest of his when declaring a trust (**2.8**), neither does the equitable owner dispose of any pre-existing equitable sub-trust interest when he declares a sub-trust.

9.31 Thus, the distinction is the difference between the creation of a new equitable interest over something one already has and must retain, and the transfer of something one already has and which one thereby loses. To repeat: when either a legal beneficial owner or an owner of an equitable interest declares a (sub-) trust they do shift, and thereby dispose of, their beneficial interest in the property concerned. But, and this cannot be repeated enough, a 'beneficial' interest is not equivalent to an 'equitable' interest (**2.8**), and it is to the latter that s 53(1)(c) refers. By creating the new trust interest, both the legal owner and the equitable interest owner retain their original interest and it is this pre-existing interest that is the property right on which the new trust 'bites'.

9.32 An exception to the rule that s 53(1)(c) does not apply to declarations of trust was, however, in previous years, widely accepted in academic literature, to wit: if the beneficiary declares a bare sub-trust, ie 'I declare that I hold my life interest upon trust for Ted absolutely', then the declaration is void unless in writing. The
p. 208 idea is that the beneficiary is now a mere conduit between the trustee and the sub-beneficiary. The sub-beneficiary, it is said, should approach the trustee directly for his benefits, since it is pointless for the trustee to pay the beneficiary/sub-trustee and for her immediately to turn around and pay the sub-beneficiary. If this is right, then the declaration of a bare sub-trust amounts to an assignment of his equitable title and should count as a disposition under s 53(1)(c), for on this reasoning, the sub-trustee 'drops out' of the picture, so in effect she has assigned her interest to the sub-beneficiary.

9.33 The reasoning, and the authority for this proposition, has now been shown to be specious. As to authority, the nineteenth-century cases (*Onslow v Wallis* (1849), *Re Lashmar* (1891), and *Grainge v Wilberforce* (1889)) cited to support the view that the sub-trustee drops out do not support it at all (*Nelson v Greening and Sykes* (2007), [57]; *Sheffield v Sheffield* (2013), [82]–[86]; Green (1984); Tham (2017)).

9.34 As to the reasoning, it would seem that the beneficiary/sub-trustee drops out not by virtue of his own declaration of the sub-trust, but by operation of law, which collapses the sub-trust giving the sub-beneficiary rights against the trustee automatically. But this seems wrong in principle. The beneficiary/sub-trustee could not himself insist on quitting the scene; the trustee could always choose to pay him and let him deal with his own sub-trust. After all, the trustee has no obligations under the sub-trust and so no duties to his beneficiary's sub-beneficiary. No solicitor in his right mind would advise the trustee to take over the trust of his sub-beneficiary on his own initiative: he would essentially be 'intermeddling' in a trust to which he was not appointed as a trustee, an act that would make him personally liable as a 'trustee de son tort' (**13.110**). Thus, the beneficiary/sub-trustee does not, indeed cannot, drop out of the picture simply by declaring the sub-trust. Of course, nothing prevents the trustee and the sub-trustee coordinating their actions as a matter of practicality (*Nelson* [57]).

Directions to the trustee to hold the equitable interest for another

9.35 If A directs his trustee to hold his equitable interest for a third party, it is generally accepted that this requires writing. This is in effect an assignment achieved, not by dealing with the third party directly, but by instructing the trustee henceforth to treat the third party as the beneficiary. *Grey v IRC* is usually cited as authority for this proposition, although as we shall see it actually concerned a different transaction. Nevertheless, the rationale for the application of s 53(1)(c) is straightforward. The beneficiary here, by his own direction, extinguishes his own equitable interest in favour of another, and so there is little to distinguish this from an assignment.

Directions to the trustee to hold the equitable interest on new trusts for another, and variations

9.36 Now we will discuss the 'big three' cases of this topic: *Grey v IRC* (1960); *Vandervell v IRC* (1967); and *Re Vandervell (No 2)* (1974). The courts made something of a hash of all of them, so it is difficult to say exactly what each decided, hence the 'and variations' above.

p. 209 **9.37** *Grey* involved an attempt to avoid paying ad valorem stamp duty on the setting up of a trust. *Ad valorem* stamp duty is a tax charged on documents that transfer the beneficial interest in property. For example, in England when you transfer title to a house, *ad valorem* stamp duty is payable, '*ad valorem*' indicating that the amount of the duty is a percentage of the value of the property. At the time *Grey* was decided, *ad valorum* stamp duty was payable on the transfer of shares. So, for example, if you transferred shares to Theresa on trust for Ben, the beneficial interest passed from you to Ben, and *ad valorem* stamp duty was chargeable on the share transfer document. If by some means you could get the shares into a trust for Ben without having to use a document that transferred the beneficial title, then you could avoid paying *ad valorem* stamp duty. Furthermore, any transfer document that did not transfer a beneficial interest only attracted a fixed stamp duty of 50p. So, a transfer of shares from one trustee to another (eg when a trustee retired), only cost 50p stamp duty, since the beneficial interest remained with the beneficiaries throughout.

9.38 So, say you wanted to transfer shares to Theresa on trust for Ben, but wanted to avoid *ad valorem* stamp duty, here's how you could do it: declare that you hold the shares on trust for Ben. Shares are personalty, so you can declare such a trust orally: no document, so no stamp duty. Now retire from the trust in favour of a new trustee, Theresa, and transfer the legal title in the shares to her. The share transfer will be stampable at 50p, not *ad valorem*, because it does not transfer the beneficial interest, which already lies with Ben. (The only catch in this scheme is that if you wrote a document recording your declaration of trust too soon after your oral declaration, the Revenue would regard this writing as a document that transfers the beneficial interest to Ben as part of a 'composite transaction' transferring the legal title to Theresa on trust for Ben, and then you would pay *ad valorem* stamp duty on it (*Cohen and Moore v IRC* (1933))). By this means, then, you could transfer the shares to Theresa on trust for Ben paying only 50p in stamp duty. The settlor in *Grey* was not so lucky.

9.39 In *Grey*, the settlor owned 18,000 company shares, which he desired to transfer in equal amounts into six trusts for his grandchildren that he had already set up. He transferred the shares to the two trustees of the grandchildren's trusts, but to hold the shares on bare trust for himself, and so, since the beneficial interest remained with him, the transfer document only attracted 50p stamp duty. He then orally directed the trustees to hold the shares in six separate and equal blocks upon the pre-existing grandchildren's trusts. Five weeks later, the trustees executed a document declaring that they held the shares on the children's trusts. The Revenue argued that this document was stampable *ad valorem* because it transferred the beneficial interest in the shares from the settlor to the grandchildren. The trustees argued that the settlor's oral direction did so, and that such a direction did not require writing under s 53(1)(c) to be valid, but the HL unanimously decided that such a direction was a disposition within s 53(1)(c) and so needed to be in writing; therefore, the oral direction was void.

9.40 Somewhat strangely, the later writing in which the trustees stated that they held the shares on the grandchildren's trusts was regarded as validly transferring the settlor's interest, and that document was held
p. 210 to be subject to stamp duty. The case therefore also appears to stand for the proposition that a later writing may retroactively validate an invalid oral disposition. Although the settlor was not expressed as a party to the deed declaring the trusts, he did sign it, and so the participation of the beneficiary is necessary for this to work. On the other hand, it may be the case that the court just conveniently found this document to be one that could be stamped for revenue purposes.

9.41 What precisely does the case decide? The settlor's direction was clearly not a direction to the trustees to hold his equitable interest for his grandchildren in equal shares. That would simply have made them equitable co-owners of the shares under the same bare trust. Nor was it a self-declaration of a sub-trust for his grandchildren. Rather, he directed his trustees in their nominee capacity to divide the shares into equal lots and thereafter hold the lots as trustees of the grandchildren's *separate* trusts, each trust to receive one lot. The important point is that the trustees were not to continue to hold the shares as bare trustees for new beneficiaries, but to hold the shares in their quite separate capacity as trustees of the grandchildren's trusts. Because the trustees of the grandchildren's settlement were the same two persons that were the settlor's nominee trustees, the legal title did not have to be transferred, but this should not obscure the point. A trustee is a separate trustee to each of the trusts he administers and must keep the property of the different settlements separate. For example, in this case, the trustees would be required either to divide the share certificates equally into six lots or use the share serial numbers to allocate particular lots to each of the different grandchildren's settlements (see Green (1984)).

