Self-declarations of trust

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*L.Q.R. 67 I. Introduction

According to Turner L.J. in *Milroy v Lord*, express trusts may be constituted in one of two ways.

"[The trust will be] effectual if [the settlor] transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes". [1]

The focus of this article is on the latter method of constitution, typically called a "self-declaration" of trust. In such cases the settlor does not convey legal title to trust property to a third party, but "declares" that they themselves hold it for the beneficiary.

The leading case is *Paul v Constance*, [2] where the deceased partner of the defendant had frequently said to the defendant, in respect of a sum of money: "This money is as much yours as mine". In finding that this amounted to a self-declaration of trust, Scarman L.J. stated the principle:

"there must be a clear declaration of trust and that means there must be clear evidence from what is said or done of an intention to create a trust". [3]

In this article we attempt to explore the central role played by the "declaration" in such trusts. Despite it being crucial to the conceptual coherence of this category of trusts, it is difficult to pin down precisely what is meant by the declaration requirement. We seek to explain this, and in doing so, to offer some possible explanations as to why the courts recognise and enforce self-declared trusts.

II. The Role of the "Declaration"

In this section we aim to demonstrate the legal significance of the "declaration". The declaration is a distinctive requirement for self-declarations of trust, and does much to mark them out as a separate category of transaction. We will show this by comparing self-declarations of trust to other, similar, transactions, specifically ***L.Q.R. 68*** transfers on trust, gifts and constructive trusts. From this analysis two points will emerge. First, in the case of self-declarations of trust, the making of the "declaration" is the sole constitutive act which creates the trust. Secondly, the formation and expression of an intention to hold rights in property for another will not, in and of itself, count as a "declaration" for these purposes.

1. Self-declarations and transfers on trust

A self-declaration of trust is a comparatively recent mode of constituting a trust. Traditionally a settlor would create a trust by transferring rights to another, a trustee, to be held for a beneficiary. If a settlor skipped the first part, and simply declared that they were holding their rights for a volunteer beneficiary, courts would not give effect to the trust. [4] This position changed as a result of Lord Eldon's judgment in *Ex parte Pye*. [5] In *Pye* , the settlor had instructed his agent to purchase an annuity in his mistress' name. The agent ignored the instruction, and purchased the annuity in the settlor's name. Lord Eldon held that trusts could be created in one of two ways: the traditional method of transfer of the legal title, in a manner that would be effective at law, to a trustee, and by self-declaration. [6] Applying this to the facts, it did not matter that the settlor had not transferred the annuity to a trustee, but had merely expressed a desire, in his instructions to his agent, to hold them for the beneficiary. In Lord Eldon's words:

"he has committed to writing what seems to me a sufficient declaration, that he held this part of the estate in trust for the annuitant". [7]

The trust was created by a declaration rather than a transfer.

The significance of the change wrought by Lord Eldon in *Pye* becomes clear when one compares the two modes of constitution. In the case of a transfer upon trust, the trust cannot be constituted unless and until the settlor succeeds in conveying legal title to the trust property to, and vesting it in, the intended trustee by whatever means are necessary at common law to achieve this. If the trust property is land, then the settlor must execute a deed and register the trustee as proprietor; if it is shares, the settlor must complete the stock transfer form and have it approved by the company directors; if it is a chattel, there must be a deed or delivery to the trustee. In other words, there must be a recognised form of conveyance at law before the trust can arise in equity. Mee suggests that the constitutive act of these trusts is the conveyance, rather than the declaration, which, in his view, simply tells us something about the settlor's motive for the the conveyance: did the settlor desire the recipient to take absolutely, or to hold for another? [8] Consider the recent case of *Charity Commission for England and Wales v Framjee*, [9] where donors made donations to particular charities through the ***L.Q.R. 69*** defendant's website. The issue was whether the defendant held the donations upon trust for the intended charities before the money was paid over to them. It is notable that Henderson J. (as he then was), in finding that there was a trust, was not troubled by the absence of a specific declaration by the donors. Instead of a clear oral or written statement declaring a trust, we find contextual evidence of the purpose of the transfer, from which Henderson J. could infer an unexpressed intention to create a trust. On Mee's account, this approach makes sense: given the presence of a transaction—the conveyance of title to the moneys from donors to the defendant—an unexpressed intention to create a trust, inferred from background factors, satisfied the declaration requirement. Mee's point is that in the case of trusts by transfer, the declaration is relevant only because it reveals something about the settlor's intentions, and *not* as a specific act that constitutes the trust.

When one turns to self-declarations, because legal title remains with the settlor, there is no legally relevant act or transaction other than the declaration itself. This alone is effective to change the settlor's status from absolute owner to trustee and give the beneficiary equitable title. It follows that the declaration does more than simply provide evidence of the settlor's intentions. As Mee notes:

"In the self-declaration situation, the declaration is not merely evidence of the settlor's motive in entering into a particular transaction in a situation where equity regards that motive as controlling the effect of the transaction—instead, the declaration of trust is *in itself* the transaction". [10]

The difference between transfers on trust and self-declarations lies in the role played by the declaration. In the latter case, because the declaration is the only legally relevant event, courts will require evidence of a specific act of declaration in order to find a trust. [11] This is what created problems in *Paul v Constance*. Whilst the deceased's mental state was clear, in that he intended to hold the money for himself and his partner, there was no obvious declaration of this intent. Although Scarman L.J. eventually concluded that a trust had been constituted, he described it as a "borderline" case, where it was "not easy to pin-point a specific moment of declaration". [12] Unlike transfers on trust, in the case of self-declared trusts, courts do insist on a declaration as it is the very act by which a valid trust is created. What is needed, therefore, is some understanding of what kind of statement or act satisfies the "declaration" requirement.

2. Gifts

The role of the "declaration" also comes into focus when self-declarations are compared with gifts. It is a settled principle that a donor cannot make a gift of property merely by manifesting an intention to do so. In Knight Bruce L.J.'s words: ***L.Q.R. 70***

"a gratuitously expressed intention, a promise merely voluntary, or, to use a familiar phrase, nudum pactum, does not (the matter resting there) bind legally or equitably". [13]

In addition to a manifestation of intention, the donor must complete the necessary act of conveyance, such as the execution of a deed or a physical delivery of the thing. The classic illustration of this principle is found in *Cochrane v Moore*. [14] An owner of a horse called Kilworth purported to make a gift of one quarter of the horse to the defendant jockey, following the latter's riding of the horse to victory at a race in Paris. There was no doubt over the owner's intention, as his words to the defendant were perfectly clear and were followed up with a letter to the stable owner informing him that the defendant now held a share in the horse. However, the Court of Appeal held that the gift failed due to the absence of a delivery. Lord Esher stated:

"actual delivery in the case of a 'gift' is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is a part of the proposition itself. It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition, and, as such, is one of the facts to be proved by evidence". [15]

Self-declarations, by contrast, have no such requirements. The settlor need not execute a deed [16] or physically deliver the trust property to another in order to constitute the transaction. Rights can be conferred by mere words alone.

The line between self-declarations and gifts is a fraught one. When a gift has failed for want of delivery, there is an obvious temptation to argue that the donor's words amounted to a self-declaration of trust in the alternative. This is precisely what happened in *Cochrane v Moore*. Fry L.J.'s scholarly judgment, which sets out at length the authorities for the delivery requirement, finishes with the almost casual conclusion that the owner's words could, nonetheless, amount to a declaration of trust: "[the owner's statement] constituted [him] a trustee for Moore of one-fourth of the horse Kilworth". [17] It is an odd feature of *Cochrane v Moore*, the case which authoritatively established the delivery requirement, that the donor was still able to achieve something very similar to a gift by mere words.

