Theoretical Inquiries in Law

Volume 10, *Number* 2 *July* 2009 *Article* 4

HISTORIES OF LEGAL TRANSPLANTATIONS

Transplantation and Mutation in Anglo-American Trust Law

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Transplantation and Mutation in Anglo-American Trust Law

Joshua Getzler[*]

In the early nineteenth century, authoritative treatise writers such as James Kent and Joseph Story represented Anglo-American trust law as a seamless web. But the transplantation of trust law from England to America was not a simple process of adherence. Rather, American courts and legislatures came to discard fundamental English trust doctrines. Restraints on anticipation and on alienation were embraced, and in key state jurisdictions bare trusts were abolished, or else displaced from the core of trust law. Irreducible settlor power over beneficiaries and the strong protection of beneficiaries from creditors under spendthrift trusts were two strikingly original American creations, which flowed from these basic doctrinal choices. The changes made to American trust doctrine yield a paradox for the legal, social and economic historian, namely that republican America ended up with a more dynastic property law, more wedded to dead hand control and more hostile to commercial creditors, than did aristocratic England with its unreformed system of common law and equity rooted in the feudal property system. The American abandonment of free alienability of beneficial interests and the corresponding reduction of the beneficiary's powers over trust assets may have been rooted in the volatility of credit in America and the desire of the wealthy to escape from the pressures of the market, though disparities between jurisdictions remain to be explained.

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I. SUGDEN VERSUS HUMPHREYS

By 1826 Edward Sugden, the son of a hairdresser and wigmaker, had risen to become a bencher of Lincoln's Inn, and a coming man of the Tory party. He was counted the leading authority on trusts and estates in all England. Now, in the full flush of success and with a busy and lucrative conveyancing practice, he found time to write strenuously against fellow-barrister James Humphreys' ideas for the rationalization of English property law in the form of a modern code. Humphreys aimed at remaking property law in plain language and so reducing the monopoly power of the lawyers and the costly uncertainties of the law. His code treated land, movables and intangibles including trusts as a unified whole, and so reconceptualized landed property not as estates that conferred status and power, but as freely alienable and chargeable assets in a liberal economy.[1]

Humphreys, like many jurists in both England and America, made the free alienability of property a central plank of legal policy. This policy had two arms. First, land was to be freely assignable at the will of the parties in order to perfect the market for real assets; this involved simplification of the possible interests in land, including removal of substantive restraints on alienation such as entails and remote vestings (perpetuities), together with improved procedures for the proof and transfer of title. Secondly, there was to be liberal assignment of realty and personalty in order to perfect credit markets. Protection of creditor rights required effective attachment of property for debt and ready realization of securities such as mortgages, charges and liens; such enforcement ultimately helped asset-holders by improving access to loan capital. The two arms of the policy were distinct because in credit transactions the transfer of property was not a freely undertaken primary transfer as with a plain sale, but rather a coerced transfer taking effect as a secondary remedy to uphold other primary contractual rights.

Under the early common law, obligations could be attached to a debtor's personalty by seizure of chattels,[2] and from 1285 through writ of *elegit* a

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1 JAMES HUMPHREYS, OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY, WITH THE OUTLINES OF A CODE (London, J. Murray 1826); Bernard Rudden, *A Code Too Soon: The 1826 Property Code of James Humphreys*, *in* ESSAYS IN MEMORY OF PROFESSOR F.H. LAWSON 101 (P. Wallington & R.M. Merkin eds., 1986).

2 Writ of *fi. fa.* against a debtor, or distraint against a tenant, with *capias* or arrest of the person as a further sanction: JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 64-67, 237-38 (4th ed. 2002).

debtor's landed wealth could be seized or its income appropriated by a judgment creditor. Formal contractual obligations such as covenants were held to bind heirs and executors, and so debt obligations could follow land as it descended into new hands, though enforcement procedures were complex. By the fourteenth century, however, it had become possible to place property behind the screen of a trust and so immunize both realty and personalty from attachment — a mischief noted by the courts and Parliament, but only fitfully combated.[3] English law across the centuries seems to have run contradictory policies simultaneously: land holders could use limitations and trusts to entail their property and proof it from judgments, but the law also created actions facilitating the assignment of real interests and allowing recovery of debt against land and trusts. English law was thus a mixture of pro-creditor and pro-debtor norms, of rules for free assignment and rules allowing property to be removed from the operation of the market. Moreover, the law in operation was so opaque, so lacking in clear, rational rules, that it was difficult and costly to work out which policy applied and how to operate the machinery in any given circumstance. This opacity and expense was the mischief that Humphreys' work addressed.[4]

Humphreys had clearly touched a nerve. Sugden vehemently defended the beauty and utility of the old system of titles. One of his demonstrations of the fitness of the unreformed English law was its desirability to strangers:

> It is a singular circumstance, that whilst we complain of our law of property, and are so anxious for new laws, the infant state of America is daily adopting ours, with scarcely any variation, and particularly those portions of the operation of which we appear to complain so loudly.[5]

Not all observers were so hostile to codification as Sugden. Jeremy Bentham wrote with rapt approval of Humphreys' scheme — possibly a further factor ensuring its failure. Certainly the legal profession rallied behind Sugden to

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3 *See* Langedon v. Stratton (Ct. of the City of London, Aug. 5, 1374); and Statute of Mortmain, 50 Edw. 3, c. 6 (1376) (attacking transfers to uses to defraud creditors), *noted in* BAKER, *supra* note 2, at 249 n.6.

4 The story continued into the twentieth century, where many of Humphreys' ideas won acceptance. *See* J. STUART ANDERSON, LAWYERS AND THE MAKING OF ENGLISH LAND LAW 1832-1940 (1992); AVNER OFFER, PROPERTY AND POLITICS 1870-1914: LANDOWNERSHIP, LAW, IDEOLOGY AND URBAN DEVELOPMENT IN ENGLAND (1981).

5 EDWARD B. SUGDEN (LATE LORD ST LEONARDS), LETTERS TO JAMES HUMPHREYS 76 (3d ed. 1826), *cited in* GREGORY ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 413-14 (1997).

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oppose codification. Sugden, who could be spiteful, even acted to stymie Humphreys' promotion at the bar, as an object lesson to putative reformist lawyers.[6]

The confrontation between Humphreys and Sugden was yet another episode in the long-running contest between Philosophical Radicalism and the vested interests of the Bar and Bench; but there was an unexpected aftermath to this particular squabble. Humphreys' ideas were welcomed by James Kent, just then embarking on the publication of his famous *Commentaries on American Law*,[7] and were also a strong influence on New York's property codification of 1828-30,[8] undermining Sugden's claim that the unreconstructed English law was an attractive export item. And it is at this juncture that we come to an interesting problem in the history of legal transplantation.

II. NEW YORK, PENNSYLVANIA, AND THE BIRTH OF THE SPENDTHRIFT TRUST

The New York reformers, perhaps inadvertently, made a transformative change to English property law in their scheme of codification. They pursued the liberal commodification of real property championed by Humphreys, but they also acted to insulate family property from the full extent of market discipline, producing a trust law that expressly allowed the support of vulnerable or subordinate family members — women, children, the infirm — without granting the beneficiaries liberal dispositive powers to assign or charge the estate capital. In formulating the New York Revised Statutes of 1828, the legislators claimed that the simplification of trusts, and in particular the abolition of bare or "dry" trusts over land as screens for beneficial interests, would enhance creditor protection. The special trusts protecting the vulnerable were a controlled anomaly that would help a narrow class, but would not impinge on the bulk of market transactions. There were good precedents in English law for raising trusts for married women's and infant's property that created inalienable interests proof from creditors and yet allowed persons of less than full capacity to enjoy property; the New York statute in a sense restated these institutions in simple

6 Bernard Rudden, *James Humphreys*, *in* NEW DICTIONARY OF NATIONAL BIOGRAPHY (2004).

7 JAMES KENT, COMMENTARIES ON AMERICAN LAW (New York, O. Halstead 1826-30) (4 vols.).

8 Rudden, *supra* note 1.

legislative language.[9] But in a further 1830 revision the reformers allowed such trusts restraining alienation to be created for all manner of beneficiaries, not simply presumptively vulnerable women and minors, and this helped open the floodgates to inalienable trust property that could pay income even whilst the capital was judgment-proofed against creditors. This device became known as the "spendthrift trust."[10]