9.42 At a minimum, therefore, the case decides that an oral direction to bare trustees to hold the trust property on different trusts that they also administer is void unless in writing, although a later writing may be effective as a 'belt and braces' device to cure a prior invalid oral direction. However, Green is clearly right to argue that the case must also be authority for the proposition that a direction to bare trustees to transfer the property to other trustees on different trusts is similarly void unless in writing, since the situations are identical except for the fact that in the former the trustees of both trusts happen to be the same persons, and this is no reason to distinguish between the two. However, in *Vandervell v IRC*, the HL unanimously decided that an oral direction to a trustee to transfer the legal title to shares to different trustees on new trusts was valid. The HL did not, apparently, realise they were deciding this, but they did.

9.43 The case concerned the attempt of a rich industrialist, one Guy Anthony Vandervell, to endow a chair of pharmacology in the Royal College of Surgeons. The facts of the case are somewhat convoluted, but the essential points are clear enough. There were three players: Vandervell himself, who controlled and owned most of the shares of a private engineering company he had founded; the Royal College of Surgeons (RCS); and Vandervell Trustees Ltd (VTL), a trust company that administered two separate trusts, one for Vandervell's children, and one a retirement, profit-sharing, and savings fund trust for Vandervell's employees. The plan to endow the chair in the RCS (as devised by Vandervell's accountant to avoid tax) was to get shares of
p. 211 Vandervell's company into the hands of the RCS, and then Vandervell, using his control over his company, would have the company declare dividends on the shares sufficient to fund the chair; as part of the scheme, the RCS would grant an option to VTL to purchase the shares, so that once the dividends were paid the shares could be held by VTL.

9.44 Vandervell duly instructed a bank that held some of the company shares on bare trust for him to transfer the shares to the RCS, which it did, and RCS in turn granted an option to purchase the shares for £5,000 to VTL. The evidence was fragmentary, but at a minimum it was clear that the option was not to be granted to Vandervell himself because he did not want the beneficial ownership of the shares, which would increase his tax liability. Dividends sufficient to fund the chair were declared.

9.45 A majority in the HL decided that because the option was essentially an interest in the shares that Vandervell had himself created by the arrangement, he had a beneficial interest in it; therefore, although the option was granted to the trust company, it held the option on automatic resulting trust (ART) for Vandervell. Since he held the beneficial interest in the option under a resulting trust, he had retained a beneficial interest in the shares, because by exercising the option he could regain ownership of them. So, although the RCS clearly had a beneficial interest in the shares, so did Vandervell under the option. Under the rules of taxation prevailing at the time, this beneficial interest in the shares entitled the Inland Revenue to charge Vandervell large amounts of surtax on the dividends; so, as it turned out, the grant of the option proved hugely costly to him.

9.46 But before getting to this result, there was a preliminary point to be decided. The Revenue's first argument was that the transfer of the shares held on bare trust for Vandervell by the bank to the RCS on Vandervell's oral direction failed because this amounted to a disposition of his equitable interest under the bare trust, and therefore it needed to be in writing under s 53(1)(c). The point their Lordships thought they were deciding was this: Is A's oral direction to his trustee to transfer the legal title to shares held on bare trust to a third party absolutely, ie so the third party acquires the beneficial legal title to them, valid, or must it be in writing under s 53(1)(c)? They all decided that s 53(1)(c) did not apply and so the oral direction was valid.

9.47 The reasoning of their various Lordships was brief and does not repay intense scrutiny (see Green (1984)). For his part, Lord Upjohn said this (at 311E–F):

> *[I]f the intention of the beneficial owner in directing the trustee to transfer the legal estate to X is that X should be the beneficial owner I can see no reason for any further document or further words in the document assigning the legal estate also expressly transferring the beneficial interest; the greater includes the less. X may be wise to secure some evidence that the beneficial owner intended him to take the beneficial interest in case his beneficial title is challenged at a later date but it certainly cannot, in my opinion, be a statutory requirement that to effect its passing there must be writing under section 53(1)(c).*

p. 212 **9.48** To the extent that Lord Upjohn is satisfied because the transfer of a legal title involves a document anyway, and so a 'further' document seems superfluous, he has forgotten that the rule of law he has just propounded will apply equally to chattels, which can be transferred out of the trust by delivery—the result is that a trustee may give away certain kinds of trust property on the basis of an oral direction with no writing whatsoever. Secondly, the point is not whether a legal transfer normally includes the beneficial interest—of course it does; the question is whether it does in this case, where the beneficiary has not expressed in writing his intention to give up the beneficial interest. Without any writing, why should we not presume that when the trustee, T, transfers the legal title to X, X takes the legal title because he has been appointed as a new trustee to replace T, in which case the beneficiary's interest would, of course, remain attached to the property? Lord Upjohn's concern that X, the recipient, might want some sort of writing is interesting, since it indicates he is somewhat aware of the kind of trouble that oral dispositions can cause, not only to the Xs of the world but to beneficiaries, who might be defrauded on the basis of supposed oral directions, and trustees, who may later have to prove oral directions to show that their actions were not in breach of trust. (Lord Wilberforce, in an interesting departure, decided that s 53(1)(c) did not apply on the basis of a quite different reading of the

facts, roughly that the bank had effectively transferred the legal title to the shares to Vandervell before the transaction with the RCS, and so it was Vandervell himself, through the bank acting as his agent, who assigned the legal title to the RCS, not the bank acting as his trustee.)

9.49 But here's the really goofy part of this decision. As just mentioned (**9.45**), the HL decided that the grant of the option from the RCS to the trust company was held on ART for Vandervell. We shall examine this aspect of the case in detail (**10.61** et seq), but basically the court found on the facts that VTL held the option on trusts which Vandervell would later declare. But because he hadn't declared any such trusts (eg for his children), VTL held the option on ART for Vandervell. But if this is true, which it must be because that is the decision of the case, then the transfer by the bank of the shares was a transfer subject to some kind of equitable obligation or condition, that is, *a transfer on trust*, *not a transfer of the absolute beneficial legal title.*

9.50 If that is so, then the HL actually decided that an oral direction to a trustee to transfer property held on bare trust to another person on trust for a third party is valid. This, of course, directly contradicts the broader basis of decision that Green (1984) argues is the right interpretation of *Grey*.

9.51 So, what is to be made of the court's decision on the 53(1)(c) point? For the purpose of the 53(1)(c) decision, the court relied on a reading of the facts *that was inconsistent, indeed contrary to*, their reading of the facts regarding their ART decision. This must significantly weaken the authority of the decision.

9.52 Most commentators, however, take Lord Upjohn at his word and it is textbook gospel to say that *Vandervell v IRC* decides only that an oral direction to a bare trustee to transfer the trust property to a third
p. 213 party absolutely for his own benefit is a valid disposition. This decision is commercially convenient, it is sometimes said, because it allows nominee trustees of shares, like brokers, to sell them on the oral directions of their beneficiaries. This justification is specious: the buying and selling of shares amounts to the trustee's exercise of his power of investment (**8.2**), and in general trustees never have to get the written direction of the beneficiaries to manage the trust property in this way: that is, s 53(1)(c) does not apply because these 'dispositions' of the trust property are not the disposition of anyone's equitable interest, but merely dealings with the trust corpus in which those equitable interests lie (**2.49**–**2.50**). As *Akers v Samba v Financial Group* (2017) makes clear, even a transfer of trust assets in breach of trust by the trustee does not amount to a disposition of the beneficiary's interest. *A fortiori* it cannot be the case that a transfer of trust assets allowed by the terms of the trust is such a disposition.

9.53 Such a transaction with the trust property is made by exercising an administrative power or discretion, not a dispositive one (**2.26**). The only difference the trust being a bare trust makes is that the beneficiary has the right to tell the trustee how to exercise any of the powers he has in virtue of being the legal owner of the trust property, including the power to exchange trust property for other property. The exercise of this administrative power, then, has nothing whatever to do with the trustee's defeating or extinguishing a beneficiary's interest by giving the trust property away, or extinguishing part or all of the beneficiary's entitlement under the trust (whatever its specific property) on the basis of oral instructions. (For a contrary view, see Nolan (2002), who thinks oral instructions of both the administrative and dispositive kind should be treated alike in the case of a bare trust.)

9.54 The *Vandervell* saga continued in *Re Vandervell (No 2).* Once the Revenue made its claim for the surtax, Vandervell and the trust company decided to exercise the option. The trustees used £5,000 from the children's trust and purchased the shares. The trustees wrote to the Revenue informing it that the shares were now held under the children's trust. As he had done for the RCS, Vandervell then exercised his control over his company and had various dividends declared on the shares over the next few years, amounting to more than a million pounds; in doing so he intended to provide for his children, and subsequently wrote a will leaving them nothing more. After his death, the executors of his will claimed that none of the preceding transactions had worked to displace Vandervell's beneficial interest in the option, nor therefore in the shares purchased through its exercise; thus, the dividends declared on those shares were his property as well, so following his death VTL held the shares and dividends on trust for Vandervell's estate.