The potential for self-declarations of trust to undermine the substantive requirements of gifts is perhaps the "unfortunate" [18] consequence of Lord Eldon's decision in *Ex parte Pye*. In the well-known case of *Richards v Delbridge*, [19] Lord Jessel M.R. asserted that it should not be possible to save a failed gift by treating it as a self-declaration of trust. The distinction between them is a fine one. The question is whether the donor's words merely convey general donative intent, or whether they amount to a declaration of trust. As Alexander notes: ***L.Q.R. 71***

"Stating 'I give' without delivering possession has no legal effect; stating 'I declare a trust' effectively transfers beneficial ownership, i.e., everything except title". [20]

Recent cases demonstrate this distinction between gifts and trusts. In *Shah v Shah*, [21] Dinesh Shah signed a letter which purported to dispose of shares in favour of his brother, Mahendra. He delivered the letter to Mahendra, together with the executed share transfer forms but without a share certificate (which was held by the company). The letter stated:

"I am as from today holding 4,000 shares in the above company for you subject to you being responsible for all tax consequences and liabilities [arising] from this declaration and letter."

Dinesh argued that the letter merely contained an expression of an intention to make a gift, which was never completely constituted, and therefore was ineffective to vest title in Mahendra. The Court of Appeal disagreed, and held that in fact the letter contained a valid self-declaration of trust in Mahendra's favour. Arden L.J. [22] held that the wording of the letter evinced an intention that it would take effect immediately, and as a matter of law this could only involve a disposition of the beneficial interest in the shares, as legal title could not pass before the share transfer forms had been registered. [23] As Dinesh had executed and delivered a stock transfer form, he clearly intended registration to occur in due course. The idea that Dinesh would *hold* (rather than give or assign) the shares for Mahendra pending registration could be made effective only by the imposition of a trust and this was what Dinesh had to be taken in law to have intended. Arden L.J. remarked that although it could take some time to complete a gift of shares by registration:

"[O]ne of the ways of making an immediate gift is for the donor to declare a trust. In my judgment that is what happened in this case". [24]

The outcome in *Shah* may be contrasted with that in *Gorbunova v Berezovsky Estate* [25] where the Russian oligarch, Boris Berezovsky, had promised his partner, in a deed, any proceeds from a successful outcome in litigation that he was conducting. The material words were that "[Mr Berezovsky] hereby irrevocably and unconditionally covenants with [Ms Gorbunova] that he will pay or procure the payment to [her]" of the proceeds. The issue was whether this amounted to a trust or a purported gift, with Arnold J. stating that for a trust to arise:

"the words used must show that the settlor intended to dispose of property so that someone else acquired the beneficial interest to the exclusion of himself … A mere intention to make a gift is insufficient for this purpose". ***L.Q.R. 72*** [26]

He construed the words in the deed as a promise to make a gift of the proceeds to Ms Gorbunova, rather than a declaration of trust, as they did not evince an intention to dispose immediately of the beneficial interest in the proceeds. [27]

The principal distinction between gifts and self-declarations of trust is that in the former the donor *transfers* rights to another, whereas in the latter the settlor *holds* rights for another. These transactions are completed in different ways. In the case of a gift, the donor's donative intent must be backed up with some act, such as a physical delivery or the execution of a deed, that evinces the donor's intention irrevocably to transfer rights. In the case of a self-declaration of trust, because the settlor continues to hold their rights, something a little more subtle is required: the settlor must do some act, which the law can take cognizance of, which demonstrates that they are now holding those rights in a different capacity, i.e. an act that shows that they are no longer held for himself, but for a beneficiary. The most obvious act is the settlor's "declaring" of this intention. It is this declaration, as opposed to general donative intent seen in the context of a gift, that marks out self-declared trusts, albeit that, as *Choithram International SA v Pagarani* [28] demonstrates, this distinction is not always adequately observed.

3. Constructive trusts

The final boundary that puts pressure on the "declaration" requirement is that with constructive trusts. The category of constructive trusts is a miscellaneous one, encompassing several trusts "constructed" by law for different reasons. [29] Some of these, such as trusts arising in response to wrongdoing [30] or (controversially) unjust enrichment, [31] are not important for present purposes. The difficult cases are those that are said to arise in response to the intention of the parties. The prime example of this, found in the context of family property, [32] is the "common intention constructive trust". [33]

In the typical "sole name" case a cohabiting couple occupy a house as their family home, but the legal title is registered in one of their names only. [34] There is usually some form of agreement between the parties, which can be express or inferred from their conduct, to share the value of the home, and a detrimental reliance by one of the parties on this agreement. [35] Take the case of *Thompson v Hurst*, [36] where the claimant and defendant, who had been cohabiting as council tenants, bought their house under a right-to-buy scheme. As the claimant's employment history was quite uneven, they were advised to make the mortgage ***L.Q.R. 73*** application, and acquire the title to the land, in the defendant's sole name. They continued to live together in the house and, although the defendant was responsible for mortgage repayments and other major costs, the claimant did contribute to household expenses. When the relationship broke down, the claimant successfully argued that he had an interest under a common intention constructive trust. The basis of this trust was the trial judge's finding that, while the parties had not intended to become legal co-owners, they had intended to share in the value of the home. This common intention was inferred from the initial discussion between the parties as well as their subsequent conduct. The claimant had also relied upon this agreement to his detriment.

The precise requirements of the common intention constructive trust are a matter of some dispute. [37] The courts have traditionally applied a restrictive approach to the question of what types of evidence might be admitted of a common intention, [38] but more recent cases have been much more liberal in this regard. [39] What is entailed in the "detrimental reliance" requirement is also a difficult question. What is not disputed, however, is that a common intention is necessary for the creation of such trusts. Etherton L.J. made this clear in *Thompson v Hurst* when he said:

"In the case of a single legal owner, such as the present, where there is no express declaration of a trust, the claimant has first to establish some sort of implied trust, normally what is now termed a common intention constructive trust … The claimant must show that it was intended that he or she was to have a beneficial interest at all. That can only be achieved by evidence of the parties' actual intentions, express or inferred, objectively ascertained." [40]

This was also made clear in the leading case of *Jones v Kernott*, [41] where Lord Walker and Baroness Hale said: "[t]he first issue is whether it was *intended* that the other party have a beneficial interest in the property at all". [42]

In a case such as *Thompson v Hurst*, if the court finds that the parties have a "common intention", then it must also be true to say that the legal proprietor has formed an intention to hold that title, in part, for the other party. Given this fact, one might ask why this is not simply categorised as an express trust, rather than a constructive trust? One answer might be found in s.53(1)(b) of the Law of Property Act 1925, which provides that an express trust of land must be manifested and proved in writing. The intention of the legal proprietor in *Thompson v Hurst* was established by parol evidence, not written. For some commentators this means that these trusts can take effect only as constructive trusts, as these have no formal requirements. [43] We would suggest that this is a slightly superficial answer to the question. If Parliament, for instance, were to abolish s.53, would we be happy to reclassify the trust in *Thompson v Hurst*, and those in other family homes cases, as "express trusts", constituted by self-declarations? Perhaps not. What typically ***L.Q.R. 74*** happens in these cases is that the intention of the parties, so far as it exists, emerges over time, and is inferred from vague discussions and a pattern of behaviour. There is rarely anything that might be called a declaration; rather, it is the cumulative conduct and discussions of the parties which gradually leads to an understanding between them. [44] Given that intent is inferred in this way, perhaps the category of "implied trusts" [45] would be the natural home for these cases. However, ever since Maitland argued that there is no such thing as an "implied trust", [46] it does not appear that any court or scholar has taken them seriously as a category of trust. [47] Maitland's argument was that whenever intention was "implied" or "inferred" from words and conduct, there was simply an express trust. This is problematic as it fails to recognise that it is not intention per se that creates the trust, but the declaration of the intent. In cases where intention has to be "implied" or "inferred", it will always be difficult to say that the settlor has "declared" their intent.

