From Law to Faith:
Letting Go of Secret Trusts

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Stephen James Alan Swann BA (Cantab.)

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Stephen James Alan Swann 

This thesis re-examines the law of secret trusts and the doctrinal justification for enforcing a legatee’s promise to a testator to apply his inheritance for the benefit of a third party nominated by the testator. It critically appraises, in terms of both case law and theory, the justifications presented by the fraud and dehors the will theories. Commencing with a review of the law on past and present testamentary formalities, it presents evidence that the modern dehors the will theory is a throwback to early misunderstanding about the relationship of informal testamentary trusts to wills. The testamentary nature of secret trusts is confirmed by an examination of probate case law defining a will and an analysis of the functions of the Wills Act formalities excludes the notion of an implied statutory exception for secret trusts. A review of precatory secret trust case law indicates how the law has developed based on a conventional assumption as to the nature of testators’ secret instructions. The thesis also re-considers limits to the fraud-based constructive trust jurisdiction assumed to have endured the demise of the special probate courts. The thesis offers a new approach for English law based on accommodating the legatee’s moral duty within a contingent restitutionary principle of personal fraud.
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CHAPTER 1: INTRODUCTION

A description of secret trusts and their problematic nature

1.1 This thesis is concerned with testamentary secret trusts and seeks to re-assess their juridical basis in equity. The purpose of the thesis is to challenge present theorising about their nature by considering the history and policy of testamentary formality and re-discovering the importance of the extra-legal confidence often associated with an informal trust. These insights enable a fresh approach to secret trusts to be put forward for evaluation as a more principled solution of the legal problems posed by secret trusts.

1.2 Simply stated, a testamentary secret trust is a trust intended by a property owner to take effect at his death in respect of part or all of his estate, but whose terms are not expressed in the deceased’s will. The essential characteristic of the secret trust - from which its problematic nature derives - is that it is not contained within the formal will of the settlor. As Page Wood VC indicates in a much approved passage in his judgment in Wallgrave v Tebbs, the active or tacit agreement of the legatee to act as trustee substitutes for the formality of the will in providing the legal basis for the secret trust’s validity:

   Where a person, knowing that a testator in making a disposition in his favour, intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will

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1 See, for example, Jones v Badley (1866) L.R. 3 Eq 635, 652 per Lord Romilly MR and on appeal at (1868) L.R. 3 Ch App 362, 363-364 per Lord Cairns L.C; Rowbotham v Dunnett (1878) 8 Ch D 430, 437 per Malins VC.

2 (1855) 2 K & J 313.
carry the testator's intention into effect, and the property is left to him
upon the faith of that promise or undertaking, it is in effect a case of
trust [...].

1.3 Although the element of communication and acceptance of the trust office remains
essential to the creation of the trust, it is established law that the domain of the
secret trust doctrine stretches beyond the confines of this formulation. A fully-secret
trust may arise:

(a) where a legatee or devisee gives an undertaking inducing a testamentary
disposition in his favour, whether by inducing the testator to make the gift by
will or codicil or to leave an executed gift unaltered by codicil or unrevoked or
to revoke another gift so as to restore the gift to the legatee or devisee. or

(b) where the intestate successor gives an undertaking inducing full or partial
intestacy, whether by inducing the deceased to revoke an existing will or to
refrain from making a will or codicil to an existing will.

3 Ibid at 321.
4 See, for example, Drakeford v Wilks (1747) 3 Atk 539 (Lord Hardwicke LC); Stickland v Aldridge (1804) 9 Ves Jun 516 (Lord Eldon LC).
5 See, for example, Edwards v Pike (1759) 1 Eden 267 (Henley LK) where the testatrix devised the land to her two nieces for their own use by a third codicil to her will and, after the execution of the codicil, the nieces were summoned to her room and made to promise to perform the secret trust.
6 Tharp v Tharp [1916] 1 Ch 142 (Neville J).
7 Re Gardner [1923] 2 Ch 230, 233 per Romer J.
8 Chamberlaine v Chamberlaine (1678) 2 Freem 34 (Lord Nottingham LC); Anon. (undated) 2 Freeman 137 (Court of Chancery); Sellack v Harris (1708) 2 Eq Ca Abr 46 (Lord Cowper LC, reversing Wright LK and Trevor MR); Harris v Horwell (1708) Gilb Rep 11 (Lord Cowper LC).
1.4 A half-secret trust may arise, comparably with a fully-secret trust of a legacy, where the will bequeaths the secret trust property to the legatees on trust and alludes to the existence of a secret trust, but omits the trust terms.9

1.5 A secret trust is so-called simply because its objects and the other terms of the trust are not contained in the will. Whether or not the trust is kept secret from the intended beneficiaries during the testator's life, the exclusion of the trust from the will is the only sense of secrecy which is relevant in legal terms.10 The jurisprudential difficulty posed by secret trusts lies in the combination of two legal principles. As explained in chapter 2, the statutory formality requirement for an express testamentary trust may be thought to dictate that a secret trust is void: the correlate of agreeing a trust outside the will is non-compliance with the statute. Despite this, the courts have consistently held not merely that a trust is to be enforced but that the legatee is to perform the trust which he accepted. The problem for legal theory lies in reconciling the absence of formality with specific enforcement of the trust in favour of the nominated beneficiaries.

1.6 It is only with the advent of modern testamentary formalities that secret trusts have raised this fundamental question. Until statutory formalities were enacted, the relaxed formalities permissible under the general law of English equity meant that an agreement between testator and legatee which we would now categorise as a secret trust would have taken effect simply as a parol amendment of the testator's will. This is illustrated by the early seventeenth-century case, *Penson v*

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9 *Re Fleetwood* (1880) 15 Ch D 594 (Hall VC); *Blackwell v Blackwell* [1929] AC 318.

10 See *Sweeting v Sweeting* (1864) 10 Jurist (NS) 31, 32 *per* Kindersley VC; *O’Brien v Condon* [1905] 1 IR 51, 56 *per* Porter MR.
In that case the testator had bequeathed certain pecuniary legacies in writing. During his final illness he orally directed his prospective executor to increase the sums he had bequeathed. Assuming that the executor would have been entitled to the residuary personalty in the testator’s estate, the testator’s instructions would have operated *pro tanto* to reduce the property inherited by the executor. If (as would be the case under the modern law) the testator’s parol directions could only operate collaterally to the written will, they would have subjected the executor’s interest under the will to an obligation to pay the requested additional legacies. However, since at that time no written formality was required for a will of personal property, the testator’s instructions could take effect simply as a nuncupative codicil and thus a valid part of his will. Given the very relaxed formality requirements at that time for a will of personalty, secrecy in the sense of

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11 (1614) Cro Jac 345; 2 Bulstrode 207; *sub nom.* *Cartwright’s Case* Godbolt 246 (Court of King’s Bench).

12 This is on the supposition, *inter alia*, that the testator’s will had not contained a residuary bequest. At common law an executor was entitled to the undisposed of residuary personalty: *R v Raines* (1697-1700) Holt KB 310; 3 Salk 161; *sub nom.* *R v Raines* 12 Mod 205 *per* Holt CJ, *obiter*. Subject to exceptions, equity followed this general principle: see, for example, *White v Williams* (1814) 3 V & B 72; G Coop 58 (Grant MR). The very fact that the testator in *Cartwright’s Case* imposed on the executor in the manner noted suggests that the testator had indeed omitted a residuary bequest and contemplated allowing the executor the benefit of his common law right to the residue. The law was subsequently reformed by the Executors Act 1830, s. 1, which deemed the executor a trustee of the undisposed of residual personalty for the next of kin, unless it appeared by the will that the executor was intended to take the residue beneficially.

13 See para. 2.7.

14 The *dictum* of Coke CJ to this effect, while correct, was strictly only of persuasive authority. The question in issue was whether the Court of King’s Bench could grant an order of prohibition to prevent another temporal court from pronouncing on the substantive question of whether the oral directions took effect as a will, this being a matter which was then within the exclusive jurisdiction of the spiritual courts. See on this point para. 8.2.
excluding the terms of a trust of a legacy from the instrument admitted to probate, was rarely obtainable: the secret trust agreement would usually be efficacious in its own right as part of the testator's will.

The purpose, scope and structure of the thesis

Purpose

1.7 The aim of this thesis is to re-evaluate two of the central explanations for secret trusts: the fraud theory and the dehors the will theory. This admittedly leaves other possible explanations unexplored, such as those based on contractual arguments or specific reparation for a tort. However, since the inventiveness of the legal mind, like that of the fraudster, may be inexhaustible, this thesis will concentrate on the two theories which have dominated in the case law. Apart from the constraints on space needed to do justice to these alternative explanations of the secret trust doctrine and the necessity to prefer established theories, this focus can be justified because the purpose here is to found a new beginning, rather than a conclusion, to the secret trust question. The fraud theory, historically, and the dehors the will theory, currently, are the explanations which the judiciary itself has mooted in the process of developing the rules of the secret trusts doctrine. By returning to some of the fundamental legal rules which form the context to the secret trust doctrine - particularly those pertaining to probate - it may be possible to expose more fundamental flaws or limitations in the two central theories. In so doing, this thesis

15 For treatment of a contractual analysis, see Austin Wakeman Scott, "Conveyances upon Trusts not Properly Declared" (1924) 37 Harv L Rev 653, 674 (dismissing it as "highly artificial").

16 Consider, by analogy, the arguments doubted in J. D. Feltham, "Informal Trusts and Third Parties", [1987] Conv 246, 251.
aims to offer a new approach to secret trusts. A new beginning is suggested by returning to origins, by tracing the historical development of part of the legal environment in which the secret trusts doctrine has arisen.

**Scope**

1.8 Our concern will be with the secret trusts doctrine in English law. Since the attention of the thesis is to a significant and detailed degree historical, directed at re-tracing the steps which have taken equity from the 'true' path, no attempt has been made to set this initial study in a comparative context. Exceptionally, however, extensive reference has been made to Irish authorities. Decisions of the Irish courts have been especially persuasive in the past development of English equity.¹⁷ and their influence has been particularly strong in relation to secret trusts, where the House of Lords has expounded on this area of the law in leading cases on appeal from Irish courts.¹⁸

1.9 Within the realm of English law, it is case law relating to fully-secret trusts which dominates in the coming chapters. This is partly because such trusts have dominated in the reported litigation across the historical time frame. Furthermore (as becomes apparent in chapter 4) the model of equity's relation to secret trusts contended for here would compel the half-secret trustee to hold for the next of kin on an automatic resulting trust and so preclude the perfection of the testator's informal intentions.


¹⁸ Primarily *Cullen v AG for Ireland* (1866) LR 1 HL 190; *McCormick v Grogan* (1869) LR 4 HL 82; *French v French* [1902] 1 IR 171 (on its facts a case of mutual wills, but treated as raising a secret trust).
1.10 It would be possible to enlarge the focus of this study, for different reasons, to
embrace other kindred areas of the law, but in each instance there is a mismatch
with the distinctive features of secret trusts. One might examine the institution of
donatio mortis causa, a form of revocable gift effective on death which, if it is not
an anomalous inroad on the Wills Act, occupies an indeterminate area between
inter vivos and testamentary dispositions and may therefore reflect light on the
character of the latter. On the other hand, gifts in contemplation of death are
distinguishable from secret trusts because (i) they can be effected unilaterally, (ii)
they cannot be given generally (the donor must have a particular state of mind) and
(iii) the property or an indicia of title must be delivered in the testator’s lifetime.
Most importantly, the donee is usually intended to take for himself: such gifts do
not raise any question of equity’s trust law jurisdiction.

1.11 Bearing closer relation, the constructive trust imposed on property owned by the
survivor of a mutual will shares with the secret trust both the Wills Act context and
the obligation to hold on trust for another and may assist in a review of equity’s
enforcement of informal testamentary trusts in favour of third parties. This too can
be differentiated, however. In a mutual will case each party formally executes a will
in accordance with an agreement or understanding whereby each expresses or
professes a qualitatively similar promise - usually to dispose of their estate on their
death to the other party, if they survive them, and otherwise to a mutually nominated
third party. Each party is placed under an inchoate obligation to abide by the mutual
will which is perfected when one party survives the other: the deceased as well as

19 *Sen v Headley* [1991] Ch 425, 440B-C *per* Nourse J.J.

20 The gift is traditionally seen as a hybrid: see *Re Beaumont* [1902] 1 Ch 889, 892 *per*
Buckley J; *Williams’ Law Relating to Wills*, 4th edn by C. H. Sherrin and R. F. D.
Barlow (London: Butterworth, 1974), p. 6 (an “amphibious nature”); *Sen v Headley*
[1990] Ch 728, 742A-B *per* Mummery J.
the survivor will have been contingently bound by the obligations arising from the mutual will. While the secret trust likewise depends on the presence of an agreement or understanding, it is characterised by an absence of mutuality as the testator makes no promise at all in return for the legatee’s undertaking. No matter how willing the secret trustee, the testator in his lifetime retains full freedom to abandon unilaterally his secret trust intentions. Secondly, the survivor may be bound to hold on trust property which he already owned before the predeceasing testator died - property which has not been acquired by virtue of the agreement, but which it was agreed would be bequeathed to another. Finally, the trust need not attach to assets in the hands of the survivor of a mutual will until his own death. This thesis puts forward principles which could have ramifications for both

21 See further para. 6.19.


23 This distinction between secret trusts and mutual wills was drawn in Re Goodchild [1997] 1 WLR 1216 at 1224D-E per Leggatt LJ and at 1229G per Morritt LJ.

24 Re Cleaver [1981] 1 WLR 939 (Nourse J), applying Birmingham v Renfrew (1937) 57 CLR 666 (High Court of Australia).

In Ottaway v Norman [1972] 1 Ch 698, 713F-G Brightman assumed for the purposes of the case that it was possible to create a “floating” secret trust of a legacy with suspensive operation during the trustee’s life. It was alleged the trustee, the testator’s cohabitee, had agreed to leave to the secret beneficiary the residue of a legacy not otherwise expended by the trustee for the trustee’s own benefit. Brightman J later held that the secret trust claim failed on this point on the ground the obligation would have been meaningless unless the trustee was to keep distinct the legacy and her other funds (ibid, 714A-B). The better view is that any trust of the cohabitee’s share of residue on these terms would have been explicable in terms of subjecting the secret trust to a general power of appointment reserved to the legatee. See, to the same conclusion, Gbolahan Elias, Explaining Constructive Trusts (Oxford: Clarendon Press, 1990), p. 60 n. 53. If, moreover, the legatee was authorised by the secret agreement to mix the legacy with her other funds, this could have been reconciled with a traditional trust (contra Brightman J) as the grant of an administrative power over the trust funds, provided the trustee was obliged to keep separate accounts of expenditure and to apportion income from investment.
of these discrete areas of the law or which might benefit from reflective
consideration in their context, but to consider them here would introduce
obfuscating complication to the study.

1.12 The strongest case may be made for examining inter vivos secret trusts of land.
There is clearly an affinity between testamentary secret trusts and equity's
intervention in respect of trusts of land orally declared by a donor and agreed to by
the donee to the conveyance. The formalities for inter vivos trusts of land were
first contained in the Statute of Frauds 1677 and, as chapter 2 elaborates, it is
from the same statute that modern testamentary formalities are derived. In each case
title to property vests at common law with due formality but subject to an informal
trust which, by reason of that informality, is prima facie ineffective. Moreover, in
both instances the principle that equity will not allow a statute to prevent fraud to be
used as an instrument of fraud has been invoked to justify the imposition of
trusteeship on the party taking the property under the informal trust.

1.13 Nonetheless, there are material differences which justify considering testamentary
secret trusts in isolation from inter vivos secret trusts. Firstly, the law of
testamentary secret trusts is more fully developed and has resulted in the
formulation of a range of special rules not (yet) to be found in inter vivos secret
trust law. This is particularly marked in the distinction within testamentary trust
laws.

25 See, among others, Davies v Otty (No. 2) (1865) 35 Beav 208 (Romilly MR);
Rochefoucauld v Boustead [1897] 1 Ch 196 (Court of Appeal); Bannister v
Bannister[1948] 2 All ER 133; [1948] WN 261 (Court of Appeal).

26 S. 7, requiring writing signed by the settlor. See now the Law of Property Act 1925, s.
53(1)(b).

27 The inter vivos secret trust law is silent, for example, on the effect of communication to
only one transferee (cf. Re Stead [1900] 1 Ch 237, 241).
law between fully-secret and half-secret trusts. Secondly, the testamentary context raises matters which are of special significance to the reasons for and manner of equitable intervention, both in terms of legal policy and the historical development of the law. The formality requirements for a testamentary trust are more extensive than those needed to declare an enforceable trust of land. This difference suggests possible discrepancy in the balance of functions to be performed by the formality requirement in each case: the more stringent testamentary formality reflects the fact that the disponor’s testament obtains the consideration of the law only after his death. Similarly, a transfer of land may be registered under the Land Act 1925.

28 Although the current law is not free from controversy, half-secret trusts differ from fully-secret trusts in that the trust must be communicated to the trustee at or before the execution of the will: Johnson v Ball (1851) 5 De G & Sm 85 at 90 per Parker VC; Scott v Brownrigg (1881) 9 L R Ir 246, 261 per Sullivan MR; Re Hetley [1902] 2 Ch 666, 669 per Joyce J, obiter; Re Gardner [1920] 1 Ch 501, 505-506 per Eve J, reversed on appeal but on this point endorsed in [1920] 2 Ch 523, 530-531 per Warrington LJ; Re Spence [1949] W N 237 (Romer J); Re Keen [1937] 1 Ch 236 (Court of Appeal); Blackwell v Blackwell [1929] 1 Ch 318, 339 per Lord Sumner; Re Bateman’s W. T [1970] 1 W L R 1463 per Pennycuick VC. A fully-secret trust may be communicated and accepted at any time before the testator’s death: see, inter alia, Edwards v Pike (1759) 1 Eden 267 (Henley LK); Chamberlain v Agar (1813) 2 V & B 259 (Plumer VC); Baillie v Wallace (1869) 17 W R 221 (Giffard VC); Re Maddock [1902] 2 Ch 220, 230-231 per Cozens-Hardy LJ. See also McCormick v Grogan (1867) Ir L R 1 Eq 313 (Lord Blackburne LC), reversed on other grounds, but without adverse comment on this point.

A further difference is that a half-secret trustee cannot assert an interest in the legacy qua secret beneficiary: Re Rees [1950] 1 Ch 204 (Court of Appeal). Such a rule has never been set up to exclude a fully-secret trustee from benefiting under the trust consistent with the secret agreement with the testator. The reservation within the secret trust of substantial benefit for the trustee is common place. See, for example, Chamberlain v Agar, where the trustees took the whole of a residuary legacy less an annuity payable to the secret beneficiary.

29 See n. 26.
Registration Act 1925 and title may be inspected by the public, but a formally declared *inter vivos* trust need not pass into the public domain; this contrasts starkly with a trust in a will admitted to probate. Clearly the reasons for informality (secrecy) and its impact will differ. Moreover, the historical law is encumbered with particular rules which may have prompted testators to create certain types of testamentary secret trusts and the judiciary to recognise them, rules which had no counterpart in relation to *inter vivos* secret trusts. In particular the Mortmain Act 1735, which struck at certain testamentary trusts for charitable purposes, would not usually invalidate a formal conveyance of land on trust for charitable purposes, but the inability of a testator to devise to charity was a major factor in the development of the testamentary secret trust.

1.14 The testamentary context forms a sharp difference when considering the possible relief which equity might provide when it is proven that an apparently beneficial gift was actually made by way of an agreed informal trust for a third party. The imposition of a restitutionary trust over a legacy necessarily has a different practical result from its imposition to protect a donor who on a conveyance of land forsook formality in declaring his express trust. Whereas the deceased *ex hypothesi* can be in no position to re-dispose of his estate, the settlor on an *inter vivos* informal trust taking under an implied trust might subsequently achieve his original object by disposing of his interest by signed writing. It is not yet conclusively established that an *inter vivos* secret trust in favour of the donor’s nominated beneficiary would be specifically enforced rather than merely giving rise to a restorative trust for the

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30 Land Registration Act 1925, s. 112, as substituted by the Land Registration Act 1988, s. 1(1).
31 The Mortmain Act is considered further in chapter 5.
32 For the formality for disposing of an equitable interest subsisting under a trust, see the Law of Property Act, s. 53(1)(c), replacing s. 9 of the Statute of Frauds.
donor.\textsuperscript{33} In contrast the enforcement of testamentary secret trusts so as to benefit the intended third party and not the testator’s estate is firmly settled. For all these reasons testamentary trusts may be seen as a high water mark of equitable intervention which presupposes the existence of the strongest grounds for enforcement of informal trust intentions. If this thesis, in reviewing the presumably compelling reasons underlying the current law, points against the present mode of equitable intervention, a \textit{prima facie} case is established for the like reform of \textit{inter vivos} secret trust law.

\textit{Structure}

1.15 This thesis commences in chapter 2 with a review of the present and past formalities for the creation of a testamentary trust. This establishes the limits which \textit{prima facie} constrain the effectiveness of any secret disposition. The following chapter examines the policy of the statutory requirement of formality. The results of this chapter are material in identifying whether the secret trust falls within the mischief as well as the literal terms of the Wills Act and also in marking out the boundaries within which any equitable doctrine of fraud affecting the Act may operate consonant with the legislature’s objective. Chapter 4 sets out a fresh approach to secret trusts, explaining the proper response of equity when a secret trust is created based on a contingency of fraud by the legatee. Buttressing this new model of secret trust law is an appreciation of how testators have substantially relied on merely moral obligations and how the judiciary has often been over-zealous in finding a trust obligation in the secret communicated intentions of the testator. Chapter 5

therefore focuses on the extent to which the reported case law has suppressed the true precatory character of many secret trusts. The next four chapters seek to show that the two main theories defending the current law enforcing the trust in favour of the secret beneficiary are ill-founded, in support of the new model pressed in chapter 4. Chapter 6 examines the *dehors* the will theory; chapter 7 demonstrates the traditional importance of fraud as the basis of equitable intervention. In chapter 8 the probate/equity jurisdictional divide is mapped in the context of actual fraud procuring a will. This establishes a framework in which the content of secret trust fraud and the nature of the proper equitable relief can be identified in chapter 9. Finally, the conclusion defends the new approach to secret trusts by integrating the knowledge gained in the previous chapters.

**The conventions adopted in the thesis**

1.16 For the sake of brevity, this thesis takes as a recurring point of reference the creation of a testamentary secret trust where a legatee has agreed with a testator to hold on trust a legacy which according to the will is bequeathed as an outright gift. This should be taken as representative of all secret trusts, including those where the primary donee\(^34\) is the next of kin or (historically) heir at law inheriting under the rules of intestate succession, unless differential treatment between fully-secret and half-secret trusts or legatee-trustee and next-of-kin-trustee arrangements is under discussion. Both in the reported case law and the focus of this thesis we are usually concerned with the secret trust imposed in testate rather than intestate succession and proceeding from this scenario allows for greater efficiency and clarity in the

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\(^{34}\) This is the terminology used by Brightman J in *Ottoway v Norman* [1972] 1 Ch 698, 711A.
language. According to the context, the same principles should be understood as applicable, mutatis mutandis, where the secret trustee is the next of kin.

1.17 To the same end of convenience, discussion proceeds on the basis that the testator and trustee are male, while the secret beneficiary is female. This gender allocation reflects one type of secret trust scenario where a male testator has sought to make provision for his mistress and, as the case may be, for his illegitimate children by her. The aim is to assist in exposition of argument only. It should not be taken as an assumption that in the modern scenario there are gender-determined roles and that the responsibility of property custodianship and management is a necessarily male one, while a beneficiary must be a damsel in distress, dependent on the financial provision of others. It is hoped that the conservative reinforcement of sexual stereotypes in adopting this assignment of roles is outweighed by the improved clarity of writing coupled with the frequently historical focus of the thesis where the assignment fits the predominant trend of the case law.

1.18 In regard to matters of legal scholarship, it should be noted that references to the House of Lords and the Privy Council are to the House of Lords as a judicial court or the committees of those bodies exercising judicial functions. Peers holding judicial office are referred to throughout as Lords, regardless of the degree of peerage obtained, since from a legal point of view nothing turns on the particular rank. In view of the slender weight which can be attached to the slim reports of cases there, no reference has been given to the report of cases in Equity Cases Abridged unless this is the only or the best report of the case in the nominate reports collected in the English Reports reprint. The Charitable Uses Act 1735 is

35 A General Abridgment of Cases in Equity, Argued and Adjudged in the High Court of Chancery, 2 vols, repr. in vols 21 and 22 of the English Reports.
referred to throughout by the unofficial title of Mortmain Act which is both a better reflection of the statute's long title and a reflection of established usage in legal discourse. In quotations from older texts, spelling and punctuation have been modernised to assist the reader.

36 An Act to Restrain the Disposition of Lands, whereby the Same become Unalienable.
CHAPTER 2: ESSENTIAL ASPECTS OF TESTAMENTARY TRUST LAW

Introduction

2.1 This chapter examines the essential legal background against which the modern doctrine of testamentary secret trusts has arisen. It outlines those aspects of law, past and present, which provide the critical context to secret trusts. The starting point is an exposition of the formality requirements presently demanded by the law for the creation of a testamentary trust. It is the apparent inconsistency between the statutory formality requirement and the enforcement of the (informal) secret trust which poses the problem of justifying equity’s response and generates the subject matter of this thesis. However, since the secret trusts doctrine has developed over time against changing formality requirements it is necessary to add a summary of earlier law governing the creation of testamentary trusts. The secret trusts doctrine first emerged with the enactment of the Statute of Frauds, and the historic description of testamentary formalities commences with the legal changes effected by that enactment. After considering the status of a testamentary trust which fails to comply with the statutory formality requirements, the chapter concludes by looking at publication of the will on grant of probate. Avoidance of this publicity is a motive for the creation of some secret trusts - as in the classic case where a married testator wishes to shield from his family his benevolence towards a mistress. However, regardless of motive, the effect of recognising the validity of a testamentary disposition dehors the will is not merely to puncture the integrity of the statutory formality requirement; it also encroaches (in Langbein’s words) on the “probate monopoly”.

The current formality requirements for testamentary trusts

2.2 The formalities required for a testamentary disposition are contained in section 9 of the Wills Act 1837 which, as substituted by the Administration of Justice Act 1982,² provides:

No will shall be valid unless

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness either

   (i) attests and signs the will; or

   (ii) acknowledges his signature

in the presence of the testator (but not necessarily in the presence of any other witness).

but no form of attestation shall be necessary.

2.3 The Wills Act defines “will” (so far as is material here) as extending to “a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power. [...] and to any other testamentary disposition”.³ This definition applies “except where the nature of the provision or the context of

² S.17.
³ S. 1.
the Act shall exclude such construction”, but there appears to be no reason why the
definition is impliedly excluded from section 9. Section 9 seeks to establish a
formality requirement applicable to voluntary transactions of a testamentary
character. As the following chapter demonstrates, its purposes include ensuring that
testamentary dispositions of property are made with a solemnity which will caution
the testator to deliberate and which will provide adequate evidence of the
transaction. Such purposes are general in nature and suggest that the wide definition
of “will” in section 1 is fully applicable in section 9. The necessity for caution and
suitable evidence of the disposition subsists for any manner of testamentary
disposition and is at least as applicable to a disposition by way of trust as it is to a
testamentary gift outright.

2.4 There does not appear to be any scope for arguing that the term “testamentary
disposition” in section 1 should be considered as limited by a construction ejusdem
generis, having regard to the specific terms “testament” and “codicil” which are
included within the definition “will”. Although it is well established that these terms
may be used in their widest sense interchangeably to denote a testamentary
disposition, a distinction between their more precise meanings may be drawn in a

4 Ibid.

5 The definition in s. 1 was considered applicable to s. 9 by David Gilliland QC in Wood
v Smith [1993] Ch 90, 102G-103B. See also Re Barnett [1908] 1 Ch 402 where
Warrington J applied s. 1 in determining that a purported exercise of a power to appoint
new trusts under an inter vivos settlement effective at the appointor’s death was an
appointment by writing in the nature of a will void under s. 10 for non-compliance with
s. 9. In academic discussion of secret trusts the proposition has been assumed: see, for
example, David Wilde, “Secret and Semi-secret Trusts: Justifying Distinctions Between

6 See Henry Swinburne, A Brief Treatise of Testaments and Last Wills (London: [no
pub.], 1590; repr. New York: Garland, 1978), passim but especially at fols 3r and
112v-113r; Samuel Toller, The Law of Executors and Administrators (London:
number of ways. Firstly, a testament may denote a bequest of personalty, in contrast to a devise of realty.\(^7\) This distinction relates only to the subject matter of the testamentary gift and not its nature.\(^8\) Secondly, a testament may constitute a particular type of will - namely, a will which appoints an executor.\(^9\) This distinction is equally unhelpful in this context, since the appointment of an executor, while material to the future title to the estate on the testator's death, is not indicative of any difference based on the manner in which the testator disposes of his property. A codicil merely denotes a testament executed subsequent to some other instrument which, by itself, would amount to a will and which is not revoked by the codicil, but which is amended or supplemented by it. It is evident therefore that neither term can offer assistance in the context of section 9, since they simply denote valid testamentary dispositions and connote formal instruments, without any distinguishing features of form or of testamentary or dispositive nature. The only specific type of disposition referred to in the definition is the exercise of a power of

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\(^7\) See on this terminological point, inter alia: Harwood v Goodright (1774) Lofft 559 at 574 per Lord Mansfield CJ; Richard Burn, Ecclesiastical Law, 3rd edn (London: Cadell, 1775), vol. IV, p. 41; Arthur Browne, A Compendious View of the Civil Law, 2nd edn (London: Butterworth, 1802), vol. I, p. 272 n. 3; Brett v Brett (1826) 3 Add 210 at 220 where Sir John Nicholl employs this distinction.


\(^9\) Swinburne, fol. 3r. A definition of a testament in these terms is derived from an analogy with Roman law; see Browne, vol. I, p. 272, and R. W. Lee, The Elements of Roman Law, 4th edn (London: Sweet & Maxwell, 1956), § 289, on the requirement of an instituted heir in Roman law. See, however, AG v Jones (1817) 3 Price 368 at 383 where Wood B adopts a strict meaning of "will" in this sense, which confirms that even here the terms have been used equivalently.
appointment, which does not leave much room for limiting the meaning of “disposition”.

2.5 It follows from this interpretation that any “testamentary disposition” must satisfy the requirements of section 9 of the Wills Act 1837. This will include the creation of a trust to take effect on the testator’s death since that constitutes a testamentary disposition to the beneficiary of a beneficial interest in property, and, if informal, it must be void for non-compliance with the Wills Act. Case law has certainly established that the creation of a testamentary trust must satisfy the formalities for a testamentary disposition.

2.6 The new form of section 9 introduced in 1983 and implementing recommendations of the Law Reform Committee made only modest changes to

10 Supporting the view that s. 9 has a wide ambit and does not in itself contain any exception, see Croker v Marquis of Hertford (1844) 4 Moo PC 339 at 359 per Dr Lushington, giving the opinion of the Privy Council. To the same conclusion see David R. Hodge, “Secret Trusts: The Fraud Theory Revisited”, [1980] Conv 341, 346.


12 Addlington v Cann (1744) 3 Atk 141 at 151 per Lord Hardwicke LC (where the unattested signed memorandum of the testator did not graft a trust for charitable purposes onto the general devise to the defendants). See also the obiter dicta of Lord Eldon LC in Muckleston v Brown (1801) 6 Ves Jun 52 at 67 (“[A] man cannot by an unexecuted instrument attach a trust upon real estate”), Stickland v Aldridge (1804) 9 Ves Jun 516 at 519-520, approving Addlington v Cann on the ground that an unattested paper could not found a trust in the absence of communication of the trust to the trustee and Paine v Hall (1812) 18 Ves Jun 475 per Lord Eldon LC (where no secret trust was proven).

13 S. 17 of the Administration of Justice Act came into force on 1st January 1983: s. 76(11).

the law. As originally worded, section 9 shared the same essential features, requiring a signed instrument attested by two witnesses. The evolving marginal rules touching the implementation of these significant requirements need not detain us here. The secret trust is almost invariably a deliberate creation of a testator and the path of informality is an intentional choice. We are thus not concerned with cases where the testator has endeavoured to observe the formalities of section 9, but failed to comply with one or more of the precise requirements of the section, and where any court might feel sympathetically inclined to salvage the testator’s aspirations from the wreck of an accidental slip. It is sufficient for our purposes to hold in mind the three core elements of the Wills Act formality: (i) the necessity for writing; (ii) the requirement that the will be signed by the testator; and (iii) the need for two attesting witnesses. Furthermore, the very modest and marginal nature of the statutory changes touching section 9 confirms the satisfactory role and importance of these fundamental elements of writing, signature and attestation. When the opportunity to reform the law was grasped, these essentials were left intact. The unswerving devotion of the legislature to these requirements over a sustained period of time points to an appreciation of the relative benefits conferred by these formalities when set against the burden that they impose on testators. This in turn has implications for any defence of the secret trusts doctrine which is based on

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15 These may be summarised as follows:

(i) Originally the will had to be signed by the testator “at the foot or end”. This requirement was relaxed by the Wills Act Amendment Act 1852, s. 1, reversing the effect of *Smee v Bryer* (1848) 1 Rob Ecc 616, affirmed 6 Moore PC 404. Following LRC Rep. No. 22, para. 2.7, the testator was enabled to sign anywhere, reversing the effect of *Re Stulman* (1931) 145 LT 339 and *Re Beadle* [1974] 1 WLR 417.

(ii) Following LRC Rep. No. 22, para. 2.11, a witness was empowered to acknowledge their previous signature, reversing the effect of *Moore v King* (1842) 3 Curt. 243 and *Charlton v Hindmarsh* (1859) 1 Sw & Tr 433 (Sir C. Cresswell), affirmed sub nom. *Hindmarsh v Charlton* (1861) 8 HLC 160, followed in *Wyatt v Berry* [1893] P 5 and *Horne v Featherstone* (1895) 73 LT 32.
setting against the legislature’s perspective the legitimacy of indulging the testator’s
desire for informality.

The history of formality requirements for testamentary trusts

Bequests

2.7 Before the enactment of the Statute of Frauds, a will of personal property might be
made in any form. A written testament was common. However, it was permissible
to create a nuncupative will whereby the testator’s wishes were declared orally and
at some time before grant of probate (but not necessarily in the testator’s lifetime)
the oral declaration was reduced to writing. Such nuncupative wills, lacking any
strong evidence of connection with the testator or his manifest deliberation in
endorsement, might easily be obtained by exerting pressure on the testator or
wrongly set up by bearing false witness before the Ecclesiastical Court. This
laxity was a target for reform in the Statute of Frauds 1677, which sought to restrict
the scope for creating nuncupative wills so as to ensure there was adequate evidence
of a genuine testamentary intention. Section 18 of the Statute of Frauds provided
that from the 24th June 1677:

16 *Contra* Law Reform Committee (Sub-Committee on the Making and Revocation of
Wills) Consultative Document ([no p.]: [no pub.], 1977), para. 13, asserting that until
1677 most testamentary dispositions of personal property were nuncupative.

17 See Swinburne, fols 6r, 17V, 19f, 185V, 189f and 260f; William Nelson. *Lex

18 Similarly, Blackstone, vol. II, p. 500, referring to impositions and perjuries; followed in

19 Statutes of the Realm edition; s. 19 in the Ruffhead version where s. 13 (date of signing
judgments to be entered on the roll) is divided into ss 13 (recital) and 14 (substantive
[N]o nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of thirty pounds that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same did bid the persons present, or some of them bear witness that such was his will or to that effect, nor unless such nuncupative will were made in the time of the last sickness of the deceased and in the house of his or her habitation or dwelling, or where he or she has been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick being from his own home and died before he returned to the place of his or her dwelling.

2.8 Apart from bequests of estates worth no more than £30, and the privileged wills of soldiers on military service and sailors at sea,²⁰ where the freedom of the former law continued, the nuncupative will was thus restricted to moments of fatal illness²¹ and even there it was subject to severe limitations. Moreover, where

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²⁰ S. 22. See now the Wills Act 1837, s.11, as extended by the Wills (Soldiers and Sailors) Act 1918, ss. 2 and 5(2).
²¹ Blackstone, vol. II, p. 501, asserting that last sickness meant that from which the testator does not recover. A literal construction would imply that a nuncupative will would be valid if the testator recovered, provided he was never again sick before he died (e.g. in an accident). Blackstone's construction is supported by the clear legislative purpose of restricting the freedom to create a nuncupative will to the situation of most
testimony was to be led in support of a nuncupative will more than six months after the will was made, it would be inadmissible unless the substance of the testimony had been committed to writing within 6 days of the will being made. These restrictions were so extensive that the nuncupative will largely fell into disuse.

2.9 Written testaments were valid if signed or sealed by the testator, otherwise they were valid if they were executed either in the testator’s hand-writing as a holograph will or, if written by another, on his proven instructions and approval. If the will was a holograph or written on the testator’s instructions, signature, sealing and attesting witnesses were all equally unnecessary. It was sufficient for probate if extreme necessity, when insistence on formality might preclude execution of the will. Cessation of that emergency (i.e. recovery from illness) would bring with it the opportunity to execute a written will and end the need for the law’s exceptional indulgence of informality.

22 S. 19.


24 Swinburne, fols 30r and 191v-192r; Stephens v Gerard (1666) Sid 315; sub nom. Stephens v Gerrard 2 Keble 128 (Court of King’s Bench), where the unsigned will was dictated; Blackstone, vol. II, pp. 501-502, adopted in Toller, pp. 2 and 34, and Browne, vol. I, p. 280 n. 20. These principles were adopted in the non-contentious probate rules of the Court of Probate in respect of wills of personalty dated before 1838: see the Rules and Orders and Instructions for the Registrars of the Principal Registry of the Court of Probate 1862, r. 17; Rules, Orders and Instructions for the Registrars of the District Registries of the Court of Probate 1863, r. 22.

parol evidence established the writing was intended by the deceased to be his final will, regardless of its form. The Statute of Frauds did not affect the formalities for written wills of personalty, a point on which the statute was later criticised. However, both Swinburne (writing before the Statute of Frauds) and Blackstone (writing afterwards) urged as a matter of best practice that written wills should be signed and witnessed and it is probable that even before the Wills Act 1837 this advice would have been heeded in the preparation of professionally-drafted wills of personalty. Although not essential to the validity of the will, the practice was advisable since probate required two witnesses to depose that the

Delegates, *per curiam* asserting, *obiter*, that a paper written in the testator's own hand but not signed or sealed would have amounted to a good will of personal estate; Page J doubting the point; Toller, pp. 2 and 33; Browne, vol. I, pp. 279 n. 17 (sealing) and 280 n. 20 (attestation); *Brett v Brett* (1826) 3 Add 210 at 224 *per* Sir John Nicholl (attestation); *Emanuel v Constable* (1827) 3 Russ 436 at 439 *per* Leach MR (attestation). Commenting on the law before the Wills Act, see *Countess De Zichy Ferraris v Marquis of Hertford* (1843) 3 Curt 468 at 477 *per* Sir Herbert Jenner Fust (signature); S. J. Bailey, *The Law of Wills*, 6th edn (London: Pitman, 1967), pp. 21-22 (signature and attestation).

26 *Sheldon v Sheldon* (1844) 1 Rob Ecc 81 at 85-86 *per* Dr Lushington, noting that a will need not have holograph.

27 See Holdsworth and Vickers, *The Law of Succession*, p. 32, suggesting the enactment was not very efficacious in this regard and left room for fraud.

28 Fols 19f and 23v, seeing in these formalities and attestation by the witnesses a safe course to ensure correct identification of the will and thus prevent forgeries.


30 Support can be found in contemporary published will precedents which were drafted with signature and attestation by two witnesses in mind: see Burn, vol. IV, pp. 416 (will of personalty) and 421 (codicil encompassing only pecuniary bequests). Examples can also be found in early reported litigation of wills which had been signed and subscribed by witnesses: see, for example, the two wills in *Andrews v Powys* (1723) 2 Bro PC 504. Shortly before the Wills Act it was observed by Sir John Nicholl that wills of personalty were frequently attested by at least one subscribing witness: *Brett v Brett* (1826) 3 Add 210 at 224-225.
testator acknowledged the writing as his will. Following the enactment of the Wills Act, implementing (with minor deviation) the recommendation of the Real Property Commissioners, the formality requirements of s. 9 were made to apply to wills of personalty and the limited opportunity for nuncupative wills (other than privileged wills) was abolished. Written wills of personalty were subjected to the further necessities of signature and attesting witnesses, raising the formality requirements to those obligatory for wills of land.