9.55 The CA decided that a valid trust had been declared in favour of the children, and so the dividends properly belonged in the children's trust. The court gave a number of reasons, most of which are insupportable. The only plausible one, and pertinent to our discussion, is in this passage from Lord Denning MR's decision (at 320C–E):

> *A resulting trust for the settlor is born and dies without writing at all. It comes into existence whenever there is a gap in the beneficial ownership. It ceases to exist whenever that gap is filled by someone becoming beneficially entitled. As soon as the gap is filled by the creation or declaration of a valid trust, the resulting*
> p. 214 *trust comes to an end. In this* ↵ *case, before the option was exercised, there was a gap in the beneficial ownership. So there was a resulting trust for Mr Vandervell. But, as soon as the option was exercised and the shares registered in the trustee's name, there was created a valid trust of the shares in favour of the children's settlement. Not being a trust of land, it could be created without any writing. A trust of personalty can be created without writing.*

9.56 Green (1984) assumes that what makes Lord Denning's decision even possibly correct is a finding on the facts (however erroneous) that the trust company had the power to declare trusts of the option or shares purchased with it: by exercising the option and holding the shares on trust for the children the trust company declared a trust that 'filled the gap' in the beneficial interest, which declaration the court found did not attract the requirements of s 53(1)(c). On this view the case has a tiny narrow ambit, to wit: where a trustee holds property upon an almost bare trust for a settlor, but there is (oddly, it must be said) one term of the trust that gives the trustee the power to declare new trusts of the property, his exercise of that power need not be in writing.

9.57 But this interpretation cannot stand with the decision in *Vandervell v IRC*, nor with Lord Denning's own words: Vandervell held under an ART, an automatic resulting trust—a trust that simply cannot contain any special powers of this kind for the trustees or anyone else. An ART, which arises by operation of law, is the barest of bare trusts, under which the trustee holds the assets for the settlor absolutely. So even if on the facts the express trust Vandervell had intended the trustee company to hold the option under gave the trustee company the power to declare new trusts, that trust failed for uncertainty, and nothing of it lingered in the ART that arose upon its failure.

9.58 Rather, the CA decision, per Lord Denning MR at least, appears to be that because Vandervell was fully aware of and assented to the trustee company's exercise of the option to hold the shares on the children's trust, his assent amounted to an oral declaration of trust. So, the case is authority for the proposition that where a settlor transfers personal property on trust yet fails to make an effective oral declaration of trust, so that an ART in his favour arises, s 53(1)(c) does not apply to his subsequent oral declaration of trust.

9.59 This decision is not in conflict with *Grey*, since there the settlor intentionally transferred property on express bare trust for himself and later directed the trustee to hold it on different trusts for his grandchildren. In *Re Vandervell (No 2)*, by contrast, Vandervell had tried to do what was perfectly legitimate, ie transfer personalty to a trustee on orally declared trusts, only the oral declaration failed for uncertainty. If the settlor remedies the situation by declaring trusts that are certain, why should that declaration require writing when the first did not? This, indeed, would appear to be the one case where an exception to s 53(1)(c) is justified, since one might say that the second, valid, declaration is part and parcel of one transaction in which the holder of an interest in personal property transfers it on trust—and that, of course, is a case of an oral declaration of trust that is provable whether there is written evidence or not, there being no equivalent to s
p. 215 53(1)(b) that applies to interests in personalty. (It should be noted, however, that in this passage Lord Denning appears to make the common mistake of thinking s 53(1)(b) goes to validity, rather than proof).

9.60 This view is fortified by the history of the resulting trust (**10.1**–**10.2**) and the point that one receives the beneficial interest under an ART not as a beneficiary—the interest does not move forward to one as someone intended as a beneficiary—it 'remains with' or 'results to' one as settlor. Therefore, it makes sense to think that the ART 'beneficiary' deals with this interest as *a settlor*, ie declaring the trust, hopefully successfully this time, not 'disposing' of an equitable interest validly created under an express trust.

Releases, surrenders, and disclaimers

9.61 A release and a surrender are the same thing. A beneficiary surrenders his interest when he clearly indicates that he no longer wishes to benefit under the trust. If the beneficiary has a vested interest, for example a life interest in shares, what follows is an ART in favour of the settlor, if the trust is *inter vivos*; if the trust is testamentary, to that extent the trust fails and the property falls into residue. If the beneficiary has only a contingent interest (eg he is the object of a discretionary trust or power of appointment), then his surrender just removes his name from the list of possible objects; there is no ART because he has no vested interest in any property upon which it could operate.

9.62 Section 53(1)(c) should apply to surrenders or releases, since they clearly amount to the beneficiary's disposing of his entire equitable interest in favour of others, even if he does not know or care who will benefit under the trust by his surrender. There is, however, no good authority on the point, almost certainly because any careful trustee will insist that a beneficiary surrendering his interest will do so in writing. *IRC v Buchanan* (1958) is perhaps of some small assistance. There, the CA interpreted 'disposition' as used in the Finance Act 1943 to include the exercise by a beneficiary of a special power under a trust to surrender her life interest in favour of her children.

9.63 A person disclaims an interest under a trust when he refuses any beneficial interest from the outset. The only authority for the application of s 53(1)(c) to disclaimers is *Re Paradise Motor Co Ltd* (1968). The CA held that 'a disclaimer operates by way of avoidance, and not by way of disposition'. A person disclaiming 'avoids', that is, never obtains any equitable interest, and therefore never acquires anything to dispose of: s 53(1)(c) has no application. This characterisation of disclaimers seemed entirely ad hoc, to avoid one more complication in a case in which the beneficial ownership to shares had to be determined on vague and ill-remembered oral testimony, and the authority the court referred to (*Re Stratton's Disclaimer* (1958), CA) actually takes the opposite line: that a beneficiary takes the benefit of an equitable interest from the moment the gift becomes effective in his favour, and therefore his disclaimer does amount to a disposition extinguishing a right he presently enjoys. Little weight, then, should be given to the decision. Certainly, the purposes behind the section apply just as much to disclaimers as to other dispositions, and 'disposition' under the Law of Property Act 1925, s 205(1), (2) includes a disclaimer.

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Agreements to assign or vary equitable interests for consideration

9.64 Applying the maxim 'equity looks upon that as done which ought to be done' (**6.19**), in the case of specifically enforceable contracts for the transfer of rights in property, equity will impose a vendor–purchaser constructive trust on the vendor of the interest. We shall look at these trusts in detail (**17.10** et seq). This doctrine operates just the same in the case of assignments of equitable interests where the interest is 'unique' in the sense that a failure to receive it under the contract cannot be adequately compensated by money damages. Always remember (some judges do not, eg Lord Wilberforce in *Chinn v Collins* (1981)) that this constructive trust depends on the availability of specific enforcement of the contract, and this in turn depends on whether the property is unique in this way. For example, private company shares are, since they cannot be freely purchased on the open market, but public company shares are not.

9.65 In the case of an agreement to assign equitable interests under a trust, the vendor–purchaser constructive trust that arises is a constructive sub-trust. The beneficiary holds his equitable interest on constructive sub-trust for the purchaser subject to purchaser's being willing and able to pay; if the purchaser is not, the beneficiary can refuse to proceed and can terminate the contract. When the purchaser does pay up, the beneficiary holds his equitable interest on bare sub-trust for him and the purchaser can get a decree of specific performance requiring the beneficiary to assign the equitable interest to him.

9.66 In *Oughtred v IRC* (1960), the vendor–purchaser constructive trust was employed in an attempt to avoid stamp duty. Mrs Oughtred and her son, Peter, both held interests in a trust of private company shares. They agreed to vary their equitable interests, as a result of which Mrs Oughtred would acquire the entire beneficial interest in the shares under a bare trust; in return she would transfer a separate block of shares to Peter. Following the agreement, Mrs Oughtred and Peter executed a deed that declared that Mrs Oughtred now had the entire beneficial interest in the shares. The trustees then formally transferred the legal title to the shares to her absolutely. The question before the court was whether the formal share transfer attracted *ad valorem* stamp duty, or only a 50p duty because by virtue of the constructive trust, she already beneficially owned the shares in equity.

