

AVOIDING ANARCHY? COMMON LAW v EQUITY & MAITLAND v HOHFELD

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Professor of Law, University College London. I am grateful for the support of a British Academy/ Leverhulme Trust Small Research Grant and for comments received at the “Equity and Law: Fusion and Fission” seminar. This is a chapter from the forthcoming book: P Turner et al (eds), *EQUITY AND LAW: FUSION AND FISSION* (Cambridge, CUP, 2018).

1 INTRODUCTION

This chapter aims to explain and resolve aspects of two apparent conflicts. The first is between common law and equity. Maitland famously argued that, for two centuries before 1875, “the two systems had been working together harmoniously”.¹ He used the trust as an example of an apparent conflict which dissolved on closer inspection. This chapter aims to shed light not only on the operation of the trust, but also on the wider relationship of common law and equity in a modern legal system. It therefore discusses not only the trust (in section 2) but also (in section 3) some other forms of equitable intervention, such as the recognition of equitable assignment. Employing a Hohfeldian analysis, the chapter identifies three important general features of equitable intervention in each of those areas: those features are summarized in the conclusion (section 4). Each of those features is consistent with Maitland’s analysis of the relationship between common law and equity; and each demonstrates the importance of paying close attention not only to the outcomes arising from the application of equity, but also to the *means* by which equity achieves those results. It is thus argued that a Hohfeldian analysis can be used to support Maitland’s central point: the conflict between the two writers as to the relations between common law and equity, like the conflict between the two systems of law itself, may therefore be more apparent than real.

The chapter also explores a third conflict: between form and substance. It is often said, or assumed, that one distinctive feature of equity is its preference for the latter.² It is true, of

¹ F. W. Maitland, *Equity: A Course of Lectures* (2nd ed, 1936, A H Chaytor & W J Whittaker, eds, revised by John Brunyate, CUP, Cambridge, 1909) 17.

² See e.g. *Parkin v Thorold* (1852) 16 Beav 59 at 66-67; 51 ER 698, 701 *per* Lord Romilly MR: “Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of

course, that, in assessing the parties' objective intentions, a court may in some cases look beyond the formal expression of the parties' transaction.³ Yet this desire to discover the reality of the parties' dealings is certainly not confined to equity;⁴ equally, in equity as at common law, a court cannot simply disregard the legal form chosen by the parties.⁵ The broader point made in this chapter is that, to understand apparent conflicts between common law and equity, it is crucial to consider precisely the relevant legal relations. For example, it might be said that, by acknowledging the rights of a beneficiary of a trust of land, or of an equitable assignee, equity undermines the common law rules as to when a party can acquire an estate in land, or as to when a chose in action can be transferred. This is because the beneficiary or assignee may be seen as, in *substance*, enjoying the same benefits as conferred by a legal estate, or by a chose in action, even though the beneficiary has not satisfied the common law rules as to when and how such rights can be acquired. The key rejoinder, explored in this chapter, is that the rights of the beneficiary differ in their *form* from that of an unencumbered holder of a legal estate, and the rights of the equitable assignee similarly differ in their form from that of an unencumbered holder of a chose in action. At this formal level (which can be usefully understood by a Hohfeldian analysis), there is no conflict between common law and equity, as the content of the rights afforded to the beneficiary, or equitable assignee, differ subtly but significantly from those held by an unencumbered holder of a legal estate or a chose in action.

Crucially, this is not a purely technical point. As will be explored in this chapter, important *practical* consequences, particularly for third parties, depend on the fact that the rights of the beneficiary or equitable assignee are formally different from those of an unencumbered

form; and if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance.”

³ This is the case, for example, when determining if the right acquired is a security interest rather than an absolute one: see e.g. *G & C Kreglinger v New Patagonia Meat and Cold Storage Co, Ltd* [1914] AC 25 at 47, *per* Lord Parker.

⁴ See e.g. *Orion Finance Ltd v Crown Financial Management Ltd (No 1)* [1996] BCC 621 (determination of whether an assignment was absolute or by way of security); *A. G. Securities v Vaughan* [1990] 1 AC 417 (determination of whether an agreement created a licence or a tenancy).

⁵ For example, it is possible for parties to structure a transaction so as to escape any equitable penalties doctrine, by making clear that a party's duty to pay is a primary and not a collateral obligation: see e.g. *Astley v Weldon* (1801) 2 Bos & P 346 at 353; 126 ER 1318, 1322-3 (Heath J): “It is a well-known rule in equity, that if a mortgage covenant be to pay £5 per cent and if the interest be paid on certain days then to be reduced to £4 per cent, the Court of Chancery will not relieve if the early day be suffered to pass without payment; but if the covenant be to pay £4 per cent, and if the party do not pay at a certain time it shall be raised to £5, there the Court of Chancery will relieve.”

holder of a legal estate or of a chose in action. It is not the case that the equitable rights are different only in a trivial sense: rather, the differences ensure that concerns as to, for example, notice and information costs for third parties can be met. An awareness of the formal differences between common law rights and their supposed equitable “equivalents”⁶ is therefore necessary, not only to resolve apparent conflicts between the two systems, but also to understand how equity responds to the same practical concerns that set the limits of common law rights.

2 EQUITY, OWNERSHIP AND THE TRUST

2.1 Maitland and Hohfeld

(i) *Competing Views*

To support his contention that common law and equity worked together harmoniously, Maitland gave the example of the trust. An examiner might be told that: “whereas the common law said that the trustee was the owner of the land, equity said that the *cestui que trust* was the owner”, but such a statement was not only crude but also dangerously misleading: it would mean “civil war and utter anarchy” if two courts of co-ordinate jurisdiction varied on such an essential question.⁷ Where A holds on trust for B, the better view, according to Maitland, is that equity does not challenge the common law position that A is the owner: it simply “add[s] that [A is] bound to hold the land for the benefit of [B].”⁸ The apparent conflict is thus resolved.

⁶ See e.g. *R v Tower Hamlets London Borough Council, ex p von Goetz* [1999] QB 1019, 1023 per Mummery LJ, citing with approval the analysis of Carnwath J at first instance that an equitable lease is “for all practical purposes, and interest as good as a legal interest”.

⁷ Maitland, n 1, 17.

⁸ Maitland, n 1, 17.

Hohfeld took a different view. In ‘The Relations between Equity and Law’,⁹ he argued that there is in fact:

a very marked and constantly recurring conflict between equitable and legal rules relating to various jural relations...Though [the legal rule] may represent an important *stage of thought* in the solution of a given problem, and may also connote very important possibilities as to certain other, closely associated (and valid) jural relations, yet as regards the very relation in which it suffers direct competition with a rule of equity, such a conflicting rule of law is, *pro tanto*, of no greater force than an unconstitutional statute.¹⁰

To choose a very simple example from the extensive list provided by Hohfeld, if A holds a fee simple on trust for B, then in equity, A has a duty to B not to cut down ornamental trees on the land, whereas at common law A has a privilege against B to do so.¹¹ The jural relation consisting of A’s duty to B is thus not one also recognized at common law and so is, in Hohfeld’s terms, “exclusively equitable”;¹² and, in “every such case there is a conflict, *pro tanto*, between some valid and paramount equitable rule and some invalid and apparent legal rule.”¹³ In such case, of course, the “jural relation is finally determined by the equitable rule rather than by the legal”,¹⁴ so the *genuine* jural relation between A and B is that A *is* under a duty to B not to cut down the trees.

