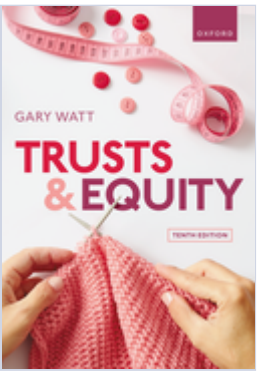

Trusts & Equity (10th edn)
Gary Watt

p. 3

1. Foundations

Gary Watt, Professor of Law, University of Warwick

https://doi.org/10.1093/he/9780192869630.003.0001
Published in print: 01 April 2023
Published online: August 2023

Abstract

This chapter focuses on the historical and conceptual foundations of trusts and equity, first examining the history of the relationship between law and equity, including the historical origins of the trust. It then explains the idea of equity and how it is intertwined with the common law, and compares the trust with concepts such as gifts and contracts. The chapter shows that the trust arose in response to equity's special concern to ensure that legal rights are not used in bad conscience, but later developed into a sophisticated institution governed by established rules. It looks at the reform of the Court of Chancery and considers trust property, equitable rights under a trust, separation of legal and equitable title, and the paradox of property and obligation.

Keywords: trusts, equity, equitable rights, equitable property, history, Court of Chancery, obligation, contract, metaphorical explanation of equity

Context

Students typically study the law of trusts for a year or less, but the law of trusts will be different this year from last, and different next year from this. How is a student to acquire an appreciation of the fundamentals of the trust, and of the relationship between law and equity that will stand the test of time? This chapter seeks to help by looking to history to give an indication of the trends that might influence future development. As Winston Churchill once wrote, 'The longer you can look back, the farther you can look forward'.[1] By identifying foundational conceptual tensions in our subject, this chapter will help the student not only to understand the law, but also to criticize it.

Watch the author introduce the law of trusts <https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-an-introduction-to-trusts?options=showName> and the law of equity <https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-an-introduction-to-equity?options=showName>.

1.1 Introduction

The first part of this chapter is an examination of the history of the relationship between law and equity, including the historical origins of the trust. It proceeds to explain the idea of equity, and the symbiotic way in which equity and the common law function. The term 'equity' can be used to describe social fairness, or a branch of morality, or even an aspect of divine justice,[2] and all such uses are apt to shine a critical light upon the law.[3] For the purpose of this book, however, the term 'equity' simply connotes an established aspect of law and legal reasoning. Nowadays, when a judge hears a case, he or she has authority to administer the common law rules with equity. Equitable remedies, doctrines, and principles (many in the form of maxims) are considered in detail in the last chapter of this book.

p. 4 ↵ The second part of this chapter is a preliminary introduction to the modern trust. The trust will be contrasted with concepts such as gift and contract, with which the reader will already have some every day, if not technical, familiarity. We will see that the trust developed in response to equity's special concern to ensure that legal rights are not used in bad conscience, but that it later became a sophisticated institution governed by established rules, with the result that most problems concerning deliberately created trusts can now be resolved without recourse to equity's flexible, discretionary approach.

1.2 Historical relationship between law and equity

1.2.1 The Middle Ages

In the twelfth century, the royal court was largely itinerant. The majority of cases were heard locally by shire courts, hundred courts, and local lords.[4] Effective government required the King and his courtiers to travel the length and breadth of the realm collecting taxes, dispensing justice, and generally asserting royal authority. Thus the itinerary of Henry I took him as far afield as Carlisle, Norwich, Southampton, and Normandy, all within the years 1119–23, while still allowing time to campaign war in Wales. The King's Chancellor was one of the chief members of this travelling court. He was a learned cleric, usually a bishop, whose role was to advise the King as a member of his private ('privy') council. The Chancellor was keeper of the King's Great Seal, and below him were the Chancery scribes who were responsible for the King's paperwork (or parchment work, as it was then). The manuscripts of early Chancery proceedings helped to establish coherence in the law, and they also helped to standardize the English language, where previously there had been great regional variation.[5] Most other written material of the time was in Latin; hence

Chancery became known as the English jurisdiction.[6] Writs bearing the royal seal were issued out of Chancery to deal with any matters of law and justice falling within the King's special concern or 'prerogative'. The *Leges Henrici Primi* (Laws of Henry I)[7] contain a long list of such matters, including murder, treason, governance of the forests, and such like. Most significant for us is that the King's prerogative included the power to deal with 'unjust judgment' and 'default of justice'.[8] Here, in the King's authority to issue writs out of Chancery to address the unjust judgments of his courts, is the seed of English equity.

By the early thirteenth century, certain royal writs could be purchased cheaply and directly from the Chancery,[9] and by the early fourteenth century, the forms of writ ↵ and the form of the King's common law had become very well established, even to the point of rigidity, and inflexibility. In fact, as early as *The Provisions of Oxford 1258*, it was established that Chancery had no authority to issue novel writs without the prior approval of the King's council, so thereafter claimants had to show that the facts of their case fell within some existing form of writ in order to gain a remedy. But what if the facts didn't fit? In such a case one had to petition the king through his Chancellor. Petitions to the Chancellor became routine in the late thirteenth and early fourteenth centuries, as a way of escaping the rigidity of the common forms of writ, and the judgments of the common law courts. It became an important function of the Chancellor, through his Chancery scribes, to exercise the King's prerogative of 'grace' or 'mercy' to grant special relief in particular cases. Shakespeare's lawyer Portia observed rightly (however cynical her motives) that mercy 'is enthronèd in the hearts of kings; / It is an attribute to God himself, / And earthly power doth then show likest God's / When mercy seasons justice… '.[10] The establishment of the Chancellor's court depended upon a simple hierarchy typical of medieval thought: the King was accountable to God for the righteousness of his laws and the Chancellor, as 'keeper of the king's conscience', would act in particular cases to admit 'merciful exceptions' to the King's general laws, to ensure that the King's conscience was right before God. By extension of this hierarchy, the basis for granting relief became concern for the personal 'conscience' of the defendant in Chancery. The defendant in Chancery would not be permitted to act in a way that would be 'unconscionable'.[11] If the King's common law were abused by, say, enforcing a common law right or relying upon a lack of common law formality against a vulnerable defendant this would reflect badly on the King himself. Accordingly, the Chancellor intervened to prevent unconscionable conduct in order to protect the conscience of the king. One common form of relief was an injunction granted by the Court of Chancery against the unconscionable enforcement of a common law judgment, with the threat of imprisonment for breach of the injunction.[12] This inevitably produced a rivalry between Chancery and the common law courts.

p. 5

"不可理喻"

In the middle of the fourteenth century, litigation caused by the 'Black Death' overwhelmed the common law courts, and the Chancellor picked up a great deal of extra work. So much so, that by the end of the century the Chancellor was dispensing justice on his own authority from his base at Westminster Hall. As petitions to the Chancellor grew in number throughout the fifteenth and sixteenth centuries, the Court of Chancery expanded, and records of the Chancellor's decisions gradually acquired the status of a separate body of legal authority distinct from the common law.

p. 6

1.2.2 The Early Modern Period

The rivalry between Chancery and the common law courts came to a head in the early seventeenth century as exemplified by *The Earl of Oxford's Case*.[13] Judgment had been awarded against a defendant to a common law action who then took the not unusual step of applying to the Lord Chancellor for an injunction to prevent the enforcement of the common law judgment. The defendant claimed that the common law judgment entered against him had been obtained by fraud. The head of the common law courts, Sir Edward Coke,[14] Lord Chief Justice of the King's Bench, promptly indicted the defendant, but Lord Ellesmere granted the injunction in favour of the defendant, with the result that the common law and Chancery were at loggerheads. Coke argued that the Lord Chancellor was guilty of illegally hearing appeals from common law judgments, but Ellesmere reasoned that his injunction did not offend the common law courts. He argued that it merely operated *in personam* against the conscience of the person who had been successful at common law:

> The office of the Chancellor is to correct men's consciences for frauds, breach of trust, wrongs and oppressions, of what nature soever they be, and to soften and mollify the extremity of the law.[15]

According to Lord Ellesmere, Chancery leaves the common law judgment in peace, and is only concerned with the corrupt conscience of the party.

1.2.3 Supremacy of equity established

In 1616, the dispute between the Chief Justice and the Lord Chancellor was finally referred to King James I. On the advice of his Attorney General, Sir Francis Bacon, the King resolved the matter in favour of Lord Ellesmere. (Hence the maxim 'where equity and law conflict equity prevails'.)[16] The real reason underlying the King's decision to favour Chancery was not jurisprudential, but political. Bacon was a firm defender of the royal prerogative over the common law, whereas Sir Edward Coke favoured the supremacy of the common law over the royal prerogative. So Chancery, like that other peculiarly English institution, the Church of England, traces its independence and pre-eminence to a personal clash of political wills as much as to any doctrinal dispute. Coke was dismissed from office shortly after *The Earl of Oxford's Case* and, the following year, Bacon succeeded Lord Ellesmere as Lord Chancellor. Within 30 years of *The Earl of Oxford's Case*, the issue of royal prerogative was to become a prime cause of the English Civil War.

Confident in its new status, equity matured through the seventeenth century like a good port wine of the sort so popular at the time. One of the Chancellors of this period was Sir Heneage Finch, Earl of Nottingham,[17] who has rightly been called the father of modern equity.[18] The doctrine of clogs on the equity of redemption, which enabled ↵ borrowers to redeem their mortgaged land free from unconscionable conditions, and the modern rule against perpetuities[19] find their source in his judgments. However, it was a frequent criticism of Chancery in the sixteenth and seventeenth centuries that the Chancellor's discretion to dispense justice ad hoc on the ground of 'conscience' produced justice that varied markedly in quality from case to case and from one Lord Chancellor to the next. Thus one sixteenth-century lawyer asked whether '*it be meet that the Chancellor should appoint unto himselfe, and publish to*

p. 7

others any certaine Rules & Limits of Equity'.[20] In the mid-seventeenth century, such criticism had become a standing joke, hence John Selden's famous observation that the official measure of justice might as well be the foot, because it varies according to the length of the Chancellor's foot.[21]

1.2.4 The Enlightenment and modernity

In the eighteenth century, Enlightenment philosophy helped to free equity from its early association with the royal prerogative and ecclesiastic notions of conscience, so that it became, in Enlightenment terms at least, a 'rational' feature of the law. This was followed in the nineteenth century by a period of consolidation and development, culminating in the procedural unification of the Court of Chancery with the courts of common law (this is considered in section 1.2.5). The late nineteenth century can also be regarded as the golden age of the settlement trust.

