

Historical Conceptions of the Express Trust, c 1600–1900

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I. Introduction

In a volume on the philosophical foundations of the express trust, it may be salutary to consider the role which historical conceptions of the trust have played in shaping modern legal thought. In the late sixteenth century, the trust was conceived as a ‘confidence annexed in privity’. This definition promoted a highly personal conception of the trust which emphasised the reposing of trust in an identified individual and the binding of their conscience to perform the trust. Such a personal conception tended toward some significant limitations on the enforceability of the trust but, as the trust concept evolved over the course of the seventeenth century, many of these limitations began to fade from the case law. Increasingly the trust came to be conceived as attaching not merely to the trustee’s conscience, but to the trust property itself. This shift in emphasis from ‘confidence’ to ‘property’ had a number of consequences for the creation, administration and enforceability of trusts, but also encouraged a reconceptualization of the trust in explicitly proprietary terms. By the late 1820s indeed, John Austin could conceive of trusts as giving rise to proprietary rights which he described as ‘rights *in rem*’. By the 1880s, Austin’s adoption of the civilian terminology of rights *in rem* triggered responses from scholars who considered the beneficiary’s right to be better characterised as a right *in personam*. There followed the famous debates in the school of analytical jurisprudence which, by the early twentieth century, had produced a raft of essays explaining the nature of the beneficiary’s right as either ‘*in rem*’ or ‘*in personam*’ in nature. Since then, this language has seeped into the collective legal conscious and has become the orthodox way to describe equitable rights.¹

In spite of the ubiquity of the *in rem/in personam* distinction, few modern writers have stopped to consider why technical procedural terms lifted from classical Roman law should be apt descriptors of such a quintessentially common law concept as the trust. Fewer still have considered the continuing significance of the historical conception of the trust which both pre-dated and existed alongside the Austinian analytical models. Ultimately, the debate over the proper classification of the beneficiary’s rights as either *in rem* or *in personam* remained inconclusive precisely because these civilian tags did not map neatly onto the privity-based, historical conception of the trust which was reflected in the case law and the treatise literature. After all, what would come to be described as variously the *in rem* or *in personam* aspects of the beneficiary’s right had themselves been determined according to the historical conception of the trust as annexed in privity. Thus, that which the school of analytical jurisprudence regarded as a source of intense speculation was readily intelligible to historians of equity. This chapter will consider each conception in turn, paying regard to their origins and significance in the history and philosophy of the express trust.

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¹ *Sinclair v Brougham* [1914] AC 398, 418 (Haldane LC); *Re Diplock* [1947] Ch 716, 787 (Wynn-Parry J); *Re Diplock* [1948] Ch 465, 475–6 (Greene MR); *Shiloh Spinners v Harding* [1973] AC 691, 721 (Lord Wilberforce); *Webb v Webb* [1992] ILPr 374, [13] (Scott LJ), [16] (Nourse LJ); *Webb v Webb* (C-294/92) [1994] QB 696, [34]–[54] (AG Darmon); *Tinsley v Milligan* [1994] 1 AC 340, 371 (Lord Browne-Wilkinson); *Westdeutsche Landesbank Girozentrale v Islington BC* [1996] AC 669, 711 (Lord Browne-Wilkinson); *Akers v Samba* [2017] AC 424, 461 (Lord Sumption).

II. The Historical Conception of the Trust

The privity-based conception of the trust had deep roots, stretching back to the sixteenth century,² and owing much to the medieval use.³ In Coke's report of *Chudleigh's case* (1594), we find the following definition:

A use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cestuy que use* shall take the profit, and that the terre-tenant shall make an estate according to his direction. So as *cestuy que use* had neither *jus neque in re*, *neque ad rem*, but only a confidence and trust, for which he had no remedy by the common law, but his remedy was only by *subpoena* in Chancery.⁴

This definition of the use/trust was a *locus classicus*. At its heart lay two key elements which would be foundational for later writers: 'confidence' and 'privity'. These two ideas combined to produce a highly personal conception of the trust which emphasised the reposal of trust in an identified person and which was enforceable only against a narrow class of individuals who were deemed 'privy' to the confidence. Over the course of the seventeenth and eighteenth centuries, many of the more restrictive aspects of these ideas were discarded and a more proprietary conception of the trust was allowed to take root. The following sections illustrate how this shift from the personal to the proprietary conception took place in the case law and treatise literature of the period.

A. Confidence

'Confidence' – sometimes referred to as 'privity in person' –⁵ referred to the act of entrusting another person to carry out the trust. The reposal of trust and confidence was essential because it burdened the trustee's conscience and grounded the beneficiary's right to enforcement.⁶ The need to repose confidence in an identifiable person naturally emphasised the personal relationship between the parties to the trust but had some peculiar consequences for the creation and enforceability of express trusts – many of which did not survive into the modern law – including: a refusal to recognise corporate trusteeship; limitations on enforceability by third-party beneficiaries; and restrictions on equity's supervisory jurisdiction over trusts. As each of these aspects of confidence were discarded from the case law, the conceptual focus shifted from 'confidence reposed' to the trust property itself and encouraged more explicitly

² *Delamere v Barnard* (1567) 1 Plow 346, 352; *Chudleigh's case* (1594) 1 Co Rep 120a, 121b; *Witham v Waterhouse* (1596) Cro Eliz 466; *Sir Moyle Finch's Case* (1600) 4 Co Inst 85; *R v Holland* (1648) Style 20 and 40; *Pawlett v AG* (1667) Hardres 465, 469; H Finch (later Lord Nottingham), *Prolegomena* (written c 1670) in DEC Yale (ed), *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (CUP 1965), c 12, s 5, c 14, s 1 (hereafter Yale (ed), *Prolegomena*); *Burgess v Wheate* (1759) 1 Wm Bl 123, 162.

³ DEC Yale, *Nottingham's Chancery Cases*, vol ii (1961–62) 79 Selden Society 87–91 (hereafter 'Yale (ed), *Nottingham's Chancery Cases*, vol ii').

⁴ *Chudleigh's case* (1594) 1 Co Rep 120a, 121b. Similar sentiments are attributed in Popham's report to Ewens, Owen, Bateman and Fenner JJ (Poph 70, 71–2). This definition originated in *Delamere v Barnard* (1567) 1 Plow 346, 352.

⁵ C Butler (ed), *An Essay on the learning of Contingent Remainders and Executory Devises* (7th edn, J Butterworth 1820) 290, n (h); T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (A Maxwell 1837) 19 (hereafter 'Lewin, *Trusts and Trustees*').

⁶ NG Jones, 'Trusts in England after the Statute of Uses: A View from the 16th Century', in R Helmholz and R Zimmermann (eds), *Itinera Fiduciae* (Duncker & Humblot 1998) 173, 193–5 (hereafter 'Jones, 'Trusts in England'); NG Jones, 'Aspects of Privity in England: Equity to 1680' in EJH Schrage (ed), *Ius Quaesitum Tertio* (Duncker & Humblot 2008) 135, 170–2 (hereafter 'Jones, 'Aspects of Privity').

proprietary conceptions of the trust. By the end of our period indeed, trusts were conceived not as mere personal confidences reposed in another, but as vesting equitable rights in the trust property which could not be impugned for lack of an express reposal of trust in an identified trustee.

The rule against corporate trustees stemmed from the idea that corporations were not natural persons in whom confidence could be reposed. In *Chudleigh's case* (1594), it was said that 'a confidence cannot be in land, or other dead thing...nor a corporation, because it is a dead body, although it consist of natural persons: and in this dead body a confidence cannot be put, but in bodies natural'.⁷ The focus on the confidence reposed in the trustee served to underline the importance of the personal relationship between the parties, but limited capacity for trusteeship to *natural* persons only.⁸ Understandably, this aspect of confidence was found inconvenient and was abandoned in the later seventeenth and eighteenth centuries as courts recognised the possibility of both corporate⁹ and royal trusteeship.¹⁰ By the eighteenth century, a trustee's lack of capacity would not bar the creation of an express trust. Such decisions tended to downplay the significance of confidence in the creation of express trusts.¹¹

The requirement of confidence also affected the rights of third-party beneficiaries under a trust (i.e. beneficiaries who were not themselves settlors). In 1564, Weston J had observed that one 'cannot have any trust or confidence in those whom he does not know'¹² and this sentiment was repeated by Egerton LK in the 1590s.¹³ But this conception of confidence operated to render trusts readily defeasible by the settlor. In *Yelverton v Yelverton* (1599), for example, Egerton held that:

it is no breach of trust if any man of his own accord, minding to do good to another, do put one in trust with assurance and the party trusted do redeliver it at the request of him which did trust him without the privity of him to whom the good was meant, for the party to whom the good was meant did not trust him, but the party which did mean to do good.¹⁴

Where a third-party beneficiary was unaware of the trust, therefore, the trustee would not be liable for breach where he reconveyed the trust property at the request of the settlor.¹⁵ It was the settlor who had reposed confidence in the trustee, not the beneficiary. For this reason, the trust was revocable at the settlor's election and it was no breach for the trustee to comply.

⁷ Poph 70, 71–2. See also 1 Co Rep 120a, 127a, and *Anon* (1598x1603) 117 Selden Society 290, no. 119–123.

⁸ Although Jones, 'Trusts in England' (n 6) 194, n 131, observes that there was seemingly no objection to corporations acting as trustees of charitable trusts in the sixteenth century. Notably, infants were also considered to have the capacity for trusteeship: *Ridgway v Forth* (1590) 117 Selden Society 247, no. 119.

⁹ *Sterling v Wilford* (1676/77) 79 Selden Society 447. See copious authorities listed by J Willis, *A Practical Treatise on the Duties and Responsibilities of Trustees* (R Pheney, S Sweet, and Stevens & Sons 1827) 32, n 11.

¹⁰ *Earl of Kildare v Eustace* (1686) 1 Vern 438, 439 (Trevor MR); *Penn v Lord Baltimore* (1750) 1 Ves Sen 444, 453 (Hardwicke LC).

¹¹ Yale (ed), *Nottingham's Chancery Cases*, vol ii (n 3) 90–1.

¹² *Anon* (1564) Moo KB 61 (translated from Law French). See NG Jones, 'Wills, Trusts and Trusting from the Statute of Uses to Lord Nottingham' (2010) 31 JLH 273, 291 (hereafter 'Jones, 'Wills, Trusts and Trusting'').

¹³ Jones, 'Trusts in England' (n 6) 194.

¹⁴ 117 Selden Society 270, no. 118–[308].

¹⁵ Jones, 'Trusts in England' (n 6) 194.

The rule was otherwise where the third-party beneficiary had provided consideration.¹⁶ Where consideration had passed from the beneficiary, a trustee who made a reconveyance would be liable for breach. In *Pye v George* (1710),¹⁷ for example, it was held that trustees to preserve contingent remainders who joined in a conveyance to bar the remainder before a son was born were guilty of a breach of trust. Although unborn at the time of the breach and incapable of reposing confidence in the trustee, the son was within the marriage consideration of the parties to the settlement and had thus provided the consideration necessary to ground a claim for breach. The recognition of liability to an unborn beneficiary was necessary to ensure the efficacy of the trust to preserve contingent remainders, but also served to detract from the requirement of a personal confidence reposed by the beneficiary in the trustee. Rather, where the beneficiary had provided consideration, they could be regarded as having purchased an interest under the trust which could not be readily destroyed by the settlor and trustee acting in concert.