Testamentary trusts of personalty

2.10 Prior to the Statute of Frauds, a testamentary trust of personalty might be established by parol evidence. However, just as the Wills Act establishes the formality for testamentary trusts as one type of testamentary disposition which may be made by will, there is little doubt that, previously, the formality requirements for wills of personalty applied in particular to the creation of testamentary trusts of personalty. Such doubt as exists on the point is raised by an obiter dictum of Lord Nottingham LC in Chamberlaine v Chamberlaine and his judgment in Fane v Fane. Lord Nottingham LC asserted that it was possible for a testamentary trust

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31 Toller; see also Brett v Brett (1826) 3 Add 210 at 224-225 per Sir John Nicholl.
32 The Commissioners recommended that the witnesses be stipulated to be “credible”, in the manner of s. 5 of the Statute of Frauds, but the partiality of witnesses was addressed separately by the legislature in s. 15 of the Wills Act.
33 Fourth Report, p. 80, proposition 2.
34 Ss. 18-22 of the Statute of Frauds were repealed by s. 2 of the Wills Act.
35 See Evers v Owen (1627-1628) Godbold 431 where Hyde CJ considered that a trust in favour of the testator’s children might be averred against the rights of an executor.
36 (1680) 2 Freem 52.
37 (1681) 1 Vern 30.
of personalty to be averred against a will by admission of parol proof\(^\text{38}\) and in *Fane v Fane* he seemed to accept as sufficient the assertion of one executor that the testatrix intended the beneficial interest in the residuary personal estate should pass to her children, the next of kin. This proposition that a testamentary trust of personalty might be established in the absence of a formal will by parol evidence as to the informal testamentary intentions of the deceased does not seem sound in principle.\(^\text{39}\) As we will see shortly, there is considerable authority, across a wide time-span, supporting the notion that testamentary trusts of realty must observe the formality requirements for devises. No argument is apparent to justify why trusts of personalty should not be treated comparably. Lord Nottingham LC's approach was certainly unnecessary for the decision in *Fane v Fane* which properly turned on a simple question of construction of the will. By one clause in the will the testatrix had left "the rest of my goods and chattels" to her executors, but by a later clause she had bequeathed "the rest of my personal estate" to the Fane children and gave only pecuniary legacies to her executors. Accepting, as Lord Nottingham LC did, that the testatrix did not intend to distinguish between her goods and chattels and her other personalty and that she had therefore in effect created two inconsistent clauses for the disposition of her residuary personalty, the children were surely entitled on the simple ground that the later clause impliedly revoked the earlier. No question of recognising any informal trust actually arose, as the will itself, when properly understood, had determined the matter. The approach which Lord Nottingham LC pioneered is best seen as an unguarded misadventure in the

\(^{38}\) 2 Freem 52 at 53; 1 Vern 30 at 31.

\(^{39}\) For later contrary authority, see *Whitton v Russell* (1739) 1 Atk 448 at 448, where Lord Hardwicke LC rejected a secret trust type claim in respect of a devise to the defendants and, in setting out the general law, indicated *obiter* that a legacy could not be grafted on to a will of personalty by parol proof.
immediate aftermath of the enactment of the Statute of Frauds when its full significance had not been grasped.

2.11 The *dictum* in *Chamberlaine v Chamberlaine* casts particular light on how the doctrine of secret trusts may have its roots in this notion, later so emphatically disowned, that parol proof of a testamentary trust was admissible. In that case the testator had devised a life interest to his eldest son, with remainders to the issue of his eldest son, Edmund. In default of issue, the testator had provided for a remainder to his second son, Humphrey, and stipulated the like remainders in favour of Humphrey’s issue. The testator had further directed Edmund to pay £40 annually towards the maintenance of Humphrey’s eldest son until such time as Edmund had a son of his own. In fact Edmund had a son who died three days after his birth and it was alleged that the testator had intended that the annuity in favour of Humphrey’s son should not determine in those circumstances. Lord Nottingham LC accepted that the annuity had determined and would not admit proof of the allegation in order to qualify the terms of the will. It was in this context that Lord Nottingham LC indicated, by way of contrast, that parol proof of a *trust* would have been admissible. What is of particular note here is that the decision on this point which prompted Lord Nottingham LC’s *dictum* followed earlier litigation concerned with the same will, where Lord Nottingham LC had applied the secret trusts doctrine in recognition of a charge over the defendant’s life interest.\(^{40}\) The *dictum* in the subsequent case, if taken as a justification of the earlier decision, points towards the notion that initially the secret trust doctrine was founded on the unsound notion that a trust of a beneficial legacy might always be proven because it was possible to embellish the formal will by evidence of a trust intended by the testator in respect of the legacy.

\(^{40}\) *Chamberlaine v Chamberlaine* (1678) 2 Freem 34.
Devises

2.12 So far as the Statute of Wills 1540 allowed freehold land to be devised at common law, the only formality requirement for the will was that it should be in writing. It was not necessary that the writing should be signed, sealed or executed in the testator's hand-writing, provided the writing was produced in his lifetime and it accorded with his instructions. A requirement that the writing be

41 An Act how Land may be willed by Testament (32 Hen. 8 c. 1, as supplemented by 34 & 35 Hen. 8 c. 5, s. 3 (limiting the Act of 1540 to devises of estates in fee simple). The effect of the Statute of Wills with respect to freeholds in knight's service tenure, where a devise of only one-third of the land was permitted, was later extended when knight's service was abolished by the Tenures Abolition Act 1660, ss. 1(5)-(6), 2(2) and 4.

42 Under the Statute of Wills, s. 1, "by [...] last will and testament in writing" (socage tenure) and "by [...] last will or testament in writing" (socage tenure in chief); under s. 2, "by [...] last will by writing" (knights service); and under s. 3, "by [...] last will in writing" (knights service in chief) (emphasis added). It is quite remarkable how the draftsman managed to achieve quite so much - ultimately inconsequential - variation in so small a detail in the statute.

43 Anon. (1587) 2 Leonard 35 (Court of Common Pleas) (where the devisor's name was not contained in the will).

44 See Hawtre v Wallop (1668) 1 Chan Rep 265 (Court of Chancery, affirming Grimston MR), discussed in para. 3.25.

45 Dime v Munday (1663) 1 Sid 362 (Court of King's Bench); Stephens v Gerard (1666) Sid 315; sub nom. Stephens v Gerrard 2 Keble 128 (Court of King's Bench); Lawrence v Kete (1672) Aleyn 54 (Court of King's Bench).

A written will which reproduced his testamentary directions in his lifetime but which had not been produced on his instruction was nonetheless a valid will if the testator subsequently approved the writing: Nelson, p. 529. It remained open whether, in the absence of such approval, such writing sufficed as a will on the pure ground that it accurately recorded the testator's testamentary wishes: see Nash v Edmunds (1587) Cro Eliz 100; sub nom. Nash v Edwards 1 Leonard 113, where the Court of King's Bench unanimously held the devise void, accepting obiter it would have been valid if the testator had ratified the writing; contra Anon. (1582) 3 Leonard 79 (Court of King's
signed by the testator and attested by witnesses was introduced by section 5 of the Statute of Frauds which, so far as material, provided that from 24th June 1677:

[All devises and bequests of any lands or tenements [...] shall be in writing, and signed by the party so devising the same or by some other person in his presence and by his express directions and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses or else they shall be utterly void and of none effect.

2.13 This, together with the Statute of Wills, was repealed by the Wills Act, which, in substituting the requirements of section 9 for wills made after 1st January 1838, reduced the number of witnesses needed from three to two, and made other alterations in the precise formalities, but maintained the same underlying

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Bench and Anon. (1587) 2 Leonard 35 (Court of Common Pleas), where the oral devise reduced to writing in the testator’s lifetime without the testator’s knowledge was held to be valid. Swinburne (fol. 22v) rightly considered the devise void. The testator is hardly in a position to arrange his testamentary affairs effectively if he is ignorant of a valid will which another has made for him.

Although s. 5 referred to “bequests” of land, s. 5 was confined to realty and did not extend to rights in respect of land which were personalty, such as leaseholds, since s. 5 expressly applied to those (freehold) estates in land which could be devised under the Statute of Wills, custom or (if an estate pour autre vie) under s. 12 of the statute itself, whereas a leasehold, as a chattel real, might be bequeathed by virtue of the common law.

Unlike the reduction in the number of witnesses, these alterations increased the formality demanded in the execution of a devise, as follows:

(i) under the Statute of Frauds it was not necessary that the testator should sign or acknowledge his signature in the joint presence of the witnesses. The signature or its
threefold requirement of writing, signature and attesting witnesses. However, there is reason for supposing that even before the enactment of the Statute of Frauds it would have been recognised as best practice for devises to be signed in the presence of at least two witnesses. This is significant since it tends to show that, while the precise formal requirements of the law may have altered over time, the practice of will drafting - at least for professionally prepared wills - has not necessarily changed so dramatically. Better practitioners aspired to the more exacting standards

acknowledgment might be witnessed serially: see Anon. (1680) 1 Freem 486; Anon. (1682) 2 Ch Cas 109; Lee v Libb (1687-89) Comb 174; sub nom. Lea v Libb Carthew 35 per Dolben J, obiter; Cook v Parsons (1701) Pre Ch 184 per Wright LK, obiter, reserving validity of the devise for trial at law; Jones v Lake (1742) 2 Atk 176 n. 2 per Lee LCJ, and (recognising this position) the Rules and Orders and Instructions for the Registrars of the Principal Registry of the Court of Probate 1862, r. 19; Rules, Orders and Instructions for the Registrars of the District Registries of the Court of Probate 1863, r. 24. The requirement that both the witnesses be present for the testator's signature or acknowledgment introduced by the Wills Act has been retained in the Act in its amended form: see now para. (c) of section 9.

(ii) similarly, under the Statute of Frauds it sufficed if the will was signed anywhere: see Lemayne v Stanley (1681) 3 Lev 1 (unanimous Court of Common Pleas), where the testator's name handwritten by him in the commencement of the will sufficed as a signature; Coles v Trecothick (1804) 9 Ves Jun 234 at 248-249 per Lord Eldon LC, obiter. The Wills Act required that the will be signed at the end. As to subsequent relaxation of this rule: see n. 15 above. The law has come full circle. Under section 5 of the Statute of Frauds, though a testator was permitted to sign anywhere the testator had to intend to give effect to his will by signing: cf. Lord Mansfield CJ's reasoning in Right v Price (1779) 1 Doug 241 at 243, where signature to two sheets of the will was not a signature to the third, the testator intending to sign that one as he had the others. See now para. (b) of section 9 and for an illustrative application Wood v Smith [1993] Ch 90.

50 See the will precedents in Orlando Bridgman, Conveyances, 2nd edn (London: Battersby and Basset, 1689-1702), vol. II, at p. 237 (will form drawn in 1663 and providing in its attestation clause for signing and sealing by the testator in the presence of witnesses) and similarly at p. 238 (will form drawn for 1659). Reported cases confirm that wills were sometimes attested by two witnesses: see, for example, Serjeant v Puntis (1697) Pre Ch 77, where the testator, who died after the Statute of Frauds was enacted, had executed a will in this manner before that enactment.
of the Wills Act long before they were placed on the statute book. Across the
generations the formality requirements of the current law have not be seen as
especially arduous, at any rate when set against the evidential and cautionary
functions which those formalities perform. The point is worth noting when
weighing up the merits of contemporary apologies for secret trusts on the mere
ground that the Wills Act’s requirements are inconvenient.

Testamentary trusts of realty

2.14 In setting out the formality requirements for a devise of land, the Statute of Frauds
also established the requirements for a valid testamentary trust of freehold land.
Previously no formality was required and it sufficed to show by parol evidence that
the deceased had intended a devise to be encumbered with the alleged use.51
However, even under the Statute of Wills, it had been insisted that a testamentary
trust of land devisable under that statute ought itself to be in writing or it would be
void under that statute, and that no parol averment could be made to supplement the
will.52 An attempt to encumber a devise of land by parol proof of testamentary
intentions was not permitted, on the ground it would infringe the Statute of
Frauds.53

2.15 Acknowledging this to be the correct approach to the Statute of Frauds, it must be
noted that some informal trusts of a testamentary character were wrongly enforced

51 Anon. (1451-1452) Jenk 115 where land was devised to three feoffees to use for the
benefit for life of one of the feoffees, but the Court of Exchequer upheld the claim of
the cestui que use’s heir that the cestui que use was to have the benefit of the remainder
too.

52 See Jenk 115.
by the courts. When devises of land were governed by the Statute of Wills, it was at times wrongly supposed that a trust might be averred outside the written will, provided the legal estate passed to the trustee under the written will. In *Evers v Owen* Dodderidge J opined that while the grant of an estate could not be averred, its disposition might be - a view from which Jones J appears to dissent. The *dictum* of Dodderidge J is notable for its tenor, rather than as an authority. In that case Ever's guardian sued Owen before the Council of the Marches of Wales for a legacy. The application in King's Bench was for an order of prohibition on the grounds that no equity could be taken up against the will and that in any event the Council lacked jurisdiction because the suit should have been conducted in the ecclesiastical courts. The case was thus concerned with legacies rather than devises. For this reason Hyde CJ's comment that nothing was more common than to aver a will was for the benefit of children should perhaps be understood as directed to proof of a parol trust of personalty attaching to the apparent rights of an executor, rather than as an endorsement of Dodderidge's position. In any event it was jurisdiction of the Council and not the validity of the disputed informal will on which the Court of King's Bench was called upon to pronounce. Ultimately the litigation was adjourned and no judicial resolution is reported.

2.16 A narrow justification could be offered for Dodderidge J's position on the basis that equitable estates in land had been freely devisable before the Statute of Wills by means of feoffment to feoffees to uses who would hold to the use of the feoffor's will. The Statute of Wills had sought to create a power to devise at common law and arguably only legal estates were within its purview, so that equitable estates might be devisable as informally as they had been before the statute. However, this

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53 See *Whitton v Russell* (1739) 1 Atk 448 at 448, where Lord Hardwicke LC rejected a secret trust type claim to a charge for an annuity on a devise to the defendants.
argument overlooks the fact that the Statute of Wills had been enacted because the Statute of Uses 1535 largely terminated the power of devising in equity, bare passive uses being executed by that statute. The Statute of Wills was only an amelioration of a legislative scheme to prevent exploitation of uses to the detriment of the public interest. An ability to devise informally in equity in the manner Dodderidge J envisaged would hardly conduce to that public interest, since a testator who once made a formal will of the legal estate might determine the destination of the beneficial interest by any number of parol variations, a circumstance likely to invite the very fraud or uncertainty which the formality of the Statute of Wills was intended to prevent.

2.17 In any event it is clear that the Statute of Frauds, alert to this problem, sought to formalise devises of equitable estates as much as those of legal estates. Dodderidge J's approach to wills of equitable interests, dubiously supportable as it might have been under the Statute of Wills, was certainly inappropriate after its demise. There is little doubt that after the enactment of the Statute of Frauds an informal testamentary trust of land could not be tacked onto the formal will by parol proof, as Puleston v Puleston demonstrates. Here the will devised to the testator's wife subject to a proviso granting an option for five years to the testator's brother to purchase an entailed estate in remainder after the wife's life, but the brother insisted inter alia the devise was on trust to convey to him the entailed estate. The Court of Chancery dismissed that claim, pointing to the dangers of admitting a trust which did not appear in the will.

54 (1628) Godbold 431.

55 In respect of a trust constituted in the testator's lifetime a testamentary assignment of the equitable estate had to be assigned by will under s. 9 of the Statute of Frauds, which referred back implicitly to the formalities of s. 5.

56 (1677) Rep Temp Finch 312 (Court of Chancery)
2.18 Nonetheless the supposition that a testamentary trust of land might be established by parol lingered under the Statute of Frauds on the basis of a mistaken understanding of that statute. It is easy to appreciate why the judiciary might be prone to slipping into this erroneous mindset. The difference in formality requirements for dispositions of realty and personalty would often lead to the situation where a disposition of personalty could be engrafted informally onto a formal disposition of land\(^\text{57}\) and from here it was a short step to extrapolating the false proposition that any trust might be engrafted onto a formal devise.

2.19 A further potential source of misunderstanding was a conflation with the Wills Act of the formalities for an *inter vivos* trust. Prior to the enactment of the Wills Act, in cases where the informal trust of land was evidenced in writing, the courts at times erroneously upheld the trust on the basis that the informal declaration of trust, if signed by the testator, satisfied the formality requirement of section 7 of the Statute of Frauds. In *Boson v Statham*\(^\text{58}\) a testator executed contemporaneously with his will an informal instrument purporting to attach a charitable trust to a devise of his realty contained in the will. Lord Henley LK held that the charitable trust was caught by the Mortmain Act on the ground that, although not communicated to the devisees and thus not an enforceable secret trust, it was an honorary trust and such moral obligations sufficed for the purposes of the Mortmain Act - an interpretation

\(^{57}\) Legacies secured by way of charge on a land by a previous attested will might be bequeathed by an unattested instrument since the bequests themselves (as opposed to the creation of a charge) involved only a disposition of personalty: John Eyken Hovenden, *A General Treatise on the Principles and Practice by which Courts of Equity are Guided to the Prevention or Remedial Correction of Fraud*, 2 vols (London: Sweet and others, 1825), vol. I, pp. 264-265.

\(^{58}\) (1760) 1 Eden 508; 1 Cox 16.
of the scope of that statute which was rejected in the modern law.\textsuperscript{59} In the alternative, however, Lord Henley \textsc{LK} reasoned that the collateral instrument created a valid trust because it satisfied the formality of section 7 of the Statute of Frauds as a signed written declaration of trust.\textsuperscript{60}

2.20 The decision on this alternative ground was equally wrong.\textsuperscript{61} Section 7 required that:

\begin{quote}
[A]ll declarations or creations of trusts [...] of any lands tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust or by his last will in writing or else they shall be utterly void and of none effect.
\end{quote}

2.21 The section thus provided for two modes by which a trust might be formally and validly declared - namely, signed writing or a (written) will. This did not mean, however, that a testamentary trust might simply be created by signed writing \textit{instead of} a written will. If such freedom from the formalities of section 5 had been intended in respect of testamentary trusts of land, there would have been no need to refer to a "will in writing" in section 7 since the formality of (mere) signed writing was contained within the higher requirements of a section 5 will of land. The existence of two modes for declaring the trust acquires meaning if these were

\begin{itemize}
  \item \textsuperscript{59} See para. 5.27 and especially n. 48.
  \item \textsuperscript{60} 1 Eden 508 at 514; 1 Cox 16 at 19.
  \item \textsuperscript{61} In \textit{Wallgrave v Tebb's} (1855) 2 K \& J 313 at 323 and 325 Page Wood \textsc{VC} noted that the case was decided on this basis, but indicated it could not be followed. This re-asserted the orthodoxy established by Lord Hardwicke \textsc{LC} in \textit{Addlington v Cann} (1744) 3 Atk 141 at 152 where a memorandum of the uncommunicated secret trust was held to be neither a will \textit{nor} a good declaration of trust (that is, within s. 7 of the Statute of Frauds).
\end{itemize}
intended to relate to trusts taking effect at different times: mere signed writing was required for the trust created *inter vivos* and generating present rights; a will was required for a testamentary trust which would be constituted on the testator's death. On this analysis the effect of section 7 - far from offering an alternative and weaker formality requirement for a testamentary trust than section 5 - reinforced the point, by demanding a will and thus referring back to section 5, that the creation of a trust of land taking effect on death is a form of testamentary disposition.

2.22 The trust in *Boson v Statham* was to take effect with and be constituted by the devise and was thus clearly testamentary in character. It could never be sufficient, therefore, that the declaration satisfied the lesser formality for an *inter vivos* trust of land. Lord Henley LK's decision is inconsistent with the later law, from which it is clear that mere writing satisfying section 7 of the Statute of Frauds or, now, section 53(1)(b) of the Law of Property Act is insufficient to declare a trust of a devise in such circumstances. A testamentary trust must be declared as well as constituted by will: it is insufficient to leave property to the trustee in a will and declare or record the trust terms in an instrument complying with the lesser formality required of an *inter vivos* declaration of trust. Nonetheless, the propensity of both the judiciary and commentators to make this slip from testamentary to *inter vivos* trusts is of


63 See, for example, J. A. Strahan, *A Digest of Equity*, 5th edn (London: Butterworth, 1928), pp. 66-67, implying that before the Wills Act a testamentary trust of land needed only to satisfy s. 7 of the Statute of Frauds. Strahan accepted that after the Wills Act the trust must comply with that Act, but failed to recognise that this contradicted his understanding of the effect of s. 7 of the Statute of Frauds. The Wills Act did not repeal s. 7 of the Statute of Frauds, although it did replace s. 5 of that Act. If the substantive
considerable note. In chapter 6 we will critically appraise the dominant modern explanation for the enforcement of secret trusts which is based on the notion that they are created *dehors* the will - a notion which relies on re-casting the testator’s informal testamentary intention as an *inter vivos* declaration of trust. It is evident from this historical review, however, that the judicial expression of the *dehors* the will theory may be no more than a perpetuation of an error.

The status of the informal testamentary trust

2.23 Traditionally section 7 of the Statute of Frauds and its successor provision in section 53(1)(b) of the Law of Property Act 1925 have been construed as merely having evidential effect and so only affecting the enforceability rather than the validity of an *inter vivos* trust of land which has been declared informally. In contrast it seems never to have been disputed that the statutory wills formality - whether under section 5 of the Statute of Frauds for realty or, now, under s. 9 of the Wills Act 1837 for all property - goes to the mode of effecting the disposition, not law was changed by the Wills Act so as to require henceforth an *attested* signed writing, as Strahan accepted), while s. 7 remained untouched, s. 7 cannot have been the governing statutory provision.

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64 Forster *v* Hale (1798) 3 Ves Jun 696, 707 per Arden MR; (1800) 5 Ves Jun 308, 315 per Lord Loughborough LC; *Smith v Matthews* (1861) 3 De GF & J 139, 151; *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206-207 per Lindley LJ. It is generally considered that these authorities on s. 7 of the Statute of Frauds are equally applicable to s. 53(1)(b); see Youdan, “Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*”, p. 321 n. 77. The soundness of the traditional view is not necessarily beyond dispute, but it is outside the scope of this thesis to challenge it here.

65 In respect of s. 5 of the Statute of Frauds, see, for example, *Brudenell v Boughton* (1741) 2 Atk 268 at 272 per Lord Hardwicke LC: “It is very certain, no devise of lands can be made, but with such solemnity accompanying the execution of it, as is directed by this Act [...]” (emphasis added), holding that the creation of a charge on land was within the section.
merely evidencing it, and therefore touches its validity. Undoubtedly the constituent and unambiguous language of the legislation has been decisive here: in both its original and current forms section 9 of the Wills Act enacted that "no will shall be valid" unless formally executed, while section 5 of the Statute of Frauds concluded that without compliance a devise would be "utterly void and of none effect".

2.24 The general rule - to which the secret trusts doctrine is either an exception or consequential relief - is therefore that the informal testamentary trust is void. It has been established from the earliest times, when the Statute of Wills first imposed a statutory formality for devises of land, that nothing declared orally dehors a written will may be averred to supplement or modify the unambiguous written terms of the testamentary instrument which statute requires. Evidence cannot be admitted to attempt to explain or qualify some absolute or other gift in the will by reference to the testator’s informally manifested intentions. To do otherwise is to

66 Countess De Zichy Ferraris v Marquis of Hertford (1843) 3 Curt 468 at 479 per Sir Herbert Jenner Fust (a disposition in any other form will not be deemed valid); Blackwell v Blackwell [1929] AC 318, 337 per Lord Sumner (where a valid half-secret was in fact created): "[T]he Wills Act prescribes the form, in which any disposition in a will must be testified, if it is to be valid [...]."

67 Note also s. 18 of the Statute of Frauds which stated that "no nuncupative will shall be good..." if it did not satisfy the terms of the enactment. Similar language did not prevail in regard to s. 7 however: see n. 64 above.

68 See, for example, Blackwell v Blackwell [1929] AC 318, 335 per Lord Sumner, quoted in para. 6.47.

69 See Nelson, p. 90.

70 Towers v Moor (1689) 2 Vern 99 where the Lords Commissioners dismissed the plaintiff’s attempt to introduce depositions of witnesses as to the testator’s intentions since s. 5 of the Statute of Frauds required devises of land to be in writing.
go against the Act of Parliament which determines the required will formalities;\(^\text{71}\) to allow an informal writing which is not incorporated into a formal will to dispose of the testator's estate is a *pro tanto* repeal of the statute.\(^\text{72}\) Consequently a fully-secret trust omitted from the will and *not* communicated to the legatee is void and unenforceable by the secret beneficiary.\(^\text{73}\) Similarly, where a bequest is stated to be for a purpose but that purpose is not disclosed by a formal testamentary instrument, the property must be held on resulting trust for the testator's estate,\(^\text{74}\) as it would be if a mere trust *nominatum* were declared.\(^\text{75}\)

**Publication of the will**

71 *Ibid.* As Page Wood VC observed, *obiter*, in *Moss v Cooper* (1861) 1 J & H 352 at 366 (a case where the secret trust had been communicated and was constituted):

If you attempt to raise a trust out of some uncommunicated intention, you contravene the express provisions of the statute by varying the dispositions of the will by parol evidence.

72 *Croker v Marquis of Hertford* (1844) 4 Moo PC 339 at 365 and 368 *per* Dr Lushington, commenting respectively on s. 5 of the Statute of Frauds and s. 9 of the Wills Act.

73 *Wallgrave v Tebbs* (1855) 2 K & J 313 at 327-328 *per* Page Wood VC, acknowledging that the Wills Act prevented the court from looking at writing which expressed the uncommunicated secret trust intended by the testator; *Sweeting v Sweeting* (1864) 10 Jurist (NS) 31, 32 *per* Kindersley VC.

74 See *Gloucester Corp v Wood* (1843) 3 Hare 131 (Wigram VC), affirmed (1847) 1 HLC 272 (House of Lords). The testator executed a codicil reciting that in a previous codicil he had bequeathed £140,000 to the plaintiff corporation and bequeathing a further £60,000 "for the same purpose as I have before named". No previous codicil was found, so that the purpose named was not ascertainable. Since the testator had indicated a purpose which might be other than the benefit of the corporation itself, whether as a public or private trust, the legacy of £60,000 was void for uncertainty and the gift of £140,000 fell with it: see 3 Hare 131 at 140-2 and 145 *per* Wigram VC; 1 HLC 272 at 284 and 286 *per* Lord Lyndhurst, giving the main opinion of their Lordships.

75 *Welford v Stokoe* [1867] WN 208 (Malins VC).
2.25 In giving effect to a secret trust the court does not merely brush against (or overstep) the boundary of the Wills Act. The legal efficacy of a testamentary disposition notwithstanding its omission from the will would undermine the principle that all such dispositions having effect will be contained in instruments admitted to probate. Probate therefore forms part of the essential matrix of rules which are touched by the secret trusts doctrine. The enforcement of an informal trust of a legacy in favour of a beneficiary nominated by the testator must be reconciled not merely with the terms of section 9: it must also be consistent with the function of the probate system, as will examined in chapter 3.

The necessity for probate

Executor's title to the estate

2.26 In strict law the executor's title to property is derived not from probate but from the will, which gives the executor on the testator's death constructive possession of the testator's property sufficient to found an action in its defence. The will by

76 *Comber's Case* (1721) 1 P Wms 766 *per* Lord Macclesfield LC; *Smith v Milles* (1786) 1 TR 475 at 480 *per* Ashurst J, *obiter*, giving the judgment of the Court of King's Bench; *Sykes v Sykes* (1870) LR 5 CP 113, 117 *per* Bovill CJ; *AG v New York Breweries Co. Limited* [1897] 1 QB 738, 746 *per* Wills J and [1898] 1 QB 205, 216 *per* Lord Parker for the Privy Council, applying English law. Reform of the machinery of succession has not altered this historic principle. Thus, under s. 1(1) of the Administration of Estates Act, the testator's freehold estates vest in all the executors, not merely those who have proved the will: see *Re Pawley and London and Provincial Bank* [1900] 1 Ch 58 (Kekewich J) (construing the predecessor provision in the Land Transfer Act 1897, s. 1(1)).

77 *Wankford v Wankford* (1702) 1 Salk 299 at 302 and 307, *obiter, per* Powell J (trover and detinue) and Holt CJ (trover), respectively; *Pinney v Pinney* (1828) 8 B & C 335 at
itself is sufficient authority for the executor to undertake his office\textsuperscript{78} and if he acts without probate he makes himself an executor by estoppel rather than an executor de son tort as an intermeddling wrongdoer.\textsuperscript{79} He is therefore entitled in advance of probate to receive debts owing to the estate\textsuperscript{80} and take possession of other property\textsuperscript{81} and to dispose of the testator’s rights or property,\textsuperscript{82} whether by release,\textsuperscript{83} assent to the vesting of legacies,\textsuperscript{84} assignment,\textsuperscript{85} or sale.\textsuperscript{86}

2.27 While probate is not the source of title, a grant of probate (or letters of administration with the will annexed) is an unavoidable practical necessity on several counts as authenticated evidence\textsuperscript{87} of the executor’s title under the will. In

\begin{itemize}
  \item \textsuperscript{78}See \textit{AG v New York Breweries Co. Limited} [1897] 1 QB 738, 746 per Wills J; \textit{Whitmore v Lambert} [1955] 1 WLR 495, 501 per Evershed MR.
  \item \textsuperscript{79}See \textit{Sykes v Sykes} (1870) LR 5 CP 113 at 118 per Smith J and at 119 per Brett J; \textit{Re Stevens} [1898] 1 Ch 162, 177-178 per Vaughan Williams LJ.
  \item \textsuperscript{80}\textit{Wankford v Wankford} (1702) 1 Salk 299 at 305-307 per Holt CJ, \textit{obiter}.
  \item \textsuperscript{81}\textit{Cottle v Aldrich} (1815) 4 M & S 175 at 177 per Le Blanc J; \textit{Whitmore v Lambert} [1955] 1 WLR 495, 501 per Evershed MR.
  \item \textsuperscript{82}See generally \textit{Re Stevens} [1897] 1 Ch 422, 429-430 (North J).
  \item \textsuperscript{83}\textit{Wankford v Wankford} (1702) 1 Salk 299 at 301 per Gould and Powys JJ; \textit{Humphrey v Ingledon} (1721) 1 P Wms 752 per Lord Macclesfield LC, \textit{obiter}; \textit{Comber’s Case} (1721) 1 P Wms 766 per Lord Macclesfield LC, \textit{obiter}.
  \item \textsuperscript{84}\textit{Wankford v Wankford} (1702) 1 Salk 299 at 301 per Powys J, \textit{obiter}; \textit{Humphrey v Ingledon} (1721) 1 P Wms 752 per Lord Macclesfield LC, \textit{obiter}; \textit{Fenton v Clegg} (1854) 9 Ex 680 (Court of Exchequer), where the rule was implicitly applied; \textit{Johnson v Warwick} (1856) 17 CB 516 at 519-520 and at 522 per Williams J, explaining \textit{Fenton v Clegg}.
  \item \textsuperscript{85}\textit{Comber’s Case} (1721) 1 P Wms 766 per Lord Macclesfield LC, \textit{obiter}; \textit{Brazier v Hudson} (1836) 8 Sim 67 (Shadwell VC).
  \item \textsuperscript{86}\textit{Sykes v Sykes} (1870) LR 5 CP 113, 118 per Smith J, \textit{obiter}.
  \item \textsuperscript{87}\textit{Bambridge v IRC} [1955] 1 WLR 1329, 1335 per Lord Cohen for the House of Lords.
\end{itemize}
this sense the grant of probate is essential for perfection of title to property by will - historically for personalty and in the modern law for realty too. For these purposes of establishing title, probate is the only acceptable evidence for the court. As Le Blanc J put it in *Cottle v Aldrich*, probate clothes the executor with perfect title.

2.28 Firstly, probate is required for the protection of those benefiting under the will and deriving title from the executor, to establish their title to property after payment from or disposition by the executor, including assent to legacies. In this regard it may be said the 1925 property law reforms have strengthened the importance of probate which, in relation to a legal estate in land, is to be considered a document of title.

88 See *Smith v Milles* (1786) 1 TR 475 at 480 *per* Ashhurst J; *Re Lovett* (1876) 3 Ch D 198, 204 *per* Malins VC; *Pinney v Hunt* (1877) 6 Ch D 98, 100 *per* Jessel MR; *AG v New York Breweries Co. Limited* [1897] 1 QB 738, 746 *per* Wills J and [1898] 1 QB 205 at 216 *per* Smith LJ and at 224 *per* Collins LJ; *Meyappa Chetty v Supramanian Chetty* [1916] AC 603, 608-609 *per* Lord Parker.

89 (1815) 4 M & S 175.

90 *Ibid*, 177.

91 *Pinney v Pinney* (1828) 8 B & C 335 *per* Lord Tenterden CJ, where the plaintiff failed in his action in trover for a horse and gig which he had purchased from an executor because he relied only on the will appointing the executor and could not prove undisputed exclusive possession. See also *R v Inhabitants of Netherseal* (1791) 4 TR 258 at 259-260 where Lord Kenyon CJ indicated that a leasehold title could not have been asserted if it had depended on the will alone, but an independent claim to a tenancy by estoppel was made out.

92 *Re Miller and Pickersgill's Contract* [1931] 1 Ch 511, 514 *per* Clauson J (in the context of s. 36(5) of the Administration of Estates Act 1925). The decision of the Court of Appeal in *Whitmore v Lambert* [1955] 1 WLR 495 does not seem justified. Evershed MR, giving the decision of the court, acknowledged that title cannot be fully made good without probate (*ibid*, 501), but failed to apply that principle admitting an unproven will to show that an executor had acted with authority.
2.29 Secondly, while an executor is for almost all purposes competent to act without probate, he is not able to sue at law or in equity to enforce rights of action enduring after or acquired on the testator's demise unless a grant of probate is obtained. The omission to prove the will is merely an impediment to enforcement of the right: the right itself derives from the will and is unaffected. Consequently, an action may be commenced and maintained by an executor before probate is obtained, but the defendant is entitled to insist on the production of probate by

despite the absence of probate. Although an executor may act without probate, probate is subsequently essential in any dispute to show that the executor's lawful acts are attributable to his office.

93 Wankford v Wankford (1702) 1 Salk 299 at 301 per Gould and Powys JJ; Sykes v Sykes (1870) LR 5 CP 113 at 117 per Bovill CJ and at 118 per Smith J.

94 R v Raines (1698-1700) Holt KB 310: 1 Ld Raym 361 at 364; sub nom. R v Rains 12 Mod 205; sub nom. R v Raynes 1 Salk 299 per Holt CJ; Humphreys v Ingledon (1721) 1 P Wms 752 (Lord Macclesfield LC); Mitchell v Smart (1747) 3 Atk 606 (Lord Hardwicke LC); Re Stevens [1897] 1 Ch 422, 430, where North J noted the executors could not have compelled the insurance company to pay the proceeds of a policy on the testator's life; Haas v Atlas Assurance Co. Limited [1913] 2 KB 209, 216 per Scrutton J.

95 Wankford v Wankford (1702) 1 Salk 299 at 303 per Powell J, obiter, and similarly Webb v Adkins (1854) 14 CB 401 at 406 per Jervis CJ. An exception is where administration has been granted. In that case an executor cannot sue or otherwise act until the grant of administration is revoked: see the Administration of Estates Act 1925, s. 15, replacing the Court of Probate Act 1857, s. 75.

96 Wankford v Wankford (1702) 1 Salk 299 at 302-303 per Powell J and at 306-307 per Holt CJ; Humphreys v Humphreys (1734) 3 P Wms 349 at 351 per Lord Talbot LC, obiter; Sykes v Sykes (1870) LR 5 CP 113, 117 per Bovill CJ, obiter; Meyappa Chetty v Supramanian Chetty [1916] AC 603, 608 per Lord Parker.

Hence an executor of a testator who was a creditor may participate in the debtor's insolvency proceedings: see Rogers v James (1816) 7 Taunt 147 (Court of Common Pleas, upholding Park J), where probate had been obtained but initially insufficient stamp duty was paid on the probate; Ex parte Paddy (1818) 3 Madd 241 (Leach VC); Re Masonic and General Life Assurance Co (1885) 32 Ch D 373 (Pearson J).
the plaintiff to establish his title when the matter comes into court for trial. Historically a plaintiff might declare his title without probate, but he had to make profert of probate (in which case the defendant was entitled to demand oyer) or he otherwise justified a special demurrer. After profert, oyer and special demurrers were abolished by the Common Law Procedure Act 1852, the court has exercised its inherent jurisdiction to stay proceedings at the request of the defendant for his protection where the plaintiff is called upon but unable to produce probate.

Correspondingly an executor would not be allowed to enforce a judgment obtained by the testator in his lifetime without showing his grant of probate.

2.30 Thirdly, a creditor of the testator or someone having possession of part of the estate might (and as a matter of best practice should) insist on probate before complying with an executor's demand for payment or delivery. The will under which the executor claims might be void or revoked by a subsequent testamentary instrument and a different personal representative might ultimately be entitled. Insistence on probate protects such parties against the risk of paying to someone not

97 AG v New York Breweries Co. Limited [1897] 1 QB 738, 746 per Wills J. See also Meyappa Chetty v Supramanian Chetty [1916] AC 603, 608 per Lord Parker, noting there can be no judgment before probate is obtained.

98 See Humphrey v Ingledon (1721) 1 P Wms 752 (Lord Macclesfield LC); Thompson v Reynolds (1827) 3 Car & P 123 (Court of Common Pleas); Sykes v Sykes (1870) LR 5 CP 113, 118 per Smith J, commenting on the earlier law.

99 Ss. 51 and 55.

100 Webb v Adkins (1854) 14 CB 401 (Court of Common Pleas), followed in Tarn v Commercial Banking Co. of Sydney (1884) 12 QBD 294 (Divisional Court, reversing Field J), where, however, probate was obtained after the first hearing and only a costs order ensued.

101 Comber's Case (1721) 1 P Wms 766 (Lord Macclesfield LC).

102 See Re Lovett (1876) 3 Ch D 198, 204 per Malins VC.
truly entitled to the testator's property. In practice, therefore, no one will deal with an executor as such unless he can produce a grant of probate. 103

Taxation

2.31 By section 11 of the Revenue Act 1884, the production of a grant of probate is necessary in establishing a right to receive any part of the deceased's estate situated in the United Kingdom. 104 It has been asserted, however, that this provision means only that an executor must produce probate when seeking to establish his title to receive or recover property and does not apply where there is no dispute as to the executor's right. 105 It would appear, therefore, that this adds little to the common law rule outlined above.

2.32 Further provisions of the taxing Acts, however, require probate to be taken out for taxation purposes. A fine is imposed on persons who take possession of and administer an estate and are dilatory in obtaining probate. 106 It is a clear policy of the state that large estates which are subject to taxation should only be administered on the basis of a grant of probate. By making probate an essential step in administration, the state can acquire the information necessary for levying wealth or transfer tax effectively on the deceased's estate or successors. In order to prevent evasion of duty, the grant of probate can be made dependent on the provision of

103 Williams, p. 143.

104 S. 2 of the Administration of Estates Act 1925, which assimilates the law affecting probate of chattels real to real interests in land, has the effect of extending the scope of this section from personality to include the deceased's realty.

105 AG v New York Breweries Co. Limited [1897] 1 QB 738, 746 per Wills J.
information to the fisc or on the discharge of liability to tax. Under the current law, reflecting an established policy of the legislature, no grant of probate can be made without a certificate from Inland Revenue that inheritance tax has been paid or that none is payable. By this means probate and taxation are brought into an interdependent relationship. To the extent that personal representatives are permitted to administer an estate without probate the state’s fiscal interest is undermined.

Publication of a proven will

2.33 A statutory right for any person to obtain a copy of a will, on payment of a fee, was granted in 1529. On the creation of the Court of Probate, which took over the probate jurisdiction of the ecclesiastical courts in 1858, a similar statutory right was granted to enable interested persons to obtain a copy of a will which had been proved, subject to payment of the fee provided for by Rules and Orders under the

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106 Stamp Act 1815, s. 37, as amended by the Finance Act 1975, ss 52(2) and 59(5) and Sched. 13, Part 1, and see also n. 104 above for the application of the Administration of Estates Act 1925, s. 2.

107 See s. 38 of the Stamp Act 1815 and s. 30 of the Customs and Inland Revenue Act 1881 (both repealed by the Finance Act 1975) which prohibited the grant of probate until receipt of an affidavit stating the value of the beneficial estate. See also s. 99 of the Court of Probate Act which provided that no document liable to stamp duty was to be filed or used in the court or have any validity for any purpose until stamped.

