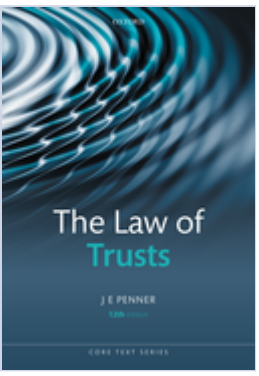

The Law of Trusts (12th edn)
J E Penner

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1. The historical origins of the trust

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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. This chapter traces the historical roots of the trust. The law of trusts is the offspring of a certain English legal creature known as ‘equity’. Equity arose out of the administrative power of the medieval Chancellor, who was at the time the King’s most powerful minister. The nature of equity’s jurisdiction and its ability to provide remedies unavailable at common law, the relationship between equity and the common law and the ‘fusion’ of law and equity, and equity’s creation of the use, and then the trust, are discussed.

Keywords: Court of Chancery, in personam, maxims of equity, jurisdictions of equity, fusion of law and equity, Judicature Acts 1873–5

Summary

The Court of Chancery and the origin of equity

1.1 The law of trusts is the offspring of a certain English legal creature known as 'equity'. The historical development of English law is marked by the existence of a series of different judicial institutions over time; the most significant of these for the modern student are the Courts of Common Law and the Court of Chancery. The Courts of Common Law developed the basic rules and principles that we now recognise as the law of torts (civil wrongs), the law of contract, the law of restitution, and much of the law of property. The Court of Chancery generated its own rules and principles, which as a body of law are collectively known as 'equity'. Chancery developed the law of trusts, the law governing fiduciaries, also much of the law of property, much of company and commercial law, and, very importantly, a variety of legal remedies, such as the injunction, which the Courts of Common Law were unwilling or unable to provide.

1.2 The term 'equity' does not contrast with 'common law' when the latter is understood to distinguish judge-made law from legislation by Parliament. From that perspective, both equity and the common law are creations of 'common law', bodies of rules and principles developed over time as judges gave reasons for their decisions in actual cases.

1.3 The common law was developed and administered in the royal courts, those courts established by the King, in contrast to local manorial courts, which were the province of local nobles and which applied local customary law. It was called the 'common' law of England because in theory it applied universally. The origins
p. 4 of equity are much murkier. Equity arose out of the power of the medieval Chancellor, who was at the time the King's most powerful minister. The Chancellor was head of the Chancery, the chief function of which was to issue writs at the behest of would-be common law plaintiffs. The issuance of a writ was how an action in a common law court was commenced. Because writs were in Latin, this function was known as the 'Latin side' of Chancery.

1.4 Since the King was regarded as the fount of justice, it was appropriate for him to hear pleas by his subjects concerning injustices and, kings being kings, they eventually delegated the task to their Chancellors. Since in the early days of the office the Chancellor was usually a high-ranking churchman, such as a bishop, early Chancellors treated their delegated task to do justice on the basis of whether the behaviour complained of was such as to threaten the perpetrator's immortal soul. This idea was translated into a particular framing, ie that the perpetrator's conscience was affected. Thus it was on the basis of 'conscience' that the Chancellor exercised this royal power to remedy injustice, by ordering individuals to act in accordance with good conscience despite what their legal rights might be. Because this business of the Chancellor was conducted in English, this was known as the 'English side' of Chancery. In order to appreciate the character of this jurisdiction, and how it came to be in some sense opposed to the common law, certain considerations must be borne in mind.

1.5 The first is that equity, fairness, or justice were never absent from the common law courts. The difference was that from the mid-fourteenth century the complaints that the common law courts would hear became fixed. That is, the common law courts refused to invent new categories of writs, or different 'forms of action'; the procedures of the court as to pleading and evidence also became fixed. Baker (2002), at 102–103 (slightly modified) illustrates the sort of problem that could arise because of this:

> *[T]he growing strength of the substantive law could also work injustice, because the judges preferred to suffer hardship in individual cases than to make exceptions to clear rules. The stock example was that of the debtor who gave his creditor a sealed bond [a paper document recording the obligation to pay the debt], but did not ensure that it was cancelled when he paid up. The law regarded the bond as incontrovertible evidence of the debt, and so payment was no defence. Here the debtor would suffer an obvious hardship if he was made to pay twice; but the mischief was a result of his own foolishness, and the law did not bend to protect fools ... Now it was not that the common law held that a debt was due twice ... [that proposition] would have been dismissed as absurd. Yet that was the result which followed from observing strict rules of evidence, rules which might exclude the merits of the case from consideration but which could not be relaxed without destroying certainty and condoning carelessness.*