(ii) Reconciling the Competing Views

⁹ (1913) 11 Mich L R 537.

¹⁰ Hohfeld, n 9, 544 (emphasis original).

¹¹ Hohfeld, n 9, 555.

¹² Some care must be taken with this term. It is not intended by Hohfeld to refer only to exercises of what is often referred to as equity’s exclusive jurisdiction. It is rather intended to refer to a jural relation that is recognised only in equity, and not also at common law. For example, the power, historically existing only in equity, of a litigant to obtain a disclosure order can be seen as part of the auxiliary jurisdiction of equity (in the sense that it may aid a litigant in enforcing a common law right), but was in Hohfeld’s terms an exclusively equitable power, as it was not recognised at common law. In contrast, on Hohfeld’s view, the duty of A not to libel B exists in equity (as shown by the possible availability of an injunction to enforce the duty), but is not an exclusively equitable legal relation as it is also recognised at common law.

¹³ Hohfeld, n 9, 555.

¹⁴ Hohfeld, n 9, 557.

It is, of course, very hard to argue against Hohfeld's logic;¹⁵ it is also reasonable to allow some margin for exaggeration in material intended by Maitland for oral presentation to students.¹⁶ It is also worth noting that Maitland did concede, when considering the role of s 25(11) of the Judicature Act 1873, that "[p]erhaps" there was a conflict between common law and equity as to so-called equitable waste: in the example of A's cutting down ornamental trees, Maitland admitted that "we might here say that equity did consider that [A] must pay for his act, while law held that he need not".¹⁷ As Hohfeld notes,¹⁸ it is hard to understand Maitland's hesitation, as the conflict is clear. At the level of genuine jural relations between A and B, either A is under a duty to B not to act in a particular way, or A is not under such a duty. One of two answers must be given, and the answer reached once equity supplements the common law's rules differs from that which would be given at common law alone. That should, of course, be no surprise: if there were no jural relations recognized by equity but not by common law, there would be no point in the equitable jurisdiction.

This does not mean, however, that Maitland's general analysis must be dismissed. There are two key points to be borne in mind. The first relates specifically to the example of the trust. It will be argued here that there is a great deal to be said for Maitland's observation that the trust does not operate by way of equity's establishing in the beneficiary an independent property right that conflicts with that of the trustee. Indeed, Maitland was right to warn that it is dangerous to adopt the competing property rights model of the trust: such a model can lead a court to err.¹⁹ Maitland himself admitted that: "for the ordinary thought of Englishmen 'equitable ownership' is just ownership pure and simple, though it is subject to a peculiar, technical and not very intelligible rule in favour of *bona fide* purchasers ... let the Herr

¹⁵ Although one general objection, relevant here, is to Hohfeld's characterisation of a privilege as a legal relation set up by the law, rather than as a mere absence of legal intervention (for discussion see e.g. G Peller, 'Privilege' (2016) 104 *Georgetown Law Jo* 883). If that objection were accepted, the force of Hohfeld's ornamental trees example as a demonstration of conflict between common law and equity would be reduced, although of course equity would still have varied from the common law's position of non-intervention. The analysis in this chapter takes Hohfeld's case at its strongest, by accepting that a privilege can be a positive legal relation, and seeks to show that, even so, that case is not inconsistent with Maitland's key point.

¹⁶ Indeed, Hohfeld, n 9, 541 refers to Maitland's "entertaining" series of lectures; even the most ardent admirer of his work would hesitate to apply that adjective to Hohfeld's writing.

¹⁷ Maitland, n 1, 157.

¹⁸ Hohfeld, n 9, 570 (fn 36).

¹⁹ See the discussion in section 2.2 of the decision, in *Shell UK Ltd v Total UK Ltd* [2011] QB 86; [2010] EWCA Civ 180 and in section 2.3 of the decision of the New South Wales Court of Appeal in *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309.

Professor say what he likes, so many persons are bound to respect [B's rights] that practically they are almost as valuable as if they were *dominium* (ownership).²⁰

Indeed, part of the attraction of the trust, for legislatures²¹ as well as individual settlors, is that the interest of the beneficiary (B) can often be regarded “[as] for all practical purposes, an interest as good as a legal interest”.²² The holder of a registered company charge, for example, has little in practice to fear from the fact that its right, as an equitable interest, is subject to a bona fide purchaser defence.²³ The benefits of B's position should not, however, be allowed to obscure the important structural differences between the nature of B's rights and those of an unencumbered holder of a legal title. The key point, made clear by a Hohfeldian analysis, is that, when comparing the impact of B's rights on third parties with the impact of ownership on such parties, the differences extend beyond an inability to assert a right against a bona fide purchaser for value without notice. Two such differences, each of importance in practice, will be examined here: first, in section 2.2, the rights of B against a stranger interfering with the trust property; second, in section 2.3, the rights of B against an innocent donee of that property. In each case, it will be seen that B generally has no claim against the defendant, even though that defendant is not a bona fide purchaser.

The second key point extends beyond the trust and relates to the wider idea of what it means for law and equity to conflict. The model applied in this chapter to consider the operation of the trust can also be applied to other important equitable doctrines which might be seen to involve a conflict between law and equity. In relation to equitable assignment, for example, it might be thought that equity permits something to occur that is not allowed at common law.

²⁰ F W Maitland, ‘Trust and Corporation’ in F. W. Maitland, *State, Trust and Corporation* (ed D Runciman & M Ryan, CUP, 2003) 94. Maitland there cites J W Salmond, *The First Principles of Jurisprudence* (London: Stevens and Haynes, 1893) 278, where B is referred to as the ‘real owner’, with the trustee’s ownership described as ‘nominal’ and ‘fictitious’.

²¹ See e.g. the scheme of the Law of Property Act 1925 (Eng), under which estates in land that, by virtue of s.1, are no longer permitted at law (such as a life estate) may instead operate as equitable interests behind a trust.

²² *R v Tower Hamlets London Borough Council, ex p von Goetz* [1999] QB 1019, 1023 per Mummery LJ, citing with approval the analysis of Carnwath J at first instance.

²³ The phrase “bona fide purchaser defence” will be used in this paper as a convenient shorthand for the circumstances (see e.g. *Pilcher v Rawlins* (1872) LR 7 Ch App 259) in which, as a result of acquiring a right in good faith, for value, and without notice of B's prior equitable interest, a third party has an immunity to later coming under a duty to hold that right subject to the same core duty as A, the party initially subject to the equitable interest.

It will be argued, however, that, whilst the very fact of equitable intervention means there is a conflict at the level of jural relations between two parties (A and B), a Hohfeldian analysis can in fact show that there is no inconsistency between common law and equity at the broader level of principle. So, for example, as will be argued in section 2.4, equitable assignment does *not* provide a means for A and B to achieve a result prohibited at common law (i.e. the transfer of a chose in action from A to B). Whilst such an assignment may be seen to operate in substance as a form of transfer, at the level of jural relations it does not, as the duty of the debtor is still owed to A rather than to B. It is, therefore, equity's focus on form rather than substance that allows conflict at the level of deeper principle to be avoided: the common law rule is not, at a formal level, undermined. There is, of course, a conflict of the kind Hohfeld identified in relation to the duty of A to B, but there is no such conflict at the more significant level of principle, and thus anarchy is avoided.