108 Supreme Court Act 1981, s. 109(1). See also Inheritance Tax Act 1984, s. 216(1) requiring personal representatives to deliver an account to Inland Revenue.

109 See on this point *AG v New York Breweries Co. Limited* [1898] 1 QB 205, 221 where Rigby LJ notes the importance of representation to probate duty.

110 21 Hen. 8 c. 5, s. 5(3), (4).

111 See further para. 8.21.
enabling Act.112 Under the present law, by the terms of section 125 of the Supreme
Court Act 1981, a copy of any will admitted to probate which is open to inspection
under section 124 of that Act may be obtained on payment of the prescribed fee.113

2.34 A proven will is therefore a public document. A chain of legal principles precludes
a testator from effecting a secret (that is, non-public) disposition of his estate: (i) the
will must comply with the Wills Act, (ii) a formal will is admitted to probate, (iii) a
proven will is a public document. For the testator who is anxious to avoid publicity
the apparent solution is to attempt a testamentary disposition which is informal and
avoids this chain of consequences. Publicity cannot be avoided by means of setting
out the trust in a separate unattested document incorporated by reference into the
will. All documents incorporated by reference are part of the will.114 The general
principle is that they are to be admitted to probate, while papers left out of probate
have no legal effect.115 The testator's ambition can be realised in his own hands
only by excluding the gift from the will entirely; an informal disposition of a
beneficial interest under the cloak of a secret trust is the apparent solution. For the
legal system there are three questions, though the jurisprudence of secret trusts has
focused almost exclusively on the first. Assuming the secret trust to be a will, the
testator's desire for secrecy might be indulged by allowing it to take effect

112 Court of Probate Act 1857, s. 69.
113 See also the Non-Contentious Probate Rules 1987, r. 59. For the procedure for
obtaining copies, see Practice Direction (Probate: Supply of Copies) [1990] 1 WLR
1510.
114 In the Goods of Dickens (1842) 3 Curt 60 (Sir Herbert Jenner Fust), where a copy was
admitted to probate. It is for this reason that any attempt to explain secret trusts on the
basis of the doctrine of incorporation by reference must be unsound, contra Paul
Matthews, "The True Basis of the Half-Secret Trust?", [1979] Conv 360. If that were
the case, the main object of many testators would be defeated: Bailey, p. 142.
115 Sheldon v Sheldon (1844) 1 Rob Ecc 81 at 86-87 per Dr Lushington.
notwithstanding its informality. This is the position adopted in the current law. It raises the question of whether the policy of the Wills Act can be subordinated to the policy of indulging the testator's secrecy and is considered in the next chapter. Even if secrecy may legitimately be preferred, the solution is a drastic one since it indulges secrecy by enabling an informal will *regardless of whether secrecy is the motive*. It assists testators to make informal wills who have no interest in secrecy at all - such as those who are merely indecisive or who have an aversion to complying with the Wills Act formalities and exploit the secret trust as a convenient means of informally varying their will.\(^1\) Alternatively, breaking the chain at a later point, certain formal trusts might be allowed to be effective notwithstanding exclusion from probate. This raises the issue of what function probate performs and is also considered in chapter 3 since the notion of a valid testamentary disposition outside the formal will necessarily excludes the disposition from probate.

2.35 There remains the possibility that the formal will could be admitted to probate but excluded from the public. This is clearly the most desirable solution to the problem since it addresses the secrecy concern directly. The testator who is anxious to shield his disposition from public gaze after his demise has no inherent objection to formality or probate. The statutory terms by which a will becomes a public document do in fact seem to provide scope for legal development to indulge a legitimate call for privacy. Section 124 of the Supreme Court Act 1981 provides that all original wills and other documents which are brought for the purposes of grant of probate under the control of the High Court are open to inspection “subject to the control of the High Court and to probate rules”\(^1\). This impliedly authorises

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\(^1\) This follows previous enactments in similar terms: see the Supreme Court of Judicature (Consolidation) Act 1925, s. 170, as substituted (without material alteration on this
the court to restrict in appropriate cases on an *ad hoc* basis access to wills and, in consequence, the availability of copies. The probate rules themselves provide explicitly for restriction of access. By rule 58 of the Non-Contentious Probate Rules 1987\(^{118}\):

> An original will or other document referred to in section 124 of the Act shall not be open to inspection if, in the opinion of a district judge or registrar, such inspection would be undesirable or otherwise inappropriate.

2.36 Neither rule 58 nor section 124 indicate that inspection might be restricted in respect of *part* of a will, as opposed to the whole instrument, but there is no reason to suppose the statutory power in either case is limited to permitting full access or none.\(^{119}\) These provisions appear wide enough to enable the judiciary to indulge the testator’s wish for secrecy in suitable cases - for example, by excluding the right of inspection to a particular document incorporated in the will setting out the terms of a trust imposed in the body of the will. Whether such restrictions on access are justified as a matter of policy or, indeed, fully effective in appeasing the testator’s desires will be considered in the next chapter.

**Conclusion**

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\(^{118}\) The Rules were amended by r. 7(1) of the Non-Contentious Probate (Amendment) Rules 1991 consequentially on the change of title of registrars to district judges provided for in s. 74 of the Courts and Legal Services Act 1990.

\(^{119}\) Since s. 125 explicitly refers to a copy of part of a will open to inspection under s. 124, this construction is consistent with (though not implied by) s. 125.
2.37 In this chapter we have noted the requirement of testamentary formality and its counterpart that an informal testamentary disposition by way of trust is void. The doctrine of secret trusts forms an apparent exception to this principle. Review of historic cases where the judiciary lost sight of fundamental principle suggests that the secret trusts doctrine (on one view at least) may amount to a contemporary repetition of old errors. This is the assumption that such informal trusts need only comply with inter vivos formalities because they are constituted by dispositions in the formal will and that they may be grafted onto formal dispositions. Confirmation that this approach to informal trusts is wrong-headed awaits the fuller discussion of the dehors the will theory in chapter 6.

2.38 In a preliminary consideration of reasons for the creation of secret trusts, the pivotal significance of will publication has been described. We will see in the next chapter that sacrificing the statutory policy of publicity on probate in appeasement of the testator's desire for privacy for sensitive dispositions is a doubtful policy. In any case, the enforcement of secret trusts stands as a misdirected legal development given that other routes (in particular, the exercise of statutory discretionary power) are open for some reconciliation of testator ambition with probate policy.
CHAPTER 3: THE POLICY OF THE WILLS ACT

Introduction

3.1 The previous chapter indicated that a secret trust, as an informal and apparently testamentary disposition, is void unless either such trusts are exempt from the Wills Act or, for some other reason of legal principle, they may be enforced despite the annulling effect of the legislation. This chapter considers the policies which the statutory formality requirements are designed to promote. The question is whether secret trusts, notwithstanding their informality and apparent capture within the literal terms of the Act, are outside the mischief which the legislation seeks to remedy. This will include an examination of the function of probate which is intimately connected with the formality of the Wills Act. It will be seen that on a sound view it is not possible to save secret trusts by an inward-looking purposive analysis of the statute and, in consequence, other justifications for the enforcement of secret trusts must be considered.

The functions of testamentary formalities

3.2 The Wills Act may be subject to other policy goals which limit its operation, allowing secret trusts to be shielded from the (otherwise applicable) requirement that a testamentary disposition be executed formally. As Dr Lushington expressed it when considering (but rejecting) an exception for testaments executed abroad by English domiciled British citizens:

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1 For the law governing foreign wills of British citizens, see now the Wills Act 1963, extending and replacing the provisions of the Wills Act 1861.
[T]hose words [of section 9] are general, and do not of themselves import any exception, but it may be that exceptions may be engrafted upon them, if it can be shown, from a consideration of the whole statute, and from acknowledged principles of law, that the statute was not intended to apply to such cases.2

The possibility of a purposive interpretation of the statute to find an implied exception clearly turns on an analysis of the purposes performed by statutory formalities for testamentary dispositions.3

3.3 There is little doubt, as both its short and long4 titles imply, the Statute of Frauds was enacted with the primary object of preventing - or more properly *minimising* - fraud. The purpose of section 5 of the Statute of Frauds in imposing greater formality requirements for a devise of land was clearly to strengthen the evidential quality of a will and so preclude the frauds and perjuries to which the lax formality of writing under the Statute of Wills had given scope.5 That this objective not merely held for section 5 of that statute6 but also holds for the successor provision in section 9 of the Wills Act7 can hardly be doubted. The important questions are

2 *Croker v Marquis of Hertford* (1844) 4 Moo PC 339 at 359.
4 An Act for Prevention of Frauds and Perjuries.
6 *Lea v Libb* (1687-89) Carthew 35 at 37 (Court of King's Bench).
7 *Countess De Zichy Ferraris v Marquis of Hertford* (1843) 3 Curt 468 at 478 (Sir Herbert Jenner Fust), implicitly; *Wallgrave v Tebbs* (1855) 2 K & J 313 at 322 per Page Wood VC; *Re Vere-Wardale* [1949] P 395, 397 per Willmer J, quoted in para. 7.2; *Re Colling* [1972] 1 WLR 1440, 1442B (Ungoed-Thomas J); *Wood v Smith* [1993]
what manner of fraud these statutes were intended to preclude in laying down formalities for wills and, further, whether they serve any additional purposes.

**Evidential function**

3.4 Clearly a primary function of the statutory wills formality is to ensure adequate evidence of the testator's intentions as to the *post mortem* disposition of his property. Satisfactory evidence of the fact and content of a will in reasonably permanent form is necessary because the will takes effect only after the death of the testator, potentially after many years have elapsed since execution and comment has been made by the testator to others about its provisions - in contrast to *inter vivos* instruments which are not commonly suspended until the occurrence of such an indefinite and potentially distant event; consequently challenges to the will or arising from its terms can constitute an issue only when the disponor is necessarily unable to give first hand evidence in confirmation or clarification of his intentions.  

It was the view of the Real Property Commissioners that informality of wills was in large degree responsible for the large proportion of doubts and litigation relating to realty which wills generated; the formalities which they proposed, leading to the enactment of the Wills Act, were directed at preventing the establishment of false wills and rendering titles secure.  

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9 *Fourth Report*, p. 3 and similarly at pp. 15-16.

It has been argued that the terms of the Statute of Frauds (including its will formality provisions) were only directed at preventing perjury and thus fraud by perjury. If the purpose of the Statute of Frauds was conceived in such narrow terms then an implied exception would have been justified in the restricted manner accepted in the early secret trust case of Jones v Nabbs. In that case the secret trustee refused to perform the direction of the testatrix which had been communicated to her orally, but she had admitted the relevant statement of the testatrix on which the plaintiff based her claim to payment. Lord Macclesfield LC held that he would not have granted relief against the Statute of Frauds were it not for the fact that the defendant had confessed the trust. The mischief against which the Statute intended to provide was the danger of perjured evidence from a variety of witnesses and an admitted secret trust required no proof and fell outside that risk. With this rationale Lord Macclesfield LC implies that perjury was the sole mischief against which the statute strove and thus that a secret trust could be enforced only if it was not necessary to establish the trust by reference to oral testimony.

11 Crayston v Banes (1702) Prec Ch 208 per Trevor MR, holding that a parol contract which ought to have been evidenced in writing by s. 4 nevertheless might be enforced specifically in equity if admitted by the defendant; obiter dictum in Symondson v Tweed (1713) Prec Ch 374; sub nom. Limondson v Sweed Gilb Rep 35, where the defendant did not admit the parol contract.

12 See George P. Costigan, “Has There Been Judicial Legislation in the Interpretation and Application of the ‘Upon Consideration of Marriage’ and other Contract Classes of the Statute of Frauds?”, (1919) 14 Ill L.R. 1, 18; George P. Costigan, “The Date and Authorship of the Statute of Frauds” (1913) 26 Harv L. Rev 329, 344-345. Although the long title to the statute seems to treat fraud and perjury as distinct evils and implies a wider ambit to the legislation, the argument gains support from the preamble to the statute which reads: “For prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury ...”.

13 (1718) Gilb Rep 146; sub nom. Nab v Nab 10 Mod 404 (Lord Macclesfield LC).
3.6 This clear position may be criticised both as to its premise and its deduction. As regards the latter, the logic of Lord Macclesfield LC’s reasoning implies that written evidence of the secret trust might be accepted as an alternative to the secret trustee’s confession, if by this means the trust could be proved without introducing witnesses to give oral evidence. A secret trust of land might have been established by reference to a signed or holograph writing not amounting to a formal will within section 5 of the Statute of Frauds, but a legatee’s denial that he had orally agreed to a secret trust could not have been rebutted by testimony. Furthermore, it would not have been necessary for the legatee to have accepted the trust in the lifetime of the testator. It would suffice if the legatee knew the (uncommunicated) intention of the testator provided he admitted the intended trust. The enforcement of the informal trust would not turn on the acknowledgment of a secretly agreed trust: it would hinge instead on proof (whether by admission of the relevant legatee or by documentary evidence) of the mere fact that a legatee had been intended to be a trustee. These conclusions cannot be reconciled with the developed rules of secret trusts, where an acceptance of the trust by the legatee in the testator’s lifetime is required and, moreover, the secret trust can be proved by oral evidence against the denial of the secret trustee.

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14 This proposition is so fundamental and pervasive in the secret trusts law that supportive authority is superabundant. The following is offered as a representative selection. For statements of the law see: *Re Downing’s Residuary Estate* (1888) 60 LT 140, 141 per Chitty J; *Re Pitt Rivers* [1902] 1 Ch 403, 407 per Vaughan Williams LJ; *Re Keen* [1937] 1 Ch 236, 244 per Lord Wright MR; *Ottaway v Norman* [1972] 1 Ch 698, 711A per Brightman J. For application of the principle see: *Moss v Cooper* (1861) 1 J & H 352 at 365-366 per Page Wood VC; *Jones v Badley* (1868) LR 3 Ch App 362 (Lord Cairns LC), reversing (1866) I R 3 Eq 635 (Lord Romilly MR) on the facts, but not on the law; *Re Stirling* [1954] 1 WLR 763 (Wynn-Parry J).

15 *Chamberlaine v Chamberlaine* (1678) 2 Freem 34 (Lord Nottingham LC); *Sellack v Harris* (1708) 2 Eq Ca Abr 46; *Harris v Horwell* (1708) Gilb Rep 11 (Lord Cowper LC); *Reech v Kennegal* (1748) 1 Ves Sen 123, also reported sub nom *Reech v*
3.7 These conclusions cast doubt on Lord Macclesfield LC's initial premise - the supposition that the prevention of perjury is the sole object of the statute. If an informal trust of land could be proved by written evidence which invites no perjury but does not comply with all the terms of section 5, it is difficult to see what was the purpose of the exacting terms of that provision. It is hardly to be credited that the requirement of attestation might be side-stepped merely because the explicit and indisputable hand of the testator excluded all risk of perjury. The assumption of so narrow a mischief to the statute produces such a large implied exception that the statute is emaciated. It would have reduced section 5 almost to the weaker standard of section 7. Undoubtedly the prevention of perjury was an object of section 5, but the better view is that the testamentary provisions of the Statute of Frauds were not confined to preventing fraud by perjury alone. A broader assault on fraud seems to have been part of the legislative purpose and the detailed formality requirements sought to perform additional functions. In any case the transposition of section 5 to the Wills Act and its extension to wills of personalty has severed any restriction which was implicit in its original setting in an enactment to restrain perjury.

3.8 The purpose of the Wills Act is therefore properly understood in wider terms. The function of section 9 is usually conceived in terms of this purpose of preventing wills conducing to false claims and to frequent disputes of a type which would be difficult to resolve. The restriction on proof of nuncupative wills by the Statute of

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Kennigate Amb 67 and sub nom Reech v Kennigale 1 Wils KB 227 (Lord Hardwicke LC).

16 Whitton v Russell (1739) 1 Atk 448 at 449 per Lord Hardwicke LC.

Frauds and their elimination under the Wills Act prevent opportunities for fraudulent claims which relaxed formalities would afford.\textsuperscript{18} There is little doubt that the requirement of writing\textsuperscript{19} and the testator’s signature\textsuperscript{20} to a testamentary dispositions should be maintained and that the presence of two witnesses is a safeguard against the non-genuineness of the will.\textsuperscript{21}

3.9 In so stating the purpose of the Wills Act, it tends to pass, by omission of others, as a statement of the \textit{exclusive} function of the statute.\textsuperscript{22} This is a perilous assumption. It invites the notion that if the judiciary can be satisfied of the evidential quality of an alleged secret trust (even if it is testamentary), then the fence of the Wills Act may be legitimately jumped by the harnessed horse of public policy.\textsuperscript{23} That notion is objectionable on two scores. In the first place it substitutes for the legislature’s notion of satisfactory evidence a judicial one. It is predicated on the idea that the legislative intent was to stipulate an outcome (secure evidence of the dispositions) and dictated a \textit{standard} of formality, but that it was indifferent as to the \textit{mode} of formality. That idea leaves the way open to the courts, by generous purposive construction of the Act, to except circumstances where an alternative mode of transaction outside the literal terms of section 9 is considered to reach the same evidential threshold.

\textsuperscript{18} Hovenden, vol. I, p. 290 (Statute of Frauds).
\textsuperscript{19} LRC Rep. No. 19, para. 35 (where the point was outside the terms of reference).
\textsuperscript{20} Law Reform Committee, Consultative Document, para. 7.
\textsuperscript{21} Law Reform Committee, Consultative Document, para. 13.
\textsuperscript{22} See \textit{Windham v Chetwynd} (1757) 1 Burr 414 at 420; \textit{sub nom. Wyndham v Chetwynd} 1 Black W 95 at 100; 2 Keny 121 at 147 where Lord Mansfield CJ opines that in s. 5 of the Statute of Frauds the legislature meant only to guard against fraud.
3.10 It is difficult to support the enforcement of secret trusts on such a basis. The premise that the legislature meant only to stipulate by example the required degree of formality and not the sole permissible mode of execution might be arguable in other contexts - even in respect of other provisions of the Statute of Frauds restricting the enforcement of rights. It does not seem fitting in the context of section 9 which determines the actual validity of a purported disposition. It cannot be presumed that the legislature would intend the validity of an informal will to depend on the availability of evidence of an indeterminate class. Indeed there is every reason to suppose the opposite. The legislature has been painstaking in its efforts to set out the particular formalities contained in section 9. The progressive refinement and calculated relaxation of these formalities by the Wills Act Amendment Act 1852 and more recently the Administration of Justice Act 1982 shows a commitment to one specified method of executing a will. This labour of love in perfecting its nominated mode of disposition does not seem consistent with the notion that the legislature was concerned only with the degree of evidential security and not its manner of production.

3.11 Moreover, the assumption by the courts of a power to dispense with the specified statutory formalities in supposedly suitable cases of non-compliance would install into the law that which the Law Reform Committee, in its report leading to the reformation of section 9 by the 1982 Act, had emphatically rejected. Nor would the encroachment on the Wills Act stop here, for in setting down circumstances in which a testamentary trust may be created dehors the will (as the secret trust

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24 For a rejection of that approach in the context of the then applicable s. 40 of the Law of Property Act 1925 (replacing s. 4 of the Statute of Frauds) and an affirmation of the fraud principle as the basis of the equitable doctrine of part performance, however, see M. P. Thompson, “The Role of Evidence in Part Performance”, [1979] Conv 402.

25 LRC Rep. No. 22, para. 2.5
doctrinal does) the judiciary has not merely exercised a benevolent discretionary power. It has created a conveyancing device to avoid the Wills Act formality. Given that acquiescence in the testator's designs suffices for the purposes of the secret trusts doctrine as an acceptance of the trust, it may be argued with force that the current law allows the testator to opt out of the strictures of the Wills Act provided he communicates his informal testamentary intentions to an agreeable or indifferent legatee; the formality of communication is substituted for those set down in section 9. With the court's blessing, the creator of the secret trust has apparently enacted for himself his own Wills Act. It must be contrary to legislative intent that the testator should be able to nominate alternative testamentary formalities.

3.12 In any case, even if this jurisprudence was sound, it is strongly to be doubted that secret trusts satisfy an evidential standard comparable to section 9. Subject to the unresolved question whether a secret trust of land must satisfy section 53(1)(b) of the Law of Property Act 1925, there is no requirement that the secret trust be evidenced in writing. It is hard to see how proof of a mere oral declaration, albeit

26 Watkin, p. 339, and similarly Hodge, p. 349.
29 In Re Baillie (1886) 2 TLR 660 North J held that a purported half-secret trust of the testator's entire estate failed. S. 7 of the Statute of Frauds was applied as to the realty. Additionally, however, the next of kin was held entitled to the personalty. This suggests that the real basis for the decision was the assumption that there could never be a valid half-secret trust and that an expression of trusteeship in the will created an automatic resulting trust. The point was not taken in Ottaway v Norman [1972] 1 Ch 698 in respect of the fully-secret trust of the bungalow which Brightman J upheld.
30 See, for example, the cases cited in para. 3.6 n. 15.
one which is supplemented by the presence of an acquiescing legatee, can ever reach the same threshold of security as a signed and attested writing.

3.13 There is, however, a second and more profound reason why the focus on the evidential functions of the Wills Act has unfortunate consequences. The neglect to consider other purposes of the statute renders a court too ready to uphold an informal disposition and so dispense with the formality requirement. In excluding from its purview the other operative functions of formality - to which we now turn the court disregards other interests which are protected by formality. Such interests may not be safeguarded merely by collateral proof of informal testamentary intentions, however evidentially compelling they might be.

Protective function

3.14 Closely allied to the evidential function is the protective function. While the evidential formalities are intended to ensure that a proffered will was indeed made by the testator and contains his intentions, the Wills Act serves a further function in protecting the testator from imposition and promoting wills that are made with a real testamentary intention.31 Protective formalities are therefore those which place obstacles in the path of those seeking to exert undue pressure on a testator to make a will which does not state his actual wishes.

3.15 The benefit of the protective function facilitated by testamentary formality has perhaps been understated, but it is easily overemphasised. So far as the formality of a will recommends legal assistance, the likelihood of undue influence is theoretically reduced, but this may be of little assistance in many cases. Given that wills are often put off until the testator sights the grim reaper’s shadow, the elderly client may receive legal advice, perhaps mediated through others, only after his decaying mind has already been made up for him. Would-be beneficiaries may be restrained from exerting pressure by section 9, as has been suggested. Certainly the necessity to meet the requirement of an attested will must retard any effort to convert an appeasing expression from a reluctant testator into a formally valid disposition; but that obstacle might achieve little without the additional necessity of finding two obliging witnesses imposed by the forfeiture rule in section 15.

3.16 It will be seen in chapter 7 that the procurement of a secret trust is not to be equated with coercion as a legal wrong. In contrast to the coerced testator, the testator who bequeaths to a secret trustee has a real intention to leave his property to the legatee. Usually the testator’s initiative, it is part of his plan that the legatee should take in order that the secret beneficiary may take under the agreed trust. It cannot be maintained, therefore, that the protective policy pursued by section 9 is imperilled by the recognition of secret trusts. In any case, unlike the evidential function, this protective policy is not exhausted when it is established that the formality of section 9 is duly satisfied. In this sphere section 9 performs a merely secondary and proxy

32 See Windham v Chetwynd (1757) 1 Burr 414 at 420 per Lord Mansfield CJ, commenting in relation to s. 5 that “many more fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it” and in similar terms sub nom Wyndham v Chetwynd 1 Black W 95 at 100; 2 Keny 121 at 147.

33 Critchley, p. 52.
role, avoiding certain coerced dispositions on the indirect ground that the coercion was never brought to the stage of completion - the valid execution of a will. The protective policy is given full effect in probate proceedings as a separate ground for impugning an otherwise perfectly executed will. It is where section 9 is the only means for the legal system to achieve its ends that an exception to the statute undermines the legislative intent.

Cautionary function

3.17 Distinct from the protective function, section 9 seeks to protect testators in ensuring that only their deliberate and final wishes are effected. Although there is an undoubted overlap with formalities providing evidence of the will, the formalities operative to that end may be defined discretely as those calculated to induce forethought and care in the creation of the testamentary disposition. The cautionary function complements the evidential and protective functions in a triumvirate. Each is directed to safeguarding a genuine will, excluding counterfeit wills (evidential function), coerced wills (protective function) and casual wills (cautionary function). However, the latter two, in excluding certain forged and procured wills, serve primarily to assist basic legal principles touching the validity of the transaction. In contrast the cautionary function has something in keeping with the certainty function, discussed below: the purpose is to raise the quality of the transaction.

34 Under s. 15 a beneficiary under a will loses their interest if they are an attesting witness or the spouse of a witness.

35 Hence the frequent assertion (taking all these discrete functions in an undifferentiated round) that the purpose of the statute is to validate any document representing the testator's true will and to safeguard against the propounding of false ones: Law Reform Committee, Consultative Document, para. 3; LRC Rep. No. 22, para. 2.2
3.18 The cautionary function is particularly important for a will since in executing a testamentary instrument (other than a codicil) the disposition of the entire estate of the deceased is at stake - if not by will, then on intestacy by default. Since the testator, unlike the donor of an *inter vivos* gift, does not part with possession or enjoyment of his property until death, there is nothing besides the formality of the transaction to remind him of the seriousness of his proposed disposition. Admittedly the cautionary function of section 9 has not been acknowledged by the courts to the same extent as the evidential function, but it has not forgone recognition. Hannen P observed that "the legislature in prescribing the conditions necessary for the due execution of testamentary papers intended to guard against certain innocent acts of testators as well as the fraudulent acts of others."\(^{36}\) The Law Reform Committee in its report leading to the substituted wording of section 9 noted that the existing rules provided a safeguard against ill-considered dispositions which might lead to family dissension and litigation.\(^{37}\)

3.19 Formalities of a cautionary nature are certainly present in section 9. A written disposition, being slower and harder to produce than the ephemeral and quickly forgotten vocalisation of a wish, will tend to compel greater thought in the process of expression and the act of watching wishes set down in print (a visual echo) may induce further contemplation of the desirability of that which is expressed. The documentary will as a physical product must be kept if it is not to be destroyed or disposed of, which itself may force the testator to assess whether its contents should be saved for posterity or whether they contain a mere fleeting whim unworthy of retention. Moreover, a witnessed document is likely to advance the cautionary

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\(^{36}\) *In the Goods of Adamson* (1875) LR 3 P & D 253, 256.

\(^{37}\) LRC Rep. No. 22, para. 2.2. See also the Law Commission, *Should English Wills be Registrable?*, Working Paper No. 4 ([no p.]: [no pub.], 1966), para. 45.
function still further. The very necessity of placing the document before witnesses may induce delay and time for reflection. It may require a particular appointment to be made for witnessing the execution of the document, adding to the aspect of ceremony in the execution. The modest inconvenience involved in producing a witnessed document may cause the testator to plan the will with special care in the knowledge that an amending codicil or a new will would require a repetition of the inconvenience. In order to avoid the necessity for revisions, the terms of the will may be written with more deliberation than if they might be amended at any time by a mere stroke of the pen. If the text of the will is not hidden from the witnesses, the testator is more likely to produce a presentable document, which will in turn encourage the testator to take care in the preparation of the will. The act of producing a clean copy from a scribbled draft or (now) checking the printed version of a word-processed computer file may invite further reflection on the terms of the will which is being reproduced. Finally, the necessity to compose a dispositive instrument or the awareness that there are rules governing the formality of execution may encourage the testator to seek legal advice in the preparation of the will.

38 See Browne, vol. 1, p. 286, writing before the Wills Act, noting that the formality of requiring witnesses attesting the execution of the will operates to manifest the solemn and thus deliberate intention of the testator.

39 It is permissible for a testator to execute a will, asking the witnesses to attest his signature without disclosing the fact the instrument is a will: see Keigwin v Keigwin (1843) 3 Curt 607 (Sir Herbert Jenner Fust), holding further that an express acknowledgment by the testator of his signature is unnecessary where the signature is patent on the document; Smith v Smith (1866) LR 1 P & D 143 (Sir J. P. Wilde), where the text of the will was masked by blotting paper. The same principle had applied under s. 5 of the Statute of Frauds: see Windham v Chetwynd (1757) 1 Burr 414 at 421; sub nom. Wyndham v Chetwynd 2 Keny 121 at 147 per Lord Mansfield CJ, obiter. The
3.20 Non-enforcement of an informal dispositive intention is not necessarily a matter for regret if the unobserved formality serves a cautionary function. The informal disposition may not necessarily reflect the testator’s true intention: because the testator has not taken his intention to the point of solemn execution it cannot be assumed that it is supported by the same degree of care or seriousness as a formal will. Of course one individual’s particular informal intention may be more serious than another’s formal one. However, the point of the formality rule, on grounds of efficiency in the legal system, is to state a principle, reflecting the general difference between formal and informal wills, which is to be applied so as to forestall scrutiny of the actual merits. In this regard the formality rule functions analogously to an irrebuttable presumption.

3.21 Just as a secret trust offers little evidential security, so it is difficult to see how the requirements of the secret trust doctrine provide a comparable guarantee that a testator has created his secret trust with due caution. At first this may appear to be a surprising assertion. The conscious decision to create a trust rather than make an outright gift to the secret beneficiary, the decision to combine a formal gift with an informal arrangement and the necessity for the trustee’s agreement to this indirect disposition - the necessity that at the very least the trust is proposed to the legatee - constitute the trappings of a scheme which has the hallmark of due deliberation. However, here too the informality of the trust poses a significant problem. The gift to the trustee might take effect under the will, in which case the will itself shows deliberation in respect of the benefit to the trustee.\(^{40}\) What is missing is caution in

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\(^{40}\) It should not be overlooked, however, that the trustee might take by agreement with the testator under the intestacy rules, in which case the cautionary effect of the Wills Act has not been enjoyed even to this limited extent.

Real Property Commissioners had not recommended a change in the law: see *Fourth Report*, p. 21.
setting out the terms of the trust and the identity of the secret beneficiaries. The only formality involved in nominating a beneficiary is the (passive) consent of the proposed legatee.

Certainty function

3.22 The certainty function may be seen as complementary to the evidential function: while the latter seeks to make certain the existence of the transaction, this function promotes certainty in its terms. Formality helps oust ambiguous agreements. As a result of deliberation and concentration necessitated by observance of written formality, a testator will tend to express his dispositions clearly, orderly and more completely. The very act of visually setting out the various intentions may assist in identifying potential conflict between testamentary aspirations and sharpening the boundary between distinct gifts and interests. The formalities which promote a cautionary function will likewise tend, as the output of that objective, to lead to amendments and refinements which may eradicate ambiguities and generally improve the clarity and precision of the terms of the will. Furthermore, the minor inconvenience of formal execution helps to ensure testators are encouraged to draft wills which are intended to remain unrevoked in the longer-term and not merely provisional instruments with limited foresight and functionality. The terms of the

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41 See, for example, McCormick v Grogan (1869) LR 4 HL 82, 85 where the testator in his memorandum of the secret trust (held, on the facts, to be merely precatory) confessed that it had been written in a hasty manner. Clearly this was material to the precatory nature of the trust. As with uncertainty in the terms of the trust, the more casual the manner in which it is mooted, the more likely it is that a binding obligation was not intended. This is another reason, besides those set out in chapter 5, why secret trusts are particularly prone to being merely precatory.

42 Making a similar juxtaposition, see Gardner, pp. 74-75, treating these two functions as the primary functions of formality.
will may therefore address a number of contingencies affecting the testamentary dispositions and render explicit the testator's wishes over a range of potential circumstances - wishes which might otherwise remain latent, obscure and unfulfilled. Finally, if the formality is such that testators are encouraged to seek legal advice, this may further improve the quality of planning and drafting in preparation of the testament.

3.23 Although disputes as to the effect of an instrument executed as a will may turn on its validity, a legal system has an interest in promoting certainty in the contents of an instrument as much as its evidential value. For kindred reasons, wills are highly likely to promote disputes as to their import. As voluntary dispositive instruments coming into effect after the maker's death, the flamboyant litigious spirit of unfilial relations can no longer be deterred from laying claim to the plunder in the family treasure chest by the threat of withholding future generosity. Guiding the testator to define his wishes so as to minimise the scope for competing claims to his estate reduces litigation draining court time and state expenditure in the administration of justice. It benefits the testator in eliminating the risk that his estate will be lost in funding litigation rather than effecting his intended dispositions. Given the settled nature of the intestacy rules, it will often be better for a testator never to speak at all rather than that he should utter his testamentary wishes in obscure words.

3.24 The promotion of certainty has been judicially noted as one of the objects of the Statute of Frauds and there can be little doubt that the insistence on section 9 formality serves the purpose of steering testators towards wills which in the testimonium and ancillary clauses at least is well structured. The Law Reform Committee, implicitly adopting the disapprobation of their consultees, noted that

43 Anon. (1708) 5 Viner Abr 521 per Lord Cowper LC.
nuncupative wills besides raising difficulties of proving the relevant statements also created uncertainty and problems of interpretation.\textsuperscript{44} This benefit is entirely lost in the secret trust, where the objects of the trust and its terms may be set out on any loose writing or in any loose conversation, provided the trust is accepted. The ease with which the trust may be modified creates the possibility of multiple and inconsistent declarations of the trust to the legatee. Even if the parties agree that a secret trust was created, there may be conflicting views of the terms of the trust derived from the evidential scraps manifesting the secret trust agreement.\textsuperscript{45}

**Channeling function**

3.25 The Wills Act formalities assist in assuring the testator’s peace of mind: he may rely on the fact that in executing a regular instrument the court will be able to identify a will and effect his testamentary directions.\textsuperscript{46} Stipulation by the legislature of a distinct and elaborate formality which is not required or generally used for other purposes distinguishes as a will any instrument executed in the recognised and obligatory form. The advantage for a testator is that he is able to show (both positively and negatively) whether he has an intention to effect a testamentary disposition having legal effect. This is of particular assistance in distinguishing (i) mere statements of intent or desire not meant to constitute a will and (ii) merely preparatory papers. Under the relaxed formalities of the Statute of Wills it was possible for a personal letter to constitute a sufficient will of land as it might for

\textsuperscript{44} LRC Rep. No. 22, para. 2.20.

\textsuperscript{45} See in this regard the different views taken in *French v French* [1902] 1 IR 172, where Porter MR at first instance, Lord Ashburne LC dissenting on appeal and a unanimous House of Lords considered a secret trust obligation had been accepted, but with legitimacy the majority in the Irish Court of Appeal found evidence only of an understanding and confidence falling short of a binding obligation.
personalty. By insisting on the solemnity of attestation, the Statute of Frauds reduced the range of instruments capable of taking effect as a will and thus the burden falling on affected parties and the court in determining which instruments collectively formed the testator's final will. Likewise a draft is revealed as such by the absence of execution in accordance with section 9, while conversely due execution signals the finality of deliberation and the completion of the disposition. The problem arising in the absence of formality is illustrated by the case of Hawtre v Wallop, decided shortly before the Statute of Frauds. The testator had executed a will bequeathing £1,000 to the plaintiff, payable at her marriage, and had provided for equal portions to be raised out of income from realty for his younger children. The plaintiff later married and was advanced £1,000 by the testator whose subsequent holograph will devised his land to executors to raise portions for the use of his children for whom he had not provided by way advancement in his lifetime. An unsealed paper was found with his will which expressed his wish that the plaintiff should share equally with the younger children on his death. The plaintiff's claim, based on this paper, was contested by the defendants, inter alia, on the ground that the paper was a mere draft; and indeed, as regards the testator's personalty, the ecclesiastical court had determined that the paper was not effective as a codicil. The Court of Chancery, however, upheld the plaintiff's claim. Clearly the room for disagreement as to the finality of the paper was created by the absence of any signature, sealing or attestation which would have gone a considerable way to manifest the testator's intention to give the document legal effect. This channeling function of the Wills Act formality removing doubt about the conclusion

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46 See Critchley, p. 52.
47 West's Case (1581) Moore KB 177 per Popham CJ.
48 (1668) 1 Chan Rep 265.
49 The defendants also argued that the paper had been written before the testator's final will, but the court rejected this claim.
of a will has been judicially recognised. Moreover, it was the channeling effect of section 9 which dissuaded the Law Reform Committee, after consultation, from recommending the admissibility of holograph wills, since these were more likely to be confused with draft wills.

3.26 This function of the Act not only eases the burden on the testator in labelling his testamentary wishes as such. In tending to promote a regular format for a will - especially if the need for formality drives testators into the hands of solicitors standing ready with the precedent book - section 9 will also assist the court, personal representatives and third parties having business with the estate. The ability to rely generally on a homogenous form to a transaction enables consequential business - not the least of which is probate - to be processed efficiently. These too are benefits renounced by the creation of a secret trust. Devoid of the distinguishing features of attested signed writing, the testator’s declaration of secret trust to the legatee may risk being taken, for example, as a merely precatory direction. Third parties compelled to deal with or interested in the trust, moreover, may be compelled to navigate through a matrix of extrinsic evidence, unbounded as to form, in order to ascertain its nature and effect.

Administrative functions

3.27 The formality requirements for wills may also serve a number of governmental functions serving specific state interests in addition to more general public

50 Countess De Zichy Ferraris v Marquis of Hertford (1843) 3 Curt 468 at 478 (Sir Herbert Jenner Fust), implicitly.

51 LRC Rep. No. 22, para. 2.22.
interests. This function may therefore be seen as simply a special case of the channeling function.) In particular the requirement that the will is in writing expedites the process of probate, whereby the will is duly recognised by the court: the state is able to look to and endorse a documentary form of the will without having to undertake a more elaborate exercise for every testator to ascertain the terms of the final will, if any. The ease of reference to the detailed terms of the deceased's testate succession promotes the government's interest in reducing the scope for avoidance of inheritance taxation on the testamentary dispositions of the deceased. As we have seen, the obligation to obtain probate plays a critical role in the effective operation of that tax. In upholding an informal will, therefore, the court not only undermines the intrinsic benefits of the Wills Act outlined above; it also removes the consequential advantages to the probate process.

3.28 We saw in chapter 2 that probate is essential for tax reasons and for authenticating the executor's title. A further policy reason for promoting probate by insisting on probate as a requirement of litigation was the protection of the interests of creditors to the estate since the probate process called for exhibitions of inventories. If these reasons constituted the core policy underlying probate, then it might not appear that the policy would be challenged by the enforcement of a secret trust effective on death but dehors the formal will. It is only the beneficial entitlement which is suppressed from the face of the will in the secret trust. Accordingly the disposition to the trustee is itself contained within the will and the trustee derives title through the probate and from the personal representative. That the secret

52 See Critchley, pp. 51-52, stressing the fiscal function of instruments.

53 Wankford v Wankford (1702) 1 Salk 299 at 302-303 per Powell J, obiter. A personal representative is under a duty, when required, to exhibit a full inventory of the estate: Administration of Estates Act 1925, s. 25(b), as substituted by the Administration of Estates Act 1971, s. 9.
beneficiary’s title is derived *dehors* the will from the trust creates no more problem of evidencing title than an *inter vivos* declaration of trust might. The disposition is not *dehors* the probate estate and is included for the purposes of tax and the discharge of debts.

3.29 The conflict with the policy of probate which does arise from the enforcement of an informal disposition *dehors* the will touches what may have been the very reason for the trust: secrecy. Prioritising the testator’s desire for privacy at the expense of the formality policy of the Wills Act also subordinates to the testator’s aspirations the publicity function of probate. As Morritt LJ explained in *Corbett v Newey*:

> [T]he plain and understandable emphasis is that the devolution of the estate of a testator should be written out for all to see in a document which, so far as possible, can be shown to be the product of the testator himself.

The publicity of the will serves the purpose of enabling those with an interest in the will to inspect its terms. Persons taking an interest under the will need to be able to assess the extent of their entitlement so that they may take any necessary legal action (for example, against a recalcitrant executor) in order to safeguard their interest. Furthermore, those contingently entitled need to know of their potential interest. A residuary legatee or a next of kin taking under a partial intestacy, as the case may be, has an interest in knowing the terms of the will since they may benefit on failure (respectively) of specific and residuary gifts.

54 [1998] Ch 57.

3.30 A rule which enables testamentary gifts to take effect outside a published will tends to defeat this statutory policy. In the first place, the beneficiary under the secret trust cannot identify her entitlement in the will. She can only enforce her interest if the testator has provided her with adequate proof of the trust and its acceptance by the legatee. It need not trouble us whether the testator's secret scheme fails in so essential a matter: the trust's dependence on potentially fragile evidence is the consequence of his preference for secrecy over formality. On the other hand, the residuary legatee or next of kin, as the case may be, is entitled to the secret trust property to the extent that the trust fails. Unless aware of the terms of the trust, the contingently entitled party will not be in a position to assert his or her interest: the testamentary gift may fail behind the curtain of the will. This distinguishes the testamentary disposition from the *inter vivos* settlement. The testator, like the settlor, knows the dispositions he has made, but since a resulting trust in this case rebounds to the benefit of the residuary or intestate successor and not the donor it is imperative that the testamentary settlement is disclosed for their information. Testamentary secrecy prejudices the effective operation of the principles associated with trust failure.

