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The Persistence of Equity: Lessons from the Trust

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I. AN OVERVIEW AND TWO VIEWS

A. Overview

This chapter aims to use the example of the trust to address the question that motivates this book: 150 years after the Judicature Act 1873, is there any reason (other than simple curiosity as to the historical origin of a particular rule or principle) to continue to distinguish between common law and equity?[1] As well as examining the trust, and equity more generally, it considers a still broader question: does the role of equity today reveal anything of wider significance about the nature of English law, and therefore of the common law as applied in jurisdictions around the world? Certainly, the continued presence, and prominence, of a body of rules and principles referred to as 'equity' is one of the more striking features of English law.

The chapter compares two approaches to these questions. The first will be referred to as the 'pragmatic view'; the second as the 'formal view'. It is not suggested that these views are the only two which might be taken, nor that there is only one view which could be called 'pragmatic', and only one which could be called 'formal'. The particular pragmatic view examined here, however, is a popular one, and a key aim of this chapter is to reveal some of its deficiencies, and show the possibilities opened up by adopting a particular type of formal view. One such advantage of this specific formal view, it will be argued in section II, is that it can answer a long-standing puzzle as to the nature and operation of the trust. As will

[1] This chapter is closely based on my inaugural lecture as Professor of English Law at the University of Oxford, delivered on 31 March 2022, but has fewer jokes. A video of the lecture itself is available at the YouTube site of the Oxford Faculty of Law: www.youtube.com/watch?v=TNUQ96ik2tQ. I am particularly grateful to Lord Burrows for chairing the lecture and for Professor Chen-Wishart, Dean of the Faculty of Law, for introducing it. I am also grateful to David Foster for his comments on a draft of this chapter and his permission to cite from (what was at the time) forthcoming work, and to Ernesto Vargas Weil and Giorgia Bucaria for assistance with some civil law perspectives.

be explored in section III, this shows in turn that, at least in some contexts, we should continue to distinguish between common law and equity as, in doing so, we are distinguishing between two fundamentally different forms of right. On this view, the contribution of equity goes beyond the undeniable practical benefits it has delivered in English law, and extends to the recognition of new legal concepts, which may be of use even beyond common law borders.

B. The Pragmatic View

A pragmatic view focusses essentially on outcomes, on ends rather than means.[2] The particular pragmatic view examined here does not attempt to give a principled defence of the historic distinction between common law and equity. Rather, it acknowledges the (undeniable) practical benefits that products of equity, such as the trust, have conferred on those bound by, or choosing to use, English law. On this view, continued use of the distinction between common law and equity is justifiable as long as those terms mark *some* practical difference in the operation of particular rules – so, for example, an equitable property right is usefully distinguished from a legal property right given its different effect on third parties. Such a view may draw support from the relatively haphazard origins and early development of equity, which was conceived not as a coherent system but was rather based on a series of initially ad hoc interventions aimed at avoiding practical outcomes which, for varying reasons, seemed unjust. It can further be linked to a broader view of English law as a whole as characteristically unconcerned with conceptual tidiness, given that fundamental parts of it have been established and refined by judges as a by-product of the very practical work of settling disputes.[3] The rules, therefore, were not worked

[2] J Goldberg, 'Pragmatism and Private Law' (2012) 125 *Harvard Law Review* 1640 uses the label 'brass-tacks pragmatism' to refer to three such analyses of private law: OW Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457; K Llewellyn, 'Some Realism About Realism – Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222; and D Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685. Goldberg (ibid 1641–42) notes that such views aim to be 'hardheaded in the particular sense of pushing past the surface to get to what is "really" at stake' and are as a result sceptical about traditional private law distinctions (such as that between common law and equity). Goldberg argues instead for approaches which are based on 'inclusive pragmatism', which 'makes room for conceptual legal analysis without equating the study of law with logic or botany'. Certainly, the formal view proposed here is not unconcerned with practical consequences, and so may fall within the scope of 'The New Private Law' which Goldberg identifies as 'inclusively pragmatic'. For more on the consequences of the New Private Law for equity, see B McFarlane, 'Equity' in A Gold et al (eds), *The Oxford Handbook of the New Private Law* (Oxford, OUP, 2021). Note that, in his own inaugural lecture as Professor of English Law, published as 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law' (1980) 65 *Iowa Law Review* 1249 (and also as *From Principles to Pragmatism* (Oxford, Clarendon Press, 1978)) Patrick Atiyah at 1251 adopted a linked, but slightly different definition of 'pragmatism' and associated it with judicial decisions 'designed to achieve justice in the particular circumstances of the case, irrespective of the possible impact of the decision in the future.' Atiyah then linked equity and its conferral of judicial discretion to this sense of pragmatism. This chapter takes, in effect, the opposite approach, arguing that the true effect of many equitable doctrines can be understood only if we consider their formal role in the legal system.

[3] See, eg, R Pound, 'What is the Common Law?' (1937) 4 *University of Chicago Law Review* 176, 186–87: 'Behind the characteristic doctrines and ideas of the common-law lawyer there is a significant frame

out in theory and then formalised in codes and written constitutions devised by legislators or – even worse – academics.[4] As a result, we should not expect notions worked out pragmatically over the years, such as the effect of an equitable property right on a third party, to be capable of neat classification. On this view, in considering the persistence of equity, the lesson to be taken from the trust is simply that, despite the conceptual shakiness of its foundations, equity has allowed English law to respond in a flexible and pragmatic way to the needs of commercial and social life, unencumbered by the doctrinal scruples that would hold back less pragmatic jurisdictions.

A very useful exposition of the pragmatic view was given by Maitland, in writing for a primarily German audience at the start of the twentieth century.[5] It should be immediately noted that Maitland was not endorsing that view; the attention paid in other parts of his work to the correct conceptual understanding of the nature of the trust shows that, rather, Maitland himself adopted a view both of the trust and of equity more broadly which was closely concerned with the form of the court's intervention and thus of the parties' rights.[6] Rather, Maitland eloquently exposes how such a pragmatic view was commonplace amongst English lawyers. In considering how such a lawyer would react if asked by a German counterpart whether to classify the trust within the law of property, or the law of obligations, Maitland stated: '[t]o this elementary question I know of no reply which would be given at once and as a matter of course by every English lawyer.'[7] Nonetheless, Maitland showed, the possibility of setting up a trust conferred practical benefits in a wide variety of contexts: for example, it allowed groups as varied as the Catholic Church, the Jockey Club, and Lincoln's Inn to hold property without needing to take the formal step of incorporation. Maitland emphasised a cheerful absence of intellectual rigour on the part of the English lawyers, thus hinting that these significant practical benefits were related to, and could even depend on, this willingness not to worry about conceptual matters

of mind. It is a frame of mind which habitually looks at things in the concrete, not in the abstract; which puts its faith in experience rather than in abstractions.' See too, from a civilian perspective, K Zweigert and H Kotz, *An Introduction to Comparative Law*, T Weir tr, 3rd edn (Oxford, OUP, 1998) 265: 'With their practical empiricism and habit of going step by step from case to case the English would have regarded it as dangerous and unnatural to prescribe the outcome of comparable cases in advance by making general regulations to cover the whole area of life: "we'll cross that bridge when we come to it".'

[4] See, eg, J Getzler, 'Legal History as Doctrinal History' in M Dubber and C Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford, OUP, 2018) 171, 185: 'The common law until well into the eighteenth century may be described as a type of tacit or craft knowledge, learnt by doing, and resistant to formal or rational doctrinal statement.'

[5] As noted in Getzler's very helpful examination of this 'late, great, sprawling and challenging essay' (J Getzler, 'Frederic William Maitland – Trust and Corporation' (2016) 35 *University of Queensland Law Journal* 171, 171), the essay in question was originally published in German as 'Trust und Korporation' (1905) 32 *Grunhut's Zeitschrift fur das Privat- und Offentliche Recht der Gegenwart*. It first appeared in English, as 'Trust and Corporation' posthumously in H Fisher (ed), *The Collected Papers of Frederic William Maitland, vols I-III* (Cambridge, CUP, 1911) vol III 321–404. It appears too as ch IV in HD Hazeltine, G Lapsley, PH Winfield (eds), *Maitland: Selected Essays* (Cambridge, CUP, 1936). Pinpoint citations in this chapter will be taken from D Runciman and M Ryan (eds), *Maitland: State, Trust and Corporation* (Cambridge, CUP, 2012) 75–130.

[6] Note however that Maitland's formal view was not the same as the formal view advocated in this chapter: see section II below.

[7] Runciman and Ryan (n 5) 76.