9.67 The HL majority held that the formal share transfer attracted *ad valorem* stamp duty, but largely on what might be called the 'principles of stamp duty law'. Lord Jenkins held that while the purchaser under a specifically enforceable agreement has a proprietary interest of some sort, that does not prevent the subsequent transfer of the property that completes the transaction from being stampable *ad valorem*. After all, *ad valorem* stamp duty was payable (and remains payable) on documents transferring title to land even though the purchaser willing and able to pay the purchase price acquires the beneficial interest in the land on the day of completion under this paradigm example of a vendor–purchaser constructive trust. Lord Radcliffe dissented, accepting that upon the agreement being made Mrs Oughtred became the owner in equity, and so felt that the share transfer did not transfer any beneficial interest.

p. 217 **9.68** The view that the constructive trust arising on the specifically enforceable agreement is sufficient to create an enforceable equitable interest has been endorsed since, outside the stamp duty context (*Re Holt's Settlement* (1969); *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* (1976)). In *Neville v Wilson* (1997) the CA held that the equitable interest in private company shares could pass by virtue of a contractual constructive trust arising on a specifically enforceable, although oral, agreement. In that case, the equitable interest in certain shares was held by a company—the legal title in them was vested in two nominees purely for the purpose of qualifying them as directors. The company was subsequently wound up, but although the equitable interest in these shares was clearly an asset of the company it was never dealt with according to the shareholders' winding-up agreement—indeed, the nominee trustees were thereafter treated by all concerned as the beneficial owners of the shares, taking the dividends for themselves, and so on. Nevertheless, trustees they were, and so the trial judge concluded that the equitable title, as an asset of the company never transferred, remained with the company, which was, of course, now defunct having been wound up. Since by the time of trial the defunct company could not be reinstated as a legal entity, the result was that no one owned the equitable interest in the shares, and so it passed as bona vacantia to the Crown.

9.69 On appeal it was argued that the shareholders' winding-up agreement gave rise to a constructive trust over the shares in favour of the shareholders. After reviewing the decisions in *Oughtred*, the CA agreed, reasoning (at 158A–C) that:

> *So far as it is material to the present case, what subsection (2) says is that subsection (1)(c) does not affect the creation or operation of implied or constructive trusts. Just as in* Oughtred v IRC *the son's oral agreement created a constructive trust in favour of the mother, so here each shareholder's oral or implied agreement created an implied or constructive trust in favour of the other shareholders. Why then should subsection (2) not apply? No convincing reason was suggested in argument and none has occurred to us since. Moreover, to deny its application in this case would be to restrict the effect of general words when no restriction is called for, and to lay the ground for fine distinctions in the future. With all the respect which is due to those who have thought to the contrary, we hold that subsection (2) applies to an agreement such as we have in this case.*

Testamentary trusts: Wills Act 1837, s 9

9.70 Section 9 of the Wills Act 1837 provides:

> *9. No will shall be valid unless—*
>
> (a) *it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and*
>
> (b) *it appears that the testator intended by his signature to give effect to the will; and*
>
> (c) *the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and*
>
> p. 218 (d) *each witness either—*
>
> (i) *attests and signs the will; or*
>
> (ii) *acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary.*

The section applies to any testamentary gift, including testamentary trusts (but see **9.79**). Unless properly signed and attested, an intended testamentary gift fails. Formalities are of obvious importance here, as a will takes effect when the testator is dead, so we will not hear any oral evidence from him as to his intentions.

Non-testamentary gifts providing an interest on death

9.71 Not every gift by which the donee takes an interest on the donor's death is testamentary. For example, I can declare that I hold Blackacre on trust for myself for life, and then for you. My personal representatives will hold Blackacre for you from my death. This *inter vivos* trust immediately vests in you a future interest in Blackacre. For a gift to be testamentary it must be revocable and ambulatory. A valid testamentary gift, ie one in a will, can be revoked or amended by the testator any time before his death, although he must do so in writing in compliance with s 9. A document that amends a will in part is called a 'codicil' and becomes part of the testator's whole will.

9.72 'Ambulatory' means that a will, while valid when properly made, just walks along without immediate effect, only operating when the testator dies. Thus, gifts that would have been valid had they been made *inter vivos* when the testator made his will may fail at the time of his death, because in the interval things may happen to his legatees, to him, or to his property. A gift 'lapses' if the intended legatee pre-deceases the testator; the property remains in the deceased's estate and goes either to the residuary legatees or intestate successors. When a testator makes a will, he may leave specific gifts, such as his car to X or his house to Y, or pecuniary legacies, such as £10,000 to Z. The testator might be rich when he makes his will, but poor when he dies. Before any property is distributed under a will, all of the testator's creditors must be paid, and some or all of his property might have to be sold to do this. Thus, the particular items of property and the total wealth distributable under the will can never be ascertained until his estate is administered. A specific gift adeems, ie fails, if the testator's estate does not include the specific property; if, for example, he sells his car then any specific gift of the car in his will fails. A gift abates when a legatee's gift is proportionately reduced because there is insufficient property to satisfy all the testator's gifts. Thus, a pecuniary legacy may abate anywhere down to zero, for example if the testator is insolvent at the date of his death.

9.73 Even if the *inter vivos* trust of Blackacre (**9.71**) is made revocable, it is not truly ambulatory since unless and until revoked it cannot lapse by reason of your predeceasing me—if you die first, then your successors will take the fee simple in Blackacre when I die. Nor will the gift adeem or abate if it turns out that I am deeply in debt when I die—the beneficial interest in Blackacre has been disposed of *inter vivos* and cannot form part of my estate.

p. 219 **9.74** Besides *inter vivos* trusts giving an interest that vests on the death of a settlor, property can 'go' to others on one's death by operation of the right of survivorship on jointly held property (**1.24**). Thus, if I transfer Blackacre to you and me as joint owners and I then die before you, you become the sole owner as my joint interest just disappears on my death. I can also take out a life insurance policy naming you as the beneficiary; the policy will pay out to you on my death. In *Re Danish Bacon Co Ltd Staff Pension Fund* (1971), Megarry J held that the right of an employee to nominate someone who will receive death-in-service benefits under a pension fund trust was not testamentary and therefore not subject to s 9 requirements. Megarry J also held that such nominations do not require writing under s 53(1)(c), since the nominator is not disposing of any subsisting equitable interest—the benefit only arises on his death (see also *Baird v Baird* (1990)).

Informal testamentary trusts: secret and half-secret trusts

9.75 Secret and half-secret trusts are testamentary trusts that fail to comply with the Wills Act because they are not disclosed or disclosed fully in a valid will. Typically, a fully secret trust (FST) arises when T appears to take an absolute gift under A's will, but T has informally agreed with A to hold the property on trust for B. Secret trusts, however, can arise when there is no will at all: if T is A's intestate successor, he may also informally agree with A to hold the property he gets on trust for B (*Sellack v Harris* (1708)). After A's death, T, whether a legatee under A's will or A's intestate successor, is in the position to deny the informal trust and keep the property for himself.

9.76 A half-secret trust (HST) is one in which the existence of the trust is apparent on the face of the will, but the terms of the trust are not disclosed (eg 'I leave Blackacre to X on trusts that I have communicated to him'). Unlike the fully secret trust case, X is not in the position to deny the trust, and so cannot take the property himself, because he is clearly a trustee for someone, and of course, equity will not allow him to take the property beneficially.

9.77 Why should anyone wish to make informal testamentary trusts of this kind? The word 'secret' basically says it all. Secret trusts are created by the testator to ensure the secrecy of her testamentary gifts. Since wills must be proved in a Court of Probate the contents of a will become public, and any person or member of the tabloid press can buy a copy for a trivial sum. (A brisk business was done in Princess Diana's will.) Testators wishing to provide for their secret lovers or other objects that would embarrass them or rather, harm their posthumous reputations, may instead of leaving them property by will leave property absolutely to a friend who agrees to hold the property on trust secretly for these beneficiaries.

9.78 If the testator regards the obligation the legatee undertakes as only a moral obligation, and the legatee is
p. 220 trustworthy, then legal enforcement is not required. The imposition of such moral obligations does not interfere with the effect or policy of the Wills Act, because in law the legatee becomes the absolute owner under the will, and moral obligations to the deceased do not upset that.

Trusts of land and personalty and the statutory formality provisions

9.79 It is orthodox to believe—all the cases of secret trusts assume this to be true—that any attempt to create testamentary trusts must comply with s 9, that is, must be set out in a valid will. Matthews (2010) (17–22) disputes this. Examining the history of the Statute of Frauds 1677 and s 9 of the Wills Act and its predecessors, he argued that s 9 applies only to the transfer of legal title to the intended trustee; s 9 does not require testamentary trusts themselves to be declared in writing. Only testamentary trusts of land are required to be proved by writing under s 53(1)(b); note the last four words of the subsection: 'or by his will'. If this is right, then one needs no 'doctrine' of secret trusts at all. Any testamentary trust of personalty is valid, whether oral or not, and could be proved in court on the basis of oral evidence. And in cases of land the appropriate principle to apply where the intended trustee of an oral trust of land fraudulently denies the trust, is the principle of *Rochefoucauld* (**9.14**).