1.6 This brings us to the idea of the 'penalty of having to go to equity'. Common law judges might well have been perfectly at ease with the unhappy common law litigant's having to resort to equity. As Gray (1976), 220 says,

> *The common law itself does not hold that careless people should always or even usually have to pay twice,*
> p. 5 *but only that a deterrent price should be attached to carelessness.* ↵ *The price consists in having to bring a suit in equity, with the trouble and risk of failure any lawsuit involves; in having to ... convince the court of equity that the carelessness was in some way excusable or the hardship of double payment an undue penalty in the circumstances.*

The thought that the law allows individuals to 'do it the easy way', such as comply with the rules about formalities, or 'do it the hard way', having to bring a suit in equity and engage in a time-consuming and inefficient exploration of all the circumstances, is significant. To take just one example we shall explore in detail in **Chapter 17**, informal arrangements with respect to valuable family property, in particular the family home, very much give rise to just the sort of uncertainty, and consequent likelihood of a need to resort to litigation, which in practice does amount to a penalty for failing to comply with clear rules about property transactions.

1.7 In contrast to the procedures of proof available at common law, the Chancellor had the power of subpoena, ie the power to make litigants appear in person before him and to interrogate them. This was a quite different sort of proceeding from those which operated in the common law courts, and thus one element, perhaps a predominant one (see Macnair (2007)), in the notion that the court of equity was a court of 'conscience' is that the Chancellor made his rulings, not on the basis of various formal rules of evidence, but on the defendant's personal replies to the Chancellor's interrogation, replies that might well be adverse to the defendant's own interests. Not surprisingly, the Chancellor's decrees were treated not so much as legal decisions as they were orders directed to individuals to ensure that they acted according to good conscience in

the particular circumstances of the case. This is one meaning of the phrase that 'equity acts *in personam*': equity did not determine rights under law, whether to land or anything else; rather, equity required particular individuals to comply with the Chancellor's decrees.

1.8 The Chancellor's conscience-based corrective role narrowed over the centuries. Although at the outset his jurisdiction encompassed pleas concerning any injustice in any of the myriad medieval courts and tribunals, in time the Chancellor came to exercise a quasi-judicial function, in the Court of Chancery, which by and large was restricted to matters that were in some way covered by rules of the common law. Cases called 'suits', as opposed to 'actions' at common law, could be brought before him, the suitor appealing to the Chancellor on the basis that the application of the common law rules caused injustice in his particular case. In response, the Chancellor could order a person not to act upon his common law rights if in good conscience he ought not to do so, in effect overturning the rules of common law. In theory, however, the common law was regarded as unchanged; the Chancellor merely decreed that the parties could not act upon it.

1.9 As might be expected, however, continual correction of decisions generated by a rule-based system will give rise to rules or principles of correction. It would not be conscionable for the Chancellor to give relief to one suitor unjustly dealt with by the common law, but deny it to the next whose suit was based on
p. 6 substantially the same facts. One of the most fundamental principles of justice, after all, is that like cases be decided alike, and this naturally leads to the development of a body of rules and principles. These became known as 'equity'. The term 'equity' reflected the idea of fairness implicit both in the 'conscience-based' administrative jurisdiction of the Chancellor, and in principles of 'equity' found in the Roman and ecclesiastical law in which many early Chancellors were learned. These principles ultimately derived from Aristotle's idea of 'equity', that there will be cases in which one must depart from the rules in order to avoid injustice (see Penner (2019b; 2020c).

1.10 The traditional contrast between the rigid rules of the common law and the flexible conscience-based fairness of equity was a highly misleading caricature by the end of the eighteenth century. By then the principles of equity were fast becoming rules of equity as rigid and technical as any in the common law. Equity, which was once said to vary with the length of the Chancellor's foot to emphasise the personal character of the Chancellor's intervention, ie intervention on the basis of what he personally understood to be good conscience, had become a second body of law.