A parallel source of the spendthrift trust derived from early Pennsylvania decisions allowing protection of beneficial property against creditors, a development that seemed to have emerged from a quirk of procedure, namely because there was originally no court of equity in Pennsylvania capable of recognizing trusts. Beneficiaries in Pennsylvania thus enjoyed the informal protection of trusts controlled by non-debtor trustee-owners, much as the English cestui que use had enjoyed informal protection from legal debts in the fourteenth and fifteenth centuries. The earliest Pennsylvania courts of common law simply did not take cognizance of the methods by which English law had come to recognize beneficial interests under trusts as substantial estates that could be attached for debt. Moreover, early American courts (and not just in Pennsylvania) did not always grasp the complex procedural machinery from *elegit* to implied declaration of trusts for creditors necessary to attach judgment debts to real and beneficial property, and mistook procedural fictions as bars to recovery intrinsic to the nature of the property.[11]

These mistakes–cum–innovations of early American courts and legislatures turned out to be a wedge allowing the emergence of a modern American property law embracing dynasticism, dead-hand controls, perpetuities, judgment-proofing of assets, and creation of fanciful purpose trusts, all policies reined in or banned in English law.[12] It is true that

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9 With the legislative recognition in England of married women's property later in the century, Parliament finally abolished inalienable trusts for women's property, which had served as one of the templates and justifications of the American spendthrift trust; the new English married women's estates carved out by statute were fully alienable.

10 ALEXANDER, *supra* note 5, at 122-26; ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS 46-60 (2d ed. 1947).

11 GRISWOLD, *supra* note 10, at 21-25. Later Pennsylvanian courts did manage to combine law and equity successfully within the one curial jurisdiction, *see* ANTONY LAUSSAT, AN ESSAY ON EQUITY IN PENNSYLVANIA 42 (Philadelphia, Robert Desilver 1826); this caught up with the long-established fused practice of the Massachusetts courts, described in Phyllis Maloney Johnson, No Adequate Remedy at Law: Equity in Massachusetts 1692-1877 (June 2, 2008) (unpublished manuscript, on file with author).

12 A key sociological study, emphasizing tax and investment pressures as well as

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English law acknowledged the utility of protective trusts allowing income to a vulnerable beneficiary whilst proofing the capital against creditors, but the income could not be paid once the beneficiary was insolvent; at that stage the trust would be revoked, and any payments would have to be made under a separate discretionary trust. The New York reformers, by adopting the simpler technique of the spendthrift trust paying income to a beneficiary regardless of his state of solvency, had unwittingly created a new departure in trust doctrine, one that used the nomenclature of English law and that emulated some of its functions, but which was in effect a new breed. The key change was that rights to income no longer equated to powers to direct and alienate capital, and hence control by the settlor and enforcement of settlor's purposes were elevated above the powers, rights and duties of trustee and beneficiary.

Protective trusts today play a minor role in England; it may be that their complexity and requirements of active management discourage widespread use.[13] By contrast, spendthrift trusts and similar asset protection devices command huge amounts of capital in modern America. Some of the American states are now breaking new ground by allowing owners to self-declare trusts to prevent alienation of their own capital, a further radical innovation that nineteenth-century lawyers could not admit. So powerful has the phenomenon of asset protection become that commentators have now begun to speak of a "death of liability" in America, a transformation achieved largely through the unique qualities of American trust law.[14] Defenders of the spendthrift trust claim that creditor lobbies would have acted against the device had it

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insolvency protection, is Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547 (1964). Historical insights are offered in benchmark studies by Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985); Gregory Alexander, *The Transformation of Trusts as a Legal Category*, 5 LAW & HIST. REV. 303 (1987); ALEXANDER, *supra* note 5, at 97-184, 277-302. Modern American doctrines are charted in JESSE DUKIMINIER ET AL., WILLS, TRUSTS, AND ESTATES (7th ed. 2005). Measurement of the flow of trust funds into states competing to favor settlor interests is adduced in Robert H. Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005). For criticism of modern toleration of perpetuities, see Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705 (1990). English constraint on settlor purposes continues in the face of offshore pressures. *See* Paul Matthews, *From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust*, *in* EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR RING-FENCED FUNDS 203 (David J. Hayton ed., 2002); *cf.* David J. Hayton, *Developing the Obligation Characteristic of the Trust*, 117 L.Q.R. 96 (2001); Patrick Parkinson, *Reconceptualising the Express Trust*, 61 C.L.J. 657 (2002).

13 GRAHAM MOFFAT WITH GERRY BEAN & JOHN DEWAR, TRUSTS 258-80 (4th ed. 2005).

14 Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1 (1996); James J. White,

unreasonably disturbed priorities, distorted credit markets and injured their business interests; but this is a counterfactual claim that is impossible to measure.[15]

This Article investigates the doctrinal foundations of English trust law regarding alienability by beneficiaries and rights of creditors against beneficial property through the nineteenth century. It then reviews the changes made to those foundations fashioned in America, as a case study in common-law transplants and the divergence of common-law systems. The apparent paradox — that there should be a marked commitment to free alienability in feudal and aristocratic England, and a toleration of dynasticism and restraint of alienation in capitalistic and republican America — motivates the inquiry.

III. LEGAL TRANSPLANT OR LEGAL MISTAKE?

It may assume too much to see the mutated American trust as a "legal transplantation." As well to speak of mistaken transcription, of partial and misfired emulation, or simple adaptation. Does the concept of a legal transplant from England to America, from parent common-law system to offspring, hold any promise as an explanatory framework? The transplant metaphor may be admitted, but with caution. English law and equity formed the basis of the early American private law, and American courts treated English precedents and juristic writings as authoritative in day-to-day practice. American treatise writers such as Kent and Story devoted the bulk of their literary efforts to restating English law, with Kent taking a special interest in adapting that law for importation into America, a necessary exercise since there were no general codifications of the common law at that time.[16] This is not to forget institutional works such as Blackstone's *Commentaries*, a text heavily relied upon by American lawyers, but this

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Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability, 107 YALE L.J. 1363 (1998).

15 Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685 (2006); Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1 (1995).

16 KENT, *supra* note 7; JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA (Boston, Hilliard, Gray & Co. 1835-36). Kent constantly returns to recent American experiments in legislation and case-law, whilst Story is almost entirely English in his focus, broaching detailed Chancery doctrine of scant use or interest in the United States. Arguably Story's was polite rather than practical learning, establishing intellectual hegemony rather than policy leadership. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 160 *passim* (1977), detects in Story's work on equitable regulation of

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polished learning hardly provided a basis for practical lawyering.[17] In the new American societies the old English rules could hardly be transcribed and applied without variance. With large tracts of land available for settlement and the absence of a hereditary class of gentry, American lawmakers early did away with fee tails and other such settlement devices characteristic of English aristocracy, with Virginia abolishing entails in 1776, New York in 1782. There were also good professional reasons to depart from English praxis. The American legal system after the Revolution no longer had close contact with the London Bar and Inns of Court. Distanced from the collective consciousness of English lawmaking and tradition, and lacking their own dense professional communities, American lawyers, highly instrumental in their approach to legal rules, took the law in books and put their own practical twist into the doctrine they read there, departing both from English tradition and English reformism in so doing.[18] One should not register great surprise at the ensuing disjunctions, save that in our case of alienability of property under trusts the doctrinal break was so sharp. The American changes uprooted some of the basic ideas of English trusts jurisprudence; and, as a consequence, the reformers have been accused of both technical mistake and ideologically-motivated experimentation.[19]

How are we to understand botched legal transplants? Alan Watson has made famous the notion that lawyers typically change the law by mistaken transcription, losing the context in which the original rules were cultivated and hence changing their substance. The genes of doctrine are subtly misunderstood and corrupted, leading to fresh mutations of the legal

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contract an assault on the idea of natural-law just prices in early equity, but this has been doubted: A.W. BRIAN SIMPSON, *The Horwitz Thesis and the History of Contracts*, *in* LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 203 (1987). One may detect a classicizing formalist ideology in Story's massive and impractical productions of legal science, tacitly projecting the message that law is an autonomous discourse or abstract art divorced from politics.

17 Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996).