Where the beneficiary was a mere volunteer, however, equity retained a discretion to order trustees to join conveyances to destroy contingent remainders.¹⁸ The case law thus suggested that, even by the eighteenth century, the beneficiary's right remained somewhat ephemeral.¹⁹ It was only in the early nineteenth century that the link between consideration and the defeasibility of the beneficiary's right was effectively broken. In *Ellison v Ellison* (1802),²⁰ Eldon LC held that, where the trust was completely constituted, the beneficiary's equitable interest could be enforced in chancery regardless of whether consideration had passed from the beneficiary or not. Thereafter, consideration would only be necessary where the trust was incompletely constituted.²¹ Trusts could now be conceived as vesting rights to the trust property in the beneficiary which were not defeasible either for lack of confidence reposed or lack of consideration moving from the beneficiary. This shift from confidence to consideration and then to constitution served to emphasise the beneficiary's equitable interest in the trust property and to diminish the role of confidence as an organising principle in the creation and enforcement of express trusts.

The final consequence of the language of confidence in the sixteenth century was to limit equity's supervisory jurisdiction in the event of a failure by those in whom trust had been reposed. In *Bonefant v Greinfeld* (1586),²² for example, the testator had devised land to four executors with instructions to sell, but one executor refused to act. Coke argued that the remaining executors could not sell because 'it is a speciall trust, and a joynit trust, and shall never survive: for perhaps, the devisor who is dead, reposed more confidence in him who refused, than in the others'. By the middle of the seventeenth century though, it came to be accepted that trusts bound the land, not merely the consciences of those in whom trust had been reposed. In the event of failure of the testamentary trustees, equity would instead imply a trust

¹⁶ JL Barton, 'The Medieval Use' (1965) 81 LQR 562, 570–2; TFT Plucknett and JL Barton (eds), *St German's Doctor and Student* (1974) 91 Selden Society xlivi; AWB Simpson, *A History of the Common Law of Contract* (Clarendon 1975) 337–344; S Anderson, 'Trusts and Trustees' in W Cornish *et al* (eds), *Oxford History of the Laws of England*, vol xii (OUP 2010) 252–268.

¹⁷ 2 Salk 680; 1 P Wms 128; Prec Ch 308; (1712) 7 Bro PC 221. Followed in *Mansell v Mansell* (1732) Cas t Talb 252; 2 P Wms 678.

¹⁸ *Tipping v Piggot* (1711) Gilb Rep 34; *Basset v Clapham* (1717) 1 P Wms 358.

¹⁹ MRT Macnair, 'The Conceptual Basis of Trusts in the Later 17th and 18th Centuries' in R Helmholz and R Zimmermann (eds), *Itinera Fiduciae* (n 6) 224 (hereafter Macnair, 'Conceptual Basis').

²⁰ 6 Ves Jr 656, 662.

²¹ MRT Macnair, 'Equity and Volunteers' (1988) 8 LS 172, 181–2.

²² Godb 77.

on the testator's heir.²³ In *Gwilliams v Rowel* (1661),²⁴ the testator had left his property on a trust to sell but, on the death of one of the trustees, the surviving trustee and the testator's heir were ordered to sell the property because 'the lands were tied with a trust, which will survive in equity.' *Gwilliams* suggested that the trust was moving beyond the *dictum* in *Chudleigh's case* (1594), that 'a confidence cannot be in land'.²⁵ Nevertheless, chancery practice remained unsettled in this period. In *Pitt v Pelham* (1667–9),²⁶ the testator purported to devise lands upon trust but failed to name a trustee. When the testator died, the lands instead descended to the heir. The will was held void at law and Bridgman LK decreed there was 'no cause or colour to make good the same in equity'.²⁷ Although eventually reversed on appeal to the House of Lords,²⁸ Bridgman's decision demonstrated that, even by the later seventeenth century, a failure to identify the person in whom trust was reposed could be fatal to the creation of an express trust.²⁹

As with the other inconveniences arising from the requirement of personal confidence, this aspect of trusteeship faded by the later seventeenth century. In the 1670s, Nottingham would readily imply a trust on the heir on the grounds that 'a trust is fixed upon the land'³⁰ and, in *Eales v England* (1702–4),³¹ it was held that a trust of a legacy would not lapse where the trustee predeceased the testator. In *Bennet v Davis* (1725),³² the testator devised lands to his daughter upon a trust for her separate use but failed to nominate a trustee. By analogy with the testamentary cases, Jekyll MR decreed that the daughter's bankrupt husband held the property as trustee for his wife. Around this time, we also see a rising practice of judicial exercise of trust powers in the event of default by the trustee.³³ Such expansions of the supervisory jurisdiction were ultimately viewed by later writers as the origin of the maxim that 'a trust shall not fail for want of a trustee'³⁴ and demonstrated how far the need to repose trust and confidence had receded from the case law. In none of these cases had the testator actually reposed trust in the court, or the court-appointed trustee. Instead, as Charles Butler noted in 1794, 'the relief is administered by considering the land in whatever person vested, as bound by the trust'.³⁵ The cases thus demonstrated a shift from confidence reposed in the trustee, to the equities attaching to the subject matter of the trust. The concern for the court was not that trust had been reposed in a particular person, but that the case involved trust property and ought to be administered according to the terms of the trust.

²³ *Locton v Locton* (1637/8) 2 Freem 136.

²⁴ Hardres 204.

²⁵ Poph 70, 71–2.

²⁶ 1 Ch Cas 176; 1 Ch Rep 283; 2 Freem 134; Yale (ed), *Prolegomena* (n 2) c 13, s 3.

²⁷ 1 Ch Rep 283, 288.

²⁸ (1669–70) 1 Lev 304; Rep t Jones 25.

²⁹ See Lord Mansfield's discussion of *Pitt v Pelham* in *Burgess v Wheate* (1759) 1 Bl Wm 123, 159–160, as an example of the ephemeral nature of the trust prior to Nottingham's chancellorship.

³⁰ *Stutville v Rossell* (1674) 79 Selden Society 49, no. 86. See also Yale (ed), *Nottingham's Chancery Cases*, vol ii (n 3) 106–8, and Jones, 'Wills, Trusts and Trusting' (n 12) 290–2.

³¹ (1702) Prec Ch 200; (1704) 2 Vern 466.

³² 2 P Wms 316.

³³ *Moseley v Moseley* (1673) Rep t Finch 53; *Clarke v Turner* (1694) 2 Freem 198; *Warburton v Warburton* (1701) 2 Vern 420; (1702) 4 Bro PC 1; *Harding v Glyn* (1739) 1 Atk 469. These decisions were canvassed by Lord Wilberforce in his seminal speech on judicial execution of trust powers in *McPhail v Doulton* [1971] AC 424, 451–2.

³⁴ Lewin, *Trusts and Trustees* (n 5) 572–3; G Spence, *Equitable Jurisdiction*, vol i (V Stevens, R Stevens and GS Norton 1846) 500–1 (hereafter 'Spence, *Equitable Jurisdiction*, vol i').

³⁵ F Hargrave and C Butler (eds), *Notes on Lord Coke's First Institute or Commentary upon Littleton*, vol iii (E and R Brooke 1794) 113a, n 2.

These developments demonstrated that the sixteenth century language of ‘reposing trust and confidence’ could no longer adequately describe the basis upon which modern trusts were enforced. By the late seventeenth century, we find the early institutional writers on equity grappling with the evolving nature of the trust and struggling to create new models to explain the nature of the beneficiary’s right. There was a notable reliance on civilian analogies when explaining the nature of the trust,³⁶ although the precise analogy chosen would depend on the author’s conception of the trust as either obligational or proprietary. In his *Prolegomena* (c 1670), Nottingham had emphasised the proprietary nature of the beneficiary’s right, defining the trust as ‘an equitable interest in the land’³⁷ and, thereafter, explained that ‘[s]uch kinds of trusts in the Civil Law are called *fideicommissa*’.³⁸ Jeffrey Gilbert (c 1700), on the other hand, seemed to favour an analogy with the *usufruct*.³⁹ Both analogies were designed to buttress the conception of the beneficiary’s right as an equitable interest in land;⁴⁰ the right of beneficiary did not arise from any contract or agreement with the trustee, but because the trust invested the beneficiary with a property right. By contrast, the author of *A Treatise of Equity* (1737) – attributed to Henry Ballow – adopted the more radical explanation of the trust as a type of contract (specifically, *depositum*).⁴¹ For Ballow, equity’s enforcement of trusts was merely an instance of specific performance of a contractual obligation,⁴² the trustee’s duty and the beneficiary’s right emerged from agreement and was, therefore, personal in nature. It is notable, however, that as his analysis progressed Ballow quickly abandoned this analogy and returned to the language of confidence found in *Chudleigh’s case*.⁴³

Ultimately, Ballow’s contractual analysis found few supporters⁴⁴ and, by the dawn of the nineteenth century, we find a pivot back to more proprietary conceptions in the treatise literature – this time with a marked focus on the trust property itself as the basis for the beneficiary’s rights and the trustee’s duties. In 1813, Francis Sanders wrote that ‘all the questions concerning the capacity of persons to stand seised to a use are avoided in the case of modern trusts; as the courts of equity fasten the trust upon the estate, and not upon the person’.⁴⁵ Similarly, in his notes to the 1826 edition of Coke’s *Reports*,⁴⁶ John Henry Thomas remarked that ‘the courts of equity now hold, that a trust shall never fail on account of the disability or non-appointment of the trustee, because the trust, if properly created, will fasten upon and attach to the land’.⁴⁷ In 1837, Thomas Lewin was careful to downplay the role of confidence in his account of the trust, observing that a trust ‘is a *confidence*; not necessarily a confidence

³⁶ DJ Ibbetson, ‘Natural Law and Common Law’ (2001) 5 Edin LR 4, 13–14; IS Williams, ‘The Tudor Genesis of Edward Coke’s Immemorial Common Law’ (2012) 43 Sixteenth Century Journal 103, 120–1. An early example was Francis Bacon’s analogy with the *fideicommissum*: see F Bacon *Reading on the Statute of Uses* (M Wallbancke and L Chapman 1642) 7 and 15–16 (hereafter ‘Bacon, *Reading*’).

³⁷ Yale (ed), *Prolegomena* (n 2) c 12, s 5.

³⁸ *ibid* c 12, s 8. See also c 14, ss 15–18 and W Blackstone, *Commentaries on the Laws of England*, vol ii (Clarendon 1766) 327–9.

³⁹ J Gilbert, *Law of Uses and Trusts* (E Nutt, R Nutt, and R Gosling 1734) 3 (hereafter Gilbert, *Uses and Trusts*). cf *usufruct* analogy in *Re Henry de Vere* (1625) W Jones 96, 127 (Dodderidge *in arguendo*).

⁴⁰ For the limitations of these analogies, see Macnair, ‘Conceptual Basis’ (n 19) 213–6.

⁴¹ [H Ballow], *A Treatise of Equity* (E Nutt, R Nutt, and R Gosling 1737) bk 2, c 1, s 1 (hereafter ‘[Ballow], *Treatise of Equity*’). This analysis had some limited support in the case law (*Lord Hollis’ case* (1674) 2 Vent 345; 1 Eq Cas Abr 380, in which money lent for a purpose was referred to as ‘a *depositum* and a trust’ for the lender).

⁴² Macnair, ‘Conceptual Basis’ (n 19) 216–8.

⁴³ [Ballow], *Treatise of Equity* (n 41) bk 2, c 1, s 2. See Jones, ‘Aspects of Privity’ (n 6) 162–4.

⁴⁴ cf W Blackstone, *Commentaries on the Laws of England*, vol iii (Clarendon 1768) 432.