(such as the exact nature of the rights of individual members of an unincorporated association).[8] 'Shameful though it may be to say this,' Maitland confessed, speaking of English lawyers, 'we fear the petrifying action of juristic theory.'[9] So, Maitland explained to his German audience:

> [F]or the ordinary thought of Englishmen 'equitable ownership' is just ownership pure and simple, though it is subject to a peculiar, technical and not very intelligible rule in favour of *bona fide* purchasers … let the Herr Professor say what he likes, so many persons are bound to respect the rights [of the beneficiary] that practically they are almost as valuable as if they were *dominium* (ownership).[10]

On the pragmatic view, then, in considering the persistence of equity, the lesson to be taken from the trust is simply that equity persists because it has allowed English law to respond in a flexible way to the needs of commercial and social life; there is little to be gained from considering the precise nature of a beneficiary's rights under the trust and how they might differ from the rights of a party with unencumbered title to property. Such a pragmatic view can be applied to equity more broadly: whilst attention to 'juristic theory' would prevent any country having two separate sets of courts within a single jurisdiction, English law has in practice benefitted from the flexibility which allows parties further means by which to structure their transactions, and gives courts additional ways of responding to situations not covered by the parties' own arrangements.

Indeed, the organisation of the English court system before the Judicature reforms, whilst '[f]rom any managerial point of view … ludicrous',[11] was crucial to the existence of equity, and evidence of, at the least, a willingness to proceed without conceptual order. From a purely conceptual perspective, there would seem to be no obvious reason for having a separate court of Chancery, operating not as an appeal court to overturn common law judgments or otherwise issue instructions to common law judges, but rather to make orders against individuals.[12] Starting from scratch, no-one would design a system of dual, and sometimes duelling, jurisdictions. And yet, the legacy of that structure, the 'productive paradox of two rival court systems',[13] includes some real practical benefits. Certainly, the importance of the trust, and of other equitable creations, has only increased since Maitland's time. For example, Worthington has stated that trusts and equitable charges are 'often assumed to be equity's greatest legacy to the law. Their enormous commercial significance goes

[8] See too N McCormick, *Legal Reasoning and Legal Theory* (Oxford, Clarendon Press, 1978) 4: 'By and large English lawyers and writers have tended to think of it as almost a virtue to be illogical, and have ascribed that virtue freely to their law: "being logical" is an eccentric continental practice, in which common-sensical Englishmen indulge at their peril.'

[9] Runciman and Ryan (n 5) 106.

[10] ibid 94. Maitland adds in a footnote there: 'Some writers even in theoretical discussion have allowed themselves to speak of the [beneficiary] as "the real owner", and of the trustee's ownership as "nominal" and "fictitious". See Salmond, *Jurisprudence*, 278.'

[11] J Hackney, *Understanding Equity and Trusts* (London, Fontana Press, 1987) 15.

[12] F Maitland, *Equity; also, The Forms of Action at Common Law: Two Courses of Lectures*, edn by A Chaytor and W Whittaker (Cambridge, CUP, 1909) 9 – see too Swadling's chapter in this volume.

[13] B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 *Journal of Equity* 1, 9.

without saying.'[14] The utility of a particular type of trust, the *Quistclose* trust,[15] was recently seen by Lady Arden as depending on, and demonstrating

> … the flexibility of equity. That flexibility makes an important and beneficial contribution to the legal system … because it enables equity to respond to the need for different sorts of transactions, and also because in that way it contributes to the development of society and to the growth of its economy.[16]

Moving beyond equity, the pragmatic view could be seen as resting on a wider characteristic of English law, or perhaps even Englishness more generally. For example, in a speech given by Queen Elizabeth II, on the occasion of her Golden Jubilee, to both Houses of Parliament,[17] the late Queen reflected on what qualities might be seen as distinctively British. One of the points she emphasised was that 'we are a moderate, pragmatic people, more comfortable with practice than theory.'[18]

It is dangerous of course to generalise, particularly given the quite different nature of Scots law; on the pragmatic view, nonetheless, the practical benefits of some important parts of *English* law, including both equity and the trust, could be seen as resulting from a relative lack of concern as to underlying coherence. Indeed, in their introduction to a collection of Maitland's work which contains his essay cited above, Runciman and Ryan expand on Maitland's observation that '[w]e Englishmen never clean our slates'[19] and write that the English 'were rarely afforded the vantage point from which to judge whether the law by which they lived made sense as a set of ideas, not least because they were too busily and successfully living by it.'[20]

C. The Formal View

It is no surprise, given that it is based on an inaugural professorial lecture, that the purpose of this chapter is to put forward a different view: it will be referred to here as the *formal* view, as it depends on a close analysis of *how* precisely equity intervenes, and therefore of the particular form of the rights that arise as a result. It is not suggested that only one type of formal view is possible; a different formal view could ask the same question as to the conceptual nature of the parties' rights, but reach a

[14] S Worthington, 'The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation' (2007) 42 *Texas International Law Journal* 917, 921.

[15] Named for *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).

[16] *Prickly Bay Waterside Ltd v British American Insurance Co Ltd* [2022] UKPC 8, [2022] 1 WLR 2087 [32].

[17] A reply to the addresses of both Houses of Parliament. The text is available at news.bbc.co.uk/1/hi/uk_politics/1959753.stm.

[18] ibid. See too T Weir, 'The Common Law System' in R David (ed), *International Encyclopedia of Comparative Law* (Leiden, Brill, 1974, No 82) vol II, ch 2, 77: 'The Englishman is naturally pragmatic, more concerned with result than method, function than shape, effectiveness than style; he has little talent for producing intellectual order and little interest in the finer points of taxonomy.'

[19] Runciman and Ryan (n 5) 67. See too Maitland's more general observation in 'Trust and Corporation' (ibid, 89) that '[m]en often act first and think afterwards.'

[20] Runciman and Ryan (n 5) xiii.

different answer. It is suggested, however, that the specific formal view adopted here provides a useful understanding both of the nature of the trust, and of the persistence of equity more generally.

Whilst accepting the practical benefits that the trust, and equity, have conferred, the formal view aims to show that each has a sound conceptual underpinning and that, if it is to continue to deliver such benefits by developing to meet new practical challenges, this underpinning must be understood. To focus solely on the pragmatic benefits of the trust would be to miss a very valuable contribution it has made to our list of legal concepts: the idea of a right that has as its subject matter another person's right. It is the particular *form* of such a right that makes it hard to classify as within either the law of property or the law of obligations. The difficulty of classification does *not* arise because an interest in conceptual order is alien to equity, or to English law, but rather because equity, by recognising rights with a particular form, requires us to re-think certain distinctions and, in particular, to recognise that classificatory schemes derived from other systems (such as the divide between *in personam* and *in rem* rights) may not capture the formal complexity of English law.[21] The formal view thus aims to show that an exclusive focus on the practical benefits conferred by the trust, and by equity, in fact undervalues the contribution of those ideas, by missing the formal concepts they have added.

The formal view is not an attempt to ignore, or to re-write, the past. Indeed, the concept on which this chapter focusses, the idea of a right relating to another's right, can be clearly linked to the role of equity as a secondary or supplementary system and thus to the historical arrangement of the English courts. Nor does it deny the practical way in which that concept has developed, as a result of an accretion of judicial decisions. It does however depend on the key point that such conceptual ideas can be valid even where they have not been definitively posited by any legislature or court. This argument is consistent with the broader nature of English law, as a common law system, as it is often the case that principles have to be extracted, by careful analysis, from a mass of decisions. This point was made very clearly in the inaugural lecture of Wade,[22] when he argued that a coherent set of principles of English administrative law, although they had never been explicitly set out by the judges, could be extracted from the case law:

> The law is always working on inarticulate major premises – and so inarticulate are they that our highest judicial authorities may hold opposite opinions about them. Every student and practitioner of the law must have reflected upon this tantalising, fascinating mystery.[23]

As Wade put it, this means that the underlying justifications which can give English law coherence 'slowly crystallise beneath the surface'[24] of judgments: practitioners, judges, and academics can all play a role in bringing those principles to light.

[21] See section II.C. This observation is consistent with the analysis of Fox's chapter in this volume.
[22] The first holder of the statutory Professorship of English Law established in 1961.
[23] HWR Wade, 'Law, Opinion, and Administration' (1962) 78 *LQR* 188, 196.
[24] ibid 197.

II. THE TRUST

A. The Puzzle

It is helpful to start with another inaugural lecture, delivered by Burrows in 2001.[25] It made the fundamental point that, in seeking to explain a difference between two rules or principles, it is never enough simply to state that one came from common law, and the other from equity. Referring to the jurisdictional origin of the rule or principle cannot by itself justify a divergence, as there is no reason why common law and equity should continue to give competing answers to the same question. As Burrows notes, the practical imperative of treating like cases alike can be met only if we have a defensible means of identifying like cases, and it is not defensible to assume that two cases are different *simply* because one concerns an equitable right and the other a legal right.