9.80 Whilst Matthews makes a persuasive case, going the other way is the fact that all the judges do seem to think that s 9 applies here. Otherwise, they would not have thought it necessary to create either the 'fraud' theory of the enforcement of secret trusts or, as we shall shortly see (**9.92** et seq), the poor and hopeless alternative, the 'dehors the will' theory. Also, it would seem that the underlying policy of the Wills Act, to discourage so far as to make invalid informal testamentary gifts, applies just as much to gifts on trust as other gifts, and this is probably the thought motivating the judges' beliefs that it does so.

The fraud theory of enforcement of secret trusts

9.81 Originally, it appeared that equity would enforce the trust obligation over the property against the secret trustee only in a case akin to *Rochefoucauld*. Equity would not allow a fraudulent legatee to plead that the trust was invalid under the Act on the basis that 'Equity will not allow a statute enacted to prevent fraud to be used as an instrument of fraud'. This is the 'fraud theory' of the enforcement of secret trusts, but the leading nineteenth-century HL case, *McCormick v Grogan* (1869), is ambiguous as to what counts as fraud.

9.82 In *McCormick*, the testator left all his property to his friend Grogan. On his deathbed, he told Grogan that he had left all his property to him in his will, to which Grogan replied: 'Is that right?' The testator also told him where to find the will and a letter with it. There was no further communication between the testator and
p. 221 Grogan. The letter to Grogan detailed a large number of gifts in pursuit of which he desired Grogan to apply the money, although he left much to Grogan's discretion. Grogan did not make all of the detailed gifts, and one non-recipient, McCormick, sought to have Grogan declared a secret trustee.

9.83 The HL refused to do so, but their Lordships' conception of the fraud in response to which equity will enforce a trust against the legatee is ambiguous. Their reasons suggest either that the necessary fraud is (1) a fraudulent scheme on the defendant's part to induce the property owner either to make a will in the

defendant's favour (or not revoke a will in his favour), or refrain from making a will because the defendant will take on his intestacy, in which the defendant misrepresents his true intentions, falsely promising to carry out the owner's wishes, thereby acquiring the owner's property on his death for his own benefit; or (2) merely the defendant's 'fraudulent' refusal, when he receives the property on the owner's death, to comply with an agreement with the original owner upon which the owner relied in disposing of the property as he did. (1) is obviously much narrower and amounts to saying that a testator who attempts to make informal testamentary gifts will, by operation of the Wills Act, fail to do so unless he was fraudulently induced to avoid making a valid testamentary gift by a legatee or intestate successor who benefits from the fraud. (2) essentially allows the testator to opt out of the strictures of the Wills Act; so long as he effectively communicates his testamentary intentions to a legatee or intestate successor, who agrees to carry them out, this joint endeavour to defy the Wills Act will succeed because equity will enforce the agreement against the legatee.

9.84 Whatever the actual state of the authorities in 1869 that led to their Lordships' ambiguous characterisation, (2) is the way the law has developed. As stated by Lord Sterndale MR in *Re Gardner* (1920, at 529):

> *The obligation upon the [secret trustee] seems to me to arise from this, that he takes the property in accordance with and upon an understanding to abide by the wishes of the testatrix, and if he were to dispose of it in any other way he would be committing a breach of trust, or as it has been called in some of the cases a fraud. I do not think it matters what you call it. The breach of trust or the fraud would arise when he attempted to deal with the money contrary to the terms on which he took it.*

9.85 The more recent case of *Re Snowden* (1979) provides a good example of the current ambit of the court's willingness to enforce FSTs. There an indecisive testatrix, after making various particular gifts in her will, left the residue of her estate to her brother, he 'knowing her wishes' for the money. Her brother died six days after she did, and the question was whether on very insufficient evidence a trust of the residue was undertaken by him. Megarry VC found that the testatrix had only imposed a moral, not a legal, obligation upon her brother, so there was no secret trust. (For a recent case where the court similarly found what was at most a moral obligation on the legatee, see *Titcombe v Ison* (2021).)

9.86 However, Megarry VC pointed out that only some cases of secret trust involved the possibility of fraud,
p. 222 and as there was none here—the secret trustee could not personally benefit by any fraud, for he had died—the question was whether there was a secret trust that would take the property out of his estate on death. While the burden of proof that a secret trust exists lies on the person who asserts its existence, in cases where there is no actual fraud the normal civil standard of proof, ie what is more likely on the balance of probabilities, applies.

9.87 The state of the law now is well put by Mitchell (2010) at para 3-122:

> *Testators, today, who do not want their testamentary wishes to become public by admission to probate as part of their will can take advantage of the doctrine of secret trusts to make provision for mistresses, illegitimate children, relatives whom they do not wish to appear to be helping or organisations which they do not wish to appear to be helping. Indecisive, aged testators can also leave everything by will absolutely to their solicitors, from time to time calling upon or phoning their solicitors with their latest wishes. [On this last sentence, see further* **9.113**, **9.121**–**9.123***]*

9.88 It would appear, then, equity allows a testator to make an informal will just because he uses a human instrument, ie his legatee, to do so. By reposing his informal, even oral, will in this human vessel he can succeed where another testator committing his wishes to an unattested paper cannot, because the unattested paper 'cannot commit fraud', even though the human legatee and the unattested paper are fulfilling exactly the same function. While perhaps a bit extreme, it is perhaps relevant to draw upon the law's traditional view that where property is transferred under an illegal agreement, one should allow the property interest to lie where it falls (**3.78**). A strict application of this principle to the 'illegality' of intentionally avoiding the Wills Act would leave the beneficial title of the property in the hands of the legatee and defeat the testator's intentions (see also Gardner (2010)).

Fraud and HSTs

9.89 The trustee of an HST can lie about the trust upon which he holds the property, telling the world it was for his own illegitimate child rather than the testator's, for instance, but he cannot deny there is any trust at all and take the property for himself like the fully secret trustee can, for he is a trustee on the face of the will. As a result, because the court would only get round the Wills Act in the case of fraud, it was not settled until the HL decision in *Blackwell v Blackwell* (1929) whether HSTs should be enforced. The gift in Blackwell was as follows (at 326):

> *I give and bequeath to my friends ... the sum of twelve thousand pounds free of all duties upon trust to invest the same as they in their uncontrolled discretion shall think fit and to apply the income and interest arising therefrom yearly and every year for the purposes indicated by me to them ...*

9.90 The appellants argued that where the trustee was named in the will, there could be no fraud under any version of the fraud theory in *McCormick*; the question was merely one of for whom the trust asset is held: if
p. 223 there is no further validly expressed intention that specifies the trust terms, then the trust should fail and the asset remain in the testator's estate. The HL disagreed, allowing parol evidence to prove the terms of the trust, adopting a new variation on 'fraud'. According to Lord Buckmaster, the defendant's fraud is not falsely to induce the testator to make a gift in the defendant's favour, nor to refuse to comply with his promise to the testator, but to cheat the testator's intended donees of their intended benefits—the fraud is a fraud on the secret beneficiaries.

9.91 This reasoning is circular. As Sheridan (1951) points out, to consider the fraud as a fraud 'on the beneficiaries' begs the question. There is no fraud on an intended beneficiary if a gift intended for him 'fails' for formal invalidity, because if it is an invalid trust, he is not a beneficiary. The question is whether an HST is

a valid or invalid means of making someone a beneficiary despite the Wills Act. If it is not, then there is no fraud. By thinking of the intended beneficiaries as properly entitled beneficiaries from the outset is to assume what needs to be shown, ie that failing to enforce an HST abets a fraud.

The 'dehors the will' theory of the enforcement of secret trusts

9.92 In *Blackwell*, Viscount Sumner provided a further reason for the result, articulating what is now conventionally called the 'dehors (ie outside) the will' theory of secret trusts (at 339–340):

> *The limits, beyond which the rules as to unspecified trusts must not be carried, have often been discussed. A testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust, never communicated to him in the testator's lifetime ... To hold otherwise would indeed be to 'give the go-by' to the requirement of the Wills Act, because he did not choose to comply with them. It is communication of the purpose to the legatee, coupled with the acquiescence or promise on his part, that removes the matter from the provisions of the Wills Act and brings it within the law of trusts, as applied in this instance to trustees, who happen to be legatees.*

9.93 Under the 'dehors the will' theory, secret trusts are regarded as *inter vivos* declarations of trust by the testator; the only atypical feature is that the trusts are not constituted, ie the property is not transferred into the hands of the trustee, until the testator's death, through his will. Therefore, secret trusts operate outside the will, and therefore the Wills Act has no application. Do not confuse this idea with Matthews's (**9.79**); Matthews claims that secret trusts are outwith the province of the Wills Act because s 9 does not apply to testamentary trusts, not because secret trusts are *inter vivos*.