2.2 Example 1: Interference with trust property

Example 1: A holds a legal estate in land on trust for B. X, who is unaware of the trust, carelessly damages the land.

No bona fide purchaser defence is available in such a case, but the orthodox position is that B's position as beneficiary does not, in itself,²⁴ give B any claim against X.²⁵ Certainly, the power to bring a claim against X in negligence or trespass is held by A. As that power derives from A's legal title to the property, the power is itself trust property and, should A in breach of trust refuse to exercise the power for B's benefit, it will be possible for B to seek an order requiring A to do so. By taking advantage of the *Vandepitte* procedure,²⁶ B, by joining A and X, can combine that (equitable) claim against A with A's (legal) claim against X in one set of

²⁴ If B was in fact in possession of the trust property at the relevant time, the fact of that possession may give B a legal title permitting B to sue X (see e.g. *Healey v Healey* [1915] 1 KB 938); but then B's claim is based on that legal title, not on B's position as beneficiary.

²⁵ See e.g. *The Lord Compton's Case* (1587) 3 Leo 196, 74 ER 629; *Leigh and Silavan Ltd v Aliakman Shipping Co Ltd* [1986] AC 785 (HL); *Restatement (Third) of Trusts* (2003) §§ 107-108. B will have a claim if X has dishonestly assisted A in breaching the trust, but of course there may be no breach of trust involved where X simply damages the trust property.

²⁶ Named for *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70.

proceedings, but this is simply a “procedural short-cut”²⁷ and two distinct claims are involved.²⁸ This has important substantive consequences. First, if A has authorised X’s conduct, so that A has no tort claim against X, then B’s only protection comes from a claim against A under the trust. Second, when calculating the extent of X’s liability, the relevant claim for those purposes is A’s claim, as holder of the legal title to the property, against X: consequential losses suffered by B as a result of the damage to the property are not, in themselves, recoverable from X.

B’s lack of a direct claim against X in Example 1 is not, it is submitted, simply an accident of history or of jurisdictional divides. Maitland, tongue no doubt somewhat in cheek, characterised the trust beneficiary as “the spoilt child of English jurisprudence”,²⁹ indulged as equity extended B’s rights so as to bind not only A, but also parties acquiring the trust property from A with notice of the trust, or as donees. He also stated, however, that there was a limit to the generosity of the Chancellor, as he could not give “true ownership, a truly *dingliches Recht*” to B, as such a step would undo, rather than supplement, the work of the common law courts.³⁰ The line would be crossed were B to have a direct claim against a stranger interfering with trust property. This can be seen by contrasting the rules as to the acquisition of legal title with those that need to be satisfied before B can become a beneficiary of a trust. The former rules generally require certain steps to be taken (in relation to land, for example, registration may be necessary)³¹ that may make it easier for a stranger, X, to establish who has legal title to particular property.³² This gives X, at least in theory, a greater chance of knowing who to approach for consent should X wish to make use of the property, and also of discovering for whose consequential losses X might be liable were X tortiously to damage the property. The *numerus clausus* principle similarly limits the

²⁷ *Don King Productions Inc v Warren* [2000] Ch 291, 321.

²⁸ See e.g. *Barbados Trust Company Ltd v Bank of Zambia* [2007] 1 Lloyd’s Rep. 495; [2007] EWCA Civ 148, [29] and [45].

²⁹ Maitland (n 20) 95.

³⁰ Maitland (n 20) 90. See too C Langdell, ‘A Brief Survey of Equity Jurisdiction’ (1887) 1 Harv L Rev 55, 60: “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.”

³¹ See e.g. Land Registration Act 2002 (Eng), ss 4 and 27.

³² In relation to tangible personal property, the prominent role played by possession in the acquisition of title can be explained in part by the salience it confers: see e.g. H E. Smith, ‘The Elements of Possession’, in Y.-C. Chang (ed.), *Law and Economics of Possession* (CUP 2015), ch. 3.

inquiries that X may have to undertake.³³ In contrast, even in relation to land, a trust can be established without any formality³⁴ or any change in possession, and there is no limit, other than the rule against perpetuities, on the content of the rights of a beneficiary of a trust. As a result, it would impose an undue burden on X if careless interference with a thing would lead to X's being directly liable not only to those with legal property rights in that thing, but also to any beneficiaries of a trust related to it.

Hohfeld's distinction between a duty and a liability is useful in demonstrating the differences, as far as the position of X is concerned, between two cases: first, where A, a holder of a legal estate in land, creates a lesser legal interest, such as an easement; second, where A instead declares that his or her legal estate is held on trust for B. In each case, the general duty of non-interference with the land is still owed by X to A. Where a legal easement is granted, there is no transfer of a particular proprietary stick from A to B; both before and after A's grant, X, along with the rest of the world, is under a prima facie duty to A not to physically interfere, deliberately or carelessly, with A's land. As a result of the grant, X does come under a new duty: a duty to B. X's strict duty to A is "cloned"³⁵ in the sense that X now owes a similarly strict, but more limited, duty to B: a duty not to physically interfere, deliberately or carelessly, with A's land in such a way as to prevent X's exercise of the liberty (e.g. to use a path on A's land) involved in the easement. Where a trust is declared, there is again, no de-bundling or fragmentation of A's rights and liberties against third parties,³⁶ as A continues to enjoy those rights; although, as noted by Hohfeld, A does of course lose liberties of use as against B. In contrast to the grant of a legal easement, however, where a trust is declared, there is no such cloning in B's favour of any strict duty owed by X to A. As with any creation

³³ The rule can thus be seen as lowering the information costs imposed on third parties by the existence of *in rem* rights: see e.g. T W. Merrill & H E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, (2000) 110 Yale LJ 1, 9.

³⁴ Under s 53(1)(b) of the Law of Property Act 1925, writing is required for the proof of a declaration of trust relating to land, but not for its establishment, as such writing can come into existence even after the declaration: see e.g. *Gardner v Rowe* (1825) 2 Sim. & St. 346; 57 ER 378, aff'd (1828) 5 Russ 258, 38 ER 1024.

³⁵ The term used by B Rudden, 'Economic Theory v Property Law: The Numerus Clausus Problem', in John Eekelaar and John Bell (eds.), *Oxford Essays In Jurisprudence* (Clarendon Press, Oxford, 1987) 251-252 when describing the effect on strangers of A's creation over A's land of a legal easement in B's favour.

³⁶ See P Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', in L Smith (ed) *The Worlds of the Trust* (CUP, 2013), 320. In relation to a trust, the content of the rights held by A on trust can be seen as constituting the 'module' that regulates the operation of the trust and controls its effect on third parties: (for a discussion of modularity in relation to property, see H E Smith, 'Property as the Law of Things' (2012) 125 Harv L Rev 1691). On the approach taken in this paper, the organising module, or metaphorical thing, in relation to a trust is the right held on trust.

of a fiduciary duty, X does come under a new duty not to dishonestly assist in breaching A's fiduciary duty to B, but of course liability in such a case is not strict.³⁷ The significance of the equitable interest acquired by B is rather that, if X acquires the trust property, or its traceable proceeds, in circumstances where the bona fide purchaser defence does not apply, and, whilst still holding that property or its traceable proceeds, X then acquires knowledge of the trust, X may come under the same core³⁸ duty as A, the initial trustee: a duty not to use that property for X's own benefit.