By the twentieth century, it was generally accepted that 'equity's naked power of improvisation' had long since been 'spent'.[22] One judge even asserted that '[i]n the field of equity the Chancellor's foot has been measured or is capable of measurement', although his Lordship added the following caveat:

> This does not mean that equity is past child-bearing; simply that its progeny must be legitimate —by precedent out of principle.[23]

1.2.5 Reform of Chancery procedure

A victim of its own success, by the early nineteenth century, the Court of Chancery had become hopelessly busy. The creation at this time of strict rules preventing trustees from entering into certain species of transaction,[24] which rules still survive today,[25] has been attributed to the fact that the courts were
p. 8 frantically busy, and were therefore ↵ unable to examine the rights and wrongs of individual transactions in any detail.[26] The appointment, in 1729, of the Master of the Rolls (the chief Chancery Master) to sit as a second judge in certain cases had done little to reduce the burden on the Chancellor, because any decision of the Master of the Rolls could still be appealed to the Chancellor. It was not until 1833 that the Master of the Rolls had a true concurrent jurisdiction. In 1813, a Vice-Chancellor was appointed to assist the Chancellor and the Master of the Rolls. Yet when, in 1816, Sir Launcelot Shadwell VC was asked by a Commission of Inquiry whether the three judges could cope, he is said to have replied: '*No; not three angels.*'[27]

The Chancery judges were, indeed, overworked and increasingly unable to cope with the demands made upon them. In 1616, the supremacy of equity had been established as a means of escaping the common law jurisdiction, but by the nineteenth century, because of the backlog of administration in the Court of Chancery, escape was often sought in the other direction. Even as late as 1852, it appears that claimants were attempting to avoid the queue to the Chancellor's door by asserting concurrent common law rights arising out of facts that ought to have been the exclusive concern of the Court of Chancery. Thus in *Edwards v. Lowndes*,[28] Lord Campbell CJ had to remind litigants that a trustee is accountable to the beneficiaries of his trust in equity, but not at common law:

> [N]o action at law for money had and received can be maintained against him, though he has money in his hands which under the terms of the trust he ought to pay over to the cestui que trust.[29]

The Court of Chancery Procedure Act 1852, which attempted to wrestle with the procedural problems in the Court of Chancery, appeared in the same year as the first instalment of *Bleak House*, Charles Dickens's great satire on delays in Chancery.[30] However, the major step towards expediting the procedure of Chancery did not come until Lord Chancellor Selborne introduced the Judicature Act 1873 into Parliament. Ironically, it was due to administrative delays that the statute did not come into force until 1875, when it was re-enacted with amendments. We now refer to the Judicature Acts 1873–5. By these enactments, the Supreme Court of Judicature was established with concurrent jurisdiction to administer the rules of equity and law within a unified procedural system. Today, all judges have jurisdiction to administer both law and equity.

p. 9

1.2.6 Summary of the historical development of equity and trusts

Note that some events were of an ongoing nature, and not limited to the indicative dates:

- 12th century: Chancellor begins to advise the King in Privy Council.
- 13th century: As keeper of the King's 'Great Seal', the Chancellor frames common law writs. The 'use' (precursor of the 'trust') of land is established.
- 14th century: As keeper of the King's conscience, the Chancellor remedies the strictness of the common law in particular cases.
- 15th century: Growth of the Chancellor's court (Court of Chancery) at Westminster.
- 16th century: At the start of the century, Chancellors were clerics; by the end they were lawyers and the Chancellor's equitable jurisdiction was established as a branch of law rather than a branch of ecclesiastic morality. Henry VIII attempts to abolish uses of land.
- 17th century: Equity is established as supreme in cases of conflict between equity and the common law. Methods for indirectly enforcing uses of land become accepted and the modern trust is established.
- 18th century: Equity develops in a manner supplemental to the common law; modern trust doctrine and mortgage doctrine is developed, and established.
- 19th century: Chancery and common law courts are subsumed within a new Supreme Court of Judicature. Procedures are united, but both branches of law remain functionally distinct.
- 20th century: Statutory consolidation and reform of the general law governing the creation, and operation of trusts.
- 21st century: Increasing and on-going international popularity of the trust as a commercial device, even in jurisdictions without the English tradition of equity.

1.3 The historical development of the trust

The progenitor of the trust was the 'use'.[31] Later, we will examine the shared history of the use and the trust in detail, but in simple terms we can say that the trust of land began its life when medieval monks wished to enjoy the benefit of land without infringing their vow of poverty by actually being owners of the land.[32] A more speculative account suggests that the trust originated when early medieval landowners went abroad on religious crusades and pilgrimages, leaving behind their families, and their lands.[33] Before
p. 10 ↵ he 'took up the cross', the crusader would make a legal transfer of his lands to a trusted friend. The trusted friend, or 'trustee', would then be the legal owner of the land, with all the rights and powers that come with legal ownership, but his duty was to re-convey the land to the crusader on his return, and in the meantime, to hold the land for the benefit of the crusader's family. If the trustee, asserting his legal entitlement to the lands, refused to account to the crusader's family for rents received on the lands, or otherwise exercised his legal entitlement in bad conscience, the crusader's family (the 'beneficiaries' of the trust as we would call them today) had no rights at law, but could petition the King for justice. If he was moved to, the King would exercise his royal prerogative and order the recalcitrant trustee to do his duty, and if the trustee had wrongfully paid away rents to a third party, the King would make an order against the third party. In every case, the order operated '*in personam*' against the personal conscience of the trustee or the third party, which meant that the beneficiaries of the trust (the 'use' as it was then) had no direct property right in the assets.[34] We will now turn to consider the historical relationship between the trust and the use.

1.3.1 The historical trust's origins in the 'use'

As early as the seventh and eighth centuries, the common law had a form of 'use' in relation to chattels and money, under which money received by A 'for the use of B' had subjected A to common law obligations in relation to the use of the money. If A refused to account to B, B could bring an action to account which came to resemble something like a modern action for breach of trust.[35] This common law 'trust' for the payment of money was enforced long before Chancery recognized trusts of land.

It was in relation to land that '[t]he use simply could not be fitted into the common law scheme of things, for the doctrine of estates and the doctrine of seisin left no place for the separation of beneficial enjoyment from legal title'.[36] ('Seisin' means to hold land from a feudal overlord and the various 'estates' describe the duration of the feudal holdings, and any conditions attaching to them.) However, the Chancellor, who had a more flexible and less form-bound jurisdiction than the common law, was prepared to recognize the use of land, and as early as the beginning of the thirteenth century he recognized the 'use' to be a practical device for separating legal title from beneficial enjoyment. Thus if Sir Guy de Pends were about to depart for the crusades, he might choose to convey the estate in his land (the 'feoffment to uses') to his trusted friend Sir Richard de Livers (the 'feoffee to uses') 'for the use and benefit of Lady de Pends and her children'. Sir Richard would thereby become solely entitled to the land at law, but with an obligation to exercise his entitlement for the exclusive benefit of Lady de Pends and her children, and to re-convey the
p. 11 land to Sir Guy on his eventual return from the ↵ crusades. The use in this form did not bind the land itself so as to confer a property right on Lady de Pends and the children; rather, it was conceived as a

personal confidence reposed in Sir Richard de Livers, binding upon his conscience and the conscience of any third party (other than a bona fide purchaser of the legal estate for value without notice of the use) into whose name Sir Richard might choose to pass the legal title.[37] The Chancellor ensured that Sir Richard did not place unconscionable reliance upon his legal title to the detriment of Sir Guy, Lady de Pends, and their children.

1.3.1.1 The use as an early 'tax avoidance scheme'

From the King's point of view, there was a significant downside to the recognition of the use. The King was entitled, as supreme overlord in the medieval feudal system of land ownership, to levy valuable feudal 'fines' or 'incidents' whenever land was inherited or an owner died without an heir. The use provided a way of circumventing these feudal incidents by allowing the owner of land to place his legal title in a number of persons who could be replaced periodically, thereby ensuring that the land always had a living legal owner, and that legal title would never be inherited or left without an heir. In the meantime, the true beneficiary of the land was able to continue in occupation of the land, and to reap the benefits of the land, so that the use can be regarded as an early 'tax avoidance scheme'. The use was also subject to the complaint that, because of it, '*no man can know his title to any land with certainty*'.[38] In response to such issues, Henry VIII enacted the Statute of Uses 1536.[39] The effect of the statute was to transfer legal title to the beneficiary of the use (the so-called *cestui que use*), thereby bringing the use to an end or 'executing' it. By means of this statute, Henry VIII executed a great many uses, but as with his wives, he did not execute them all. The only uses that were executed were those concerning land for which there was a single named beneficiary, usually the original absolute owner, and which therefore represented a sham device for avoiding feudal incidents. Eventually, of course, inventive legal draftsmen found creative ways of avoiding the statute entirely. One such was a 'use upon a use' in the generic form: 'to A to the use of B to the use of C'. It was supposed that the effect of the Statute of Uses would be to execute the first use by vesting legal title in B, who would then be obliged to hold it to the use of the intended beneficiary, C. This supposition was confirmed by the routine enforcement in Chancery of B's conscientious obligation to observe the use upon a use in favour of C. In the seventeenth century, the Chancellors '*began to enforce the use upon a use as a trust*',[40] leading one commentator to observe that a '*bastardly use*' had started up '*by the true name which the use had at first—which is 'trust and confidence*'.[41] By the end of the seventeenth century, it was not even necessary for A to be mentioned at all: Chancery was content to enforce a form of conveyance 'to B, unto and to the use ↵ of B, in trust for C'.[42] The interest of C, the *cestui que trust* (the 'beneficiary' as we would now call them), could only be defeated by a bona fide purchaser of the legal estate for value without notice of C's interest, and so the modern form of equitable ownership[43] and the modern trust were conceived.[44]

p. 12

1.3.1.2 The crucial historical step that created equitable property under a trust

Professor Lionel Smith has suggested that the most significant and surprising step in the evolution of proprietary aspect of the trust was not that the trust (originally the 'use') came to bind strangers who wrongfully accepted a transfer of the asset from the trustee (originally 'feoffee to use'), but that Chancery decided that it should bind those who had *innocently* inherited the asset from the trustee. According to Professor Smith, the decision of the Chancery judges to enforce such a burden was the decision that

transformed a personal right over a thing in the hands of the trustee[45] into a proprietary right in the thing[46] binding on the whole world (other than innocent purchasers without notice). The crux of Smith's argument is that the step to recognizing the beneficiary's proprietary right was made possible because their personal right already had a *negative* proprietary aspect, in so far as every person in the world was already under an obligation not to commit any wrongful interference with the beneficiary's personal right against the trustee.[47]