18 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 3-71 (3d ed. 2005); HORWITZ, *supra* note 16, at 1-30; WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 69-88, 165-74 (1975); JOHN PHILLIP REID, CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE (2004); WILLIAM E. NELSON, THE COMMON LAW OF COLONIAL AMERICA I: THE CHESAPEAKE AND NEW ENGLAND 1607-1660, at 67-79, 125-31 (2008).

19 JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, at xi (Boston, Boston Books 2d ed. 1895) (1883) (condemning the opening given to spendthrift trusts in the New York legislation).

DNA.[20] This can as well occur through change across time within the one society and one legal system; the original context of past law is lost and the meaning of legal ideas shifts without anyone noticing.[21] Watson's theory that Justice Story's poor grasp of Romano-Dutch private international law begat the *Dred Scott* decision and so caused the American Civil War is a particularly extreme illustration of the legal mistake model.[22] Watson does not project a clear idea of the sources of mutation; he implies a stochastic process of faulty reproduction. But in at least some cases the importing lawyers will know precisely what the originating model requires, yet choose to bend it into a new shape to match the local conditions or ideology. Not miscopied DNA but ad hoc genetic engineering would be a more plausible metaphor. English law may have been particularly prone to mutation upon transplantation, as it lacked the clarity of a codified system that stood ready for wholesale export and practical application in new lands. Moreover, in the United States, in contrast to Canada, Australia and New Zealand, there was no body of English-trained professional lawyers and no imperial appeal to the Privy Council to ensure the persistent sway of metropole legal values in the settler societies of the imperial periphery. Despite the regard for the common law in elite legal circles, English legal norms in post-imperial America simply did not attain the same persuasive status as Roman law rules in medieval Europe, likewise a sophisticated jurisprudence that had lost political sway, but which maintained prestige and influence over the legal intelligentsia and so maintained its force over centuries.

Putting speculations about the process of transplantation to one side, our puzzle remains — why did American lawyers who were cognizant of English law and who based their own systems on the doctrines of English law push the American trust in new and surprising directions? To understand the transplantation of English trust law in America, we must identify which legal institutions were being transplanted, how they evolved, and what their function was. We may first set out some functional questions and then turn to the history.

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20 ALAN WATSON, LAW OUT OF CONTEXT (2000); Alan Watson, *Legal Transplants and European Private Law*, *in* IUS COMMUNE LECTURES ON EUROPEAN PRIVATE LAW 1 (2000); Alan Watson, *From Legal Transplants to Legal Formats*, 43 AM. J. COMP. L. 469 (1995); ALAN WATSON, LEGAL TRANSPLANTS (2d ed. 1993); S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW (2003).

21 JOHN W. SALMOND, *The History of the Law of Prescription*, *in* ESSAYS IN JURISPRUDENCE AND LEGAL HISTORY 73 (London, Stevens & Haynes 1891), provides a good example of cross-temporal mis-transcription within the common law.

22 ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS (1992).

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IV. THE EVOLUTION OF BENEFICIAL ESTATES AND THE RISE OF BENEFICIARY POWER

A. Proprietary and Personal Obligations Generated by the Trust

An owner may wish to settle title to property upon a trustee (that is, a manager holding legal title and wielding powers to manage, transform and deal with the property), on the basis that the trustee will apply that property for the use and benefit of a beneficiary. In such a situation a trust or trust-like institution is formed. A major focus of trusts jurisprudence is to analyze the proprietary consequences of such arrangements. How far can the settlor's intentions as to the running of the trust bind the trustee and the beneficiary over time, and so generate fresh forms of property imprinted with the settlor's purposes? To what extent can the beneficiary — or settlor — direct or control the trustee's use of the title? Must the trustee's successors in title be bound to respect the beneficiary's rights when they were not privy to the entrustment decisions? Can the beneficiary's successors in title claim the benefit of the estate, also being not privy to the entrustment? How far are third parties who interfere in the trust assets (stealing, occupying, destroying), without taking any derivative title from the trustee, liable to actions from the trustee, from the beneficiary, or from the beneficiary acting through the trustee? All of these issues of law are heavily contested.

Less well-explored are questions of personal or obligational rights and duties that bind trust actors and trust assets, rather than proprietary rights and duties. As part of the trustee's accountability to the beneficiary, the trustee may owe personal duties of restitution and compensation to maintain due administration of the trust. If the trustee borrows or contracts on behalf of the trust, he is personally liable, but with an indemnity against the trust fund for duly contracted obligations. He does not thereby become a full agent and cannot bind the beneficiary *in personam*.[23] The beneficiary's conduct in turn may give rise to liabilities, which may apply directly to trust assets as where the beneficiary charges those assets, or may be attached to trust assets as where the beneficiary accrues obligations independently of the trust by making contracts or committing torts. Can the trustee be made personally liable for the beneficiary's actions? No direct *in personam* duty can arise, as there is no vicarious liability; nor can the trustee's non-trust assets be

23 See further John D. Johnston, *Developments in Contract Liability of Trusts and Trustees*, 41 N.Y.U. L. REV. 483 (1966).

attached to satisfy claims against the beneficiary or the beneficiary's assets in the trustee's hands. In the other direction, the beneficiary cannot be made personally liable for the trustee's actions, as there is no general agency; but the beneficiary's trust assets may be charged if the trustee's actions are authorized as trust actions binding the trust. Hence the trust fund cannot be attached for the trustee's gambling debts or negligent driving. Can the trust fund be attached for breaches of personal duty owed by the beneficiary to third parties, or does the division of rights and duties relating to the trust assets shield those assets from attachment? Two particular scenarios cause trouble: where the beneficiary contracts debts outside the scope of the trust relationship, using the existence of the trust to help enhance the beneficiary's credit; and where the beneficiary commits crimes or torts that would result in attachment of his assets if he were full owner. The law has struggled to decide whether the asset partitioning wrought by the trust protects the beneficiary in these circumstances.[24]

English common law never produced a formal theory of ownership, nor a definition of the trust and of split titles within the trust, and the liability rules addressing the various situations evoked above were worked out piecemeal over centuries. The rules for enforcing contractual debts and other personal obligations of the beneficiary in the circumstances of trust ownership — that is, the power of the beneficiary to assign or attach trust assets to meet his obligations — were hammered out experimentally and pragmatically in response to changing social conditions. The rules in turn helped shape the social conditions in which credit, factor and product markets operated.

B. The Development of the Property Powers of Trust Beneficiaries

It is not necessary to enter into the detailed earlier history of the trust in England, save to note some of the chief staging posts in the recognition of equitable estates capable of sale and transfer, and hence prone to debt collection. Rights of beneficiaries over trust estates were originally recognized in the court of the Chancellor as not only imposing personal duties upon trustees, but also, by the fifteenth century, regularly binding third parties who derived their legal title from the trustee unless they had a defense of purchase for value in good faith. Both law courts and Parliament recognized and advanced the property-like rights and powers of the trust

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24 On reconstructing trusts doctrine in terms of asset partitioning, see Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434 (1998).

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beneficiary in a series of practical steps. By legislation, beneficiaries who lacked a feudal title at law were nonetheless made subject to escheat of their estates for their own treasons; but concomitantly the treason of trustees need not lead to escheat or forfeiture of beneficially held property.[25] Debts of a beneficial owner could be charged against the beneficial estate, even though at law that estate was a mere personal and moral right against the trustee-owners. Enforcement of debts against beneficiaries began in church courts as courts of conscience, and then from the sixteenth century moved to the courts of common law, using simplified actions of debt and assumpsit. Such debt claims also bound the successors of beneficial estates who were outside the privity of the obligation. The formal legal powers and liabilities of beneficiaries were massively augmented in 1484 when legislation armed them with the power to convey the legal estate, a measure aimed at protecting bona fide purchasers who took from a vendor-beneficiary in possession, not realizing that the legal title was vested elsewhere with trustees. By allowing the beneficiary without legal seisin a power to shift title independently of the trustee-owner — to "strike a fire without a flintlock" — Parliament had in effect recognized the beneficiary as a titleholder to land.