9.94 The dehors the will theory is fundamentally unsound. In the first place, the theory should be called the 'dehors the *Wills Act*' theory to reflect what it means. The argument is that secret trusts are *inter vivos* trusts, therefore not testamentary, therefore not within the ambit of the Wills Act. Of course, secret trusts are outside
p. 224 *the* will: wholly in the case of FSTs; partly in the case of HSTs. But that entails nothing whatsoever about the application of the Wills Act—every informal testamentary disposition is outside the will; if it were a formally valid testamentary disposition it would be a will, or part of one. So, the theory depends upon establishing that secret trusts are not testamentary dispositions at all, so the formality requirements of the Wills Act simply do not apply.

9.95 But, alas, secret trusts are testamentary dispositions. They are perfectly revocable by the testator—either he can revoke the trust per se by communicating with his secret trustee and cancelling or modifying the arrangement, or more simply, he can execute another will deleting or modifying the gift to his legatee (or by just writing a will if the fully secret trust operates on intestacy), thus ensuring that the '*inter vivos*' trust he declared is never 'constituted' (**Chapter 6**), that is, by doing this he ensures that the specified trust property never gets into the hands of the trustee. Secondly, and more fundamentally, such a trust simply cannot be an effective *inter vivos* trust because in order to be effective the testator would be declaring a trust of future property (**6.18**), and such a declaration is invalid, ie creates no trust. Now you might think that if I own Blackacre, and I tell you that I'm giving it to you in my will to hold on trust for Albert, then what's wrong with

that? Blackacre exists, doesn't it? The point, however, is that I'm not declaring a trust over Blackacre now—I could do that, but that would take Blackacre out of my estate on death. But I have not done that. I am declaring a trust over property that may or may not be in my estate on death. Even if I do my utmost to ensure that Blackacre will be in my estate, it may turn out that I have to sell it before I die, or I may die in such debt that Blackacre will have to be sold by my executors.

9.96 This point is even more obvious in the case of a pecuniary legacy (eg a secret trust of £5,000). There is a further problem in the case of an *inter vivos* trust of a pecuniary legacy: unless you actually identify the actual money, ie the very notes and coins, the trust fails for uncertainty of subject matter/lack of constitution (**5.90**). A person cannot just say, 'I now hold £5,000 on trust for you', even if he is worth millions; before the trust is valid, he must segregate or otherwise identify the money that is the property of the trust (**5.90** et seq). Clearly, there is no way of doing that now with money only identified some indefinite time in the future by executors following their administration of the estate.

9.97 So, the fact of the matter is that secret trusts are imposed over assets that will only be ascertained upon the administration of the testator's estate and are subject to ademption and abatement like any other such gifts (for an interesting example, see *Re Maddock* (1902)). They are, therefore, ambulatory and, therefore, testamentary. Of course, the Wills Act applies to them. The 'dehors the will' theory is just an attempt to cloak the embarrassing jam equity has got itself into with its willingness to flout the Wills Act (see also Wilde (2020)).

9.98 The theory has also proved to have confused a court in a nearby area. In *Gold v Hill* (1999), the court purported to treat the nomination of a beneficiary under a life insurance policy, the beneficiary having agreed to hold the insurance proceeds on trust for the nominator's wife and child, as a situation analogous to a secret trust. The analogy to, much less the application of the doctrine of secret trusts is misconceived. The
p. 225 nomination of a beneficiary under a life insurance policy is not a testamentary gift (**9.74**), but akin to the assignment of a contractual right to a benefit. It is therefore not caught by the Wills Act, and any declaration of trust or undertaking of the trust by the nominee concerns the creation of a trust over a right that is personal property, so no formality requirements apply. Therefore, there is no need to import a doctrine the purpose of which is to overcome the failure to comply with the formality requirements of testamentary gifts.

9.99 The only reason one would apply the doctrine mistakenly in this way would be to assume that all informal undertakings to hold property on trust would normally fail, and so one needs some kind of 'dehors the normal rules' equitable intervention to save the day, which is clearly false. The CA in *Kasperbaur v Griffiths* (1997), stated in obiter, quite correctly, that the doctrine of secret trusts has no application to nominations of beneficiaries under life insurance policies.

9.100 It is submitted that the true reason for the decision in *Blackwell* has nothing really to do with the court's realising a new 'dehors' justification for secret trusts, but is the obvious pragmatic reason, here stated by Viscount Sumner (at 335):

> *In [both fully and half-secret trusts] the testator's wishes are incompletely expressed in his will. Why should equity, over a mere matter of words, give effect to them in one case and frustrate them in the other?*

9.101 In other words, although there might be a valid juridical basis for enforcing FSTs but not HSTs, ie that there is no possibility of fraud in any meaningful sense in the latter, the different rules would be in pragmatic conflict, ie the law would look like an ass. Once equity has sold the Wills Act up the river by allowing testators to give it 'the go-by' with FSTs, it seems rather irrational to stop there and deny equity's enforcement to HSTs, and might well lead to apparent injustice, since from the testator's perspective the decision to use the words 'on trust' in his will can hardly seem to him to be of much consequence; furthermore, it would seem strange if a person who complied with the Wills Act as much as he could while keeping his gifts secret, by declaring in his will that the gift was held on trust, should be in a worse position than one who keeps everything secret. The result is, then, that both FSTs and HSTs, if properly created, are formally invalid testamentary trusts that equity will enforce.

9.102 Although the 'dehors the will' theory is insupportable, certain decisions appear to depend upon it. In *Re Young* (1951), the testator's chauffeur was to receive a gift under an HST, but he had also attested the will; under s 15 of the Wills Act 1837, gifts to attesting witnesses and their spouses fail. Attesting witnesses must be able to give unbiased evidence about the validity of the will's execution, and if a witness or their spouse is to receive property under the will, that might bias them in favour of validity.

9.103 Danckwerts J held that the chauffeur did not take 'under the will', so was able to receive the gift under the HST. Section 15 does not normally apply to trustees in a will because they receive no beneficial interest
p. 226 (*Cresswell v Cresswell* (1868)), but presumably, if the 'dehors the will' theory applies, s 15 should defeat both an HST and an FST if the trustee attests the will. This may appear a bit odd in the case of the HST, for the trustee is identified as a trustee on the face of the will. But the dehors story says that he is not a trustee under the will, but under an *inter vivos* trust, so s 15 should apply to him as much as to a trustee of an FST. Of course, one might argue that s 15 should not apply to any trustee, secret or not, since none takes a beneficial interest, but such a view cannot stand alongside *Re Young*, because that would be to have it both ways. (It has been suggested that whether a secret beneficiary should lose his interest for witnessing the will should turn on whether he was aware of his interest under the trust at the time (Kincaid (2000), 424–425), but this is misconceived. Section 15 concerns a person's competence to give unbiased testimony when the will is proved, not whether she knew or did not about any gift to her when she attested it.)

9.104 If secret trusts are *inter vivos* trusts, then s 53(1)(b) should apply to secret trusts of land. North J accepted obiter in *Re Baillie* (1886) that formal requirements would apply to an HST of land; an oral FST of land was found to be valid in *Ottaway v Norman* (1972), although the formalities point was not raised.

9.105 An alternative version of the dehors theory was advanced by Romer J in *Re Gardner* (1923), which is that the secret trustee is the one that declares an *inter vivos* trust over the property he shall receive under the will; that, of course, is even more obviously ineffective as a declaration of trust over future property (**9.95**). Such a declaration is at most a promise made to the settlor, and a mere promise will not be enforced by equity unless it is supported by consideration. (Of course even a gratuitous declaration of trust over future property will be effective if the intending settlor constitutes the trust by transferring the property (or getting an agent to do so) to the intended trustee when the property is received (**6.18**, **6.49**, **6.53**–**6.56**); *Re Bowden* (1936).) Romer J decided that the interest that was to go to a beneficiary under a secret trust did not lapse when she predeceased the testator, because she was a beneficiary not under a testamentary trust, but under the *inter*

vivos trust declared by the secret trustee. This logically follows from the finding that the legatee declares himself a secret trustee, but for the reason just stated, such a trust is invalid, so the decision should not be followed.