3.31 It is for this reason that the testator's desire for secrecy is *not* "as much indulgeable as the desire of the state to ensure the existence of reasonable evidence of those dispositions". The point emerges if we appraise the reform Sheridan suggested as a means of accommodating secrecy consistently with the Wills Act. Sheridan recommended legislation to enable registration of secret trusts during the testator's lifetime, so ensuring written evidence of the trust after the testator's death; but secrecy would be arranged because the register would be open "only to persons

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having business with the will”.

As we noted in the last chapter, existing legislation could enable the protection of privacy in respect of a formal trust, but neither these nor Sheridan’s proposed rules are likely to satisfy the testator’s wishes. The difficulty is that ‘persons having business with the will’ may include persons whom the testator is anxious should not acquire knowledge about the secret trust. In the classic secret trust case, where the testator is benefiting a mistress, he may be striving after the perpetuating the ignorance of those closest to him rather than strangers in the wider public per se; but it is those closest to him who are most likely to feature in his will and have an interest in its contents as residuary legatee or next of kin. To exclude their reference to the terms of a formal or registered (secret) trust might seriously frustrate their ability to claim the property specifically bequeathed to the secret trustees in the event that the trust has failed.

Summative analysis

3.32 The benefits of obligatory formality in testamentary dispositions have been consistently acknowledged and (quite aside from the commanding will of the legislature) their maintenance is a consensual goal of the legal community. The counterpart to this is that the provisions of the Statute of Frauds as to devises and nuncupative wills and the modern requirements of the Wills Act intended to lay down minimum standards for cautionary, evidential and other purposes. It is an obvious but nonetheless critical point to accept that the very objective of the statute is to strike down certain informal wills: “The design of the statute was to prevent

57 Ibid, p. 329.
58 Watkin, p. 338.
wills that ought not to be made [...]. Harshly as this rule may operate from time to time, it is fundamental to the achievement of the policies encapsulated in the Act, since it is only by eliminating that which does not meet its demands that it can ensure the observation of its required standards. The provision performs a negative function, creating intestacies, in order to protect a positive public interest. It is inevitable when sight is lost of this broad picture that the focus of sympathetic attention is transferred to those hard cases of non-compliance, but any attempt to gather up such cases within the frame of validity involves a blurring of the statutory benchmark.

3.33 For the reasons already outlined, the enforcement of the secret trust cannot be reconciled with the aspirations of the Wills Act. A court may be tempted to give effect to the testator’s informal intentions on the ground they were seriously meant in order to prevent hardship resulting from their frustration, but this overlooks the considerable weaknesses arising from the trust’s informality. Devoid of those signals which provide due assurance that the testator solemnly and really intended to benefit his secret nominee, the secret trust is declared by the testator without the benefit of cautionary protection provided by the Wills Act form. In enforcing the secret trust in favour of the third party, equity binds the testator to his informal gift and sanctions the deprivation of a protection Parliament intended to confer. In a contest between the testator who has changed his mind and the secret beneficiary who is a mere volunteer, there is no reason why equity should intervene in favour of the volunteer when the testator has neglected to satisfy the requirements of form


61 Acknowledging this collective interest, see Lea v Libb (1687-89) Carthew 35 at 37 (Court of King’s Bench) (s. 5 of the Statute of Frauds); Countess De Zichy Ferraris v Marquis of Hertford (1843) 3 Curt 468 at 498 per Sir Herbert Jenner Fust.
necessary to perfect his bounty; enforcement of the trust defeats the policy behind the requirements of form.62

3.34 Discussing the pertinent example of a secret trust contained in a side-letter left with the will, not communicated to the legatee until after the testator's death and which the legatee refuses to perform, Ames commented:

The rule that the intention of the testator must be found exclusively in the duly-witnessed document, in view of the danger of perjury and forgery, is the best security for giving effect to the true will of the generality of testators.63

Since the mere communication of the secret trust does not correspond to the evidential, cautionary and other protections of the Wills Act, a purposive construction affords no scope for an implied exception for communicated secret trusts. If the secret trust is testamentary and within the literal terms of the Act, its immunisation from the Act's effect must be justified on some other basis. The point must be stressed: it can never be a sufficient justification to enforce the informal will simply because in the circumstances of a particular case the testator's intentions can be proven. Here it is helpful to return to Ames' argument. In his view, the defence of the 'innocent' legatee based on the statutory provision is undoubtedly dishonourable - it disturbs the sense of fairness that the victim of an unrighteous act obtains no redress - but it is a case of utilitarian advantage, where the interest of the individual must defer to the public interest contained in the object of the

62 Cf. Feltham, p. 248, on inter vivos secret trusts.
legislation. Since the erosion of the statutory protection risks opening the door to injustice in other cases, public policy stands against the claim of one individual injured by morally reprehensible conduct. If the secret trust is testamentary, enforcement of a trust rests on establishing an interest which must take priority over the public policy of the Wills Act; there must be some greater wrong in the face of which the benefits of formality must yield.

3.35 The policy of the Wills Act is therefore material to any equitable doctrine which grants relief in respect of an informal testamentary trust. If enforcement of the secret trust cannot be justified as impliedly exempt from the Act, because it conflicts with the statutory policy, the enforcement is equally improper if equity purports to grant relief after the Act applies by engrafting a trust on title taken under the will. On any view the fraud theory of secret trusts is confined by the Wills Act policy. Enforcement of the trust in favour of the intended beneficiary *prima facie* resembles a subversion of the Wills Act because it takes the testator’s informal intentions as the object for implementation and by terminological slight of hand enforces the very express trust which the Act struck down. A restitutionary remedy for fraud, in contrast, involves no unwarranted contradiction of the legislature’s intentions: it gives relief for fraud without perfecting the testator’s informal disposition. There is in fact a striking academic consensus that in policy terms the secret trusts doctrine, whatever its basis, is an undesirable contradiction of the Wills Act and that restitution shows greater respect for the statutory policy.

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64 *Ibid*, pp. 109-110


66 Feltham, p. 248.
The paradox (a critic might say *malaise*) in the secret trusts doctrine is that despite the enforcement of the trust the judiciary has constantly searched for ancillary rules with which to constrain the encroachment on the statute. Thus the court has flirted with a standard of proof greater than that required for proof of a conventional trust, denied a half-secret trustee the opportunity to prove his (partial) beneficial interest under the secret trust and insisted for half-secret trusts that

67 Traditionally it has been assumed that the standard of proof applicable is that operative where actual fraud is alleged, requiring "clear" evidence: see *Lomax v Ripley* (1855) 3 Sm & Giff 48 at 77-78 *per* Stuart VC; *McCormick v Grogan* (1869) LR 4 HL 82 at 89 *per* Lord Hatherley LC and at and 97 *per* Lord Westbury, respectively; *Scott v Brownrigg* (1881) 9 LR Ir 246, 258 and 260 *per* Sullivan MR; *French v French* [1902] 1 IR 172, 213 *per* Walker LJ (evidence "such as to leave no doubt [... in the mind of the tribunal"]). This was a misconception: as chapter 7 shows, secret trust fraud does not depend on deceit. Subsequently in *Ottaway v Norman* [1972] 1 Ch 698, 712B-C Brightman J considered the standard of proof equated to the standard the court required before it rectifies a written instrument. The comparison implies that the secret trust is imposed in order to enforce the informal testamentary intentions of the testator, just as rectification of a will gives effect to the 'true' intentions of the deceased, notwithstanding their omission from the will as executed. If, as this thesis maintains, the secret trust imposed by the court for fraud is a trust imposed for breach of promise after the will has taken effect, it is comparable to a constructive trust imposed for breach of fiduciary duty - for example, in retaining an unauthorised profit - where the usual civil standard of proof applies. Megarry VC in *Re Snowden* [1979] 1 Ch 528, 535D was therefore right to doubt the analogy with rectification and apply the ordinary civil standard.

68 See chapter 1, n. 28. The rule insisting that the half-secret trustee can take only to the extent that his beneficial interest is declared in the will treats the half-secret trust *pro tanto* as a testamentary disposition to be subjected to the Wills Act formalities, for if it were genuinely *inter vivos* proof of the trustee's beneficial interest would not be subject to any formality requirement other than s. 53(1)(b) of the Law of Property Act. Kiralfy, commenting on *Re Rees*, rightly identifies secret trusts as exposing the testator to the danger of making a gift which he may not have intended: see A. K. R. Kiralfy, (1950) 14 Conv (NS) 74. The insistence on disclosure of the trustee's equitable interest in the will is merely an effort to restore the evidential security that a will provides.
communication be made no later than the time of executing the will.\textsuperscript{69} This is a retarded recognition that the secret trust is illegitimate, for if it were no more than an \textit{inter vivos} trust or otherwise immune from the chastising hand of the Wills Act there would be no justification for burdening the secret trust with special rules inapplicable to ordinary express trusts. The imposition of restrictions is simply an attempt to re-introduce the protection which the statutory requirement of formality would have provided. This is particularly evident in respect of the early communication rule for half-secret trusts. The prevention of communication after execution by limiting the field of time in which communication may have occurred restricts the period through which interested parties and a court pronouncing on the matter must trawl in the hunt for evidence of communication of the trust. This limitation of relevant extrinsic evidence partially substitutes for the channeling function of section 9 which in the case of a formal declaration of trust would have restricted the focus on transactions after the date of the will to any validly executed codicil.

\textbf{Conclusion}

3.37 A review of the functions of the Wills Act has shown that a secret trust does not contain the same evidential, cautionary and other protections for the testator and third parties which the Act affords. The enforcement of the secret trust in favour of

the intended beneficiary cannot be justified as excepted from the Act on a purposive
construction and enforcement under the general law after the Act applies equally
frustrates the legislative object.

3.38 We have also seen that the policy of the Wills Act has been wrongly subordinated to
indulging the testator's desire for secrecy. In facilitating secrecy through the
medium of informality, the solution of the current law approximates to a medieval
physician's bloodletting which treats the illness by weakening the constitution of
the system. This indirect mode of appeasing the desire for secrecy opens up the door
to informal testamentary trusts where informality itself and not secrecy was the
testator's ambition. By this means the sound policy of the Wills Act is needlessly
undermined.
CHAPTER 4: A NEW APPROACH TO SECRET TRUSTS

Introduction

4.1 In the previous chapter it was established that according to the policy of the Wills Act, the enforcement of the secret trust is not justified. In this chapter we turn to other justifications for the enforcement of secret trust which either ‘trump’ the Wills Act or locate the trust outside the reach of the Act. The two dominant (and alternative) explanations - the fraud theory and the dehors the will theory - are outlined by way of introduction to the detailed analysis in chapters 6-9. From these chapters it will emerge that equitable intervention in respect of testamentary secret trusts is justified on the basis of fraud, but, contrary to historical thinking, this does not justify enforcement of the trust in favour of the intended secret beneficiary. It will also be shown - again contrary to assumed orthodoxy - that this does not mean that the testator’s ambitions must automatically fail. This chapter seeks to set out a new approach to secret trusts which aims to balance securely the conflicting demands of Wills Act policy and protection of the testator. This new model of secret trusts forms a critical point of reference for later discussion of the fraud and dehors the will theories.

An outline of the fraud and dehors the will theories of secret trusts

The dehors the will theory

4.2 Since both the terms and spirit of the Wills Act appear to embrace the secret trust, its enforcement falls to be justified as a transaction undisturbed by or else resurrected after the Wills Act. This might be because the secret trust is only apparently a testamentary disposition of the deceased, not so as a matter of
substance, and therefore it is outside the Act. This is the dehors the will theory - the notion that an inter vivos trust is created.¹ The constitution of the trust by the will, it is urged, does not convert the trust into a testamentary one. Another form of this theory treats the trust as a non-testamentary disposition on the basis that it is in fact a disposition of property belonging to the legatee, taking effect as an inter vivos disposition after the will has operated. This theory has potentially wide explanatory power if it is sound, but it will be established in chapter 6 that the testamentary character of the secret trust is inescapable.

Fraud theory

4.3 As an alternative explanation to the dehors the will theory, accepting that the secret trust is testamentary, enforcement may be justified because the refusal of the legatee to perform the secret trust would amount to equitable fraud (the fraud theory). The fraud principle might operate either as an aspect of statutory interpretation, finding an implied exception in the Wills Act for the secret trust on a purposive statutory construction, or it might constitute a supplementary legal rule operating after the statute has applied in order to ameliorate an untoward outcome and thus implying by operation of law an equitable burden on the title taken by the legatee in accord with the statute. We have already noted, however, that presumptively the enforcement of a testamentary trust in favour of the testator's nominee regardless of doctrinal reason is a contradiction and not a promotion of the Wills Act policy.

4.4 The problematic issues for the fraud theory are the identification of the type of fraud involved and the related matter of the form of relief which equity should grant to

¹ Supporting this theory, see A. J. Oakley, Constructive Trusts (London: Sweet & Maxwell, 1997), p. 253
prevent or remedy the fraud. In chapter 7 it will be seen that fraud in its strongest sense of deceit is not the type which operates in the secret trusts doctrine, but the exact nature of the constructive fraud has been fiercely debated. One notion of fraud, endorsed with qualifications in this thesis, is that the fraud is "personal"; that is, it lies in reneging on the secret promise for the personal gain of the trustee. As an explanation of the current law of secret trusts, however, it leaves unanswered the question why the trust is enforced in favour of the secret beneficiary. If a trust is enforced in order to prevent the trustee's personal gain, it suffices if a restitutionary trust is imposed in favour of the testator's estate since this is all that is necessary to achieve the goal of depriving the trustee of the beneficial interest. Moreover, no intervention to prevent personal gain by the legatee is required where a half-secret trust is created; according to the will the legatee takes as trustee and this formally valid imposition of trusteeship deprives the legatee of beneficial enjoyment. Conversely, a merely restorative constructive trust imposed on a fully-secret trustee is easily reconciled with the Wills Act; the trust arising to prevent fraud will operate outside the Wills Act because it does not effect the testator's informal testamentary intention to benefit his nominee.

4.5 The contested question is therefore whether fraud can be understood as applying in some wider and more interventionist sense, so that it justifies enforcing, against the literal terms of the Wills Act, the testator's informal testamentary disposition. In chapter 9 it will be argued that a wider meaning of fraud and equitable redress in favour of the secret beneficiary are not justified. The argument to be maintained here is that a legitimate policy of preventing personal fraud does justify intervention

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3 Everton, p. 28; Ashburner, p. 101.
by equity in respect of an agreed trust not complying with the Wills Act formalities, but that intervention to redress this fraud in the manner of the current law exceeds the bounds of that justification. Fraud may become operative where a secret trust is created; it does not occur automatically and it does not have the effect of vesting an equitable interest in the testator’s secret nominee. The remainder of this chapter introduces the reader to the new ‘model’ of secret trust law adopted here and supported in the ensuing chapters.

**The relationship between the fraud and dehors the will theories**

4.6 If the secret trust is a testamentary disposition, then fraud is essential to its enforcement; without fraud there is nothing to save the informal trust from the full nullifying force of the Wills Act. Conversely, if the secret trust is not testamentary, all reference to the principle of fraud is entirely superfluous since an *inter vivos* trust is unaffected by the Act. The fraud and the dehors the will theories thus stand as mutually exclusive explanations of the compatibility of secret trusts with section 9.

4.7 To justify the secret trust by reference to both theories therefore involves a contradiction. Moreover, if the half-secret trust is not testamentary, then the fully-secret trust must be so too: it is the nature of the secret agreement, not the contents of the will, which make the agreement an *inter vivos* transaction. It is therefore difficult to see how it can be argued that the half-secret trust is not testamentary

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4 An exception would be where the secret trust concerned land but was not evidenced by writing signed by the testator. It could then be argued that the trust is *inter vivos, dehors* the will, but can only be enforced under the fraud principle because it would otherwise founder on the formality for declaring an *inter vivos* trust contained in the Law of Property Act 1925, s. 53(1)(b).
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while the fully-secret trust is enforced to prevent fraud. Logically the fully-secret trust should be treated as not testamentary too and (save in regard to formalities for an inter vivos trust of land) fraud should be irrelevant.  

The jurisprudential basis of equitable intervention

A new model of secret trusts

4.8 The new model of secret trusts mooted here may be briefly stated. Where the deceased in his lifetime has obtained the acquiescence in a secret trust of a bequest of a legatee taking beneficially on the face of the will (or the agreement of the next of kin in the corresponding case of intestate succession), the legatee (or next of kin) takes their inheritance beneficially and free of the secret trust, but comes under an equitable obligation to make restitution to the extent that the secret trust is not executed.

4.9 The rationale for this proposition may be broken down into the following component assumptions. Firstly, the secret trust is testamentary and void under the Wills Act. Secondly, since the secret trust (qua informal express trust) has no validity, the will takes effect according to its tenor: a fully-secret trustee is absolutely entitled; a half-secret trustee is a trustee for unascertainable objects. Thirdly, there is no fraud committed by the fully-secret trustee in procuring his legacy. There is therefore no reason to deprive him of his legacy at the time the testator dies and the will takes effect. Fourthly, it will be fraud for the legatee who has acquiesced in the creation of a secret trust for the benefit of a third party to

5 See preceding note.
retain the legacy for his own benefit. Fifthly, this fraud is committed against the
testator’s estate, not the secret beneficiary: it is the residuary legatee (or next of kin)
who has a contingent claim to restitution. Since the trustee cannot profit from the
secret trust, he must either shun fraud and perform the secret trust or commit fraud
and come under a constructive trust obligation to return the legacy. Sixthly, any
trust imposed on the legatee on the ground of his fraud in purported
misappropriation of the beneficial interest is not a testamentary one. This is because
the trust is created by operation of law on the fraudulent act of the legatee occurring
at an indeterminate time after - not when - the will takes effect.

4.10 Before turning to the political justification for this approach to secret trusts, it may
be helpful to note how it departs from the current law in several fundamental
regards. There is no automatic trust arising on the testator’s death in favour of the
beneficiary of a fully-secret trust. Indeed no trust in favour of the testator’s secret
nominee ever arises, even if the fully-secret trust is duly performed, unless the
legatee declares a trust of his inheritance after the will has taken effect. The secret
trust agreement never gives rise to any automatic trust - only a trust contingent on
default in an unenforceable *de facto* obligation to execute the secret trust. Moreover,
the contingent trust implied by law to defeat the legatee’s fraud takes effect as a
restorative rather than performative constructive trust, moving the benefit of the
legacy back to the testator and not forward to its intended destination. Secondly, a
half-secret trust automatically gives rise to a resulting trust. There is here no scope
for the legatee to perform the secret trust since the will deprives him of the
necessary beneficial interest which vests by operation of law in the testator’s estate.

The character of fraud in the new approach: wrongful retention of property

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4.11 A full justification for adopting the concept of fraud adopted here and criticism of other fraud concepts must await fuller treatment in chapters 7-9. However, precisely because this notion of fraud pervades later treatment of the new approach to secret trusts, it is necessary to explain the concept of fraud adopted in this thesis, to defend it jurisprudentially and to suggest its distinctive ramifications.

4.12 Fraud in equity has a plethora of meanings, but in identifying the class of fraud relevant to secret trusts, a suitable starting point is the conventional distinction - expressed here by Bogert - between fraud in its narrowest and morally most reprehensible sense (actual fraud) and fraud in all other ‘weaker’ senses (constructive frauds):

It may mean misrepresentation which would give ground for an action for deceit. It may imply the acquisition of property by some other types of wrongdoing or by any type of inequitable conduct.\(^7\)

Deceit by a legatee need not be demonstrated for the court to enforce a secret trust.\(^8\)

The relevant fraud is in the spirit of the second of Bogert’s senses: an acquisition of property by other inequitable conduct. It is fraud by reason of some act which is less heinously unconscionable than the “highly unethical conduct”\(^9\) which is involved in an intentional misrepresentation. Although it may appear a debasement of the fraud concept to align it with mere unconscionability, so that the former is absorbed into

\(^{116, 120-121.}\)


\(^8\) See paras 7.26-7.29.

\(^9\) Bogert and Bogert, § 473.
the generality of the latter and loses its stigmatic quality, it is settled that fraud embraces lesser breaches of moral duty.\textsuperscript{10} It is this weaker sense of fraud which underlies equitable intervention in respect of the testamentary secret trust.

4.13 Bogert identifies the acquisition of property as an element of fraud in this weaker sense. It is not mere inequitable conduct which constitutes fraud: it is only inequitable conduct (substituting for the fraudulent misrepresentation in deceit) which procures the acquisition of property. One could be forgiven for assuming that any account of the fraud-based constructive trust within the secret trusts doctrine must involve this combination of elements: unconscionability and the acquisition of property.

\textit{Fraud in acquisition}

4.14 Given this broader concept of fraud constituted by unconscionably acquiring property, an explanation of current secret trust law seems readily to present itself. It need only be shown that the gift in favour of the legatee is induced unconscionably. Since deceit is not an essential ingredient of a valid secret trust claim, it must be shown that there has been some other mode of unconscionable inducement; but if such can be established, it will be irrelevant whether the legatee after the testator’s death intends to perform the secret trust or to keep the property beneficially, since the fraud occurs at the time of acquisition.

4.15 It will be equally immaterial whether the legatee takes beneficially or not. Admittedly, the beneficial interest never vests in the trustee, because the will

\textsuperscript{10} \textit{Peek v Derry} (1887) 37 Ch D 541, 582 \textit{per} Sir James Hannen (although his particular contention that \textit{common law} fraud extended to mere careless misrepresentation did not
imposes trusteeship, and the only interest he acquires is a bare legal interest. A secret trust in favour of the intended beneficiary can be enforced only by subjugating to the terms of the informal trust (and thus expropriating) the beneficial interest of the residuary legatee or next of kin which results in default of formal expression of the trust terms in the will. The justification assumed here is that the beneficiary under the resulting trust, if such were implied, would profit from the trustee's fraud. The trustee has obtained property on trust and the testator's estate has acquired a beneficial interest. It should not matter that the (resulting) trust induced was not the (express) one which the testator intended: the legatee has caused the semi-secret trusteeship and it is only by reason of this that the residuary legatee or next of kin is entitled to enjoy the beneficial interest. All that matters, therefore, is that the legatee's unconscionable conduct has caused the gift to be made, regardless of whether trusteeship is stated in the will. The attraction of this analysis is that it purports to explain the enforcement of the half-secret as well as the fully-secret trust.

4.16 The weakness of the argument lies in its dependence on an acquisition of property at the moment of the testator's death. It is necessary to explain how (in the absence of misrepresentation) the gift is induced unconscionably by the legatee's conduct prior to the testator's death. The gift is induced by the legatee's active or passive promise

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11 This is based on the principle known as the rule in *Huguenin v Baseley* (1807) 14 Ves Jun 273. The plaintiff was held entitled to set aside a settlement induced by undue influence even as against volunteers taking under the settlement who were not parties to the defendant's wrong. Lord Eldon LC held that it was competent for a court of equity to take away from third parties benefits which they derive from the fraud or undue influence of others: *ibid*, 289. For consideration of the same principle where fraud procured a will, see *Roberts v Wynn* (1663-64) 1 Chan Rep 236 at 238-239 (Lord Clarendon LC), where the application failed but seemingly only because the will had to be set aside in a common law court.
to observe the secret trust, but the mere giving of a promise is not inherently unconscionable. To pledge oneself is an honourable act and the act of promising is the creation of a relationship with the testator, not the abuse of one. Of course, breach of promise may be unconscionable, but that cannot avail here because acquisition precedes the breach of promise. The unconscionable breach of promise does not cause acquisition.¹²

_Fraud as retention in breach of promise_

4.17 The failure of this first argument does not necessitate the complete abandonment of a fraud-based justification for equitable intervention in the domain of testamentary secret trusts. What is required is merely a re-interpretation of the constituent elements of the fraud defined in terms of the unconscionable acquisition of property.

4.18 'Acquisition' need not be construed too literally. What is morally objectionable here - what prompts a universal sense of outrage in the legal mind - is the notion that the donee can wrongfully enjoy the procured gift. (It may be a more open question whether the deprivation of the intended beneficiary offends the common sense of justice.) The single moment of acquisition, the instant of time when a right in the administration of the estate is obtained or the later transfer of title by vesting, is of interest only because the acquisition of proprietary right is a _sine qua non_ for

¹² It is for this reason that any attempt to invoke the rule in _Huguenin v Baseley_ in order to found or re-cast the rules governing when an ignorant legatee will be bound by the acceptance of the secret trust by a co-owner is entirely misplaced, unless the co-owner induced the secret trust by deceit. _Contra_ Turner VC in _Russell v Jackson_ (1852) 10 Hare 204 at 212; Ashburner, pp. 99-100; _Kerr on the Law of Fraud and Mistake_, 7th edn by Denis Lane McDonnell and John George Monroe (London: Sweet & Maxwell, 1952), p. 435; Bryn Perrins, “Can You Keep Half a Secret?”, (1972) 88 LQR 225.
wrongful enjoyment. Out of the acquisition of dominion over the property comes the right of the owner to control, exploit and dissipate the property. The real concern is this dominion over the property for which acquisition, in its strict and narrow sense, is a mere preliminary and, as a definition of ‘enrichment’, a proxy. The gift must certainly be obtained and the wrongdoer’s conduct must be a causative factor in inducing the gift; but the ultimate concern is not wrongful procuration - it is enjoyment which, given the prior circumstances which induced the gift, would take on a wrongful character.

4.19 Fraud may provide an effective basis for equitable intervention if we are not limited to wrongs in procurement and can establish instead a wrong which involves taking advantage of that which has been properly obtained. It has long been accepted that the constructive trust is not limited to cases of acquisition of property by actual fraud and other impropriety; it extends to cases where property “has been fairly and properly acquired, but it is contrary to some principle of equity that it should be retained by the party in whom it is vested, at least for his own benefit”.\(^{13}\) It may remedy fraudulent retention of property as much as fraudulent acquisition.\(^{14}\) It is this sort of constructive trust which is operative in the secret trust context. Fraud lies in the unconscionable retention of the legacy. The element of unconscionability is established because (i) the gift was induced by the legatee’s promise and (ii) the promise has not been kept. Breach of promise is thus not the only element of fraud,

\(^{13}\) George Spence, *The Equitable Jurisdiction of the Court of Chancery* (London: V & R Stevens and Norton, 1846), vol. I, p. 510. In this latter category Spence gives the example of a fiduciary’s secret profit, but this may be seen as a case of improper acquisition - the unauthorised exploitation of a fiduciary office.

but merely one of several necessary ingredients. There must be (a) a promise, (b) a gift induced thereby, (c) a breach of promise and (d) a retention of the gift.

4.20 Beneficial retention of the secret trust property should not to be treated too literally. Too narrow an understanding of enrichment has led commentators into a premature abandonment of personal fraud as a justification for enforcing secret trusts. The requirement that the legatee retain the property for himself, as an essential ingredient of fraud, is fulfilled whenever the legatee treats the property which has been left to him as if it were beneficially his own. There is no necessity that the legatee should *personally* enjoy the property. Permitting another to make use of the property is itself an act of proprietorship, since an authority to licence the user is assumed by the licensor. Similarly, where the legatee disposes of the bequest, whether to a collusive associate of his own choosing or altruistically for the benefit of some nominated charity, there is an assumption of an entitlement to deal with the property in that manner. These are modes of exploiting the beneficial interest in the property as much as personal consumption by the legatee. Retention, in the sense employed here, extends to any appropriation of the substantive benefit of the property after acquiring formal rights to it.

*Unjust enrichment of the fully-secret trustee*

4.21 The wide concept of retention urged here is consistent with a sound understanding of enrichment. A legatee who disposes of the property enriches himself because in the act of disposition, treating the property as his own to give away, he extends his

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15 For examples of where disposition by the trustee is seen as falling outside fraud in the sense of advantage to the trustee, see: Gardner, p. 83; Todd, p. 203.
patrimonie for an instant so as to embrace the gifted property.16 This suggests that the same approach to secret trusts may be reached by establishing an unjust enrichment. While this may not yet constitute a general doctrine of English law, it is certainly one strand of the principles underpinning some constructive trusts.17 An analysis in terms of constructive fraud may simply reduce to a statement of the principle of unjust enrichment in morally-charged tones.18

4.22 American scholars have already made this jurisprudential transfer. The consensual view is that except in cases of trusts induced by deceit equity should impose a trust to prevent unjust enrichment by the fully-secret trustee in retaining the legacy in violation of his promise, and that this should be in favour of the testator's estate.19 From our policy analysis of the Wills Act, the latter can be accepted if the first

16 A fortiori if the disposition is by way of sale for valuable consideration.
18 Cf. Romilly MR's definition of fraud in Green v Nixon (1857) 23 Beav 530 at 535 as implying "a wilful act on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled to." That case, however, concerned an alleged actual fraud and Romilly MR expressed disapprobation for the term "constructive fraud".
proposition is established. On the other hand, Hayton has suggested that the English secret trusts doctrine - which enforces a performative solution - can equally be explained in terms of a constructive trust remedying unjust enrichment. Clearly there is nothing axiomatic about the outcome when applying the principles of unjust enrichment. The doctrine in its abstract form does not denote who as beneficiary has the best claim to the disgorged enrichment of the legatee, and as a rationale for trust law principles it may justify either restitution or a performative solution, depending on the specific trust law context. The following examination of the elements of the doctrine seeks to show that the proper solution in fact lies between these two extremes.

4.23 The basic structure of unjust enrichment requires three conditions to be satisfied: (i) there must be an enrichment by receipt of a benefit, (ii) the enrichment must be at the claimant's expense and (iii) it must be unjust to allow the enriched party to retain the benefit. The equation with constructive fraud is complete, however, since the elements of unjust enrichment soon resolve themselves into the questions which have just taxed us under a different terminology. In justifying the enforcement of the secret trust, the problem becomes one of showing an enrichment at the expense of the secret beneficiary rather than the testator who has made the legacy. The problem is aggravated in the half-secret trust scenario where there is no apparent enrichment of the trustee because he takes no beneficial interest in the legacy.


21 See Ames, "Law and Morals", pp. 107-108, giving the enforcement of express trusts in favour of the intended cestui que trust as an example of the latter.
4.24 In the fully-secret trust scenario, enrichment is unproblematic: the legatee takes the entire beneficial interest in the property in accordance with the will. If the other elements of the doctrine can be made out, which we can leave open for the moment, the entitlement of the secret beneficiary may be rationalised. It is less easy to subsume the half-secret case within the doctrine, since the beneficial interest would vest not in the trustee but on resulting trust principles in the testator's estate. The temptation is to resort to an argument comparable to that aired already in the fraud context: the testator's successor, taking under the resulting trust, would be unjustly enriched at the secret beneficiary's expense. The relevant enrichment therefore is not that of the trustee but of the residuary legatee or next of kin. This only moves the problem one stage on, because it cannot be shown that the enrichment of the testator's estate (whether or not at the secret beneficiary's expense) is unjust. While supporting the doctrine as an explanation for the enforcement of testamentary secret trusts, Hayton in his discussion of *inter vivos* secret trusts provides the very reason why the secret beneficiary's claim should fail. By neglecting the formality of section 9 for the declaration of trust the testator has made no perfect gift in favour of the secret beneficiary. The residuary legatee or next of kin, as successor to the testator's rights, cannot be compelled to perfect this imperfect gift. The testator never irreversibly committed himself *vis-a-vis* the secret beneficiary to making his intended gift and his successors cannot be deprived of the right to decline to

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23 See Hayton, "Constructive Trusts: Is the Remedy of Unjust Enrichment a Satisfactory Approach?", p. 220. Hayton fails to see that the testamentary secret trusts, properly treated, are equally cases of imperfect gift. See n. 27 below.
complete a voluntary disposition which has failed. The imperfect gift thus provides a positive juristic reason for the equitable interest taken by the testator’s estate under the resulting trust and justifies the enrichment.

4.25 This has a wider significance, however, since the problem in the fully-secret trust scenario is that so far as an enrichment of the legatee is unjust it is unjust primarily at the expense of the testator. Even if the enrichment may be said to be coincidentally at the expense of the secret beneficiary, the enforcement of the secret trust can be justified in preference to a restitutionary trust only if it is legitimate to exclude the presumptive rights of the testator’s estate in favour of the secret beneficiary. To that end reliance may be placed on the same argument that the enrichment of the residuary legatee or next of kin under a restitutionary trust is unjust and at the expense of the secret beneficiary. The argument only has to be stated for its evident weakness to become apparent; it confronts an identical difficulty. There is no enrichment of the testator’s estate under a restitutionary trust to prevent unjust enrichment (or, it might added, constructive fraud, if the claim is phrased in those terms). The enrichment is justified by reference to the legitimate claim of the estate for restitution. It is reparation for the wrong done.

Subtraction from the claimant

4.26 The unjustified enrichment must be at the expense of somebody with a better claim to the property than the property holder.24 As the preceding paragraphs have already suggested, the chief difficulty which stands in the way of unjust enrichment as a rationalisation of the current law is the problem of showing how the enrichment of the legatee is primarily at the expense of the secret beneficiary. It must be shown

firstly that the secret beneficiary has a claim and secondly it must be better than the claim of the testator's estate.

4.27 If the claim against the legatee is conceived in terms of fraud, then resolution of the argument as to who must benefit when a trust is implied depends on a true understanding of the nature of the fraud committed by the legatee and the identity of the victim - whether it is a fraud on the intended secret trust beneficiary, or merely on the estate from which the legatee received the gift. These issues are pursued in chapter 9 in the context of the secret trusts case law, but the features of the debate remain the same if the wrong inflicted by the legatee is conceived in terms of unjust enrichment and the conclusion of that debate may be stated here.

4.28 The position taken in this thesis is that the estate of the testator has a claim superior to any of the intended beneficiary. The primary wrong is on the testator: it is the testator who is the promisee and who relies on the secret trust promise of the legatee in making the bequest. The legatee enriches himself at the testator's expense because it is the testator's property which he acquires. The secret beneficiary, in contrast, is a mere volunteer, asserting an interest under a trust never formally declared and never validly constituted.

4.29 This does not neglect the point that the beneficiary may be said to experience loss.\(^25\) The intended beneficiary suffers an expectation loss in the form of a beneficial interest forgone because of failure by the legatee to honour the informal trust. By his breach of promise to the testator, the legatee appropriates to himself the property which the testator had informally directed should have gone to the intended beneficiary. In one sense, therefore, the legatee has enriched himself at the expense

\(^{25}\) *Contra* Waters, p. 58.
of the secret beneficiary. However, the loss suffered by the testator - a reliance loss of actual property gifted out of his patrimonie - is of a more significant order than the mere expectation loss of the secret beneficiary.\(^{26}\) If the secret beneficiary can be said to be a collateral victim of the legatee’s wrong, it is in the character of a less injured victim. In the event of fraud or unjust enrichment it is the testator’s estate which should have the prior claim to the property bequeathed to the legatee. The claim of the estate cannot be subordinated to the lesser claim of the secret beneficiary.

4.30 As was hinted earlier, the fact that the testator informally intended the secret beneficiary to enjoy the bequest does not assist. Precisely because the testator’s intention was not in solemn form, his voluntary intention to benefit his nominee cannot be binding on him, a point which may easily be overlooked in this debate.\(^{27}\) The testator has certainly and irrevocably granted to the legatee the permission to dispose of the property in the agreed manner: the gift to the legatee is contained in the will and the testator is bound by his formal disposition. He can be held to his informal instruction because it is only a breach of it which justifies a claim of fraud or unjust enrichment and triggers equitable intervention. As between himself and the secret beneficiary, in contrast, the secret trust cannot bind the testator: there has been no formal disposition in the beneficiary’s favour. To bind the testator in the absence of formality would frustrate the cautionary function which the Wills Act


\(^{27}\) See, for example, Hayton, “Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?”, pp. 219-220, treating the fact that the testator died happy with his secret arrangement for the legatee to benefit his nominee as signifying that the property was “definitively” intended by him for the secret beneficiary and failing to see the imperfect nature of the gift.
formality is intended to perform. In the event of fraud or unjust enrichment, it remains open to the testator's personal representatives, on behalf of his estate and in exercise of his rights to which they succeed, to seek on behalf of the residuary legatee or next of kin a restitution of the bequest to the prejudice of the intended beneficiary.

4.31 Performance of the trust involves a deprivation from the testator's estate of the right to redress for the fraud effected on the testator. Admittedly the testator has manifested informally an intention that the property should be applied for the purposes of the secret trust. That intention might be set up by the legatee to frustrate the claim for a restorative trust: the legatee may plead and perform the trust as a means of denying any fraud which would justify restitution. Yet it is difficult to see why, when the legatee declines to perform the secret trust, the testator's estate should be prevented from claiming the property as against the intended beneficiaries merely because of an intention to benefit them which was never made formal. As we have already noted, to bind the testator's estate to the informally manifested intention in that manner is to strip from the testator the cautionary protection which the Wills Act formality is there to provide.

*Unjust retention: the element of unconscionability*

4.32 Within the framework of unjust enrichment it will not suffice that the legatee has been bequeathed property which he retains beneficially for himself, even though it was informally intended by the testator for the benefit of another. The enrichment must be shown to be unjust or, in the language of equitable fraud, retention of the benefit must be defective in terms of a free conscience. Furthermore, that element of absence of justification or unconscionability must be established at the time of the enrichment. This need not limit us to the moment of acquisition. Since retention of
benefit constitutes the enrichment, the question of whether justification is absent or unconscionability present falls to be decided after the will has taken effect and has vested in the legatee a right to due administration of the estate leading, ultimately, to substantive title to the bequest. Events before and after acquisition may combine to establish the unconscionability of retention. This emerges if we postulate the case where a testator has not in his lifetime communicated the secret trust to the legatee, but has left a note for him to be read after the will has come into effect. The absence of effective communication excludes the application of the secret trusts doctrine and likewise excludes unjust enrichment. By itself the existence of the informal trust provides an insufficient reason for disgorgement by a legatee taking beneficially according to the will and refusing to perform the informal trust: the trust is void and imposes no equitable burden on the legatee's enjoyment. In moral terms the property is acquired defectively since the testator did not intend to benefit the legatee personally but to use him as an intermediary for another. Nonetheless the legatee retains a free conscience since at the time of acquisition he had done nothing to cause the testator to act on his private intentions. Retention of the legacy becomes unjust only where the legatee has by his conduct induced the bequest in his favour in reliance on the secret trust. The property is acquired only by reason of the legatee's secret trust promise. The conscience of the legatee is affected because by his express or tacit promise he induces a legacy which he knows or ought to have known was given only on a secret trust.

4.33 It would be tempting to conclude at this stage that unjust enrichment is established and if so the American solution seems irresistible, but demonstrating a contingent reason for the gift and a tainted conscience is an incomplete foundation for the restitution. It must also be shown that the contingency is unsatisfied and the affected conscience is outstanding. The simple way for the legatee to relieve his conscience is to perform his promise to the testator for which the bequest was made. Writing in
the context of conditions imposed expressly in a will, Swinburne formulated the principle which applies so aptly here:

It agrees with equity [...] that no man be [...] deprived of his right without his fault, and it seems that he is not in fault, but worthy to be excused, who does whatsoever lies in him for the accomplishing of that which is imposed upon him.28

The significance is that it shows there is no ground for judicial intervention where the legatee is actually carrying out the secret trust and no necessary cause for intervention when the will takes effect. The legatee may appropriate the bequest in order to fulfill the secret promise. If the equitable fraud or unjust enrichment justifies the creation of an implied trust in favour of the testator's estate, the trust cannot arise *instanter* when the will takes effect if the legatee is willing to perform his secret promise. Unconscionability can only arise where the legatee retains the trust property (including, in this wide sense, any disposition thereof) as if it were free of the obligation which he incurred to the testator. Correspondingly, the secret beneficiary has no entitlement to the legacy, but transfer to her neutralises the potential claim of the testator’s successor.

4.34 It is for this reason that the predominant view in American academic literature, that the secret trust should give rise to an automatic restorative trust for the testator’s estate, should be rejected. According to the North American model, the secret trustee cannot beneficially convey the trust property to the intended legatee.29 An

28 Fol. 131v.

29 See Austin Wakeman Scott, “Conveyances upon Trusts not Properly Declared”, p. 687; Scott and Fratcher, vol. 1A, § 55.8.
automatic resulting trust has arisen in favour of the testator’s successors which
denudes the legatee of the required beneficial interest; the secret beneficiary could
only take a bare legal title on a voluntary assignment by the trustee. According to
the model presented here, the legatee can beneficially assign to effect the testator’s
wishes, since no trust is implied in equity until such time as the trustee turns away
from his promise to the testator. The execution of the secret promise is the antithesis
of a wrongful retention of the legacy and excludes the unjust enrichment which is
essential to the generation of the implied trust.