Further legislation followed in the sixteenth century, completing the process of recognition of beneficiaries' rights as a species of dominium. The Feoffments to Uses Act 1503 deemed a use of socage land in the absence of a will as no cover for evasion of debts, and likewise deemed the beneficiary to be in possession for the purposes of legal execution of their obligations. Exasperated by the impact of uses on revenue through the creation of private titles outside the feudal framework, the Crown finally forced through Parliament the Statute of Uses 1536, which acted to collapse legal and beneficial titles entirely, save in the cases of active uses, leaseholds and copyholds. The undercutting of the use led to the renegotiation of Crown-tenant relationships in 1540, with a conferral of a statutory will-making power and the acceptance that wardships would be levied over one-third of estates without evasion, and that Parliament would contribute regularly to support of Crown revenues. By 1660, military feudal tenures had gone and parliamentary control of finance was evolving into its modern form. This was followed in the seventeenth century by the revival of trusts in the form of active uses upon uses and trusts of leasehold.

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25 Treason Acts, 26 Hen. 8, c. 13 (1534), 33 Hen. 8, c. 23 (1541), and 5 & 6 Edw. 6, c. 11 (1551); Burgess v. Wheate, (1757-59) 1 Wm. Blackstone 123, 96 Eng. Rep. 67; 1 Eden 177, 28 Eng. Rep. 652 (Ct. of Ch.). Republican U.S. law hemmed in escheat and forfeiture still further to protect heirs: U.S. CONST. art. III, § 3; Note, *Origins and Development of Modern Escheat*, 61 COLUM. L. REV. 1319 (1961).

These devices were enforceable in Chancery and unaffected by the statutory conveyance of legal title; they permitted estate planning and control of debt rather than evasion of taxes. The earlier learning of uses, which established that beneficiaries could dispose of, direct, will and charge their estates and could be sued upon the wealth they controlled, was transferred into the trust and so created a doctrine of equitable estates suited for post-feudal times.[26] But the final steps in this long process were not taken until the mid-nineteenth century.

V. *SAUNDERS V. VAUTIER*

In the 1841 case of *Saunders v. Vautier*[27] a legacy settled East India stock on trust for the benefit of one Vautier, but with trustees to accumulate all income until the beneficiary "should attain his age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, and assigns absolutely." No gift-overs or remainders were specified. Some nine years after the settlement Vautier attained his majority and, wishing to marry, sought his inheritance. It was argued that since the accumulation was stipulated for the beneficiary's sole benefit, the beneficiary could anticipate the payment and quash the accumulation once he attained full capacity at 21. Lord Langdale, the Master of the Rolls, agreed that the income and capital could be anticipated:

> [W]here a legacy is directed to accumulate for a certain period, or

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26 See Lord Mansfield's recognition of the beneficial interest as a proprietary estate in *Burgess*, 1 Wm. Blackstone at 155, 96 Eng. Rep. at 81: "If uses, before the Statute of Hen. 8, were considered as a pernancy of the profits, as a personal confidence, as a chose in action; and now trusts are considered as real estates, as the real ownership of the land." For the socioeconomic context, see JOHN HABAKKUK, MARRIAGE, DEBT, AND THE ESTATES SYSTEM: ENGLISH LANDOWNERSHIP 1650-1950 (1994). The legal development of uses and trusts is described in John L. Barton, *The Medieval Use*, 81 L.Q.R. 562 (1965); Richard H. Helmholz, *Early Enforcement of Uses*, 79 COLUM. L. REV. 1503 (1979); JOHN H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 94-133 (1986); JOHN H. BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, VOLUME VI, 1483-1558 (2003); ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE (Richard H. Helmholz & Reinhard Zimmermann eds., 1998).

27 (1841) 4 Beavan 115, 49 Eng. Rep. 282 (M.R.), *aff'd*, Cr. & Ph. 240, 41 Eng. Rep. 482 (L.C.). The most recent close study is Paul Matthews, *The Comparative Importance of the Rule in* Saunders v Vautier, 122 L.Q.R. 266 (2006).

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> where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.

It followed that Vautier could now exercise his vested power to claim the capital by transfer from the trust; the absence of gift-over implied an absolute grant. Lord Chancellor Cottenham affirmed on appeal. His reasoning seems to have been that the testator had intended the gift to be complete on execution of the will; the property was then to be separated from the general estate and vested in the trustee on behalf of the beneficiary.[28] Earlier precedents supported Langdale's reasoning regarding the precatory nature of accumulations. The controversy surrounding *Thellusson's* Case, where an eccentric testator settled his estate on trust subject to a long accumulation period triggered by certain contingencies of survivorship, apparently because he disliked his extant descendants, resulted in legislation restraining excessive accumulations, as an adjunct to the well-established rule against perpetuities that forbade attempts to control vesting beyond a life and twenty-one years.[29] However cogent this anti-accumulations policy might have been, attention came to be focused on Cottenham's wider theory in *Saunders*, namely that a vested interest became absolute in the sense of allowing beneficiary direction of the estate.

The *Saunders* doctrine confirmed a vein of authority stretching back many decades; but there were also many cases contradicting Cottenham's approach, stating instead that restraints on payment might be conditions precedent to the estate vesting.[30] Since in *Saunders* the immediate beneficiary

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28 R.S. DONNISON ROPER & HENRY HOPLEY WHITE, A TREATISE ON THE LAW OF LEGACIES 580 (London, J. Butterworth 4th ed. 1847) (1799).

29 Thellusson v. Woodford, (1798) 4 Vesey Jun. 227, 31 Eng. Rep. 117 (L.C.), *aff'd*, (1805) 1 Bosanquet & Puller New Rep. 357, 127 Eng. Rep. 502; 11 Vesey Jun. 112, 32 Eng. Rep. 1030 (H.L.); Curtis v. Lukin, (1842) 5 Beaven 147, 49 Eng. Rep. 533 (M.R.); PATRICK POLDEN, PETER THELLUSSON'S WILL OF 1797 AND ITS CONSEQUENCES ON CHANCERY LAW (2002).

30 Lord Cottenham himself adduced authorities denying the vesting of a gift where payment was conditioned on an event in the earlier case of *Watson v. Hayes*, (1839) 5 Mylne & Craig 125, 41 Eng. Rep. 319 (L.C.), including Batsford v. Kebbell, (1797) 3 Vesey Jun. 363, 30 Eng. Rep.1055 (L.C.); Hanson v. Graham, (1801) 6 Vesey Jun. 239, 31 Eng. Rep. 1030 (M.R.); Leake v. Robinson, (1817) 2 Merivale 363, 35 Eng. Rep. 979 (M.R.); and Vawdry v. Geddes, (1830) 1 Russell & Mylne 203, 39 Eng. Rep. 78 (M.R.). For similar decisions denying vesting post-*Saunders*, see *In re* Trusts of the Will of Bennett, (1857) 3 Kay & Johnson 280, 69 Eng. Rep. 1114 (V.-C.); *In re* Hart's Trusts, (1858) 3 De Gex & Jones 195, 44 Eng. Rep.

Daniel Vautier had not reached the stipulated age of 25 at the date of the suit, the only way to execute the gift was to avoid characterizing the beneficiary attaining 25 as a condition for release of the principal. Later case-law oscillated between these two positions, with some bequests with restraints seen as conditional grants, and others as absolute vested interests where restraints could be circumvented by beneficiaries requiring collapse of the trust and conveyance of the corpus. A hybrid position was to regard a grant to a beneficiary or beneficiaries that was absolute (as where a life tenant and remainderman between them controlled all possible beneficial interest in the estate) as absolutely vested, with restraints as a void attempt to control the purpose of an outright grant or impose conditions subsequent that derogated from the grant. At any rate, the classical "Rule of *Saunders v. Vautier*" soon emerged on the basis of Cottenham's stronger ratio, entitling beneficiaries, all being *sui juris* jointly, to direct the trustees to convey the corpus to them and so take the assets free of any controlling words of restraint, purpose, precation or conditioning of the gift.[31] If all the objects of a discretionary trust, whose individual claims were all contingent and rivalrous, acted in concert, they too could wield the *Saunders* rule to end the trust and force distribution, overriding the discretions and powers built into the settlement.[32]

This development brought final recognition of beneficiaries under a trust as holding a beneficial title mirroring the plenary title of a common legal owner, save for the interposition of a nominee as legal titleholder. The trustee could not be dictated to during the currency of the trust, but in effect the beneficiaries enjoyed levers of control by being able to direct the full untrammeled title to themselves. Beneficiaries could use this power to shape the way in which trustees wielded their discretions, and ultimately the power could be used to remove and replace trustees, or to apply to court for reformation of the trust terms, stopping short of collapsing the extant trust. The power afforded under the rule could also be used to convey both legal and equitable estates to third party assignees simply by an absolute beneficiary ordering the trustee to convey to the assignee with due formalities.[33] The emergence of a strong power to assign as well as claim the legal and beneficial estate not only enhanced the techniques for alienating trust property, but also appeared to support the a priori, intrinsic

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1243 (C.A. in Ch.); *cf.* Josselyn v. Josselyn, (1837) 9 Simons 63, 59 Eng. Rep. 281 (V.-C.).