Like all the best points, this is both very simple and has profound consequences, a number of which are dealt with in other contributions to this book.[26] Burrows identified and examined three categories in private law, focussing on the third where, in his view, common law and equity are in conflict, and reform is necessary to bring consistency and coherence to the law. The lecture is thus a fine example of the practical benefits of adopting a conceptual analysis: the convenience and pragmatic attraction of English law is impaired if there are competing legal and equitable rules, and uncertainty as to which should be applied.

For present purposes, however, it is Burrows' first category that is the most important. This category comprises cases where common law and equity *do* work coherently together and, moreover, it makes sense to use the labels of common law and equity to refer to the different rules. Understanding this category is therefore crucial to understanding the persistence of equity 150 years after the Judicature reforms. Burrows describes the prime example of a case in this first category as follows:

> I particularly have in mind here that greatest invention of equity, the trust. It is very hard – albeit not impossible as is shown by the approach in some other jurisdictions – to describe the trust without at some stage relying on, and referring to, the split between legal and equitable title.[27]

The argument in this chapter is that the trust is, indeed, an excellent example of the coherent co-existence of common law and equity; but that this coherence can only be seen if we reject the language of 'the split between legal and equitable title'. Of course, it is commonplace to refer to a trustee as having legal title, to a beneficiary as having equitable title, and to distinguish between legal property rights on the one hand and equitable property rights on the other.[28] The problem, however, is that, as Burrows

[25] A Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 *OJLS* 1. The author is now of course Lord Burrows JSC.

[26] See, eg, Edelman's and Elliott's chapters in this volume.

[27] Burrows (n 25) 5.

[28] See, eg, Foxton J in *Serious Fraud Office v Litigation Capital Ltd* [2021] EWHC 1272 (Comm) [292], noting that the '"equitable property" approach to trusts, although subject to significant academic challenge, remains a substantial presence in the decided cases.'

made very clear, *simply* adding the adjective 'equitable' cannot in itself explain why a different outcome obtains. If, for example, we say that A has title to some property at law, but that B has title in equity, then common law and equity seem to be giving different answers to one of the most fundamental questions addressed by a legal system: who is the owner? An essay by F Scott Fitzgerald contains the line that 'the test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function',[29] but the title of that essay is telling and, in any case, it cannot be the mark of a good legal system to say that one party owns at common law, and another in equity. This point was memorably made by Maitland, with a touch of the hyperbole permitted in lectures: 'Think what this would mean were it really true. There are two courts of co-ordinate jurisdiction – one says that A is the owner, the other says that B is the owner. That means civil war and utter anarchy.'[30]

As soon, then, as we aim for the conceptual rigour which Burrows rightly identified as necessary to meet the basic aim of coherence in the law, the trust raises a puzzle: on its conventional understanding as depending on a split between legal and equitable ownership, it seems to be an egregious example of common law and equity giving different answers to the same, fundamental question. Rather than being an example of Burrows' first category, where common law and equity co-exist coherently, the trust, as often presented, seems to be a clear case of conflict.

A chief aim of this chapter, however, is to show that Burrows was correct in seeing the trust as a paradigm for the role of equity in the modern law. The key point, revealed by adopting the formal view, is that, in asking if a party (B) has a right under a trust, equity does not repeat the common law question, and ask if B has title to any property; rather, equity asks a fundamentally *different* question. The difference in the questions asked by common law and equity allows for different, but still coherent, answers to be given. And it is not just that there is *a* difference in the questions: the *nature* of the difference will tell us something of wider importance as to the general nature of equity, and its role in the modern legal system. We will consider these points further in section III, but it is first necessary to see how the pragmatic view might deal with the puzzle raised by the trust.

B. Limits of the Pragmatic View

One response to the puzzle of the trust, which might be given by a supporter of the pragmatic view, is simply to point to its success in practice: to stop worrying and learn to love the trust. Maitland's invocation of the 'ordinary thought of Englishmen' provides an example. Even if B (the beneficiary) is, in effect, an owner, B's vulnerability to the bona fide purchaser defence means that the distinction between legal and equitable property rights can work: the protection available to the holder of

[29] F Scott Fitzgerald, 'The Crack Up', first published in the Feb–April 1936 issues of *Esquire* magazine.
[30] Maitland (n 12) 17.

the equitable flavour of property right is weaker than that available to the holder of the legal equivalent. So, English law extends the options of the parties[31] (and of the courts)[32] by offering two types of property right and, in the case of the trust, two types of title. These are not, in practice, confused as the rules as to their acquisition, as well as the rules as to their content and enforceability, are different. There is also some logic to the system: whilst equitable property rights are generally easier to acquire than their legal counterparts, and more flexible as to their content, their enforceability against third parties is more limited.

The first point to make is that, on this pragmatic view, whilst it is coherent to distinguish between legal property rights on the one hand, and equitable property rights on the other, this does not demonstrate that the trust must fall into Burrows' first category: it does not provide a reason why we should continue to use the labels of 'legal' and 'equitable'. On this pragmatic view, the use of 'equitable' to refer to the weaker variety of property right tells us only about the historical jurisdictional origin of such rights, rather than identifying anything about the nature of the rights themselves. It would therefore seem perfectly acceptable, and perhaps more transparent, to drop the labels of common law and equity, and instead refer to two different types of property right, each with its own rules as to content, acquisition, and enforcement against third parties.

The second, linked point is that whilst this pragmatic analysis is, like Maitland's 'ordinary thought of Englishmen', avowedly conceptually unambitious, it is also limited even in its own, pragmatic terms: it breaks down rather quickly when specific practical questions arise. It tells us that there must be *a* difference between the effect of legal property rights on the one hand, and equitable property rights on the other, but tells us nothing about the extent of, or reasons for, this variation. For example, consider a case where A holds title to a painting on trust for B. Acting without authority under the trust, A then transfers title to the painting, as a gift, to C. C later makes a gift of that same painting to D. When receiving the painting, and throughout the time C held it, C did not know, and had no reason to believe, that the painting had been held by A on trust. In such a case, is it possible for B to make a claim against C? What if C received some benefit from the painting, such as a loan fee, but had spent that money on C's everyday expenses before becoming aware that the painting had been transferred by A in breach of trust? In such a case, of course, C is not a bona fide purchaser for value and so, adopting Maitland's 'ordinary thought', it might be argued that C should therefore be liable to B in the same way as C would be liable to an owner when innocently receiving and dealing with a stolen painting: in conversion in the first example, and/or in an action for money had and received in the second. That is not, however, the current position in English law: it seems instead that, in each

[31] As noted by, eg, Lady Arden in the quotation from *Prickly Bay* (n 16) (see section I.B above). See too H Dagan and I Samet, 'Express Trust: The Dark Horse of the Liberal Property Regime' in S Degeling, J Hudson and I Samet (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford, OUP, 2023).

[32] Through the possibility of recognising a non-express trust.

case, B has no claim against C,[33] as B's equitable 'title' under a trust of the painting is treated differently from a case of simple ownership.[34]

Similarly, should there also be a difference in how an equitable property right, as opposed to a legal property right, affects a third party (X) who carelessly damages that property? In a case where A holds title to a physical thing on trust for B, does the difference between A's right and that of B require that X is liable only to A, and so does not have to pay damages in relation to consequential loss suffered only by B? The answer given by the Court of Appeal in the (much-criticised)[35] decision of *Shell UK Ltd v Total UK Ltd*[36] was No: the nature of the trust was such that B was in practice entitled to the economic benefit of the property, and so was regarded as the 'the "real" owner'. The Court thus held it would be 'legalistic'[37] to deny B the protection against a careless third party that would be available where B is simply an owner of property. The analysis of the Court in *Shell* is a fine example of the pragmatic view[38] and its tendency to focus on ends rather means: if, in practice, it is B who enjoys the economic benefit of particular property, why should B be denied the protection usually given to an owner? It is also an almost direct application of Maitland's 'ordinary thought of Englishmen': where there is no bona fide purchaser involved, the beneficiary should be given the same protection as an outright owner of property.[39]

Contrast *Shell*, however, with the decision in *Akers v Samba*,[40] where the Supreme Court concluded that section 127 of the Insolvency Act 1986 (which operates to render void[41] a disposition of a company's property occurring after that company's winding-up has commenced) applies quite differently according to whether that transaction consists in the company's losing an equitable property right, rather than a legal property right. It was held that, if A, acting without authority under the trust, transfers to C shares held on trust for B, this is not a 'disposition' of B's property. Such a disposition would of course occur where the directors of a company transfer to a third party shares that the company held outright. The essential reasoning in *Akers* is thus in

[33] See, eg, *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 [76]; *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Ch) 290–91. See too *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89.

[34] See, eg, L Smith, 'Property, Unjust Enrichment and the Structure of Trusts' (2000) 116 *LQR* 412.