4.35 The principles would clearly apply differently if, notwithstanding argument above,
it is supposed that the primary claimant in equitable fraud or unjust enrichment is
the secret beneficiary. A constructive trust imposed at the time of the testator’s
death can be justified if, in the event of any breach of promise, the secret
beneficiary would have a right to enforce the secret trust. Regardless of whether the
trustee would perform his informal undertaking voluntarily or only by compulsion
of court order, the secret beneficiary will in either case become entitled to the trust
legacy. An automatic constructive trust can be rationalised in these circumstances in
a manner equivalent to the constructive trust arising out of the entitlement of the
purchaser to obtain specific performance of an estate contract. Either the obligation
is performed according to the agreement or performance can be compelled; in either
scenario the transferee obtains the subject matter of the agreement and the
imposition of a constructive trust merely effects in equity an inevitable outcome.
However, the premise of this type of constructive trust remains the dubious
dominating right of the secret beneficiary to enforce the trust in the event of fraud or
unjust enrichment, a premise which is again denied in the context of fraud in
chapter 9. Without such a right in the secret beneficiary, an automatic trust is excluded and the imposition of one by operation of law must depend on the actual occurrence of fraud.

The nature of the imposed trust

4.36 The restorative trust imposed by equity to prevent the fraud or unjust enrichment of the legatee is constructive, not resulting, even though it has the effect of a resulting trust in restoring the bequest to the testator's estate. As Lord Millet has stated extrajudicially, "[T]he resulting trust is not merely a constructive trust which happens to be in favour of the person at whose expense the property was provided."\(^{31}\) A resulting trust arises because the donor did not intend the donee to acquire a beneficial interest. In contrast, in creating a secret trust, the testator does intend the beneficial interest to pass under the will. He merely intends it to advance through the trustee to the secret beneficiary beyond. The trust imposed to prevent the legatee from enjoying the fruits of his breach of secret promise is constructive and arises because in the circumstances it is unconscionable for the legatee to assert his own beneficial title in denial of the title of the intended beneficiary.

Recursive intervention

4.37 One argument against a restitutionary remedy has been that it may enable the secret trustee to take the trust property in another capacity as successor to the testator. The

\(^{30}\) For this position see Hodge, pp. 344 and 348, accepting that there is no fraud until the trustee refuses to implement his promise, but justifying an automatic trust in the intended beneficiary's favour on this basis.

\(^{31}\) Peter Millett, "Restitution and Constructive Trusts", pp. 201-202, where the distinction is explained.
next of kin who is also a residuary legatee taking on fully-secret trust or who agreed to hold his intestate inheritance on such trust may claim the legacy or inheritance in his capacity as next of kin entitled under any resulting trust of the secret trust property.\(^\text{32}\) Even amongst those who, in order to prevent the unjust enrichment of the trustee, advocate a restitutionary trust in preference to a performative trust in favour of the secret beneficiary, it has been accepted there is no theory on which the trustee may be properly deprived of their entitlement in their other capacity.\(^\text{33}\)

4.38 It is suggested that this view is misconceived. It wrongly assumes that equity's means to deny the legatee the fruits of his wrong are exhausted after a first pyrrhic victory. This narrow view may be derived from a focus on acquisition of title, when it is *retention* of the property that matters. Where the trustee would take in another capacity following the application of restitutionary principles favouring the testator's estate, fraud principles may be re-applied so as to deprive the legatee of the property which he takes in his new capacity as general successor to the testator's property. The legatee is placed in a position to perform the secret trust and the retention of the property for his own benefit will remain unconscionable. The precise mode of indirect acquisition of the property - the fact that it is re-acquired not *qua* legatee but as intestate successor, for example - is immaterial if the opportunity to re-acquire the property is derived by an unbroken chain of legal rules from the legatee's initial and wrongful failure to perform the secret trust. We can reach this conclusion on fraud principles because the wrongful element lies not in acquisition, but in retention in breach of trust having previously induced the


\(^{33}\) Austin Wakeman Scott, "Conveyances upon Trusts not Properly Declared", p. 676; Ashburner, p. 100; Scott and Fratcher, vol. IA, § 55.1. See also Waters, p. 58, where it is suggested that the restitutionary solution may be abandoned in this case in favour of a performative constructive trust.
disposition, from which (ultimately) the legatee benefits. Although not self-evident, the same conclusion can be reached in terms of unjust enrichment since the trustee’s entitlement in his other capacity as successor to the testator is only superficially a juristic reason justifying his enrichment. The trustee is only able to set up this (narrow) defence of his enrichment by reference back to his earlier unjust enrichment which the imposition of a restitutionary trust failed to prevent. His enrichment is rooted in the remedy for his own wrong and remains unjust so far as he is able to retain the property in defiance of his secret obligation. Re-intervention by equity is justified to deny the trustee the benefit of the property in his capacity of residuary legatee or next of kin. The property will thus pass to the next of kin in the former case and in the latter case to collateral next of kin taking an augmented share (where the trustee has equally entitled siblings) or to next of kin of the next degree. If this relief still confers a benefit on the trustee and he still refuses to do his duty, further re-intervention is justified to deprive the legatee of his interest in favour of others with an equal or next best claim to the estate. Iterative relief is justified until the wrongful profit is substantively disgorged.

The forfeiture example

4.39 Recursive intervention in this form to prevent a wrongdoer from obtaining a gain consequential on his wrong is not alien to English law. It is applied under the rule of public policy which precludes someone who unlawfully kills another from acquiring a benefit in consequence of intentional killing. Under the modern law,34 and subject to the court’s discretion under the Forfeiture Act 1982 to modify its application, the forfeiture rule prevents the killer from benefiting as the victim’s testate or intestate

34 Prior to the enactment of the Forfeiture Act 1870, s. 1, the forfeiture rule operated to vest the benefit acquired by the criminal in the Crown.
successor. Where the killer was the residuary legatee under the victim's will, the residuary gift will lapse. If the killer is also the victim's next of kin, he will not be entitled to take in that capacity and the property will pass to other next of kin of the same class or, as the case may be, the next class. In *Re Sigsworth* the testatrix was murdered by her son, to whom she had bequeathed her whole estate, the son afterwards committing suicide. The son was disqualified from taking under his mother's will by the forfeiture rule and Clauson J held that the son was likewise precluded from benefiting under the consequent intestacy. As Fry LJ expressed the principle in *Cleaver v Mutual Reserve Fund Life Association* (on which Clauson J relied):

> [T]he principle of public policy must be applied as often as any claim is made by the murderess, and will always form an effectual bar to any benefit which she may seek to acquire as the result of her crime.

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35 [1935] Ch 89 (Clauson J).

36 Followed in *Re Pollock* [1941] 1 Ch 219, 222 by Farwell J. See also *Re Pitts* [1931] 1 Ch 546 where Farwell J, *obiter*, endorsed the *Cleaver* principle and inclined against the view that the rule of public policy was confined to testate succession; *Re Royse* [1985] Ch 22, 26 G and 27F-G *per* Ackner LJ, *obiter* (where the victim died testate). *Contra Re Houghton* [1915] 2 Ch 173, 177-178 *per* Joyce J, *obiter*. In *Pitts and Houghton* the murderer was insane at the time he murdered his intestate victim and by virtue of his insanity he was not to be deprived of any benefit by the forfeiture rule. The legislature has envisaged that the forfeiture rule applies to intestate succession, since the discretion under the Forfeiture Act 1982 extends to intestate interests: see s. 2(4)(a)(i).

37 [1892] 1 QB 147 (Court of Appeal, reversing the Divisional Court).

38 *Ibid*, 158.
Substituting the fraud principle for the rule of public policy, and equitable wrong for the crime of murder, this metaprinciple or Grundnorm may be brought into application in the analogous secret trust context.

4.40 As the Attorney-General was not a party in Re Sigsworth, Clauson J left open there the question whether the son was merely to be 'struck out' (leaving the estate to be distributed under the intestacy rules as if he had never been born) or whether his interest should pass to the Crown as bona vacantia. However, the point could not really admit of doubt. Clauson J had placed reliance on Fry LJ’s statement of principle in Cleaver v Mutual Reserve Fund Life Association. Although the recursive application of the public policy rule was not called for in that case, it is evident from the reasoning there that the Crown could not have maintained a claim to Sigsworth’s estate. In Cleaver the deceased had entered into an insurance policy with the defendants on his own life and was later poisoned by his wife. The first plaintiff, seeking payment of the proceeds of the policy, was the assignee of such interest in the policy as the wife might have under the Married Women’s Property Act 1882; the other plaintiffs were the deceased’s executors. The fact that the first plaintiff, in view of the public policy rule, could not maintain a claim to payment under the Act was rightly not considered to provide the defendants with a defence against all possible claimants. It did not exclude the testator’s executors who were entitled on resulting trust principles consequent on failure of the wife’s interest. The rationale for this decision was that the wife’s crime did not disturb independent rights. Correspondingly, the contingent right of other or more remote interest...
next of kin to take in the event that the victim's murderer was excluded from intestate succession ought not to have rendered the estate bona vacantia: the intestacy rules should apply, disregarding the murderer.

4.41 This conclusion was reached, with significant reluctance, by Vaisey J in *Re Callaway*. Without elucidating the point (but consistent with the explanation above), Vaisey J inferred from *Cleaver* that the interest of the criminal was to pass as if it had lapsed or the criminal had been struck out. As the lapse of the criminal's interest may have an unnecessarily dramatic effect as between different third parties, it would be more accurate to say (as Vaisey J suggested) that the killer is simply disqualified as a member of the inheriting class. In that case the testatrix had bequeathed her whole estate to her daughter. The daughter killed her mother and herself, the mother either dying first or being treated as dying first according to the presumption of survivorship under section 184 of the Law of Property Act 1925. Accordingly the son, who had been entirely excluded from his mother's will, took the entire estate on an intestacy. Were it not for the trend of authority against it, Vaisey J would have personally favoured the resolution that the whole of the daughter's interest under the will should pass to the Crown as bona vacantia or alternatively, if it must pass on intestacy, that the daughter's share under

43 [1956] 1 Ch 559. For a more recent application in a case of marital manslaughter, see *Re Giles* [1972] 1 Ch 544, 553C-D (Pennycuick VC) where the property passed to the testator's child as the sole next of kin, excluding the wife under both the husband's will and the intestacy.

44 [1956] 1 Ch 559, 563.

45 For example, where a testator settles a bequest on trust for his killer for life, remainder to X, leaving his residue to Y, treating the killer's interest as lapsing will simply accelerate X's remainder interest rendering him absolute owner of the specifically bequeathed property, whereas a mere disqualification of the killer causes an interest *pur autre vie* to fall into residue in favour of Y.
the Administration of Estates Act should pass to the Crown as bona vacantia.47 In any event the conclusion which he felt compelled to reach did not appeal to him:

That the plaintiff should take the whole seems to me both illogical and unmeritorious. For why [...] should he be the person to profit by his sister’s crime and the consequent frustration of his mother’s testamentary intentions?48

4.42 The lack of merit in this outcome, however, is more apparent than real. The son as one of the next of kin had a contingent right to intestate succession, a right to future property which might have come to fruition in any of a range of circumstances prompting revocation of the mother’s will. Vaisey J’s objection may be stood on its head: why should the son be cheated of his intestate expectancy by his sister’s crime in effecting the premature demise of his mother? That alone points against the Crown’s claim to the whole estate in lieu of an intestacy. Nor, moreover, does it seem improper that the Crown is equally excluded from the daughter’s half-share on intestacy. If the events constituting the daughter’s attempt to kill her mother had taken a minor turn, so that the mother survived her daughter, even if only for a scintilla temporis, the testamentary gift to the daughter would have lapsed before the mother died and the son would have inherited all under the intestacy rules, unaffected by the rule of public policy. Why should the accident of the murderer’s accomplishment in surviving her crime give the Crown a right in priority to the contingent right of the son? Since the daughter may only have survived her mother by virtue of the statutory presumption of death in order of seniority, compelling the

46 Ibid, 564.
48 Ibid.
son to give up the estate to the Crown in this particular case would have deprived
him on the singular ground that he could not prove that which the mode of his
sister’s crime concealed. When the sole legatee in her successful bid for suicide has
taken an involuntary testator for companion, it seems an eminently just outcome to
the tragedy that the remaining next of kin should inherit all.

4.43 Vaisey’s J outburst in *Re Callaway* is intriguing, therefore, not because it is
logically well-founded, but because it reveals the same untercurrent of prejudice
which may so easily distort the focus of rules in testate succession and particularly
the secret trusts doctrine. The apparent demerit in the inheritance of one who was
deliberately excluded from the will exists only because the rhetorical question of
Vaisey J takes as its starting point the priority of the testamentary intentions. There
is a natural bias against intestate succession which Vaisey J’s airs, but in the secret
trusts context it is especially important that the bias is bounded by the notion that
only the formal will of the testator is to be upheld, so far as possible, and by
remembrance that intestacy is the law’s default for failure of formal testamentary
disposition. Vaisey J’s unwarranted disinclination to let in the son to the benefits of
an estate which had been willed away and its preference for the claim of the Crown
has its parallel in the assumption of secret trusts law that enforcement of the
informally agreed trust is preferable to throwing the estate to the next of kin, given
that in both instances the wrongdoer cannot keep the spoil. If the denial of recursive
restitutionary intervention would have been improper in *Callaway* then *a fortiori* it
should not be excluded in the secret trusts context where the will in favour of the
third party is informal and therefore cannot legitimately command the same respect
accorded to formalised testamentary intentions.

4.44 There are, moreover, two particular reasons why the analogous application of
*Sigsworth/Callaway* recursive intervention in the secret trusts context is apposite.
Firstly, it is derived, as we have seen, from Fry LJ’s statement of principle in *Cleaver*. In *Cleaver* itself Fry LJ arrived at his proposition by reasoning from the principle of public policy against *fraud*: if fraud could not found an action, then *a fortiori* a claim could not be grounded in a crime. At least where secret trusts are enforced to prevent fraud in equity, the application of *Sigsworth/Callaway* in iteratively denying to the secret trustee the benefit of his breach of trust is merely an application of the rule in its original setting, as Fry LJ saw it.

4.45 The second reason why the extension of *Sigsworth/Callaway* to the secret trust context is not out of place rests in the perceived relation of the principle to statute. In *Re Sigsworth* Clauson J affirmed a rule of construction expressed by Fry LJ in *Cleaver*, namely that the principle of public policy excluding a sane killer’s benefit on the victim’s death was to be so regarded that in the construction of statutes general words apparently including cases obnoxious to the principle were to be construed as subject to it. It is possible to relate this rule of construction to the secret trusts context, where the rule finds its counterpart in the application of the equitable maxim preventing a statute being used as an instrument of fraud. In both cases it may be argued that there is an implied exception preventing a wrongdoer from profiting by his wrong in conjunction with the absolute rights which the statute would otherwise confer.

49 [1892] 1 QB 147, 156.

50 [1935] Ch 89, 92. See also *Re Pitts* [1931] 1 Ch 546 where Farwell J, *obiter*, thought that the Administration of Estates Act was to be read as subject to the public policy rule.


52 See para. 7.4.
4.46 It should be noted, however, that in *Cleaver* this rule of construction was not actually in point. In the first place, the rule of public policy was simply not an issue at this state of the litigation, properly considered. Whether or not the wife took a beneficial interest under a trust of the insurance policy proceeds by virtue of the Married Women’s Property Act, the testator’s executors had legal title to claim the funds from the defendants and that was sufficient to dispose of the defendants’ claim that they could refuse to pay out on the policy. The rule of public policy would be relevant only at the later stage, when the funds were in the executors’ hands, in determining whether (as was the case) the wife had forfeited her interest under the statutory trust and the funds formed part of the testator’s estate. In any case, even having regard to the rule of public policy at this stage, the issue of statutory construction did not arise. The Court of Appeal held that the statutory trust under the 1882 Act subsisted only so far as the trust was unperformed, that it could not apply where performance of the trust was impossible and that it was to be treated as rendered impossible of performance where the rule of public policy deprived the wife of her interest. This was not a case of construing the Act as excepting the rule of public policy. The Act, on these terms, took full effect in creating a trust in the wife’s favour. The rule of public policy operated consequentially, determining the failure of the statutory trust and the creation of a resulting trust. Of course, this does not mean that the rule of construction was not applied in *Sigsworth* and *Callaway* in finding an implied exception in section 46 of the Administration of Estates Act 1925. However, such cases are equally explicable on the basis that a rule of common law applies in respect of benefits taken under the intestacy provisions and cedes them to those who would have taken under section 46 in the killer’s absence. That would maintain the parallel with the application in

53 See [1892] 1 QB 147 at 154 *per* Lord Esher MR and similarly at 158 *per* Fry LJ. Lopes LJ agreed with Fry LJ: *ibid*, 160
the secret trusts context of the equitable maxim against using a statute to prevent fraud as an instrument of fraud, if it is the case that the maxim operates *in personam* to impose a constructive trust on rights gained under the Wills Act (as this thesis later suggests) rather than as an exception implied in the Act.

**The implications of the new approach**

**Fully-secret trusts**

*The legatee's freedom of election*

4.47 Conventional understanding of the current law is that the trust imposed by equity arises the moment the gift under the will vests in the legatee.\(^5^4\) Under the contrasting American approach where a restitutionary outcome is achieved by the implied trust, the legatee’s beneficial interest is equally snatched away at the instant the will comes into operation. On either view there is an enforceable trust at the time of the testator’s death. In the approach to secret trusts advocated in this thesis no trust arises automatically. Since there is nothing fraudulent or unconscionable in the legatee’s secret undertaking inducing the testator’s reliance, there are no grounds for immediate equitable intervention when the legacy is acquired. If the

equity depends on enrichment by retention of the legacy in breach of promise, the fraud occurs, if at all, later, when the legatee refuses to perform his duty. Should fraud subsequently emerge, equitable relief favours the testator's estate rather than the intended beneficiary; but until then the testator's successor has only an "incipient" equity.55

4.48 It follows that on this model of secret trusts, fraud reduces to a mere possibility, a contingency depending on whether the legacy is applied for the agreed purpose. The legatee is therefore afforded a freedom to elect between two beneficial objects. While he may not retain the legacy for himself, he may either shun fraud and the potential right of the testator's estate by executing the secret trust in favour of the intended beneficiary or alternatively resist the secret beneficiary's demands, treat the property as his own to dispose of and, by asserting an entitlement against the interest of the beneficiary, commit the fraud that vests the beneficial interest in the testator's estate by operation of law.

4.49 The initial and potentially enduring absence of a trust may seem unexpected and heretical. Thus in *Ottaway v Norman*,56 responding to the argument (which he rejected) that the secret trust was enforceable only if deliberate wrongdoing by the secret trustee could be shown, Brightman J stated:

That proposition, if correct, would lead to the surprising result that if the primary donee [the trustee] faithfully observed the obligation

55 The term is invoked in Bogert and Bogert, § 499, in an analysis of *Re Boyes* (1884) 26 Ch D 531, but may be borrowed here, where its use seems apposite.

56 [1972] 1 Ch 698.
imposed on him there would not ever have been a trust at any time in
existence.57

However, the result is “surprising” only because it is counter-intuitive. The legal
intuition is that every obligation-in-fact which is fulfilled must be an obligation-in-
law cloaked by a legal duty. This is the juridical mindset that comes from
habituation with the cases of ‘failure’ and breach of duty which give rise to legal
principles and the machinery of enforcement intended to redress ‘failure’ and
prevent further or future departure from obligation. Establishment of sanction-
supported legal obligations constitutes part of the reasoned process of preventing
injustice, but misleadingly invites the abstraction that the existence of a legal
obligation is always essential to an outcome where the obligation is performed.
Instead it must be remembered that if an undertaking which in conscience ought to
be performed is performed, equitable relief was unnecessary. The sanction of a
trust obligation is only needed in precisely those cases where the obligation is not
satisfied: if the outcome is just, the tools of the law can stay in the box.

4.50 The real question is whether there is anything intrinsically wrong in legal rules
which enable the legatee to choose between performance of the trust and restitution.
An outcome of this nature has been shortly rejected from time to time, but without
explaining the objection.58 Given that a discretionary trustee, for example, might
elect between the claims of different beneficiaries, it is not unknown in equity that
the rights of rival interests should be resolved at the hands of another. Of course a
discretionary trustee is subject to legal duties of good faith and consideration when
choosing objects to benefit, while the legatee in this model of secret trusts is guided

57 Ibid, 712B
only by the moral constraint of his conscience, but it is not the absence of fiduciary obligations which has been criticised. Moreover, the legatee was the very person who was entrusted with the task of executing the secret trust. That the decision whether the trust is performed should ultimately rest on his shoulders is hardly an inappropriate or arbitrary outcome.

**Termination of elective power**

4.51 The legatee may be compelled at any time to make the election. Either the secret beneficiary or, on the other hand, the residuary legatee or next of kin, as the case may be, may make a formal or informal application to the legatee. The simplest mode of forcing an election would be to press a claim to the beneficial interest in the legacy. In the act of conceding or refusing the claim which is pressed the election is made. A refusal by the legatee to allow the secret beneficiary to enjoy the property or to transfer it to her would constitute an act of fraud and so give rise to the restorative trust in favour of the testator’s estate. On the other hand, a refusal to admit the claim of the residuary legatee or next of kin may amount, by inference from the circumstances, to a declaration of trust in favour of the secret beneficiary since the existence of a trust obligation owed to the secret beneficiary is the only ground on which the legatee may legitimately deny the fraud or unjust enrichment and refuse the claim of the estate. As a practical measure one would expect that either side might present the legatee with a draft declaration of trust setting out the terms of the secret trust. The legatee has no option but to sign or else comply with the directions of the testator’s residual successor. Alternatively, the legatee might be put to his election by the act of third parties. For example, the Inland Revenue might seek to assess the legatee to income, capital gains, inheritance tax or stamp duty liability on the trust property, according to the circumstances of the testator’s estate, the nature of the property and any subsequent dealings with it. In refuting the
revenue’s assertion that he maintains a personal interest in the beneficial enjoyment of the property, the legatee may be compelled to identify the objects of the trust on which he holds the otherwise taxable asset.

4.52 Two exceptional cases should be noted where the right to elect entirely disappears and the legatee must hold the bequest on trust for the testator’s estate ab initio. The first of these cases is where the secret trust is imposed on a residuary legatee in favour of the next of kin. Whether the legatee performs the trust or whether he refuses and commits fraud, the next of kin will be entitled. The same will be true where a specific legatee agrees to hold on trust for the residuary legatee. The reasoning has already been explained in paragraph 4.35. The second case is where the creation of the secret trust has been procured by actual fraud. The ante mortem wrong committed by the legatee in making a fraudulent misrepresentation to the testator confers on the testator an automatic right to restitution. This case is considered further in chapter 9.

Creditors and successors in title of the legatee

4.53 A further argument against the approach to secret trusts suggested here may arise from the suspicion that the absence of a trust at the time of the will renders the property vulnerable to the acquisition of rights in the property by third parties in the interval before the secret trust is performed or the legatee’s fraud triggers the restorative constructive trust. This suspicion overlooks the fact that fraud or unjust enrichment will arise whenever the legatee seeks to dispose of the inheritance, the act of disposition constituting an appropriation of the right to beneficially enjoy the legacy. The disposition to a successor in title converts the incipient equity of the testator’s estate into an actual burden on the property. The successor in title will take subject to the estate’s equity in accordance with conventional principles of the
doctrine of notice or statutory replacements of the doctrine as the case may be. Equally, if a legatee prior to accepting a secret trust covenanted for valuable consideration to transfer his expected inheritance to a covenantee, the covenantee can make no claim to the legacy when the testator dies. Though the competing equity might be older, it will not be equal; the covenantee can take only the precarious beneficial interest of the legatee which is extinguished in favour of the testator’s estate. Moreover, there is no obvious reason why involuntary dispositions should be treated any differently - for example, where all the property of the legatee vests in a trustee in bankruptcy.59 A creditor proving in the bankruptcy or levying execution against the legatee’s property cannot be in any better position than the secret trustee. As they claim through the legatee, the only rights creditors can acquire or enjoy are the rights in the property which the legatee would have been able to vest in them beneficially. The beneficial interest of the legatee in the property endures only until fraud is committed since it was given and is tolerated only for the purpose of enabling the legatee to perform the secret trust. It may be likened to a form of determinable interest under a protective trust.60 It follows that successors in title and creditors acquiring an interest in the property should be subject to the same limitation as bound the secret trustee. To lay claim to the beneficial interest in the property they must found themselves in the legatee’s fraud - his right to keep the property for himself in defiance of his secret trust undertaking.

Half-secret trusts

59 Insolvency Act 1986, s. 306(1).
60 Compare the trust of income set out in the Trustee Act 1925, s. 33(1)(i).
4.54 As was indicated earlier, the half-secret trust scenario cannot be treated in the same manner as the fully-secret trust. The model of secret trusts and the power of election outlined above depend on the legatee taking the property beneficially under the will. It is only where the legatee is apparently entitled to the equitable interest that he is placed by the testator in a position to perform the secret trust. In a half-secret trust the legatee takes the legacy denuded of its beneficial interest; he owns nothing which can be subjected to a fraud-based constructive trust. Where trusteeship is imposed by the will, the half-secret trustee must hold on a resulting trust for the testator's estate due to the failure of objects in the will. The legatee cannot move the property on to the secret beneficiary because he never owns the trust property beneficially and is therefore never able to dispose of it freely. Lacking beneficial ownership, the half-secret trustee may only dispose of the property in accord with the trust imposed by the will. His entitlement to hold and dispose of the property are governed entirely by the resulting trust.

4.55 It may appear hard on the testator that the insertion of trusteeship into the will should inevitably frustrate his secret intentions. The formal bare statement of trust in the will does not just bind the trustees, denuding them of beneficial enjoyment and thus the ability to hold for the intended third party. It also binds the testator. This is merely the reverse side of the facilitative function which the will performs. If a testator chooses to make use of the Wills Act formality to give effect to his testamentary dispositions he must accept that his estate will be governed by his choice as to what he includes and what he omits. Whatever the testator seeks to accomplish by means of informal transactions must be subject to and work within the formal declaration of his intentions which he has chosen to superimpose and for which he has called upon the due application of legal principles. The only basis for disrupting the workings of the testator's formally declared intentions are to prevent a donee from exploiting any advantage accruing from failure to formalise secret
intentions. Once a trust is declared in the will, the potential for fraud (as understood in this thesis) disappears and the reason for equity to look to the informal intentions disappears with it. The testator's informal will is simply obliterated by the primacy of his formal will.

4.56 We have already noted that the argument that the estate is itself unjustly enriched or profits from a fraud does not assist the secret beneficiary. There can be no fraud by the legatee where he is restrained by law and not by choice to hold the bequest on resulting trust and retention of the benefits of the resulting trust are justified by the failure of the imperfect gift of the beneficial interest in the secret trust.

4.57 In one special case, however, the intentions of a testator creating a half-secret trust are not doomed to automatic failure. Where the half-secret trustee takes a beneficial interest under the resulting trust in some other capacity, the principle of recursive equitable intervention can apply. The acquisition of a beneficial interest by the trustee, derived in consequence of his inducing the testator to create the half-secret trust, when coupled with his promise to perform the secret trust brings into operation the principles relevant to a fully-secret trust. If the trustee has pledged himself to perform a secret trust, he cannot escape that obligation merely because the testator had imposed trusteeship by the will and thereby caused the trustee to take the beneficial interest not in the capacity of a specific legatee in the will but as a residuary legatee or, where a residuary bequest has failed, as next of kin. By a roundabout way the testator has effected what the legatee induced: a beneficial disposition of the secret trust property.

*Post-mortem* communication of the terms of an accepted secret trust
4.58 The fundamental difference between the current law and the new approach to secret trusts advocated here may be best illustrated by considering the case where the existence of a secret trust is duly communicated to a legatee who agrees to his trust office, but the terms of the secret trust are never communicated during the testator’s lifetime and emerge only after the testator’s death, usually because a memorandum of the secret trust has been left by the testator with his will. It is one instance where the approach to secret trusts in this thesis provides for an outcome which, while consistent with the Wills Act, is more in harmony with the testator’s intentions.

Fully-secret trusts

4.59 In Re Boyes the testator left all his property to his solicitor, the defendant, absolutely. He had previously instructed the defendant to take the property on trust to deal with it according to further directions to be given by letter shortly thereafter. No directions were given, although two signed unattested letters were found among the testator’s papers after his death, instructing the solicitor to keep £25 and give the balance to a specified woman. The next of kin sought a declaration that they were beneficially entitled to the estate.

4.60 In support of the next of kin’s claim counsel sought to show that there was no ground to enforce the informally evidenced and uncommunicated trust and that the property should result to the testator’s estate. The argument was premised on a polarisation of two extreme solutions to the problem - on the one hand enforcement of the secret trust and on the other an automatic resulting trust. The approach to secret trusts in this thesis is a via media whereby the legatee may choose to perform the secret trust, subject to a resulting trust in default, and it is argued that this is the

61 (1884) 26 Ch D 531 (Kay J).
It will be urged here that the very same intermediate position is also the proper solution to the problem in *Re Boyes* of a post-mortem communication of the terms of a fully-secret trust. The polarisation of possible outcomes in *Re Boyes* is a particular manifestation of the poverty of analysis of secret trust fraud.

**Juridical analysis in Re Boyes**

4.61 The first argument of counsel for the next of kin in *Re Boyes* was that the defendant must be a trustee for the next of kin because he did not claim a pecuniary interest "so that there is no room for fraud". Set against the model of fraud mooted in this thesis, this is misleading. If the defendant was disclaiming a right to the beneficial interest, this would preclude the defendant from personally enjoying the property, but that does not exclude fraud. A disclaimer is a disposition. A rejection of the beneficial interest includes an assertion of the right to treat it as one's own to give away. Although it is destructive of personal enjoyment, it is nonetheless a momentary assumption of the beneficial interest which is alienated in favour of the testator's estate. Moreover, where a defined secret trust has been accepted, a disclaimer is self-evidently inconsistent with the obligation to retain the trust property and apply it as agreed. This constitutes fraud on the model set out earlier. It is, however, fraud which only serves to benefit the testator's estate; its restitutionary effect renders this type of fraud immaterial.

4.62 The argument was, however, only misleading. There is a sound underlying point: if the legatee does not retain the beneficial interest, there can be no secret trust for the

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63 *Law of Property Act 1925,* s. 205(1)(ii).
intended beneficiary because there is no beneficial property owned by the legatee which on ground of fraud can be subjected to the trust. If, as in the case of the half-secret trust, the legatee holds legal title only, an automatic resulting trust should arise because there is nothing in respect of which the legatee can commit fraud. However, this must be distinguished from the situation where the legatee retains the beneficial interest and a right to control its enjoyment but does not assert a personal right to make use of it. This is a disclaimer in honour but not in law. In this case, since the legatee does retain the equitable interest, he has the ability to execute the informal trust. There will be no automatic trust for the testator's estate: resolution will depend on whether the legatee commits fraud.

4.63 Since the defendant in Boyes wanted to perform the uncommunicated secret trust and since a disclaimer in law would have deprived him of that opportunity, the better view is that the defendant was disclaiming the beneficial interest only in honour. It was consistent with the defendant's admission that he was a trustee that he retained the beneficial interest, but, by his renewed expression of desire to perform the testator's wishes, he had declared himself a trustee of the estate in favour of the secret beneficiary. The effectiveness of the declaration would presuppose that the defendant had not disclaimed his rights under the will.

4.64 Adopting this analysis of the facts and applying the approach to secret trusts contended for in this chapter, the legatee should have been able to assert in law a beneficial interest against the testator's estate to the extent he would perform the secret trust. The reason is that the will takes full effect prima facie and there will be no restitutionary trust of the legacy unless there is fraud. There will be no fraud if

64 Since the testator's estate consisted only of personality, it was possible for the defendant to declare himself trustee of his rights without any formality.
the legatee carries the beneficial interest forward to the intended beneficiary; this
complies with the testator's wishes and is perfectly conscionable. The solution to
the problem in Re Boyes is thus the same as for any secret trust problem; once
trusteeship is agreed during the testator's life, the same principles should apply
whether the secret trust terms are communicated or not. The legatee may elect to
perform the secret trust; if he does not, he will hold on trust for the next of kin. This
of course enables the legatee to give effect to the failed secret trust, if he so chooses.

4.65 That this solution was overlooked is a consequence of the polarised nature of the
argument pressed by the next of kin. Thus it was argued that no trust of which the
legatee had not heard in the testator's lifetime can be fastened on the legatee's
conscience. All this implies is that no trust for the intended beneficiary can be
enforced. It does not mean that the court must take the opposite extreme of implying
a trust for the next of kin. If there is no binding secret trust then prima facie the
legacy should take effect according to the tenor of the will as an absolute gift: if the
conscience of the legatee is unaffected, there is no reason to disturb his beneficial
rights. The informal agreement of the legatee to hold as trustee only becomes
relevant where the absolute terms of the will are set up by the legatee for the
purposes of fraud. Only if the legatee refuses to perform the trust informally
declared by the testator would the assertion of a beneficial claim constitute a fraud;
and only then should the legatee hold on trust for the next of kin. Even under the
law currently where communication during the testator's life is required to make the
secret trust enforceable against the trustee in favour of the third party, there appears
no reason why the trustee should be deprived of the freedom of voluntarily
performing the trust.

65 (1884) 26 Ch D 531, 534.
4.66 In the absence of supportive reasoning, the correctness of Kay J’s judgment in favour of the next of kin must depend on the extent of the defendant’s denial of interest in the trust property. If the disclaimer was *de facto* and not *de jure*, as is suggested above, then Kay J’s decision that the defendant could only perform the trust if it bound him as against the next of kin was wrong and reflected the mistaken polarisation of options presented by counsel. It was only if the trustee was disclaiming in law all interest in the property that the defendant rendered himself unable to perform the secret trust and a trustee for the deceased’s estate.

4.67 Some support for the view that *Re Boyes* is ill-founded can be derived from *McCormick v Grogan*. In that case the testator had left his estate to the defendant and subsequently informed him of this, telling the defendant that in the testator’s desk he would find a letter with the will. The letter, setting out the testator’s wishes, was addressed to Grogan, but not seen until after the testator’s death and had been contained with the testator’s will in an envelope directed to the testator’s brother. The facts of the case are thus fully distinguishable from those in the later case of *Re Keen* where the “sealed orders” of the testator were placed in the hands of the trustee. In *McCormick v Grogan*, while the legatee knew of the existence of the document and that its contents would relate to the testator’s estate, the trustee lacked the means to inspect the document and ascertain its terms during the testator’s lifetime. On orthodox principle, as in *Re Boyes*, it could not be said that the secret trust had been fully communicated in the lifetime of the testator and consequently, if it were shown that the legatee had indeed agreed to act as trustee, an automatic resulting trust in favour of the next of kin should have arisen. In fact it


67 (1867) Ir LR 1 Eq 313 (Irish Court of Appeal), affirmed (1869) LR 4 HL 82 (House of Lords), reversing (1867) Ir LR 1 Eq 318n (Lord Blackburne LC)
was held both in the Irish Court of Appeal and the House of Lords that the terms of
the secret trust were fully precatory and the legatee took the bequest beneficially. At
first instance, however, Lord Blackborne LC upheld the secret trust, implying that
there was an effective acceptance of the secret trust. The point of note here is his
assertion that the defendant could bind himself to effectuate the testator's intentions
expressed in the testator's letter even though he did not know of its terms.

4.68 Lord Blackborne LC's assumption that the testator intended a legally binding trust,
rather than one which was merely precatory, is criticised in chapter 5. Although his
decision was reversed on appeal on this and other grounds, there is nothing in the
judgments of the higher courts which impugned Lord Blackborne LC's implicit
determination that the defendant could bind himself in the testator's lifetime to
perform a post-mortem communicated secret trust. It was objected by Grogan's
counsel in argument on appeal that there could be no valid acceptance of a trust
without knowledge of it, but it is not clear why knowledge of the detail of an
intended trust should preclude a blanket acceptance of whatever trust might
ultimately be left behind for the legatee to execute - especially in view of the
legatee's opportunity to withdraw his acceptance at any reasonable time before the

68 [1937] 1 Ch 236.
69 (1867) Ir LR 1 Eq 313, 319. Counsel gave the example of a testator choosing a high
Trinitarian to act as trustee of a trust for advancing Unitarian religion. This case can be
answered by the fact that if a Trinitarian chooses to commit himself to blind acceptance
of an obligation which might prove difficult to reconcile with his faith, he might be
better advised in future to be less rash in his neighbourly urge to indulge those intent on
imposing on his generosity of spirit and to select with greater care those to whom he
volunteers his services. In any event a trustee surprised with such a predicament after
the testator's death might be able to retire office, either under the Trustee Act 1925, s.
39(1), if there are co-trustees, or by order of the court under s. 41(1) of the Act or under
its inherent jurisdiction.
Agreements of this sort are well accepted in contract law. Far from endorsing counsel's submission, Christian LJ in the Irish Court of Appeal expressed agreement with Lord Blackburne LC's decision on the issue of whether a secret trust was communicated. Admittedly the decision of Lord Blackburne LC and Christian LJ in regard to communication may be roundly criticised, as it was in the House of Lords, but there too one finds an echo of Lord Blackburne LC's view that a legatee may agree to such trust as might later be communicated. Lord Hatherley LC formulated the secret trusts doctrine in terms which required a knowledge of the existence of an instrument setting out the secret trust and an undertaking to carry it into effect, but did not go further and demand actual or constructive knowledge of its contents.

The better view, therefore, is that where a legatee gives a promise 'blindfold' - that is, an undertaking to act as trustee of such fully-secret trust as may be communicated during or after the testator's life - the legatee will be permitted to discharge the obligation. There is nothing in the logic of the fraud principle which necessitates an automatic resulting trust and precludes the performance of the secret trust if the legatee is willing to comply with the post mortem communicated wishes. Enforcing the trust is irreconcilable with the Wills Act and the dicta in McCormick v Grogan to that effect overstate the case. As the following chapters will argue,

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70 See G. H. Treitel, The Law of Contract, 9th edn (London: Sweet & Maxwell, 1995), p. 23 for illustrations of the principle that an offeror may by the terms of his offer waive the requirement that acceptance be communicated. The legatee in the secret trust scenario is in the position of making an offer which the testator accepts. The existence of a promise on the part of the legatee is not destroyed by the fact that the legatee expresses his agreement at the outset and that it is the testator who has the last word.

71 See (1867) 1 LR 1 Eq 313, 323.

72 (1869) LR 4 HL 82, 88. See also his reference (ibid) to an heir undertaking to effect all such wishes as the deceased may communicate.
enforcing the secret trust would give effect to an informal testamentary disposition and exceeds the restitution required to redress the fraud. However, a sound view of principle in the Boyes case justifies allowing the legatee the same freedom of election between performing the secret trust and making restoration to the estate as would have arisen if the terms of the trust as well as its existence had been communicated before the testator’s death.

Theoretical analysis: (1) fraud

4.70 The analysis of the issues in Re Boyes was hardly fulsome and it may be helpful to set out the issues in fuller form. The argument against allowing the defendant to fulfil the intended secret trust might be put in these terms as a series of propositions. (1) The terms of the intended secret trust were not communicated in time; (2) the intended secret trust is therefore not binding; (3) but the legatee agreed to accept the property as a trustee; (4) he must therefore hold the legacy on trust; (5) the intended secret trust having failed (see (2)), there is a resulting trust for the next of kin. The key to identifying the error in this reasoning lies in the counter-intuitive notion that the fourth proposition does not actually follow from the third. The gift in the will is in absolute terms while the trusteeship agreed by the legatee was informal. The legatee may rely on the absolute terms of the will, unless there is fraud. The legatee may therefore claim a beneficial interest if in doing so he does not commit fraud, despite the fact that he informally agreed to take only as a trustee. If he performs the informal agreement, he may take the beneficial interest to that end: there is no fraud in taking the property in order to fulfil the intended secret trust. The mere assertion of an entitlement to the legacy against the estate is not in itself a fraud, if that is the means to perform the secret trust. The fact that the terms of the informal secret trust were not communicated to the legatee is irrelevant. What matters is whether they are satisfied by the legatee.
4.71 One can go further than this in support of freedom for the legatee to fulfil the uncommunicated secret trust. To hold otherwise is in fact to give effect to an informal will. Any recognition of a testamentary intention not complying with the Wills Act requires justification. In Re Boyes the court correctly applied this principle in respect of the trust terms discovered only after death, so as to exclude the enforcement of the uncommunicated secret trust. It lost sight of this principle, however, when it came to the significance of the legatee’s bare undertaking to act as trustee. If fraud is the justification for equitable intervention in respect of informal wills not complying with the Wills Act, then fraud provided the only justification for recognising the effectiveness of the legatee’s bare undertaking to act as trustee. The legatee cannot be held to that undertaking except in so far as there is fraud. Imposing an automatic resulting trust solution frustrates the testator’s intentions to no purpose. It is not necessary to prevent the legatee from benefiting from breach of his undertaking: no such profit accrues to him when he is willing to perform the uncommunicated trust.