⁴⁵ *An Essay on the Nature and Laws of Uses and Trusts* (3rd edn, W Walker 1813) 34. See also Spence, *Equitable Jurisdiction*, vol i (n 34) 500–1.

⁴⁶ JH Thomas and JF Fraser (eds), *Reports of Sir Edward Coke* (J Butterworth 1826), 13 parts in six volumes. This edition was reproduced in the *English Reports*.

⁴⁷ 76 ER 270, 292, n E2 (*Chudleigh’s case* (1594) 1 Co Rep 120a, 127a).

expressly reposed by one party in another, for it may be raised by implication of law; nor need the trustee of the estate *actually* be capable of confidence, for the capacity itself may be supplied by legal fiction, as where the administration of the trust is committed to a body corporate'.⁴⁸ These ideas were subsequently combined by George Spence in the first volume of his highly influential treatise, *The Equitable Jurisdiction of the Court of Chancery* (1846):

a body corporate might be compelled to execute a trust, thus abolishing the rule that there must be a *person* in whom the confidence is placed... The trust, in fact, was treated as if it were fastened on the estate rather than the person; and a trust was never allowed to fail for want of a trustee, whether the trustee named died, or was an improper or incapable person. When trustees refused to act, it was considered that the trust devolved upon the court.⁴⁹

By the nineteenth century, the notion of confidence had become dislocated from the trust and the attendant case law was relied upon by institutional writers to emphasise a more proprietary conception of the trust. Neither the trustee's capacity to be trusted, nor the beneficiary's capacity to trust, was an objection to the enforceability of a trust and, in dubious cases, the court could exercise its supervisory jurisdiction to ensure the efficacy of the trust instrument. Even in the absence of an express entrusting between beneficiary and trustee, the trust could be enforced because it gave rise to rights which were now understood to enure in the trust *res*.

B. Privity

The second aspect of the early modern definition of a trust was the doctrine of privity. Privity governed the 'continuation' of the confidence and allowed the trust to be enforced by and against those who were not the original parties to the trust.⁵⁰ The rules of privity provided that the beneficiary's right could only be enforced against, and claimed by, those whose rights were derived from an act of the parties to the trust (e.g. by grant or assignment). By contrast, those whose rights arose by operation of law (e.g. the lord by escheat, the disseisor, or the judgment creditor) were outwith the privity and could neither claim the benefit of the trust, nor could they be bound by it. The doctrine of privity thus governed the contours of the trust's exigibility and enforceability, but also affected how the trust was conceptualised, first as a type of *chose* in action and subsequently as attaching to the trustee's estate in the trust *res*. These shifts in the understanding of privity reflected the same slow proprietisation of the trust outlined in the preceding section.

Privity had governed the medieval use and was, originally, an exceptionally strict doctrine. In the mid-fifteenth century, it had been said that the chancery *subpoena* was only available against the feoffee personally and did not extend to the feoffee's heir⁵¹ or the feoffee's assignee.⁵² Around the same time, it was also held that the use could not be enforced other than by the *cestui que use*.⁵³ The central idea was that the confidence reposed in the feoffee was

⁴⁸ Lewin, *Trusts and Trustees* (n 5) 15. Emphasis in original.

⁴⁹ Spence, *Equitable Jurisdiction*, vol i (n 34) 500–1.

⁵⁰ *Chudleigh's case* (1594) Poph 70, 71 ('confidence shall bind but in privity'). Fenner J (c 1594) said that privity was 'nothing else but a continuance of the confidence without interruption...' (Bacon, *Reading* (n 36) 8–9).

⁵¹ YB 8 Edw IV, f 5b, pl 1. See also YB Pas 22 Edw IV, f 6, pl 18 (Hussey CJ).

⁵² Anon (1453) Fitz Abr tit *Subpoena*, pl 19.

⁵³ YB 5 Edw IV, f 7b, pl 18 (*subpoena* could not be brought by lord claiming by escheat upon the *cestui que use*'s attainer of felony).

personal and incapable of being enforced by or against one who was not a party to the use.⁵⁴ Charles Butler explained the effects of this doctrine in the following terms:

between the feoffee and *cestuy que use*, there was a confidence in the person and privity in estate...But this was only between the feoffee and *cestuy que use*. To all other persons the feoffee was as much the real owner of the fee, as if he did not hold it to the use of another. *He* performed the feudal duties; *his* wife was entitled to dower; *his* infant heir was in wardship to the lord; and, upon *his* attainder, the estate was forfeited.⁵⁵

In effect, therefore, privity rendered the trust property immune to the liabilities of the *cestui que use*, and liable to those of the feoffee. This strict formulation of the doctrine of privity had inconvenient consequences for the enforceability of the use – particularly where the feoffee died – but, in the mid-to-late fifteenth century, exceptions were carved out to permit enforcement of the use against the feoffee's heir⁵⁶ and the feoffee's assignee.⁵⁷

This partially relaxed doctrine of privity was subsequently transposed from the use into the trust and helped to structure the rules of the trust in its formative period (c 1536–1600). There was, however, a significant debate about the nature of privity in the later sixteenth century which produced some instability in the case law. In the mid-1590s, 'privity' was understood ambiguously as meaning either 'privity of contract' or 'privity of estate'. It was the latter version of the doctrine which would make a lasting impact on the trust, but, for a period in the 1590s, the trust was being analogised to *chooses* in action and, by extension, was thought to be governed by privity of contract.⁵⁸ On this view, the beneficiary's right was merely a right to the chancery *subpoena* to enforce the trust (rather than an interest in the trust property itself). In *Witham's case* (1596), for example, a trust of a lease was described as 'a thing in privity, and in the nature of an action, for which no remedy was but by writ of *subpoena*...for the trust runneth in privity'.⁵⁹ In *Sir Moyle Finch's case* (1600),⁶⁰ this analogy was carried further with the resolution that a trust was unassignable 'because it was a matter in privity between them, and was in the nature of a *chouse* in action, for [the beneficiary] had no power of the land, but only to seek remedy by *subpoena*'.⁶¹ This highly personal conception of the trust was short-lived; indeed, it seems to have been doubted even at the time it was being crafted.⁶² By the mid-seventeenth century, any doubt as to the assignability of the trust had been dispelled and the analogy with the *chouse* in action was roundly rejected.⁶³ By this stage, the trust was clearly

⁵⁴ RW Turner, *Equity of Redemption* (CUP 1931) 43 (hereafter Turner, *Equity of Redemption*).

⁵⁵ C Butler (ed), *The First Part of the Institutes of the Laws of the Realm or, A Commentary upon Littleton*, vol ii (19th edn, J & WT Clarke 1833) 271b, n 1; emphasis in original.

⁵⁶ *Dod v Chytynden* (1502) 116 Selden Society 395, 396 (Vavasour J).

⁵⁷ YB 5 Edw IV, f 7b, pl 16 (enforcement against purchaser with notice).

⁵⁸ MRT Macnair, 'Development of Uses and Trusts: Contract or Property and European Influences' (2015) 66 *Studi Urbinati A – Scienze giuridiche, politiche ed economiche* 305, 315–318 (hereafter 'Macnair, 'Development of Uses and Trusts').

⁵⁹ 4 Co Inst 87.

⁶⁰ 4 Co Inst 85.

⁶¹ *ibid.*

⁶² Bacon, *Reading* (n 36) 13. Macnair, 'Development of Uses and Trusts' (n 58) 317–8, views Bacon's analysis as 'not stating the dominant position, but arguing against it' in order to 'demonstrate legal skill by contrarianism'. cf NG Jones, 'The Trust Beneficiary's Interest before *R v Holland* (1648)', in ADE Lewis, P Brand and P Mitchell (eds), *Law in the City: Proceedings of the Seventeenth British Legal History Conference, London, 2005* (Four Courts 2007) 95, 111–116, suggesting that the late sixteenth century chancery did not see a difficulty in accepting assignments or devises of beneficial interests.

⁶³ *R v Holland* (1648) Style 20, 21 (Rolle J).

more than an unassignable *chose*, but its precise classification remained a matter of speculation.⁶⁴

By contrast, the ‘privity of estate’ approach endured rather longer than the ‘privity of contract’ theory and continued to inform conceptions of the trust until the middle of the nineteenth century. The language of privity of estate suggested that the enforceability of trusts was being explained by analogy to the running of real covenants.⁶⁵ Such an analogy strongly implied a more proprietary conception of the trust was taking root.⁶⁶ The core idea was that the trust attached to the estate vested in the trustee and would bind the trustee’s successors in title, such as those claiming by grant or assignment. Where, for example, the trustee assigned the trust estate to a volunteer, the volunteer claimed the *same estate* as the trustee – or, in the technical language of the time, they claimed *per* the trustee – and would take subject to the rights of the beneficiary. Privity of estate came to 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. Such legal right holders were not privy to the trustee’s estate and were said to enter the land ‘in the *post*’. 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).⁶⁷ The disseisor was not bound by the trust because they did not claim the same estate as the trustee. Instead, the disseisor claimed a new estate (known as a tortious fee) to which the trust was not annexed and thus lacked the privity of estate required to be bound by the beneficiary’s rights. The same was true of the lord by escheat; where the trustee died intestate and without heirs, the trustee’s estate came to an end and the land went to the lord discharged of the trust.⁶⁸ Privity of estate thus explained why certain classes of legal right holders might take free of the trust. In this way, the doctrine placed clear limitations on the enforceability of the beneficiary’s rights against third parties and thus represented an obstacle to the further proprietisation of the trust.

When discussing privity of estate, the trust was sometimes contrasted with rights annexed to the possession of the land.⁶⁹ A right annexed to the possession of the land was capable of binding any subsequent holder of the land (whether claiming in the *post* or otherwise). By the later seventeenth century, it had been recognised that certain equitable rights were capable of binding the possession of the land. In 1667, Sir Matthew Hale CB said that the equity of redemption could bind in the *post*, but explained this rule in contradistinction to the trust:

There is a diversity betwixt a trust and a power of redemption; for a trust is created by the contract of the party, and he may direct it as he pleaseth...and therefore they only are bound by it, who come *in* in privity of estate....But a power of redemption is an equitable right inherent in the land, and binds all persons in the *post*, or otherwise.⁷⁰

⁶⁴ Macnair, ‘Conceptual Basis’ (n 19) 216–8.

⁶⁵ *ibid* 228. The language of privity of estate (‘*per*’ and ‘*post*’) appears in connection with the use/trust in *Chudleigh’s case* (1594) 1 Co Rep 120a, 122a, and also in *Spencer’s case* (1583) 5 Co Rep 16a, 17a–17b, on the running of real covenants.

⁶⁶ *Hopkins v Hodylo* (1591) 117 Selden Society 193, no. 118: ‘There is a difference between a trust and a promise concerning land, because the one goes annexed to the land and will bind the heir whereas the other is collateral to the land and will not bind the heir’. Approved by Peryam CB at *Anon* (c 1594) 117 Selden Society 248, no. 123.

⁶⁷ *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; Gilbert, *Uses and Trusts* (n 39) 168–9; Lewin, *Trusts and Trustees* (n 5) 13, 124; G Spence, *Equitable Jurisdiction*, vol ii (V Stevens, R Stevens and GS Norton 1849) 196 (hereafter, ‘Spence, *Equitable Jurisdiction*, vol ii’).

⁶⁸ *Wickes’ case* (1609) Lane 54.

⁶⁹ *Chudleigh’s case* (1594) 1 Co Rep 120a, 122a.

⁷⁰ *Pawlett v AG* (1667) Hardres 465, 469; Yale (ed), *Prolegomena* (n 2) c 12, s 12. See also *Roscarrick v Barton* (1672) 1 Ch Cas 17; Yale (ed), *Prolegomena* (n 2) c 21, ss 22–3.