What this analysis shows is that not all trusts based upon intention are "express trusts". Some intention-based trusts are classed, in the absence of an "implied trust" category, as "constructive". Further, the line between express and constructive trusts seems to relate to the role played by intention. In the common intention constructive trust, intention is necessary, but not usually sufficient, for the creation of the trust. Courts tend to consider other factors, such as detrimental reliance of the cohabiting partner, as important for the creation of the trust. By contrast, in self-declarations, the settlor's intention, or rather, the form in which the intention is manifested, the declaration, is sufficient for the creation of the trust. As Bryan recently put it:

"The difference lies in the distinction between an objective manifestation of intention as a constitutive act for the creation of express trust obligations, and an intention which is not a constitutive act but which, in conjunction with other factors, justifies the imposition of a constructive trust." [48]

Pulling these threads together, we can see the importance attached to the declaration of trust. It is not merely a necessary fact for the establishment of the trust; it is the legally relevant transaction, the existence of which constitutes the trust.

III. What is a Declaration?

In the last section we saw that simply because a person has formed the intention to hold their rights for the benefit of another, does not mean that there has been a "self-declaration" of trust. If it did then the line between express trusts, and intention-based constructive trusts, would break down. As French C.J. recently warned: "The ascertainment of an express trust may come to resemble the **L.Q.R. 75* imposition of a constructive trust". [49] To avoid this the law needs to conceptualise the thing that distinguishes self-declarations from other types of trust, namely the "declaration".

The origins of the word "declaration" are to be found in the Latin, *declarare*, which means to make clear. A declaration is therefore defined as: "the action of explaining or making clear"; "the action of setting forth, stating, or announcing, publicly, formally, or explicitly; a positive statement, an emphatic or solemn assertion"; or, in law, "a formal affirmation or statement, usually made in writing". [50] In linguistic terms, a declaration is a speech act, which has illocutionary effect. [51] It is performative, in that its propositional content (i.e. its object) may be achieved merely by its utterance, i.e., where "saying makes it so". [52] As Searle explains: "If I successfully perform the act of declaring a state of war, then war is on." [53] In the following sections we will consider the different ways in which we might think of this illocutionary act as a legal concept.

1. The "declaration" as a formality

One way to conceptualise the declaration is purely as a legal formality. In this model one draws a distinction between the substantive fact which is stated, and the form in which it is expressed, the *declaration*. A formality, as Birks explains, may be thought of as an "additional requirement":

"[A] formal requirement will be one which either adds to what would 'naturally' be done or restricts the modes in which it could so be done by excluding some which would seem to work just as well if the law would let them." [54]

Whilst there is no single type of formality, [55] the rules that we tend to refer to as "formalities" have similar functions, such as the promotion of caution, the provision of evidence of the intention of the parties, and the prevention of fraud. [56] Can we think of a declaration as something that performs these functions, by imposing an additional requirement on what would otherwise "naturally" be done to create a trust?

Judges sometimes appear to think of declarations in other areas of law as a type of formality. Take the case of *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* **L.Q.R. 76* [57] where the court considered the requirement under s.317 of the Companies Act 1985 that a director who had an interest in a contract with the company must "declare" the nature of that interest at a meeting of the company. Here, the relevant substantive fact was the director's interest. Lightman J. explained that the effect of s.317 was to ensure that that this would be drawn to the attention of all the directors, but this must happen in a particular way. He held that the making of the declaration:

"should be the occasion for a statutory pause for thought about the existence of the conflict of interest and of the duty to prefer the interests of the company to their own". [58]

The disclosure of the interest had to be "a distinct happening at the meeting" and recorded in the minutes. [59] Where more than one director was present at the meeting, the declaration had to be made out loud, and a failure to record it in the minutes would not preclude proof that it had been made. Where the company was run by a sole director, that director could make the declaration alone, and even silently, but it had to be recorded in the minutes, as otherwise "the court may well find it difficult to accept that the declaration was made". [60] Lightman J.'s remarks suggest that he clearly regarded the declaration as performing

some or all of the functions of a legal formality. He explicitly referred to its cautionary effect and, where it was made in the presence of other directors, its evidentiary function. It was also likely to perform a channeling function, by providing a process which—in the absence of any objections at the meeting—would enable the director to proceed with the transaction despite the apparent conflict of interest.

In trusts cases, the substantive fact is the settlor's intention. [61] If a court is satisfied that a settlor formed the intention to hold rights for the benefit of another, that finding of fact may naturally justify the creation of a trust. Yet if the declaration acts as a legal formality, then we would be saying that there is an additional requirement to the proof of the settlor's intention, specifically, the need to express the intention in a particular way. Conversely, we would also be saying that the declaration could lead to the creation of a trust even if the substantive underlying fact, the intention, was absent.

In some self-declared trust cases the courts appear to regard the declaration as having formal significance. We can perhaps see this in *Paul v Constance* where, it will be recalled, a settlor had told his partner on several occasions that a particular sum of money was "as much yours as mine". The court, in construing these terms, had little doubt that the necessary fact of intention was present. What troubled the court was whether this intention was expressed in the appropriate form, with Scarman L.J. noting the trouble in pinpointing "a specific moment of declaration". [62] If the declaration is a form, separate from the underlying fact of the settlor's intention, then what does the form consist of? Is there a particular set of words that, when uttered, produce the effect of the trust regardless of whether or not the ***L.Q.R. 77*** underlying fact of intention is present? An analogy might be found in the Roman contract of *stipulatio*, which required parties to contract by a question and answer that used corresponding verbs ("Will you give?", "I will give"; "Do you promise?", "I do promise", etc). Failure to express the agreement in this way would render the contract void, notwithstanding the fact that the parties were in agreement with each other. Is there anything comparable in trusts?

If there were magic words in the context of trusts, the obvious ones would be "I declare myself trustee". Yet it is clear that the failure to use words such as "declare" and "trust" does not prevent a self-declared trust from arising. The declaration does not require the settlor's intention to be expressed in any particular way, and it may be written [63] or oral. [64] There is also authority that a declaration may also be inferred from conduct, [65] or, at the very least, from what the settlor has said or done. [66] Where words are used, they must be "clear, unequivocal and irrevocable, but it is not necessary to use any technical words". [67] Thus, "any expressions will suffice, from which it is clear that the party using them considers himself a trustee, and adopts that character". [68] Although, occasionally, the solemnity of the circumstances in which the declaration is made has been emphasised by the courts, [69] generally this does not seem to be a relevant feature when assessing whether a declaration has been made. Furthermore, there appears to be little, if any, discussion about the cautionary or evidentiary effect of the declaration, which one might expect to see if the courts were concerned with its status as a formality.

Take, for example, *Rowe v Prance*, [70] where the defendant, who was in a relationship with the claimant, acquired title to a yacht and invited the claimant to live on it with him. The defendant had casually referred to the yacht as "ours" on a few occasions. When coupled with other background factors, such as the claimant's giving up of her lease and their treating the yacht as their residence, this led the court to conclude that a trust had been created. Warren Q.C., sitting as a high court judge, said:

"I am satisfied that Mr Prance effectively constituted himself an express trustee of the boat; writing is not required since we are dealing with personal property in relation to which there is no formality." [71]

The facts of *Rowe v Prance* could not be further removed from the paradigm declaration where a settlor solemnly executes a deed which states "I declare a trust". The notable feature of the case is the casualness of the communications.

Indeed, it seems that the existence of a declaration does not depend on the utterance by the settlor of any particular words at all. For example, in *Re Kayford*, [72] a mail order company took advice from its accountants as to how to ensure that any customers who had paid it money but not yet received goods, could be refunded ***L.Q.R. 78*** if the company became insolvent. The accountants advised the company to transfer the customers' moneys from its current account to a separate savings account, to be designated "Customers Trust Deposit Account". The moneys were transferred into a dormant company account but the bank did not give the account the required designation until the day after the company went into voluntary liquidation. Nevertheless, Megarry V-C had no doubt that a trust had been established. He held that there was no need to use the words "trust" or "confidence", and the question was "whether in substance a sufficient intention to create a trust has been manifested". [73] The

purpose of transferring the moneys into the savings account was "to ensure that the moneys remained in the beneficial ownership of those who sent them", and a trust was "the obvious means of achieving this". [74] A trust could be created by the company if it took "suitable steps on or before receiving the money" and this would be sufficient to transform the company's obligations towards the customer "from contract to property, from debt to trust". [75] The segregation of money in a separate account was unnecessary, but it was a "useful" indication of the company's intention to create a trust. Megarry V-C clearly regarded the segregation of the moneys as sufficient to support the finding that a trust had been declared, as the trust was held to cover *all* moneys paid in by customers, including those which had been paid in before the account had been expressly designated as a trust account.