[35] See, eg, P Turner, 'Consequential Economic Loss and the Trust Beneficiary' (2010) 69 *CLJ* 445; J Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 *LQR* 66; B Häcker, '"Substance over Form": Has the Pendulum Swung Too Far?'; W Swadling, 'In Defence of Formalism'; and B McFarlane, 'Form and Substance in Equity', all in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Oxford, Hart, 2019).

[36] [2010] EWCA Civ 180, [2011] QB 86.

[37] ibid [132] (Waller LJ).

[38] See too the analysis of Millett LJ in *Trustee of the Property of FC Jones v Jones* [1997] Ch 159 (CA): sums credited to the bank account of A (Mrs Jones) were the traceable proceeds of a disposition of partnership assets which was void as made after an initial act of bankruptcy. Millett LJ (at 170) stated that the bank account 'in reality belonged to the trustee [in the bankruptcy of the partnership]' so that the trustee in bankruptcy (B) was 'entitled to the money in [Mrs Jones's] account'. For the difficulties with this analysis, see McFarlane and Stevens (n 13) 21–22.

[39] For a similarly pragmatic view, see Mummery LJ in *R v Tower Hamlets LBC, ex parte von Goetz* [1999] QB 1019 (CA) 1023, citing with approval the analysis of Carnwath J at first instance that an equitable lease is 'for all practical purposes, an interest as good as a legal interest'.

[40] [2017] UKSC 6, [2017] AC 424 [83].

[41] Subject to the exercise by the court of a power to allow the disposition nonetheless to take effect.

direct conflict with that in *Shell*: in *Akers*, a disposition of the trust property was not seen as a disposition of B's property, whereas in *Shell* damage to the trust property was seen as damage to property of which B was the 'real' owner.

The immediate point here is not as to whether the reasoning in either *Shell* or *Akers* is correct;[42] it is rather as to the difficulties that courts face when deciding on the impact of B's right on a third party. A pragmatic analysis, identifying *some* difference between such a right and a legal property right, neither explains why that difference exists, nor tells us the nature and extent of the divergence. Indeed, it is telling that, in *Akers*, the conceptual point which determined the outcome in the Supreme Court – that the unauthorised transfer by the trustee was not a 'disposition' of the company's property – went unconsidered not only at first instance[43] and by a very strong Court of Appeal[44] but also during the Supreme Court hearing itself, and was a matter first raised only after that hearing, when the Justices invited written submissions from counsel on the point.[45] *Akers* also demonstrates that the practical difficulties caused by the absence of a clear conceptual understanding of the trust extend to legislators, such as the drafters of section 127 of the 1986 Act, as it can make it difficult to know in advance how terms, such as 'a disposition of a company's property', will be applied by the courts in relation to equitable property rights.[46]

C. The Proposal

In order to understand the trust, and to answer important *practical* questions as to its operation, such as those canvassed in section II.B, it is necessary to move beyond a pragmatic view and engage instead with the form of the parties' rights. The proposal of this chapter, adopting a particular type of formal view, is that, where A holds on trust for B, B should not be seen as having 'equitable title', but rather as having a right that relates to the right that A holds on trust.[47]

[42] This will be discussed in section III.A.

[43] *Akers v Samba* [2014] EWHC 540, (2014) 16 ITELR 808.

[44] *Akers v Samba* [2014] EWCA Civ 1516, [2015] Ch 451.

[45] This set of events is consistent with the point made by J Penner, 'An Untheory of the Law of Trusts, or Some Notes Towards Understanding the Structure of Trusts Law Doctrine' (2010) 63 *Current Legal Problems* 653, 662 where he argues that, in relation to trusts, 'demonstrable errors' are made 'all the way up to highest courts'. See too *Criterion Properties v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846, where it was only in the House of Lords that the 'faulty elision of two different issues' relating to the authority of a company's directors (see Lord Nicholls at [2]), which had occurred in the courts below, was pointed out.

[46] In his 2017 Chancery Bar Association Lecture, Lord Justice Briggs (as he then was) states that it would have come as a surprise to an insolvency lawyer to discover that the protection of section 127 has the 'flaw' that it does not apply where the company loses an equitable interest under a trust: see Lord Justice Briggs, '*Akers v Samba*: Equity's Darling Reigns Supreme' (2017) [59], available at www.chba.org.uk/for-members/library/annual-lectures/equitys-darling-reigns-supreme/view.

[47] This is a view I have developed in previous work, such as B McFarlane, *The Structure of Property Law* (Oxford, Hart, 2009); McFarlane and Stevens (n 13); B McFarlane and R Stevens, 'What's Special About Equity? Rights About Rights' in D Klimchuk, I Samet and H Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford, OUP, 2020).

The need to adopt a formal view was clearly appreciated by Maitland, who grappled with the paradox inherent in the conventional view that the trust involves the split between legal and equitable title. Maitland's solution was to regard the notion of equitable title as, in some important respects, misleading: whilst B's rights under a trust have come to have many of the same practical effects as the rights of an owner,[48] the core technique of equity in protecting those rights against third parties was to recognise situations where a third party could come under a new duty to B. It would be a mistake, therefore, to see that protection of B against third parties as depending on B's having title, or a property right; rather, the initial obligation of T to B could give rise to a new obligation of a third party to B, and so B's protection was in fact the result of a series of personal rights of B.[49] In Milsom's pithy phrase, 'equity has proved that from the materials of obligation you can counterfeit the phenomena of property'.[50]

The analysis in this chapter gives two cheers to Maitland.[51] One cheer for his recognition of the need to investigate the formal nature of B's rights under a trust, and thus to go beyond the pragmatic view which he identified as common amongst English lawyers. The second cheer is for his insight that it simply cannot be possible for equity, as a secondary or supplementary system, to contradict the common law position and claim that it is B who is the true owner of the trust property. Whilst B's rights may have some of the same effects as ownership, or of a legal property right, this need not depend (either as a matter of the development of the law, or of current analysis) on seeing B's right as a right *in rem*. In his chapter in this volume, for example, Fox shows how B's protection in A's insolvency – often said to depend on, and prove, the proprietary status of B's rights – was developed by the courts independently of any such classification of B's rights.[52] This is not of merely historical interest, as it also shows that there is no necessary conceptual link between protection in insolvency and the holding of a right *in rem*. As Mitchell has pointed out,[53] for example, a legatee of an unadministered estate has no right in any specific property of the deceased, but this does not mean that general creditors of the personal representative have any access to the deceased estate to meet the debts of the personal representative.

The third cheer is withheld, however, as the claim that B has only a purely personal right is very difficult to defend.[54] This can be seen most simply by considering the different treatment of the following three cases.

Example 1: A has a freehold of land and enters a contract with B to allow B a limited use of that land for two years. One year later, A sells A's freehold to C, who is aware of A's contract with B, but makes no promise to respect that contract.

[48] Maitland (n 12) 117.

[49] ibid 120.

[50] SF Milsom, *Historical Foundations of the Common Law*, 2nd edn (London, Butterworths, 1961) 6.

[51] See too B McFarlane, 'The Essential Nature of Trusts and Other Equitable Interests: Two and a Half Cheers for Hohfeld' in S Balganesh, T Sichelman and H Smith (eds), *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries* (Cambridge, CUP, 2022).

[52] See Fox's chapter in this volume.

[53] C Mitchell, '*Commissioner of Stamp Duties v Livingston* (1965)' in B Sloan (ed), *Landmark Cases in Succession Law* (Oxford, Hart, 2019).

[54] As shown in the responses to Maitland's analysis: see, eg, A Scott, 'The Nature of the Rights of the "Cestui Que Trust"' (1917) 17 *Columbia Law Review* 269.

Example 2: A has a freehold of land and holds that title on trust for B. X, who is aware of the trust, enters the land and takes possession of it without permission from A or B.

Example 3: A again has a freehold of land and holds that title on trust for B. A then sells A's freehold to C, who is aware that this is a breach of the trust.

In each case, the third party interferes with the performance of A's duty to B, and has acted with knowledge of that prior duty. In the first two cases, however, equity gives B no claim against the third party.[55] What then is different about the third case, where a claim can be made?

The significance of the third case, and the answer to the puzzle about the nature of the trust, can be seen by asking what it is A, the trustee, actually holds on trust for B. The standard term to use is the 'trust property' and it is tempting therefore to think that A (with legal title) and B (with equitable title) are making competing claims to the same asset. So, in a case such as *Shell*, it is natural to identify the trust property as the land (including of course the pipelines on it) damaged as a result of the fire caused by the defendant's lack of care. This is consistent with the Court of Appeal's view that, in *Shell*, B was the 'real' owner of those pipelines. However, the analysis in *Shell* is confused even on its own terms. The consequential loss suffered by B in that case was identified by the Court as purely economic loss, and thus prima facie covered by the 'exclusionary rule' preventing recovery in the tort of negligence; yet, of course, if the pipelines really were the property of B, then any loss suffered by B as a result of the damage to them would not be purely economic loss.