4.72 A tempting but mistaken approach is to adopt an analogy with express trusts. If a formal trust is declared for unspecified objects, it fails and the trustee holds for those who take under a resulting trust. So, it may be thought, where the fact of trusteeship is communicated, but not the terms of the trust, there will be fraud if the legatee moves the property on to those named in some uncommunicated instrument: he will be denying the interests of those who take under the resulting trust. However, it is not possible to establish a sound analogy with fully-constituted and formally valid trusts which fail. Since the secret agreement is informal, it has no effect at all other than through the medium of fraud. In formal terms there is no trust in the will and the property is the legatee’s absolutely unless there is fraud. The inescapable point is that fraud requires the legatee to act unconscionably and,
whether or not he agreed to be a trustee, he does not act unconscionably if he
perfects the testator's informal wishes.

Theoretical analysis: (2) moral duty

4.73 It is possible to construct a positive reason for permitting the legatee to perfect the
uncommunicated informal intentions of the testator. In so far as the legatee has
power to move the beneficial interest on to the intended beneficiary, he is invariably
under a moral obligation to do so. Where the legatee has discovered an intended
secret trust only after the testator's death, the legatee becomes aware that he was to
be a mere channel through whom the benefit would pass to another. Knowing this,
the legatee should in conscience make the transfer which the testator intended. This
is not a conscience which equity can perfect because it would give effect to an
informal testamentary disposition. Nonetheless a moral obligation exists.73 There is
someone else whose moral claim to the property is more deserving because (i) the
donee has taken gratuitously and can set up no moral claim to the property other
than by reference to the testator's gift and (ii) the testator intended the property for
another. Where no undertaking is given, the legal system permits the donee to
perfect the lesser moral obligation, since the donee takes absolutely in equity and is
therefore able to make a disposition of his (newly acquired) property in favour of
the intended beneficiary.74

73 For judicial recognition of the moral obligation where a legatee learns post mortem that
they were to be a mere trustee, see especially Boson v Statham (1760) 1 Eden 508 at
512; 1 Cox 16 at 18 where Lord Henley LK refers to an honorary trust.

74 See Addlington v Cann (1744) 3 Atk 141 (Lord Hardwicke LC); Wallgrave v Tebbs
(1855) 2 K & J 313 (Page Wood VC); Juniper v Batchelor (1868) 19 LT 200 (Giffard
VC).
4.74 The position in *Re Boyes* differs only in that the legatee gave an undertaking to act as trustee. Since the legatee has induced the gift by his undertaking to act as trustee, his conscience in this case is affected to the extent that faithlessness should generate a fraud in equity. In terms of moral obligation the difference is only of degree - an obligation of a higher order. On the current law equity will not be justified in perfecting the informal trust and on the model of secret trusts presented in this thesis not even *ante mortem* communication of the trust terms could have justified enforcement of the trust. However, the moral obligation remains and the inability to compel its execution is no reason to frustrate it. In these circumstances our guiding principle should be that "a theory of legal rights, while it need not make every moral wrong a legal wrong, may not make it legally wrong to exercise a moral right or to resist a moral wrong."\(^7^5\) The giving of an undertaking as to trusteeship without knowledge of the beneficiary, though it cannot justify equitable intervention so as to harden the moral obligation into one of law, certainly should not provoke equitable intervention so as to prevent the performance of the moral obligation. It is perverse to permit a legatee who gives no undertaking the freedom to perform his moral duty, but to deny the same freedom to a donee who has given an informal undertaking as to trusteeship and is under a stronger moral duty to fulfil it. In the absence of any competing moral obligation, equity should not intervene to compel a person to default on a moral duty. It is contended, therefore, that it should be irrelevant whether a fully-secret trustee knew the identity of the beneficiary or merely knew he was to be a trustee: in both cases the trustee should be able to formally declare the trust informally agreed with the testator in favour of the secret beneficiary and he

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75 Charles Fried, *Right and Wrong* (Cambridge, MA: Harvard University Press, 1978), p. 99. This approach was developed by Fried in the context of his critical discussion of the economic analysis of rights, but it is clearly general in application and seems pertinent here.
will hold on trust for the testator's estate only to the extent that he refuses to perform his moral obligation.

4.75 This argument can also be supported by comparing the predicament of the precatory secret trust fully communicated before the testator's death. Precatory trusts, which do not seek to impose a trust obligation and only articulate a recommendation, generate a moral obligation. The moral obligation in a precatory secret trust derives from the fact that the legatee knows that the gift is made by the testator with a particular aspiration in mind, to benefit others. The testator's recommendations make an appeal for consideration, but the moral duty is not as strong as it is where a binding undertaking to hold on trust is given. In the latter case the legatee knows that an imperative obligation is imposed. In the precatory secret trust, by contrast, the legatee is aware that the testator intended him to have freedom to depart from the trust urged on him. The moral obligation in the *Re Boyes* case, where a secret trust fails under the current law because its terms are not communicated until after death, must occupy a higher position in the hierarchy of norms than the obligation to execute a merely precatory secret trust. One paradox in the secret trust case law has been the judicial tendency to perfect a weaker form of moral obligation. As will be seen in chapter 5, the courts have not infrequently equated a precatory secret trust to a legally binding one, thereby compelling a legatee who undertook only to consider the moral claim of the secret beneficiary to perform the trust as a matter of legal duty. Juxtaposing this with the decision in *Re Boyes*, it appears the court has allowed an inferior (precatory) moral obligation to leapfrog the greater moral duty to effect an incompletely communicated but imperative moral obligation: the former has given rise from time to time to a binding secret trust; the latter has been forced to mutate into a mandatory resulting trust.
4.76 This should not be understood as endorsing the notion that a precatory secret trust should be enforced as if a legally binding trust had been agreed dehors the will. As chapter 5 indicates, the addition of legal compulsion to a merely moral obligation subverts rather than perfects the testator’s intentions. The proper approach, recognised in the case law if not always obviously applied, is for the precatory secret trust to have no effect other than to subject the donee of an absolute gift to an obligation of honour. Even on this view, however, the decision in Re Boyes remains inconsistent. The legatee taking on a precatory secret trust, like the legatee whose first awareness of an imperative secret trust originates after the testator’s death, has a beneficial interest in the legacy and freedom to perform the secret trust. In Re Boyes, by contrast, the fact of the legatee’s informal undertaking to perform an imperative trust - which ought to subject the legatee to a more serious moral duty to the testator - was held to deprive the legatee of the means to discharge it.

Half-secret trusts

4.77 According to the present law, where the terms of a half-secret trust are duly communicated, the trust will be enforced; if trusteeship is accepted but the trust terms are not communicated in time, an automatic resulting trust arises in favour of the residuary legatee (if the trust property is specific) or the next of kin under a partial intestacy (if the trust property is of residue). Informal testamentary papers found after the testatrix’s death have no effect.\(^\text{76}\)

\(^{76}\) Briggs v Penny (1849) 3 De G & Sm 525 at 547-8 per Knight Bruce VC. See also Johnson v Ball (1851) 5 De G & Sm 85 (Parker VC), where property was left to two legateses “to hold the same upon the uses appointed by letter signed by them and myself”, but no such letter was created until after the execution of the will and it was
4.78 According to the approach to secret trusts advocated here, a half-secret trust, communicated or otherwise, should always give rise to a resulting trust. The general argument in favour of an automatic resulting trust for a communicated half-secret trust is equally applicable here. Clearly this involves a rejection of the principles which have just been urged in respect of fully-secret trusts where the trustee has promised the testator to act as a trustee. Why are the principles which point against the *Re Boyes* solution for fully-secret trusts not equally applicable to the half-secret counterpart and why is there no contradiction in enforcing an automatic resulting trust based on the object-omitting bare declaration of trusteeship contained in the will?

4.79 The answer lies in the general argument, given above, that the trust in the will precludes any fraud by the half-secret trustee. The option given to the fully-secret trustee exists because the property belongs beneficially to the trustee as legatee except to the extent of any fraud. Since it is not fraud to move property onto the intended beneficiary (but rather the satisfaction of the testator's wishes), the legatee is able to make a beneficial disposition in favour of the intended secret beneficiary of property which the will has beneficially made the legatee's. Where a trust is imposed by the will, in contrast, the existence of the trust excludes all beneficial interest in the trust property for the legatee, vesting it instead, by operation of law, in the testator's successor. The legatee owns nothing with which he can perform the secret trust.

4.80 Turning from fraud to moral duty, there is no contradiction in preventing a half-secret trustee from performing his secret obligation. In contrast to the fully-secret trust scenario, there exists a superior moral claim which equity should enforce, even never signed by both trustees. The purported half-secret trust failed and the trustees'
at the cost of depriving the trustee of his chance to perform his undertaking to the
testator. The testator has created two competing obligations. There is the obligation
to hold for the testator's estate arising from the will and the resulting trust principles
whose application the testator has not excluded. There is also the obligation to
perform the secret trust. However much it might conflict with the trustee's own
sense of moral worth, equity must prefer the obligation which arises out of the
formal instrument. It is objectionable for the legatee to divert the assets to the secret
beneficiary identified in the informal and uncommunicated trust: the equitable
interests of the residuary legatee or next of kin generated by the will would be
overreached if any advancement could be made to the secret beneficiary.

4.81 In fact these arguments find their echo in the case law. In Johnson v Ball,77 where a
half-secret trust failed for due communication in accord with the terms of the will,
Parker VC dismissed any notion that the informal trust was effective based on the
fact that the trustees admitted it. The trustees were to be trustees for uses to be
appointed by the testator, and, if those trusts failed (as they had), they were to be
trustees for the residuary legatee.78 They could not by their own admission create
any other trust: they had no interest in the trust property enabling them to admit
it.79 Of course it is precisely this line of reasoning which compels the further
conclusion that a testator can never create a valid half-secret trust.

Secrecy under the new model

77 (1851) 5 De G & Sm 85 (Parker VC).
78 Ibid, 91.
79 Ibid.
4.82 The new approach to secret trusts meets the objections of the probate system as well as the terms of the Wills Act; so far as the secret trust is performed, the testator's desire to benefit his nominee without publicity in the will is indulged. Since the informal direction to the legatee has no binding legal effect and imposes no trusteeship, there is no disposition outside the bounds of the formal will. The success of the secret trust depends on the legatee's beneficence in making an inter vivos gift of his inheritance. The secret beneficiary has no proprietary interest; only the trustee has such an interest and his (beneficial as well as legal) interest is disclosed in the will.

4.83 There is no unwarranted infringement of the rule that every testamentary beneficial entitlement be set out in the will in order that interested parties are able to protect or challenge them. Admittedly those entitled to the residue of the estate have a contingent interest not apparent from the will, since a restorative trust arises if the trustee does not perform the secret trust. The existence of this contingent right to restitution is not disclosed in the will. This infringes the policy of disclosure, but for legitimate reasons. The estate's contingent right is only a consequence of the fraud principle. As with the formality of the Wills Act itself, judicial intervention is justified in recognising a trust, despite omission from the will, in order to accomplish the higher remedial object of preventing fraud. The recognition of a contingent right dehors the will is a necessary evil, since this is the only means to prevent the trustee's fraudulent gain from the secrecy of the trust. This is entirely different from cutting a hole in the probate system in order to further the testator's intended disposition.

Conclusion
4.84 The approach to secret trusts contended for here is rooted in a combination of propositions. The legitimacy of imposing a trust is based on a conception of fraud which reflects the concerns of unjust enrichment. Secondly, that fraud or unjust enrichment is established only when the secret trust is breached: failure to carry out the testator's wishes constitutes the condition precedent for the imposition of a constructive trust. It is the absence of any equitable obligation imposed on the fully-secret trustee pending his resolution to break his promise that assures to him a freedom of election between moving the legacy on as agreed or returning it to the testator's estate by default. The legatee either makes a voluntary inter vivos disposition of his legacy to the secret beneficiary or he makes an involuntary one of the beneficial interest to the testator's estate. No restitutionary trust arises automatically on the testator's death; if the legatee maintains a positive intention to hold for the benefit of the third party and does not lay claim to the beneficial enjoyment of the property, no trust will arise at all unless this is formally declared by the legatee. In substantive, though not in formal terms, the outcome is much as if the testator had formally granted to the legatee a bare special power of appointment exercisable in favour of the objects which he had secretly nominated and in defeasance of a reserved beneficial interest.80

80 See in this regard Austin Wakeman Scott, "Conveyances upon Trusts not Properly Declared", pp. 687-688, where Scott approaches this type of model in the very limited context of a secret trust for a non-charitable purpose. This was not a deduction from principles relating to secret trusts, but merely a manifestation of the wider concern that a failed express trust for non-charitable purposes should so far as possible give rise to a power for the like objects. See further in the same vain J. B. Ames, "The Failure of the 'Tilden Trust' ", pp. 395-396, stressing unconsciously the elements of the scheme which are relevant here, namely: (i) the absence of an express trust and an enforceable duty; (ii) the existence of a duty of honour imposed on the legatee; (iii) the absence of a principle of public policy opposing his power to act (including the inability to compel exercise of the power as an insufficient reason for preventing its exercise); (iv) the authority of the court to interfere if the legatee proves false to his duty; and (v) the consequent contingent right of the testator's estate. The comparison is apt for obvious
reasons: the freedom of election for a legatee mooted in this thesis savours of a trust of imperfect obligation. The distinction is that here the trust is unenforceable because of the informality of the beneficiary's right, not its non-existence.
CHAPTER 5: PRECATORY SECRET TRUSTS

Introduction

5.1 In addition to the particular requirements for constitution of a secret trust and subject to special modificatory rules in the secret trusts context, all the basic requirements for the creation, enforcement and operation of a valid trust applicable in the general trust law must be satisfied in effecting a secret trust. So, for example, there can be no secret trust without certainty of subject matter and of beneficial shares.¹ Similarly, the claim of the beneficiary under the secret trust will be subject to general equitable defences, such as laches.²

5.2 In this chapter we are concerned with the interaction between the secret trusts doctrine and one particular aspect of the general trust law - the requirement that a trust be declared with a sufficiently certain intention. The significance of this review of secret trust case law is not to establish that the judiciary has developed a special rule having localised application for secret trusts. The law which applies is the general trust principle that no express trust is created unless the testator intended to impose on his legatee a trust obligation in respect of the bequest. What is discernible is instead a pronounced unevenness in the manner in which the law has been (and perhaps continues to be) applied in drawing the boundary between legal and purely moral obligations to perform a secret trust. It is the purpose of this

¹ See, for example, Addlington v Cann (1744) 3 Atk 141 at 152-153, discussed in para. 5.29.

² See Whitton v Russell (1739) 1 Atk 448 at 449. The claim of the plaintiff, which was essentially treated as one of secret trust, was mounted only some nine years after the testator’s death. The bill was rejected by Lord Hardwicke LC on the ground of delay, among others.
chapter to probe the nature of that unevenness and identify its importance to the past and present justifications for secret trusts.

The precatory tendency of secret trusts

5.3 As we will see, secret trust law has evolved in keeping with (though not necessarily at a pace with) the evolution of the general law towards a higher threshold for legal recognition of the trust and away from the enforcement of precatory trusts. This development masks the critical fact that the precatory 'obligation' is a common feature of the secret trust. Two main reasons can be offered for this. The first explanation is historical. Due to the restrictions of the Mortmain Act, a testator who wished to make a devise for charitable purposes could achieve that end only by devising on a secret charitable trust which was not binding on the devisee, either because the trust was not communicated or (which is relevant here) because it was agreed that the trust should bind the devisee in morality only. It was essential to the effectiveness of the testator's scheme that the devisee took subject only to a moral obligation, since a devise on trust would have been void and under the statute vested the beneficial interest in the heir. In these cases the secret trust was characterised by an intimate relationship between testator and devisee, where the latter's conscience was activitated by ties of friendship and shared (altruistic) values.3

5.4 The second explanation lies in the inherent quality of secrecy in a trust dehors the will. If we exclude those cases where the testator is merely indecisive or is otherwise using the secret trust as a mere conveyancing device to avoid the Wills Act formalities, then confidentiality is a central aspect of the trust. The aim of the

testator is to ensure the trust does not become public knowledge and the trustee is chosen with this in mind. Moreover, in the fully-secret trust scenario the fact that the existence of the trust is not even apparent from the will renders the legal recognition and efficacy of the trust vulnerable if there is a failure of extrinsic evidence. The higher the chance of failure of the testator’s scheme, the greater likelihood the trustee will be chosen for their integrity and trustworthiness as well as their reliability in maintaining the secrecy of the trust.

5.5 It is the existence of these qualities of sensitivity and trustworthiness in the secret trustee which, in comparison with conventional and formal express trusts, render it more likely that the testator did not intend a trust in the legal sense. The state of mind of a testator driven to procure engagements outside his will from some party who is particularly trusted to uphold the secrecy of the gift is never far away from that state of mind which relies on the good faith and honour of the donee in lieu of a binding obligation. While no doubt is left in the mind of the ‘ordinary’ trustee as to the nature of his obligation, the secret trustee will ideally have qualities to match his special responsibility. There comes a point where the trustworthy character of a person chosen for the office of a secret trustee is so impressive that the testator places reliance in the person and not the office: faith supplants law.

5.6 The point emerged in *Ottaway v Norman*. In Brightman J’s view the testator had dismissed altering his will to create an express trust of his bungalow in order to grant a remainder interest to his son and daughter-in-law because he had complete confidence that his cohabitee, who took the property absolutely under the will, would do what she was told and gift the property as agreed by her will.

4 [1972] 1 Ch 698.
5 *Ibid*, 712F.
Superficially this appears to affirm the notion that the testator intended a legal obligation: if the secret trust had not been agreed, a legal obligation would have been imposed in the will, so the secret trust is to be equated to a legal obligation. Brightman J seems to have proceeded on that supposition, rejecting the defendant’s argument that the secret trust was precatory. In fact Brightman J’s inference of fact establishes the defendant’s case. The testator omitted the trust from the will, where it would be legally binding, because a legal obligation was unnecessary. Having expressed his wish to the legatee, he was confident his desired distribution would take place because he had faith in her fidelity to his wish. The precatory obligation substituted for amendment to the will.

5.7 For these a priori reasons, as the decision in Ottaway v Norman illustrates, a judicial urge to construe a strict obligation out of an acceptance of the testator’s desire will be misguided more frequently than in the case of the conventional (formal) testamentary trust. In the following review of case law we will see specific instances where the court has overshot the mark, measured by the testator’s aspirations as disclosed in the particular facts of the case. The significance of this is its tendency to demonstrate a judicial ambivalence about the practical efficacy of a moral obligation imposed on the legatee in bringing about the testator’s ambitions. In the mortmain cases the fear was that the moral obligation would be as effective as a formal trust. It furthered the operation of the Mortmain Act if a legally enforceable trust had been secretly agreed and if the secret trust could be construed as not merely precatory. Inconsistent with this, the court in cases liberated from the mortmain anxiety has been sceptical that a merely moral obligation on the legatee will suffice for the achievement of the testator’s wishes and, to perfect those wishes, has inclined in favour of legal enforcement. The trend, therefore, has been to find an agreement for a legally enforceable secret trust, notwithstanding that the testator
intended only a moral obligation and that in the testator's judgment this would suffice.

The requirement of certainty of trust intention: present and past rules

5.8 It is firmly established in the modern law that a secret trust can only succeed where the testator had an intention to create a trust and did not merely seek to impose a precatory or purely moral obligation.⁶ This reflects the modern trust law rule for certainty of intention that an express must be declared in terms which are imperative in meaning.⁷ The question in any case where a secret trust scenario emerges will be the traditional one of ascertaining whether the testator's request was intended to operate as a mandatory instruction or mere "expression of an anxious desire".⁸ Formulating the same test from a different perspective, the issue is whether the

⁶ See, for example, Re Downing's Residuary Estate (1888) 60 LT 140, 141 per Chitty J; Ottaway v Norman [1972] 1 Ch 698, 711A per Brightman J; Re Snowden [1979] 1 Ch 528, 534C per Megarry VC; but see also French v French [1902] 1 IR 171, 230 where Lord Davey formulates the law in overly wide terms attaching a binding trust if the testator's "wish" is accepted, without distinction as to whether the wish is intended to be discretionary or mandatory.

⁷ Meredith v Heneage (1822) 1 Sim 542 at 550 per Richards LCB; (1824) 1 Sim 542 at 565 per Lord Eldon LC; Knight v Knight (1840) 3 Beav 148 at 172 per Lord Langdale MR (affirmed by the House of Lords sub nom. Knight v Boughton (1844) 11 Cl & Finn 513); Lambe v Eames (1870) LR 10 Eq 267, 274 per Malins VC; Reid v Atkinson (1871) IR 5 Eq 373, 375-376 per Lord O'Hagan LC (where a precatory fully-secret trust may have been communicated). See also Sale v Moore (1827) 1 Sim 534 at 540 per Hart VC: "The first case that construed words of recommendation into a command made a will for the testator, for everyone knows the distinction between them. The current of decision has, of late years, been against converting the legatee into a trustee."

⁸ From Page Wood VC's description of the testator's request in the course of counsel's argument in Wallgrave v Tebbs (1855) 2 K & J 313 at 317.
testator intended as the sanction for breach of trust a court of justice or merely the legatee's conscience. 9

5.9 Before the entrenchment of the modern and more exacting rule requiring trust certainty, a precatory expression of desire or confidence contained in a will automatically operated as if an imperative command had been stated. 10 It was consistent with general trust law that during this historic period the courts enforced a secret trust in circumstances where the testator had not in fact wished to impose a trust obligation and where undoubtedly a modern court would no longer do so. In Jones v Nabbs, 11 for example, Lord Macclesfield LC enforced as a trust a parol statement by a daughter to her mother (to whom she had bequeathed all her personalty), telling her "You may, if you please, give one hundred and eighty pounds to my niece, but I leave it entirely to you." When the niece sought to claim the sum, the deceased's mother asserted that she had intended to pay, but had changed her mind on account of the niece's misbehaviour. The most natural construction of the daughter's words suggests that the mother was to have complete discretion as to whether any payment was to be made at all and not merely a delegated fiduciary power to decide whether payment would be appropriate. The trust was precatory and, so far as any constraint was imposed on the mother's freedom, it bound in morals not in law. Nonetheless it was upheld as an enforceable trust, thereby limiting the unrestricted discretion which the daughter had intended to

9 McCormick v Grogan (1867) Ir LR 1 Eq 313, 328 per Christian LJ.

10 See Cary v Cary (1804) 2 Schoales & Lefroy 173 at 189 per Lord Redesdale LC; Hovenden, vol. 1, p. 373.

11 (1718) Gilb Rep 146; sub nom. Nab v Nab 10 Mod 404 (Lord Macclesfield LC). The case is, however, better analysed in terms of the creation of an inter vivos trust: see para. 6.40.
grant.\textsuperscript{12} Lord Macclesfield LC attempted to explain the precatory dimension of the daughter's request as imposing a condition of forfeiture on the niece's interest. The trustee was entitled to exercise discretion adversely to the niece, to determine that the interest should be forfeited, but only on specific grounds, whereas the trustee had in fact sought to rely on general grounds and was acting outside that power. As an attempt to reconcile the daughter's wishes with a trust obligation, however, this could not suffice. It raises the question of what specific grounds would have justified a forfeiture. The daughter had specified none, relying instead on the free judgment of her mother, and this fact throws us back to the construction that there was no trust obligation at all.

5.10 Nevertheless \textit{Jones v Nabbs} may be viewed in one regard as a progressive decision: Lord Macclesfield LC appreciated there was some necessity to explain how words which \textit{prima facie} negated any intention on the part of the deceased to impose a trust were to be reconciled with the imposition of a legal obligation on the secret trustee. More typically, it was merely assumed - in accord with general trust law as then applied - that a merely precatory direction of the testator to the legatee \textit{dehors} the will would suffice to give rise to a binding obligation without substantial consideration of the issue. This is reflected even as late as \textit{Russell v Jackson}\textsuperscript{13} and \textit{Tee v Ferris},\textsuperscript{14} where the testator in each case merely stated his confidence that the legatees would in fact make the desired application. In \textit{Barrow v Greenough}\textsuperscript{15} the defendant, who was entitled to the ultimate residue, admitted reporting in a memorandum that the testator had told him of his wish that the testator's wife

\textsuperscript{12} See similarly \textit{Kingsman v Kingsman} (1706) 2 Vern 559 (Lord Cowper LK), explained in \textit{Jones v Nabbs}.

\textsuperscript{13} (1852) 10 Hare 204.

\textsuperscript{14} (1856) 2 K & J 357 (Page Wood VC).
should have a larger annuity; but the secret trust was denied on the ground that the
testator, refusing to amend his will, had told the defendant he was leaving it to the
defendant’s generosity. Possibly the defendant’s version of events lacked
credibility, particularly when assessed in the light of the forthright terms contained
in the memorandum which he admitted writing. However, Arden MR took the
defendant’s evidence at its highest when he dismissed the argument that the testator
intended the defendant to have discretion whether to pay the annuity. ‘Generosity’,
he considered, meant that the matter was left to the defendant’s conscience. The fact
that Arden MR considered this disposed of the point shows the depth of assumption
then current in the law. The distinction between a conscience subject to purely
moral (or spiritual) sanctions and a conscience over which the body of the law
would superintend was entirely ignored. Implicitly it was enough that the
conscience was affected.

5.11 The significance of this is not merely that such cases would not have satisfied the
modern test for certainty of trust intention if considered afresh today. The more
important point is that it shows the context against which many of the founding
secret trust cases were decided. The court felt little anxiety at the fact that it was
often elevating into a binding legal obligation a matter which the testator had
wished to leave to the honour or moral scruple of the legatee. Despite the change in
the law on trust certainty, this judicial tendency towards raising up an unintended
and potentially superfluous legal obligation has proved to be a enduring but
unwarranted feature in the secret trusts case law.

Uncertainty in application of the trust intention requirement

5.12 Even after the recognition of the modern rule requiring certainty of trust intention, the application of this general principle of trust law has often proved a demanding exercise in relation to secret trusts. For inherent reasons the secret trust is prone to pose this difficulty. The problem of identifying whether or not a legal obligation was intended by the testator and of ascertaining the trust terms is often attributable to the absence of formality declaring the secret trust. By omitting the trust from the will an opportunity for setting out precisely what was envisaged has been lost, besides losing definitive evidence of the trust. As chapter 3 showed, one of the functions performed by the formality required under the Wills Act is to induce an element of certainty in the terms of the formalised testament. The secret trust, in contrast, is necessarily stated outside the will and may not be formally recorded at all, so that the court may be left to interpret the precise meaning of indirectly reported directions given by the testator. Instead of a single ambiguous expression in the will, the court must weigh up evidence which may stretch across the testator’s lifetime and evaluate the import of statements made in casual writings or conversations in the search for a concrete instruction. A further aggravating factor is that the confidential nature of the relationship and the sensitivity of the task may leave much that passes between testator and legatee vague or incomplete.

5.13 In *Podmore v Gunning*, for example, where both testator and secret trustee had died before the existence of the trust was litigated, Shadwell VC was reduced to drawing inferences from the fact that the secret trustee - the testator’s wife - had made a will inconsistent with her obligation (if such it was) to leave the estate she inherited from her husband in its entirety to his two natural daughters. By his will the testator bequeathed his residuary estate to his wife “having a perfect confidence that she will act up to those views which I have communicated to her in the ultimate

16 (1832) 5 Sim 485; (1836) 7 Sim 643; Donnelley 72.
disposal of my property after her decease". Shadwell VC determined that this expression of confidence in the will was merely precatory. The live question was therefore whether the secret undertaking by the testator's wife was merely precatory or created a binding trust obligation.

5.14 Shadwell VC held that the evidence did not support the view that the secret trust was intended to impose a legal obligation, but he was clearly taxed by it. Two days after the testator's funeral, Dr Jarvis had prepared for the wife a will leaving her property to the plaintiffs but excepting certain legacies and it was argued this demonstrated that no trust obligation attached to the property, because any obligation would have attached to the whole and precluded excepting legacies from the residue. Shadwell VC initially dismissed this argument on the ground that the wife may have misunderstood the extent or nature of the promise she had made and executed her will on that erroneous basis. On further hearing, however, he radically reversed his interpretation of the facts. The will drafted by Dr Jarvis was considered strong evidence of what had passed between her and the testator, although Shadwell VC left unexplained how the self-serving evidence of a trustee after the testator's death could be probative. What was palpably clear at least was that the testator had left little behind which could shed light on his exact intentions.

The counterfactual presumption of trust intention

The twofold application of the certainty test

17 See (1836) 7 Sim 643 at 654; Donnelley 72 at 74.
18 See (1836) 7 Sim 643 at 660-661 ("[N]ot a particle of evidence" supporting plaintiffs' case); Donnelley 72 at 77.
19 See (1832) 5 Sim 485 at 496-497.
5.15 Where no secret arrangement has been entered into between testator and legatee and the existence of a formal express trust is all that is in issue, the question of whether a trust is imposed falls to be settled by simple reference to the language of the will. Either the testator has imposed a formal testamentary trust (a certain obligation) or has expressed an aspiration not binding the legatee as a matter of law (a precatory direction). In the secret trusts context, as Podmore v Gunning demonstrates, the certainty test must be applied twice. Firstly, the language of the will must be examined since this may itself impose a trust, in which case (as ex hypothesi the trust terms have been suppressed) either a half-secret trust or a resulting trust arises on the current law, depending on whether the other requirements for a valid half-secret trust are satisfied. If no trusteeship is imposed by the will, the certainty test must be applied a second time to gauge whether the secret agreement between testator and legatee amounts to the imposition of the legal obligation of trusteeship in respect of the legacy bequeathed beneficially by the will. A precatory secret trust can therefore only arise where neither the will nor the secret agreement purports to bind the legatee in law.

Formal denial of a binding secret trust

20 (1836) 7 Sim 643 at 663-664; Donnelley 72 at 77-78.

21 For further illustrations, where both the will and the secret trust were held to be precatory, see Creagh v Murphy (1873) 7 Ir Eq 182 (Chatterton VC) (no evidence of a distinct trust dehors the will); Re Downing's Residuary Estate (1888) 60 LT 140 (Chitty J) (insufficient admissible evidence of a fully-secret trust); Sullivan v Sullivan [1903] 1 IR 193 (Porter MR) (memorandum of secret trust communicated to trustee expressed to be for her guidance and authorising her to modify the trust inconsistent with a binding obligation)
5.16 The two-stage test of certainty of trust intention will extend to the case where the precatory language of the will goes so far as to purport to exclude or deny the existence of a binding secret trust obligation. The existence of a binding obligation dehors the will must be considered, notwithstanding the terms of the testament. This possibility was anticipated in Re Spencer’s Will\textsuperscript{22} where the testator had left £500 to two legatees “relying but not by way of trust” on their applying the legacy towards the object privately communicated to them. The executors, who were also trustees of the residuary personality, refused to pay the legacy on the ground that the bequest was on a void fully-secret purpose trust and that the sum therefore resulted to the testator’s estate and fell into residue. Both at first instance and on appeal it was held that the executors’ evidence of the secret trust could be admitted, notwithstanding that the will expressly refrained from imposing a trust. This decision falls squarely within the two-stage test: the language of the will purported only to govern the effect of the will and could not therefore preclude proof of a trust dehors the will.

5.17 It was an approach which was followed in Re Falkiner\textsuperscript{23}. There the testatrix bequeathed almost her entire property to her solicitor and his partner as joint tenants. In the will she expressed a request that they dispose of the property in accordance with any signed memorandum which she might leave among her papers, but declared that her expression of request was not to create any trust. According to the will, therefore, the half-secret trust obligation was merely precatory: the partners were not trustees and would take beneficially.\textsuperscript{24} Despite the provision in the will

\textsuperscript{22} (1887) 57 LT (NS) 519 (Court of Appeal, affirming Bristowe VC).
\textsuperscript{23} [1924] 1 Ch 88 (Tomlin J).
\textsuperscript{24} See [1924] 1 Ch 88, 94-95 \textit{per} Tomlin J. On these questions of construction, the decision of Tomlin J was applied by Wynn-Parry J in Re Stirling [1954] 1 WLR 763 at
that no trust obligation was to arise from her request, the further question still arose as to whether in their informal dealings the testatrix had intended (and the solicitor had given) an absolute undertaking to effect her wishes or whether she envisaged (and he agreed) that the arrangement would be only on a precatory basis. On the facts it was held that the precatory approach of the will had been incorporated into the informal agreement and accordingly the legatees took the property absolutely.

5.18 In Re Spencer's Will, however, Cotton and Bowen LJJ went further in asserting, obiter, that the evidence would have been admissible even if the will had stated the testator did not impose a trust dehors the will. In other words, the language of the will could not determine the effect of any secret agreement: its effect would depend only on the nature of the obligation undertaken by the legatee. This is a sound principle: the will cannot exclude the possibility of a secret trust. It would always be possible for the legatee to give an undertaking to the testator to comply with a secret trust notwithstanding the negative terms of the will, so that to uphold the exclusion in the will would create a window for fraud. All that the formal precatory terms or a denial of a legal obligation can serve to do is to preclude a trust in the will, exclude a half-secret trust and reinforce the fact that according to the will the legatee will take beneficially. This achieves no more than if the will were entirely silent on the matter, implying that the outright gift is a beneficial one.

767-8 where a married couple had made wills which similarly purported to exclude any trust obligation on the legatee: see para. 5.20.

25 See [1924] 1 Ch 88, 956 per Tomlin J.
26 Ibid.
27 57 LT (NS) 519, 521
28 Ibid, 521-522.
29 Quaere whether such opportunities for fraud were the "unfortunate and very serious" consequences of allowing mere expression in the will to prevent the court from inquiring into a secret trust to which Bowen LJ alluded: Ibid, 522
In every case the possible existence of a fully-secret trust imposed outside the will must be examined.

5.19 The authority of these *dicta* are marred somewhat by the reliance\(^{30}\) placed on the decision in *Russell v Jackson*\(^{31}\) as a supportive authority. The principle in discussion here did not have to be addressed in that case: there was nothing in the terms of the will in *Russell v Jackson* which went beyond affirming a gift so far as to expressly deny the existence of a trust. More importantly the judgment at first instance in *Re Spencer's Will* contains a reminder of the judicial tendency in the secret trusts context (even after the modern test for certainty of trust intention had been clearly stated) to give merely precatory directions the force of trust. One reason why Bristowe VC considered the evidence of the secret trust was admissible, in spite of the wording of the will, was because that wording mentioned the testator's reliance. In his opinion that reliance was “contrary to the notion of [...] [the legatees] enjoying the money personally themselves, and is only consistent with the notion of their applying it for some purpose which in fact amounted to a trust.”\(^{32}\) Bristowe VC thus deduced the existence of a trust obligation *dehors* the will from the statement of reliance in the will. This sets too little store by the fact that the reliance referred to in the will was reliance of a precatory sort; it was expressly stated to be reliance *other than by means of a trust obligation*. The purpose of admitting the informal evidence was to assess whether there existed a *different* reliance *dehors* the will which, in contrast to that stated in the will, was a reliance by way of trust obligation. In determining whether the evidence established a binding secret trust, the court would have to determine *inter alia* whether the

\(^{30}\) See 57 LT (NS) 519 at 520 (Bristowe VC) and on appeal at 521 (Cotton LJ) and 522 (Bowen LJ). Fry LJ (ibid, 522) merely concurred in the judgments of his colleagues.

\(^{31}\) (1852) 10 Hare 204 (Turner VC).
testator had relied on the legatees' honour or on their legally binding promise. Bristowe VC's judgment manifests the tendency in the secret trusts context for a judicial blurring of the distinction between these two senses of reliance in the interest of enforcing a legal obligation.

5.20 Before turning to further illustrations of the judicial tendency, when applying the two-stage test of trust certainty, to conflate legal and moral secret obligations, the case of *Re Stirling*[^33] should be noted. Besides confirming the principle expressed *obiter* in *Re Spencer's Will*, the facts are illustrative of a testamentary state of mind that is easily past over in the hunt for a legally binding secret trust. A husband and wife had made wills in identical terms whereby a pecuniary legacy and a one-third share of residue was left to the plaintiff bank. In respect of both gifts the will stated a request that the property be disposed of according to a signed memorandum, but it explicitly provided that the memorandum was not to form part of the will and that the expression of request in the will was not to impose a trust obligation. Applying the construction which Tomlin J had formed in *Re Falkiner* for very similar terms, Wynn-Parry J held that the will did not impose any trust[^34]. The will further provided that no trust obligation was to arise even if the memorandum were communicated to the bank, but, as the Court of Appeal had rightly asserted in *Re Spencer's Will*, such a statement could not exclude the possibility of a secret trust. In fact there was no communication at all by the husband or the wife to the bank in *Re Stirling*: the relevant memoranda were found among their papers after their deaths. Unsurprisingly, Wynn-Parry J held that the bank took free of any trust. The married couple had thus achieved their goal of giving directions to the bank without

[^32]: 57 LT (NS) 519, 520.
[^33]: [1954] 1 WLR 763.
[^34]: *Ibid*, 767-768.
imposing any legal obligation on them to follow those directions, an object which according to *Re Boyes* 35 would have frustrated their plans if they had at any time indicated to the bank it was to take as a trustee. What is particularly noteworthy about this case is the elaborate lengths to which the husband and wife went, both in the terms of their will and in the absence of communication to the bank, to ensure that the bank would be left under a merely moral obligation to apply its beneficial interest in the manner which, according to their memoranda, each spouse desired. The deliberate decision was made to vest outright ownership in a professional but profit-making enterprise, subjecting it only to an obligation of honour to fulfill the informally recorded testamentary wishes. The similarity of the wills in *Re Stirling* and *Re Falkiner* show that this was not an isolated act of foolhardy recklessness. Placing an unenforceable confidence in a secret trustee may be more widespread and more often desired than the judicial mind supposes.

*The conflation of legal and moral obligations in secret trusts*

5.21 The problem in the secret trust law has been something approximating a judicial prejudice against the existence of a merely moral secret trust obligation. Despite the reasons, given above, for why a testator might intend unenforceable secret obligations, the application of this simple two stage test of certainty of trust intention has often as not been corrupted by the presumption that the agreement dehors the will, in contrast to the language of the testament, must have legal effect.

5.22 An example of this deviant application of the law is *Irvine v Sullivan*, 36 In this case the testator left his estate to his executors on trust for the plaintiff absolutely

35 (1884) 26 Ch D 531.

36 (1869) LR 8 Eq 673 (James VC).
“trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted”. Before making his will, the testator told the plaintiff that he wished her to make certain gifts out of the property to be left to her, which gifts would not exhaust the estate. James VC held that the language of the will did not impose a trust, that the testator intended her to take a beneficial interest and that she was entitled to the net residue after performance of the testator’s communicated and accepted wishes. In so holding, however, James VC treated the wishes expressed secretly as imposing a legal and not merely precatory obligation. If James VC was following the two-stage process of ascertaining whether the will imposed an obligation and, if not, whether the secret agreement imposed such an obligation, he saw no necessity to expressly address the second stage. What is striking about this case is the readiness with which the existence of a trust obligation is inferred despite the fact that the formal will was held to have expressed only a precatory obligation. James VC appears simply to have assumed that the wishes orally communicated were intended to impose an obligation to effect them, rather than serving simply as recommendations to be set against the plaintiff’s unfettered discretion and to function as a repetition and completion of the precatory sentiment in the will.

5.23 This is not an isolated example, as is evident from the first instance decision in the landmark case of McCormick v Grogan. In McCormick v Grogan the testator had left his estate to the defendant and later informed him of this, telling the defendant he would find a letter with the will. The letter to Grogan was not seen until after the testator’s death. In an action brought by one of the unpaid annuitants mentioned in the side-letter, the defendant denied all legal liability to make the payments listed

37 (1867) Ir LR 1 Eq 313 (Irish Court of Appeal), affirmed (1869) LR 4 HL 82 (House of Lords), reversing (1867) Ir LR 1 Eq 318n (Lord Blackburne LC).
there on the basis that he had not been informed of the testator’s wishes and had not promised to carry them out.