It was clear, therefore, that certain equitable rights could inhere in the land such that they might bind all takers in the *post*, but this step seems never to have been decisively taken with the trust. Throughout our period, the position regarding the enforcement of trusts against the Crown in the *post* remained deeply unclear,⁷¹ although there were suggestions that the equity side of the exchequer might grant relief in such cases⁷² and that the chancery ought to take similar steps against other parties claiming in the *post* (such as the lord by escheat).⁷³

Notwithstanding any agitation for further proprietisation, the trust seems to have remained unenforceable against the disseisor and the lord by escheat. In 1811, Edward Sugden wrote that:

At this day everyone is bound by a trust who obtains the estate without a valuable consideration, or even for a valuable consideration if with notice, unless perhaps the lord by escheat. But persons claiming the legal estate by an actual disseisin, without collusion with the trustee, will not be bound by the trust. Therefore, if I oust A., who is a trustee for B., and a claim is not made in due time, A. will be barred, and his *cestui que* trust with him, although I had notice of the trust.⁷⁴

By the nineteenth century, the trust had clearly gained a proprietary hue through its association with privity of estate, but this self-same association prevented the enforcement of a trust against the disseisor or the lord by escheat. Whilst the trust never quite became an interest annexed to the possession of the trust property, the limitations of privity were rolled back in other respects which brought a more proprietary conception brought to the fore. To better explain these developments, it is helpful at this stage to separate the contexts in which these changes took place.

1. *Exigibility*

According to the doctrine of privity, the trust property would be liable for legal demands made against the trustee, but immune to those made against the beneficiary.⁷⁵ The trust property was regarded as forming part of the trustee's estate; it was liable to execution for the trustee's debts, to forfeiture for the trustee's treason, to the dower of the trustee's widow, and to escheat upon the trustee's felony or death intestate and without heirs.⁷⁶ The rights of the trustee's legal demandants arose by operation of law – in the *post* – and hence were not bound by the trust.⁷⁷

⁷¹ *Burgess v Wheate* (1759) 1 Eden 177, 225 (Henley LK): 'Whether this remedy has since been settled in the Exchequer, where alone it can, I really do not know: but I hope it is so settled'.

⁷² *Scounden v Hawley* (1689) Comb 172; *Reeve v AG* (1741) 2 Atk 223.

⁷³ *Geary v Bearcroft* (1665) Carter 57, 67; *Eales v England* (1702) Prec Ch 200, 202; *Burgess v Wheate* (1759) 1 Bl Wm 123, 165–6.

⁷⁴ EB Sugden (ed), *Gilbert on Uses and Trusts* (3rd edn, W Reed and P Phelan 1811) 429, n 6. This passage was relied upon unsuccessfully by counsel in *Re Nisbet and Potts' Contract* [1906] 1 Ch 386, 391, 394–5, when arguing that a restrictive covenant should only bind if the defendant derived possession from the covenantor.

⁷⁵ For excruciating detail on this subject, see DA Foster, *Legal Demands Against the Beneficial Interest under a Trust, c 1590–1759* (2020) Queen Mary, University of London (unpublished PhD thesis).

⁷⁶ *R v Boys* (1568) 3 Dyer 283b (forfeiture for trustee's alienage); *Pimb's case* (1585) Moo KB 196 (forfeiture for trustee's treason); *Wickes' case* (1609) Lane 54 (forfeiture for trustee's treason); *Nash v Preston* (1630) Cro Car 190 (liability to mortgagee's dowress; the case was thought to apply equally to the trustee's dowress in *Noel v Jevon* (1678) 2 Freem 43).

⁷⁷ *Gervys v Cooke* (1522) 119 Selden Society 108, 117 (Broke J), 118 (Pollard J); *Chudleigh's case* (1594) 1 Co Rep 120a, 122a. It should be noted that there was some debate in the seventeenth century as to who precisely was

By equal logic, the trust property did not form part of the beneficiary's estate and was, initially, exempt from the legal demands of the beneficiary's judgment creditors, surviving spouse, and the Crown claiming by forfeiture or escheat for the acts of the beneficiary.⁷⁸ The beneficiary's legal demandants were thus barred from claiming the trust assets; they did not claim in the *per*, and so were not entitled to claim the benefit of the trust. Over time, however, these restrictions were loosened and, as a by-product of these developments, the trust came to be cast in more proprietary terms.

In the middle decades of the seventeenth century, the trust was increasingly subjected to liability to the Crown for the acts of the beneficiary.⁷⁹ Under section 10 of the Statute of Frauds, the beneficial interest was made liable to execution for the beneficiary's judgment debts.⁸⁰ Meanwhile, Nottingham LC led the way in strengthening the trust's protection against the trustee's legal demandants.⁸¹ In *Medley v Martin* (1673),⁸² Nottingham (then Finch LK) held that the beneficiary could be relieved against the claims of trustee's judgment creditors and, in *Tassel v Hare* (1675),⁸³ the beneficiary was similarly relieved against the trustee's widow claiming dower.⁸⁴ This line of cases was reaffirmed in the early eighteenth century⁸⁵ and began to suggest that, in certain contexts, the trust could indeed be enforced against those claiming an estate arising by operation of law.⁸⁶ Between the seventeenth and nineteenth centuries, there was a concerted effort by both parliament and the courts to subject trust assets to the liabilities of the beneficiary, whilst simultaneously shielding them from those of the trustee.⁸⁷ The result was a partial reversal of the precepts of privity and naturally tended to undermine any conception of the trust which depended upon privity as its organising concept.

One of the most significant attacks on privity in this context had been launched in the mid-eighteenth century by Lord Mansfield. In *Burgess v Wheate* (1759), Mansfield opined that 'the old law of uses does not conclude trusts now...that part of the old law of uses, which did not allow any relief to be given for or against estates in the *post*, does not now bind by its authority in the case of trusts'.⁸⁸ Mansfield's *dictum* was repeated by successive treatise writers,

regarded as privy to the trust: W Sheppard, *A Touchstone of Common Assurances* (W Lee, M Walbanke, D Pakeman, and G Bedell 1648) 503; *Pawlett v AG* (1667) Hardres 465, 467–8 (Hale CB).

⁷⁸ *Kemp v Lady Reresby* (1626) Toth 99 (dowress); *Bennet v Box* (1665) 1 Ch Cas 11; 2 Freem 184 (judgment creditor); *AG v Sands* (1669) Hardres 488 (Crown by escheat for felony); *Burgess v Wheate* (1759) 1 Eden 177; 1 Bl Wm 123 (Crown by escheat for want of heirs).

⁷⁹ *AG v Bindloes* (1628) 118 Selden Society 556 (liability to execution for Crown debts); *R v Holland* (1648) Aleyn 14; Style 20, 40, 75, 84, 90, 94 (liability to forfeiture for alienage); *AG v Fitzjames* (1672) Lincoln's Inn MS Misc 500, f 197v, British Library Add MS 36,197, f 394, 398 (liability to forfeiture for outlawry).

⁸⁰ 29 Car II, c 3.

⁸¹ Although see too the earlier decisions in *Cholmeley v Cave* (1623) TNA WARD 9/539, f 77 (relief against the trustee's judgment creditor) and *Stephens v Baily* (1665) 1 Nels 106 (relief against special occupant).

⁸² Rep t Finch 63.

⁸³ 73 Selden Society 230, case 339.

⁸⁴ Affirmed in: *Noel v Jevon* (1678) 2 Freem 43; *Norman v Woodfall* (1680) 79 Selden Society 835, case 1046; *Bevant v Pope* (1681) 2 Freem 71, 79 Selden Society 890, case 1121.

⁸⁵ *Finch v Winchelsea* (1715) 1 P Wms 277; *ex p Chion* (1721) Lincoln's Inn MS Misc 384, f 243; 3 P Wms 186, n 2; *Bennet v Davis* (1725) 2 P Wms 316.

⁸⁶ cf *Morrice v Bank of England* (1736) Cas T Talb 217, 220, in which Talbot LC suggested that where the legal demandant had already taken possession of the land, equity would be powerless to assist.

⁸⁷ Dower Act 1833 (3&4 Will IV, c 105), s 2; Escheat Act 1834 (4&5 Will IV, c 23), s 2; Judgments Act 1838 (1&2 Vict, c 110), s 13; Trustee Act 1850 (13&14 Vict, c 60), s 46; Bankruptcy Act 1869 (32&33 Vict, c 71), s 15; Forfeiture Act 1870 (33&34 Vict, c 23), s 1.

⁸⁸ 1 Bl Wm 123, 155.

including Cruise (1804),⁸⁹ Willis (1827),⁹⁰ and Jeremy (1828).⁹¹ Each relied expressly upon Mansfield's opinion in *Burgess* as a basis for suggesting that the doctrine of privity no longer applied to the trust. Significant as Mansfield's opinion was, it did not gain universal endorsement. In *Burgess v Wheate* itself, Henley LK largely rejected Mansfield's view and, in his *Jurisconsult Exercitationes* (1811), Francis Hargrave remarked that: 'I must confess the more I consider the argument his Lordship [Mansfield] so eloquently delivered in that case, the more I am convinced, that the doctrine he endeavoured to establish is irreconcilable, both with the principles of our law, and with the current authorities.'⁹² The suspicion of Mansfield's opinion was shared by Thomas Lewin⁹³ and George Spence⁹⁴ – both of whom continued to rely on a modified version of the doctrine of privity in their accounts of the trust.

Lewin recognised that many of the technical aspects of privity had been steadily abandoned by successive chancellors – particularly regarding the demands which could be levied upon trust assets.⁹⁵ By the nineteenth century, the surviving spouse and judgment creditors of the trustee and beneficiary, though claiming by operation of law, were respectively bound by and could claim the benefit of the trust. For this reason, Lewin retained the doctrine of privity in his account of the trust but in an altered form:

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... And if the trustee die and leave no heir, the lord who takes by escheat is not privy to the estate upon which the trust was ingrafted, and therefore will not be bound by it, but will hold beneficially. And upon the same principle, if the trustee be disseised, the tortious fee is adverse to that impressed with the trust, and therefore the equitable owner cannot sue the disseisor in Chancery, but must bring an action against him in the name of the trustee.

During the system of uses, and also while trusts were in their infancy, the notion of privity of estate was not extended to tenant[s] by the courtesy, or in dower, or by *elegit*, or in fact to any person claiming by operation of law, though through the trustee; but in this respect the landmarks have since been carried forward, and at the present day a trust follows the estate into the hands of everyone claiming under the trustee, whether in the *per* or in the *post*. A lord by escheat and a disseisor are the only persons not bound: the lord, because he claims by title paramount; a disseisor, because his possession is adverse.⁹⁶

Lewin explained that those who claimed derivatively from the trustee or beneficiary could be bound by or take advantage of the trust. The beneficiary's judgment creditors claimed by operation of law but were entitled to the trust property because they claimed the benefit of the trust 'through' the beneficiary. The trustee's judgment creditors also entered by operation of law but were bound by the trust because they claimed 'through' the trustee and could only claim the (limited) estate to which the trustee was entitled. By contrast, neither the disseisor nor the lord by escheat claimed through the trustee. The lord claimed by a title paramount – a

⁸⁹ W Cruise, *A Digest of the Laws of England respecting Real Property*, vol i (J Butterworth 1804) 492.

⁹⁰ J Willis, *A Practical Treatise on the Duties and Responsibilities of Trustees* (R Pheney, S Sweet, and Stevens & Sons 1827) 109, n 99, citing Cruise's treatise and Lord Mansfield in *Burgess*.