There are thus two, linked differences between the effect on X of a legal interest on the one hand and B's interest under a trust on the other. The former imposes a general duty on the rest of the world, and the duty is a strict one. The latter instead consists of the immediate duties of A, the initial trustee, and the core duty of A can be extended to a third party, but only if such a party acquires the trust property or its traceable proceeds and, even then, the duty is not strict as it depends on the conscience of the third party's being affected. To the extent that the existence of a general, strict duty of non-interference (often summarised by focusing on the *in rem* "right to exclude" to which it correlates) is characteristic of ownership,³⁹ a Hohfeldian analysis thus supports Maitland's claim that it is inaccurate to think of a beneficiary as an owner of the trust property. That does not mean that it is necessarily appropriate to think of the trustee, A, as holding all the usual incidents of ownership: the "self-seekingness"⁴⁰ permitted by an owner's general liberty against all others to use the property as he or she pleases is of course absent, but only because of A's duties as trustee to B, and thus only in relation to B: A has a liberty to use the property for A's own ends as against everyone other than B. On the assumption, then, that questions of ownership and proprietary rights are best judged by considering the general effect of a parties' rights on

³⁷ See e.g. *Twinssectra Ltd v Yardley* [2002] 2 AC 164, [26], [2002] UKHL 12; *Novoship (UK) Ltd v Mikhaylyuk* [2013] QB 49; [2014] EWCA Civ 908.

³⁸ This does not mean of course that X is then subject to all the trustee duties of A. For the differences between the duty that may arise on a third party recipient and the duties of A, see e.g. R C Nolan, 'Equitable Property' (2006) 122 LQR 232.

³⁹ See e.g. A M Honoré, 'Ownership' in A. G. Guest (ed) *Oxford Essays in Jurisprudence: First Series* (Clarendon Press, Oxford, 1961), ch V; T Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska L Rev* 730 and 'Property and the Right to Exclude II' (2014) 3 *Brigham-Kanner Property Rts Conf J*. 1.

⁴⁰ This aspect of ownership is only incidentally addressed by Honoré (ibid), but is discussed by J W Harris, *Property and Justice* (OUP, 1996) 5-6 and in a later piece by Honoré, 'Property and Ownership: Marginal Comments' in T Endicott, J Getzler and E Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (OUP, 2006), ch 7.

strangers, it is a mistake to confuse B's ability, in practice, to enjoy the benefits of trust property with genuine ownership of that property.

A useful practical example of the danger of regarding B as an owner of the trust property is provided by the decision of the Court of Appeal in *Shell UK Ltd v Total UK Ltd*.⁴¹ The carelessness of the defendant, X, caused significant damage to fuel storage and pipeline facilities used by B. As a result, B suffered serious economic loss through its inability to supply fuel to its customers. B did not however have legal title to the land or facilities: that title was instead held by A (in fact, two service companies) on trust for four companies, of which B was one. Such was the legal form chosen by the companies when co-operating to establish the terminal. It was held at first instance that, as B had no legal ownership or possessory title to the property, the loss it had suffered as a result of the damage was purely economic loss, and so the general "exclusionary rule" applied, meaning that X was not liable for having carelessly caused such loss.⁴²

The Court of Appeal, in contrast, allowed B's claim for substantial damages. Particular weight was placed on the ability of B to describe itself as an "equitable owner" of the damaged property, with the court holding that: "it is legalistic to deny [B] a right to recovery by reference to the exclusionary rule. It is, after all, [B] who is (along with [the other three beneficiaries]) the 'real' owner, the 'legal' owner being little more than a bare trustee of the pipelines."⁴³ The court then went on to find that the exclusionary rule was justified by the need to prevent the "unacceptable indeterminacy" that would result if a general liability for carelessly causing pure economic loss were admitted, and that recovery of such loss could be permitted only if some special relationship of proximity can be established between claimant

⁴¹ [2011] QB 86; EWCA Civ 180. For further discussion of the decision from a Hohfeldian perspective, see B McFarlane, 'The Essential Nature of Trusts and Other Equitable Interests: Two and a Half Cheers for Hohfeld' in S Balganes, T Sichelman, & H Smith (eds) *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries* (Cambridge, CUP, 2018, forthcoming).

⁴² The first instance decision is reported as *Colour Quest Ltd v Total Downstream Ltd* [2009] 2 Lloyd's Rep. 1; [2009] EWHC 540 (Comm).

⁴³ *Shell* (n 41) at [132].

and defendant, which “goes beyond mere contractual or non-contractual dependence on the ... property”.⁴⁴ It held that:

Beneficial ownership of the damaged property goes well beyond contractual or non-contractual dependence on the damaged property and does indeed constitute a special relationship of the kind required ...⁴⁵

The reasoning of the Court of Appeal in *Shell UK* has been subject to widespread criticism,⁴⁶ chiefly as a result of its departure from the settled precedent⁴⁷ establishing that the existence of a trust does not impose additional direct duties of non-interference on strangers to the trust.⁴⁸ Even on its own terms, however, the decision is hopelessly confused. First, whilst emphasis is placed on B’s “equitable ownership”, the exclusionary rule is seen as *prima facie* applicable. This means that the analysis is in fact consistent with the orthodox view that X is not in the same position as a party with a legal property right in the damaged thing: in other words, B’s loss is purely economic as it does not flow from interference with B’s property. So, whilst the rhetoric of the judgment is inconsistent with Maitland’s analysis, and with the traditional analysis of the effect of B’s right on strangers, a critical step in the reasoning in fact supports Maitland’s view. Second, the court regards the case as falling within an exception to the exclusionary rule, as B’s beneficial interest provided the required relationship of proximity. This must be wrong, however, as the exception depends on the existence of a special relationship of proximity between claimant and *defendant*, not between the claimant and a different party, such as the trustee. It is surprising to find an appellate court making such an error, but the chances of such sloppiness of thought are increased when B’s beneficial interest is conceived of as ownership.

⁴⁴ *Shell* (n 41) at [133], citing A M Jones and M A Douglas (eds.), *Clerk & Lindsell on Torts*, 19th ed. (Sweet & Maxwell Ltd, London, 2006) at [8.116].

⁴⁵ *Shell* (n 41) at [134].

⁴⁶ See e.g. K.F.K. Low, ‘Equitable Title and Economic Loss’ (2010) 126 L.Q.R. 507; P.G. Turner, ‘Consequential Economic Loss and the Trust Beneficiary’ [2010] C.L.J. 445; J Edelman, ‘Two Fundamental Questions for the Law of Trusts’ (2013) 129 L.Q.R. 66.

⁴⁷ See n 25.

⁴⁸ The Supreme Court gave permission to appeal against the decision, but the appeal was settled. Even if the defendant had succeeded on the point as to the negligence claim, A was also pursuing a claim against X based on public nuisance.

2.3 Receipt of trust property by an innocent donee

Example 2: A holds property on trust for B. Acting in breach of trust, and without authority from B, A makes a gift of that property to C. C receives the property as a gift and has no knowledge or notice of the trust. C sells the property, spending the proceeds on groceries, which C consumes. Only then does C acquire knowledge of the trust.