1.3.2 Economic efficiency as the origin of equitable property?

It is something of a mystery how and why a mere personal right against a particular defendant, based upon his possession of a thing, and the corresponding burden on his conscience, became a property right in the thing enforceable by the beneficiary against the whole world, apart from the bona fide purchaser for value of a legal estate without notice. The answer may lie in the pragmatism and economy of the equity judges. As we know, there never were many equity judges in the old Court of Chancery, and those few were hopelessly overburdened with work. Suppose that, instead of having to examine the conscience of each alleged trustee or recipient of trust property on a case-by-case basis, they had been able to protect trust beneficiaries generally by recognizing them to have proprietary rights in the trust assets. The Chancery judges achieved precisely this by adopting a version of the relatively efficient common law system of proprietary entitlement. Thus 'efficiency' rather than any deeper principle best explains how the Chancery trust evolved from a purely personal relation into a property relation. Crucially, though, equity's idea of property was not as extensive as that of the common law; ↵ hence the recognition of the superiority of legal title by means of the 'bona fide purchaser' exception (according to which, the proprietary title of a mere 'equitable owner' does not bind the good faith purchaser of legal title who paid value and had no notice of the equitable interest). The maxim says that 'equity follows the law', but if equitable property had been made coextensive with legal title, equity would have undermined the common law of property. It is because equitable property is inherently limited that it cannot properly be said to confer true rights '*in rem*',[48] although that term (somewhat unhelpfully adopted from the Roman law, which has no concept of division between legal and equitable property)[49] is still often used as shorthand to describe a beneficiary's proprietary right in the trust property.

p. 13

1.3.3 Trust exists when legal ownership of an asset is not identical to equitable ownership

Whatever the explanation for how and why the beneficiary's mere personal right against a particular defendant became a property right in the trust asset, it is now clear that when the absolute owner of an asset transfers it to trustees on express trusts for certain beneficiaries, the effect is to vest legal title to the property in the trustees and equitable title (also called equitable or beneficial 'ownership') in the beneficiaries. Today we can say that when a trust is created the ownership of the asset is split between the formal legal title (in the case of land, this will be held by the person identified on the deed or register as having title to the legal estate), and beneficial title in equity (this will belong to the trust beneficiary and in the case of land they will have the right to reside in the land or to receive rents from it). Likewise, splitting legal from equitable ownership creates a trust. A trust therefore comprises two owners—with distinct legal

and equitable ownership—of the same asset at the same time. It is sometimes claimed that legal and equitable title in an asset can be split without creating a trust, but such claims are never convincing. For example, Lord Browne-Wilkinson has stated (obiter) that this is the case where a mortgagor (borrower) has fully discharged their mortgage debt.[50] In fact, under a modern mortgage relationship the borrower and the lender own different assets, rather than separate legal and equitable titles in the same asset. The borrower owns the land subject to the mortgage charge, and the lender owns a quite different asset—the mortgage charge itself.[51]

If it is hard to picture a single asset being owned in two distinct ways at once. It might help to picture it as a banana (hence the cover image of this book). If I show you an unpeeled banana you will say 'that's a banana' even though you can only see the inedible ↵ outside form of the banana. If I show you a peeled banana you will still say 'that's a banana' even though you are now looking at the very different edible inside. Under a trust, legal and equitable ownership exist likewise in an invisible split between non-beneficial form and beneficial substance. The banana skin of legal title is how the trust presents itself to the outside world when the trust needs to enter contracts and so forth, but the legal powers conferred on the trustee by the banana skin of legal title give the trustee no share of the benefit in the assets. On the contrary, the banana skin of legal title imposes personal responsibilities that the trustee is liable to slip up on.[52] As for division of the beneficial ownership, this—somewhat like the beneficial part of a banana—can be sliced in different ways and can be divided between many beneficiaries. Thus the equitable proprietary interest may be divided sequentially, as in the case of a trust 'for A for life and B in remainder' or contemporaneously, as in the case of a trust 'for A and B equally' or both sequentially and contemporaneously, as in a trust 'for A and B for life, and for C and D in remainder'. Legal title cannot be divided. Trustees hold their legal title not in shares but as joint tenants (in much the same way that two people might own a joint bank account by holding it in their joint names). Every trustee owns the entirety of legal title to the trust assets so that when one trustee dies there is no personal share of the legal title that can be left to the trustees' next-of-kin. Rather, the surviving trustee or trustees continue to hold the entire legal title by 'right of survivorship'.

p. 14

Of course, when we use the language of equitable 'title' and equitable 'ownership', this is just convenient shorthand to describe the most distinctive and potent feature of the beneficiaries' interest under a trust, which is its proprietary status, i.e. its ability to bind third parties other than the trustee. One must not be confused by shared proprietary language into thinking that equitable property is the mirror-image of legal title.[53] Equity's operation and proprietary effect is, as we will see, very different to that of law.

1.4 Conceptual foundations of equity and trust

The purpose of this section is to introduce the modern concepts of equity and trust; with a special focus on how equity functions in relation to the common law.

1.4.1 Equity distinguished from common law

Equity is a body of principles, doctrines, and rules, developed originally by the old Court of Chancery in constructive competition with the rules, doctrines, and principles of the common law courts, but now applied, since the Judicature Acts 1873–5, by the unified Supreme Court of England and Wales. The abolition of the old Court of Chancery and courts of common law has led to the suggestion that the distinction between p. 15 ↵ law and equity is now obsolete; that the two systems of law have become 'fused'. The better view is that the common law and equity remain distinct, but mutually dependent, aspects of law.[54] They '*are working in different ways towards the same ends, and it is therefore as wrong to assert the independence of one from the other as it is to assert that there is no difference between them*'.[55]

1.4.1.1 Metaphors for equity's relationship to common law

The difficulty with asserting the independence of law from equity is inherent in Professor Ashburner's attempt to describe equity and law as different streams running in the same channel without mingling their waters.[56] The metaphor does not work: it is no more sensible to suppose that two streams of water could be kept separate within the same channel than to suppose that the same judges sitting in the same courts could dispense two truly independent forms of justice. However, the assertion that equity and the common law are identical is equally inaccurate. Lord Diplock was correct to observe, in *United Scientific Holdings Ltd v. Burnley Borough Council*, that the waters of Ashburner's confluent streams have mingled,[57] but his Lordship was guilty of the so-called 'fusion fallacy' if he meant to suggest that there is no longer any substantial functional difference between equity and the common law. The authors of the Australian textbook *Meagher, Gummow, and Lehane on Equity* seized on this, describing his Lordships' analysis as '*the low water mark of modern English jurisprudence*'.[58] Professor Peter Birks took a more charitable view of Lord Diplock's intent, observing (with yet another aquatic metaphor) that:

> it is dangerous, not to say absurd, almost 120 years after the Judicature Acts, to persist in habits of thought calculated to submerge and conceal one or other half of our law.[59]

This brings us back to our initial view, surely the correct one, that the common law and equity are mutually dependent aspects of all law:

> Neither law nor equity is now stifled by its origin and the fact that both are administered by one Court has inevitably meant that each has borrowed from the other in furthering the harmonious development of the law as a whole.[60]

What metaphor should we use to describe the complementary but distinct functions of law and equity? The p. 16 possibilities are endless, but the point is that we will need ↵ a metaphor of some sort to describe the subtle relationship between them. If you don't believe me consider the opening words of a 2014 decision of the UK Supreme Court in which the relationship of law to equity was a central question. Lord Toulson began his speech with the observation that '140 years after the Judicature Act 1873, the stitching together of equity and the common law continues to cause problems at the seams'.[61] I prefer the metaphor of the horse and rider.[62] The common law is the horse and equity is the rider. The common law is the main

muscle of the justice system and does most of the work. The common law walks straight on, following the rigid rule, and the rider is content to sit back in the saddle where the law maintains a just course. 'Equity follows the law', as the maxim puts it.[63] Only where the straight course of the law is going to cause harm in a particular case, as when a person is about to be unconscionably trampled by the weight of the law, does equity intervene. Equity, the rider, steers the law in such a case. As another maxim puts it: 'where Law and Equity conflict, equity prevails'.[64] As for the question of the metaphor—perhaps the best way to seek to appreciate the relationship between equity and law is to try to invent your own.

1.4.1.2 The functional distinction between equity and law

The distinction between equity and law must be understood at the level of function, not form. The eminent legal historian, Professor J. H. Baker, has observed that:

> [i]f, for reasons of history, equity had become the law peculiar to the Court of Chancery, nevertheless in broad theory equity was an approach to justice which gave more weight than did the law to particular circumstances and hard cases.[65]

It is because equity is functionally distinct from the common law that both approaches to law survived the Judicature Acts, which brought about the physical and jurisdictional unification of the old Court of Chancery with the courts of common law.

The function of the common law is to establish rules to govern the generality of cases; the effect of those rules is to recognize that certain persons will acquire certain legal rights and powers in certain circumstances. Legal rules allow the holders of legal rights and powers to exercise them in the confidence that they are entitled to do so. But '*in some cases it is necessary to leave the words of the Law, and follow that* [which] *Reason and Justice requireth, and to that intent Equity is ordained; that is to say, to temper and mitigate the rigor of the Law*'.[66] The function of equity is to restrain or restrict the exercise of legal rights and powers in particular cases, whenever it would be unconscionable for them to be exercised to the full.

p. 17

1.4.1.3 Unconscionability

'Unconscionable' cannot be defined in the abstract; it can only be understood in connection to the facts of particular cases.[67] The question is always whether it would be unconscionable to exercise *this* legal right or power in *this* factual context.[68] Unconscionable conduct '*is not by itself sufficient to found liability*'.[69] The most that can be said of a general nature is that unconscionability '*will commonly involve the use of or insistence upon legal entitlement to take advantage of another's special vulnerability or misadventure … in a way that is unreasonable or oppressive to an extent that affronts ordinary minimum standards of fair dealing*'.[70]

Even the legal rights that accompany the legal title to a fee simple absolute in possession, the most complete form of ownership known to land law, are not beyond equity's jurisdiction to restrain an unconscionable abuse. So, for example, if the legal owner of the fee simple title to land invites a stranger to build a house upon it, having raised in that stranger a legitimate expectation that the stranger will thereby acquire a beneficial interest in the land, and the stranger duly builds the house in reliance on the assurance

given by the legal owner, equity restrains the legal owner from asserting the absolute quality of his legal title. The legal owner will not be able to exercise his usual legal right to evict trespassers in order to evict the stranger.[71]

It may be true, as Millett LJ suggested in *Jones & Sons (a firm) v. Jones*,[72] that the common law itself has sometimes had regard for considerations of conscience, but if the common law has ever prevented a person from placing unconscionable reliance upon a legal rule or right or power, it was then performing an equitable function.