31 *See, e.g.*, Dundas v. Wolfe Murray, (1863) 1 Hemming & Miller 425, 71 Eng. Rep. 185 (V.-C.).

32 *In re* Smith, [1928] Ch. 915.

33 Grey v. I.R.C., [1959] 3 All E.R. 603 (H.L.).

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alienability of trust interests. Where a trust estate or interest was subject to restraints on payment or other purposive restraints (e.g., "to spend only on the beneficiary's education"), the beneficiary who wished to capitalize the delayed beneficial estate could simply assign it to a third party for a discounted value reflecting the impact of the postponement on expected value. The *Saunders* rule could be justified as a shortcut permitting ready capitalization of restrained but non-contingent interests under trusts to occur without resort to such discounted sales, simply by collapsing the trust and sweeping away the restraints built into the settlement.

The operation of the *Saunders* rule may be seen as a surrogate for capitalization by assignment, but it could also be aligned with the well-known social practice by which expectant heirs or other holders of future interests sold their expectancies to third parties, often at steep discounts, in order to anticipate income and capital and so enjoy immediate consumption.[34] Such expectancies were purely contingent, unlike shares yet to be fixed under a discretionary trust, and therefore could not be subjected to realization by forced conveyance of a vested interest under the *Saunders* rule itself; but a present right to any future product of the contingency could be granted. Courts of equity inhibited such capitalization by giving heirs relief from improvident bargains, on the basis that expectant heirs were often capricious and impatient youths who lacked complete adult capacity, and were thus vulnerable to exploitation and fraud. Equity thus permitted beneficial interests to be assigned at a discount where the beneficiary knew what he was doing, but allowed protective curbs on the power of alienation where this was seen as just. This jurisdiction led towards the protective trust as a method to blunt the inexorable logic of the *Saunders* rule. So here the Court of Chancery spoke in rather contradictory voices, upholding a general principle of equitable assignment whilst viewing certain such assignments as suspicious and voidable.

The force of the *Saunders* rule aroused some judicial disquiet. At one stage the courts considered tying the *Saunders* rule back to testamentary bequests,[35] or departing from it altogether. Lord Herschell, a notably liberal judge, expressed doubts in *Wharton v. Masterman*:[36]

> The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence

34 The legal techniques are evoked in Michael Macnair, *Equity and Volunteers*, 8 LEGAL STUD. 172 (1988).

35 Gosling v. Gosling, (1859) Johnson 265, 272, 70 Eng. Rep. 423, 426 (Wood V.-C.).

36 [1895] 1 A.C. 186, 193 (H.L.).

> of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming sui juris, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.
>
> It is needless to inquire whether the Courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognised that it would not be proper now to question it.

However the result of the case was to *extend* the operation of the *Saunders* rule to encompass all beneficiaries, whether testamentary or inter vivos, and whether charitable, corporate or individual. This was hardly a reduction of the authority of the rule.

It was possible to defeat the pro-beneficiary logic of the *Saunders* rule simply by reserving a beneficial interest to settlor or to trustee or some other trusted reversioner who would not agree to collapsing the trust. But the *Saunders* rule eventually led to the possibility of non-unanimous change to the trust. The Variation of Trusts Act 1958 allowed courts to reform the terms of trusts where this would be to the *benefit* of all beneficiaries, without requiring the *consent* of all possible vested or contingent beneficiaries (as where there were children or persons unborn or potential objects, each unable to give consent). Such reformation of a trust could be done against the direct intentions of settlors.[37] This won for beneficiaries a power to reshape the terms of a trust using a swift legislative path, a power that proved to be a fillip for tax minimization and so helped preserve family trusts in the face of twentieth-century fiscal impositions on the wealthy. In balancing and protecting the interests of rival beneficial interests, the court retained the controlling discretion. Could settlors who mistrusted both beneficiaries and pro-beneficiary judges claim back some control and inhibit the free alienability of trust property? The answer given by courts and legislatures was a guarded affirmative.

The aim of the *Saunders* rule may have been to advance the assignability of beneficial estates, but in practice it could also be used to reduce assignability

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37 Michael Chesterman, *Family Settlements on Trust: Landowners and the Rising Bourgeoisie*, *in* LAW, ECONOMY AND SOCIETY, 1750-1914: ESSAYS IN THE HISTORY OF ENGLISH LAW 124 (Gerry R. Rubin & David Sugarman eds., 1984); Peter Luxton, *Variation of Trusts: Settlors' Intentions and the Consent Principle in* Saunders v Vautier, 60 M.L.R. 719 (1997).

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and marketability. The rule against perpetuities prevented remote vesting of interests under a settlement. The *Saunders* rule permitted a settlement to divide an asset temporally between a life interest and a remainderman, where the potential power to collapse the trust within a life and 21 years vested in the two beneficiaries amounted to a present property interest sufficient to exclude the operation of the rule against perpetuities. But if a more complex division between multiple members of two generations was effected, then in practical terms the scattered interests could not be wielded unanimously, and family pressures could then be used to engineer resettlement to the third generation. An effective system of perpetuity could thus emerge, shielded from legal controls by the potential of the *Saunders* rule to allow immediate formal vesting, but still preventing individual beneficiaries from taking immediate practical enjoyment. This unforeseen consequence aligned with the long practice of dynastic families using strict settlement to induce each inheriting generation to resettle the family estate to the next round of grandchildren. As perpetuities rules came to be applied more aggressively to trusts, the *Saunders* rule proved entirely useful for keeping perpetuities controls at bay. It became in many cases a device to restrain anticipation for as long as the controlling members of the family wanted.

The other shield against beneficiary powers of assignment was the development of the protective trust.[38] The basics have already been stated: property was settled on a trust to pay income during life, but no capital was to be accessible during life or at death, and in the event of an act of insolvency or other adverse action by the beneficiary, the trust would be determined and the assets moved back to the donor or to a trustee on new trusts. In the developed protective trust a new discretionary trust would then be erected, allowing maintenance payments to be made ad hoc even to an insolvent beneficiary and his family, with the capital shielded from the creditors. So popular were these provisions that they were annexed to family trusts by boilerplate terms under the Trustee Act 1925 section 33; it was enough to declare a "protective trust" in favor of a beneficiary for the entire apparatus of section 33 to be read into the settlement.

Despite these massive inroads into beneficiaries' powers of assignment, the background *Saunders* rule was constantly maintained and affirmed by the courts. It was joined to the doctrine that property rights could not be granted with repugnant limitations that derogated from the grant. In the leading case of *Brandon v. Robinson* in 1811, Lord Chancellor Eldon stated:

38 For a key precedent, see Davidson v. Foley, (1787) 2 Brown's Ch. Cas. 203, 29 Eng. Rep. 115 (Thurlow, L.C.).

> There is no doubt, that property may be given to a man, until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life estate; and, as I have observed, a disposition to a man, until he shall become bankrupt, and after his bankruptcy is over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited.[39]

This principle had been established earlier in the great case of *Foley v. Burnell* in 1783,[40] with the House of Lords following Lord Chancellors Thurlow and Loughborough and a majority of the judges in insisting on the alienability and chargeability of capital where income was devoted to a beneficiary. This principle too was affirmed with vehemence throughout the nineteenth century as a motherhood principle, with Justice Kay offering a representative statement in 1888:

> The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid.[41]

The *Brandon v. Robinson* doctrine and the *Saunders* rule thus combined to produce the appearance that, ideologically, modern English trust law tilted to alienability, beneficiary control, and access of creditors to beneficial assets. But the full reality beneath the doctrinal surface was far more complex, with the protective trust undercutting *Brandon*, and the *Saunders* rule actually assisting in enhancing settlor power and the promotion of dynastic, inalienable property. It was certainly the case, however, that the pro-market, pro-beneficiary message of these doctrines were important planks of the ideology of English law in this period. We will next see how trust law was reshaped in America, with departures from English precedent both in practice and justificatory rhetoric.