The maxims of equity

1.11 Although equity developed its own definite rules covering various matters, it also produced a series of 'maxims' or broad principles that manifested equity's general approach to the solution of legal problems. An example of such a maxim is 'Equity aids the vigilant.' If a person delays too long in bringing a claim before the court, equity can refuse to provide a remedy. (This doctrine has largely, though not entirely, been superseded by statutes of limitation.) Given equity's development of more specific rules and principles, it would be a great mistake to treat these maxims nowadays as anything more than devices that assist the interpretation and organisation of particular equitable doctrines, and that helps explain their historical development.

The relationship between equity and the common law

Equity as a ‘gloss’ on the common law

1.12 Equity and the common law were not separate but equal systems of rules covering the same matters only differently. Equity has always relied on the existence of the common law, being essentially, in the terms of Maitland (a great equity scholar), a ‘gloss’ on the law (Maitland (1929), at 18–19). If you were to peel away all of the rules of equity, the common law could still stand alone as a comprehensive body of rules covering tort, contract, property, etc. If you were to peel away the common law from equity, however, you would not have anything like a comprehensive body of rules—equity, was, and remains, a kind of patchwork overlay modifying particular common law rules. The two exceptions to this are the subjects of this book: the law of trusts and the law governing fiduciaries, which are each their own fully developed bodies of law.

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Strife between equity and the common law

1.13 Equity largely worked through the issuance of ‘common injunctions’, by which a plaintiff at common law could be enjoined, ie stopped, by a decree of the Court of Chancery, from proceeding with his case, or restrained from enforcing the result. As one might imagine, from the point of view of the common law judges this was tantamount to the Chancellor’s denying claimants access to justice. After several attempts by the common law judges to assert the dominance of the common law over the power of the Chancery, and some consequential political strife, it became settled by the end of the seventeenth century that the decrees of Chancery would prevail. Equity was here to stay. So, for about two centuries, England had a true dual system of courts with two different finely developed bodies of law.

The ‘jurisdictions’ of equity

1.14 Equity is said to have three jurisdictions, or areas of operation, each of which relates it to the common law: (1) equity’s ‘exclusive’ or ‘original’ jurisdiction, where equity alone created law in an area; (2) its ‘concurrent’ jurisdiction, where both it and the common law developed rules in relation to certain fact situations; and (3), its ‘auxiliary’ jurisdiction, in which equity would assist plaintiffs at common law in pursuing their common law rights. This division is controversial and its utility has been questioned. There is disagreement about whether certain areas of equitable doctrine fit into (2) rather than (3), and indeed about whether certain areas of doctrine originating in equity fit into any of these three categories (see Hohfeld (1913); Heydon et al (2015), [1-90]–[1-110]; Penner (2020a)). Even so, these classifications broadly illuminate the differing ways equity interacts with the common law. The law of trusts is the most obvious example of equity’s exclusive jurisdiction. The law of trusts was developed entirely by the Court of Chancery. An example of equity’s concurrent jurisdiction is one you may think of if you have studied the law of contract, that is, the law of misrepresentation. Both the common law and equity developed rules providing remedies for a contracting party who entered into the contract because of a misrepresentation by the other party. To take an example of equity’s auxiliary jurisdiction, you may know that as part of the litigation process, litigants can be required to disclose documents that bear on the facts of the claim. Historically, common law litigants were not afforded any right to disclosure under the procedures of the common law courts, but a common law litigant

could get a decree from Chancery ordering the other party to disclose. Nowadays, this particular auxiliary jurisdiction of equity has been superseded by the statute-based codes of civil procedure. Another example of equity's auxiliary jurisdiction is equity's willingness to provide certain remedies not available at common law to common law litigants in order better to vindicate their common law rights. This aspect of equity, its range of remedies, and its willingness to apply them, remains of great importance.

Remedies at common law and equity

1.15 Different remedies were available from the common law courts and the court of equity and this was reflected in the actual wording of their rulings: Chancery rulings were formulated explicitly as orders (eg 'this
p. 8 court doth order the defendant to give the claimant possession of …'), whereas common law rulings merely expressed that a certain state of affairs shall happen as in 'It is this day adjudged that the plaintiff shall recover against the defendant £100' (see Smith, S (2019), ch 2). In England the distinction has been abolished; since the Civil Procedure Act 1997 all court rulings in England now take the form of orders. A common law court could 'adjudge' that a losing defendant pay damages, a money sum, to the plaintiff, and in cases concerning land could adjudge that a defendant give up possession of the land to the plaintiff. If the defendant refused to pay damages, the judgment provided a ground for a sheriff or bailiff to come round, seize his possessions, and either hold them until the plaintiff was paid or sell them to raise the plaintiff's damages. Similarly, if a defendant refused to get off the land, the sheriff would come round, clear him out, and put the plaintiff in possession. Thus, the common law courts didn't *order* the defendant to do something—it essentially just said, 'This will happen', and would make it happen if the defendant didn't cooperate.