Together these cases [76] suggest that the declaration requirement may be satisfied not by the presence of particular words, but because the court is satisfied, as a result of the settlor's words and conduct around the time the trust is alleged to have been created, [77] that he or she has formed an intention to hold the rights for the benefit of another. Conversely, using the magic words of "declaration" and "trust" do not lead to the creation of the trust, if the underlying fact of intention (objectively interpreted) [78] is not present. Take the recent case of *Singha v Heer*, [79] which involved a dispute between business partners. The claimant had provided a loan to the defendant to fund the purchase of a home, the defendant granting a mortgage in return. In written correspondence between the parties, the defendant had referred to his holding the title to the land "on trust" for the claimant. The court held that this did not automatically constitute a trust, but that the court must ask what intention is reasonably conveyed by these words. In the context they meant no more than an admission of the claimant's security interest. A similar point emerges from *Re B (A Child; Property Transfer)*, [80] where a stipulation that a mother was to hold 70% of the proceeds of sale of the family home "for the benefit of" her daughter was held to be no more than an incantation of certain relevant statutory wording, and did not create a trust for the daughter. ***L.Q.R. 79***

In light of the above, it seems clear that the declaration does not operate purely as a formal requirement, as it neither adds anything to, nor is a substitute for, the settlor's intention. It is difficult, therefore, to prize apart the declaration requirement from the need to establish the settlor's intention to hold rights for another. If this is right, then the crucial question is what type of intention is required. This brings us back to the difficulty, adverted to earlier, of distinguishing such trusts from intention-based constructive trusts where, it will be recalled, there is also a requirement that settlors form an intention to hold rights for another. Why, it may be asked, is the declaration requirement not equally satisfied in those cases? [81]

2. Declarations as "intention to be bound"

If the declaration requirement is not a matter of form, then this would suggest that it is a matter of substantive fact. If so, then what fact must be proved under the "declaration" requirement? We would suggest that it is concerned with the settlor's intention. Not, it should be stressed, the settlor's basic intent to hold rights for the benefit of another. Rather, it is the settlor's intention that, by their words or actions, they thereby hold rights for the benefit of another. To put it a little differently, we are suggesting that for an express trust to be effectively declared, two separate intentions must be manifested: (a) an intention to hold rights for the benefit of another; and (b) an intention that by the settlor's very words or action, the trust relationship should be immediately constituted.

i) An intention to hold rights for the benefit of another

The settlor's intention to hold rights for the benefit of another is itself a composite intention. The effect of the trust is not only to confer the right to beneficial enjoyment of the property on the beneficiary but also to subject the settlor to the obligations of a trustee. Therefore, the settlor's intention must be to retain his or her legal rights to the property, whilst conferring the benefit of the property on another *and* coming under "an onerous obligation" to that person. [82] The courts tend to emphasise the first element, i.e. the intention to confer a benefit on another. The key question is said to be whether the settlor has divested himself or herself of the entire interest in the property, [83] such that whatever legal right he or she retains is held in trust for the beneficiary. [84] Fewer authorities dwell on the obligations of trusteeship. However, on occasion the courts have asked whether the settlor "intended to subject himself to all the consequences of the liability to account". [85]

One reason why the courts focus more on whether the settlor had an intention to part with the beneficial interest in the property is perhaps because many ***L.Q.R. 80*** self-declared trusts will be bare trusts. This is the likely consequence, at least in cases where the "declaration" was oral or has been inferred from the settlor's conduct. If the trust is a bare trust, the settlor-trustee

will not be subject to active duties.[86] However, there are cases relating to transfers on trust, which suggest that bare trustees are not necessarily free of the core fiduciary obligation of loyalty, at least where they have accepted the terms of the trust;[87] a fortiori in the case of self-declared trustees. Moreover, a self-declared trustee is also likely to be subject to minimal custodial obligations, such as not to dispose of the property for his or her own benefit.

ii) An intention that by the settlor's very words or action, the trust relationship be constituted

It is quite common for a settlor to intend not only the creation of a trust, but its creation by a specific utterance or action. Take the case of *Rabin v Gerson*[88] where the claimant expressed, in instructions to counsel, a wish to advance money to a Jewish educational association upon a charitable trust. However, the trust deed subsequently executed by the claimant did not reflect this, with the words in the deed conveying an intent to make an absolute gift to the association. The court held that it was not permissible to consider the communications with counsel as evidence of the terms of the transfer. Fox L.J. said:

"Such evidence, I think, is simply parol evidence of the intention of the grantor … The result, in my view, is that the opinions cannot be referred to generally for the assistance that their contents may give."[89]

One may argue that this ignores the intention of the settlor, as it was clear from the earlier communication that a charitable trust, not an outright gift, was desired. However, to take this view would be to ignore the role of the document. Where a settlor has created a trust by executing a trust deed, the normal inference is that they intended the transaction to take effect according to terms contained in the document. Earlier drafts and other statements of intent may be vague or inconsistent, reflecting changes or refinements of their wishes. The final document is usually meant to supersede these earlier expressions by giving a final statement of the terms.[90] The important point for present purposes is that the settlor did not merely intend a transaction; they also intended that the transaction take effect according to a specific utterance, the execution of the deed. The court would have frustrated this intention had they admitted evidence of earlier statements in ascertaining the terms of the trust.

Although concerned with an issue of interpretation, rather than constitution, what *Rabin v Gerson* illustrates is the double nature of a settlor's intention, which must be present in order that a self-declared trust may be constituted. There may ***L.Q.R. 81*** be an underlying desire to hold rights for another's benefit, but the settlor must also intend, by a specific statement or act, for those legal consequences to follow. For this to happen, it is unnecessary that the settlor understand precisely the mechanics of trust law; it is sufficient if he or she broadly understands the consequences of his or her actions, i.e. that he or she is holding rights for another person's benefit.[91]

It follows that expressing a desire to create a trust in the future will not constitute a declaration.[92] This is clear from *Bayley v Boulcott*,[93] where a mother was entitled to property under the will of a relation. In a conversation with the executor of the will, she expressed an intention to make a settlement of part of that property upon her daughter, and requested him to instruct her solicitor to prepare the settlement. When it was brought to her for execution, she had changed her mind and refused to sign it. Leach M.R. held that a declaration of trust of personal property could be made orally, but the mother's conversation with the solicitor could not be considered "as being, on her part, a fixed and concluded declaration of trust in favour of the daughter".[94] It was no more than an expression of her intention to make a declaration of trust in the future by an instrument which she had authorised the executor to prepare, the terms of which had not yet even been considered.

The same approach can be seen in the case of *Re Farepak Food and Gifts Ltd*.[95] A company officer, aware that the company was about to go bankrupt, telephoned the company's solicitors and instructed them to draw up a deed declaring a trust over the company's current account (which contained customer moneys) for the benefit of the customers. When the deed was drafted, owing to some confusion on the solicitor's part, the deed referred to an (empty) savings account. In an attempt to avoid having to plead rectification of the trust deed, it was argued that, prior to the execution of the flawed document, a trust over the current account had already been constituted: the settlor had, it was pointed out, already expressed a clear intention to create a trust over the current account in the conversation with the solicitor when the instructions were initially given. Rejecting the argument, Mann J. said:

"The directors clearly manifested an intention to create a trust, but they have to do something in the nature of a declaration in order actually to create it. What they did was execute the deed of trust. There is no evidence of any other act going beyond

a mere declaration of intention, apart from the execution of the deed, that is even a candidate. Accordingly an express trust arises out of the deed or not at all." [96]

It is worth pausing to consider this. The company officer had, in the telephone conversation prior to the execution of the deed, expressed in the clearest terms a desire to hold moneys on trust for the benefit of its customers. Why could that not amount to a declaration of trust? The answer, it is suggested, is because, as in *Bayley v Boulcott*, the officer did not intend those particular words—uttered in the ***L.Q.R. 82*** course of the telephone conversation—to constitute the trust. This is obvious from the fact that they were desirous of executing a more formal document shortly after. There may have been an intention to create a trust, but not by those particular words.