It is important, therefore, to look more closely at the form of the trust. Its subject matter, in a case such as *Shell*, is not the land itself, but is rather A's estate in the land. In a significant recent consideration of the historical development of the trust, Foster notes how the notion of 'privity of estate' played a pivotal role both in allowing B's right to affect third parties, and to determine which third parties were so bound. As Foster puts it:[56]

> The core idea was that the trust attached to the estate vested in the trustee and would bind the trustee's successors in title … Privity of estate came to an end, however, when one entered the land by virtue of an estate arising by operation of law, which was not derived from an act of the trustee … Where the trustee was disseised of the trust lands, for example, the disseisor took the lands free of the beneficiary's rights (even where they had prior notice of the trust's existence).[57]

[55] For Example 1, see, eg, *Keppell v Bailey* (1834) 2 My & K 517, 547; 39 ER 1042, 1053; *Lloyd v Dugdale* [2001] EWCA Civ 1754, [2002] 2 P & CR 13. For application of the same analysis where the A–B contract relates to the use of property other than land, see, eg, *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146 (QB); Z Chaffee, 'Equitable Servitudes on Chattels' (1928) 41 *Harvard Law Review* 945. For Example 2, see, eg, the authorities set out in n 57 below.

[56] D Foster, 'Historical Conceptions of the Express Trust, *c* 1600–1900' in S Degeling, J Hudson and I Samet (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford, OUP, 2023).

[57] *Lord Compton's Case* (1587) 3 Leo 196; *Chudleigh's Case* (1594) 1 Co Rep 120a, 122a; *Sir Moyle Finch's Case* (1600) 4 Co Inst 85; G Gilbert, *The Law of Uses and Trusts* (London, E and R Nutt and R Gosling, 1734) 168–69; T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (London, A Maxwell, 1837) 13, 124; G Spence, *The Equitable Jurisdiction of the Court of Chancery* (London, V and R Stevens and GS Norton, 1849) vol II, 196 (footnote taken from Foster's text).

The historical role of the trustee's estate can also be shown in an example used by Maitland: the effect, prior to statutory intervention, on B of the loss of A's estate by escheat.[58] A's estate simply ceased to exist, and the superior lord (in some cases the Crown) took advantage by re-asserting its own prior rights and thus without making any use of A's estate. As a result, that superior lord could not be bound by the trust.[59]

Foster also notes the importance of the analysis by Lewin, the author of what is still a leading work on trusts, in modifying the technical notion of 'privity of estate' to focus instead on whether the third party had 'derived their claim from the trustee'.[60] This idea, which can be separated from the technical notion of privity of estate, is helpful in understanding the difference between Examples 2 and 3 above. In Example 3, where A, the trustee, makes an unauthorised transfer to C of a freehold held on trust for B, then C's rights clearly derive from the estate that A held on trust for B, and so it is possible (subject to defences such as the bona fide purchaser defence) for B to bring a claim against C. In contrast, in Example 2, where X trespasses on, or carelessly damages, the land, then whilst A may have a claim against X, there is no such direct claim for B, as X does not 'derive their claim from the trustee'.[61]

Foster notes that Lewin's analysis fell out of favour partly because of its apparent reliance on the concept of an estate.[62] This made it awkward to apply the analysis to cases where the subject matter of the trust was not an estate in land but, instead, chattels or a chose in action, such as a bank account. Instead, amongst writers on trusts 'there emerged a tendency to discuss the trust simply in terms of "equitable ownership" and to refer to the beneficiary as the "true owner" of the trust property'.[63] With the increased popularity of Austin's emphasis on the distinction between rights *in rem* and rights *in personam*, there then arose the classic debates of the late nineteenth and early twentieth century as to which of those categories best fits with B's rights under the trust: as we have seen, Maitland's analysis supported the *in personam* view. One reason for the long-running nature of this debate is that, as Fox notes,[64] it is doubtful that *either* of those Austinian concepts is helpful when seeking to understand how, and why, B's rights were allowed by the courts to affect third parties. A second reason is that, as can be seen in the outcomes of Examples 2 and 3, the cases seem to provide fuel both for a view of B's rights as purely personal, and for a view of them as proprietary.

[58] Maitland (n 12) 120.

[59] HF Stone, 'The Nature of the Rights of the Cestui Que Trust' (1917) 17 *Columbia Law Review* 467, 480–81 draws a distinction between escheat and forfeiture of an estate to the Crown, on the basis that the Crown can be bound by a pre-existing trust in the case of A's being subject to forfeiture, as it then acquires the very estate held on trust. Foster (n 56), however, notes that the position in relation to forfeiture was not as clear as Stone suggests.

[60] Foster (n 56), section II.B, discussing T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (London, A Maxwell, 1837) 18–19. Lewin states for example (ibid at 18) that: 'A trust is *annexed in privity to the estate*, that is, must stand or fall with the interest of the person by whom the trust is created.'

[61] Where X takes possession of the land, X may acquire a new estate in the land as a result; but that estate is of course different from the estate held on trust and does not derive from A.

[62] Foster (n 56) section III.A, referring, eg, to the criticism of Lewin's analysis in A Underhill, *A Concise Manual of the Law Relating to Private Trusts and Trustees* (London, Butterworths, 1878) 1 where it is stated that Lewin's approach 'would seem applicable to real estate only'.

[63] Foster (n 56) section III.A.

[64] See Fox's chapter in this volume.

The argument of this chapter is that, in hindsight, a mistake was made in regarding Lewin's analysis as dependent on the notion of an estate, and thus as applicable only to cases involving land. The value of the analysis can be seen by reconsidering the 'trust property'. When we consider land, it is necessary to distinguish between the thing itself and the rights held in it. This is clear because, whilst Maitland's Englishman might ordinarily think of himself as an owner of land, his lawyer (or even his estate agent) will quickly tell him that he has, in fact, either a freehold or leasehold estate. So, where the subject matter of a trust appears to be land, it is in fact A's estate, the freehold or leasehold, which is held on trust for B. The crucial point, which extends beyond land, and beyond estates, is that we *always* have to distinguish between the thing and the rights held in it.[65] So, where O thinks of himself as selling his car to P, we know that O is in fact transferring his title to the car to P. Similarly, if a chattel is the subject matter of a trust, then it is A's *right* to the chattel that is held on trust for B.[66]

The irony is that the type of analysis preferred by Lewin in fact becomes even *more* useful when we move away from land to cases where a chose in action, such as a bank account, is held on trust. In such cases, it makes little sense to think of 'ownership' or 'rights *in rem*'. After all, if A has a bank account, this does not give A ownership of, or title to, any specific property: it simply means that A has a personal right against A's bank. If A then declares a trust of that right in favour of B, it would seem to breach any number of rules, from *nemo dat* to the first law of thermodynamics, if A, a holder of a *right in personam*, could thus confer on B a right *in rem*.

It is, however, possible to align the trust of a bank account with the case of chattels and land, if we again focus on the *right* held by A. On the conceptual view of the trust preferred in this chapter, the subject matter of a trust is always a specific right (or rights) held by A, and the third parties against whom B may be able to make a trust-based claim are those who acquire either that right, or a right that depends on it. The term 'trust property' is one which can reasonably be used, but only as long as we remember that the subject matter of the trust is always a right, rather than any independently existing thing. Terms such as 'trust property' or 'trust assets' are simply shorthand for the rights held on trust.[67]

D. Some Advantages of the Proposal

The first advantage of the conceptual view proposed here, which identifies the subject matter of a trust as the rights held on trust, is that it can justify Burrows' view that the trust provides an example of the coherent interaction of common law and equity.

[65] See, eg, W Swadling, 'Property' in A Burrows (ed), *English Private Law*, 3rd edn (Oxford, OUP, 2013) para [4.02].

[66] This is apparent in cases where it is claimed that a trust arises following a theft: the right which the thief can hold on trust is the precarious title acquired by the thief through taking possession. For discussion, see, eg, R Chambers, 'Trust and Theft' in E Bant and M Harding (eds), *Exploring Private Law* (Cambridge, CUP, 2010).

[67] As was expressly noted by Kiefel CJ, Keane and Edelman JJ in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* [2019] HCA 20, (2019) 268 CLR 524 [24]. See too Briggs J, as he then was, in *Re Lehman Bros International (Europe) Ltd* [2010] EWHC 2914 (Ch) [241], noting that B can have a beneficial interest even where A holds a purely personal right, such as a bank account.