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39 18 Vesey Jun. 429, 433-34, 34 Eng. Rep. 379, 381 (L.C.).

40 (1782-83) 1 Brown's Ch. Cas. 274, 28 Eng. Rep. 1125 (L.C.), *aff'd*, [1785] 4 Brown P.C. 319, 2 Eng. Rep. 216 (Lords Comm'rs), *aff'd*, [1789] 4 Brown P.C. 34, 2 Eng. Rep. 23; 1 Equity Cas. Abridged 363, 21 Eng. Rep. 1104 (H.L.), *interpreted and applied in* Rochford v. Hackman, (1852) 9 Hare 475, 68 Eng. Rep. 597 (V.-C.).

41 *In re* Smith, [1928] Ch. 915.

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VI. Restraints on Alienation and Anticipation in Classical American Law

The birth of the spendthrift trust in the early legislative and judicial experiments of New York and Pennsylvania have already been noted. Next we will examine the full flowering of doctrines permitting restraints on alienation and anticipation in modern American law.

A. The *Claflin* Rule and Restraints on Anticipation

In the 1889 Massachusetts case of *Claflin v. Claflin*,[42] a father made a will settling property on trust unconditionally for his son, with a first installment of $10,000 to be paid on the son turning 21, a second like installment at 25, and the balance of his third share in the capital of the estate at age 30. There was no residuary or gift-over named for this portion of wealth; the wealth would inevitably fall to the son's estate. The father was simply trying to delay and stage the release of the son's money. When the son attained majority and received the first payment, he brought a suit to have the trustees pay over the balance of the wealth on the basis that there was no reason why he, as full, controlling beneficial owner, should not take the wealth as he pleased, and that holding it back would cause him unnecessary inconvenience. The case bore an uncanny resemblance to *Saunders v. Vautier*, and in light of the long acceptance of *Saunders* in the American courts,[43] the result in *Claflin* should have been a swift victory for the beneficiary. The Supreme Court of Massachusetts affirmed the lower court's decree denying the plaintiff beneficiary's suit. The money was to stay in trust and be released according to the settlor's instructions — even though the plaintiff was the full beneficial owner, and even though English and American trust law to date had committed to the opposite result.

The *Claflin* opinion was given by Justice Field, with the concurrence of four other appellate judges, including Justice Holmes. The ratio of the case was as follows:

> [N]othing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the

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42 20 N.E. 454 (Ma. 1889).

43 Authorities are assayed in GRAY, *supra* note 19, at 99-125 and GRISWOLD, *supra* note 10, at 581-653.

> plaintiff. It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow that, because the testator has not imposed all possible restrictions, the restrictions which he has imposed should not be carried into effect.

It is not clear what the said alienable interest was — presumably the present right to income and a vested but delayed right to capital. To reach the desired result the contrary *Saunders* rule had to be disposed of, and this was attained by a simple assertion that a settlor's will and purpose in cutting down the power of a beneficiary to transfer trust assets trumped any concept of a minimal core content to beneficial property:

> [W]e are unable to see that the directions of the testator to the trustees . . . are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.

Claflin has given its name to a foundational doctrine of American trust law, namely that settlor purposes not invalidated by some other principle of law cannot be overborne by joint decision of the beneficiaries, even if the beneficiaries have the cooperation of the trustees. The result of *Claflin* in effect is to accord both constitutive and enforcement powers to settlors, and deny control to beneficiaries. For English trust lawyers, this truly was a revolutionary departure. But even greater divergences were in train.

B. *Nichols v. Eaton* and Restraints on Alienation

Perhaps the more startling shift in the doctrinal structure of trusts was wrought over a decade earlier in the decision of the United States Supreme Court in *Nichols v. Eaton*[44] in 1875. This case decided that a trust revoking a beneficial right to income upon insolvency of a beneficiary and then moving the corpus to the beneficiary's family on trust was a valid disposition. The revocation of a trust on the triggering of some condition was orthodoxy in English trust law and was not a remarkable decision; indeed the court followed Lord Eldon's decision in *Brandon v. Robinson* to justify their conclusions. However, Justice Miller, delivering judgment for the court,

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44 91 U.S. 716.

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added lengthy obiter remarks going deeply into the policy of restraints on alienation of trust capital,[45] intentionally distancing himself from Lord Eldon's approach in *Brandon*. The dicta were extraordinary in their detail, their forcefulness, and also their complete extraneousness from the case at bar, and indeed could have been characterized as an unconstitutional foray by a federal court into sovereign state jurisdiction over private law causes.[46] The key passages of Justice Miller's theorizing about trusts were of enormous influence in the state courts and deserve close study. Justice Miller was in effect offering a declaratory judgment as to where the law should go, an act of curial legislation.

> But, while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English Chancery Court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a necessary incident to a life-estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits

45 *Id.* at 725-27. See also the decision of the Supreme Court in *Hyde v. Woods*, 94 U.S. 523, 526 (1877), also delivered by Justice Miller.

46 The doctrine forbidding federal judicial intervention in state private-law causes was recognized in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *overruling* Swift v. Tyson, 41 U.S. 1 (1842).

sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the States of this Union, as expressed both by their statutes and the decisions of their courts, has not been carried so far in that direction.

It is believed that every State in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different States. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many it embraces the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled, policy in all the States. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by State laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held, that, as to contracts made thereafter, the exemptions were valid.

This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law to his case, as he knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country, all wills or other instruments creating such trust-estates are recorded in public offices, where they may be inspected by every one; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this life-estate or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows, that, in creating a debt with such person, he has not right to look to that income as a means of discharging it. He is neither misled nor

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> defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise.
>
> Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.[47]

The springboard for Justice Miller's analysis was the policy he divined in the influential New York property code of 1828-30 and the early Pennsylvania decisions, which placed protective or spendthrift trusts at the centre of equitable property law. But beyond ratifying the philosophy expressed in the legal systems of those states, Justice Miller was rehearsing deeply held beliefs about the relationships between law, economy and society in the new American republic and in the mother country. His attack on English doctrine requiring the alienability of capital was premised on the claim that "[t]his doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors."

C. Pro-Debtor America, Pro-Creditor England?

The idea that English law was intrinsically pro-creditor was woven into American visions of England. The ancient English practice of imprisonment for debt could be seen as emblematic of a harsh regime whereby the wealthy could punish the recalcitrant non-payer, and at the same time extract payment from his kin *in terrorem* by taking his person as hostage. Such an approach, incapacitating the debtor and forcing him to access all possible sources of credit in order to win back his freedom, made little sense in America with its limitless frontier and its mobile labor force. In England itself the practice was falling apart, as the rise of industrialism reduced class deference and thinned out kinship ties, undermining the old system of debt enforcement. Nonetheless from an American vantage the notoriously harsh debt collection regime in England could be seen as a story of deference

47 *Nichols*, 91 U.S. at 725-27.

and class war, with the law pressing hard on men of little capital in the interests of rentiers. American law expressed these sentiments by embracing an overtly pro-debtor policy, which can be found lurking in the nascent trust law of the early colonies. Thus in 1664 a Maryland doctor, Luke Barber, who was facing a heavy damages claim, successfully moved his property to two friends "in trust to the only use and behoofe" of his "most deare . . . Wife Elizabeth . . . and her heyres forever" and thus insulated the family fortune.[48] Later, as America expanded westward, the state homestead statutes served to ring-fence the subsistence capital of the worker and his family from creditors.[49] Nineteenth-century America was also in advance of England in producing insolvency regimes allowing the failed entrepreneur a "fresh start," without stigma.[50] There was a general sense that readily available credit, opportunity to harness such credit, and easy escape from insolvency should one's business fail were defining features of productive and mobile American society.[51] Yet easy credit had its dark aspect, bringing with it steep business cycles and sharp credit crunches, often provoked by manic land speculations and exacerbated by a fissured financial system without effective reserve insurance or regulatory oversight.[52] This very volatility created by the forms of credit may have reinforced a belief that business failure might have little to do with a debtor's worth and might simply be a product of external fortune.[53] A hefty proportion of nineteenth-century American males experienced insolvency; by some estimates, one could expect to endure insolvency at least once in one's lifetime. In such circumstances, individuals commonly sought legal protection from the consequences of insolvency by partitioning their assets and shielding

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48 *Cited in* FRIEDMAN, *supra* note 18, at 26-27.