1.16 Chancery had a much more sweeping power, which provided scope for a variety of equitable remedies. The Court of Chancery could throw anybody who disobeyed its orders into gaol, for contempt. This was not a criminal sentence, where if you served your time you got out. If you refused to carry out an order of Chancery, you rotted in gaol until you decided to comply. (Nowadays, imprisonment for contempt of court is regulated by the Contempt of Court Act 1981, and the court also has powers to act in place of the defendant in certain instances, for example by executing documents, or by appointing others to act in his place: RSC Ord 45, r 8, incorporated into the Civil Procedure Rules 1998.) This gives another meaning to the phrase 'equity acts *in personam*': equity acts on your body. Equity has the power to make you do something, or to stop doing something, because if you refuse, you lose your liberty for as long as it takes. Thus, injunctions have their origin in equity. As a result, litigants in many cases whose substantive rights lay at common law would seek the remedial assistance of Chancery—so, for example, one suffering the smoke of a neighbour's brickworks and unsatisfied with money damages would apply to Chancery for an injunction to shut the brickworks down; or a contracting party would seek an order from Chancery for the specific performance of the contract in a case where money damages for breach would inadequately compensate.

The Judicature Acts and the administrative fusion of law and equity

1.17 The administrative inconvenience of a dual system of courts that dealt in different fashions with the same factual issues is apparent, and by the Judicature Acts 1873–5 Parliament abolished the institutional division between the Courts of Common Law and the Court of Chancery. One High Court was established, the

judges of which were henceforth to apply the rules of both common law and equity, where appropriate, in the cases before it; where the rules conflicted, the rules of equity were to prevail. What counts as equity today,
p. 9 therefore, is the body of rules and principles that *derive from* those applied in the Court of Chancery until 1875. The term 'derive from' is important. Judge-made law is a living thing, and so the rules and principles of equity have developed since 1875, in just the same way as have those of the common law. Despite the abolition of the separate courts, there remain distinct traces of this institutional history that bear directly on the current state of English law.

Equity purism, equity pragmatism, and the substantive fusion of law and equity

1.18 Since 1875, judges apply both common law and equity in the same court at the same time. It remains an open question to what extent the rules and principles of the common law and of equity have been fashioned into one coherent, principled body of law; whether, that is, the common law and equity have 'fused'. There are two issues. The first concerns what Lionel Smith calls 'equity purism' and 'equity pragmatism' (Smith (2004)). Equity purists hold that equity reflects a distinct form or mode of reasoning that resists assimilation to common law legal reasoning, reflecting some different understanding of justice, based perhaps on some idea of an individual's 'conscience' being affected in a way that the common law disregards. By contrast, equity pragmatists respect the historical division of labour that arose with the development of the Court of Chancery, but disagree that the rules of both equity and the common law answer to different standards of reasoning, justice, or morality (see Penner (2019a; 2020b)). You must decide in what camp you fall after studying the subject; some judges seem to be more of the one rather than the other. The second, related, issue, 'substantive fusion', involves *assimilating* some common law and equitable doctrines. (Heydon et al (2015), 47–66 take a strong line against such a view.) Two examples suffice. Langbein has argued that trusts should be treated as a kind of contract (Langbein (1995)). Some theorists of the law of restitution have argued that certain trusts doctrines should be re-interpreted to reflect 'unjust enrichment' reasoning (**Chapter 16**). All one can say at present is that it is not clear that any of these substantive fusionist projects have succeeded.

1.19 But here is a less sweeping 'fusionist' thought. It is orthodox to say that all equitable remedies lie in the discretion of the court, whereas at common law remedies lie 'as of right', must be given by the judge if the plaintiff proves his case. So we now pose the question: should it still matter which court originally devised a particular remedy when judges come to decide how they should apply it nowadays? It would seem odd to say so. If it remains true that some remedies that arose in equity should only be granted on a discretionary basis (and there may be good grounds for this), this must be justified as a matter of principle that fits into a coherent rationale that explains the remedial rules in that particular area of law. This coherent rationale must, of course, also explain the various restrictions and limitations that exist today upon remedies originally given at common law. Even if an explanation is based upon concerns about justice that were originally given voice by Chancery, that does not entail that the rule must henceforth be identified as an 'equitable' one, any more than we would identify a modern rule of the law of wills as ecclesiastical, because the law of wills was originally the province of the ecclesiastical courts.