公平并不总是认为一方以"尖锐"或甚至压迫和不公平的方式利用合法权利是不道德的

Equity does not always consider it to be unconscionable for a party to take advantage of a legal right in a way that is 'sharp', or even oppressive and unfair. So, for example, in *Liverpool Marine Credit Co v. Hunter*,[73] the defendants (the owners of a ship subject to a mortgage) deliberately sent the ship to Louisiana knowing that Louisiana did not recognize mortgages of ships. The plaintiff argued that the defendant had committed a positive fraud. The judge held that the defendant owed no duty to the plaintiff:

> I do not ... see how Equity could properly interfere to restrain the actions which, however oppressive ... arose out of remedies employed by the plaintiff for the recovery of his debt, of which the law entitled him to avail himself.[74]

It is not uncommon for a judge to express disapproval for the way in which a party has exercised a legal right or power. and to conclude, nevertheless, that equity is powerless ↵ to do anything about it.[75] The court will even *insist upon* morally dubious conduct, such as breaking a non-contractual agreement entered into by a trustee, if the financial interests of the beneficiaries require it.[76]

p. 18

1.4.1.4 Equity should not be elevated to the status of generally applicable rule

The essential point is that equity is meant to regulate and supplement the general law; it is not meant to undermine the general law with exceptions. In short, 'equity follows the law'.[77] Having said that, the former Chief Justice of Australia, Sir Anthony Mason, is not alone in taking a different view. He has suggested that:

> by providing for the administration of the two systems of law by one supreme court and by prescribing the paramountcy of equity, the Judicature Acts freed equity from its position on the coat-tails of the common law and positioned it for advances beyond its old frontiers.[78]

From this starting point, his Lordship contends that the neighbourhood principle in the common law tort of negligence might conceivably have been developed in equity, rather than in the common law tort of negligence.[79] This writer would respectfully disagree. It is not, and should not be, equity's task to determine which forms of social behaviour ought to give rise to justiciable obligations; equity should be concerned with one form of wrongful behaviour, and one only; namely, the unconscionable abuse of rights and powers established by the common law. Equity follows the law, '*coat-tails*' and all. The distinction between common law and equity is predicated on an immutable distinction between their functions. The function of the common law is to lay down rules for society, generally—to regulate society one might say

—whereas the function of equity is to regulate the common law.[80] Remove this distinction and one entirely removes any meaningful distinction between common law and equity, leaving one with no distinction apart from that based on the bland historical observation that equity is the form of law developed in the old Court of Chancery prior to the Judicature Acts.

1.4.1.5 Unconscionability, morality, and social values

CHRIS: 'We took a contract.'

VIN: 'It's not the kind any court would enforce.'

CHRIS: 'That's just the kind you gotta keep.'

This dialogue between the characters played by Yul Brynner and Steve McQueen in the MGM classic, *The Magnificent Seven*,[81] expresses the fundamental incompetence of courts to deal with matters of private moral conscience and social obligation. Sir Anthony Mason made substantially the same point when sitting as the Chief Justice of Australia:

p. 19

> The breaking of a promise, without more, is morally reprehensible, but not unconscionable in the sense that equity will necessarily prevent its occurrence or remedy the consequent loss.[82]

Equity's concern with unconscionability is a concern for a limited branch of immoral or antisocial behaviour—namely, the immoral or antisocial abuse of legal rights. Attempts to use equity as a vehicle for the promotion of morality and social justice must be sensitive to this limitation or they will fail. Thus Margaret Halliwell is right to observe that '*conscience, as represented by the body of law we all know as equity, contributes a key "morality" to the legal system in general*'[83] and that equity '*operates as an anti-legal element* via *the judicial modification of existing rules of law by reference to current conditions and circumstances*'[84] (or '*matches established principle to the demands of social change*'[85] as one senior judge put it). But Halliwell overestimates equity's functional capacity when she suggests that, in the context of trust law, equity '*prescribes optimum standards of behaviour in social relationships of trust*'.[86] Equity doubtless exemplifies or demonstrates a legal form of trusting through its enforcement of the trust, and the legal paradigm might influence social perceptions. In fact, a person who wants to entrust assets to another will often rely on an equitable trust (the sort a court will enforce) precisely because mere moral trust will not guarantee performance of the obligation.[87] However, it is going too far to suggest that equity 'prescribes' standards of social behaviour. If that is a legal function, it is a function of the general common law and ideally in its legislative form.

Caution must be exercised before notions of social and moral wrongdoing are introduced into the interpretation of unconscionability. Judges can do no more than promote *their own* 'reasonable', 'objective' ideas of morality and society.[88] It was observed long ago that even when a judge is conscious that he has no right to '*Dictate according to his Will and Pleasure*', he will nevertheless look to his own moral ideas and perceptions of society, to what he perceives to be 'that infallible Monitor within his own Breast'.[89]

One should not lose sight of the relatively narrow sphere within which unconscionability and equity operate. Equity is singularly uncritical of a vast range of behaviour that might be regarded as immoral or
p. 20 antisocial. No court of law, not even the old Court ↵ of Chancery, is in any moral sense a court of conscience.[90] (See Figure 1.1). In 1594, a leading scholar of English law made the following telling observation:

> There is a difference between Equitie and Clemencie: for Equitie is always most firmly knit to the evil of the Law which way soever it bends, whether to clemency, or to severity.[91]

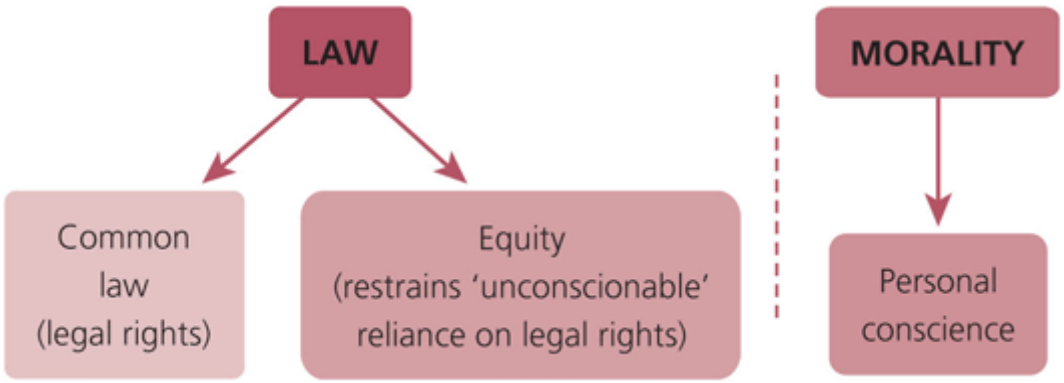

Figure 1.1 Equity is not morality

And it is a myth to suppose that courts of law (and equity) are concerned with social justice per se. If 99 per cent of all wealth were in the hands of 1 per cent of the population, this would be a great social inequality, but equity would have nothing to say on the matter. Equity, especially in the context of trusts law, is concerned with supporting or vindicating private rights to property; it is not its business to reassess the political correctness or moral 'righteousness' of wealth.[92] This perspective chimes with those who argue convincingly that Chancery's language and concepts serve financial capital above all things and have become a fetish of the capitalist project.[93]

1.4.1.6 Equity hardens into rights

It has been suggested that one way of describing the difference between common law and equity is to say that common law seeks to achieve justice in the generality of cases, through certainty, whereas equity seeks to prevent injustice occurring when general legal rules are applied in individual cases. There is some truth in that, but equity judges are pragmatic, and efficiency determines that they should respect precedents laid down by other equity judges. Over time, this means that awarding equitable relief in certain common types of case tends to become routine. In this way, equity's concern for justice in the particular case grows into a wider concern to achieve a common law that is just. Hence the rhetorical question posed by Lord Eldon, the Lord Chancellor, in *Muckleston v. Brown*:[94]

> Is the court to feel for individuals and to oblige persons to discover in particular cases and not to feel for the whole of its own system and compel a discovery of frauds that go to the root of its whole system?[95]

p. 21 When, over time, equitable relief is routinely granted to restrain unconscionability in certain types of case, it might make sense to say that the equitable claimant is *entitled* to his relief and therefore that he has an equitable *right* to a remedy. This tendency of equity to become rule-bound over time has been called the '*the decadence of equity*'.[96] One case in which this has clearly occurred is the recognition that trust beneficiaries have equitable proprietary rights in, or 'equitable title' to, trust property. Nowadays, with the possible exception of the constructive trust,[97] there really isn't very much equity in the trust, at least not that flexible equity which is functionally distinct from the common law. Hence Bernard Rudden's suggestion that the traditional distinction between law and equity '*provides only an historical and not a rational account of the trust*'.[98]

1.4.2 Trust contrasted with absolute ownership

The trust is a unique way of owning property under which assets are held by a trustee for the benefit of another person, or for certain purposes, in accordance with special equitable obligations. The trust should be contrasted with absolute ownership, because a person who is solely and absolutely entitled to an asset is entitled to the exclusive and unrestricted right to possess, use, and otherwise enjoy the asset for his *own* benefit (he is even at liberty to abuse and destroy it), subject only to limitations imposed by statute as a matter of public policy[99] and limitations imposed to take account of the rights of others to enjoy the assets they own absolutely.[100]

If the absolute owner of this book wishes to make an absolute gift of it to one of next year's students, he or she simply has to transfer possession of the book in circumstances which indicate that an absolute gift is intended. Words such as 'happy birthday', 'this is for you', or 'I don't need this any more' will suffice. Transferring possession of an ordinary moveable asset is sufficient to transfer legal title,[101] and the transfer of legal title is presumed to confer with it the exclusive right to the beneficial use and enjoyment of the asset in equity. In contrast, transfer of legal title to a transferee to hold on trust for someone else has the quite different effect of constituting the transferee a trustee of the property for the designated beneficiary. A related distinction between an absolute gift and a trust is that it is possible to create a trust for the benefit of beneficiaries who, because of some legal incapacity such as infancy or mental illness, are unable to take an absolute interest in the asset in question. Land, for example, cannot be held absolutely by any person under the age of 18, but it is possible to transfer land to a competent adult to hold on trust for an infant. It is even possible to create a trust for the benefit of persons who have not yet been born: there is nothing to prevent an 18-year-old from establishing a trust for his grandchildren. Nevertheless, for all of their differences, absolute gifts and trusts do have some significant features in common. Indeed, a transfer

p. 22 on trust can be seen as a special type of gift: not an absolute, immediate and outright gift but '*a gift projected on the plane of time and, meanwhile, in need of management*'.[102] Gifts on trust and absolute gifts have important features in common, not least the fact that transfer of benefit is irrevocable under both. If, having read it from cover to cover, the owner of this book declares that she holds it on trust for her friend, the generous student is now a trustee and is no longer entitled to use the book for her own benefit. To use

the language of the banana image referred to earlier, the student making the donation has, by declaring a trust, split their formal legal title to the book from the beneficial ownership of the book. They still hold the legal skin, but not absolutely. They hold their legal title, with all the legal rights and powers that come with it, on trust for their friend who now owns the equitable substance.