49 Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245 (2006).

50 EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA (2001); DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001); BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2002); Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 365 (2006). The late development of traders' bankruptcy regimes in England is charted in WILLIAM R. CORNISH & GEOFFREY DE N. CLARK, LAW AND SOCIETY IN ENGLAND 1750-1950, at 230-37 (1989); V. MARKHAM LESTER, VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT, AND COMPANY WINDING-UP IN NINETEENTH-CENTURY ENGLAND (1995).

51 A view promoted by modern economic historians: Richard Sylla, *Financial Systems and Economic Modernization*, 62 J. ECON. HIST. 277 (2002).

52 *Plus ça change* . . . .

53 *Cf.* Friedman, *supra* note 12, at 578.

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their families from capital loss, and creditors therefore may have been prepared to accept that the security of payment could be lessened by general law or by individual legal arrangements. The added legal risk, generally known to all, that capital could not always be reached by the creditor, could simply be factored into the division of risks and costs assumed by contract between the parties.

Ideas such as these provided the policy bedrock of Justice Miller's judgment. The notion that the creditors of a trust beneficiary have notice, implicit or explicit, of the limited interests created by settlors was a crucial conceptual tool in the entire debate over restraints on alienation. Whether effective registration of all judgment-proofing testamentary trusts really occurred, as Justice Miller claimed, may be doubted, and it seems even less likely that inter vivos trusts were uniformly registered. The theory — or stylized fact — of implicit notice was taken by Justice Miller from the influential 1882 Massachusetts decision of *Broadway National Bank v. Adams*,[54] where Chief Justice Morton upheld a settlor's intrinsic power as owner to make capital inalienable under a trust to pay income:

> It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of his estate . . . . [The settlor] has the entire jus disponendi, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives. Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given.[55]

The rule in *Claflin* is now regarded as bedrock in American trust doctrine, establishing that the settlor can stipulate how wealth will be distributed under the trust he or she constitutes, such that the trustees can be required to pursue the settlor's instructions and purposes, even if the beneficiaries between them have the fullest possible equitable ownership of the assets and wish to claim the assets freed of the settlor's restrictions. The rule in *Saunders* may survive as a weak default rule that a fully comprehensive

54 133 Mass. 170 (1882).
55 *Id.* at 173-74.

beneficial interest with no restraints, no gift-overs, and no active duties that the settlor may have wished to see executed can give the beneficiary power to get in the estate;[56] but this saving of the effect of *Saunders* is so weak that it equates to a reversal of the rule. Settlor power to design and enforce trust stipulations was thereby enhanced, with a corresponding weakening of trustee powers and beneficiary interests. The *Claflin* rule further reinforced the development of asset protection trusts insulating wealth from the claims of creditors, and also permitted the development of non-charitable purpose trusts with the interests of human objects attenuated or excluded; and ultimately it encouraged the abolition of restraints on perpetuities or dead hand controls of wealth by a settlor impressing his or her purposes onto settled property for long stretches of time.

D. Aftermath

From the outset, the shifts in American trust law attracted a degree of hostility from leading jurists. The illustrious legal commentator James Kent, an intellectual conservative who loved the old feudal learning, protested in 1830 that the New York reformers had jettisoned much of the hallowed doctrine of trusts without truly understanding it, and had instituted dangerous experiments inimical to market society and liberal polity. His *Commentaries* certainly agreed with the reformers' upholding of alienability as a talisman of modern property, but he also protested that the radical New York simplification of trust law went too far and too fast in doing away with bare trusts and the complex learning of future and contingent interests, and he warned that the dynastic urge would reassert itself in an unconstrained form if the tried and tested methods were subject to brute abolition.[57] This, as we have gauged, turned out to be prophetic.

At the turn of the century, John Chipman Gray launched a passionate polemic against the spendthrift trusts that by then were engulfing state laws and attracting Supreme Court support. He argued that American trust law, by permitting beneficiaries to receive trust income whilst the

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56 See, for example, the use of *Saunders v. Vautier* in *Landram v. Jordan*, 25 App. D.C. 291 (C.A.D.C. 1905), *aff'd*, 203 U.S. 56 (1906); Comm'r v. Field, 42 F.2d 820 (2d Cir. 1930) (Hand, J.).

57 4 KENT, *supra* note 7, at 306-08, a passage deserving of close reading. See further ALEXANDER, *supra* note 5, at 149-57. DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 99-162 (1975) (reissued 1998 & 2006), offers a reconstruction of Kent's property thought that misses entirely his complex reactions to the New York reforms.

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trust corpus of property was shielded from liability for debts, would undermine all commercial morality, and represented an unholy mixture of paternalism (which for Gray, like his English contemporary Albert Venn Dicey, encompassed socialism), inegalitarianism and dynasticism that would corrupt the sturdy values of the republic. Gray's impassioned attack, all the more remarkable for coming from a noted professor at the heart of the Boston legal and business establishment, has long been celebrated for its rhetorical power and the depths of scholarship Gray summoned to advance his case; but perhaps the vehemence of his attack helped blunt its impact, and he could not stem the tide.[58]

It may be that Massachusetts led in these developments of the law because its judicial class was close to the wealthy dynasts who dominated that state, and shared their social and economic ideology. But judges in other jurisdictions could be hostile to the key cases of *Claflin*, *Broadway National Bank* and *Nichols*.[59] In an angry dissent, Chief Justice Alvey of Maryland condemned the new trust doctrines as leading to the "encouragement of idleness and lack of enterprise," promoting a "class who become habitually reckless and indifferent to the honest obligations."[60] State-by-state research might reveal that regions with less concentration of old wealth were more hostile to asset protection laws; more work needs to be done. At any rate, many nineteenth-century American judges and jurists consistently took the English line on alienability and anticipation of beneficial interests. In a federal system, it simply was not possible for a few leading decisions to align the private law of the entire Union. These variances in state laws were acknowledged in *Claflin* and *Nichols*, only to be explained away or disregarded. Past authorities did not really matter; the eminence of Justice Miller and the power of his *Nichols* judgment had an enormous impact, so much so that Gray lamented that if another judge had delivered the *Nichols* judgment the entire course of trusts doctrine in America would have been different.

It is difficult to assess this Cleopatra's Nose theory of legal change; what did happen was that in 1913 the U.S. Supreme Court in *Shelton v. King*[61] pushed the revolution in American trust law to its conclusion and ratified the power of settlors to create inalienable interests, in a brief and

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58 GRAY, *supra* note 19, at 120-25 & *passim*; GRISWOLD, *supra* note 10, at 24-33; Austin W. Scott, *Control of Property by the Dead*, 65 U. PA. L. REV. 527 (1917).

59 *See* Friedman, *supra* note 12, at 572-86.

60 Smith v. Towers, 14 A. 497 (Ct. App. Md. 1888), *cited in* Friedman, *supra* note 12, at 577.

61 229 U.S. 90 (1913); the background to the lower-court litigation of the case is set out in Note, *The Doctrine of* Claflin v. Claflin, 24 HARV. L. REV. 224 (1911).

barely reasoned judgment of Justice Lurton. In that case, it was held that conditions restraining alienation could be seen as installing a power of active management of the trust, and could be supported on that ground alone. Justice Miller's obiter remarks in *Nichols v. Eaton* were ratified.[62] Lord Herschell's purported doubts regarding the *Saunders* rule expressed in *Wharton v. Masterman* were quoted approvingly, with no sense that that decision had actually entrenched and extended the rule.

VII. Assessment

An ironic side of the story is that English law, supposedly so rigidly pro-creditor in the eyes of Americans, had evolved complex and highly variegated strategies for balancing creditor and debtor rights. It is a crude misapprehension to describe this system as "pro-creditor." In the early modern period, credit relations took place in a moral economy largely unregulated by law, with parties far more concerned with commercial reputation than the giving of collateral or the formal attachment of assets. Law was a tool of last resort, and often ineffective in attaching debtors' assets unless reputational pressures were also at stake.[63] In the nineteenth century, English legal reformers concentrated on trade rather than family credit relations. Creditor rights against individuals and firms were first clarified by rafts of legislation to reform procedures, and then in the latter part of the century creditor interests were regulated and reduced through bills of sale and notice legislation, concerned both with protecting vulnerable trade debtors and preventing clogs on title to personal property. Counterbalancing this push to protect debtor and third-party rights, there was also a pro-creditor enhancement of secured lending through doctrines of implicit notice binding third parties to respect charges in the commercial courts at the same time.[64] In the arena of family estates, different considerations applied; debt enforcement against land and trust interests was always complex and long remained subject

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62 Griswold, *supra* note 10, at 24-29, 583-92.