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Equity's creation of the use and the trust

The use

1.20 The historical roots of the trust lie in a medieval property device: the 'use'. The history of the land law in the first centuries following the Conquest can be described as the process by which true property or ownership in land arose, as the influence of the social and political structure of feudalism waned. Under feudalism, rights in land basically amounted to rights in a complex hierarchical system of social and political authority and agricultural wealth distribution. This hierarchy was maintained through a system of 'tenures' of land, under which different 'tenants' had rights in the same land. At the top of this ladder was the King, at the bottom the person actually in possession of the land, and in between there might be any number of 'mesne (pronounced "mean") lords'. It was essentially a system of taxation. Each tenant, starting with the one in possession who, via the labours of his serfs, would produce agricultural goods, passed the wealth of the land upward by doing 'rent service' of various kinds to the lord immediately above him, and so on up to the King. Thus, although a person might have an 'estate', an ownership interest, in some piece of land, this estate was as likely to be a 'seigneury', ie the right to a rent from a tenant immediately below on the feudal ladder, as it was to be an estate giving possession of the land itself. Different kinds of rights and duties defined the different kinds of tenure by which land could be held, such as 'knight-service', the obligation to provide knights or money for arms, or 'socage', the obligation to provide agricultural products.

1.21 The use arose as a means of avoiding some of the more disgruntling rules of the tenurial feudal system. Land could not be left by will, but could only be inherited according to the rules of primogeniture, the general effect of which was that the entirety of a man's rights in land passed to his eldest son. This preserved large estates in land, but it meant that a man could not take advantage of his landed wealth to provide for all of his children on his death. Among nobles, there was also the problem that the English Crown was often bloodily contested over long periods of time, in particular during the War of the Roses. If a landowner were in the position of having backed the wrong claimant to the Crown, not only would he lose his life, being condemned as a traitorous felon by the victor, but all his lands would be forfeit to the Crown, ruining his family. Finally, certain legal incidents of feudal land-holding could themselves become very oppressive. In particular, if land held in knight-service passed to a minor heir, the lord immediately above on the feudal ladder acquired the 'right of wardship', the right to manage the estate and take all the profits of the land until the heir reached maturity. These elements (amongst others) of land tenure inspired medieval lawyers to avoid them. The avoidance mechanism was the use.

1.22 Although land could not be left by will, there were no similar restrictions on *inter vivos* transfers, ie transfers between living persons. At this time, the mode of transfer of freehold land was called a 'feoffment'; the transferor was called a 'feoffor', and the transferee, the person he 'enfeoffed', the 'feoffee'. Thus A, a feudal tenant, could convey his property to X, Y, and Z as co-owners. Of course, a straightforward conveyance like
p. 11 this would not do A any good to realise any plans for his land: by conveying the land in this way he would give up all rights to it; rather, the property was conveyed *on use*: the conveyance was written to X, Y, and Z 'to the use of' some person or persons whom A wanted to benefit, called the 'cestui(s) que use'. (This is a term of old 'law French'—England was conquered by the Normans, after all. The way it is pronounced today would not

meet with the approval of the Parisian on the street. 'Cestui(s) que use' is pronounced 'settee(s) key use'.) X, Y, and Z, taking the land subject to the use, were called 'feoffees to use'. The term 'use' is somewhat misleading. It is a corruption of the Latin *ad opus*. What it means is, roughly 'for the benefit of', so to grant land 'to the use' of someone meant that the feoffees to use were not entitled to treat the land as their own, but must hold it for the benefit of the cestui(s) que use.

1.23 In general, A could benefit whomever he wanted, in whatever fashion he wished: thus A could convey the property to his own use for his life and then to the use of his widow for her life, and then to the use of all of his children in equal shares. The common law completely ignored the words 'to the use of'. As far as it was concerned, X, Y, and Z were the owners by conveyance, subject to all the feudal duties of their estate, and could do whatever they liked with the land, regardless of the wishes of A, because A no longer held the legal estate to the lands: X, Y, and Z did.