1.4.3 Trust contrasted with contract

It has been suggested that the trust is '*functionally indistinguishable from the modern third-party-beneficiary contract*',[103] in other words that the trust is merely a form of contract between the settlor and the trustees entered into for the benefit of the third-party beneficiary. Langbein argues that:

> even in the law of donative transfers the trust functions as a deal, in the sense that what trust law does is to enforce the trustee's promise to the settlor to carry out the terms of the donative transfer.[104]

It is true that a trust usually originates in the consensual disposition of the trust property by the settlor in favour of a trustee who consents to receive it,[105] but such consent need not be contractual. It is certainly hard to see the contractual 'deal' where the court appoints a trustee[106] or where the trust comes into effect on the testator's death.[107] (The reader should note that the term 'settlor' is used to describe the creator of a trust—called an *inter vivos* trust—that comes into effect during the settlor's lifetime, whereas the term 'testator' or 'testatrix' is used to describe the creator, male and female respectively, of a trust—called a 'testamentary' trust—that comes into effect when the creator of the trust dies.)

There are a number of reasons why it does not make sense to regard the arrangement entered into between settlor and trustee as being contractual in nature. For one thing, whereas a contracting party always has the right to enforce his contractual rights against the other party, the power of enforcing trusts lies with the beneficiaries of the trust, so the settlor of a trust has no power to enforce it against the trustees unless he ↵ happens to nominate himself to be a beneficiary (or becomes a beneficiary under a resulting trust[108]). Generally, the settlor of a trust drops out of the picture just as the donor of an absolute gift drops out of the picture when he has made his gift.

p. 23

1.4.3.1 Contracts confer personal rights, trusts confer property rights

The most significant distinction between a trust and a contract, even a contract entered into for the benefit of a third party, is the nature of the beneficiary's rights. In some ways, the beneficiary's rights resemble contractual rights, in that they are enforceable against the trustee personally, but the beneficiary's right is not merely a personal right against the trustee; it is also a proprietary right in the asset itself. This is the feature that most clearly distinguishes the English trust from concepts that perform similar functions in other jurisdictions.[109] The significance of the proprietary status of the beneficiary's right under the trust is essentially twofold. First, the beneficiary's right under the trust can be enforced not only against the trustee, but also against the trustee's successors in title. This is useful where the trustee has wrongfully transferred trust property into the hands of a third party and is particularly useful if a trustee dies or becomes insolvent. At no time does the beneficiary's property become part of the trustee's personal estate.

When a trustee dies, the beneficiary's proprietary right in the trust assets is binding on the trustee's personal representatives[110] and when a trustee becomes insolvent the beneficiary's right is binding on the 'trustee in bankruptcy', or, if the trustee was corporate (as many trustees are), on its successor in insolvency.[111] Second, the proprietary status of the beneficiary's right under the trust means that the beneficiary is free to alienate the property wholly (by selling it or giving it away, for example) or partially (by leasing it or subjecting it to a charge such as a mortgage, for example). It is even possible for a beneficiary to declare a trust of her equitable interest, thereby creating a sub-trust.[112]

1.5 Creating a trust—preliminary points

The deliberate or 'express' creation of trusts, and the necessary prerequisites to constituting an express trust completely, are discussed in depth in Chapters 3 and 4. Suffice to say here that the simplest way to create a trust is for the absolute owner of an asset to declare that he holds the asset for the benefit, at least in part, of someone else. He might say: 'See this book I am holding? I declare that I hold it with immediate effect on trust for my room-mate.' Such a 'declaration of trust' will make the original absolute owner a trustee for his room-mate. The room-mate will be the sole beneficial owner or 'equitable' owner of the book and, as such, she is entitled, assuming that she is a competent adult, to insist that the book be transferred to her. Of course, a trust may have several ↵ trustees[113] and several beneficiaries. Under a traditional settlement trust, the trustee would typically hold the asset on trust for one beneficiary (often the settlor's spouse), for the duration of that beneficiary's life, and for another beneficiary (typically the settlor's child), after the first has died. The first beneficiary is called the 'life beneficiary' or 'life tenant' and has an immediate interest in the benefit of the asset, which means that she can possess it, take income from it, and so on, whereas the second beneficiary is called the 'remainderman' or 'remainder beneficiary', because she is primarily interested in what remains of the trust assets when the first beneficiary has died. The interest of the life beneficiary is said to vest 'in possession' the moment the trust is created, whereas the interest of the remainder beneficiary merely vests 'in interest' at that point and does not vest in possession until the death of the life beneficiary. Naturally, there may be several life tenants, followed by several remaindermen. No remainderman will be entitled to an interest in possession until all the life tenants have died. Settlement trusts of this sort are typically created by will.

p. 24

1.6 Bringing trusts to an end—preliminary points

The processes of terminating and varying trusts are discussed in depth in Chapter 9. Suffice to say here that a private (as opposed to a charitable or public) trust will eventually terminate and the assets will be owned absolutely once again. If a trust is established 'for A for life and B in remainder', B will become the absolute owner of the asset when A dies. After A's death and until the trustee actually transfers legal title into B's name, there will still be a form of trust, but, assuming that B is an adult, the trustee's only duty under such a 'bare trust' is to transfer the trust property to B and, in the meantime, to account to B for any income arising from the trust property.[114] By extension of this principle, once A has died B can demand the trust property even if her interest is subject to a contingency that has not yet been met. The trust might have been established 'for A for life and B in remainder *when B reaches the age of 30*'. If, when A dies, B is a competent adult and is solely entitled to the benefit of the trust property, she is entitled to demand that the

trustee transfer the property to her even though she has not yet reached the age of 30. This rule was laid down in the case of *Saunders v. Vautier*.[115] By extension of the so-called 'rule in *Saunders v. Vautier*', it is now established that a trust can be terminated even if there is more than one beneficiary interested in it,[116] as would be the case if a trust were established 'for my nephews'. If all the nephews are of full age and between them absolutely entitled to the trust property, they can agree to bring the trust to an end.

p. 25

1.7 What types of asset can be held on trust?

A trust asset does not have to be a tangible thing such as a plot of land or a book; it can be an intangible asset such as a debt, a trademark, the right to the proceeds of an insurance policy, and even cryptocurrency.[117] Of course, even in the case of a book or a plot of land, the true asset is not the thing itself, but the intangible right to benefit from the use and enjoyment of the thing. Usually, the trust 'property'—or the 'estate' as it is sometimes referred to in the case of traditional settlement trusts—consists of a number of different assets that together make up a 'fund'. Eventually, the trust fund must be distributed to the beneficiaries, or the proceeds of sale of the fund must be distributed, but, in the meantime, the fund must be managed and invested.[118]

1.8 Equitable rights do not bind a bona fide purchaser for value without notice

An equitable proprietary right under a trust does not 'bind the whole world' in quite the same way that legal title is binding on the whole world or in quite the same way that *in rem*[119] property rights in a civil (Roman law-based) jurisdiction are binding on the whole world ('*erga omnes*').[120] The most important limitation on the binding nature of equitable proprietary rights under a trust is the fact that a bona fide ('good faith') purchaser for value of a legal estate will not be bound by any beneficial interest under a trust affecting the vendor's legal title unless the purchaser had, or ought reasonably to have acquired, notice of the equitable interest.[121] ('Notice' is not quite the same thing as 'knowledge', but that distinction can wait until later.)[122] The bona fide purchaser for value of a legal estate without notice is sometimes referred to as 'equity's darling',[123] because a beneficiary's equitable interest under a trust cannot be enforced against him. In fact, the bona fide purchaser for value without notice is, in reality, the darling of the common law, because the reason equity does not enforce its property rights against the innocent purchaser of legal title without notice is that it would undermine the common law rules for acquiring 'good title' to property if it did.[124]

p. 26

1.9 Trusts in civil jurisdictions

Civil jurisdictions, which base their law upon the model of the Roman civil law code, have little difficulty with the idea of a trust of property, provided that it does not involve the distinction, quite alien to the Civilian mind, between legal and equitable title:[125]

> Dans le trust, le droit de propriété est éclaté suivant une division inconnue des systèmes civilistes.[126]

So, for example, Scotland has a Civilian system of law and a form of trust, but in the Scottish trust, the beneficiary's right is purely personal against the trustee.[127] The Scottish solution to the problem of insolvency is to treat the beneficiary's property as a 'special patrimony' in the hands of the trustee, so it does not become available to the trustee's creditors in the event of his insolvency.[128] As the Scottish example shows, the tendency of Civil jurisdictions is to employ distinct laws to fulfil different functions, each of which is performed automatically by the English trust.[129] Germany provides another example. The German idea of holding property faithfully for another (*Treuhänderschaft*)[130] belongs to a quite different branch of law to the German idea of special property set aside for a particular purpose (*Sondervermögen*). There are some Civilian devices that might be said to be true hybrids of property and obligation—the Swiss *substitution fideicommissaire* is a candidate[131]—but there is none that involves a genuine ↵ split in ownership of the subject matter of the obligation. The result has been a recognition in certain Civil jurisdictions that the commercial utility of the English trust has given common law systems a commercial advantage over their Civilian counterparts.[132] Ironically, it is in Italy—source of the original Civil law—that the need for a form of trust has been most keenly appreciated. One result is a growing body of Italian scholarship on trusts that has sought to express the English idea in Civilian terms.[133] The benefit to English scholars is a perceptive and critical insight into ideas that we thought we understood: 'What knows he of English trusts that only English trusts knows' is the new version of an old motto.