Communication and acceptance

9.106 In order to prove an FST or an HST, the evidence must show (1) the intention of the testator to create a trust; (2) timely communication of that intention to the intended trustee; and (3) timely acceptance by the intended trustee of the trust obligation. The communication may be by the testator's agent (*Moss v Cooper* (1861)), and *so long as the secret trustee* undertakes the obligation to carry out the trust, he may 'sail under sealed orders', that is, the testator can provide him with an envelope containing the terms of the trust not to be opened until his death (*Re Keen* (1937); *Re Boyes* (1884); *McCormick*). Note the point in the italics carefully, for students regularly get this wrong in exams. Simply accepting a letter not to be opened until later which
p. 227 contains trust terms does not fulfil conditions (2) or (3); the recipient must understand that he is to hold on trust some property for some person(s) as specified in the letter. The testator must have decided the terms of the trust when the communication is made: 'The devisee or legatee cannot by accepting an indefinite trust enable the testator to make an unattested codicil' (*Re Boyes*). There must be an actual acceptance of or acquiescence in the trust obligation (*McCormick*); the imposition of a merely moral obligation is insufficient (*McCormick*; *Re Snowden*).

9.107 The orthodoxy governing what counts as timely communication and acceptance of the trust differs for FSTs and HSTs: an FST must be communicated to and accepted by the secret trustee before or after the execution of the will, but before the testator's death (*Moss v Cooper*); the rationale here is that because a will is revocable, he may execute his will and then communicate the trust to the intended secret trustee; if the latter refuses the trust obligation, the testator can make another will revoking the gift and leaving the property to someone else (*Re Gardner*, per Warrington LJ, at 530). In contrast, HSTs must be communicated before or at the same time as the making of the will.

9.108 This stricter HST rule for timely communication and acceptance arises for no good juridical reason, since the testator can still revoke the gift in the will if his intended trustee does not agree to undertake the trust just as easily as the testator of an FST can. Commentators almost universally abhor the difference in the communication rules, and, for example, in Ireland (*Re Browne* (1944)), the USA (American Law Institute (1959), para 55(c), (h)), and New South Wales (*Ledgerwood v Perpetual Trustee Co Ltd* (1997)), the rule that communication and acceptance may occur any time before the testator's death applies to HSTs as well as FSTs.

9.109 The leading case is the CA decision in *Re Keen* (1937), where £10,000 was given to two trustees (at 237):

> *to be held upon and disposed of by them among such person, persons, or charities as may be notified by me to them or either of them during my lifetime.*

The court found that before the execution of the will, one trustee was adequately notified as to the terms of the trust by being given a sealed envelope containing the name of the intended beneficiary; although told not to open it until the testator's death, he understood it to contain the terms of the trust: 'a ship which sails under sealed orders is sailing under orders though the exact terms are not ascertained by the captain till later'. The trust failed, however, for two reasons. The first, which is sometimes referred to as the 'broad' ratio, was that Lord Wright MR found that 'may be notified' referred to future communication of the trusts, ie communication after the execution of the will. Such a clause was bad: because it contemplated future dispositions, the testator was reserving to himself the power to make future unwitnessed dispositions and so giving the 'go-by' to the Wills Act, and it therefore violated the principles laid down by Viscount Sumner in *Blackwell*. Even if the clause could be read to encompass prior communications, so long as it contemplated future ones it was invalid.

p. 228 **9.110** The 'narrow' ratio was simply that the evidence of the trust, ie a trust communicated prior to the execution of the will, was inconsistent with the clause in the will as Lord Wright MR interpreted it, not necessarily defensibly, ie as encompassing only future declarations of trust. One may argue that the broad ratio was unnecessary for the decision, and therefore strictly speaking, obiter, so that the actual rule governing post-execution communications of HSTs remains open. Nevertheless, the rule invalidating post-execution communications is generally regarded as settled, if wrong. In *Re Bateman's Will Trusts* (1970), the rule was applied as if no doubt could be entertained about it.

9.111 The rule is typically explained as the result of a confusion of the doctrine of HSTs with the rule governing the incorporation by reference of documents into wills. Where a will refers to a document existing when the will is executed, that document becomes part of the properly attested will even though it is not itself properly attested; in other words, it is incorporated into the will. Because the existence of the half-secret trustee is identified in the will, the courts have confused this with a reference to a trust declaration that has been made when the will is executed. For this reason, the courts have seen it somehow appropriate to limit the enforcement of HSTs to those communicated and accepted prior to or contemporaneously with the will's execution. If it were not for this confusion, the argument goes, then surely the FST rule would apply, because as stated above, the FST can give the go-by to the Wills Act by allowing post-execution communications, so why not HSTs?

9.112 Perhaps, however, it is not that the judges have confused the enforcement of HSTs with the incorporation of documents, but that they have realised the pragmatic conflict that would arise between the enforcement of HSTs and the doctrine of incorporation by reference if post-execution communications were allowed. The crucial point is that both HSTs and incorporable documents are clearly referred to in the will. Whatever theory of HSTs you prefer, the proving of the HST looks like an exercise in filling in a gap in the will, much as the incorporation of an outside document does. Indeed, the practical similarities between HSTs and documents incorporated by reference are so apparent that Matthews (1979) argues that the juridical basis of HSTs is an expanded doctrine of incorporation by reference, ie to incorporate properly evidenced oral testamentary trusts. In view of this, a more expansive rule for admitting HSTs, ie allowing the proof of HSTs created after the execution of the will, would have the embarrassing consequence—embarrassing, that is, for any jurisdiction that is supposed to operate under the formalities of a Wills Act—of giving a wider ambit to unattested oral testamentary dispositions referred to in a will than to unattested written ones. As a result, the

communication rules for HSTs may best be understood simply as an unprincipled but pragmatic halfway house between the doctrines of FSTs and incorporation by reference, and that it is futile to search for any more theoretically satisfying basis. The corollary is, of course, that the courts find it somewhat less embarrassing to have different communications rules for different secret trusts purely on the basis of the insertion of the words 'on trust' in the document. (Wilde (1995) argues that the stricter timing rules that apply
p. 229 to HST are justified because HSTs are invariably prepared with legal advice, and so these rules which aim to prevent testators giving the 'go-by' to the Wills Act can and should, in practice, be complied with.)

9.113 One final point on HSTs. Given current litigation practice concerning wills, it is not clear that the terms of a half secret trust are ever likely to be kept secret. As Evans (2014) explains, following the CA decision in *Larke v Nugus* (2000), solicitors must record the instructions their testator's give them in preparing their wills, and these notes must be disclosed whenever there is a dispute over the validity or terms of a will. Since HSTs are invariably created with the testator's solicitor's advice, he concludes (at 236), 'In modern legal practice employing the device of a half-secret trust is most unlikely to achieve its aim, and is consequently an act of fruitlessness and foolhardiness.'

Failure of a secret trust to be established

9.114 If the testator intends to create an FST but fails to communicate it to the intended trustee so it is not accepted by him before the testator dies, then the gift under the will is not impressed with any trust, and the trustee takes absolutely (*Wallgrave v Tebbs* (1855); *Proby v Landor* (1860)). In general, if only one of two trustees is informed of and accepts the trust before the testator's death, then only he will be bound by the trust; the other receives his property absolutely, having undertaken no trust obligation. However, there appears to be a special rule for the case of trustees who receive the property as joint tenants (as opposed to as tenants in common) where only one joint tenant has accepted the trust before the testator makes his will; in that case both are bound. In *Re Stead* (1900), Farwell J doubted that any good reason supported this rule, but accepted it as authoritative. Perrins (1985) argues that the uninformed legatee should only be bound by the representation of his co-legatee when that representation induced the testator either to make a gift to the two of them in his will or not to revoke a gift to the two of them in his will, on the principle that no one should profit from the fraud of another, and that nothing should turn on whether the legatees take as joint tenants or tenants in common.

9.115 If a legatee is told that he is to hold on trust, but the terms of the trust are never communicated to the trustee within the testator's lifetime, he is still a secret trustee, although the trust will obviously fail for uncertainty of objects; he will hold the property on an ART for the residuary beneficiaries or intestate successors (*Re Boyes* (1884)). The trustee will similarly hold on an ART if the trust is fully communicated, but the trust fails, like any testamentary trust might fail, for uncertainty or illegality: thus, in *Moss v Cooper*, the residuary legatees successfully pleaded that the legatees held the property they received on a secret trust to apply his property to charitable purposes in violation of the Mortmain and Charitable Uses Act 1736; the trust was proven, failed for illegality, and the secret trustees therefore held the property on an ART for the residuary legatees.

9.116 No cases have decided what should happen if a fully secret trustee were to renounce the gift or predecease the testator. In *Re Maddock* (1902), Cozens-Hardy LJ opined obiter that if the legatee renounced the gift or died during the lifetime of the testator, the secret beneficiaries would get nothing. In *Blackwell*, by
p. 230 contrast, Lord Buckmaster said obiter (at 328) that he 'entertained no doubt' that if an FST were proved on the evidence, the court would not allow it to be defeated by the trustee's renunciation.