1.24 The conveyance was made to X, Y, and Z as co-owners to exploit a particular technical common law rule. The form of co-ownership that was invariably employed was the joint tenancy. Joint tenancy has the significant feature of the right of survivorship (in Latin, the *jus accrescendi*), by which, upon the death of any joint tenant, his interest disappears—it does not pass to his heir—with the result that there is just one fewer co-owner. Thus if X were to die, his heir would not inherit a share of the property; his interest would just disappear: Y and Z would now together own the property as joint tenants. (The other common form of co-ownership is 'tenancy in common'. Here, in contrast, the tenant in common possesses an ownership share that passes to his heir.) As joint tenants of the legal title to the land, X, Y, and Z would be liable to comply with the feudal duties but, importantly, because of the right of survivorship, the particular worry of a minor heir inheriting the land could be completely avoided. The danger of inheritance would only arise if following a series of deaths only one of the original joint tenants remained, who would then be the sole owner. If he then died, his heir would inherit. But that could easily be avoided because, after the death of X for example, Y and Z could convey the land to themselves and V and W, on the same use as A originally did. In this way, whenever the number of joint tenants dropped to a low number, a simple reconveyance to another group of joint tenants ensured that the property was never inherited, and so a wardship would never arise.

1.25 The use, therefore, could be employed to avoid all of the rules of feudal tenure mentioned. The benefit of land could be passed to others than those who would inherit under the rules of primogeniture. It could be passed to those who were legally disentitled from holding property (eg minors), and A could convey his lands to a neutral party so that if A went to the block for treason, he could do so with the comfort that he had not
p. 12 ruined his family dynasty—not being legal owner of his lands, they would not be forfeit to the Crown, and so his wife and children would not be destitute; the legal owners would continue to hold for them upon use. Finally, the use could be used to ensure a minor never inherited.

1.26 A typical example of an enfeoffment to uses will give something of the flavour of a medieval use. Typically, a feoffor would grant land to feoffees 'to the use of my will'. 'Will' here did not mean the written instrument we think of today but rather simply the feoffor's expression of his intentions about where the property should go, often made on his deathbed (Mee (2010)). So, uses were typically created without any express terms besides the term that the feoffor would give future directions. Now, of course, the feoffees to use were not entitled to use the property for themselves in the meantime, simply because they had the legal

title. Indeed, in the vast majority of cases the feoffer continued to occupy the land and reap the profits just as he did before the feoffment to uses. Thus, the arrangement was basically one in which the feoffees to uses received essentially just the 'paper' title, which they held without having to do anything until such time as the settlor gave them further directions. This sort of feoffment to uses was absolutely standard in the fourteenth, fifteenth, and sixteenth centuries. Indeed, so standard and common was this means of holding land that in 1500 Chief Justice Frowk declared that the greater part of land in England was held in use (Baker (2002), 251).

1.27 Now, the attentive reader may have noticed one rather gaping potential flaw in these schemes employing the use. What could the cestuis que use do if X, Y, and Z refused to honour the use? As we have seen, the common law did not recognise the use: X, Y, and Z were the full legal owners, and so A's cestuis would get no relief in a court of common law. Here the Chancellor and his conscience-based power to remedy injustices come into play. It would be unfair to allow X, Y, and Z to take the benefit of the land themselves, because they only got it in order to benefit the cestuis que use. The Chancellor would enforce the use at the suit of the cestuis, ensuring that X, Y, and Z held the land according to the use A dictated.

1.28 Now it is sometimes thought that this failure of the common law to recognise the use is indicative of the harshness or rigidity of the common law, a harshness and rigidity so severe that it would deprive A, his wife, and their children of their rights in land, thwarting the clear agreement between A and X, Y, and Z. But this is a profound misunderstanding. The common law's blindness to the use was essential for the benefits of the use to be achieved. It was only because the cestuis had no legal title to the land that the various schemes to avoid the incidents of feudal land-holding would work. If the common law were to recognise a new kind of seigneury or legal estate in the use, then it would not have put the cestuis' interests in the land beyond the reach of the very legal rules that the use was engineered to avoid. It was the very rigidity of the common law in refusing to recognise a legal estate in the use that made the use effective. The common law was not hostile to the use; undoubtedly a large number of common law judges and lawyers held land to uses and/or were cestuis que use themselves. The problem of enforcing uses against legal title holders was a real, but secondary,
p. 13 problem, which appears to have been met differently as time went on. It seems that when the use originated, it was understood by all that the legal title holders were bound in honour and conscience, not law, to give effect to the use, the very extra-legality of the obligation making the device effective. The non-legal sanctions for failing to comply with such an obligation cannot be discounted. Failure to meet one's conscientious obligations could and did result in social obloquy, or church-directed penance, or even excommunication. And it is natural that as the social bonds of feudalism declined in importance failures to perform uses would come before the Chancellor in greater numbers, so that his jurisdiction became the normal, then exclusive, means of enforcement, ultimately leading to the rules that govern trusts today.