In light of the cases discussed above, it seems fair to say that the expression, through words or acts, of an intention to be immediately bound is a necessary prerequisite to a finding that a trust has been successfully declared. [97] Two further observations may be made in this regard. First, even though the courts do not require proof of a performative speech act such as "I declare a trust", the underlying intention which they look for is the same as that which underpins such an explicit declaration. Secondly, the type of intention required to create an enforceable self-declared trust is very similar, if not identical to that required for the valid non-physical delivery of deeds [98] and, arguably, the making of promises, [99] i.e. an intention that the words or acts of the maker of the deed or the promisor immediately bind him or her and thus have peremptory effect.

3. Declarations as open or public acts, or acts of communication

If the argument in the previous section is accepted, the question then arises whether the *only* significance of the "declaration" lies in the fact that it constitutes an expression of the settlor's intention. Is there anything to suggest that, to constitute a declaration for these purposes, the settlor's words or acts must also be communicated to someone else, or made public in some way? In other words, will an entirely private declaration suffice to create a trust?

A settlor can make a valid declaration even if that settlor has not communicated their intention to the intended beneficiary. For example, in *Benbow v Townsend*, [100] the testator lent £2,000 by way of mortgage to the trustees of Tottenham Court Chapel, and subsequently said to them that he should receive the interest on the loan, but that the principal was to be his brother, Job's. After the testator died, his will made no mention of the mortgage, and the question was whether the £2,000 belonged to his estate or to Job. The executor and residuary legatees argued that because the testator had not communicated his intention to Job, no trust was created and the testator's act had been revocable, so the money resulted back to his estate. The court rejected this argument and held that the property belonged to Job, "by force of the testator's declaration that the £2,000 should, after his own death, be the property of his brother, Job". [101]

Furthermore, a written declaration will be valid, even if it is not contemporaneously communicated or shown to anyone else *at all*. *Middleton v Pollock* [102] provides a vivid example. A solicitor, who had died insolvent, was found ***L.Q.R. 83*** to have declared himself trustee of certain property for E. The declaration took the form of a memorandum, by which the solicitor declared himself trustee of the property to secure the repayment of money he had received from E but failed to repay. The memorandum was found in his safe after he died, together with other similar memoranda in favour of other clients. Its contents had never been disclosed to E, and there is nothing in the case which suggests it had been disclosed to anyone else at the time it was made. The court held that, even if the solicitor had executed the memorandum with knowledge of his insolvency, E was still entitled to the benefit of the security against the other creditors because the solicitor was not a bankrupt when he made the declaration of trust, and intended to give them security. This conclusion presupposes that the declaration of trust was valid even though it had not been contemporaneously communicated to E (or anyone else). There is also academic support for the view that a written declaration may create a valid trust and thereby sever a joint tenancy by partial alienation, even where it is made entirely privately. [103]

Turning to oral declarations of trust, a declaration made in the presence of witnesses will suffice to create a trust, [104] but it is unclear whether an oral declaration made privately will have the same effect. There are two reasons why this may seem difficult to envisage. First, a solitary expression of intention, a commitment made in private to oneself, is something that may give rise to evidential difficulties unless it is recorded or its maker attests to having made it. This concern is particularly important in a trusts law context, where an objective manifestation of intention (rather than the settlor's internal state of mind) is key to satisfying the certainty of intention requirement. [105] Secondly, the question arises whether such a declaration would ever adequately demonstrate the settlor's intent for the trust to be immediately and irrevocably constituted by his or her very words or actions.

It will be recalled that Lightman J.'s comments in the *Neptune* case [106] suggest that in a company law context the courts may be prepared to take cognisance of declarations made privately. A sole director held a board meeting with the company secretary, at which he authorised a payment by the company to himself. The minutes of the meeting made no reference to his having declared his interest in the arrangement, as required by s.317 of the Companies Act 1985. On a summary judgment application by the company, Lightman J. held that there was a triable issue as to whether in fact the relevant declaration had been made at the meeting, and so he granted the director leave to defend the action. He also went further and remarked (obiter) that it was possible for a director to make the relevant declaration aloud to himself *or* mentally at a solo meeting where no-one else was present, although if it were not recorded in the minutes, the court would find it difficult to take cognisance of it. This may be because, like an unexpressed mental resolution to hold property on trust, [107] such a declaration is objectively unknowable. By analogy with *Neptune*, it may be argued that a private mental resolution to hold property on trust for another may be treated as a valid declaration, but only if it is ***L.Q.R. 84*** recorded by the settlor and therefore manifested in a manner which is capable of objective proof.

The more difficult question is whether an oral declaration of trust, which was made privately but overheard by a third party, is sufficient to create a trust. The authors are unaware of any authority directly on point. On the *Neptune* analysis, a declaration made in such a way would be capable of objective proof and therefore valid. However, there are differences between declarations of interest and declarations of trust, which arguably cast doubt on such a conclusion. The purpose of making a declaration of interest is exculpatory—to obtain the company's consent to what would otherwise constitute a breach of fiduciary duty—and it does not give rise to any obligation on the director's part. The effect of a valid declaration of trust is the exercise of a legal power, the effect of which is immediately and irrevocably to subject the alleged settlor to an obligation to hold the property for the benefit of another, and to transfer the beneficial interest in the property to that person. It must be debatable whether equity should treat words privately spoken by a settlor to himself aloud as sufficient without more to evince an intention thereby irrevocably to bind himself as trustee. Intuitively, it seems preferable to conclude that for the settlor's words to be binding in law, they must be recorded, or communicated to, or said in the presence of, someone else.

A recent analysis of private law powers by Essert [108] suggests that because the exercise of a legal power per se effects a change in the parties' legal relations, it can be validly exercised only through "an act that is public between them", [109] such as an act of communication by A. For this reason, he suggests that A does not validly exercise a power to change A's legal relations with B, if B learns of A's intention to do so only from a third party. [110] *Benbow v Townsend* suggests that the authorities on self-declarations of trust do not go as far as that, and that the settlor will validly exercise their power to declare themselves trustee for B if the intention to do so is manifested in writing or expressed orally to a third party. Nevertheless, Essert's analysis supports our view that there are difficulties with treating an unrecorded, wholly private oral declaration as a valid exercise of a power to create a trust. Moreover, if it is right to say that legal acts by which powers are exercised, such as the making of a deed, should be suitable as "distinctively public communicative acts" for them to have the requisite effect, [111] it also raises the question whether the courts have gone too far in their expansive interpretation of what counts as a "declaration" of trust.

IV. Conclusion

We have argued that the "declaration" is not purely a formality requirement. Rather, it requires proof of a substantive fact, i.e., the settlor's intention. As described earlier, a double intention is required. First, the settlor must intend to hold rights for the benefit of another. This is a composite intention, which involves an intention to confer the beneficial interest in the property on someone else, and to assume the obligations of a trustee. Secondly, the settlor must intend, by their very words ***L.Q.R. 85*** or acts, to constitute the trust relationship. What is it about these features of the declaration that justifies the recognition and enforcement of these trusts?