⁹¹ G Jeremy, *A Treatise on the Equity Jurisdiction of the High Court of Chancery* (J & WT Clarke 1828) 20.

⁹² F Hargrave, *Jurisconsult Exercitationes*, vol i (J Butterworth 1811) ch xv, 383, 388.

⁹³ Lewin, *Trusts and Trustees* (n 5) 15–20, 476–497, 498–571.

⁹⁴ G Spence, *Equitable Jurisdiction*, vol ii (n 67) 196.

⁹⁵ *Trusts and Trustees* (n 5) 11.

⁹⁶ *ibid* 18–19.

precedent estate in the land which came into possession on the death of the legal owner – to which the trust was not annexed. The disseisor meanwhile claimed a tortious fee, arising by adverse possession; it was a new estate, distinct from that of the trustee, and again was not bound by the trust. For Lewin, therefore, the exigibility of the trust no longer depended on whether the defendant entered in the *per* by act of the parties, or in the *post* by operation of law. Rather, exigibility was determined by whether the legal demandant's title was in some way derived from the trustee or beneficiary. So long as the recipient of trust property derived their claim from the trustee, they could be said to be privy to the trust and, hence, capable of being bound by it. Lewin's analysis was a significant marker in the development of the trust and demonstrated the extent to which the doctrine of privity had been altered over time. The importance of these developments for the proprietisation of the trust was explicitly remarked upon by Spence, who wrote that:

the subtle distinctions which formerly attended the nature of privity of estate were gradually discarded; and tenant in dower, tenant by the courtesy, and tenant by statute merchant were held bound by the trust. The trust, in fact, was treated as if it were fastened on the estate rather than the person.⁹⁷

By the middle of the nineteenth century, therefore, the rules on exigibility had contributed significantly to the reification of the trust by strengthening the enforceability of the beneficiary's right against non-privies, as well as subjecting the trust assets to liability for the beneficiary's acts.

2. *Enforceability against privies*

Where the trustee, in breach of trust, conveyed the land to a volunteer, the beneficiary could enforce the trust against the volunteer because the volunteer's title was derived from the trustee (i.e. the volunteer was bound because she claimed *per* the trustee and was privy to the trust).⁹⁸ Privity explained the liability of the volunteer, but where the trustee's successor in title had given consideration, privity did not conclude the matter. When dealing with a purchaser, the doctrine of privity overlapped with the doctrine of notice. In Coke's report of *Chudleigh's case* (1594), it was said that:

If the feoffee to a use, upon good consideration, infeoffeth another who hath no notice, here is privity in estate, but there is no confidence in the person, either expressed or implied, and therefore the use is gone: but if a feoffment be made without consideration to one who hath no notice, there is privity in estate, and the law implies notice, and therefore the use remains, but not as a thing annexed to the land, but to the privity of the estate.⁹⁹

From this statement, we can see that all assignees were privy to the trust and thus *capable* of being bound, but that the enforceability of the beneficiary's right might also depend on notice.

⁹⁷ Spence, *Equitable Jurisdiction*, vol i (n 34) 500–1.

⁹⁸ *Gervys v Cooke* (1522) 119 Selden Society 108; *Chudleigh's case* (1594) 1 Co Rep 120a, 122b; Pop 70, 71–2; *Cole v Moore* (1607) Moo KB 806; *Pye v George* (1710) 2 Salk 680; *Mansell v Mansell* (1732) 2 P Wms 678; *Burgess v Wheate* (1759) 1 Eden 177, 251.

⁹⁹ 1 Co Rep 120a, 122b. See also Pop 70, 71. These rules had been previously mapped out in: *Anon* (1453) Fitz. Abr., tit. *subp.*, pl 19; *Gervys v Cooke* (1522) 119 Selden Society 108; *Delamere v Barnard* (1567) 1 Plow 346, 351. See also D Fox, 'Purchase for Value Without Notice', in PS Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart 2018) 53, 57–62.

Where the assignee was a volunteer, no actual or presumed notice was required; the mere fact of privity itself was sufficient grounds to imply notice.¹⁰⁰ Where the assignee was a purchaser, however, the beneficiary could only enforce her right where the purchaser took with notice of the trust.¹⁰¹ It is important to reiterate, however, that the doctrine of notice was only relevant in cases of grant or assignment; the lord by escheat and the disseisor could not be bound by the trust regardless whether they had notice or not.¹⁰²

The doctrine of privity was, therefore, the means by which the trustee's successors in title might be bound by the trust. As the lynchpin to explaining third-party enforceability, privity was a key element of the proprietary conception of the trust. Nevertheless, as the language of privity faded from the rules on exigibility, we see a similar decline in privity-based accounts of the enforceability of trusts against assignees. By the mid-nineteenth century, greater emphasis was placed on the derivative title analysis found in Lewin,¹⁰³ but without mention of the doctrine of privity. By basing the enforceability of the trust on derivative title, mid-to-late nineteenth century treatises tended toward a *nemo dat*-type explanation; the assignee was bound because the trustee had merely transferred their own limited rights in the trust *res*. In 1845, for example, James Hill explained that 'the party, in whom the property has become vested, will be bound by the trust to the same extent, as the trustee from whom he took'.¹⁰⁴ Whilst, in 1879, Henry Godefroi stated that 'the grantee, though he have no notice of the trust, stands in place of the grantors, and is liable to the trust in the same manner as the trustees were liable to it, and the property may be followed by the *cestui que trust*'.¹⁰⁵ Arthur Underhill took a more explicitly proprietary line in 1878, remarking that '[i]f an alienee is a volunteer, then the estate will remain burdened with the trust, whether he had notice of the trust or not; for a volunteer has no equity as against a true owner'.¹⁰⁶ On this view, trusts were understood to bind the property – not the person – and any person into whose hands the property fell would be liable to the trust (excepting the disseisor and the lord by escheat). Such analyses take us beyond the more narrow concepts of 'privity of person' and 'privity of estate' and suggests the emergence of more pronounced proprietary notions in later nineteenth century conceptions of the trust.¹⁰⁷

III. The Analytical Conceptions of the Trust

In the preceding sections, I have canvassed some of the mechanisms by which the trust was converted from an obligation in confidence into an equitable interest annexed to trustee's estate. We have seen that these developments encouraged the view amongst both judges and treatise writers that the trust had been substantially reified by the first decades of the nineteenth

¹⁰⁰ Yale (ed), *Prolegomena* (n 2) c 14, s 1, c 15, s 1; Gilbert, *Uses and Trusts* (n 39) 167–8; [Ballow], *Treatise of Equity* (n 41) 68; F Sanders, *An Essay on the Nature and Laws of Uses and Trusts* (E and R Brooke 1791) 87; Lewin, *Trusts and Trustees* (n 5) 205. For a modern treatment making significant use of the historical case law, see P Ridge, 'Third Party Volunteers and Undue Influence' (2014) 130 LQR 112, 113–116, discussing the 'strict liability' of the volunteer in the context of rescission for undue influence.

¹⁰¹ In *Gervys v Cooke* (1522) 119 Selden Society 108, 117, Broke J explained that 'if he has notice, he is *particeps criminis*.' This same reasoning appears in [Ballow], *Treatise of Equity* (n 41) 69.

¹⁰² See authorities listed in n 67.

¹⁰³ See text at n 96.

¹⁰⁴ J Hill, *A Practical Treatise on the Law Relating to Trustees* (Stevens & Norton 1845) 147.

¹⁰⁵ H Godefroi, *A Digest of the Principles of the Law of Trusts and Trustees* (Stevens & Sons 1879) 295.

¹⁰⁶ A Underhill, *A Concise Manual of the Law Relating to Private Trusts and Trustees* (Butterworths 1878) 194 (hereafter Underhill, *Concise Manual*).

¹⁰⁷ It may be that this change in emphasis from 'privity' to 'derivative title' encouraged a move from the 'engrafting principle' (see e.g. Lewin, *Trusts and Trustees* (n 5) 18) to the 'carving out principle' found in later writings (see e.g. B Green, 'Grey, Oughtred and Vandervell – A Contextual Reappraisal' (1984) 47 MLR 385, 387).

century. These developments form the doctrinal backdrop to the early analytical conceptions of the trust in this period. Given the extent to which the trust was conceived and described in proprietary terms, it is unsurprising to find the founder of the school of analytical jurisprudence – John Austin – reflecting this proprietary conception in his jurisprudential writing. As we shall see, however, this was an issue over which successive members of analytical school would vacillate, producing what WN Hohfeld called a ‘striking divergence of opinion’ in the analytical conceptions of the trust.¹⁰⁸

A. Austin and the Early Analytical Conceptions of the Trust

In his *Lectures on Jurisprudence* (delivered 1829-33, published posthumously in 1863), John Austin endeavoured to explain the distinction between rights *in rem* and rights *in personam* in English law generally.¹⁰⁹ Despite its civilian flavour, this language of ‘rights’ *in rem* and ‘rights’ *in personam* was decidedly un-Roman; the Roman jurists had only used the terms *in rem* and *in personam* to describe *actiones*, rather than substantive rights.¹¹⁰ Austin himself seemed to recognise their novelty when applied to the common law, remarking that ‘I adopt them without hesitation, though at the risk of offending your ears’.¹¹¹ Nevertheless, in the course of lecture XIV, Austin gave a definition of rights *in rem* and rights *in personam* which would prove immensely influential for later writers:

The phrase *in rem* denotes the *compass*, and not the *subject* of the right. It denotes that the right in question avails against persons generally; and *not* that the right in question is a right over a *thing*...The phrase *in personam* is an elliptical or abridged expression for ‘in personam certam sive determinatum.’ Like the phrase *in rem*, it denotes the *compass* of the right. It denotes that the right avails *exclusively* against a *determinate* person, or against *determinate* persons.¹¹²

Unfortunately, Austin’s health did not permit him to continue with his project and he was unable to consider the English trust *in extenso*, but we are left with an intriguing glimpse into his views on the subject. When discussing the right of a purchaser under a specifically enforceable contract for sale of land, Austin remarked that:

By the provisions of that part of the English law which is called equity, a contract to sell at once vests *jus in rem* or ownership in the buyer, and the seller has only *jus in re alienâ*. But according to the conflicting provisions of that part of the English system called peculiarly *law*, a sale and purchase without certain formalities merely gives *jus ad rem*, or a right to receive the ownership, not ownership itself: and for this reason a contract to sell, though in

¹⁰⁸ WN Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale LJ 16, 19.

¹⁰⁹ J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (1st edn, J Murray 1863) (hereafter Austin, *Lectures on Jurisprudence*). An outline of the lectures was appended to J Austin, *The Province of Jurisprudence Determined* (J Murray 1832), in which Austin discussed the *in rem/in personam* distinction: see appendix, xxv–xli.

¹¹⁰ Discussions of *iura in rem* and *in personam* originated with the medieval canonists: B Tierney, *The Idea of Natural Rights* (WB Eerdmans 2001) 18–19, 283–4.

¹¹¹ Austin, *Lectures on Jurisprudence*, vol ii (n 109) 32. Although the phrase was used by King LC in *Anon* (1729) 2 Eq Cas Abr 108 and by Plumer MR in *Dearle v Hall* (1828) 3 Russ 1, 24.