The origin of the trust

1.29 This book is about the law of trusts, not the law of uses, so what happened? Very briefly: Henry VIII wanted money, and set about getting some by prosecuting with a vengeance his ancient feudal rights as the man at the top of the feudal pyramid. He even had a special court set up, the Court of Wards, to help him do so. Because by this time feudalism was essentially anachronistic, his efforts were branded 'fiscal feudalism'. Vexed at being deprived of the feudal revenues he would otherwise have got but for the employment of uses by his noble tenants, he managed to get Parliament to pass the Statute of Uses in 1535. This statute 'executed

the uses': a conveyance from A to X, Y, and Z to the use of B was, after the Act, treated as a conveyance from A to B directly. The title passed from A to X, Y, and Z, and then to B as the use was automatically 'executed', cutting out X, Y, and Z. Following the statute, then, the typical use (**1.26**) in which A conveyed land to X, Y, and Z to hold to his, ie A's, use, did nothing at all. A would remain the legal owner of the land. It was henceforth impossible for someone holding the legal title to be bound to benefit another, since there was no longer any use by which he could be bound.

1.30 How the trust arose in the next century and a half to replicate the use in all but name is an interesting bit of history, but not, alas, one to be gone into here. But there were two basic developments. Legally, lawyers found loopholes in the statute. Politically, the climate changed. The monarch no longer relied primarily on his feudal rights for revenue, and so there was no political concern about Chancery giving effect to uses which managed to evade the statute. Suffice it to say that, by the turn of the eighteenth century, where someone, now called the 'settlor', transferred a legal title to X to hold for the benefit of B, now rendered as 'in trust for B' rather than 'to the use of B', Chancery would require X to hold the land for the benefit of B, just as if he had formerly held it to B's use. B was consequently renamed the 'cestui que trust', and is now generally called the 'beneficiary', and X is now called the 'trustee'.

1.31 Since the incidents of feudalism are now abolished, you might ask why anyone would set up trusts today? The basic reason is the same as in medieval times: to provide for loved ones in a way one cannot do, or it would be unwise to do, simply by transferring legal title. One cannot give minors land, so if one wants a minor to have Blackacre ('Blackacre' is the name common lawyers always give to a hypothetical piece of land
p. 14 —Whiteacre, Greenacre, and so on, are the colourful variations), it must be held on trust for him by someone else. One may want someone, like your surviving spouse, to have the dividends, ie the income, from shares for the rest of their life, and someone else, say your children, to have the capital, title to the shares themselves, once your spouse has passed on. One cannot fragment the legal title to shares to accomplish that. In certain circumstances, the law of taxation also favours giving property by way of trust when one is alive over leaving property to others in one's will, so many trusts are essentially tax-avoidance devices.

1.32 Note that the structured gift and tax-avoidance functions of the trust work in essentially opposite ways. To the extent that the trust avoids taxes, it frees property from restrictions that reduce its value to an owner. On the other hand, the structured gift burdens property, and the structure of benefits under a trust can, as we shall see, be very complicated indeed.

Further reading

Baker (2002), chs 6, 12, 13, 14, and 16

Burrows (2002)

Gray (1976)

Haskett (1996)

Hohfeld (1913)

Jones (1997)

Maitland (1929), Lectures I–IV

Penner (2019a, 2020, 2022)

Simpson (1986), chs I, VIII, and IX

Self-test questions

1. What features distinguish equity from the common law?
2. What does it mean to say that 'equity acts *in personam*'?
3. What does it mean to say that equity is a 'gloss' on the common law?
4. What are the 'jurisdictions' of equity, and how do these jurisdictions relate equity to the common law?
5. To what does 'fusion' refer?
6. What was a 'use', what purposes did it serve, how did it work, and how is it related to the trust?
7. What are the benefits of forming trusts (as opposed to simply transferring legal rights) today?

Related Books

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