9.117 He did not consider the case of a fully secret trustee who predeceased the testator. This should probably be dealt with as a problem of timing and reliance: does the testator have a realistic opportunity to alter his will? If yes, then the trust should fail if the trustee renounces, or predeceases the testator. If the testator is unable to make a new will, the trust should be proved against the secret trustee or his personal representative if dead. No such problems arise in the case of HSTs, because the court will not allow a trust to fail for want of a trustee (**2.13**) (assuming the terms of the trust can be proved despite the half-secret trustee's death) (see further Glister (2014)).

9.118 In the case of HSTs, the result of any failure of the testator to specify the trusts will be that the trustee will hold the trust property for the residuary legatees, or if none, for the intestate successors. In *Re Colin Cooper* (1939), the testator made a will in which £5,000 was given to two trustees under an HST, having communicated the trust before the execution of the will. Two days before he died, he revoked the will except for the HST, but he also increased the sum to be held on the HST to £10,000; the increase was not communicated to the trustees, and the CA held (1), that the first £5,000 was to be held on the HST, because that was the extent of the subject matter communicated; the remainder went on ART into the estate, and (2) the fact that the gift of £5,000 was technically not the one in the first will, ie the will to which the communication of the trust applied, did not matter, as they were in substance the same gift. The general principle of (1), that the trust only binds to the extent communicated, applies to fully secret trusts as well. However, there the question arises, who would get the surplus? One might say that, as the surplus was not impressed by any communicated trust, then the trustees should take it as an absolute gift. On the other hand, by parity of reasoning with *Re Boyes*, one might argue that once obliged, even the fully secret trustee can only take as a trustee, so any surplus that fails to get into the trust cannot go to him beneficially, but must be held on an ART.

9.119 In the case of HSTs, complications can arise between the directions given in the will and the directions communicated to the trustee—the rule is that the instructions in the will prevail in any conflict. In *Re Huxtable* (1902), £4,000 was given in the will for charitable purposes agreed by the testator and the trustee. Evidence was admissible to prove the charity was for the relief of sick and poor members of the Church of England, but not admissible to prove that only the income on £4,000 was to be spent this way, and that the trustee was to dispose of the principal as he wished on his death, because on the face of the will the whole £4,000 was given to charity, and evidence of the trustee's power to dispose of the principal would contradict the will.

9.120 *Re Gardner* provides something of a contrast. The testatrix left all her property to her husband for his benefit during his life, 'knowing that he will carry out my wishes'. Thus, at first glance this gift of a life estate might appear to be the subject matter of an HST (although the words do not clearly manifest an intention to create a trust (**5.14–5.16**)), with an intestacy with respect to the remainder, since that was not disposed of by

p. 231 the will. However, in view of the evidence, the CA decided that the testatrix's intention was to give her husband the benefit of the life estate, while he held the remainder that came to him as her intestate successor under an FST to give it to certain beneficiaries under his will.

9.121 The question also arises whether evidence of the HST can show that the half-secret trustee is himself to benefit from the trust. In general, a person named as a trustee may only take a beneficial interest if that is clearly indicated, and on the face of the will in an HST that is plainly not the case, so in that sense evidence proving that the trustee is to take under an HST may be regarded as contradicting the will. In *Re Rees* (1950), the testator left his entire estate to his solicitor and a friend as trustees 'they well knowing my wishes concerning the same'. The friend died shortly after the testator, and the evidence of the solicitor was that the trustees were to make certain payments and keep the surplus. The CA held that the substantial surplus went on intestacy. Lord Evershed MR said that the evidence that they were to take a beneficial interest would conflict with the terms of the will, since they were named as trustees.

9.122 In *Re Tyler's Fund Trusts* (1967), Pennycuick J stated obiter that he did not find this reasoning 'easy' and that, in principle, evidence is admissible to prove all the terms of a trust, including a trust in favour of a trustee. Evershed MR's decision undoubtedly turned in part on the consideration that (at 211):

> *In the general public interest it seems to me desirable that, if a testator wishes his property to go to his solicitor and the solicitor prepares the will, that intention on the part of the testator should appear plainly in the will and should not be arrived at by the more oblique method of what is sometimes called a secret trust.*

9.123 This 'public interest' issue has since been reconsidered in *Rawstron v Freud* (2014). The British painter Lucien Freud left a will leaving his residuary estate to two named individuals. A prior will was essentially identical except for the fact that the residue was left to the same individuals as trustees of an HST. A man claiming to be a son of Freud's argued that, on the proper interpretation of the second, operative, will, the named individuals took the residue as trustees, on an unspecified HST; his purpose in so claiming appeared to be that if he was successful on this point then he could launch another action seeking to explore whether the HST was valid (perhaps claiming it was invalid for failing to comply with the rules of timely communication). The court held, on interpreting the will, that the named individuals took beneficially. The issue was then raised that since one of the named individuals was Freud's solicitor, she should not take beneficially in view of the public interest considerations raised by Evershed MR in *Re Rees*. The court disagreed. The court argued that it was generally a good thing if a solicitor could take as an absolute legatee, for then a testator could create an FST where the trustee was a qualified professional (recall **9.87**). Moreover, the court admitted the solicitor's evidence that the residue was indeed to be held on an FST, and that this met any public interest concern in this case.

9.124 As is apparent from the tone of the foregoing, the present author thinks that equity should not enforce FSTs and HSTs but should require them to fail as testamentary gifts not complying with the Wills Act, except
p. 232 in rare cases where a feckless testator really has been fraudulently induced to make a gift to the legatee, for example by being told that the law will not allow him to give his intended beneficiary any property under a will. No assistance should be given to any scheme by the testator to avoid the Act. *Inter vivos* trusts, joint

tenancy, and insurance policies can all be used to make secret post-mortem gifts by those who cannot come clean about their preferred objects of bounty even after their death. Equity should not provide a further means that so exorbitantly flouts the sound policy of the Act (see also Challinor (2005)).

Further reading

Challinor (2005)

Douglas (2021)

Glister (2014c)

Green (1984)

Hodge (1980)

Matthews (1979, 2010)

Perrins (1985)

Sheridan (1951)

Swadling (2016)

Watkin (1981)

Wilde (1995, 2000)

Youdan (1984)

Must-read cases: *Rochefoucauld v Boustead* (1897); *Grey v IRC* (1959); *Vandervell v IRC* (1966); *Re Vandervell (No 2)* (1974); *McCormick v Grogan* (1869); *Blackwell v Blackwell* (1929); *Re Keen* (1936)

Self-test questions

1. Explain the operation of s 53(1)(b) of the Law of Property Act 1925 and the doctrine of *Rochefoucauld v Boustead*.
2. What do *Grey v IRC*, *Vandervell v IRC*, and *Re Vandervell (No 2)* decide?
3. Trustbank plc holds 50,000 shares of Zinc Ltd as nominee trustee for Sam. Sam transfers 150,000 shares of Gold Ltd to Trustbank stating that he wishes to provide for his children.
    (i) Sam orally directs Trustbank to hold 50,000 shares of Zinc on trust for his three children, Albert, Jane, and Charlotte, in such shares as Trustbank shall in its absolute discretion appoint. Several months later, for revenue purposes, Trustbank makes a written declaration that it holds the shares on trust for the children.

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(ii) Sam orally directs Trustbank to transfer 50,000 Gold shares to Albert absolutely, which it does.

(iii) Sam orally directs Trustbank to hold 50,000 of the Gold shares on trust for Jane. Sam tells Jane that he has done so, and Jane demands that Trustbank transfer the shares to her, which it does.

(iv) Trustbank declares that it holds the remaining 50,000 shares of Gold on trust for Charlotte.

(v) Sam dies, leaving his entire estate to his lover, Fred. Advise Fred.

4. In 1993, Samuel made his will, leaving £50,000 to Tina and Trish, and Blackacre to John 'on trust for such persons as I shall instruct him'. In 1994 Samuel mailed Tina a letter that enclosed a sealed envelope; the letter instructed Tina that the sealed envelope was not to be opened until after Samuel's death. Also in 1994, Samuel had lunch with John and told him that he should hold Blackacre on trust for Margaret, Samuel's mistress; John agreed to do so. Samuel died a couple of weeks ago. Tina opened the sealed envelope to discover that it states that she and Trish are to hold the £50,000 on trust for Samuel's illegitimate daughter, Francesca. Advise Margaret and Francesca.

5. Is there a theoretical basis for secret trusts that justifies their enforcement?

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