The orthodox position is that, although C is not a bona fide purchaser, B has no claim against C. If C acquires notice of the trust,⁴⁹ whilst still holding the trust property or its traceable proceeds, C will come under a direct equitable duty to B. If, however, C acquires notice only at a point when C no longer has the trust property or its proceeds, then B has no claim against C. In English⁵⁰ and Australian⁵¹ law at least, that is the case even if, as in Example 2, C retains a benefit from the receipt of the trust property.

A thorough understanding of this example is important, as, whilst the traditional position is clear, there is some current controversy, in each of English, Australian, and American law as to whether that position is justifiable. The argument made here is that the orthodox position has much to recommend it, and is consistent not only with Maitland's view of the nature of B's rights but also with a Hohfeldian analysis of the particular effects of B's rights on third parties. The orthodox position has however been subject to some academic and judicial objections, one strand of which involves arguing that the strict restitutionary liability imposed on a recipient at common law (e.g. in a case of mistaken payment)⁵² should also be available in equity.⁵³ The difficulty with such an argument is that it mistakenly equates the

⁴⁹ Whether from B or otherwise: compare e.g. *Lloyds v Banks* (1868) LR 3 Ch App 488.

⁵⁰ *Bank of Credit and Commerce International (Overseas) Ltd and Another v Akindele* [2001] Ch 437, 450-458.

⁵¹ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [112], [123]-[129], [134], [140]-[158] [2007] HCA 22.

⁵² See e.g. *Kelly v Solari* (1841) 9 M & W 54, 152 ER 24; American Law Institute, *Restatement of the Law (Third): Restitution and Unjust Enrichment* (St Paul, MN, American Law Institute Publishers, 2011), vol. 1, § 6, comment f, illustration 22.

⁵³ See e.g. Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in WR Cornish, R Nolan, J O'Sullivan, G Virgo (eds.), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, Oxford, 1998) 236-9; P Birks, 'Receipt' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing, Oxford, 2002), ch. 7.

beneficiary's position with that of an owner,⁵⁴ and wrongly assumes that B has an *abstract* entitlement to the value of the trust property. A parallel to the decision in *Shell UK Ltd v Total UK Ltd*,⁵⁵ showing the dangers of equating B's position with that of a holder of unencumbered legal title, is that of the Court of Appeal of New South Wales,⁵⁶ later reversed by the High Court of Australia,⁵⁷ in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*. One of the errors identified by the High Court concerned the nature of the liability owed to B by C, the recipient of property transferred in breach of trust.⁵⁸ The Court of Appeal had taken the view that, even if C has no knowledge of the trust, C may be subject to a constructive trust in favour of B, arising to reverse C's unjust enrichment at B's expense. That view was described by the High Court as a "grave error"⁵⁹ and rested on the fallacy that "equity should now follow the law"⁶⁰ by extending to B the protection afforded by the law of restitution to a holder of a common law right. The difference in the levels of protection is not, however, "irrational",⁶¹ nor a mere result of a history and jurisdictional accident. It is rather a result of the particular means by which equity provides B with protection against third parties: by finding that C's conscience is affected in such a way as to justify extending the duty characteristic of a trustee from A to C.

In Example 2, the enrichment initially received by C takes the form of a right⁶² (the trust property) initially vested in A. The effect of the transfer from A to C is that A gains, and C acquires, that right. C's enrichment is thus at the expense of A, rather than of B, and so it is no surprise that neither common law nor equity recognises a strict liability restitutionary claim of B against C. The key point is the same as made in section 2.2: if A initially holds a

⁵⁴ As noted by e.g. L Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412, 431. For further discussion of the point from a Hohfeldian perspective, see B McFarlane (n 41).

⁵⁵ *Shell* (n 41).

⁵⁶ *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309.

⁵⁷ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [2007] HCA 22.

⁵⁸ See too section 2.1.

⁵⁹ *Farah* (n 57) [131].

⁶⁰ *Farah* (n 56) [221]-[222], citing from Nicholls (n 53) at 238-9.

⁶¹ The view of K Mason, "Where Has Australian Restitution Law Got to and Where is it Going?" (2003) 77 ALJ 358, 368, quoted and disagreed with in *Farah* (n 57) [148].

⁶² For the importance of distinguishing between enrichments taking the form of rights and other forms of value, see R Chambers, 'Two Kinds of Enrichment' in R Chambers, C Mitchell and J Penner (eds) *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, 2009), ch. 9.

right, then the impact on third parties of A's then declaring a trust in favour of B is limited. It is now possible that such a third party, if holding the trust property or its proceeds with knowledge of the trust, may come under a duty to B in relation to that property, but, as emphasised by Maitland,⁶³ such a liability (like that arising where a third party dishonestly assists in a breach of trust) arises only where C's conscience is affected. Indeed, it is significant that, whether it is based on dishonest assistance or on knowing holding of trust property, such liability is said to involve C's being a constructive trustee:⁶⁴ it is not the case that, when the trust arises, third parties comes under an immediate general, strict liability to B; rather, C may be liable if but only if C's particular actions justify regarding C as being subject to the same core duty of A, the initial trustee.⁶⁵ The trust therefore gives B a right *against A (and future trustees)* that such parties do not use the property for their own benefit, but rather use it for the benefit of B.

(i) *The American position and Ames' analysis*

In the United States, the position of C, the innocent donee in Example 2, is less clear: the Restatement (Third) of Restitution follows the First and Second Restatements of Trusts in assuming, without citation of authority, that B does have a claim against C. On C's receipt of the trust property, it is said, a prima facie liability arises,⁶⁶ and, if C retains the benefit of such property,⁶⁷ then the fact that he or she no longer holds either the property or its traceable proceeds does not displace B's personal restitutionary claim.⁶⁸ One explanation for this

⁶³ See e.g. Maitland (n 20) 91: "The concept with which the Chancellor commences his operations is that of a guilty conscience."

⁶⁴ See e.g. *Barnes v Addy* (1874) LR 9 Ch App 244.

⁶⁵ See e.g. Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 705: "Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience."

⁶⁶ *Restatement of the Law (Third): Restitution and Unjust Enrichment* (St Paul, MN, American Law Institute Publishers, 2011) vol. 1, § 17, comment c, illustration 9.

⁶⁷ As is the case where, as in Example 2, C spends the proceeds of the property on costs C would have incurred even in the absence of any receipt of the property.

⁶⁸ C's retention of an abstract enrichment prevents C's relying on the change of position defence set out in American Law Institute, *Restatement of the Law (Third): Restitution and Unjust Enrichment*, vol. 1, § 65.

stance is its consistency with Austin Scott's view,⁶⁹ opposed of course to Maitland's, that B's interest is proprietary in nature: it may thus rest on the idea, challenged in section 2.2 above, that B has a general right to the value inherent in the trust property, rather than simply a right that A (or future trustees) must use that property consistently with the terms of the trust.