p. 27

1.10 The paradox of property and obligation

> 'It is fair to say that the concept of equitable proprietary rights is in some respects paradoxical' —Lord Neuberger[134]

The trust is a hybrid of property and obligations. Paul Matthews has observed that, if the beneficiary's personal rights against the trustee had remained purely personal, the law of trusts might today lie firmly within the law of obligations.[135] The fact is, though, that the trust operates as property and obligation simultaneously. The result is paradoxical: what began as a human relationship of trust established in connection with certain property, usually land, has become, in effect, a propertized form of relationship. Today, '*the trust … is the same as the land*'.[136] James Penner reaches a similar conclusion:

> The trustee is not a person with whom [the beneficiaries] have any personal relationship of any substance—he is the personification of the trust agreement, and it is that which really settles how the gift is to work. He is like a human instrument.[137]

The frequent lack of any meaningful personal relationship between trustee and beneficiary produces another paradox: that the trust relationship becomes a relationship of mistrust instead of trust, social trust having been replaced by trust mediated through the terms of the trust and the general law. No theory can perfectly encapsulate and explain the long and complex history of the trust, and any theory designed to control ↵ its future development should strive to appreciate, rather than to resolve, the paradox of property and obligation which gives the trust its theoretical and practical dynamism. The way to understand the trust is not to force it into the preconceived categories of 'obligation' and 'property' that are much cherished in the codes of Civil lawyers,[138] but to accept that it is something of a law unto itself. In

p. 28

short, to understand the trust, one must appreciate that it does not make perfect sense. After all, the true value of the trust, like the true value of a case-based common law system of law, is to be found, not in conformity to logical absolutes, but in flexibility and functional utility: '[T]*he life of the law has not been logic; it has been experience.*'[139] In this pragmatic vein, Arden LJ has acknowledged that 'a trust is a matter which is difficult to define, but which essentially imposes an obligation to deal with property in a particular way on behalf of another person'.[140] What that 'particular way' might be continues to yield a range of doctrinal theories. Richard Nolan argues that beneficiaries have a right to require performance from their trustees and a distinct type of right to prevent interference by third parties.[141] Peter Jaffey argues that '[t]he law of trusts is not strictly speaking, a hybrid or a blend', but his suggestion that 'the beneficiary's equitable interest consists of distinct personal and property rights' inevitably yields to his conclusion that 'for the complete explanation of the trust both dimensions are required'.[142] Despite a recent academic trend of questioning the accuracy of the 'split property' metaphor for the relationship between legal and equitable title under a trust, it is hard to deny the metaphor's ongoing practical efficacy. The metaphor of the trust as divided or split ownership might not be perfect, but it remains the most efficient and persuasive way to elucidate most of, and the most significant of, the trust's practical effects —in particular the trust's proprietary effect in insolvency. It was in this pragmatic spirit that Lord Mance, commenting on the subtle shading between Jaffey's rejection of the 'divided property' analysis and Jaffey's acceptance that equitable and legal aspects of the trust have 'distinct properties', has stated that '*[i]t is unnecessary on this appeal to examine these slightly differing analyses further. What is clear, on any analysis, is that, where a trust exists, the legal and beneficial interests are distinct, and what affects the former does not necessarily affect the latter*'.[143] To appreciate the full practical picture of the trust one has to appreciate that it is the product of a complex history, even if strict unitary notions of property find it shocking. This might be a romantic point of view, but sometimes two as one makes for a perfect marriage. As a poem attributed to Shakespeare says: 'Property was thus appalled,/That the self was not the same;/ Single nature's double name/Neither two nor one was called'.[144]

p. 29

1.11 Perspectives on the study of trusts and equity

As we progress through the remaining chapters of this book, it will be useful to bear in mind that judicial decisions can be viewed from a number of different perspectives, each of which provides a unique critical insight into the subject matter of our study. Four perspectives that are always worth bearing in mind are precedent, principle, policy, and pragmatism.[145] These four factors influence judicial decisions when Parliament has not determined the issue through statute. Parliament is the fifth factor and the most powerful—it is literally the 'quintessence' of legal authority.

1.11.1 Precedent and principle

When a judge is presented with a legal problem for which statute has made no binding provision, the judge is bound to look first to judicial precedent for a solution. If it appears to the judge (rightly or wrongly) that there is no clear solution in precedent, the judge should, in theory, seek to produce a solution that is

consistent with principles derived from precedent. Maxims, such as 'equity follows the law',[146] are one species of principle, but other principles may commend themselves to judges even though they have not acquired the status of a maxim.

1.11.2 Policy

It is important to appreciate, however, that judges do not reach their decisions in a logical vacuum: judges are very often acutely aware of the impact that their decisions might have upon the wider community or society at large. They are therefore sensitive to what we might call 'policy considerations', or considerations based on the public interest. One such policy is the need to maintain certainty in dealings with property rights;[147] another is the need to maintain certainty in commercial transactions; yet another is the policy underlying the Insolvency Acts (the statutes that determine how the claims of various interested persons should be balanced fairly in the event of a party's insolvency).

Policies often conflict and, as with principles, there is no easy way to determine when one policy should take priority over another. The express trust has always had to tread carefully between the policy that a beneficial owner of property should be permitted to use and dispose of his or her property as he or she thinks fit, and the policy that imperative conditions attached to dispositions (sometimes from beyond the grave) must be obeyed even to the diminution of a beneficial owner's freedom.[148] In short, the freedoms of
p. 30 the present owner of property must be balanced against the like freedoms of ↵ past owners of the same property. Trusts, express and non-express, have also had to tread carefully between the policy that the trustee should be under an obligation to hold the trust property for the benefit of the beneficiaries and the policy that the trustees' personal creditors should be entitled to enforce their legitimate claims against any assets in the trustees' hands.

1.11.3 Pragmatism

Judges are concerned to achieve a solution that works in practice and which will not bring the entire judicial process into disrepute. The judicial process is nothing if not pragmatic. We will see that in some cases—often the hardest and therefore the cutting-edge cases—pragmatic considerations appear to override precedent and principle. As Lord Goff of Chieveley has observed:

> It is a truism that, in deciding a question of law in any particular case, the courts are much influenced by considerations of practical justice, and especially by the results which would flow from the recognition of a particular claim on the facts of the case before the court.[149]

Precedent, principle, policy, and pragmatism are blended subtly in the mind of the judge. Nevertheless, the task of students in this, as indeed in any area of law, is to attempt to discern the true basis for decisions and to distil, from the subtle blend, the fractions of precedent, principles, policy, and pragmatism in the purest form they can. It is the task of the textbook writer to help in this distillation process, to which end, the reader will hopefully see that a special attempt has been made throughout this book to bring all four

perspectives to bear upon the subject. We will discover that decisions that seem to be unprecedented and to make no principled sense can sometimes make sense from the perspective of policy, or as an attempt to find a pragmatic workable solution to a novel problem.

Test your understanding of this chapter with essay questions and problem scenarios <https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-1-essay-questions-and-problem-scenarios?options=showName> and accompanying answer guidance <https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-1-guide-answers-to-the-essay-questions-and-problem-scenarios?options=showName>. Further improve your approach by reading general guidance on answering essay questions and problem scenarios <https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-general-guidance-on-answering-essay-questions-problem-scenarios?options=showName>.

Use the flashcard glossary <https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-flashcard-glossary?options=showName> to help consolidate your knowledge of key terms.

1.12 Further reading

In addition to the following print sources, expand your learning with web links <https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-1-web-links?options=showName> to further reading on this topic.

BAKER, J. H., 'The Court of Chancery and Equity' in *An Introduction to English Legal History*, 4th edn (London: Butterworths, 2002) ch. 6.

p. 31 ↵ BURROWS, A. S., *Fusing Common Law and Equity: Remedies, Restitution and Reform—Hochelaga Lectures 2001* (Hong Kong: Sweet & Maxwell Asia, 2002).

DICKENS, C., *Bleak House* (1852–3).

DOUPE, M. and SALTER, M., 'Concealing the past? Questioning textbook interpretations of the history of equity and trusts' (2000) 22 Liverpool LR 253.

DUGGAN, A. J., 'Is equity efficient?' (1997) 113 LQR 601.

GOODHART, W., QC, 'Trust law for the twenty-first century' (1996) 10(2) TLI 38.

GRETTON, G. L., 'Trusts without equity' (2000) 49 ICLQ 599.

HALLIWELL, M., *Equity and Good Conscience in a Contemporary Context*, 2nd edn (London: Old Bailey, 2004).

HARDING, M., 'Manifesting trust' (2009) 29(2) OJLS 245.

HAYTON, D., 'The Future of the Anglo-Saxon Trust in the Age of Transparency' (2015) 29(1) *Trusts Law International* 30–8.

HERIAN R., *Capitalism and the Equity Fetish: Desire, Property, Justice* (London: Palgrave Macmillan, 2021).

HOLDSWORTH, W. S., 'Relation of the equity administered by the common law judges to the equity administered by the Chancellor' (1916) 26 Yale LJ 1.

HOLMES, O. W., 'Early English equity' (1885) 1 LQR 162.

KLINCK, D., *Conscience, Equity and the Court of Chancery in Early Modern England* (London: Ashgate, 2010).

LAWRENCE, P. and REDER, M., 'Equity and the Paris Agreement: legal and philosophical perspectives' (2019) 31(3) J Env L 511–31.

MAITLAND, F. W., 'Uses and trusts' in *Equity: A Course of Lectures* (revd by J. Brunyate) (Cambridge: Cambridge University Press, 1936) 23–42.

MATTHEWS, P., 'The new trust: obligations without rights?' in *Trends in Contemporary Trust Law* (Oxford: Clarendon Press, 1996).

MCGHEE, J. (ed.), *Snell's Equity*, 33rd edn (London: Sweet & Maxwell/Thomson Reuters, 2017).

MILLETT, P., 'Equity—the road ahead' (1995) 9(2) TLI 35.

PAWLOWSKI, M., 'Is equity past the age of childbearing?' (2016) 22(8) Trusts & Trustees 892–7.

POUND, R., 'The decadence of equity' (1905) 5 Columbia LR 20.

TUCKER, L., LE POIDEVIN, N., BRIGHTWELL, J. (eds), *Lewin on Trusts*, 19th edn (London: Sweet & Maxwell/Thomson Reuters, 2015).