¹¹² *Ibid*, 32.

equity it confers ownership, is yet an imperfect conveyance, in consequence of the conflicting pretensions of law.¹¹³

Austin thus seemed to regard the equity to specific performance (and, by extension, the beneficial interest under a vendor-purchaser constructive trust) as an equitable right *in rem*. Whilst Austin's work was important in the field of analytical jurisprudence, there is little evidence to suggest that his writings had an immediate effect on the way in which equitable rights were being conceptualised more generally.¹¹⁴ Following Austin's death, there is certainly no suggestion in the law reports that the *in rem/in personam* distinction became commonplace; indeed, we find few references to 'rights *in rem*' in the law reports at all until the very late nineteenth century.¹¹⁵

In the latter half of the nineteenth century, however, there was a shift in how the trust was being conceptualised by the new treatise writers of the period. A particular problem posed by Lewin and Spence's reliance on the doctrine of privity of estate as an organising principle for the trust was its non-application to trusts of personality. Lewin had stated that 'trusts of chattels...were conducted upon the same principles, *mutatis mutandis*, as were trusts of freeholds; the right to sue a *subpoena* turned equally on privity'.¹¹⁶ But, in an era where trusts of personality were increasingly common,¹¹⁷ an estates-based theory of trusts was ill-suited; after all, the doctrine of estates did not apply to personality at common law.¹¹⁸ Lewin himself gave little consideration to the point, but the problem of trusts of personality would provide ballast to his detractors. In 1878, Arthur Underhill took issue with Lewin's account of the trust, remarking that:

Mr Lewin adopts Lord Coke's definition of a use...This definition would seem applicable to real estate only, and certainly not to trusts of choses in action, the equities attaching to which are, generally speaking, not merely collateral.¹¹⁹

For Underhill, therefore, trusts could not be explained as annexed to the trustee's estate in the subject matter of the trust. Nor were they merely obligations personal to the trustee ('not merely collateral'). By the late nineteenth century, the new treatise writers – Snell (1868), Underhill (1878) and Godefroi (1879) – rarely made reference to privity of estate and the historical conception of the trust began to slip from view.¹²⁰ In its place, 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.¹²¹ This notion of equitable ownership was somewhat undertheorised, but the language was convenient. By removing focus from the requirement of privity of estate, the late nineteenth century treatise writers could more easily accommodate

¹¹³ R Campbell (ed), *Lectures on Jurisprudence or the Philosophy of Positive Law*, vol i (5th edn, J Murray 1885) 377. This section was not present in the first edition of 1863, but can be found in the third edition in 1869: see vol i, 388.

¹¹⁴ cf *ex p Pollard* (1840) Mont & Ch 239, 250 (Cottenham LC).

¹¹⁵ See e.g. *Allen v Flood* [1898] AC 1, 34 (Cave J).

¹¹⁶ Lewin, *Trusts and Trustees* (n 5) 5, citing *Witham v Waterhouse* (1596) 4 Co Int 87.

¹¹⁷ S Stebbings, *The Private Trustee in Victorian England* (CUP 2001) 6–8.

¹¹⁸ J Williams, *Principles of the Law of Real Property* (S Sweet 1845) 5.

¹¹⁹ Underhill, *Concise Manual* (n 106) 1, n (a).

¹²⁰ Although the doctrine of privity of estate was discussed briefly in OW Holmes Jr, *The Common Law* (Macmillan 1882) 399, 407–9.

¹²¹ Underhill, *Concise Manual* (n 106) 194; J Adams, *The Doctrine of Equity* (T&JW Johnson 1890) xxxvii; JW Salmond, *The First Principles of Jurisprudence* (Stevens & Haynes 1893) 278. Lewin, *Trusts and Trustees* (n 5) 18–19, had also used the phrase, albeit in the course of his privity-based analysis. The language of 'equitable ownership' appeared in the reports in the mid-eighteenth century (see e.g. *Hawkins v Chappel* (1739) 1 Atk 621, 624), but became increasingly common during the nineteenth century.

trusts of personality within their general schemes, whilst retaining a proprietary conception of the trust as a whole.

At precisely the same time, the *in rem/in personam* distinction was increasingly being applied to equitable rights by academic commentators. With the publication of successive editions of Austin's *Lectures on Jurisprudence* in the 1860s and 1870s, the language of rights *in rem* and *in personam* had become commonplace in English jurisprudence and Austin's followers dutifully carried his project further. Crucially, however, the early adopters of this civilian language tended, when analysing equitable rights, to classify the right of the beneficiary as a right *in personam* (*contra* Austin). In 1880, Thomas Erskine Holland's *The Elements of Jurisprudence* contained an unapologetically civilian discussion of the classification of rights.¹²² In his discussion of equitable rights, Holland specifically referred to the beneficiary under a trust as a having a right *in personam* against the trustee – apparently on the basis of an analogy with the Roman *fideicommissum*, but the point was not otherwise developed.¹²³ Holland's view was shared by CC Langdell and JB Ames and, subsequently, given its classic form by FW Maitland in his lectures on equity delivered in 1906. The collective aim of Langdell, Ames and Maitland was to place trusts within Austin's definition of a right *in personam* (i.e. a right enforceable against determinate persons, rather than persons generally). They sought to support their view by, variously: (i) demonstrating that equity was incapable of producing rights *in rem*; (ii) denigrating the concept of 'equitable ownership' and the idea of the beneficiary as 'true owner'; and (iii) providing a list of those definite persons against whom the trust could be enforced. Through this work, they produced a powerful case for the *in personam* theory of the trust.

B. Langdell, Ames and Maitland

Langdell derived his *in personam* conception of the trust at least in part from the maxim *aequitas agit in personam*. Historically, this maxim merely described aspects of equitable procedure, and was not concerned with the classification of substantive equitable rights.¹²⁴ Langdell, however, viewed the maxim as foundational for understanding the equitable jurisdiction as whole; if equity acted solely *in personam*, he reasoned, then equity was only capable of producing rights *in personam*. In his treatise on pleading in equity, for example, Langdell observed:

It is only by a figure of speech that a person who has not the legal title to property can be said to be the equitable owner of it. What is called equitable ownership or equitable title or an equitable estate is in truth only a personal claim against the real owner; for equity has no jurisdiction *in rem*, and cannot, therefore, confer a true ownership, except by its power over the person with whom the ownership resides, i.e., by compelling him to convey.¹²⁵

According to Langdell, equity operated *in personam* by making decrees against the defendant's person and could make no decrees *in rem* against the defendant's property directly. Langdell thus reasoned that the beneficiary's right was merely enforceable by a decree against the trustee's person, not against the trust *res* itself, and as such could only be categorised as a personal right against the trustee (i.e. a right *in personam*). Indeed, it was key to Langdell's

¹²² TE Holland, *The Elements of Jurisprudence* (Clarendon 1880) 107–9.

¹²³ *ibid* 168.

¹²⁴ Yale (ed), *Prolegomena* (n 2) 16–45.

¹²⁵ CC Langdell, *Summary of Equity Pleading* (CW Sever 1877) 90 (hereafter Langdell, *Summary*).

understanding of equity that there could be no equitable rights *in rem* at all. As evidence for this assertion, Langdell laid particular stress on the immunity of the *bona fide* purchaser to the beneficiary's claim. In 1887, he wrote:

if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice; a result which would not only be intolerable to those for whose benefit equity exists, but would be especially abhorrent to equity itself. Upon the whole, it may be said that equity could not create rights *in rem* if it would, and that it would not if it could.¹²⁶

For Langdell, the touchstone of a right *in rem* was its capacity to bind the purchaser for value without notice; the beneficial interest did not bind the *bona fide* purchaser, hence it could not be a right *in rem*. Such a strict definition of rights *in rem* necessarily excluded the trust but it was overbroad; Ames and Maitland each observed that, even at common law, the rights of the legal owner could be barred (for example) by a purchaser in market overt.¹²⁷ In this regard, Langdell's *in personam* account of the trust was not particularly successful, but his discussion of the maxim *aequitas agit in personam* would prove influential for his successors.

Langdell's influence was particularly marked in the work of James Barr Ames. Ames too was sceptical of equity's ability to produce rights *in rem*¹²⁸ and referred to the maxim *aequitas agit in personam* as 'the key to the mastery of equity'.¹²⁹ Like Langdell, Ames also appealed to the basic nature of equity in support of his *in personam* conception of the trust. For Ames, the purpose of equity was to complement – but never to contradict – the principles of the common law. The common law acted *in rem*, whereas equity acted *in personam* and could not set up rules in opposition to the common law position.¹³⁰ Applying this understanding of equity to the trust, Ames asserted that the common law regarded the trustee as the 'owner' of the trust property, invested with rights *in rem*. To view the beneficiary as the 'owner' and to classify the beneficiary's right as a right *in rem*, therefore, would be for equity to contradict the position at law. As Ames explained in 1887:

A *cestui que trust* is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing.¹³¹

To avoid such a conflict with the common law rules, Ames argued that the beneficiary had a mere personal right against the trustee:

¹²⁶ CC Langdell, 'A Brief Survey of the Equitable Jurisdiction' (1887) 1(2) HLR 55, 60. See also earlier statements in Langdell, *Summary* (n 125) 90.

¹²⁷ JB Ames, *Lectures on Legal History* (HUP 1913) 76 (hereafter Ames, *Lectures*); JW Brunyate (ed), *Equity: A Course of Lectures by FW Maitland* (CUP 1936) 139–140 (hereafter Brunyate (ed), *Equity*). See also RP Pound, 'Review' (1912–13) 26 Harv LR 462, 463 (hereafter, Pound, 'Review').

¹²⁸ JB Ames, *A Selection of Cases on the Law of Trusts*, vol i (2nd edn, HLRPA 1893) 244; J Ames, *Lectures* (n 127) 76.

¹²⁹ Ames, *Lectures* (n 127) 233.

¹³⁰ Ibid, 76. This view was later approved in CC Langdell, 'Classification of Rights and Wrongs, Part II' (1900) 13 HLR 659, 673, and Brunyate (ed), *Equity* (n 127) 17–19. Ames' 'no conflict' theory of equity was seemingly calculated to counter Austin's original account of equitable rights *in rem* as 'conflicting' with the 'pretensions of law' (see text quoted at n 113).

¹³¹ JB Ames, 'Purchaser for Value without Notice' (1887) 1 HLR 1, 9.

What the *cestui que trust* really owns is the obligation of the trustee; for an obligation is as truly the subject-matter of property as any physical *res*. The most striking difference between property in a thing and property in an obligation is in the mode of enjoyment. The owner of a house or a horse enjoys the fruits of ownership without the aid of any other person. The only way in which the owner of an obligation can realize his ownership is by compelling its performance by the obligor. Hence, in the one case, the owner is said to have a right *in rem*, and, in the other, a right *in personam*.¹³²

Ames' theory provided a neat solution to the problem of conflicting rules of law and equity, but it was not without difficulties. According to Ames, a right *in rem* included the right to the enjoyment, income or fruits of the *res*, whereas the beneficiary merely had a right under a trust to compel the trustee to transfer the fruits of the trust property.¹³³ This explanation of the beneficiary's right came close to the sixteenth century *chose in action* approach in emphasising the beneficiary's right to compel performance by means of the chancery *subpoena*. In that regard, however, it tended to overlook the other contexts in which the trust had been reified in the intervening centuries. In other words, Ames' analytical theory failed to account for historical change and could not explain the slow reification of the trust from the time of Coke to the present day.