A different explanation for the stance taken in the Restatement focuses instead on the nature of a restitutionary claim. James Barr Ames, for example, argued that B's ability to assert a right against an innocent donee still holding trust assets rested on the same general foundation as a claimant's ability to seek restitution after making a mistaken payment to the defendant: '[a] court of equity will compel the surrender of an advantage by a defendant whenever, but only whenever, upon grounds of obvious justice, it is unconscientious for him to retain it at another's expense'.⁷⁰ On this view, C may be liable in Example 2 if he or she retains a *benefit* when acquiring notice of the trust, whether or not C at that point retains a *right* that can be identified as either the trust property or its traceable proceeds. C's liability thus depends on a broader view of the basis of restitutionary liability, rather than on a characterisation of B's initial right as proprietary: indeed, Ames himself agreed with Maitland that it is "clearly inaccurate" to regard B as an "equitable owner".⁷¹

The first point to make, and the most important for present purposes, is that, even if Ames' analysis were accepted, there would still be a clear difference, when considering claims against an innocent donee of property, between the position of B and the position of a party with an unencumbered legal title to property. Where the claimant has legal title, a *prima facie* duty of non-interference with the property is imposed on the rest of the world, and a stranger can be liable for such interference even if unaware that the property is not his or her own. The conscience of the defendant is therefore irrelevant, as is the fact that the defendant was never enriched, or is no longer enriched, as a result of the interference with the property.⁷² Where B

⁶⁹ See e.g. A. W. Scott, 'The Nature of the Rights of the Cestui Que Trust' (1917) 17 Col L Rev 269. Scott was of course the Reporter for the Restatement of Trusts, and, with Warren Seavey, the Reporter for the Restatement of Restitution.

⁷⁰ J B Ames, 'Purchaser for Value Without Notice' (1887) 1 Harv L Rev 1, 3.

⁷¹ Ames (n 70) 9.

⁷² As noted by Lord Nicholls in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, [103]; [2002] UKHL 19, the tort of conversion may thus "cause hardship for innocent persons".

instead has only an equitable interest under a trust then, on each of the orthodox position and Ames' analysis, B's claim depends instead on the conscience of C's being affected, and thus on C's acquiring knowledge of B's rights in relation to the trust property. The difference between the traditional position and Ames' analysis is that, on the former, such knowledge must arise when C still has *either the trust property or its traceable proceeds*, whereas on the latter it suffices if C acquires such knowledge at a point when C retains an *abstract benefit* derived from his or her initial receipt of the trust property.

This leads to a second point. It is possible to argue that, in Example 2, it seems arbitrary, or even overly formal, to deny B a claim, given that B has, in substance lost out and C has, in substance, gained from the unauthorized use of the trust fund. Ames argued that, in such a case, whilst the right itself is acquired by C, the *value* of that right is not, and remains throughout with B. A Hohfeldian analysis, however, shows the difficulties with this argument, and also reveals something significant about the operation of a trust. As a party's claim-rights are rights against another party that such a party act or not act in a particular way,⁷³ it makes little sense to talk of a transfer of value or, indeed, of a right to value. In the case of a trust, as noted above, B has no abstract entitlement to value, but rather has a claim-right against A that A use the property for B's benefit as according to the terms of the trust. As against parties other than B, indeed, A has the same general privilege as an unencumbered owner to use the trust property for his or her own benefit, and to that extent, it is A who has a right to the value of the trust property. This aspect of the trust is therefore, closely linked to the point discussed in section 2.2: it is the trustee (A) who may hold rights against third parties, and B's protection against a third party is either indirect (depending on A's rights) or depends on B's providing a good reason why a third party can be said, like A, to have come under a duty to B in relation to a specific right held by that third party. This is the formal means by which equity ensures that third parties are spared the notice and information costs that would arise were an equitable interest to bind such parties in the same way as a legal interest.

3 BEYOND TRUSTS

⁷³ See e.g. J Finnis, 'Some Professorial Fallacies About Rights' (1972) 4 Adelaide L Rev 377, 377.

3.1 Equitable Assignment

A wider point, applying beyond the context of trusts, arises from the discussion in section 2: it is as to the importance of distinguishing between the *practical outcome* of a particular equitable intervention and the *technical means* by which that result is achieved. The fact, for example, that an equitable interest may be “for all practical purposes, an interest as good as a legal interest”,⁷⁴ does not mean that it is identical to a legal interest in its operation. The technical differences, seen clearly by adopting a Hohfeldian analysis, are essential to supporting Maitland’s point that apparent conflicts between common law and equity disappear on closer inspection. Indeed, there is something of an irony: the very success of equity in allowing parties to achieve certain desired practical results without breaking common law rules may lead to the mistaken conclusion that equity is operating inconsistently with such rules.

The operation of equitable assignment provides a good example of this broader point. The clear common law rule is that, other than in limited, exceptional cases,⁷⁵ if D owes a duty to A, for example to pay A a fixed sum, it is not possible for A to transfer A’s claim-right to B. In a case where D’s duty arises from a contract between A and D, this reflects the simple point that it would be inconsistent with D’s freedom to choose his or her contracting partner if a variation in D’s duty could be unilaterally effected by A.⁷⁶ In such a case, however, there is no difficulty in A’s declaring a trust in favour of B of A’s claim-right against D: D’s duty would continue to be owed to A, even if, were A to refuse in breach of trust to B to enforce that duty, B would then be able to invoke the *Vandepitte* procedure⁷⁷ to initiate proceedings against A and D. Such a trust might be seen, in practice, as giving B many of the same benefits as would come from having a direct right against D but, crucially, it does not conflict

⁷⁴ *R v Tower Hamlets London Borough Council, ex p von Goetz* [1999] QB 1019, 1023 (Mummery LJ).

⁷⁵ Such as debts owed to or by the Crown.

⁷⁶ See C H Tham, ‘The Nature of Equitable Assignment and Anti-Assignment Clauses’ in J W Neyers, S G. A. Pitel and R Bronaugh (eds.), *Exploring Contract Law* (Portland, Hart, 2009), 291.

⁷⁷ As discussed in e.g. *Barbados Trust Co Ltd v Bank of Zambia* [2007] 1 Lloyd’s Rep. 495, [30]-[47], [74]-[76], [98]-[119], [129]-[141].

with the common law rule preventing such transfers, nor with the underlying principle that A should not be free unilaterally to alter D's duty.

It might be thought that, given the possibility of equitable assignment, such a trust is unnecessary. Traditionally, however, equitable assignment has been understood to operate by way of trust.⁷⁸ This is consistent, for example, with the general requirement that, after such an assignment, A must be joined in any action by B to enforce D's duty.⁷⁹ That understanding has, however, become less prominent, and equitable assignment has come to be seen, particularly in the United States, as involving a transfer to B of A's claim-right against D.⁸⁰ This raises the awkward question of the basis on which equity may permit a result clearly barred by the common law. The apparent conflict, however, arises only if the practical result of equitable assignment is confused with the technical means by which it is achieved. It has been argued,⁸¹ for example, that an equitable assignment consists of a trust for B of A's chose in action against D, plus a special form of irrevocable agency, recognised in equity, by which A permits B to exercise certain of A's powers (including the power to release D's duty to A if D makes payment to B) in B's own interest. On that view, in a case involving a legal chose in action, the requirement for joinder of the assignor is no mere technicality, but rather demonstrates that the claim-right being enforced against D is held, as it was prior to the equitable assignment, by A. This may of course have a practical impact: in one case,⁸² for example, the question was whether an insurer (B) with a right of equitable subrogation to A's claim against D could pursue that claim directly when A was a company that had ceased to exist. Drawing on the rules applying to equitable assignment, the Court of Appeal held that no claim could be made unless and until A was reinstated on the companies register: "[t]o contend, as counsel for the insurers suggested, that the problem is only one of form and not

⁷⁸ See e.g. W. Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon Press 1766), vol. 2, ch. 30; *Gorringe v Irwell India Rubber & Gutta Percha Works* (1886) 34 Ch D 128. See too J Edelman & S Elliott, 'Two Conceptions of Equitable Assignment' (2015) 131 LQR 228.