It is difficult to identify a clear historical explanation for Lord Eldon's decision in *Pye* and similar cases. [112] Previous concerns about enforcing declarations of trust in favour of volunteers had rested partly on the idea that any obligations owed to volunteers could only ever be moral and unenforceable in equity, and partly on the view that property should not be put beyond the reach of creditors. [113] Lord Eldon does not discuss these concerns in his judgments, and Macnair argues that the suggestion that equity would never enforce trusts which were merely voluntary may have been based on general statements in obiter dicta and would have been "profoundly inconvenient". [114] Macnair also suggests that Lord Eldon drew a sharp and coherent distinction between contract and trusts: while contracts and *promises* to create a trust would not be enforceable without consideration, a trust created

by a legally effective transfer or a clear declaration of trust *would* be enforceable against a trustee. [115] And it seems clear that contemporary treatise writers, such as Lewin, regarded this conclusion as supported by principle and authority. [116]

Pothier's Traité des Obligations, which placed significant emphasis on the intention and the will, was translated into English in 1806, [117] five years before *Pye* was decided. It was not cited in the case itself but by the mid-19th century the influence of the will theory in English property law was apparent. Cornish explains that with the decision of *Kekewich v Manning* [118] the focus shifted away from voluntary recipients and towards "the essential prerogatives of property owners", which "necessarily involved the ability to give voluntarily and irrevocably" in a way the law would facilitate. [119] We cannot say whether Lord Eldon's decision in *Pye* was influenced by Pothier, but the will theory may go some way towards explaining why we *now* recognise the proprietary aspects of a self-declared trust. The expression of the settlor's double intention is a clear manifestation of his or her will to divest himself or herself of an interest in his property in another person's favour, and that is an inherent prerogative of ownership, which the law should facilitate.

We must also try to explain why the declaration is sufficient to generate trust obligations, and here there are two possibilities. First, it might be argued that if the settlor has externally manifested or recorded the intention to create a trust, and broadly understands the effect of what they are doing, [120] the settlor ought to know that other people may rely on it, and this is reason enough to preclude them from resiling from it. In other words, the fact that the declaration is an expression of intention which *may* be relied on by other people explains its enforceability. A similar explanation has been used to justify promises. The idea is that if A ***L.Q.R. 86*** communicates to B a firm intention to act in a particular way, knowing that B may rely on it, A ought to perform A's promise, and B can demand that A do so. [121] As Raz points out, the difficulty with this explanation is that it does not tell us why a promise constitutes an *obligation*, [122] when many other statements of intention to act do not. Given that not all expressions of intention to act are obligatory, the peremptory effect of a declaration of trust, i.e. the fact that it immediately imposes an enforceable obligation on its maker, cannot be fully explained by the fact that it is an expression of an intention to act on which other people may rely.

Raz puts forward another explanation of the promise as a species of voluntary obligation. In his view, A can subject herself to a voluntary obligation "by behaving in a way which normally communicates an intention to undertake by that very act an obligation". [123] On this analysis, when A communicates "an intention to undertake by the very act of communication an obligation to perform an action and invest [B] with a right to its performance", A "ought to perform that action and [B] has a right that [A] will do so". [124] Raz argues further that promises are binding because at a general level they create a relation between A and B, which "creates a special bond, binding the promisor to be, in the matter of the promise, partial to the promisee. It obliges the promisor to regard the claim of the promisee as not just one of the many claims that every person has for his respect and help but as having peremptory force". [125] For this reason, the explanation of promises as voluntary obligations "can only be justified if the creation of such special relationships between people is held to be valuable". [126] He regards promises as "an extreme form of voluntary undertaking", [127] which tend to arise within the framework of ongoing relationships, and which the law regards as valuable. In his view, therefore, the purpose of contract law is to protect the practice of undertaking voluntary obligations. [128]

Given the currency of the efficient breach theory, Raz's theory may not adequately explain why we enforce contracts, but this does not detract from its utility in helping us to try to explain the personal aspects of self-declared trusts. We have shown that the key to a valid self-declaration of trust is that the settlor intends to undertake by the very words said or acts done an obligation to perform the actions of a trustee. In Raz's view, this is precisely the type of intention which, if communicated, is sufficient to subject an individual to a voluntary undertaking, and it is consistent with one explanation of fiduciary obligations, according to which they arise as a result of one party's voluntary assumption of responsibility towards another for the latter's affairs. ***L.Q.R. 87*** [129]

It is striking that while promises and declarations are both examples of performative speech acts, which have peremptory effect, a gratuitous promise is ineffective in law to transfer property or create an obligation, whereas a voluntary self-declaration of trust achieves both these ends. It is therefore an extreme and unusual example of an illocutionary act, which equity enforces directly as a voluntary undertaking. A full discussion of the reasons why equity gives effect to such an undertaking is a question for another day. However, it may well rest on a combination of factors: the desire to protect and encourage the practice of the voluntary undertaking of fiduciary obligations towards another in respect of property, the social benefits conferred by the ability

to hold one's own property for the benefit of another, and the fact that, as a result of the influence of the will theory, we regard a property owner's intentions regarding the use and disposal of their property as paramount.

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Footnotes

1 *Milroy v Lord [1862] 4 De G.F. & J. 264; 45 E.R. 1185*.
2 *[1977] 1 W.L.R. 527; [1977] 1 All E.R. 195*.
3 *Paul [1977] 1 W.L.R. 527* at 531. This was the formulation of the principle suggested by counsel, but adopted by Scarman L.J.
4 *D. Ibbetson, A Historical Introduction to the Law of Obligations (Oxford: Oxford University Press, 1999), at p.206*; *A. Simpson, A History of the Common Law of Contract (Oxford: Clarendon Press, 1975), at p.357*. However, meritorious consideration in the form of natural love and affection would suffice: *Colman v Sarell (1789) 1 Ves. Jun. 50* at 54–55, referred to by M. Macnair, "Equity and Volunteers" (1988) L.S. 172 at 181.
5 *(1811) 18 Ves. Jr. 140; 34 E.R. 271*. The case was preceded by Lord Eldon's decision in *Ellison v Ellison (1802) 6 Ves. Jr. 656; 31 E.R. 1243*, where the consideration requirement had been dropped.
6 Macnair, "Equity and Volunteers" (1988) L.S. 172 at 182.
7 *Ex parte Pye (1811) 18 Ves. Jr. 140* at 150.
8 J. Mee, "Presumed Resulting Trusts, Intention and Declaration" [2014] C.L.J. 86 at 109.
9 *[2014] EWHC 2507 (Ch); [2015] 1 W.L.R. 16*.
10 Mee, "Presumed Resulting Trusts, Intention and Declaration" [2014] C.L.J. 86 at 109.
11 *Choithram International SA v Pagarani [2001] 1 W.L.R. 1; [2001] 2 All E.R. 492*. is an unusual example of the elision of self-declarations with transfers on trust. The court held that when a settlor expressed an intention to transfer his wealth to a group of charitable trustees, of which he was a member, there was a valid self-declaration.
12 *Paul v Constance [1977] 1 W.L.R. 527* at 532.
13 *Kekewich v Manning (1851) 1 De G.M. & G. 176 at 188; 42 E.R. 519* at 524.
14 *(1890) 25 Q.B.D. 57*.
15 *Cochrane (1890) 25 Q.B.D. 57* at 75.
16 Formality requirements may be present due to the subject matter of the trust, such as s.53(1)(b) of the Law of Property Act 1925 if it is a trust of land.
17 *Cochrane v Moore (1890) 25 Q.B.D. 57* at 73.
18 *Jones v Lock (1865) L.R. 1 Ch. App. 25* at 28 (Lord Cranworth L.C.).
19 *(1874) L.R. 18 Eq. 11*.
20 G. Alexander, "The Transformation of Trusts as a Legal Category 1800–1914" (1987) 5 Law and History 303 at 331.
21 *[2010] EWCA Civ 1408; [2011] W.T.L.R. 519*.
22 Elias L.J. and Norris L.J. concurring.