TUDSBERY, F., 'Equity and the common law' (1913) 29 LQR 154.

VINOGRADOFF, P., 'Reason and conscience in sixteenth century jurisprudence' (1908) 96 LQR 373.

WATT, G., *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart Publishing, 2009).

WORTHINGTON, S., *Equity* (Oxford: Clarendon Press, 2003).

Notes

[1] R. Langworth (ed), *Churchill by Himself* (New York: Public Affairs, 2008) 576.

[2] Psalm 98:9: 'he cometh to judge the earth: with righteousness shall he judge the world, and the people with equity' (The Bible, King James version).

[3] See, further, G. Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart Publishing, 2009).

[4] See A. Harding, *The Law Courts of Medieval England* (London: Allen & Unwin, 1973).

[5] It is arguable that '[t]he geneology of modern Standard English goes back to Chancery, not Chaucer' (D. Crystal, *The Cambridge Encyclopedia of the English Language* (Cambridge: Cambridge University Press, 1995) at 41).

[6] F. W. Hardman, 'Equity and the Latin side of Chancery' (1952) 68 LQR 481.

[7] A miscellany of laws laid down *c.* 1100–35.

[8] *Leges Henrici Primi* 10.1 (L. J. Downer, ed. and trans.) (Oxford: Oxford University Press, 1972) at 108. See J. Hudson, *The Formation of the English Common Law* (London: Longman, 1996) at 29.

[9] Hudson, *The Formation of the English Common Law* at 136.

[10] William Shakespeare *The Merchant of Venice* (4.1.191–4) Stanley Wells et al (eds), *The Oxford Shakespeare: The Complete Works* (Second Edition) (Oxford: Oxford University Press, 2005).

[11] Macnair argues that unconscionability is the remnant of a test of conscience that was devised, not as a matter of principle, but as a practical supplement to the shortcomings of common law processes of proof and evidence (Mike Macnair, 'Equity and Conscience' (2007) 27(4) OJLS 659).

[12] Even today, breach of an injunction is a contempt of court that may be punished by imprisonment. See, for example, *Patel v. Patel* [1988] 2 FLR 179. A further example is *Shalson v. Russo* [2003] EWHC 1637 (Ch), in which a fraudster was imprisoned for two years for breaching an equitable injunction that had frozen his assets.

[13] (1615) 1 Ch Rep 1.

[14] Pronounced 'Cook'.

[15] (1615) 1 Ch Rep 1 at 6, 7.

[16] See Chapter 16.

[17] Lord Chancellor, 1675–82.

[18] Sir W. Holdsworth, *History of English Law* (London: Methuen, 1966) vol. VI at 547.

[19] See Chapter 6.

[20] W. Lambarde, quoted in S. F. C. Milsom, *Historical Foundations of the Common Law*, 2nd edn (London: Butterworths, 1981) at 94.

[21] *Table Talk of John Selden* (ed. F. Pollock, 1927) at 43.

[22] R P. Meagher, W. M. C. Gummow, and J. R. F. Lehane, *Equity, Doctrines and Remedies*, 2nd edn (Sydney: Butterworths, 1984) at 68–9.

[23] *Cowcher v. Cowcher* [1972] 1 All ER 943, *per* Bagnall J at 948. See, generally, M Pawlowski, 'Is equity past the age of childbearing?' (2016) 22(8) Trusts & Trustees 892–7.

[24] *Keech v. Sandford* (1726) Sel Cas Ch 61.

[25] See Chapter 10.

[26] J. H. Langbein, 'Questioning the trust law duty of loyalty: sole interest or best interest?' (2005) 114 Yale LJ 929, 987–90.

[27] G. R. V. Radcliffe and G. Cross, *The English Legal System*, 3rd edn (London: Butterworths, 1954) at 153, n. 1. Under the Constitutional Reform Act 2005, the Vice-Chancellor is renamed 'Chancellor of the High Court'.

[28] (1852) 1 El & Bl 81.

[29] Ibid. at 89. *Cestui que trust* (pronounced 'settee key trust') is an archaic description of a trust beneficiary. Translated from the medieval French, it means 'the one who trusts'.

[30] The novel, which was published in serialized form during 1852 and 1853, was an historical critique of Chancery procedures, which had already been, in large part, reformed by the time the novel was written. See W. S. Holdsworth, *Charles Dickens as a Legal Historian* (New Haven: Yale University Press, 1928).

[31] See, generally, N. G. Jones, 'Uses, trusts and a path to privity' (1997) 56(1) CLJ 175.

[32] Holdsworth, *Charles Dickens as a Legal Historian* (New Haven: Yale University Press, 1928) vol. IV at 415.

[33] For an interesting argument that the crusaders might have brought the idea of the trust back from the crusades see M. M. Gaudiosi, 'The influence of the Islamic law of Waqf on the development of the trust in England: the case of Merton College' (1988) 136 U Pa L Rev 1231.

[34] P. Vinogradoff, 'Reason and conscience in the fifteenth and sixteenth centuries' (1908) 29 LQR 373, 379.

[35] *Taillour v. Medwe* (1320) Year Books of Edward II, 14 Edward II (London: Selden Society, 1988) vol. 104 at 39 and xi.

[36] A W. B. Simpson, *An Introduction to the History of the Land Law*, 2nd edn (Oxford: Clarendon Press, 1986), esp. ch. 8 on 'Uses and the statute' at 175.

[37] Ibid. at 170.

[38] T. Audley, *Reading on Uses* (1526) (a reading on 4 Hen. 7, *c.* 17) cited in J. H. Baker and S. F. C. Milsom, *Sources of English Legal History: Private Law to 1750* (London: Butterworths, 1986) at 103.

[39] 27 Hen. 8, *c.*10.

[40] Sir W. Holdsworth, *History of English Law*, 2nd edn (London: Methuen, 1937) vol. VI at 641.

[41] H. Sherfield, *Reading on Wills* (1623) at 32. (This publication is a commentary on the Statute of Wills 1540, Hen. 8, *c.* 1.) See, generally, M. Lupoi, 'Trust and Confidence' (2009) 125 LQR 253.

[42] A W. B. Simpson, *An Introduction to the History of the Land Law*, 2nd edn (Oxford: Clarendon Press, 1986) at 187–8. J. H. Baker and S. F. C. Milsom, *Sources of English Legal History: Private Law to 1750* (London: Butterworths, 1986) at 125–6.

[43] *Sinclair v. Brougham* [1914] AC 398, HL, *per* Lord Parker of Waddington at 441–2.

[44] Sir W. Holdsworth, *A History of English Law*, 3rd edn, vol. IV (London: Methuen, Sweet & Maxwell, 1945) at 433.

[45] A *jus in personam ad rem*.

[46] A *jus in rem*.

[47] L. Smith, *Transfers in Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing, 2002) at 123.

[48] 'In the thing'.

[49] D. Johnston, *The Roman Law of Trusts* (Oxford: Clarendon Press, 1988).

[50] This is one of the examples given by Lord Browne-Wilkinson, speaking obiter in *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 at 707A when he opined that '*[e]ven in cases where the whole beneficial interest is vested in B and the bare legal interest is in A, A is not necessarily a trustee*'. Writing extra-judicially, Lord Millett has cast doubt on this statement: 'a trust exists whenever the legal title is in one party and the equitable title in another' ('Restitution and constructive trusts' (1998) 114 LQR 399 at 403).

[51] See 2.6.8.

[52] See Chapter 13.

[53] This warning is reiterated in James Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 LQR 66.

[54] The term 'common law' is here used in contrast with 'equity', but it should be borne in mind that 'common law' and 'equity' are both parts of the common law, as that term is used to distinguish the English precedent-based system of law from code-based or 'civil' systems of law derived from the Roman model. To confuse matters still further, the term 'common law' can be used in a third sense, to describe English case law in contradistinction to English statutory law.

[55] G. R. V. Radcliffe and G. Cross, *The English Legal System*, 3rd edn (London: Butterworths, 1954) at 116.

[56] Professor Ashburner, *Principles of Equity*, 1st edn (1902) at 23.

[57] *United Scientific Holdings Ltd v. Burnley Borough Council* [1978] AC 904, *per* Lord Diplock at 924–5.

[58] R. P. Meagher, W. M. C. Gummow, and J. R. F. Lehane, *Equity, Doctrines and Remedies*, 2nd edn (Sydney: Butterworths, 1984) at xi.

[59] *Civil Wrongs: A New World, The Butterworth Lectures, 1990–91* (London: Butterworths, 1992) at 55.

[60] *Elders Pastoral Ltd v. Bank of New Zealand* [1989] 2 NZLR 180, *per* Somer J at 193.

[61] *AIB Group (UK) plc v. Mark Redler and Co Solicitors* [2014] UKSC 58; [2014] 3 WLR 1367, Supreme Court, para. [1].

[62] G. Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart Publishing, 2009) 103.

[63] Discussed later in this chapter; and see Chapter 16.

[64] Mentioned earlier in this chapter; and see Chapter 16.

[65] 'The Court of Chancery and Equity' in *An Introduction to English Legal History*, 4th edn (London: Butterworths, 2002) at 132–3.

[66] Christopher St German, *Dialogue in English between a Doctor of Divinity and a Student in the Laws of England etc* (London: Treverys, 1530) (ch. XVI).

[67] *National Westminster Bank plc v. Morgan* [1985] AC 686, *per* Lord Scarman at 709.

[68] *Royal Brunei v. Tan* [1995] 3 WLR 64, *per* Lord Nicholls at 76B–D.

[69] Sir Nicolas Browne-Wilkinson, Presidential Address of the President of the Holdsworth Club (Holdsworth Club, University of Birmingham, 1991) at 7.

[70] *The Commonwealth v. Verwayen* [1990] 170 CLR 394, *per* Deane J at 441.

[71] See 'Proprietary estoppel', discussed in Chapter 8. See, generally, E. Cooke, *The Modern Law of Estoppel* (Oxford: Oxford University Press, 2000).

[72] [1996] 3 WLR 703 at 710E, CA ('It would … be a mistake to suppose that the common law courts disregarded considerations of conscience').

[73] (1868) LR 3 Ch App at 479.

[74] Ibid. at 487.

[75] See, for example, *Re McArdle* [1951] 1 Ch 669 at 676 (in Chapter 4).

[76] *Buttle v. Saunders* [1950] 2 All ER 193.

[77] See Chapter 16.

[78] 'The place of equity and equitable remedies in the contemporary common law world' (1994) 110 LQR 238 at 239.