⁷⁹ See e.g. *Roberts v Gill & Co* [2011] 1 AC 240, [71]; [2010] UKSC 22.

⁸⁰ See too e.g. G Tolhurst, *The Assignment of Contractual Rights* (2nd edn, Hart Publishing, Oxford, 2016) 1.01; M Bridge, *Personal Property Law* (4th edn, OUP, 2015) 231.

⁸¹ In the D Phil thesis of C H Tham (*The Mechanics of Assignments: Functions and Form*, submitted to the University of Oxford, 2016) 74-80, which I have benefitted greatly from reading. That analysis can also be seen as consistent with Blackstone's account of assignment: see Blackstone, *Commentaries on the Laws of England*, vol. 2, ch. 30.

⁸² *M. H. Smith (Plant Hire) Ltd v D.L. Mainwaring (t/a Inshore)* [1986] 2 Lloyd's Rep 244.

substance, is as untenable in the present state of the law as it would be in relation to the different consequences of an equitable, as opposed to legal, assignment”.⁸³

3.2 Unjust Enrichment

The analogy drawn by Ames between the claim of B in Example 2, and the personal restitutionary claim available to Y where Y mistakenly transfers a right to Z, was considered above in section 2.3. The underlying premise of that analogy was rejected, as it depends on the idea, exposed as dubious by a Hohfeldian analysis, that each of B and Y holds an abstract and independent right to value. That point is not however fatal to Ames’ broader contention that there may be an underlying equitable basis to the core personal restitutionary claim. As well as having some support in precedent,⁸⁴ that contention now seems remarkably prescient: it is closely reflected in the language currently used (but adopted only relatively recently) by courts in England when considering liability in knowing receipt⁸⁵ and by courts in Australia when considering restitutionary liability.⁸⁶ The use of such language in the case of knowing receipt reflects a conscious judicial decision to emphasise the equitable basis of the liability and to reject arguments that, on the basis of fusion between law and equity, a common law strict liability model should be extended. So, whilst the weight of academic opinion at one point favoured the recognition of prima facie strict liability on a recipient of trust property, so as to remove a supposed inconsistency between common law and equity, there is now a judicial trend that not only re-asserts the traditional equitable position as regards recipients of trust property, but also emphasises the equitable nature of restitutionary liability itself.

⁸³ *M H Smith* (n 82) per Kerr LJ at 246.

⁸⁴ See e.g. *Moses v Macferlan* (1760) 2 Burr 1005, 1010-11; 97 ER 676, 679-680 (Lord Mansfield).

⁸⁵ See e.g. *Bank of Credit and Commerce International (Overseas) Ltd and Another v Akindele* [2001] Ch 437, 455, where Nourse LJ described the test for liability in knowing receipt thus: “The recipient’s state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.”

⁸⁶ See e.g. *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, [2001] HCA 68 at [24] (Gleeson CJ, Gaudron and Hayne JJ) and [71] and [91] (Gummow J); *Australian Financial Services Ltd v Hills Industries Ltd* (2014) 253 CLR 560, [2014] HCA 14, [65]-[76], headed: “The relevant enquiry: whether retention of monies unconscionable”.

Indeed, it can be argued that, whatever its precise jurisdictional origin, a personal restitutionary claim has a distinctly equitable function, as it works to mitigate the effects on a particular claimant of a primary set of rules (as to the validity of a transfer of rights) which, whilst justified by wider concerns, may, in certain cases, create the prospect of unconscionable conduct by the defendant recipient as against the claimant transferor. To adopt the language used by Henry Smith,⁸⁷ such a defendant might be seen as taking opportunistic advantage of the generally phrased primary rules as to transfers of rights. In a case where Y's transfer of a right to Z is made as a result of a subjective mistake, the need to provide third parties with clarity as to the location of rights⁸⁸ may justify the validity of the transfer, so that Z does indeed acquire the right. That does not mean, however, that the effect of such rules on Y's position *as regards Z* is necessarily justified. In a case where Z remains factually better off, at least by the time that he or she is aware of the mistake, there is a prima facie case for the defendant paying the value of that benefit to the claimant. As recently confirmed by the High Court of Australia,⁸⁹ however, the case is only a prima facie one and events occurring after Z's receipt, even if not resulting in a clearly measurable reduction of the enrichment, can make it no longer unconscionable for Z, even with knowledge of Y's mistake, to retain the enrichment.

It can thus be argued that there is no conflict between, on the one hand, a primary legal rule that, notwithstanding Y's subjective mistake, Y's right has been transferred to Z and, on the other hand, the possibility of Z's nonetheless being under a liability⁹⁰ to pay the value of that right to Y. Indeed, in justifying the effect of the primary legal rule on Y, the possibility of a restitutionary claim may play a vital role. Far from undermining the primary rules as to the

⁸⁷ See e.g. H E Smith, 'Property, Equity, and the Rule of Law' in L M Austin & D Klimchuk (eds) *Private Law and the Rule of Law* (OUP 2014), ch. 10.

⁸⁸ In *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775, [2004] EWCA Civ 47, for example, the transfer of the privilege to use a specific car registration number was valid as the defendant was registered as holding that privilege.

⁸⁹ *Australian Financial Services* (n 86). See too Lord Goff in *Lipkin Gorman v Karpnale* [1991] 2 AC 548, 580, on the scope of the change of position defence: "At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full".

⁹⁰ As noted by S A Smith, 'A Duty to Make Restitution' (2013) 26 Can J L Juris 157, 173-6, it is difficult to think of Z as being under an immediate duty to make restitution as soon as Z acquires the right: after all, Z may at that point be entirely unaware of the transfer. The language used in the Restatement (Third) of Restitution (see e.g. § 1, 2, 5, 13-17) may therefore be more accurate: Z is *liable* to make restitution: see S Smith, 'The Restatement of Liabilities in Restitution' in C Mitchell and W Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment—Critical and Comparative Essays* (Hart Publishing, Oxford, 2013), ch. 10.

transfer of rights, the personal restitutionary claim can instead be seen as an important part of the justification for those rules.⁹¹ Indeed, this seems to be an example of the broader argument that equitable doctrines, whilst leaving some room for discretion in the interpretation of core concepts such as unconscionable retention, may nonetheless support the rule of law by mitigating the potentially harsh effect of primary legal rules and thus “contributing to conditions under which citizens are likely to form and maintain a disposition to engage with law.”⁹² In unjust enrichment, as is the case when considering each of the effect of a beneficiary’s rights on third parties, and equitable assignment, equity can thus add to the common law by offering important substantive protection to a claimant; the form in which that protection is provided, however, ensures that, at the level of principle, equity does not conflict with the common law rules it supplements.⁹³