23 *Shah v Shah [2011] W.T.L.R. 519* at [13].
24 *Shah [2011] W.T.L.R. 519* at [22].
25 *[2016] EWHC 1829 (Ch); [2016] W.T.L.R. 1591*.
26 *Gorbunova [2016] W.T.L.R. 1591* at [55].
27 *Gorbunova [2016] W.T.L.R. 1591* at [60]–[61].
28 *[2001] 1 W.L.R. 1*.
29 See Y.K. Liew, "Reanalysing Institional and Remedial Constructive Trusts" [2016] C.L.J. 306, for a helpful overview of the category.
30 *FHR European Ventures LLP v Cedar Capital Partners LLC [2014] UKSC 45; [2015] A.C. 250*.
31 *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd [1981] Ch. 105; [1979] 3 All E.R. 1025*, cf. *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669; [1996] 2 All E.R. 961*.
32 Other examples might include the type of constructive trust recognised in *Pallant v Morgan [1953] Ch. 43; [1952] 2 All E.R. 951* and known as the *Pallant v Morgan* equity.
33 See *Marr v Collie [2017] UKPC 17; [2017] 2 F.L.R. 674* for the most recent judicial analysis of the "common intention constructive trust".
34 This is in contrast to joint names cases, such as *Stack v Dowden [2007] UKHL 17; [2007] 2 A.C. 432*, where the parties are jointly registered as proprietors and a statutory trust arises under s.34 of the Law of Property Act 1925.
35 See *Abbott v Abbott [2007] UKPC 53; [2008] 1 F.L.R. 1451* for an example of a "single name" family home case.
36 *[2012] EWCA Civ 1752; [2014] 1 F.L.R. 238*.
37 The case law and academic literature on this topic is huge. For an excellent account of the current state of the law, see B. Sloan, "Keeping up with the Jones Case: Establishing Constructive Trusts in the 'Sole Legal Owner' Scenarios" (2015) 35 L.S. 226.
38 *Lloyds Bank Plc v Rosset [1991] 1 A.C. 107; [1990] 1 All E.R. 1111*.
39 *Stack v Dowden [2007] 2 A.C. 432* at [69] (Baroness Hale).
40 *Thompson v Hurst [2014] 1 F.L.R. 238* at [22].
41 *[2011] UKSC 53; [2012] 1 A.C. 776*.
42 *Jones [2012] 1 A.C. 776* at [52] (emphasis added)
43 For critical discussion of this view, see *W. Swadling, "The Nature of the Trust in Rochefoucald v Boustead" in C. Mitchell (ed.), Constructive and Resulting Trusts (Oxford: Hart Publishing, 2010)*.
44 A good comparison might be personal property cases involving similarly vague commitments to share the value of the thing, where courts have adopted a constructive trust analysis. See *De Bruyne v De Bruyne [2010] EWCA Civ 519; [2010] 2 F.L.R. 1240* for an example, but cf. *Rowe v Prance [1999] 2 F.L.R. 787; [2000] W.T.L.R. 249*.
45 Reference to trusts created by "implication of law" are found in the Statute of Frauds 1677 s.viii. The modern equivalent, s.53(2) of the Law of Property Act 1925, continues to refer to "implied trust". Early editions of some trusts treatises contained sections on "implied trusts" (e.g. see *Lewin on Trusts, edited by J. Flint, 8th edn (Boston: Charles Edson, 1888), at p.108*).
46 *F.W. Maitland, Equity also the Forms of Action at Common Law, edited by A. Chaytor and W. Whittaker (Cambridge: Cambridge University Press, 2010), at pp.75–76*.
47 See G. Costigan, "The Classification of Trusts as Express, Resulting and Constructive" (1914) 27 Harv. L. Rev. 437 at 438–439 for discussion of Maitland's arguments.
48 M. Bryan, "The Inferred Trust: An Unhappy Marriage of Contract and Trust" (2016) 69 C.L.P. 377.
49 *Korda v Australian Executor Trustees (SA) Ltd [2015] HCA 6* at [8].
50 *R. Trumble and A. Stevenson (eds), Shorter Oxford English Dictionary, 5th edn (Oxford: Oxford University Press, 2002), Vol.I, at p.606*.
51 On illocutionary acts generally, see *R. Searle and D. Vanderveken, Foundations of Illocutionary Logic (Cambridge: Cambridge University Press, 1985), at p.1*; *D. Vanderveken, Meaning and Speech Acts, Volume 1 Principles of Language Use (Cambridge: Cambridge University Press, 1990–1991), at p.8*. See also C. Essert, "Legal Powers in Private Law" (2015) 21 L.T. 136 at fn.17.
52 *R. Searle, "A Taxonomy of Illocutionary Acts" in R. Searle, Expression and Meaning, Studies in the Theory of Speech Acts (Cambridge: Cambridge University Press, 1979), at p.16*.
53 *Searle, "A Taxonony of Illocutionary Acts" in Expression and Meaning, Studies in the Theory of Speech Acts (1979), at p.17*.
54 *P. Birks, The Roman Law of Obligations (Oxford: Oxford University Press, 2014), at p.34*.

55 Consider, for instance, the different formal rules for the creation and disposition of equitable interests found in s.53(1)(b) and s.53(1)(c) of the Law of Property Act 1925: the former is an "evidential rule" which requires written evidence of the transaction, whereas the latter is "constitutive rule" where the formality is the transaction.

56 P. Mechem, "The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments" (1926–1927) 21 Ill. L. Rev. 341 at 348–349; L. Fuller, "Consideration and Form" (1941) 41 Colum. L. Rev. 799 at 800–801.

57 *[1996] Ch. 274; [1995] 3 All E.R. 811*.

58 *Neptune (Vehicle Washing Equipment) Ltd [1996] Ch. 274* at 283.

59 *Neptune (Vehicle Washing Equipment) Ltd [1996] Ch. 274* at 283.

60 *Neptune (Vehicle Washing Equipment) Ltd [1996] Ch. 274* at 284.

61 *Knight v Knight (1840) 3 Beav. 148; 49 E.R. 58*.

62 *Paul v Constance [1977] 1 W.L.R. 527* at 532.

63 e.g. *Middleton v Pollock (1876) 2 Ch. D. 104*.

64 e.g. *M'Fadden v Jenkyns (1842) 1 Ph. 153 at 157; 41 E.R. 589* at 591 (Lord Lyndhurst L.C.); *Paul v Constance [1977] 1 W.L.R. 527*.

65 *Heartley v Nicholson (1874–1875) L.R. 19 Eq. 233* at 242 (Bacon V-C).

66 *Paul v Constance [1977] 1 W.L.R. 527* at 531 (Scarman L.J.).

67 *Grant v Grant (1865) 34 Beav. 623 at 625; 55 E.R. 776* at 777 (Romilly M.R.).

68 *Dipple v Corles (1853) 11 Hare 183 at 184; 68 E.R. 1239* at 1240.

69 e.g. *Choithram International SA v Pagarani [2001] 1 W.L.R. 1* at 12 (Lord Browne-Wilkinson).

70 *[1999] 2 F.L.R. 787*.

71 *Rowe [1999] 2 F.L.R. 787*.

72 *[1975] 1 W.L.R. 279; [1975] 1 All E.R. 604*.

73 *Re Kayford [1975] 1 W.L.R. 279* at 282.

74 *Re Kayford [1975] 1 W.L.R. 279* at 282.

75 *Re Kayford [1975] 1 W.L.R. 279* at 282.

76 See also *Re English and American Insurance Co Ltd [1994] 1 B.C.L.C. 649*; *Re Branston & Gothard Ltd [1999] 1 All E.R. (Comm) 289*; *Re Lewis's of Leicester Ltd [1995] B.C.C. 514 Ch D* —all cases where the fact of, and reasons, for segregation, were crucial to the recognition of the trust.

77 *Bentley v Mackay (1851) 15 Beav. 12 at 19; 51 E.R. 440* at 441 (Romilly M.R.).

78 *Commissioner of Stamp Duties (Queensland) v Jolliffe (1920) 28 C.L.R. 178* at 187 (Isaacs J., dissenting); applied in *Byrnes v Kendle [2011] HCA 26; (2011) 243 C.L.R. 253* at [28] (French C.J.).

79 *[2016] EWCA Civ 424; [2017] F.L.R. 1192*.

80 *[1999] 2 F.L.R. 418; [1999] 3 F.C.R. 266 CA*.

81 e.g. *Royal Bank of Scotland v Brogan [2012] N.I.Ch. 21*.

82 *J. Brunyate, F. Maitland, Equity, a Course of Lectures, edited by A. Chaytor and W. Whittaker (Cambridge: Cambridge University Press, 1936), at p.72*.