In a case, for example, where A holds a freehold of land on trust for B, B is not making a claim to the land which competes with the claim of A. B is not denying that A holds the freehold estate; rather, A's holding of that right is essential to B's claim. In finding that B has a right under a trust, then, equity does not contradict the common law's position that A has the freehold. This is why, for example, X continues to owe a duty to A, rather than to B, not to trespass on the land and why A still has the power to make a valid transfer of the freehold to C: as long as A's transfer to C complies with the general rules regulating such transfers, it will pass title to C whether or not that transfer is authorised under the trust.[68] There is then a separate question of whether C, having acquired that right from A, is also now under a duty to B in relation to it. This model also explains why, in *Akers v Samba*, the unauthorised transfer of the shares from A to C was not a disposition of B's property, even if its effect was that B no longer had a right under a trust of the shares.[69] A simply exercised A's power, as holder of the shares, to transfer A's rights to C; certainly, there was no transfer of *B*'s right to C. It is, therefore, a mistake to think of cases in which C takes trust property free from B's claim as exceptions to the *nemo dat* principle.[70] In such cases, A is *not* giving B's right to C. Rather, A simply transfers A's right to C and the separate question of whether B can assert B's right under the trust against C is answered in C's favour.

The second advantage of the proposal is that, in contrast to Maitland's analysis, it can help to explain equity's different treatment of Example 1 and Example 3, as given in section II.C. The difference lies in the content of the duty owed by A to B. In Example 3, in the case of the trust, the duty relates to the entirety of the right (the freehold) held by A on trust for B; in Example 1, the case of the contractual licence, in contrast, A's duty is simply one to give, and not revoke, A's permission for B to make a limited use of A's land. Regarding a trust as requiring A's duty to relate to the entirety of a specific right or rights held by A not only helps to explain which third parties may be subject to a claim by B, but also helps to explain when A's duty to B gives B only a personal right against A, rather than a beneficial interest. Indeed, it can be argued that the distinctive characteristic of all 'equitable property rights', whether arising under a trust or not, is that A's duty relates to a specific right or power of A.[71]

[68] See Hudson's chapter in this volume, section II.B.i.

[69] Note the model also explains why, if money is mistakenly paid to a trustee (who is not acting as an agent) and the money had not yet been paid out to any beneficiary, a restitutionary claim can be brought against the trustee, as confirmed in *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] UKPC 36, [2020] AC 1111. Contrary to Lord Reed's suggestion at [89], this is not because the 'common law ignores the equitable interest of the beneficiaries': it is rather because the transfer reversed by the restitutionary claim was between the payor and the trustee, not the payor and any beneficiary. For further consequences of this model for our understanding of the position of a trustee, see B McFarlane, 'Trusts, Property, and Rights' in S Degeling, J Hudson and I Samet (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford, OUP, 2023).

[70] For such a *nemo dat* analysis, see, eg, P Birks, 'Notice and Onus in *O'Brien*' (1998) 12 *Trust Law International* 2 (discussing the Court of Appeal's decision in *Barclays Bank plc v Boulter* [1998] 1 WLR 1 (CA), later overturned by the House of Lords: [1999] 1 WLR 1919 (HL)). The flaws in this analysis are discussed by B McFarlane and A Televantos, 'As Complex as ABC? Bona Fide Purchasers of Equitable Interests' in P Davies and T Chen-Han (eds), *Intermediaries in Commercial Law* (Oxford, Hart, 2022).

[71] See further McFarlane, *The Structure of Property Law* (n 47) and McFarlane and Stevens, 'The Nature of Equitable Property' (n 13).

As noted by Justice Edelman, writing extra-judicially,[72] the proposal is consistent with some earlier accounts of the trust, which see it as 'an obligation annexed to the ownership of the property'.[73] The contrast is between a trust and the situation where, for example, A owes a debt to B: in the latter case, A's duty is simply to pay a sum of money to B, and that duty is not linked to any specific right held by A. It is this linking of the duty to the right which provides a conceptual account consistent both with B's having a right which is different from a standard personal right and with equity's not contradicting the position that it is A who holds the right forming the subject matter of the trust.[74] It is unfortunate that a misplaced desire to fit B's rights within Austinian categories has obscured equity's remarkable development of a special type of right, arising only where A holds a specific right, and is under a duty to B in relation to that very right.

This leads to a third advantage of the proposal: it reveals the dangers, noted by both Foster[75] and Fox,[76] of applying the '*in personam*' or '*in rem*' labels to B's rights under a trust. This can be seen by considering Lord Sumption's use of the latter term in *Akers v Samba*.[77] For the formal view adopted in this chapter, there are two key points about that decision. One was discussed above: A's unauthorised transfer of the shares to C was not a disposition of B's property. The second is the preliminary point that the Court was able to apply a law other than the *lex situs* of the shares to determine B's rights. As Lord Mance stated, 'in the eyes of English law, a trust may be created, exist and be enforceable in respect of assets located in a jurisdiction, the law of which does not recognise trusts in any form'.[78] Lord Mance drew on a long and consistent line of authorities in reaching that conclusion, and a significant part of the reasoning in those cases is that, in relation to each of jurisdiction and choice of law, the question of whether B has a right under a trust of, for example, land or shares is *not* governed by the same rules as the different question of whether a party has the right to the land itself, or to the shares themselves.[79] In claiming such a right under a trust, B is not claiming the asset held on trust, but is rather claiming that the holder of the asset is under a particular duty to B. This provides one reason why, in *Webb v Webb*, each of an English[80] and a European[81] court held that, in claiming that A held title to French land on trust for him, B's claim did not have as its object a right *in rem* in immovable property, and so the French courts did not have exclusive jurisdiction under what is now article 24(1) of the Recast Brussels Regulation.

[72] Edelman (n 35) 72–73.

[73] Using the language of the Indian Trusts Act 1882, s 3.

[74] W Swadling, 'Unjust Enrichment, Value, and Trusts' (2021) 137 *LQR* 56, 70–71 argues that A's being under a duty to B not to use A's right for A's benefit does not in itself make A a trustee. As Swadling notes, it is indeed important that there are other cases, as where A is the executor of a deceased's estate, where such a duty arises. Even if there is no trust in such a case, parties who benefit from the performance of the duty, such as a legatee, receive practically valuable protection against third parties, and in A's insolvency, not available to the holder of a purely personal right: see, eg, *Commissioner of Stamp Duties v Livingston* [1965] AC 694 (PC).

[75] Foster (n 56).

[76] See Fox's chapter in this volume.

[77] (n 40) [82].

[78] ibid [34].

[79] See further S Agnew and B McFarlane, 'The Nature of Trusts and the Conflict of Laws' (2021) 137 *LQR* 405.

[80] *Webb v Webb* [1991] 1 WLR 1410 (Ch).

[81] Case C-294/92 *Webb v Webb* [1994] ECR I–1717.

It is therefore puzzling that, in *Akers v Samba*, Lord Sumption, whilst accepting that a claim depending on B's equitable interest under a trust was not governed by the *lex situs*, at the same time stated that such an interest has

> the essential hallmark of any right in rem, namely that it is good against third parties into whose hands the property or its traceable proceeds may have come, subject to the rules of equity for the protection of bona fide purchasers for value without notice …[82]

In the confidence with which it is made, as well as its content, this statement calls to mind Maitland's Englishman who, in his ordinary thinking, regards B as the owner of the asset held on trust, subject only to the technical rule of bona fide purchase. There are two particularly telling points, drawn from Lord Sumption's own analysis, which make the use of the '*in rem*' language particularly inapt. First, the specific focus is not on all third parties interacting with the trust property, but rather on recipients of that property (or its traceable proceeds): this is consistent with the distinction drawn above between Example 2 and Example 3, and the two particular types of third party represented by X on the one hand and C on the other. In contrast, a right *in rem* is more usually understood to be prima facie binding on *all* third parties interacting with the asset.[83] Second, even in those cases where C acquires the trust property then, as Lord Sumption noted later in his judgment, 'the question becomes whether the conscience of the transferee is affected'.[84] This observation is consistent with the analysis above, as the extent of C's knowledge may be decisive in determining if C has come under a duty to B; but it again shows how B's initial right operates differently from a standard right *in rem*, where strict prima facie liability is imposed on third parties, without any examination of their conscience.[85]

III. LESSONS FOR EQUITY

A. Lessons from the Trust

The particular formal view proposed here is that the trust does not involve common law and equity disagreeing about ownership of the asset held on trust; but nor is it a case of a simple personal duty being owed by the trustee to the beneficiary. Rather, the trust involves the recognition of a different type of right, transcending the *in personam/in rem* divide, arising where A's duty to B relates specifically to a right

[82] *Akers* (n 40) [82], citing Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 705.

[83] The qualification 'prima facie' is important: contrary to the analysis of, for example, C Langdell, 'A Brief Survey of the Equitable Jurisdiction' (1887) 1 *Harvard Law Review* 55, 60, a right can be *in rem* in this sense even if it is subject to a defence such as the bona fide purchaser defence. It is not, therefore, the possibility of such a defence that prevents B's interest coming within this definition of a right *in rem*: it is rather the fact that the interest is not even prima facie binding on third parties (such as X in Example 2) who do not acquire any right from A.