5.24 The letter setting out the testator’s wishes could not have made it clearer that there was no trust intention. The bequest was stated to have been made “well knowing” the legatee would carry out the testator’s intentions, but this was the knowledge of faith rather than the certainty that comes from the assurance of legal sanction as the side-letter proceeded to explain:

I do not wish you to act strictly to the foregoing instructions, but leave it entirely to your own good judgment, to do as you think I would if living, and as the parties are deserving; and [...] there cannot be any fault found with you by any of the parties, should you not act in strict accordance with it.38

As Grogan’s counsel submitted on appeal, the terms of the letter granted to Grogan an unlimited discretion and power to deviate from the testator’s directions, which was inconsistent with a trust obligation.39 Admittedly the testator’s instruction might have been understood as limiting discretion to the matter of declining specified gifts and deferring payment of least deserving annuities, with a fixed gift over of the ‘surplus’ to the testator’s brothers in equal shares to the extent the power to pay the specified gifts and annuities was not exercised. However, that analysis would still have done considerable violence to the testator’s stress that the legatee was to have a free hand in respect of “all the parties”. The testator’s motive, explicit

38 A postscript reinforced this: “I leave it to yourself to carry out the intentions as you may think best.”

39 (1867) Ir LR 1 Eq 313, 320.
in the letter, was the pious hope of preventing litigation. This implied that the secret beneficiaries were not to have enforceable rights: the trust was not to be binding in law, only in morality. The precatory view was rightly adopted in both the Irish Court of Appeal and the House of Lords.

5.25 To judge from the decision of the higher courts in this case, one might quickly conclude that the law posed little difficulty for the judiciary and that a sound application of the certainty test for trust intention was easily mastered. The case undoubtedly stands for the proposition that a secret trust obligation is not binding unless the testator intended the obligation to bind in law as well as in morals. However, in the matter of applying this straightforward principle, it is the decision of Lord Blackburne LC at first instance which is revealing. Despite his formulation of the secret trusts doctrine, which commenced with the essential fact, *inter alia* that "a trust is intended to be created", Lord Blackburne LC proceeded to the swift conclusion that the secret trust created a binding obligation in law. No consideration was given at all to the question of whether the testator had intended the force of law to apply to his directions, a proposition which could hardly be maintained against the clear terms of the testator's letter. This was not a case where the test for certainty of trust intention in the secret trust was misapplied: it was simply not applied at all. Lord Blackburne LC displayed the classic judicial prejudice that any trust agreed *dehors* the will was necessarily to be legally enforceable. It is important, therefore, to take from *McCormick v Grogan* the further point that in developing and applying the principles of secret trust law and therefore perhaps in

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41 (1869) LR 4 HL 82, 94-96 (Lord Hatherley LC, endorsing Christian LJ's judgment on this point).
formulating them too the judiciary has at times set out from a position biased against the notion of the merely moral secret trust obligation.

Precatory secret trusts and the Mortmain Act

The provisions and effect of the statute

5.26 In summary, section 1 of the Mortmain Act 1735 provided that no land, or any personal estate to be laid out or disposed of in the purchase of land, was to be conveyed or settled for any estate or interest or charged in trust for charitable purposes unless such conveyance or settlement was made by deed in the presence of two or more credible witnesses at least twelve months before the death of the donor or grantor and the deed was enrolled within six months of execution. The Act was interpreted as extending beyond realty to include trusts for sale of land where the proceeds of sale were to be applied for charity and dispositions for charity of leasehold estates and mortgages secured on land. Section 3 provided that transfers or settlements not permitted by section 1 would be void. These mortmain restrictions, largely re-enacted with a minor relaxation of the law in the Mortmain

42 S. 2 excluded bona fide transfers for full value and s. 4 excluded dispositions to benefit certain colleges and universities and related trusts for scholars. The exclusions are not material here.

43 AG v Weymouth (1743) Amb 20 (Lord Hardwicke LC).

44 AG v Graves (1752) Amb 155 (Lord Hardwicke LC); AG v Tomkins (1754) Amb 216; 3 Keny 129; Paice v Archbishop of Canterbury (1807) 14 Ves 364 at 368 per Lord Eldon LC.

45 AG v Caldwell (1766) Amb 636 (Sewell MR); Paice v Archbishop of Canterbury (1807) 14 Ves 364 at 368 per Lord Eldon LC.
and Charitable Uses Act 1888, were substantially removed at the end of the
nineteenth century\textsuperscript{46} and were finally abolished by the Charities Act 1960.\textsuperscript{47}

5.27 The effect of the statute in requiring enrolled conveyances \textit{inter vivos} was to
prevent completely any testamentary disposition of land and impure personalty for
charity. One of the primary reasons for the creation of secret trusts was to attempt to
evade the provisions of the Mortmain Act by providing for charity at the time of
death in a manner which was not evident from the will. To support the legislative
policy, the statute was interpreted as applying to such secret trusts unless they had
not been communicated to or accepted by the devisee.\textsuperscript{48} This interpretation closed
the door on the creation of \textit{legally binding} secret trusts of land for charitable
purposes. The scope to avoid the Act was reduced to those cases where the secret
trust was \textit{not} legally enforceable and the devise would take effect according to the
will, subject only to a moral obligation to benefit the nominated charitable object.
This might be done simply by leaving a note to be found with the will: no secret
trust arose because its existence and terms were not communicated until after the
testator died. The alternative method was to communicate the trust in its entirety,
but to stress to the devisee that the trust was a mere recommendation and that they
retained full freedom to depart from the testator’s wishes. It is the latter type of case
which brought into focus the borderline between a legal and a merely moral trust

\textsuperscript{46} Mortmain and Charitable Uses Act 1891, s. 5 of which permitted devises generally,
subject to limitations.

\textsuperscript{47} S. 48(2) and Sched. 7, Part II.

\textsuperscript{48} See \textit{Muckleston v Brown} (1801) 6 Ves Jun 52 and \textit{Stickland v Aldridge} (1804) 9 Ves
Jun 516 (Lord Eldon LC); \textit{Lomax v Ripley} (1855) 3 Sm & Giff 48 (Stuart VC). The
notion that an \textit{uncommunicated} secret trust fell within the Mortmain Act, applied in
\textit{Boson v Statham} (1760) 1 Eden 508; 1 Cox 16 (Henley LK) and \textit{Longstaff v Rennison}
(1852) 1 Drewery 28 (Kindersley VC), was authoritatively disowned by Page Wood
VC in \textit{Wallgrave v Tebbs} (1855) 2 K & J 313.
obligation. A judiciary which was eager to uphold the policy of the statute and which was confronted with the uncomfortable reality that a moral obligation might in practice be as efficacious as a legal one was pushed to an extreme position. A precatory secret trust for charity, if imposed on persons of honour, could achieve the testator's wishes out of reach of the legislation. The temptation placed before the courts was to construe the testator's direction as mandatory and to convert a trust intended to be honorary into one recognised and enforceable in equity.

5.28 There was nothing inevitable about an avoidance of the Mortmain legislation. In order to achieve that end the testator would have to avoid imposing a trust obligation in both the will and the secret trust arrangement. The question of whether the testator had obtained that end was necessarily one to be settled by a reference to the particular facts of the case. It was always possible that a testator might assiduously avoid imposing a legal obligation by the will, only to do so inadvertently when agreeing the secret trust dehors the will by framing his direction to the legatees in imperative terms - for example as a statement of how he required them to apply the property to be left to them.49 In Moss v Cooper50 the testator had drafted his will to leave the residue of his realty to the secret trustees absolutely, acting on advice from his solicitor that imposing an obligation in the will would cause the trust for charitable purposes to fail under the Mortmain Act. Page Wood VC rightly observed that unless the solicitor had also specifically advised against a secret trust (as had not happened in that case), it could not be inferred that the testator's intentions were merely precatory if those intentions were in fact

49 A testator might also fall into the opposite trap - agreeing a precatory trust dehors the will, but imposing a legal obligation in the will. See Re Baillie (1886) 2 TLR 660 (North J), where the testator left his estate to the executrix having told her "you can do as you like" but in the will bequeathed the estate on trust to carry out his wishes. North J rightly held that the property resulted to the heir and next of kin.
communicated to the legatees. Establishing that the testator did not intend an obligation in the will went no further than to prove the essential aspect of any fully-secret trust, that the will by itself purported to make the legatees the absolute owners of the property.\textsuperscript{51}

**Orthodoxy**

5.29 At first the temptation to distort the application of orthodox principles in order to stretch the reach of the Mortmain Act was resisted and the decision in Addlington v Cann\textsuperscript{52} marks a first correct application of the relevant law. Unfortunately for the future development of the law, Lord Hardwicke LC’s decision was primarily explicable on the ground that there was no communication of the trust to the defendants, so that it was easy to lose sight of the secondary point noted here. In Addlington v Cann the testator’s memorandum expressed only a hope that Cann would follow the directions allegedly given to Andrews, the co-devisee, and it emphasised Cann’s integrity, goodness and charitable disposition. Lord Hardwicke LC interpreted the reference to Cann’s charitable disposition as suggestive of the testator’s intention to give to charity.\textsuperscript{53} Whether or not that was so, the testator was clearly relying on Cann’s honour to perform his (unarticulated) wishes, rather than seeking to impose a legal obligation. This is supported by the uncertainty in the subject matter of any trust for charity, which Lord Hardwicke LC found.\textsuperscript{54} It is a

\begin{itemize}
\item \textsuperscript{50} (1861) 1 J & H 352 (Page Wood VC).
\item \textsuperscript{51} See \textit{ibid} at 365-366.
\item \textsuperscript{52} (1744) 3 Atk 141 (Lord Hardwicke LC).
\item \textsuperscript{53} \textit{Ibid}, 152.
\item \textsuperscript{54} \textit{Ibid}. Lord Hardwicke LC considered that on the evidence the testator intended to give part of the estate to the defendants personally and accordingly it was unclear how much
good example of the reflex action which uncertainty of subject matter may have on the question of the certainty of the testator's intention, since an inexact design implies that the appeal to conscience was not intended to be imperatively exacting. While not declaring so explicitly, Lord Hardwicke LC seems to have assumed this conclusion since he noted that there have been frequent abuses of the faith placed in donees where a testator leaves an estate "absolutely under a person's power, and then trust[s] to his generosity for the disposing of them in charity." He considered that such abuses were sufficient warning against adopting that practice and that no general injustice would be done by his decision. That reasoning implies that in the case before him the testator similarly had not intended to impose a trust, but instead left property absolutely with the mere aspiration that the property would be applied for charitable purposes. However, the absence of a clear statement of principle necessarily left room for subsequent deviation.

5.30 It should certainly not be supposed that Addlington v Cann constituted an isolated example of a sound application of the law. The same principles were applied with equal competence - and more explicitly - in the much later case of Lomax v Ripley. In that case the testator wished to leave the residue of his estate to establish a hospital for the support and education of poor children. In view of the Mortmain legislation, he was advised by his solicitor to leave the property to his wife absolutely and to take a chance of her carrying that intention into effect. He

of the property passing under the will to the defendants was to be held for charitable purposes.

55 See Mussoorie Bank v Raynor (1882) 7 App Cas 321 at 331 per Sir Arthur Hobhouse, giving the opinion of the Privy Council; Re Snowden [1979] 1 Ch 528, 534D per Megarry VC.

56 3 Atk 141 at 153.

57 Ibid.
made a will in those terms. The evidence showed that his wife had always known of
his charitable intentions, but that the testator had assiduously avoided imposing any
imperative obligation on his wife. The plaintiffs, the testator’s next of kin, claimed
to be entitled to the residue, arguing that although no trust was established, the court
should not disregard the moral obligation imposed. Stuart VC rejected that
argument: the court would only intervene where a legal obligation was imposed.59

5.31 However, even after the clear decision in Lomax v Ripley had set principle on a
proper footing, expressions of judicial disquiet in reaching this compelling solution
remained apparent. In Rowbotham v Dunnett60 the testatrix, who had few near
relations, wished to dispose of all her property for charitable purposes, but was
advised by her solicitor of the difficulties posed by the Mortmain Act. Her will
bequeathed the bulk of her personal estate to a specified charity and devised her real
estate, together with personalty which could not be given to charity by will, to the
defendants Dunnett and Minors, for them to take absolutely in equal shares. It was
clear on the facts that Minors had never known of the bequest in his favour and
therefore could not have promised expressly or impliedly to apply the property for
charitable purposes.61 As regards Dunnett, the testatrix stated in a signed side letter
executed at the time of the will that she had not subjected the defendants to a secret
trust. Malins VC therefore held that no legal obligation was imposed.62 Thus far the
judgment could not be faulted. However, in refusing an order for costs for the
defendants from the plaintiffs (rather than the estate), Malins VC described the case
as running close to the wind, “a very difficult case, and one that demanded

58 (1855) 3 Sm & Giff 48 (Stuart VC).
59 Ibid, 80.
60 (1878) 8 Ch D 430 (Malins VC)
61 Ibid, 436-437 per Malins VC.
inquiry". Contrary to Malins VC’s assertion, it is difficult to see how the testatrix could have made her intentions clearer and there was hardly any novel point of law raised. For this reason Malins VC’s comment seems to point towards the instinctive judicial anxiety that a secret trust resting on a purely moral obligation was tantamount to an evasion of the Mortmain Act - an anxiety exacerbated in _Rowbotham v Dunnett_ by the knowledge that the defendants intended to perform the charitable trust.

5.32 The same underlying but unwarranted anxiety to protect the policy of the Mortmain Act re-surfaced later in Cotton LJ’s contribution to the otherwise sound decision in _Re Spencer’s Will_. It will be recalled that in that case the Court of Appeal correctly refused to allow a disavowal of trusteeship in the precatory terms of the will to preclude consideration of whether a fully-secret trust had been agreed _dehors_ the will. Cotton LJ considered it was imperative to look behind the words of the will, since otherwise “an easy way would be opened of entirely getting rid of the Statutes of Mortmain”.

This was an expression of unjustified judicial panic, a wrong reason for a proper rule. If (contrary to their determination) the court could not have had regard to a fully-secret trust for charitable purposes and the matter had been left to be regulated by the merely precatory terms of the will, the outcome would have been a beneficial devise vested in the secret trustee coupled with an unenforceable moral obligation to apply it to charity. This was no more an evasion of the Mortmain Act than an uncommunicated secret trust, since in both cases there was no legal right vested in charity on the testator’s death to the devise. The matter rested with the legally unrestricted judgment of the legatee, and if he chose to

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62 _Ibid_, 443.

63 _Ibid_.

64 (1887) 57 LT (NS) 519, 521.
benefit charity in fulfilment of his secret promise and moral obligation, he made a gift of his own absolute inheritance. To see in this an evasion of the Act was to fuse the intention of the testator to benefit the legatee with the separate intention of the legatee to benefit charity and to merge two discrete voluntary dispositions into one. This treated the devisee not as a donee at all, but as a mere conduit. While assuming the effectiveness of the moral obligation imposed by the testator, it was a perspective which involved a destruction of the element of morality. By treating performance of the precatory secret obligation as a foregone conclusion, it denied to the legatee the very freedom (within the constraints of ethics and morality) which the testator had intended.

Heterodoxy

5.33 The greater weight of case law during the life of the Mortmain Act supports the notion that the indulgence of judicial anxiety prevailed over the sound application of principle. In Muckleston v Brown,\(^{65}\) where alleged secret trustees objected to discovery, Lord Eldon LC in dismissing the defendants' objection appeared to approach the case largely on the basis that the defendants had accepted a trust obligation. This was despite the fact that there were grounds for considering the trust was merely precatory. Brown's evidence, set out in the plaintiff's bill, was that the testator had told him the Mortmain Act would not affect the matter because the defendants would have full right to the residue and the distribution would be their own act. This implied that the testator considered his devisees would be outright owners, for only if they were outright owners - free of any trust obligation - would

\(^{65}\) (1801) 6 Ves Jun 52.
the Mortmain Act be inapplicable. Of course further evidence might have shown that Brown's statement was not to be credited and that the secret trust was not in fact precatory; by itself, Brown's evidence was not necessarily a reason for upholding the demurrer. It is striking, however, that Lord Eldon LC did not explain that the plaintiffs could succeed only if Brown's admission stated their case at its highest.

5.34 An extreme case is Briggs v Penny, where the dispute concerned the language in the will itself, but no doubt only because evidence of communication of the trust dehors the will was not forthcoming. The testatrix had executed a will leaving £3,000 to Penny, a further £3,000 for her trouble as executrix and the residue of personalty to her "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." In the testatrix's writing desk were found a draft of the will and four handwritten papers setting out certain specified annuities, legacies and charitable dispositions. Personal representatives of the testatrix's next of kin claimed the residue on the basis it was not beneficially disposed of by the will. The precatory language in the will, it was argued, created a trust in favour of undefined objects and consequently the next of kin took under a resulting trust. Penny contended that no trust was created by the will and that she took beneficially as residuary legatee. As a second line of argument, the plaintiffs also claimed that she held the residue on secret trust to give effect to the charitable dispositions and that the Mortmain Act applied. The defendant denied that any secret trust was communicated to her and Knight-Bruce VC held that there was no

66 Consistent with this counsel disputed the central question of whether the Act applied on the basis of differing views as to whether the Act extended to merely precatory obligations: see ibid at 58.

67 (1849) 3 De G & Sm 525 (Knight Bruce VC); affirmed (1851) 3 Mac & G 546 (Lord Truro LC).
proof of any secret trust communications. However, Knight-Bruce VC proceeded to find for the plaintiffs on the basis of a trust on the face of the will, giving rise to a resulting trust for want of objects, and his decision was affirmed by Lord Truro LC on appeal.

5.35 In ascertaining the existence of a trust from the precatory language, Knight-Bruce VC pointed to the fact that the language of the will indicated the testatrix had a motive in mind to benefit some object other than the legatee herself. This was clearly an application of the wrong test. Undoubtedly the will indicated that the testatrix had certain “wishes” in mind; her statement in the will would have been superfluous if the testatrix merely desired all the benefit to fall to the legatee. Yet this says nothing about the manner in which the testatrix wanted the benefit to pass to some other persons or objects: it does not answer the question whether the legatee was to be subject to a legal or merely moral obligation to benefit those other parties or purposes.

5.36 On appeal Lord Truro LC’s treatment of the question was hardly more analytical. Although he recognised that the issue was whether the will imposed a trust or merely denoted a motive for the gift, he assumed that the very expression of confidence amounted to a declaration that the property was to be held on trust for that purpose. The strongest reason which Lord Truro LC identified was the

68 (1849) 3 De G & Sm 525 at 546.
69 See ibid, 542.
70 See especially (1851) 3 Mac & G 546 at 557.
71 (1849) 3 De G & Sm 525 at 541.
72 (1851) 3 Mac & G 546 at 553.
73 Ibid, 557. Lord Truro LC also thought that the terms of the will, especially “well knowing”, excluded any discretion on the part of Penny (see ibid, 374), but this is
existence of specific pecuniary legacies in favour of Penny which he considered (with echoes of Knight-Bruce VC's judgment) implied that the residuary legacy was for some other object.⁷⁴ Even this is hardly compelling, however, as the testatrix might well have wished to mark out a distinction between property which was to be for Penny absolutely and morally, on the one hand, and the residuary gift which was hers absolutely as a matter of law but which she was to consider as subjected to moral obligations. In fact such a construction is supported by the terms of the will themselves, since the testatrix distinguished between a specific sum for Penny as a reward for her prospective trouble as executrix and a sum for the same amount left to her without any expression of motive and presumably in recognition of her friendship and personal merit. In both cases Penny took absolutely at law, but the motive for each gift was distinct.

Moreover, when regard is had to the terms of the testatrix's handwritten papers setting out the uncommunicated secret trust it is hard to resist the inference that no trust was intended in the will.⁷⁵ The testatrix could hardly have intended to impose a trust obligation in the will when the terms of the secret trust envisaged that the matter would lie within the defendant's discretion. The decision is of doubtful authority.⁷⁶

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⁷⁴ 3 Mac & G 546 at 557.
⁷⁵ One paper (lettered C in the pleadings) indicated that the testatrix had chosen Penny because of her integrity and because it was not possible for the testatrix to leave much of her property to charity. This implied a desire to avoid the Mortmain Act by leaving the residue to Penny beneficially coupled with reliance on her trustworthiness - not the imposition of a legally-enforceable and counterproductive trust obligation.
⁷⁶ See Stead v Mellor (1877) 5 Ch D 225 at 227 where Jessel MR notes that the case had not been followed and that in no other case had a trust been established by words so
5.38 It might be possible to explain *Briggs v Penny* as a relatively late failure to adapt appropriately to the changed law governing certainty of trust intention in which the expression of confidence generally connotes a substitute for (and thus an exclusion of) a legal obligation. It would be stretching a point, however, to explain subsequent cases where the court simply assumed that the imposition of a moral obligation sufficed to create an enforceable secret trust. This was the position apparently taken in the representative cases of *Springett v Jenings* and *Jones v Badley*. In *Springett v Jenings* the testatrix had transferred £3,000 and certain land to Jenings (her solicitor), Jesse Piper Snr and Jesse Piper Jnr on trust to erect a hospital and almshouses. The trust was declared in a deed which was duly enrolled, but the testatrix died only nine months after it was executed and the disposition was therefore void under the Mortmain Act. By her will, of which the two Jesse Pipers and Edward Piper were executors, she devised the same land in the event that the deed was ineffective to her executors as joint tenants. There was a devise to the plaintiff of 'the rest of the testatrix's land'. The plaintiff's claim was that the specific devise was accepted by the executors on the basis of a secret trust for charitable purposes which was void, and that the property passed to her under the devise in her favour or devolved to her and her co-heiresses on intestacy. Lord Romilly MR decided that the land resulted to the testatrix's estate.79

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vague and indefinite, leaving open (in form only, perhaps) the point whether the case was rightly decided.

77 (1870) LR 10 Eq 488.

78 (1866) LR 3 Eq 635 (Lord Romilly MR); reversed (1868) LR 3 Ch App 362 (Lord Cairns LC).

79 The devise to the plaintiff was held not to be residuary and the property devised on the void secret trust passed under the intestacy rules to the co-heiresses in gavelkind: see (1870) LR 10 Eq 488, 495-496. This part of the decision was affirmed on appeal, but
5.39 The question in issue was stated by Lord Romilly MR as being whether the devisees took the property “in such a manner that they considered, by what they had done or by what they had abstained from doing towards the testatrix, they were morally bound to devote the property to certain charities which she indicated.” This statement of the issue misrepresented two distinct points. What mattered was not whether the donees under the will considered they might be under a moral obligation, but whether (a) the donor had intended to impose a legal obligation (albeit one which is prima facie unenforceable for want of form) and (b) the donees expressly or impliedly accepted that obligation. As regards the latter aspect, Lord Romilly MR found that, although Jesse Piper Snr did not promise the testatrix he would apply the property to charity, she was induced by his silence to believe that he would carry out her wishes. That alone, however, could not justify the decision. It was not established that the testatrix’s wishes were more than merely precatory. Lord Romilly MR, however, seems to have proceeded - in keeping with his statement of the issue - on the basis that engagement in the moral obligation of a secret trust would suffice.

5.40 The same criticism can be levelled at Jones v Badley. Here the testatrix, acting under the advice of her solicitor, had intended to effect a residuary gift to the defendants absolutely. She wished the property to be applied for charitable purposes, but was advised that imposing a trust obligation, whether in the will or by a secret trust, would result in the property being caught by the Mortmain legislation and resulting in equity to the plaintiffs who were her co-heiresses and next of kin.

there was no appeal on the secret trust point: see (1871) LR 6 Ch 333 (James and Mellish LJJ).

80 (1870) LR 10 Eq 488, 495 (emphasis added).
81 Ibid.
Lord Romilly MR held that a secret trust arose because John Badley acquiesced in her intentions as to disposal of the residue.\textsuperscript{82} Lord Cairns LC reversed that decision on the ground that the secret trust had not been communicated to the defendants.\textsuperscript{83} Neither judgment considers the argument that any secret trust would have been merely precatory.\textsuperscript{84} In fact a merely precatory obligation was the more natural inference in the circumstances of the case. It would have been fully consistent with the defendants’ denial that they were under any secret trust - a denial only of a \textit{legal} obligation to implement the testatrix’s wishes. The success of the testatrix’s whole scheme depended on the fact that she placed confidence in the defendants, trusting that they would perform their merely \textit{moral} obligation. The imposition of any legal obligation would have brought the Mortmain legislation into play, the avoidance of which was her chief desire.

\textbf{Enduring failure after the Mortmain Act}

5.41 It would be tempting to conclude that the failings in the case law asserted here can be attributed to two special contexts. In the first place, the Mortmain Act encouraged the judiciary to take a robust view of secret trusts of land for charity intended to be only morally binding. Secondly and more generally, the case law largely preceded the development of the modern requirement that a trust is only created where the testator intended to impose a legal obligation. This in itself establishes an important point: that the secret trusts law has largely evolved in a judicial climate in which a sharp distinction between legal and merely moral

\textsuperscript{82} (1866) LR 3 Eq 635, 656-657.

\textsuperscript{83} (1868) LR 3 Ch App 362, 365.

\textsuperscript{84} Counsel for the defendants may have been at fault here since the point was not apparently raised, despite citation of \textit{Lomax v Ripley}: see (1866) LR 3 Eq 635 at 648-651.
obligations was never fully operative. However, if that attribution were correct, one would expect the case law of the twentieth-century to demonstrate a more acute judicial sensitivity touching secret trusts with merely moral validity. In this final section of the chapter we consider further cases which suggest that, even after the Mortmain Act and with full appreciation of the modern test of certainty of intention, the courts have continued to find difficulty in deftly applying the distinction between legal and moral obligations in the secret trusts context. While nineteenth century cases might be seen as instances where the courts were still adjusting belatedly to the entrenchment of the modern test for certainty of words, the explanation is ill fitting for later cases suggesting that the judiciary has remained ready to infer a legal obligation in circumstances which properly analysed make such an outcome a doubtful reflection of the testator’s real intentions. These later cases offer reason to doubt whether there has ever been a comprehensive change in the judicial response to precatory secret trusts.

5.42 In *Re Williams*\(^85\) the testatrix bequeathed her estate to her husband absolutely “knowing that he is fully aware of my intention” that at his death all was to be given to a specified church. There was an express charge for a pecuniary legacy in favour of a friend. The husband subsequently died intestate, either leaving the testatrix’s estate to his next of kin free of trust or holding as trustee for the church. Leaving the point open, Farwell J proceeded on the basis that the will itself did not impose a trust; the question was thus whether a secret trust had been created.

5.43 The evidence of the solicitors who had prepared the wills of the married couple was that the husband had known of the terms of his wife’s will; and the evidence of the husband’s sister was that he had considered himself to be under at least a moral

\(^{85}\) [1933] 1 Ch 244 (Farwell J).
obligation to carry out her wishes. Without particularising the evidence further, Farwell J concluded that the husband had not only known and agreed to be bound by her will, but had in fact agreed to carry out her wishes. Had he agreed to do no more than comply with her will, he would only have undertaken a precatory obligation. It was the agreement to actually effect her intentions which elevated the agreement outside the will into one of legal obligation from mere aspiration. However, on the actual facts of the case, the decision of Farwell J is open to doubt. He seems to draw on the fact that there was no express repudiation of any obligation, but such an omission on the part of the husband could only be significant if the testatrix had sought to impose a legal obligation on him which he might accept by his acquiescence. It cannot suffice that he acquiesced in merely precatory expectations; such acquiescence cannot give rise in the testator's mind to any reasonable sense that a legal obligation has been undertaken. There remain significant doubts, therefore, whether on the facts Re Williams should have been decided in the same manner as Farwell J had resolved Re Falkiner - in other words, on the basis that the secret understanding actually went no further than the precatory terms of the will.

5.44 Similarly, the Court of Appeal decisions in Re Wedgwood and Re Pitt Rivers appear to exemplify how even after the Mortmain Act had lapsed into legal history the judiciary has continued to fall into error in cases of apparently precatory secret trusts for charitable purposes. In Re Wedgwood the testatrix had bequeathed the ultimate residue of her estate to Wedgwood absolutely. She wished him to apply the

86 Ibid. 250.
87 Ibid. 252.
88 Re Wedgwood [1915] 1 Ch 113 (Court of Appeal, reversing Warrington J).
89 [1901] 1 Ch 352 (Kekewich J); reversed [1902] 1 Ch 403 (Court of Appeal).
property for the purpose of protecting and benefiting animals (which the Court of Appeal held to be charitable). The testatrix was advised by her lawyer that if she could trust Wedgwood to use the residue of her estate for her intended purpose, she could leave it to him absolutely. When she told this to Wedgwood, he agreed to the proposal and she later executed her will to that effect. Warrington J held that Wedgwood took the residue absolutely. The Court of Appeal, whose judgments are not reported on this point, reversed that decision, upholding a secret trust. On the facts as reported the suspicion must be that Warrington J's decision on this point was sound and that whether or not this precatory secret trust purpose was charitable could not affect Wedgewood's beneficial entitlement. The testatrix's lawyer clearly envisaged that the testatrix would trust Wedgwood in a precatory sense of mere confidence, having a faith in his fulfilling her ambitions rather than imposing an obligation to do so. It was that sense of 'trust' which the testatrix relayed to Wedgwood and to which alone he apparently consented.

5.45 The decision in Re Pitt Rivers may be faulted for a less serious failing: a want of sophistication in applying the accepted law to the facts. In that case the testator operated a private museum and allowed the public onto his Larmer grounds. Notices on the land declared the fact that the museum and grounds were private property, with the public admitted as a matter of licence and privilege rather than as of right. By a codicil the testator left the Larmer grounds and museum on estate tail and the museum contents (together with objects of curiosity in his house at Rushmore, for addition to the museum) absolutely to his eldest son, the first defendant. He made a further gift of £300 p.a., charged on his estates, to his son for the future maintenance of the museum and grounds.

5.46 The testator had had frequent conversations with his eldest son, and the question in dispute was whether these created a secret trust. It was common ground that in these
conversations the testator indicated his intention that the museum should be carried on in the same manner as he had, by which the public would not enjoy further privileges. The evidence also established that the son had accepted the gifts with the knowledge that they were made to him for the purpose of effecting those wishes and that he had assured his father they would be fulfilled. The Attorney-General contended that a valid secret trust for charitable purposes was created. The defendant, while willing to carry out the testator’s wish in running the museum, disputed the claim of a public right over the museum and grounds on the basis that the testator had left the matter to his discretion, expressing no more than a hope and not imposing a trust obligation.

5.47 The issue was whether the secret trust was merely precatory. At first instance, Kekewich J held that the testator had imposed a trust obligation. In his view, the testator had either created a charitable secret trust enforceable for the benefit of the public (in which case his intention to exclude public rights was defeated), or else the son was to have the same privileges of ownership as the testator himself had enjoyed (in which case the son could treat the property as his own). Kekewich J

90 See especially the letter of 3rd August 1894 quoted at [1902] 1 Ch 403, 405. The particulars of evidence are reported more fully in the judgment of Vaughan Williams LJ reported at (1902) 71 LJ Ch 225, 227-9. The essence of the evidence was that on balance the son had undertaken to allow the public to use the property in the same way that his father had done, i.e. “as a matter of grace”, rather than to treat the property as dedicated to the use of the public.

91 Kekewich J held that the direction contained in the will that the £300 p.a. be used for maintenance of the museum, while indicative of the testator’s intentions, did not interfere with the absolute beneficial nature of the gift according to the will: [1901] 1 Ch 352, 357. There was therefore no trust obligation in the will. The reversal of the decision of Kekewich J by the Court of Appeal, holding that the secret trust was merely precatory, proceeded implicitly on the basis that Kekewich J was correct on this point.

92 [1901] 1 Ch 352, 359.
favoured the former: the paramount intention was to secure the maintenance of the museum and grounds and the exclusion of public rights was a minor part of his scheme by comparison.93

5.48 The weakness in this analysis was that it was too blunt. It is quite possible that the testator had potentially contradictory intentions - a desire to bind his son to the obligation to operate a museum and a desire to exclude public rights. If a trust obligation could only be imposed by means of a charitable trust, giving public rights, so that these desires could not be reconciled, logic dictates not that one desire should prevail over another, but that the testator's contradictory ambitions must result in failure: the defendant should hold on a resulting trust for the testator's residuary legatee. The testator intended a trust obligation but, in seeking to exclude public rights to the charity (and thus to deny a right of enforcement in the Attorney-General on the public's behalf), he intended a trust without beneficiaries or others to enforce it. That amounts to a trust of imperfect obligation, as Kekewich J recognised.94 Just as non-charitable purpose trusts are generally void for want of beneficiaries who can enforce the trust obligation,95 so the secret trust here should have failed and the legal owner should have held the property on a resulting trust.

5.49 The Court of Appeal reversed the decision of Kekewich J, holding that a merely precatory obligation was imposed on the defendant and that he accordingly took the property absolutely. The defendant's promise was merely to continue to allow public use and enjoyment of the property in the same manner as the testator had

93 Ibid, 359-360
94 Ibid, 359.
done, whereby the estate owner was not to be hampered by public rights; and such a promise was not consistent with the presence of a trust.96 Such reasoning, however, jumps to the other extreme and reflects the same defective dualism which can be criticised in Kekewich J’s judgment. The Court of Appeal reasoned that an exclusion of public rights was incompatible with a charitable trust (the only type of enforceable trust that the promise could create), and hence that no effectual trust was created.97 While the conclusion of the court could have been sound as a matter of fact, it does not follow from the single premise given. What the court failed to consider was whether the testator considered he was extracting a promise that was enforceable in law rather than morals, regardless of whether in law it could be. If the testator did have such an intention, he intended to impose a trust on the defendant. Such a trust might not be enforceable in law, because it excludes enforcement by the Attorney-General on behalf of the public, but it cannot remove the fact that the testator intended and the legatee undertook a trust obligation. Consequently the defendant should have held on a resulting trust, the attempted secret trust failing as being of a type not recognised by the law. Moreover, it would appear that the testator did indeed wish to impose a legal obligation on his son, albeit one not giving rise to public rights of enforcement.98 On that basis, on the current approach to secret trusts, a resulting trust analysis seems inescapable.

96 See [1902] 1 Ch 403 at 408 per Vaughan Williams LJ, at 409 per Stirling LJ and at 410 per Cozens-Hardy LJ.

97 Ibid.

98 Note particularly Cozens-Hardy LJ’s observation at [1902] 1 Ch 403 at 410: “It may be that he desired to create that which, not being in the view of the law a charity, would be void as a perpetuity.” This expressly acknowledges that the testator may have intended, by the combined effect of his wishes, a trust of imperfect obligation; but Cozens-Hardy LJ failed to deduce from this the implication of a resulting trust. The solicitor had suggested to the testator that he create a charitable trust, or alternatively that he express a hope in the will which would not be legally binding on the legatee. Neither option was acceptable to the testator. The clear implication of his
5.50 That this outcome was passed over was a consequence of the polarisation of thought on the bench. The preparedness to categorise the testator’s intentions into one of two boxes located at the extremes of a range of possible positions is symptomatic of a reluctance to observe attentively the precise and often subtle intentions of the testator. There has been too great a willingness to make assumptions as to the testator’s designs. In most cases as we have seen this tendency has favoured the automatic imputation of a legal obligation as an element of the testator’s design. *Re Pitt Rivers* is in this regard an exceptional case, the Court of Appeal distorting the testator’s intentions in order to deny a legal obligation. This underlying flaw remains that the court did not give legal recognition to the disposition which the testator actually intended.

5.51 The decision of the Northern Irish Court of Appeal in *Re Blackwood* provides a final reminder of the enduring willingness of the judiciary to reach for false assumptions in relation to secret trusts when confronted with an ambiguous and arguably precatory phrase in the will and the existence of or allusion to secret wishes *dehors* the will. In *Re Blackwood* the testatrix left her estate to her brother-in-law, the defendant, “absolutely in full trust and confidence that he will pay, apply and divide my [...] estate amongst my friends and relatives (including himself) in accordance with my wishes”. The defendant maintained that no wishes were ever rejection of a formal precatory trust is that in his secret dealings with his son the testator was intending to impose a trust obligation, albeit one which would necessarily fail because it would not amount to an enforceable public trust if public rights were excluded. Moreover, Vaughan Williams LJ considered that the evidence showed the testator desired *both* that the public benefit be granted as a matter of free will *and* that there be some certainty the museum would be kept up by his son. The latter anxiety points strongly to the testator having intended a more than merely moral obligation.

communicated to him and there was no evidence of a secret trust. Affirming the decision at first instance, the Court of Appeal of Northern Ireland held that the defendant was a trustee for unascertained objects and, consequently, a resulting trust arose in favour of the next of kin. That decision, however, was reached without any compelling reasoning in support and part of the reasoning invoked betrays the underlying inclination within judicial circles to assume that a secret trust is invariably intended to be a more than moral obligation.

5.52 On the face of it, the terms used in the will were presumptively to be construed in a precatory sense, not giving rise to a legal obligation, as Lord MacDermott LCJ recognised.\textsuperscript{100} The question was therefore whether anything in the terms or context of the will implied that, notwithstanding the mere expression of confidence, the testatrix in her will had intended to subject her brother-in-law to a binding trust. There can be little doubt, as Porter and Black LJJ rightly asserted,\textsuperscript{101} that the term "absolutely" was used in the will in a technical sense to describe the width of title, denoting that the gift was unconditional and that no particle of interest was retained. It was not to be understood in the ‘lay’ sense of signifying unencumbered beneficial enjoyment.\textsuperscript{102} That by itself, however, can indicate nothing about whether the absolute interest was taken by the defendant for himself personally or only in the capacity of a trustee, contrary to the Lords Justices’ supposition.\textsuperscript{103} Precisely because the term was directed to determining the extent of the bequest and not its beneficial depth, it would be a mistake to infer any connotation of trusteeship. A

\textsuperscript{100} Ibid, 35.

\textsuperscript{101} Ibid, 43 and 46.

\textsuperscript{102} Cf. Re Foord [1922] 2 Ch 519 where Sargant J construed the word in the lay sense to denote an outright gift and not in the technical sense as express negation of words of limitation.

\textsuperscript{103} [1953] NI 32 at 43-44 \textit{per} Porter LJ and at 46-47 \textit{per} Black LJ.
donor may be as anxious to specify that a beneficial donee takes an unlimited estate as much as a settlor seeking to create a trust.

5.53 Porter LJ relied also on a distinction between gifts to persons who have their own income (as was the case here) and gifts to spouses or children or the like who were dependent on the testator, suggesting that the latter were more likely to involve merely precatory obligations.104 Again this seems to be a sound starting point: a testator is unlikely to impose trusteeship on dependent legatees, at least if the disputed legacy is the only provision which has been made for them. However, it seems unsound to reason from this that merely because the legatee is not a dependent that a trust expression is probably not precatory, even if the entire estate is affected. The particular gift must be examined in context. The legatee here was a brother-in-law, who, as a relation rather than a professional acquaintance, may have been chosen by the testatrix from sentiments of personal regard which are reconcilable with a merely moral trust. The point is more neutral than persuasive. On the other hand, the court seems to have given little attention to the objects nominated, namely “friends and relatives”. Construed literally at least, the first of these terms is undoubtedly too vague to satisfy the modern certainty of objects test demanded of a discretionary trust under McPhail v Doulton105 let alone the fixed list test which then prevailed.106 This vagueness might have been thought to imply, by way of reflex action, that the testatrix had never actually intended to create a legally binding trust - a trust which must fail (as the court ultimately held).

104 Ibid, 42.
106 See IRC v Broadway Cottages Trust [1955] Ch 20 (Court of Appeal).
5.54 It is the final reason given by the court which most clearly illustrates the judicial prejudice against merely moral secret obligations. Lord MacDermott LCJ deduced that the direction to follow the testatrix’s “wishes” referred to in the will was not merely a direction to second guess the mind of the testatrix. The defendant was not a spouse (who would be more likely to know the unarticulated content of her mind) and the class of objects was wide (implying a vast array of circumstances to be addressed). In those circumstances it could not be assumed the testatrix supposed the defendant would know her mind. Rather the inference was that she contemplated communicating instructions to him. It was the existence of this intention on the part of the testatrix to control the division of the estate by way of supplementary directions which implied certainty of intention.107 While this inference of fact is unobjectionable, the suggested implication did not follow. It was predicated on the presupposition that the secret uncommunicated wishes of the testatrix, in contrast to the apparently precatory expression in the will, were such as were calculated to subject the defendant to a legal obligation. In fact it is possible to argue the very opposite from the circumstances of the case. The testatrix had not in fact communicated any wishes, although (it is inferred) she had contemplated doing so. In the end she had been content to leave the matter entirely to the terms of her will which, presumptively, left the matter entirely to his unburdened judgment. The context dehors the will pointed towards a reliance by the testatrix on faith in her nominated post mortem alter-ego, rather than an intention in the last resort to impose mandatory directions. This confirmed a construction of the will as imposing only a moral obligation. It would seem that the judicial prejudice against secret moral obligations led the court into construing the will as imposing a trusteeship which was arguably unwarranted.