[79] Ibid.

[80] 'The daily relations of man and man are governed by the common law, tempered but slightly with equity': Sir Owen Dixon, *Jesting Pilate*, at 13 (cited by The Hon. Mr Justice G A. Kennedy, 'Equity in a commercial context', in *Equity and Commercial Relationships* (P. Finn, ed.) (Sydney: The Law Book Co, 1987) at 1).

[81] John Sturges (dir.) Metro Goldwyn Meyer, 1960.

[82] *The Commonwealth v. Verwayen* (1990) 170 CLR 394 at 416.

[83] *Equity and Good Conscience in a Contemporary Context* (London: Old Bailey Press, 1997) at 1–2.

[84] Ibid. at 5.

[85] Waite LJ in *Midland Bank v. Cooke* [1995] 2 FLR 915 at 927D.

[86] *Equity and Good Conscience in a Contemporary Context* (London: Old Bailey Press, 1997) at 142.

[87] For example, *Ullah v. Ullah* [2013] EWHC 2296 (Ch).

[88] See, generally, G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (Berlin: de Gruyter, 1988).

[89] R. Francis, *Maxims of Equity* (Fleet Street: J. Stephens, 1727).

[90] *Re Telescriptor Syndicate* [1903] 2 Ch 174, *per* Buckley J at 196.

[91] W. West, *Symboleography* (London, 1594) section 28.

[92] Resort to equity in colonial contexts can be read by a similar critical light. See, for example, Kwame Akuffo, 'A subaltern theory of equity' (2016) 24(1) African Journal of International and Comparative Law 12–44.

[93] R. Herian, *Capitalism and the Equity Fetish: Desire, Property, Justice* (London: Palgrave Macmillan, 2021).

[94] (1801) 6 Ves Jun 52.

[95] Ibid. at 69.

[96] R. Pound, 'The decadence of equity' (1905) 5 Columbia LR 20.

[97] See Chapter 8.

[98] 'Things as things and things as wealth' (1994) 14 OJLS 81 at 89.

[99] Such as the rule that a landowner is not entitled to oil and coal discovered under his land.

[100] Such as the common law tort of nuisance, which prevents the owner of land from using his land in a manner detrimental to his neighbour's land.

[101] See Chapter 4.

[102] F. H. Lawson and B. Rudden, *The Law of Property*, 2nd edn (Oxford: Clarendon Press, 1982) at 55; Rudden (1981) 44 Mod LR 610 (book review of *Gifts and Promises* by J. P. Dawson).

[103] J. H. Langbein, 'Contractarian basis of the law of trusts' (1995) 105 Yale LJ 625 at 627. The quotation is followed by the even bolder assertion that '[t]rusts are contracts'.

[104] 'The secret life of the trust as an instrument of commerce' (1997) 107 Yale LJ 165 at 185.

[105] Professor Kevin Gray has observed that every trust 'has its origins in some arrangement of consent or assent': 'Property in thin air' (1991) 50(2) CLJ 252 at 302.

[106] See Chapter 8.

[107] *Re Duke of Norfolk's Settlement Trust* [1981] 3 All ER 220, *per* Fox LJ at 228h–j.

[108] See Chapter 5.

[109] Compare, for instance, the French law of *La Fiducie* (see later).

[110] Officers, such as executors and administrators, who administer a deceased person's estate.

[111] The 'administrator', the 'administrative receiver', the 'liquidator', or the 'provisional liquidator', as the case may be (Insolvency Act 1986, ss. 234–6).

[112] See Chapter 6.

[113] Subject to certain limits, see Chapter 11.

[114] It has been said that 'bare trusts do not differ in kind from other trusts' but are merely 'trusts that have a narrow function' (Robert Flannigan, 'Resolving the status of the bare trust' (2019) 83(3) Conv 207–26).

[115] (1841) 10 LJ Ch 354.

[116] *Re Smith* [1928] Ch 915.

[117] *Wang v. Darby* [2021] EWHC 3054 (Comm).

[118] See Chapter 12.

[119] See earlier.

[120] *Webb v. Webb* [1994] 3 WLR 801, ECJ, *per* Mr Advocate-General Darmon at 816B.

[121] *Pilcher v. Rawlins* (1872) LR 7 Ch App 259, *per* Sir W. M. James LJ at 268–9.

[122] See Chapter 15.

[123] See, for example, *Griggs Group Ltd v. Evans* [2005] EWCA Civ 11, CA, *per* Jacob LJ at para. [7].

[124] J. Hackney, *Understanding Equity and Trusts* (London: Fontana, 1987).

[125] See D. Hayton, 'When is a trust not a trust?' (1992) 1 J Int Planning 3. The European Court of Justice has held that a beneficiary's interest under a trust is not a 'real' right: *Webb v. Webb* [1994] ECR I-1717.

[126] 'In the trust, the right to property is split in a manner unknown to Civil systems of law.' J.-P. Béraudo, *Les Trusts Anglo-Saxons et Le Droit Français* (Paris: LGDA, 1992) at 8, para. 18. As of 19 February 2007, France has at last admitted a form of trust into its Civil Code, albeit one that does not contain the defining feature of the English trust, i.e. division of the property right. The new law 'de la fiducie' is inserted as 'titre XIV' in book III of the Code Civil (Loi no 2007–211 du 19 février 2007 instituant la fiducie). See François Barrière, 'The security *fiducie* in French law' in *The Worlds of The Trust* (Lionel Smith, ed.) (Cambridge: Cambridge University Press, 2013). For discussion of the recognition of foreign trusts in France, see Alain Cornec, 'Trusts in France: to be and not to be' (2022) 1 International Family Law 35–39.

[127] Belgium now plans to follow the French example (draft proposal of Bk 5 on the Law of Obligations, art 5.8, Cabinet du Ministre de la Justice, 30 March 2018; discussed in Rafael Ibarra Garza, 'A prospective analysis of the proposed Belgian trust' (2018) 24(9) *Trusts & Trustees* 849–55). See, generally, F. H. Lawson, *A Common Lawyer Looks at the Civil Law* (Ann Arbor: University of Michigan Law School, 1953) at 201.

[128] A situation that is unlikely to change despite current Scottish Law Commission proposals to reform the Scottish law of trusts as enshrined in the Trusts (Scotland) Act 1921. See, generally, Y. Evans, 'Farewell, trusty old law: new Trusts Bill on the horizon' (2022) 26(2) Edinburgh Law Review 257–262.

[129] W. A. Wilson and A. G. M. Duncan, *Trusts, Trustees and Executors*, 2nd edn (Edinburgh: W. Green & Sons, 1995) paras 1–42 to 1–51; *Sharp v. Thompson*, 1995 SLT 837, 857; cf. at 867–8. A. Honoré, 'Obstacles to the reception of trust law? The examples of South Africa and Scotland' in *Aequitas, and Equity: Equity in Civil Law and Mixed Jurisdictions* (A. M. Rabello, ed.) (Jerusalem: Hebrew University of Jerusalem, Sacher Institute, 1997) 793 at 812.

[130] See, generally, M. Lupoi, *Trusts: A Comparative Study* (Cambridge: Cambridge University Press, 2000).

[131] For an historical account, see Oliver Wendell Holmes, 'Early English equity' (1885) 1 LQR 162 and R. H. Helmholz and R. Zimmerman (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin: Duncker & Humblot, 1998).

[132] A. Dyer and H. van Loon, 'Report on trusts and analogous institutions', in *Actes et Documents of 15th Session of Hague Conference on Trusts*, vol. II, para. 177.

[133] One of the latest civil jurisdiction adoptions of a version of the Anglo-Saxon trust is the Czech Republic's adoption in 2014 of a trust based on the Quebec model (see the 2016 special issue 24(4) of the *European Review of Private Law*, edited by LuboŠ Tichý).

[134] See M. Lupoi, *Trusts: A Comparative Study* (Cambridge: Cambridge University Press, 2000). Following Lupoi's ideas, Italian law now permits parties in Italy to adopt common law rules in order to recognize trusts in Italy (so called trusts *interni*). See M Graziadei, 'Recognition of common law trusts in civil law jurisdictions under the Hague Trusts Convention with particular regard to the Italian experience', in *Reimagining the Trust: Trusts in Civil Law* (L. Smith, ed.) (Cambridge: Cambridge University Press, 2012) at 29–82.

[135] *FHR European Ventures LLP v. Cedar Capital Partners LLC* [2014] UKSC 45; [2015] AC 250, Supreme Court, at para. [32].

[136] P. Matthews, 'The new trust: obligations without rights?', in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) at 1.

[137] Lord Mansfield in *Burgess v. Wheale* (1759) 1 W Bl 123 at 162.

[138] *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) at 125.

[138] George Gretton tries to sidestep the problem by attempting to place the trust within the civil law of persons, arguing that '[t]he trust itself is not a person. A special patrimony never is. But a special patrimony operates very like a person, as an autonomous, quasi-personal, fund' ('Trusts without equity' (2000) 49 ICLQ 599 at 614).

[139] Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown & Co, 1923), quoted by Lord MacMillan in *Read v. J. Lyons & Co Ltd* [1947] AC 156, HL.

[140] *Staden v. Jones* [2008] EWCA Civ 936, *per* Arden LJ at para. [25].

[141] R. C. Nolan, 'Equitable property' (2006) 122 LQR 232.

[142] P. Jaffey, 'Explaining the trust' (2015) 131 LQR 377–401, 394.

[143] *Akers v. Samba Financial Group* [2017] UKSC 6 at para. [51].

[144] The 'Phoenix and Turtle etc' (*c.*1601). See G. Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart Publishing, 2009) at 124–5.

[145] These four perspectives, which were offered in the first edition of this book, were expressly adopted by the Court of Appeal of Singapore in *Lau Siew Kim v. Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at para. [32].

[146] The list of major equitable maxims is considered in depth in Chapter 16.

[147] See Chapter 8 on the institutional nature of constructive trusts.

[148] R. Cotterrell, 'Trusting in law: legal and moral concepts of trust' (1993) 46(2) CLP 75.

[149] *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 at 685; 2 WLR 802 at 810G. His Lordship has made the same observation extra-judicially: Sir Robert Goff, 'Judge, jurist and legislature' [1987] Denning LJ 79 at 80. See, generally, R. Cotterrell, *The Politics of Jurisprudence* (London: Butterworths, 1989); P. S. Atiyah, *Pragmatism and Theory in English Law, The Hamlyn Lectures* (London, 1987); P. S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (Oxford: Oxford University Press, 1978).