83 *Bentley v Mackay (1851) 15 Beav. 12; 51 E.R. 440*.

84 *Warriner v Rogers (1873) L.R. 16 Eq. 340* at 348 (Bacon V-C); cited with approval in *Richards v Delbridge (1874) L.R. 18 Eq. 11*. For similar statements, see *Grant v Grant (1865) 34 Beav. 623* at 625 (Romilly M.R.); *Jones v Lock (1865) 1 Ch. App. 25* at 29 (Lord Cranworth L.C.); *Paul v Constance [1977] 1 W.L.R. 527* at 531 (Scarman L.J.).

85 *Dipple v Corles (1853) 11 Hare 183* at 186 (Page Wood V-C); see also *Lyell v Kennedy, Kennedy v Lyell (1889) 14 App. Cas. 437* at 457 HL (Lord Selborne).

86 *Christie v Ovington (1875) 1 Ch. D. 279* at 281 (Hall V-C); *Re Docwra (1885) 29 Ch. D. 693* at 696 (Bacon V-C).

87 *Persey v Bazley [1984] 47 P. & C.R. 37 CA*; *China National Star Petroleum v Tor Drilling (UK) Ltd [2002] S.L.T. 1339* Court of Session.

88 *[1986] 1 W.L.R. 526; [1986] 1 All E.R. 374*.

89 *Rabin [1986] 1 W.L.R. 526* at 531–532.

90 As some scholars have pointed out, the parol evidence rule functions in a way that is similar to "entire agreement" clauses. For discussion see D. McLauchlan, "The Entire Agreement Clause: Conclusive or a Question of Weight?" (2012) 128 L.Q.R. 521.

91 *Byrnes v Kendle (2011) 243 C.L.R. 253*.

92 *Grant v Grant (1865) 34 Beav. 623* at 625 (Romilly M.R.).

93 *(1828) 4 Russ. 345; 38 E.R. 835*. See also *De Bruyne v De Bruyne [2010] 2 F.L.R. 1240*.
94 *Bayley (1828) 4 Russ. 345* at 347 (Leach M.R.).
95 *[2006] EWHC 3272 (Ch); [2008] B.C.C. 22*.
96 *Re Farepak Food and Gifts Ltd [2008] B.C.C. 22* at [45]. See also *Harpur v Levy [2007] VSCA 128; (2007) 16 V.R. 587*.
97 *Stablewood Properties Ltd v Virdi [2010] EWCA Civ 865; [2011] W.T.L.R. 723*, especially at [28]–[29] (Arden L.J.).
98 *Xenos v Wickham (1867) L.R. 2 H.L. 296* at 312 (Blackburn J.); *Halsbury's Laws of England (2012), Vol.32 at para.201*.
99 *J. Raz, "Promises and Obligations" in P.M.S. Hacker and J. Raz (eds), Law, Morality and Society, Essays in Honour of HLA Hart (Oxford: Oxford University Press, 1977) at pp.211, 217 and 224*. See also *J.R. Searle, Speech Acts: An Essay in the Philosophy of Language (Cambridge: Cambridge University Press, 1969), at p.60*.
100 *(1833) 1 My. & K. 506; 39 E.R. 772*; see also *Ex parte Pye (1811) 18 Ves. Jr. 140*; *Wheatley v Purr (1837) 1 Keen 551; 48 E.R. 419*; *Stapleton v Stapleton (1844) 14 Sim. 186; 60 E.R. 328*; *Standing v Bowring (1885) 31 Ch. D. 282*.
101 *Benbow (1833) 1 My. & K. 506* at 510 (Leach M.R.).
102 *(1876) 2 Ch. D. 104*.
103 J. Brown, "Severance of Joint Tenancy of Land by Partial Alienation" (2001) 117 L.Q.R. 477 at 491.
104 *Grant v Grant (1865) 34 Beav. 623*.
105 e.g. *Byrnes v Kendle (2011) 243 C.L.R. 253*.
106 *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald [1996] Ch. 274*.
107 D. Klinck, "Lord Nottingham and the Conscience of Equity" (2006) 67 Journal of the History of Ideas 123 at 129.
108 Essert, "Legal Powers in Private Law" (2015) 21 L.T. 136; see especially at 149–154.
109 Essert, "Legal Powers in Private Law" (2015) 21 L.T. 136 at 149.
110 Essert, "Legal Powers in Private Law" (2015) 21 L.T. 136 at 150–151.
111 As Essert suggests: see "Legal Powers in Private Law" (2015) 21 L.T. 136 at 149.
112 *Ellison v Ellison (1802) 6 Ves. Jr. 656*.
113 *W. Cornish et al (eds), The Oxford History of the Laws of England, Vol.xii, 1820–1914: Private Law (Oxford: Oxford University Press, 2010), at pp.255–256*.
114 Macnair, "Equity and Volunteers" (1988) L.S. 172 at 181–182.
115 Macnair, "Equity and Volunteers" (1988) L.S. 172 at 182; *Ex parte Pye (1811) 18 Ves. Jr. 140* at 150 (Lord Eldon); *Pulvertoft v Pulvertoft (1811) 18 Ves. Jr. 84 at 99; 34 E.R. 249* at 254 (Lord Eldon).
116 *Cornish, The Oxford History of the Laws of England (2010), at pp.255–256*; *T. Lewin, The Law of Trusts and Trustees, 1st edn (London: A. Maxwell, 1837), at pp.110 and 111*; *T. Lewin, A Practical Treatise on the Law of Trusts and Trustees, 3rd edn (London: W. Maxwell, 1857), at p.82*.
117 *D. Ibbetson, A Historical Introduction to the Law of Obligations (1999), at pp.220 and 236*.
118 *(1851) 1 De G.M. & G. 176*.
119 *Cornish, The Oxford History of the Laws of England (2010), at p.258*.
120 *Byrnes v Kendle (2011) 243 C.L.R. 253* at [28] (French C.J.).
121 *Raz, "Promises and Obligations" in Law, Morality and Society, Essays in Honour of HLA Hart (1977), at p.211*.
122 *Raz, "Promises and Obligations" in Law, Morality and Society, Essays in Honour of HLA Hart (1977), at p.217*; see also at pp.223 and 226.
123 *Raz, "Promises and Obligations" in Law, Morality and Society, Essays in Honour of HLA Hart (1977), at p.224*.
124 *Raz, "Promises and Obligations" in Law, Morality and Society, Essays in Honour of HLA Hart (1977), at p.211*.
125 *Raz, "Promises and Obligations" in Law, Morality and Society, Essays in Honour of HLA Hart (1977), at pp.227–228*.
126 *Raz, "Promises and Obligations" in Law, Morality and Society, Essays in Honour of HLA Hart (1977), at p.228*.
127 J. Raz, "Promises in Morality and Law" (1982) 95 Harv. L. Rev. 916 at 928.
128 Raz, "Promises in Morality and Law" (1982) 95 Harv. L. Rev. 916 at 936–938.

129 J. Edelman, "When do Fiduciary Duties Arise?" (2010) 126 L.Q.R. 302 at 316; *L. Hoyano, "The Flight to the Fiduciary Haven" in P. Birks (ed.), Privacy and Loyalty (Oxford: Oxford University Press, 1997)*; see also *P. Millett, "Proprietary Restitution" in S. Degeling and J. Edelman (eds), Equity in Commercial Law (Sydney: Thomson, 2005), at pp.309 and 310*; and *J. Edelman, "The Fiduciary Self-Dealing Rule" in J. Glister and P. Ridge, Fault Lines in Equity (Oxford: Hart Publishing, 2012)*. For alternative explanations of fiduciary duties, see e.g., *M. Conaglen, Fiduciary Loyalty (Oxford: Hart Publishing, 2010)*; P. Birks, "The Content of Fiduciary Obligation" (2002) 16 T.L.I. 34 at 41–44; S. Worthington, "Fiduciaries: When is Self-Denial Obligatory?" [1999] C.L.J. 500 at 505; and E. Weinrib, "The Fiduciary Obligation" (1975) U.T.L.J. 1 at 7 and 15.