4 CONCLUSION

Hohfeld was clearly correct in observing that, as there are exclusively equitable principles, those principles, when applied, will alter the jural relations, recognised at common law, that would otherwise exist. To that extent, there may be conflict between common law and equity. Maitland, however, was correct in observing that many apparent conflicts between common law and equity are illusory. Indeed, a Hohfeldian analysis will often bear out the truth of Maitland’s view: the apparent conflict is dispelled by shifting from the level of general impression and practical benefits (e.g. the position of a beneficiary is as good as that of a holder of unencumbered legal title; an equitable assignment, in effect, involves a transfer of a right) to a more detailed examination of the parties’ rights. It is often said, when considering the operation of particular principles, that equity focuses on substance rather than form; at a more abstract level, it might instead be said that the opposite is true: it is the employment of particular technical, formal means that permits equity to give a party certain practical benefits

⁹¹ See B McFarlane, ‘Unjust Enrichment, Rights and Value’, in D. Nolan and A. Robertson (eds.), *Rights and Private Law* (Oxford: Hart Publishing, 2012), ch. 20; S A Smith, ‘A Duty to Make Restitution’ (2013) 26 Can J L Juris 157.

⁹² M Harding, ‘Equity and the Rule of Law’ (2016) 132 LQR 278, 302.

⁹³ The same argument can be made in relation to the use of equitable estoppel as a cause of action, and the relationship between such rules and the requirements of a valid contract: see .g. B McFarlane, ‘Equitable Estoppel as a Cause of Action: Neither One Thing Nor One Other’ in S Degeling, J. Edelman and J. Goudkamp (eds.), *Contract in Commercial Law* (Thomson Reuters, Sydney, 2016), ch. 16.

unavailable at common law whilst at the same time respecting the operation of primary common law rules.

The examination of the trust in section 2, and of other forms of equitable intervention in section 3, has led to three broader points about the operation of equity in a modern legal system. The first concerns the need for the conscience of the specific defendant to be affected. In looking at the trust, and the question of ownership, the crucial Hohfeldian distinction is the simple one between, on the one hand, the position of A (the trustee) who is under an immediate duty to B (the beneficiary) and, on the other hand, the position of third parties, who are not under that same, immediate duty. After all, the core duty of A is a duty not to use a particular right or rights (the trust property) inconsistently with the terms of the trust – and third parties, such as X, not holding that right, cannot be under that same duty. A condition of X's coming under the same duty is therefore the receipt by X of a particular type of right: a right that is, or is part of, the initial trust property or its traceable proceeds.

This leads to the second point: equitable principles often have a “backwards-looking” aspect, as they are based not on recognising and enforcing pre-existing duties of a defendant, but instead on asking if, given what has occurred in relation to the claimant, it would now be unconscionable for the defendant to act in a particular way.⁹⁴ Such principles can play an important practical role in mitigating the effects of primary, common law rules; the operation of the principles, by imposing liabilities rather than duties, can nonetheless be consistent with those primary rules. Those primary rules are often related to the acquisition or exercise of particular rights by the defendant,⁹⁵ and this leads to the third distinctive feature of equity: its principles can regulate and respond to a party's holding of a particular right. Indeed,

⁹⁴ The reference to “backwards-looking” aspect of equitable intervention derives from Hoffmann LJ's analysis of equitable estoppel in *Walton v Walton* (unreported CA (Civ Div), 14 April 1994) as a doctrine that: “looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept.” See too the formulation of the change of position defence adopted by Lord Goff in *Lipkin Gorman v Karpnale* [1991] 2 AC 548 at 580: “the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or to make restitution in full.”

⁹⁵ See e.g. *Australian Financial Services* (n 86) per Hayne, Crennan, Kiefel, Bell and Keane JJ at [86], where an analogy is drawn between equitable estoppel and the change of position defence to a restitutionary claim as “both estoppel and the defence are grounded in that body of equitable doctrine that prevents the unconscientious assertion of what are said to be legal rights.”

Maitland's view as to the support often provided by equity to the common law⁹⁶ is reflected in the argument that equitable liabilities of a holder of a right may play a vital role in justifying the common law rules that have permitted the acquisition of that right, or the continued enjoyment of a privilege associated with the right. Structurally speaking, equity can thus take advantage of its secondary position to supplement, but also support, primary common law rules. Similarly, Hohfeld's reference to certain common law rules as a "stage of thought"⁹⁷ suggests that there may be a potentially fruitful interaction between common law and equity, and that the initial common law position has some significance even if displaced by a contrary equitable result.

Two final points can be made. First, an emphasis on technical differences between the formal operation of particular common law and equitable rules does not mean that no useful analogies can be drawn between such rules. For example, this chapter has, in section 2, emphasized the differences between the position of a beneficiary of a trust and that of an unencumbered holder of a legal property right. Nonetheless, the focus of trusts on the rights held by the trustee means that a valid, but limited, analogy may be drawn between those two cases. In each, there is an element of depersonalisation:⁹⁸ it is not the identity of A, the initial trustee, that is crucial to the operation of the trust, it is rather the identity of the right initially held by that trustee. Just as the scope of the protection of a party with a legal interest depends on the fate of the thing to which that interest relates, and so is not tied to a specific individual, so does the scope of B's protection depend on the fate of the right or rights initially held on trust. The crucial point made by this chapter, however, is that the ability to draw an analogy between two things does not mean that those things are the same.

Second, it would of course be a mistake to regard common law rules as an immovable structure around which equitable principles grow and develop. Where equitable doctrines allow parties to achieve some practical benefits not permitted by common law, even if those doctrines initially operate in a way consistent with the common law rules, it may be that over

⁹⁶ See e.g. Maitland, *Lectures on Equity* (n 1) 17: "Equity had come not to destroy the law, but to fulfil it."

⁹⁷ Hohfeld, n 9, 544: see text at n 10.

⁹⁸ It could similarly be said that, just as a thing may serve as an organizing module when considering legal property rights (see H E Smith, 'Property as the Law of Things' (2012) 125 Harv L Rev 1691), the organizing module when considering equitable rights is an underlying right: see too n 36 above.

time the practical success and importance of the equitable doctrines leads to a reconsideration of the common law rules. In the United States, for example, it would probably be difficult now to argue that assignment operates as anything other than a transfer of a chose in action. In England, for example, the Law Commission has proposed that types of right which would currently, as restrictive covenants in land, take the form of an equitable interest should be capable in the future of operating as legal interests:⁹⁹ experience with such rights, it seems, has led to the view that there is no need for an “extension in equity of the doctrine of negative easements”¹⁰⁰ as statute can ensure that such an extension occurs directly at common law. Far from undermining common law, then, equity may thus assist not only in the justification of existing common law rules, but also in the development of new ones.¹⁰¹

⁹⁹ Law Commission, *Making Land Work: Easements, Covenants and Profits A Prendre*, Law Com No 327 (2011), [5.4]-[5.11], [5.69]-[5.75].

¹⁰⁰ This view of restrictive covenants was given by Sir George Jessel MR in *London & South West Railway Co v Gomm* (1882) 20 Ch D 562, 583.

¹⁰¹ In *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, [98], Gummow J cited with approval Lord Redesdale’s statement in *Spect v Spect* (1891) 26 P 203, 205 that: “A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next.”