[84] *Akers* (n 40) [89].

[85] As noted in section III.C of Henry Smith's chapter in this volume, the legal system as a whole loses a potentially valuable tool if all rights are seen as either proprietary or personal, thus overlooking the possibility of a different means, in equity, for a claim to be made against a third party.

held by A. The analysis then is not purely negative, aiming to avoid a confrontation between common law and equity. Rather, it aims to show that the immensely valuable practical contribution equity has made by its development of the trust is based not just on pragmatism, but on a conceptual coup, the development of a new type of right. Indeed, the continued adaptability of the trust depends in some cases on this conceptual point. For example, the potential practical benefits of the 'data trust' would be lost[86] if English law adopted the mistaken view that, since data is not property, it cannot be held on trust.[87] Rather, as long as such trusts involve specific *rights* relating to data being held subject to a duty, data trusts are possible[88] and can provide a modern-day example of the pragmatic benefits of equity.[89]

This model thus explains why the trust is an example of the coherent interaction of common law and equity: put simply, in recognising that B has a right under a trust, equity is not giving a different answer to the fundamental question of who has title. Rather, where, for example, A holds a freehold on trust for B, the fact that A has the rights and powers associated with the freehold is not an obstacle to B; the benefits accruing to B under the trust *depend* on A's having those rights and powers. Equity does not deny A those rights and powers but instead imposes a duty on A to exercise them for the benefit of B, rather than for A's own benefit. This is the sense in which the trust operates by a 'process of cumulation, and not division'.[90] It is also consistent with Maitland's analysis of equity as a secondary or supplementary system: a court of equity did not intervene by way of appeal or judicial review, overturning a common law decision or directing common law judges to act in a particular way. Its orders were rather addressed to the parties themselves.[91] This is consistent with a view which sees the recognition of the trust not as denying A's entitlements, but rather acknowledging them, and directing A to act in a particular way in relation to them.[92]

[86] For such benefits, see, eg, S Delacroix and N Lawrence, 'Bottom-up Data Trusts: Disturbing the "One Size Fits All" Approach to Data Governance' (2019) 9 *International Data Privacy Law* 236.

[87] That view was adopted by Reed, BPE Solicitors and Pinsent Masons, 'Data Trusts: Legal and Governance Considerations' (2019) in a report for the Open Data Institute, 12, available at theodi.org/wp-content/uploads/2019/04/General-legal-report-on-data-trust.pdf.

[88] See Delacroix and Lawrence (n 86) and J Lau, J Penner and B Wong, 'The Basics of Private and Public Data Trusts' (2020) *Singapore Journal of Legal Studies* 90.

[89] Note that linking the trust to cases where A holds a specific right does also provide a limit to the flexibility of equity. This is an under-explored aspect of the courts' consideration, in cases such as *AA v Persons Unknown* [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 and *Ruscoe and Moore v Cryptopia Ltd* [2020] NZHC 728, 22 ITELR 925 of trusts relating to cryptocurrency as the courts should be clearer as to what rights, if any, are held by a holder of cryptocurrency. There is a tendency in such cases to link the availability of a trust to a characterisation of cryptocurrency as property, which is misguided, given that it is clear that a purely personal right can be held on trust: see further K Low, 'Trusts of Cryptocurrency' (2021) 34 *Trust Law International* 191; McFarlane, 'Trusts, Property, and Rights' (n 69).

[90] See N Jones, 'Trusts in England after the Statute of Uses: A View from the 16th Century' in R Helmholz and R Zimmerman (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin, Duncker & Humblot, 1998) 190. See too Brennan J in *DKLR Holding Co (No 2) Ltd v Commissioner of Stamp Duties* (1982) 149 CLR 431 (HCA) 474: 'An equitable interest is not carved out of a legal estate but impressed upon it.'

[91] Maitland (n 12) 9. See too Swadling's chapter in this volume, section V.C.

[92] See, eg, *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 (NSWSC) 311 (McLelland J): 'Where a legal owner holds property on trust for another, he has at law all the rights of an absolute owner but the beneficiary has the right to compel him to hold and use those rights which the law gives him in accordance with the obligations which equity has imposed on him by virtue of the existence of the trust.'

Such a view may also be helpful in addressing civilian objections which are based on the fear, misguided but stoked by the language of the split between legal and equitable title, that the trust involves fragmenting ownership between trustee and beneficiary.[93]

On a pragmatic view, it can be said that equity mitigates, or corrects, the common law: certainly, the practical outcomes to which common law rules would lead are modified by the existence of equitable intervention so that, as the Court of Appeal noted in *Shell*, for example, it is the beneficiary of a trust who in practice enjoys the economic value of the trust property.[94] However, this misses a fundamental formal point about the role of equity: it is not the common law rule or principle that is modified, but only its practical outcome in particular circumstances. Importantly, the rule itself is left intact. To take the case of *Shell*, and to challenge again the pragmatic analysis of the Court of Appeal, it simply cannot be the case that B is the 'real' owner of the land, as title to the land is acquired through registration. That statutory rule is not modified by recognising a trust: it is *not* the case that the statutory rule (that title to the estate in the land depends on registration) is unjust because of its generality and correction, in the Aristotelian sense of equity,[95] is required. Rather, the rule is upheld: it is A, the registered party, who has title (and the consequent rights and powers in relation to third parties); but A is under a duty to B to exercise those rights and powers in a particular way.[96] The trust thus provides a fine example of equity's supplementary or secondary role, with its intervention depending on, rather than denying, pre-existing common law entitlements.[97]

Such an analysis also provides a response to a standard, but potentially fatal, objection to the persistence of equity. If equity is seen as correcting the common law, the objection is that such correction should simply occur directly: by way of changing the common law rules themselves. On a pragmatic view, there is really no good answer to that objection.[98] Consider, for example, developments in the English law of penalties. By 1873, limits imposed on a party's ability to enforce an agreed damages

[93] See P Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property' in L Smith (ed), *The Worlds of the Trust* (Cambridge, CUP, 2013).

[94] *Shell* (n 36) [132].

[95] Based on Aristotle's discussion of *epiekeia*. For consideration of this sense of equity, see Popovici and Smith's chapter in this volume, section III.A.

[96] As noted in section II.A of Nair's chapter in this volume, the registration system sharply distinguishes in such a case between A, who has a registrable estate (and so access to the protections which come with registration) and B, who does not. As Nair notes, the 2002 Act distinguishes between legal and equitable rights in establishing this divide and that distinction cannot be justified in purely pragmatic terms (such as the value of the rights concerned).

[97] For the argument that a distinctive characteristic of equity is its control of the acquisition or enforcement of rights, see McFarlane and Stevens, 'What's Special About Equity? Rights About Rights' (n 47).

[98] The type of pragmatic view favoured by certain legal realists, for example, was often associated with scepticism as to the value of the distinction between law and equity: see, eg, Z Chafee, *Foreword to Selected Essays on Equity*, edn by ED Re (New York, Oceana, 1955) 4. The argument was not that equitable methods of proceeding were unwelcome, but rather that they should not be limited to traditionally equitable areas: see, eg, R Pound, 'The End of Law as Developed in Legal Rules and Doctrines' (1913) 27 *Harvard Law Review* 195, 226–27 and, later, D Laycock, 'The Triumph of Equity' (1993) 56 *Law and Contemporary Problems* 53.

clause had long been seen as equitable,[99] but the Supreme Court in *Cavendish Square Holding BV v Makdessi* re-interpreted the rule against penal clauses as a creature of common law.[100] From a pragmatic perspective, this might be praised as a clear-sighted simplification, directly adjusting the parties' powers to make enforceable agreements. To understand the *practical* significance of the change, however, a formal approach is necessary. Where the rule against penalties is seen as an equitable one, this means that the parties' powers to create valid rights and duties under an agreed damages clause are not denied, but rather than a party can be prevented from asserting the rights arising under such a clause in particular circumstances. The existence of the right is not denied; rather, its enforcement is regulated. This means, for example, that conditions can be imposed on the enforcement of the right, or the term can be enforced up to a limit set by the court.[101] In contrast, on the common law analysis, the right and correlative duty simply do not exist,[102] as the parties lack the power to create such legal relations. This is not to say that the law as a whole is necessarily in a worse state if the rule is regarded as a common law one that denies the parties the power to create such a right; it is rather to say that, as in relation to trusts, the divide between common law and equity reflects an important formal difference, and the practical consequences of moving from one analysis to another may be missed if those formal differences are not borne in mind. As Henry Smith has shown in his analysis of the law in the United States,[103] the 'flattening' involved in overlooking the differences between common law and equity can cause important practical problems.