The classic statement of the *in personam* theory belongs to FW Maitland in his lectures on equity (first published 1909, revised 1936).¹³⁴ In these lectures, Maitland borrowed much from Langdell and Ames, but combined them into a more subtle and arguably more successful thesis. Maitland's starting point was an immediate rejection of Austin's *in rem* account of the trust, quipping that 'as a piece of speculative jurisprudence this seems to me nonsense, while as an exposition of our English rules, I think it not merely nonsensical but mischievous.'¹³⁵ For Maitland, the beneficiary could not be regarded as having a right *in rem* because, following Langdell, he considered equity incapable of creating rights *in rem*.¹³⁶ To do so, Maitland believed, would be to create two conflicting notions of ownership – one at law, the other in equity – and which would result in 'utter anarchy'.¹³⁷ Instead, he explained, equity acted merely *in personam*, as a gloss upon the law, and could not contradict common law rules;¹³⁸ as such, the beneficiary could not be regarded as 'owner'¹³⁹ and the beneficial interest could not be a right *in rem*.¹⁴⁰ Having synthesised the work of Langdell and Ames, Maitland could assert that the beneficiary's right was very clearly a right *in personam*:

equitable estates and interests are not *jura in rem*. For reasons that we shall perceive by and by, they have come to look very like *jura in rem*; but just for this very reason it is

¹³² *ibid* 9–10.

¹³³ This emphasis on enjoyment and possession as the hallmark of a right *in rem* was roundly criticised by WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale LJ* 710, 754–7 (hereafter 'Hohfeld, "Fundamental Legal Conceptions"').

¹³⁴ Brunyate (ed), *Equity* (n 127) lecture IX.

¹³⁵ *ibid* 106. cf WG Hart's observation that Austin's tentative remarks on the nature of the trust 'hardly deserves...the violent criticism to which it has been subjected by Professor Maitland': WG Hart, 'The Place of Trust in Jurisprudence' (1912) 28 *LQR* 290, 291, n 1.

¹³⁶ Brunyate (ed), *Equity* (n 127) 31; Maitland, *Collected Papers* (n 131) 350, n 1, quoting Langdell.

¹³⁷ *ibid* 17, 107.

¹³⁸ *ibid* 17–19.

¹³⁹ *ibid* 17–18, 106–7.

¹⁴⁰ *ibid* 107.

the more necessary for us to observe that they are essentially *jura in personam*, not rights against the world at large, but rights against certain persons.¹⁴¹

The great strength of Maitland's analysis, however, was his sensitivity to the currents of legal change; whilst he regarded the beneficiary's right as a right *in personam*, he recognised the need to explain how, over time, the trust had come to 'look very like' a right *in rem*. This sensitivity to history was, in turn, reflected in his approach to the Austinian terminology itself, which was more nuanced than that of his predecessors.

Whilst Maitland made extensive use of the Austinian terminology, it must be recalled that his lectures were intended for an undergraduate audience and that, elsewhere in his work, he had admitted the limitations of this language. In 'Trust and Corporation' (written in 1904), for example, Maitland had expressed misgivings as to the wisdom of pigeonholing the beneficial interest according to civilian categories:

it seems to me, the Trust could hardly have been evolved among a people who had clearly formulated the distinction between a right *in personam* and a right *in rem*, and had made that distinction one of the main outlines of their legal system...For my own part if a foreign friend asked me to tell him in one word whether the right of the English *Destinatär* (the person for whom property is held in trust) is *dinglich* or *obligatorisch*, I should be inclined to say: "No, I cannot do that. If I said *dinglich*, that would be untrue. If I said *obligatorisch*, I should suggest what is false. In ultimate analysis the right may be *obligatorisch*; but for many practical purposes of great importance it has been treated as though it were *dinglich*".¹⁴²

Maitland's caution in adopting the Austinian classification ultimately led him to embark on a historical analysis of the means by which the beneficiary's rights had evolved from an equitable obligation in the sixteenth century to something 'analogous to true proprietary rights' by the early twentieth.¹⁴³ Through this historical analysis, and whilst maintaining focus upon the *in personam* theory, Maitland could account for the various ways in which the beneficial interest had been reified over time.

From the time of Coke, Maitland tells us, 'the use or trust was originally regarded as an obligation, in point of fact a contract though not usually so called'.¹⁴⁴ For Maitland, therefore, the source of the trustee's duty and the beneficiary's correlative right was the trustee's agreement to be bound. By emphasising the agreement of the trustee, Maitland could cast the trust in obligational terms:

the Law of Trusts (formerly Uses) begins with this, a person who has undertaken a trust is bound to fulfil it. We have no difficulty in finding a ground for this – the trustee, the feoffee to uses, is bound because he has bound himself. This is the original notion. The right of the *cestui que trust* is the benefit of an obligation. This is how Coke understood the matter. 'An use is a trust or confidence reposed in some other...'¹⁴⁵

¹⁴¹ *ibid* 107.

¹⁴² Maitland, *Collected Papers* (n 131) 325–6.

¹⁴³ Brunyate (ed), *Equity* (n 127) 110.

¹⁴⁴ *ibid* 110. Maitland emphasised the importance of agreement in trusts elsewhere in his lectures: see 28–30, 54–5. cf AW Scott, 'The Nature of the Rights of the Cestui Que Trust' (1917) 17 Col LR 269, 269–271 ('hereafter Scott, 'Rights of the Cestui''), who was at pains to distinguish trust from contract.

¹⁴⁵ *ibid*, 111–2, citing Co Litt 272b.

Thereafter, however, Maitland set out the steps by which the trust had come to look like a right *in rem*, namely: (i) enforceability against the trustee; (ii) enforceability against those ‘who come to the lands or goods by inheritance or succession’ who ‘may be regarded as sustaining wholly or partially the *persona* of the original trustee’ (including the trustee’s heir, executor, administrator and dowress); (iii) enforceability against the trustee’s creditors; (iv) enforceability against the trustee’s donee without valuable consideration ‘who came to the thing through or under the trustee as a volunteer...even though he had no notice of the trust’; (v) enforceability against the purchaser with actual notice; and (vi) enforceability against purchasers with constructive notice.¹⁴⁶ The cumulative effect of these developments was, according to Maitland, that the trust began to appear ‘real’. In spite of the extent to which the beneficial interest had been reified, Maitland was quick to emphasise that the trust had remained unenforceable against the *bona fide* purchaser, the lord by escheat and the disseisor.¹⁴⁷

Maitland had thus shown how, in the period *c* 1600–1900, the trust had grown from an equitable obligation, arising from agreement, into something akin to a property right. This partial reification of the trust had, however, created problems of classification which he now endeavoured to solve. According to Maitland, the nature of the trust could, in the final analysis, be formulated in one of two ways. Either the beneficiary’s right was enforceable *in personam*, against specific classes of persons (i.e. the trustee’s heirs, devisees, personal representatives, donees, creditors etc) or it was enforceable *in rem* against an indeterminate class (with the exception of the *bona fide* purchaser, the lord by escheat and the disseisor).¹⁴⁸ Maitland preferred the first formulation on the grounds that ‘it puts us at what is historically the right point of view – the benefit of an obligation has been so treated that it has come to look rather like a true proprietary right’.¹⁴⁹ The proprietary dimension had indeed been developed over time, such that the beneficiary’s right was enforceable against a larger class of persons than (e.g.) a simple contract debt. Nevertheless, Maitland asserted that this process of reification had produced rights which were merely ‘analogous to true proprietary rights’¹⁵⁰ and only ‘misleadingly like *iura in rem*.¹⁵¹ For Maitland, the trust had, from its inception, been an equitable obligation and equitable obligations could *never* acquire the status of a right *in rem* for the simple reason that equity was incapable of creating such rights. To do otherwise would produce contradiction and anarchy in the relations between law and equity.

C. Post-Maitland

Maitland’s analysis had much to recommend it; it proceeded upon clear, logical lines and purported to explain the changing nature of the trust over time. A major weakness of the theory, however, was its reliance on the maxim *aequitas agit in personam*. In 1915, Walter Wheeler Cook observed two key criticisms of Maitland’s use of the maxim:

¹⁴⁶ Brunyate (ed), *Equity* (n 127) 112–4.

¹⁴⁷ *ibid* 115–6.

¹⁴⁸ For Maitland (*contra* Langdell), unenforceability against a *bona fide* purchaser was not in itself sufficient to determine the nature of the trust: ‘I do not for one moment think that it should be part of our conception of a right *in rem*, that the person who has that right can never be deprived of it save by his own act’ (Brunyate (ed), *Equity* (n 127) 139).

¹⁴⁹ Brunyate (ed), *Equity* (n 127) 110.

¹⁵⁰ *Ibid*, 110.

¹⁵¹ *Ibid*, 112.

a word or two may be said concerning the statements so often made that all equitable rights are rights *in personam*; that they had to be such because of the fact that equity acts only *in personam*...[I]t seems that two things may be said: first, that the premise is untrue; second, that even if the premise were true, the conclusion would not follow...[A] better example of a simple *non sequitur* could hardly be asked for...¹⁵²

The first criticism noted by Cook was historical in nature; as a matter of legal history, the maxim had only ever described certain aspects of equitable procedure and that it was not the 'key' to equity that Ames had considered it.¹⁵³ Whilst it was true that, under the writ of *subpoena*, the chancery could only act upon the person of the defendant (i.e. *in personam*), the *subpoena* was not the only writ used in chancery.¹⁵⁴ By the early seventeenth century, the chancery had developed an *in rem* jurisdiction through the writs of assistance and sequestration; these writs commanded the sheriff to seize the defendant's property directly in satisfaction of the plaintiff's claim.¹⁵⁵ As a description of equitable procedure, therefore, the maxim failed to capture how equity had evolved beyond purely personal modes of enforcement.

The second of Cook's criticisms was analytic in nature; any historical inaccuracies aside, Maitland's use of the maxim failed to distinguish the substantive right from the procedure for its enforcement.¹⁵⁶ Proceedings *in personam* could, and often did, vindicate rights *in rem*. It was, therefore, specious to reason from a form of procedure to the nature of a substantive right. WN Hohfeld provided a simple example to illustrate the point:

Suppose...that A is owner of Blackacre, and that B drives his automobile over A's lawn and shrubbery. A's primary right *in rem* is thereby violated, and a secondary right *in personam* arises in favour of A against B...It will thus be seen that, *even in the law courts* the vindication of primary rights *in rem* may, according to circumstances be by proceedings *in personam*...¹⁵⁷

Hohfeld thus concluded that:

the intrinsic nature of substantive primary rights – whether they be rights *in rem* or rights *in personam* – is not dependent on the character of the proceedings by which they may be vindicated.¹⁵⁸

This reasoning was particularly important in the context of foreign trusts, where the *situs* of the trust *res* was outside the jurisdiction of the court (and no *in rem* proceedings were, therefore,

¹⁵² WW Cook, 'The Powers of Courts of Equity, Part II' (1915) 15 Col LR 106, 139 (hereafter 'Cook, 'Powers Part II')).

¹⁵³ RMP Willoughby, *The Distinctions and Anomalies arising out of the Equitable Doctrine of the Legal Estate* (CUP 1912) 88–92; CA Huston, *The Enforcement of Decrees in Equity* (HUP 1915) 135–6 (hereafter 'Huston, Enforcement'); WW Cook, 'The Powers of Courts of Equity, Part I' (1915) 15 Col LR 37, 39 (hereafter 'Cook, 'Powers Part I')); Cook, 'Powers Part II' (n 152) 139–141; Hohfeld, 'Fundamental Legal Conceptions' (n 133) 764, n 108.

¹⁵⁴ *Penn v Lord Baltimore* (1750) 1 Ves Sen 444, 454 (Hardwicke LC); Yale (ed), *Prolegomena* (n 2) 16–45.

¹⁵⁵ Langdell, *Summary* (n 125) xxiv had noted the existence of these writs but sought to downplay their significance. For criticism of Langdell's analysis, see Cook, 'Powers Part II' (n 152) 110–115.