63 Craig Muldrew, The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England (1998); Habakkuk, *supra* note 26; Adam S. Hofri-Winogradow, Protection of Family Property from Creditors in the Enlightenment-Era Court of Chancery (Mar. 9, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1104385.

64 Joshua Getzler, *The Role of Security over Future and Circulating Capital: Evidence from the British Economy circa 1850-1920*, *in* Company Charges: Spectrum and Beyond 227 (Joshua Getzler & Jennifer Payne eds., 2006).

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to a mixture of legal, prudential and social norms. The readiness of English families to declare trusts for the payment of debt, and so maintain their credit reputations across generations, suggests that pro-creditor instincts operated in the aristocratic culture. There were high levels of aristocratic indebtedness through the mortgage system, as landowners borrowed extensively to raise portions, and also to develop their estates and on occasion engage in entrepreneurship; and the burdens of conspicuous consumption also required capital to be raised against assets.[65] Creditors were commonly accorded rights to recover from inheritances through implied declarations of trusts to pay debts, and this helped ensure sufficient land release from debtor families to maintain a healthy land market, allowing new recruits to enter the ranks of the gentry.

To say that American property and debt regimes had an overall pro-debtor character would also be overly simplistic; the reality is a good deal more complex. A recent study by Claire Priest focuses on the ready attachment of land as well as slaves for debts in the colonial and early republican periods, claiming that this shows American law to be inherently pro-creditor, upholding commercial contracts and so enabling well-functioning credit markets and rapid development.[66] But, on this view, there ought to have been little room for trusts impeding alienability and debt recovery in such a system, and no patience for protection of family interests through trusts. As in liberal England, so in republican America family estates were treated differently. Thus we find in both systems impulses toward alienability and restraint, of pro-debtor and pro-creditor rules, of concern for trading markets and for family estates, jostling for precedence in the hierarchy of legal rules, and we cannot construct a monotonic model.

How then can we best explain the divergence of modern American law from the historical doctrines of English trust law? We may close with two overlapping hypotheses. The first follows leads suggested by Morton Horwitz in his great study of early American law.[67] Horwitz argued that American elites, once their wealth was established in an expanding society with support from government, licensing of externalities, and protection from free competition, may have wished to move to market institutions and light government regulation. For a later period, Horwitz's model may be

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65 HABAKKUK, *supra* note 26, at 243 *passim*; F.M.L. THOMPSON, GENTRIFICATION AND THE ENTERPRISE CULTURE: BRITAIN 1780-1980 (2001).

66 Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385 (2006) (mainly bringing evidence from the eighteenth century but offering interpretations of later periods also).

67 HORWITZ, *supra* note 16, at 63-119.

run backwards in order to make sense of developments in private trusts. Once wealth had been amassed in conditions of free competition, owners and entrepreneurs may have wished to reshape legal institutions to protect that attained wealth from challenge through further market competition or through adverse regulation. Just as big business sought refuge in combination and cartelization, so private owners sought refuge in trusts, persuading the courts to protect them from the operations of trading and credit markets, as well as from taxes and takings. The entrepreneur who created or amassed property in the market was to be rewarded by allowing him to take his fortune and the fortune of his family out of the market system and play the dynast. Similar models have been used to analyze the behavior of contemporaneous English entrepreneurs; perhaps the thesis promoted by Martin Wiener, which points to a gentrification of the entrepreneurial classes, has at least as much purchase in America as in England.[68]

Perhaps a less exciting thesis is to tell the story in Watsonian terms, as one of mis-transcription of legal norms. The interesting problem is then to explain the source of the technical mis-transcription and its eventual bending to new ideological and social purposes. As Chesterman pointed out, the American trusts system with protection of fortunes that eventually emerged was functionally similar to the earlier English system, but involved a change in the surface appearance of trust institutions matched by a shift in the doctrinal underpinnings.[69] We have further noted that English trust law and practice was a mixture of partial legal and social constraints on free alienability, where the overt commitment to alienability had to be dealt with by doctrinal subterfuges and social norms. The result was a complex and porous system that carefully balanced the dynastic and anti-market urge with the needs for a land market and for creditor enforcement against property. The law would help families keep their assets in settlements outside the full operation of the market; the courts struck down assignments of contingent reversions by improvident heirs, and permitted the operation of protective trusts. But entails and settlements could be broken, and the acquiescence of new generations to the dynastic holding of property was necessary to maintain the system. The fact that most settlements were progressively renewed by overlapping generations was as much a social commitment as the result of dead-hand legal coercions. The legal system also allowed debts to be raised against land through mortgages, and landowners, especially at the point of generational

68 MARTIN WIENER, ENGLISH CULTURE AND THE DECLINE OF THE INDUSTRIAL SPIRIT, 1850-1980 (1981); *cf.* THOMPSON, *supra* note 65.

69 Chesterman, *supra* note 37.

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turnover, typically would meet mortgage and debt obligations from capital as well as income and avoid defaults that would destroy the long-term credit reputations of families. The English system of mingled legal and social norms broke down when the family estate ceased to have an economic function as an integrated unit of production, and trust funds of stocks and shares gradually replaced estates as the core class of trust assets. The family estate now became a target of taxation, and the whole system was transformed to shield wealth from fiscal impost from generation to generation.

American lawyers in the nineteenth century operated in a very different context. In their world it made little sense to emulate the English system; it was not possible to maintain a mix of legal and social sanctions to maintain dynastic wealth, held together by a costly legal process that supported a Brahmin class of conveyancing lawyers who extracted rents from the landed class. The American instinct was to clarify and codify the relative powers of settlors, trustees and beneficiaries, and to spell out in legal terms how property could be exposed to or protected from the market by trust institutions. Hence it was that nineteenth-century legal reforms appeared to have instituted anti-market, anti-beneficiary, paternalistic norms into the law, when all they really did was legalize and make explicit the tacit social conventions of the English *ancien régime*. This reduction of the English mixed legal-social system of constraints and its replacement by a more legalistic (in the sense of more rule-bound and literal) American system can be seen in many other areas of law too, notably contract law. The simplified, legalistic restatement of property norms thus seemed to support a more dynastic system of trusts in the United States than in England, since the favoring of the dynastic urge is made explicit. The divergences have only deepened in the past fifty years as the instinct for dynasticism weakens in modern social-democratic Britain, having passed through a long period of capital taxation and a steep reduction in the role of old wealth. The rich in Britain today — or their legal advisers — remain wedded to the rule in *Saunders* not because they want beneficiaries to have power to break trusts, but because of the great assistance the rule affords to asset management and tax minimization.

VIII. ENVOI

Historians of the law must penetrate the meaning of past legal doctrine and practice before venturing to make sense of the social and economic forces entwined with the law. But history is also made by the play of personal motivations and political decisions. Before we close off the discussion, let

us note one further irony left to us by history. The archconservative Sugden, Humphreys' nemesis, who was to ascend to office as Lord Chancellor by the name of Lord St. Leonards, himself served as a major legal reformer in the mid-nineteenth century. He simplified English property law in order to promote the efficient workings of the land market, and also strove to help the less-well-off avoid imprisonment for debt and plan their lifetime and testamentary property affairs more rationally. His most serious property works were also republished in America and proved to be highly influential there.[70] That a traditional English lawyer of low social caste and high conservative politics could work for market rationality and social equality — whilst Holmes, a patrician lawyer of radical intellectual bent, could embrace curbs on market liberalism and accept the steepest social inequalities with equanimity — should give us pause in trying to force the history of English and American law and lawyering into neat ideological explanations based on a hermetic reading of doctrine.

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70 EDWARD SUGDEN, 1ST BARON ST. LEONARDS, A PRACTICAL TREATISE OF POWERS (Philadelphia, A. Small 1st Am. ed., from the 3d London ed., with notes and references to Am. decisions by Edward D. Ingraham, 1823) (1808).

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