B. Looking Beyond the Trust

One of the most forceful expositions of a pragmatic view of the relationship between common law and equity can be seen in Atiyah's analysis[104] of the Court of Appeal's decision in *Crabb v Arun District Council*.[105] As shown by the title of his case note, Atiyah's view was that, in allowing Crabb to succeed in his claim that the council was

[99] See, eg, *Wyllie v Wilkes* (1780) 2 Doug KB 519, 523; 99 ER 331, 333; *Sloman v Walter* (1784) 1 Bro CC 418, 28 ER 1213. For full discussion of the history, see P Turner, '*Lex Sequitur Equitatem*: Fusion and the Penalty Doctrine' in J Goldberg, H Smith and P Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge, CUP, 2019) and N Tiverios, *Contractual Penalties in Australia and the United Kingdom: History, Theory and Practice* (Sydney, Federation Press, 2019).

[100] *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172. Compare the different approach taken in Australia: whilst in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 (HCA), the distinct equitable doctrine was said to have 'withered on the vine', its vitality was asserted in *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30, (2012) 247 CLR 205. See further N Tiverios and B McFarlane, 'Controlling Private Punishment in Three Dimensions: Penalties and Forfeiture in England and Australia' in E Bant et al (eds), *Punishment and Private Law* (Oxford, Hart, 2021).

[101] See, eg, the analysis of Nicholls LJ in *Jobson v Johnson* [1989] 1 WLR 1026 (CA) 1038–41.

[102] Or, at least, the right cannot be enforced: the analysis in eg, *Makdessi* (n 100) does not make entirely clear if the penal term is void or simply unenforceable.

[103] See Smith's chapter in this volume. See too H Smith, 'Equity as Meta-Law' (2021) 130 *Yale Law Journal* 1050 especially 1096–97, 1136–38.

[104] P Atiyah, 'When Is an Enforceable Agreement Not a Contract? Answer: When It Is an Equity' (1976) 92 *LQR* 174.

[105] [1976] Ch 179 (CA).

bound to grant him a right of way over its land, the Court had, in effect, modified the classic requirement of consideration, but had been too timid to challenge that rule directly, and so had used proprietary estoppel as a convenient equitable cover to reach the desired practical outcome. A more principled court, in Atiyah's view, would have foregone the equitable fig leaf and taken on the outmoded requirement of consideration directly.[106] The central difficulty with this analysis, as shown by Millett's spirited rebuttal,[107] is that it focusses too much on ends rather than means, assuming that, because the case resulted in the enforcement of an agreement, it must be seen as part of contract law. Taking a formal view is again necessary to understand the nature of the equitable intervention, and its interaction with common law.

On such a view, there are significant differences between finding a contract and permitting a proprietary estoppel claim: the latter is not the equitable equivalent of the former, just as a beneficial interest under a trust is not the equitable equivalent of ownership. Where a contract is found, A is under an immediate duty to B to honour A's side of the bargain and any judicial remedies will aim to give effect to that duty, whether or not B has suffered any loss from its breach.[108] If there is no contract, equity does not undermine that position by proceeding nonetheless to impose such a duty. In contrast, as Hoffmann LJ pointed out in an influential analysis,[109] equitable estoppel, where it operates as a cause of action, does not hold that the promise imposed an immediate duty on A, but rather 'looks backwards' and considers whether, given A's promise and B's reliance on it, it would *now* be unacceptable for A to be wholly free to withdraw from that promise. This explains, for example, why the contractual requirement of intention to come under a legally binding duty does not apply to proprietary estoppel: the equitable doctrine, after all, imposes no such duty.[110] Contrary to Atiyah's analysis, proprietary estoppel does not allow a contractual claim to proceed in the absence of consideration; rather, it recognises a quite different type of claim. This can be seen, as in the case of the trust, by focussing on the form of the parties' legal relations. It seems again that equity makes a useful addition to the forms available at common law: whereas the contractual requirements determine when A is under an enforceable duty to B to perform A's side of

[106] Atiyah (n 104) 179–80.

[107] P Millett, 'Crabb v Arun District Council – A Riposte' (1976) 92 *LQR* 342. As counsel for Crabb in the case, Millett understandably wished to rebut the notion that the case could simply have been pleaded as a contractual claim. As Millett noted (at 346) 'the apparent similarity of the results achieved [in a contractual claim and a proprietary estoppel claim]' is 'deceptive' as the claims 'are different, require different facts to be proved, and have different consequences'.

[108] See, eg, *Williams Bros v Ed T Agius Ltd* [1914] AC 510 (HL).

[109] *Walton v Walton* (CA, 14 April 1994): the case is unreported but Hoffmann LJ's analysis has been relied on in, eg, *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [52]–[57] (Lord Walker), [101] (Lord Neuberger) and *Cowper-Smith v Morgan* [2017] SCC 61, [2017] 2 SCR 754 [26] and [28] (McLachlin CJ). See further B McFarlane, 'The Importance of Looking Back' in P Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Oxford, Hart, 2015).

[110] As noted by Wilson LJ in *Sutcliffe v Lloyd* [2007] EWCA Civ 153, [2007] 2 EGLR 13 [38]: it is 'misconceived in law' to require A to have suggested to B that A's promise was legally binding as '[e]quity intervenes to make the promise unable to be revoked (and able to be enforced) not at the time when it is made but only at a significantly later stage, namely in the events both that the promisee should have acted to his detriment in reliance upon it and that the promisor should have unconscionably sought to withdraw from it. Equity does not require the promisor, in making the promise, to mis-state the law in this regard'.

an agreement, proprietary estoppel instead recognises when a court may give effect to a liability of A to ensure that A does not, without justification, leave B to suffer a detriment as a result of B's reasonable reliance on A's seriously intended promise to B. Indeed, it is in some ways fitting – albeit in other ways confusing – that the very word 'equity' is used to refer to the right B acquires where a proprietary estoppel arises, and thus to distinguish it from the claim-right B acquires where B has the benefit of an enforceable contract.[111]

IV. CONCLUSION

Less than 50 years after the Judicature reforms, Maitland stated that it would have been 'a belated, a reactionary measure' to include equity as a separate subject in an undergraduate law degree.[112] Over 100 years after those reforms, calls were made for the end of practitioner works on equity.[113] Yet, as we hit the 150th anniversary, there has been significant academic interest in recognising the benefits that equity can bring to a modern system of private law. Some have emphasised the substantive contribution of equity, for example in allowing the positive law to accord more closely with morality;[114] others have focussed on the functional advantages of a secondary system.[115] This chapter has argued instead for a formal analysis, which focusses on the specific nature of the legal relations involved where equity intervenes. Such an analysis is not inconsistent with either the substantive or functional views and, indeed, can provide support for them. The key point remains that identified by Burrows: to justify distinct equitable rules and principles, different from their common law 'equivalents', we need to identify the distinct questions which those rules and principles are answering and show how they differ from the questions posed at common law.

In the case of the trust, this chapter has argued, equity gives precisely the same answer as common law to the question of ownership of, or title to, property; it then goes on and, consistently with its role as a secondary or supplementary system, asks the further question of whether that party is under a particular type of duty in relation to that ownership or title. As Burrows claimed, common law and equity do co-exist coherently in such a case, but precisely because there is *not* a split between legal and equitable title. Rather, there is a difference between the question of title and the question of whether the holder of the title is under a particular type of duty. On this view,

[111] See, eg, *Crabb v Arun* (n 105) 192 (Scarman LJ): '[Mr Crabb] has the benefit of no enforceable contract … If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties.' For an interpretation of such an 'equity' as showing that A is under a liability, rather than a duty to B, see, eg, B McFarlane, 'Equitable Estoppel as a Cause of Action: Neither One Thing nor One Other' in S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (Sydney, LawBook Co, 2016).

[112] Maitland (n 12) 21.

[113] J Hackney, 'Snell's Equity (13th edn) (Review)' (2001) 117 *LQR* 150, 154 notes that the basic message of the organisation of P Birks, *English Private Law* (Oxford, OUP, 2000) – with its absence of a chapter on equity – is '"thank you, but no more *Snells*"'.

[114] See, eg, I Samet, *Equity: Conscience Goes to Market* (Oxford, OUP, 2018).

[115] See, eg, Smith, 'Equity as Meta-Law' (n 103).

then, the persistence of equity depends on the formal differences between the legal relations recognised by particular common law rules and principles on the one hand, and equitable rules and principles on the other. If English law is to continue to enjoy the practical benefits arising from equity, by giving clear answers to difficult questions as to the nature and operation of equitable concepts such as the trust, it is vital that those formal differences are kept in mind. The trust, and equity more broadly, thus provide examples of a still more general point: if English law is to continue to be successful in practice, we need not only pragmatists, but also Professors.