¹⁵⁶ Cook, 'Powers Part I' (n 153) 39, 52–4; Huston, *Enforcement* (n 153) 136–144; Hohfeld, 'Fundamental Legal Conceptions' (n 133) 714–6, 757–766.

¹⁵⁷ Hohfeld, 'Fundamental Legal Conceptions' (n 133) 760–2. Emphasis original.

¹⁵⁸ *ibid* 766.

possible). Whilst the enforcement of foreign trusts necessarily took effect by means of a decree *in personam* for the defendant to perform the trust,¹⁵⁹ the enforcement procedure by itself was an insufficient basis on which to classify the beneficiary's right as either *in rem* or *in personam*.¹⁶⁰ It thus appeared that Langdell and Maitland had erected their *in personam* conception of the trust on a misunderstanding of the meaning of the maxim. In the field of procedure, equity did not act solely *in personam* and, even where it did, the procedure could not determine the underlying nature of the beneficiary's right.

With the first pillar of the *in personam* conception under threat, Maitland's general account of equity – as a gloss which could not contradict the basic precepts of the law – also came under pressure. In 1913, Hohfeld argued that:

there is...a very marked and constantly recurring conflict between legal and equitable rules relating to various jural relations; and whenever such conflict occurs, the equitable rule is, in the last analysis, paramount and determinative. Or, putting the matter another way, the so-called legal rule in every such case has, *to that extent*, only an apparent validity and operation as a matter of *genuine* law.¹⁶¹

For Hohfeld, it was a basic characteristic of equity to contradict the law and he considered trusts an example of such conflict. At law, the beneficiary had no right to the trust *res* whatsoever, but in equity she could control the rights of the legal owner.¹⁶² Looking past the law-equity division and focussing on the 'ultimate jural realties'¹⁶³ between the trustee and beneficiary, Hohfeld saw a conflict between the rules which was resolved in favour of the beneficiary:

the interest of a *cestui que trust* constitutes a complex aggregate of exclusively equitable rights, privileges, powers, and immunities, (some of these being *in rem*....and some of them *in personam*...); [and]...in order to appreciate clearly the exact nature of all these jural elements it is necessary to consider definitively the "conflict" of the "legal" and "equitable" relations involved and to discover the net residuum derived from a "fusion" of law and equity.¹⁶⁴

Far from equity respecting the law, Hohfeld conceived of equity in cases of conflict as 'repealing' the law *pro tanto*.¹⁶⁵ This self-avowedly fusionist attack on Maitland would engender its own debates on the nature of equity, but, for our purposes, Hohfeld's arguments showed that Maitland's 'no conflict' view of equity remained contentious ground.

With the primary bases of Maitland's theory subject to criticism, later treatments turned to the final element of Maitland's account of the trust: the contention that the beneficiary's right was good only against a determinate class of persons and thus lay within Austin's definition of a right *in personam*. Maitland himself had admitted that the beneficiary's right *might* be

¹⁵⁹ *Penn v Lord Baltimore* (1750) 1 Ves Sen 444, 447 (Hardwicke LC); *ex p Pollard* (1840) Mont & Ch 239, 250 (Cottenham LC); *Ewing v Orr Ewing (No 1)* (1883) 9 App Cas 34, 40 (Selbourne LC).

¹⁶⁰ JH Beale, 'Equitable Interests in Foreign Property' (1907) 20 HLR 382, 386; Huston, *Enforcement* (n 153) 138; Cook, 'Powers Part II' (n 152) 128–9; Scott, 'Rights of the Cestui' (n 144) 287–9. cf HF Stone, 'The Nature of the Rights of the Cestui Que Trust' (1917) 17 Col LR 467, 497–8.

¹⁶¹ WN Hohfeld, 'The Relations Between Equity and Law' (1913) 11 Mich LR 537, 544. Emphasis original.

¹⁶² *ibid* 555. See also Hohfeld, 'Fundamental Legal Conceptions' (n 133) 767–770.

¹⁶³ Hohfeld, 'Fundamental Legal Conceptions' (n 133) 770.

¹⁶⁴ *ibid* 767.

¹⁶⁵ *ibid* 767.

explained as ‘enforceable against all save a *bona fide* purchaser’¹⁶⁶ but had rejected this formulation on the grounds that equity could not create rights *in rem* and that, to do so, would conflict with the rules at law. Now that these reasons for rejecting the *in rem* conception of the trust had been shown wanting, it was possible to argue that the beneficiary’s right was enforceable against an indeterminate class (i.e. *in rem*). A typical example this argument is found in CA Huston’s, *The Enforcement of Decrees in Equity* (1915):

the essence of a right *in rem* is not that it is good against all the world, including even a *bona fide* purchaser for value. It is sufficient if it is good generally against an indefinite number, as distinguished from those available only against sufficient persons.¹⁶⁷

For Huston, the beneficiary’s right might not have been enforceable against the *bona fide* purchaser, the disseisor or the lord by escheat, but it was nevertheless a right *in rem* by virtue of its enforceability against the trustee’s successors in title (which, in his view, amounted to an indeterminate class).¹⁶⁸ In a review of Huston’s book, Hohfeld wrote of his ‘hearty agreement with the author’s main position’¹⁶⁹ and offered some further refinements to Huston’s *in rem* account:

Such comparatively few persons as actually know of a particular trust are under actual, or present, equitable duties not to accept conveyance of the legal title from the trustee...But how about the vast majority of persons, who, of course, have no present knowledge or notice of the trust?... Perhaps, as a mere matter of legal terms and sufficient communication of ideas, it would suffice to say that the *cestui* has actual, or present, rights *in rem* against such persons, *to wit*, that they should not *knowingly* accept conveyance from the trustee...If, however, it should be objected that, under a more strict use of terms, the *cestui* has actual, or present, rights only against those having actual knowledge or notice, that technical difficulty could be met by explaining that, as against innocent parties, the *cestui* has, at the very least, very important “possibilities” *in rem*, – that is, “potential, or inchoate rights” *in rem*.¹⁷⁰

Huston and Hohfeld thus demonstrated that a shift in emphasis, from specific persons bound by the trust (the heir, the judgment creditor, etc.) to those exempted from liability (the *bona fide* purchaser, the disseisor etc), could support an *in rem* conception of the trust. Conceivably, the trust property could come into the hands of anyone in the world and they would be bound unless they fell within the class of individuals who were immune to liability. In this sense, therefore, the potential class of individuals who might be bound by the trust was indeterminate and, as such, the beneficiary’s right was deserving of the description ‘right *in rem*’.¹⁷¹

IV. Conclusion

¹⁶⁶ Brunyate (ed), *Equity* (n 127) 115.

¹⁶⁷ Huston, *Enforcement* (n 153) 126. See also Pound, ‘Review’ (n 127) 463. Pound had supervised Huston’s doctoral thesis, so some consonance in their views is perhaps unsurprising.

¹⁶⁸ *ibid* 87–114.

¹⁶⁹ WN Hohfeld, ‘Review’ (1915) 25 *Yale LJ* 166, 168.

¹⁷⁰ *ibid* 168–9. See also Hohfeld, ‘Fundamental Legal Conceptions’ (n 133) 764–6.

¹⁷¹ cf HF Stone, ‘The Nature of the Rights of the *Cestui Que Trust*’ (1917) 17 *Col LR* 467, 469–473, who deprecated attempts to widen the definition of rights *in rem* such that it ‘might ultimately embrace the whole field of law and thereby make [the] classification worthless’.

In subsequent decades, the debate within the analytical school over the precise classification of the trust rumbled on, the inconclusive nature of the debate merely serving to further embed the Austinian language in popular legal usage. The analytical debates themselves did much to lay the foundations for modern approaches to classification and taxation of trusts, as well as the enforcement of foreign trusts.¹⁷² For the legal historian, however, the continued use of the Austinian terminology to describe equitable rights remained controversial. By substituting the language of rights *in personam* and *in rem* for the language of confidence and privity, analytical models of the trust were denuded of the very ideas which had explained the trust's development over time. It was this loss of the historical conception of the trust that later scholars would criticise. The most vociferous critic of the Austinian categories was undoubtedly RW Turner. In a passage later approved by Kitto J in *Livingston v Cmmr of Stamp Duties (Queensland)* (1960),¹⁷³ Turner wrote that:

The classification of the Austinian School...does not seem to rest on any true historical basis, but is rather an attempt to explain seventeenth and eighteenth-century legal phenomena in terms of nineteenth-century doctrine. The School's jurisprudential juggling with an arbitrary classification of its own making has not produced anything which might be considered creative or explanatory...[T]he whole matter is a piece of juristic skittles of little or no importance.¹⁷⁴

Whilst this summation of the Austinian School's contribution to legal science is perhaps not wholly accurate (or fair), Turner's words capture well the dissatisfaction of the legal historian when reading analytical treatments of the trust. When doctrinal writers in the Austinian tradition purported to describe the features of the modern trust, they did so without an understanding of the ideas which underpinned the precedents and maxims on which they relied. In this way, the analytical school had become untethered from the very case law which it purported to explain.

Notwithstanding Turner's misgivings, the classification of equitable rights as either rights *in rem* or rights *in personam* has continued on an ascendant path. Having recently been endorsed in the Supreme Court – there concluding that '[a]n equitable interest possesses the essential hallmark of any right *in rem*'¹⁷⁵ – the Austinian analytical project now holds a strong claim to orthodoxy. By contrast, the historical conception of the trust has receded ever further from the legal consciousness. Over the preceding century, the matter has received little attention from historians of equity who, perhaps understandably, have avoided analytical jurisprudence to at least the same extent that legal philosophers have eschewed legal history.¹⁷⁶ The effect of this

¹⁷² See, for example: HG Hanbury, 'The Field of Modern Equity' (1929) 45 LQR 196, 197–201; DMW Waters, 'The Nature of the Trust Beneficiary's Interest' (1967) 45 Can Bar Rev 219, especially 223–226; RP Meagher, WMC Gummow, and JRF Lehane, *Equity: Doctrines and Remedies* (3rd edn, Butterworths 1992) 96–100; RC Nolan, 'Equitable Property' (2006) 122 LQR 232; B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 JoE 1; JE Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27 Can JLJ 473; EC Zaccaria, 'The Nature of the Beneficiary's Right Under a Trust: Proprietary Right, Purely Personal Right or Right Against a Right?' (2019) 135 LQR 460; S Agnew and B McFarlane, 'The Nature of Trusts and the Conflict of Laws' (2021) 137 LQR 405.

¹⁷³ 107 CLR 411, 449.

¹⁷⁴ Turner, *Equity of Redemption* (n 54) 149–150. Turner's views were, in turn, echoed by DEC Yale: see DEC Yale (ed), *Epieikeia: A Dialogue on Equity in Three Parts by Edward Hake* (Yale 1953) xv, n 6; Yale (ed), *Prolegomena* (n 2) 18.

¹⁷⁵ *Akers v Samba* (n 1) 461 (Lord Sumption).

¹⁷⁶ For a discussion of ahistoricism in analytical jurisprudence, see MJW Lobban, 'Legal Theory and Legal History: Prospects for Dialogue' in M Del Mar and MJW Lobban (eds), *Law in Theory and History: New Essays on a Neglected Dialogue* (Hart 2016).

disciplinary monism, however, has been to rob the modern lawyer of a guide to the three centuries of legal debate which preceded the modern orthodoxy, and which have determined the content of much of our law of trusts. It is hoped that this chapter has gone some little way toward bridging this gap in the historiography and jurisprudence of the express trust.