107 [1953] NI 32, 35 per Lord MacDermott LCJ, and similarly ibid. 43-44 per Porter LJ and at 49 per Black LJ.
Conclusion

5.55 The informality of a secret trust agreement makes it easier for ambiguity, contradiction and vagueness to introduce themselves into the factual matrix from which evidence of the nature of the trust is to be distilled. This is one reason why the task of differentiating legal from merely moral obligations will tend to be more burdensome for trusts declared dehors the will in comparison with those formally contained within it. This renders the ultimate resolution of the dispute dependent on a fine and less predictable calculus of certain nuances distilled out of fragmentary evidence. It is in the unpredictability of these litigated outcomes that the real value offered by will formality may be seen; the uncertainty is a measure of what has been lost in enforcing a testamentary disposition outside the Wills Act. It confirms the necessity for a sound rationale in enforcing secret trusts despite their informality.

5.56 It also emerged in this chapter that the judiciary in reported secret trust cases has often failed to give due consideration to the question whether the testator actually intended a trust obligation. This neglect cannot be entirely attributed to the influence of the Mortmain Act and the late development of the rule requiring certainty of trust intention. If it can be said that a court in construing an express trust from precatory language in a testament has sometimes made an unintended will,\textsuperscript{108} then there is good reason to suppose that the court has often made a will for a testator out of a precatory informal request to a legatee. In regard to secret trusts the court has been especially prone to uprooting the moral obligation which a testator sought to impose on a legatee and re-planting it in the legal arena where it was never intended to flourish, disturbing in the process the testator's desired

\textsuperscript{108} See Knight v Knight (1840) 3 Beav 148 at 172 \textit{per} Lord Langdale MR.
balance of power between trustee and beneficiary.\textsuperscript{109} There has been a too keen assumption that in resorting to the secret trust device outside the formality of a will the testator has been motivated to effect an informal disposition with all the legal enforceability which attends to the Wills Act compliant legacy itself. It is this dismissive regard for merely moral obligations which has formed the setting for the retrenchment of the secret trusts doctrine.

CHAPTER 6: THE DEHORS THE WILL THEORY

Introduction

6.1 In chapter 2 we saw that a testamentary trust is subject to the provisions of the Wills Act. It was established in chapter 3, moreover, that the beneficial policy of the statute does not accommodate a purposive construction excepting secret trusts. Presumptively, therefore a secret trust ought to be void for non-compliance with the Wills Act. It is the purpose of this chapter to confirm that this is indeed the case: a secret trust is a testamentary disposition which is void for informality. It should be recalled from chapter 4, however, that the dehors the will and fraud theories are generally mutually exclusive. To the extent that the case law has adopted the fraud theory, as the following chapter shows, further doubt at least is cast on the legitimacy of the dehors the will theory, if not its explanatory power.

6.2 It has long been argued that the enforcement of secret trusts is consistent with the functioning of the statutory formality for wills, although statements to that effect have often verged on mere assertion that judicial intervention can be reconciled. Attempts to construct in simple terms an explanation of consistency often fail in that

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1 See, to the same conclusion, Austin Wakeman Scott, “Conveyances upon Trusts not Properly Declared”, 675; Scott and Fratcher, vol. IA, § 55 and § 55.1; Gardner, p. 82; Penner, paras 6.36 and 6.45.

2 Consider, for example Lord Hardwicke LC’s enigmatic comment in Drakeford v Wilks (1747) 3 Atk 539 at 540 (“This is not setting up anything in opposition to the will, but taking care that what has been undertaken shall have its effect [...]”) and Arden MR’s bluntness in Barrow v Greenough (1796) 3 Ves Jun 153 at 155: “I am quite relieved from any difficulty as to the statute.”
object. A classic illustration of this is a dictum of Lord Sumner's in *Blackwell v Blackwell*\(^3\):

[T]he doctrine of equity, by which parol evidence is admissible to prove what is called 'fraud' in connection with secret trusts, and effect is given to such trusts when established, would not seem to conflict with any of the Acts under which [...] the legislature has regulated the right of testamentary disposition.\(^4\)

This statement that the court is merely giving effect to the secret agreement or the promise of the legatee and that this falls outside the Wills Act is merely question-begging.\(^5\) The critical matter is how effect may be given to the legatee's undertaking consistent with the requirement that a will comply with the Act. It does not advance matters to place reliance on the maxim that equity acts in personam.\(^6\)

\(^3\) [1929] AC 318.

\(^4\) *Ibid*, 334, and see similarly the comment at 339 that "[i]t is communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provisions of the Wills Act [...] ", which is no more than a statement that the elements necessary to establish a secret trust are not matters within the Act.

\(^5\) Academic exposition has often followed a similarly complacent line. See, for example: N. E. Mustoe, *Executors and Administrators*, 3rd edn by N. E. Mustoe and W. A. Kieran (London: Butterworth, 1939), p. 178 ("These rules are not contrary to s. 9 of the Wills Act [...] for the rules are not concerned with a trust imposed by the will. The trust which they enforce is one which is created by the promise of the legatee to deal with his legacy in a particular manner."); Fleming, p. 29, suggesting that fully-secret trusts "are substantially devoid of serious difficulty since the existence of the trust is established strictly 'dehors' the will, and consequently unaffected by the statutory requirements prescribing the formalities to which testamentary instruments must conform", thereby begging the question whether the trust 'dehors' the will ought not to be contained with in it.

This only describes the manner in which equity burdens individuals who may avail themselves of legal rights; it says nothing about why the equitable burden is to be imposed. Some reason for enforcing the secret undertaking must be found before the maxim provides any assistance.

6.3 The assumption of Lord Sumner in *Blackwell v Blackwell* appears to have been that the secret trust escapes the reach of the Wills Act because it is not in fact a testamentary disposition. He noted that while section 9 of the Wills Act prescribed the form for a valid testamentary disposition, “it does not deal with the construction of wills, or the application of the general law of trusts to interests created by wills”,7 necessarily implying that equity in giving effect to the half-secret trust in the case before him was doing no more “aplaying the general law of trusts”. This assumes that the secret trust is not to be considered a testamentary disposition, but offers no explanation in support. Given that an express testamentary trust is void if it does not comply with the Wills Act, how is it “a perfectly normal exercise of general equitable jurisdiction”8 to subject the legatee’s interest under the will to the trust informally agreed *dehors* the will?

6.4 As already outlined in chapter 4, the *dehors* the will theory attempts to answer this question in one of two ways. In its usual form, the argument is that the testator has not made any testamentary disposition of his property because the secret trust is declared *inter vivos*.9 The secret trust is thus resolved into two distinct component parts: an *inter vivos* declaration of trust and a testamentary constitution of it. The trust is really an *inter vivos* one and the will enters into the matter only because it

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7 [1929] AC 318, 337. See also *passim* at pp. 336-40.
9 For statement of the theory in these terms, see Hodge, p. 346.
constitutes the trust declared by the testator in his lifetime. It is only the transfer to
the trustee, not the declaration of trust, which is a testamentary act and must satisfy
the Wills Act. This argument finds support both in judicial dicta and academic
literature.11

6.5 A variant of the dehors the will theory contends that there is no testamentary
disposition on the basis that the beneficial interest in the legacy is vested in the
secret beneficiary by virtue of the legatee’s disposition. As Fleming has noted,
however, the courts have in fact left the relationship between the secret trust
concept and the testamentary instrument uncertain.12 This is explicable if, as this
chapter seeks to show, on a more exacting view it emerges that the secret trust is a
testamentary disposition and that either notion that it is an inter vivos disposition
cannot be pressed consistently with either principle or case law. It is only by
maintaining vagueness in the nature of the secret trust that its testamentary character
and the lack of juridical foundation can be masked.

6.6 In order to do justice to the dehors the will theory, however, it is necessary to
properly assess whether the secret trust can legitimately be characterised as
anything other than a testamentary disposition by the testator of his property. This
chapter therefore addresses both case law and principle to resolve the two
fundamental questions: (i) what amounts to a “testamentary” disposition and (ii) is a
secret trust within that definition?

10 In addition to the dicta addressed in the text of the chapter, the dehors the will
operation of the secret trust is asserted in Re Keen [1937] 1 Ch 236, 244 per Lord
Wright MR and Re Snowden [1979] 1 Ch 528, 535D-E per Megarry VC.
and 45.
12 Fleming, p. 33.
The meaning of "testamentary disposition"

The distinction between 'testament' as instrument and 'testament' as disposition

6.7 As a preliminary matter it is necessary to recognise the fundamental distinction between two different senses of 'testament' (and, correspondingly, of 'testamentary'). The term 'testament' may denote the declaration of a testator manifesting an intention to dispose of his estate on his death in a given manner. Alternatively it may refer to the instrument which contains such a declaration. In its dispositive sense testament denotes a transaction and is descriptive in a substantive sense; in its instrumental sense it indicates the document effecting the transaction and looks to its form. The distinction between these two senses is an obvious one, but failure to appreciate it has been a fruitful source of confusion in the law. Confusion is apt because the two terms may usually be used interchangeably. Except in the case of privileged wills, there can be no valid will in the dispositive sense without a will in the instrumental sense. The need to differentiate arises where testamentary intentions are not reduced to form.

6.8 For the purposes of section 9 of the Wills Act, the term "will" must operate in the dispositive sense. The purpose of the Act is to establish a formality requirement

13 See 2.8.
14 For a contrasting case where "will" was used by the legislature in its instrumental sense, see, for example, the Court of Probate Act 1857, s. 2, which defined "will" as comprehending "'testaments' and all other testamentary instruments of which probate may now be granted" and similarly the Supreme Court of Judicature (Consolidation) Act 1925, s. 175(1). The definition of will in s. 128 of the Supreme Court Act 1981, which replaces these provisions, makes more explicit account of informal wills authorised by s. 11 of the Wills Act, since the definition expressly includes a
applicable to a disposition. A will in the instrumental sense is the product of compliance with the Act, not its operand. Any other construction of section 9 is self-evidently absurd. In imposing a requirement of form, the Act presupposes a transaction which can be identified without regard to the very attribute which the section seeks to regulate.  

The elements of a testamentary disposition

6.9 In the course of argument in Lea v Libb 16 a definition of will was mooted as “a declaration of the mind (either by word or writing) in disposing an estate [...] to take place after the death of the testator.” 17 That this reflects the enduring judicial understanding of the term is evident from the expression at greater length to the same effect in the judgment of Graham B in AG v Jones 18:

[I]n order to constitute the essence of a will, it must be an instrument which a man voluntarily makes; it is an expression of his will [...] touching the disposition of his property at the time of his death. 19

6.10 This definition identifies the primary element of a testamentary disposition - that it is a disposition effective on the testator’s death. 20 A more revealing dictum,
however, treats a testament as a disposition which is "fluctuating, ambulatory and
does not take effect till after death". From this definition it is possible to
construct a list of the four interrelated qualities of a will. First and foremost, the
disposition is effective on death. Secondly, in consequence of the first attribute, the
will is an 'ambulatory' disposition: it has no effect during the testator's life.
Thirdly, in consequence of the second attribute, the will can attach only to such
property as exists within the testator's beneficial ownership at the time of his death:
the will is a 'fluctuating' disposition - ambulatory in the narrow sense. Fourthly, the
will is revocable. This last is supplementary to the second attribute and is also
contained within the wider notion of an 'ambulatory' disposition: the will has no
binding effect on the testator during his lifetime, so that he is free to recall, amend
and replace it.

6.11 The first of these three attributes is axiomatic and undisputed. Equally, the third
attribute need not detain us here. In considering the nature of an accepted secret
trust intended by a testator to take effect on his death in respect of a legacy which
will be bequeathed to the trustee it is the second and fourth attributes which require
detailed analysis.

_Suspensive effect until death_

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20 See similarly _Bartholomew v Henley_ (1820) 3 Phill Ecc 317 at 318 _per_ Sir John
Nicholl.

21 _Brydges v Chandos_ (1794) 2 Ves Jun 417 at 427 _per_ Lord Loughborough LC. For
definitions to similar effect, see Swinborne, fol. 10V; _King's Proctor v Daines_ (1830) 3
Hagg Ecc 218 at 219 _per_ Sir John Nicholl; Stephen, vol. I, p. 544; _Re Barnett_ [1908] 1
Ch 402, 407 and 409 _per_ Warrington J (implicitly), holding that an appointment within
s. 10 of the Wills Act failed for non-compliance with s. 9; Bailey, pp. 60-61; _Williams_,
p. 4; Hodge, p. 346; _Re Berger_ [1990] Ch 118, 129G-H _per_ Mustill LJ.
6.12 *Voluntas testoris ambulatoria est usque ad mortem.* A will, being ambulatory, has no binding effect in law until the death of the testator. An unrevoked will only vests rights of property on the testator’s death. During the testator’s lifetime it creates no rights for the prospective legatees. Their rights are not even inchoate: they are mere expectancies which may be lost to them by revocation or lapse. Until death, the testator retains fully his powers of *inter vivos* disposition, since the will creates no present rights in law to future enjoyment.

6.13 This quality of a will is illustrated by the classic contrast between a will and, on the other hand, a settlement which reserves to the settlor a life interest but which vests present rights in the remaindermen. The existence of present rights under the settlement - albeit rights to future enjoyment (on the settlor’s demise) rather than rights in possession - dictates that the settlement is not ambulatory. An intention that rights to enjoy property should subsist on a property owner’s death is therefore not itself determinative as to whether a disposition has a testamentary character. What matters is the time at which the right to future enjoyment is to arise. A settlement during a settlor’s life whereby he reserves to himself a life interest in the settled property is not testamentary because the creation of the settlement, if taking effect from the moment of disposition and not itself suspended, vests present beneficial rights in the remaindermen at the time of executing the settlement.

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22 *Mathews v Warner* (1798) 4 Ves Jun 186 at 210 *per* Lord Loughborough L.C.
23 See Strahan, p. 66; Hodge, pp. 346-347.
24 The decision in *Shingler v Pemberton* (1832) 4 Hagg Ecc 356 was probably right on the facts of the case, since the property to be assigned by the deed was defined by reference to the testator’s decease and therefore the assignment partook of a will, but Sir John Nicholl was wrong to attach weight to the reservation of a beneficial interest.
6.14 The suspension of all rights in the legatees until death may be further contrasted with a revocable settlement. Such an arrangement gives rise to interim or provisional rights - in other words, rights which are presently vested, although they are subject to defeasance by revocation. A strict settlement of the type already contrasted with a will does not become testamentary merely because it is revocable.25 A right pro tempore under the settlement, whatever the contingency of its duration, is nonetheless a present right and the creation of even a contingent present right is the negation of a will.26

6.15 A decisive characteristic of a testamentary disposition, therefore, is an intention on the part of the testator to create property rights with effect only from his death.27 In ascertaining whether this intention is present, the form of the instrument containing the disposition must be disregarded, since the question is one of substance dependent not on the label given to the instrument but the operation of its terms.28


26 It is for this reason that in describing this attribute of a will the term ‘ambulatory’ is to be preferred to ‘interlocutory’, which is used in Swinburne, fol. 9f. ‘Interlocutory’ implies the existence of rights which exist for the time being and such rights are necessarily present rights, however fragile.

27 In addition to the authorities noted in the text, see also In the Goods of Robinson (1867) LR 1 P & D 384 (Sir J. P. Wilde); In the Goods of Halpin (1874) IR 8 Eq 567 (Rt Hon. Robert Warren).

28 See Thorold v Thorold (1809) 1 Phill Ec 1 at 9-10 per Sir John Nicholl (where a deed was admitted to probate); AG v Jones (1817) 3 Price 368 at 381 per Richards B and at
Where an instrument is not in form a will - typically in disputed cases it has been a deed - the required intention may nonetheless be explicitly stated and the instrument will then take effect (if it can) as a testamentary disposition. Alternatively, the requisite intention may be inferred from extrinsic evidence. In Roberton v Smith an instrument complying with the Wills Act formalities which purported to make an immediate gift of sums deposited at specified banks was nonetheless held to constitute a codicil and admitted to probate since parol evidence showed that, despite the apparent effect of his wording, the testator intended his disposition should depend on his death and have no effect otherwise. In the words of Lord Penzance:

The guiding principle in determining whether a paper is or is not of a testamentary character has been determined to be this - that it will be

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392 per Graham B, where a deed was held to constitute a testamentary instrument for legacy duty purposes. See also the judgments of Sir John Nicholl in Bartholomew v Henley (1820) 3 Phill Ecc 317 at 318 (where cheques and explanatory entries in a cheque-book constituted a codicil), Glynn v Oglander (1829) 2 Hagg Ecc 428 at 432 and King's Proctor v Daines (1830) 3 Hagg Ecc 218 at 221.

29 See similarly In the Goods of Morgan (1866) LR 1 P & D 214 (Sir J. P. Wilde); Green v Andrews (1877) 41 JP 105 (Hannen P).

30 King's Proctor v Daines (1830) 3 Hagg Ecc 218 at 220-221 per Sir John Nicholl, where, however, the extrinsic evidence confirmed that a purported immediate gift of chattels in the form of a signed and attested but unsealed deed had been intended to take effect inter vivos.

31 (1870) LR 2 P & D 43.

32 See similarly In the Goods of Montgomery (1846) 5 Notes of Cases 99 (Sir H. Jenner Fust); In the Goods of Coles (1871) LR 2 P & D 362 (Lord Penzance); Fielding v Walshaw (1879) 48 LJ P 27 (Hannen P); In the Goods of Slinn (1890) 15 PD 156 (Hannen P).
held testamentary if it were the intention of the testator that the gifts
made by it should be dependent on his death.33

One may justifiably quibble that this is not the guiding principle, merely one
essential characteristic of a testament,34 but the position is otherwise correctly
stated.

Revocable until death

6.16 The probate courts historically have not shown themselves to be consistently astute
in recognising that specific consideration should be given to whether a disposition is
revocable before it may be properly labelled a will.35 It may be the case that, having
established that the donor intends his disposition to have effect only at his death, it
is to be presumed that the donor intended a will. Accepting that revocability is an
essential element of a will, it is to be further presumed that such an instrument is
revocable, whether or not so expressly, and constitutes a will, unless it is shown that
it must be irrevocable.

33 (1870) LR 2 P & D 43 at 45. See, similarly, his dictum in In the Goods of Coles (1871)
LR 2 P & D 362, 364 ("The principle is plain that where a paper is intended by the
testator to take effect after his death, it will be admitted to probate [...]"); and Re
Anziani [1930] 1 Ch 407, 424 per Maugham J ("[I]t is quite clear [...] that a deed that is
not intended to have any effect until the testatrix's death is testamentary [...]").

34 A better formulation therefore is an earlier one of Sir John Nicholl in Shingler v
Pemberton (1832) 4 Hagg Ecc 356 at 359: "The primary consideration [...] has always
been whether the instrument was intended to operate in the life-time of the party
deceased, or be consummated only on death." (Emphasis has been added.)

35 For example, the point was not specifically addressed and seems to have been assumed
in Shingler v Pemberton (1832) 4 Hagg Ecc 356, Robertson v Smith (1870) LR 2 P &
D 43, In the Goods of Morgan (1866) LR 1 P & D 214 and Green v Andrews (1877) 41
JP 105.
6.17 However, it seems settled that revocability is an essential condition of a will. Certain decisions that an instrument was not testamentary are only explicable on this basis, since the power to revoke the disposition was the only one of the necessary attributes of a will which the instrument lacked. *Dicta* in the case law confirm that, in addition to the question of whether or not the donor intended his disposition to be effective only on death, the court must be satisfied of the revocability of the disposition.36 This duality of conditions for a valid will was applied in the case of *In the Goods of Robinson*.37 The instrument in dispute was an agreement for a lease to which the deceased (as landlord) and a grandson (as tenant) were parties. The agreement provided that if the landlord died before termination of the lease, the rent was to be paid to the landlord’s executors for the benefit of all the grandchildren. It further provided, subject to an option in favour of the tenant, that the land was to be sold on termination of the lease and the proceeds distributed equally among the grandchildren. Sir J. P. Wilde held that the entire agreement was irrevocable. The instrument was to be considered as a totality. The grandson’s promise as to the application of the rent after the landlord’s death formed part of the consideration moving from the grandson. This term was thus fixed as part of the contract which was variable only by mutual agreement of the parties; it therefore lacked the revocability required of a will. Probate was refused for this reason. The fact that the entire agreement was intended to take effect immediately, for the creation of an equitable lease and the grant of possession to the grandson, was a

36 *See Nelson v Oldfield* (1688) 2 Vern 76 where Lord Jeffreys LC considered a will exacted by coercion which the testatrix had sworn not to revoke as lacking this essential attribute of a will; *Thorold v Thorold* (1809) 1 Phill Ecc 1 especially at 10 (Sir John Nicholl).

37 (1867) LR 1 P & D 384. See also *In the Goods of Halpin* (1874) IR 8 Eq 567 (Rt Hon. Robert Warren).
second reason for refusing probate. While, therefore, Robinson is not a conclusive authority that revocability is a requirement of a will, it lends support to an undisputed proposition.

Secret trusts as trusts *dehors* the will

**Trust dispositions as “testamentary dispositions”**

6.18 Satisfying the definition set out in the preceding section, the creation of an express trust which is intended to take effect on the settlor’s death is indisputably a testamentary disposition and, if executed with due formality, constitutes a will which is to be admitted to probate. In determining whether the trust is *inter vivos* or testamentary the determining factor will be whether the trust creator intends that rights under the trust should arise only on his decease.

6.19 Is it possible to distinguish a secret trust from an express testamentary trust? A secret trust is distinguishable in that there exists an additional element essential to the constitution of a secret trust: the trust must have been communicated to and

38 See, for example, *In the Goods of Morgan* (1866) LR 1 P & D 214 (Sir J. P. Wilde) (where three attested deeds of gift conveying property to trustees for the benefit of the donor’s children but suspended in effect until the donor’s death were admitted to probate).

39 See *In the Goods of Montgomery* (1846) 5 Notes of Cases 99 at 100, where Sir H. Jenner Fust held that an unsealed deed purporting to convey property to trustees on specified trusts to be effected after the settlor’s decease constituted a will, but would have held otherwise if there had been trusts to be executed immediately or within the settlor’s lifetime; *Milnes v Foden* (1890) 15 PD 105, 107, where the testatrix created a settlement in favour of such revocable trusts as she should appoint and subsequently executed two attested revocable deeds appointing the property on certain trusts from
accepted by the legatee. In contrast an express testamentary trust may take effect in
a will without the agreement of the nominated trustees, although on discovery of
their appointment to office they may disclaim trusteeship, re-vesting the property in
the testator's estate on the terms of the declared trust. Similarly, in contrast to the
execution of a formal codicil, the testator in creating a secret trust cannot simply
substitute beneficiaries at his own unilateral volition: to be binding any new secret
trust terms requires the agreement of the legatee which the legatee is free to revoke
in the testator's lifetime.40 On the other hand, the secret trust shares the same
characteristics of revocability and suspensive effect. The testator does not intend the
legatee and secret beneficiary to acquire rights in the trust property until his death;
and the testator retains the ability to revoke the secret trust either by formally
revoking the legacy or by manifesting his intention that the legatee should take
beneficially.41 The question is therefore whether the fact that the secret trust
depends on a bilateral agreement between testator and legatee denudes the trust of
its testamentary quality.

her decease which Hannen P admitted to probate, since death was the event which was
to give her trust disposition effect.

40 Contra Wilde, p. 367 n. 3.

41 See to similar effect Marshall, p. 40; Burgess, "The Juridical Nature of Secret Trusts",
p. 273; Burgess, "Secret Trust Property", p. 115; Hodge, p. 347; Gardner, p. 82;
Penner, para. 6.45.

The assumption that the testator, if he does not revoke the legacy, must actually
communicate his new intention to the legatee, rather than merely declare it, is too
restrictive. As the discussion of post-mortem communication of trust terms implies,
there will be no fraud in the legatee retaining the property beneficially if this meets with
the testator's wishes, despite his undertaking to hold on trust. A further argument is that
the testator's change of intention shows that the legatee's secret promise has not
induced the non-revocation of the legacy: the element of causation necessary to bind
the legatee to the secret trust will be lacking, even if the testator's new intention is not
communicated.
Must a testamentary disposition be unilateral?

6.20 Elias has argued that in addition to possessing the elements of revocability and ambulatoriness a disposition can only properly be considered testamentary if it is also unilateral. From this premise he deduces that a secret trust is not a testamentary disposition and that it falls outside the terms of the Wills Act; the trust takes effect by virtue of an agreement with the legatee and not as a result of the testator’s sole choice. The notion is an appealing one, primarily because in our mind’s eye the term ‘testament’ may conjure up the fanciful image of one man’s final monologue in this world as he contemplates his approach to the gate of another. Despite the participation of legal advisers and attesting witnesses, as well as the discussion with prospective executors which may precede a will, the execution of a will is in most cases the act of a single party. However, as a proposition of law, there does not appear to be any strong reason for supposing that a will must necessarily be further qualified by the attribute that it is unilateral and there is some authority which tends to negate that proposition.

6.21 Authority to support Elias’s proposition is scarce and of slender weight. In their report on the interpretation of wills, the Law Reform Committee described a will as a unilateral instrument, but this observation was not based on a review of the law and appears to have been intended as a descriptor of wills in general, rather than as setting down an essential requirement of a will. The Committee was only concerned to make the point that rectification in equity is not confined to bilateral or multilateral instruments and it is undisputed that wills are usually unilateral. Against

42 Elias, pp. 62, 87-88 and 95.
44 LRC Rep. No. 19, Cmnd. 5301, para. 10.
this must be set a *dictum* of Richards B in *AG v Jones*\(^{45}\) which dismisses the participation of trustees in an otherwise testamentary disposition as irrelevant, which would tend to negate the significance of the secret trustee’s agreement.\(^{46}\) However, this *dictum* is equally of slim weight. In *AG v Jones* the Crown was seeking legacy duty on a disposition contained in a deed and the Court of Exchequer, while not a court of probate, was compelled to apply the principles developed in the probate court to determine whether the deed constituted a will for the purposes of the taxing legislation.\(^{47}\) The deed purported to transfer to the defendants as trustees all the settlor’s personality on trust for himself for life with a remainder specified and the Crown was seeking legacy duty in respect of the remainder interest on the ground that, despite its form, the disposition was actually testamentary. The court held, Wood B dissenting, that the deed was indeed a testamentary instrument, either by incorporation into the will by reference\(^{48}\) or in its own right,\(^{49}\) as the settlement was intended to be suspended until the settlor’s death (despite the literal tenor of its terms).\(^{50}\) Although Richards B was therefore directly concerned with the meaning of “testamentary”,\(^{51}\) the facts of the case were materially different from those a secret trust. All that Richards B affirmed was that where property was not in fact to pass to the trustees during the disponor’s lifetime, the introduction of trustees would not deprive the disposition of its testamentary

\(^{45}\) (1817) 3 Price 368 (Court of Exchequer).

\(^{46}\) *Ibid*, 381.

\(^{47}\) See *ibid* at 390 *per* Graham B.

\(^{48}\) *Ibid* at 382-383 *per* Richards B and at 398 *per* Thomson CB.

\(^{49}\) Most clearly stated by Richards B, as an alternative reason, *ibid* at 379.

\(^{50}\) *Ibid* at 380 *per* Richards B, at 392 *per* Graham B and at 397-398 *per* Thomson CB.

\(^{51}\) The Legacy Duty Act 1796 in s. 7 defined a legacy for the purposes of duty as “any gift by any will or testamentary instrument” satisfied out of personality.
character.\textsuperscript{52} He was not called upon to consider the case where trustees have, before the will takes effect, undertaken to act as trustees on the testator’s death. Despite the generality of his language, Richards B’s \textit{dictum} may taken as a mere confirmation of the basic point that an express trust with effect suspended until the settlor’s death is a form of testamentary disposition.

6.22 At first glance the case of \textit{In the Goods of Robinson}\textsuperscript{53} might be thought to lend some support to the view that a bilateral instrument cannot constitute a will. As we have seen, that case concerned an agreement for a lease containing a clause in which the tenant promised to pay any rent due under the lease after the landlord’s death to the landlord’s executors on trust for the landlord’s grandchildren (which included the tenant). Sir J. P. Wilde refused probate of this provision. The facts of the case seem to reflect many of the elements of a secret trust. The promisor undertook that after the death of the promisee he would dispose of property of the promisee (in this case the chose in action constituted by the right to payment of rent) in favour of third parties. Furthermore, the promise received its efficacy from the fact it reflected the promisee’s wishes and was accepted as an obligation by the promisor.

6.23 Nevertheless it is submitted that this decision does not support Elias’ case. The resolution of the \textit{Robinson} case was based on the fact the material term of the agreement was not unilaterally irrevocable. It was not suggested that the simple fact that the agreement was bilateral was in itself decisive. Rather a bilateral arrangement disposing of the promisee’s property on his death is only non-

\textsuperscript{52} \textit{Ibid} at 381: “[I]f it is once admitted that, if there were no trustees here, the act would be testamentary, [...] you will not suffer a person to escape the [legacy duty] law by the formality of introducing trustees who are of no use during his life, while he keeps all the property, and retains control of it.”

\textsuperscript{53} (1867) L.R. 1 P & D 384.
testamentary in so far as it is also an irrevocable one. Despite the apparent equation between the Robinson scenario and the secret trust arrangement, the comparison disintegrates when the reasoning of Sir J. P. Wilde is probed. It was emphasised that the tenant, qua grandson, had an interest in the clause in question.\textsuperscript{54} As one of the grandchildren benefiting under the trust of the rent provided for on the landlord's death, he would receive back a portion of the rent he paid in his capacity as tenant if his grandfather died during the currency of the lease. It was therefore fair to assume that this term formed part of the real bargain between the deceased and the grandson: any other term would have materially altered the position of the grandson. It followed that it could not be assumed the testator during his lifetime was entitled to revoke this term of the agreement, so that the benefit of the rent would simply pass with his reversionary estate under his will or by intestate succession to his next of kin. This is in sharp contrast with the agreement giving rise to a secret trust. The secret agreement remains unilaterally revocable by the testator, who, as we noted above, may not only liberate the trustee from the obligation (so allowing an absolute legatee to keep the property for himself) but may also abandon his testamentary intentions altogether by leaving the property in some manner inconsistent with the formerly intended secret trust. The secret trust, unlike the agreement in Robinson, is testamentary because it is revocable; the fact that the testator's disposition is encapsulated in a bilateral agreement does not by itself render the trust disposition non-testamentary.

6.24 Equally no support for Elias's proposition is to be found in the Irish case of In the Goods of Halpin,\textsuperscript{55} properly analysed, since this also only affirms the proposition extracted from Robinson - that a disposition by a bilateral agreement which is

\textsuperscript{54} Ibid, 387.

\textsuperscript{55} (1874) IR 8 Eq 567 (Rt Hon. Robert Warren).
otherwise testamentary is an *inter vivos* disposition only in so far as it is irrevocable. In *Halpin* a father stipulated in an attested paper that after his death his son should become the sole owner of certain property on conclusion of marriage between the son and the son’s fiancée (whom he subsequently married). The Registrar’s refusal to admit the paper to probate on the basis that it constituted a settlement *inter vivos* was upheld. The paper constituted an ante-nuptial unilateral contract. Unlike the secret trust, however, the binding effect of the agreement lay exclusively in the donee’s hands. The subsequent solemnisation of marriage provided marriage consideration moving from the son so as to bind his father to the settlement provided for by the contract. On marrying his wife, the father’s beneficial ownership was reduced to a life interest and the son became an equitable owner in remainder. The paper was not testamentary because the agreement was a unilateral contract irrevocable by the donor and, in consequence, it operated to vest a present right to a postponed interest in the property.\(^56\) The secret trust arrangement, in contrast, is testamentary because it is revocable by the donor. The dependence of a secret trust on an agreement between testator and donee is not *per se* incompatible with testamentary status. The nature of the agreement is everything and what matters is the existence of a power of revocation in the donor’s favour.

6.25 On the other side there is some weak authority from before the Statute of Frauds which confirms that a bilateral agreement may be testamentary. The authority is all the more noteworthy in any debate as to the testamentary nature of a secret trust because it was a court of equity which affirmed the point. In *Hixon v Wytham*, an indentured deed was executed by the testator on the one part and by two trustees on the other. In consideration of five pounds the deed purported to sell to the trustees

\(^{56}\) *Ibid*, 569.

\(^{57}\) (1675) 1 Chan Cas 248 (Lord Finch LK).
land which was to be held on trust for sale after the testator's decease to apply the proceeds of sale, together with personality, as specified in the deed. The language of the deed, which appointed the trustees executors and 'bequeathed' certain sums, made it clear that the deceased had intended the deed to operate as his will. Lord Finch L.K considered the deed constituted a will and the case was settled on that basis. Strikingly the agreement was less obviously testamentary in character than a secret trust agreement since the trustees had provided monetary consideration, albeit a token sum which - consistent with later cases\(^5\) - could be disregarded as not disturbing the presumptively revocable character of the instrument. The decision is admittedly not conclusive as to whether a bilateral agreement may be testamentary. The defendants had abandoned their objection that the deed constituted a will, so that the point was not ultimately settled by the court on the basis of contested argument. In any case the decision in Chancery on the efficacy of a will of land could not carry as much weight as resolution of the point by trial at common law, given the proper jurisdiction of the common law courts on the validity of devises. Nonetheless the decision is persuasive and the fact that the other parties to the testament were to take as trustees takes the case close to the secret trust line.

Theoretical analysis

6.26 The above review of the meaning of 'testamentary disposition' suggests that the notion that a secret trust may take effect as a valid disposition *dehors* the will is ill-founded. This is confirmed, for several reasons, if we consider the issue as a matter of abstract principle.

\(^5\) See *AG v Jones* (1817) 3 Price 368 at 380 per Richards B; *Shingler v Pemberton* (1832) 4 Hagg Ecc 356 (Sir John Nicholl); *Green v Andrews* (1877) 41 JP 105
The fundamental flaw

6.27 The _dehors_ the will theory, in its conventional form, is predicated on the basis that the secret trust is declared _inter vivos_ and that the only testamentary formality required is the one to constitute the trust by moving the trust property to the trustee. The primary difficulty is the fact that the _inter vivos_ declaration of trust has no effect until the testator dies and the will takes effect to constitute the trust. At the moment the will comes into play, there is a movement not just of the legal title, which the will accounts for, but also of the beneficial title to the third party named in the secret declaration of trust. That is a testamentary disposition of the _beneficial_ interest, for which there is no instrument satisfying the Wills Act. Superficially the disposition is accounted for by the secret trust agreement as an _inter vivos_ declaration of trust by the testator: it indicates the identity of the beneficiary and the nature of the trust property. It cannot suffice, however. Since the beneficial interest will only be transferred from the settlor to the beneficiary on the settlor's death, if the trust is not revoked, a testamentary disposition is made out and a will is required.

Inconsistency with the testator's intentions

6.28 The notion that the testator has declared a trust _inter vivos_ flies in the face of the testator's actual intentions. The testator only intends the trust to take effect at his death: the sole means for constitution of the trust which he envisages is the legacy to the testator or intestate succession by the next of kin, as the case may be. He does not want to make provision for the secret beneficiary _inter vivos_ and has no desire that the trust be constituted during his lifetime by gift (or, if it so happened, by

(Hannen P).
transfer by operation of law). It is not the case of a settlor who merely neglects to constitute a trust he desired be established immediately; the postponement of constitution is a deliberate act. The declaration of trust is therefore merely part of a testamentary disposition.

The significance of communication

6.29 The *dehors* the will theory explains too much. The logic of the theory, on its conventional model, implies that a valid secret trust could be created without any communication of the trust to or acceptance of it by the legatee. If the trust is declared *inter vivos* and only constituted by the will, there is no need for the legatee to participate at all, prior to the will taking effect. A declaration of trust does not require the consent of the prospective trustee, though he may disclaim the trust property if he objects to the trusteeship foisted on him and so re-vest the property in the settlor on the terms of the declared trust. Of course it may be argued that communication is necessary if this is the factor converting a *prima facie* void informal declaration of trust into a non-testamentary and valid declaration of trust. This demonstrates that the Elias’ thesis is an integral part of the *dehors* the will theory. It must be shown that a bilateral secret trust agreement is a non-testamentary transaction.

6.30 As we have seen, however, it does not appear on the authorities that a will must necessarily be unilateral. Nor does there appear to be any reason inherent in the logic of testamentary dispositions which requires a will to be unilateral. If anything, reason seems to point the other way. Given that a testator effecting a secret trust might have provided unilaterally by a formal will for the disposition of his property envisaged in the secret trust agreement, it would seem odd to characterise these dispositions as having lost their testamentary nature merely because the testator has
chosen to substitute the agreement of a prospective trustee for the formalities of the Wills Act as the instrument of giving validity on his death to his revocable and ambulatory wishes.

**Uncertainty of trust property**

6.31 A secret trust may be imposed on a general legacy even though the property affected will not be ascertainable (if at all) until the estate has been administered. As Penner has noted,\(^59\) it is difficult to see how in these circumstances there could be an *inter vivos* declaration of trust. During the testator’s lifetime the subject matter of the prospective trust is uncertain. The secret agreement as a declaration of trust can only pertain to certain property if it speaks as a component of the deceased’s testamentary dispositions.

**Trust of future property**

6.32 In its variant form the *dehors* the will theory supposes that the legatee declares a trust of the property bequeathed to him, so that his acquisition of the legacy amounts to the constitution of a trust which he previously declared. This analysis is equally vulnerable to the last criticism. More fundamentally, it is difficult to see how the legatee has made an effective declaration of trust in the testator’s lifetime since the legacy before the will takes effect is part of the testator’s patrimony and *vis-à-vis* the legatee is future property. As a voluntary declaration of trust of an expectancy, it cannot affect the intended trust property without a further act declaring the trust when the will takes effect and the legatee acquires rights in the subject matter of the trust.

\(^{59}\) Penner, para. 6.45
Juridical analysis

Probate case law

6.33 If the secret trust is truly an *inter vivos* disposition, then its nature ought not to be altered by the form in which it may be recorded. If the secret trust is reduced to writing which coincidentally satisfies the formalities for a testamentary disposition, we would expect that this formal expression of the secret trust should not be admissible to probate as a will for the simple reason that, *ex hypothesi*, it is not testamentary. Conversely, if an instrument setting out the undertaking of the legatee is admissible to probate, we have every reason to conclude that the secret trust is, after all, a testamentary disposition.

6.34 Persuasive support for that conclusion may be found in the decision of the Court of King’s Bench before the Statute of Frauds in *Penson v Cartwright*,60 which was summarised in paragraph 1.6. In that case, it will be recalled, the testator had purported to supplement his will of personalty by way of oral directions to his future executor, seeking to increase the amounts of certain pecuniary legacies and so reduce the value of the executor’s residuary interest. The executor appears to have acquiesced in these instructions so that the oral directions savour of a secret trust agreement. Coke CJ considered that the parol directions constituted a valid codicil.

60 (1614) Cro Jac 345; 2 Bulstrode 207; *sub nom. Cartwright’s Case* Godbolt 246 (Court of King’s Bench).
6.35 Confirmation can be found in the same court’s decision in *Green v Proude*, which was determined shortly before the Statute of Frauds was enacted. In that case a father and a son executed a deed whereby the father agreed to give the son certain property and purported to give all his goods and chattels to the son. For his part the son promised to pay debts and to pay certain legacies. It is not clear that the son was only promising to make his payments out of the property he was to inherit (to the extent it would allow this); it may be that the agreement required the son to make the payments out of his own existing resources in the event that his inheritance was insufficient. Excepting this uncertainty, however, the deed was in the nature of a secret trust agreement, the father as testator proposing to transfer property to the son on his death and the son agreeing to make certain dispositions. It was resolved on the evidence that the father had indeed intended the deed to constitute his last will and the court held that the deed was in fact revocable. The agreement is clearly distinguishable from modern practice in creating a secret trust in that the son’s undertaking was formalised in the same instrument as the testator’s disposition in the son’s favour, the father presumably being anxious to extract from the son a formal promise rather than desirous of maintaining secrecy. The decision of the court that the deed was the testator’s will is therefore particularly confirmative of the point that a revocable bilateral agreement of a secret trust type constitutes a testamentary disposition. There was no suggestion that only the part of the deed containing the gifts to the son constituted the entirety of the testator’s testamentary disposition.

6.36 Finally, more modern support for the notion that a secret trust agreement constitutes a testamentary disposition can be derived from *In the Goods of Slinn*. In that case

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61 (1674) 1 Mod 177; *sub nom. Green v Froud* 3 Keb 310.
62 (1890) 15 PD 156.
the question was whether the deed which had been formally executed and attested by two witnesses was an *inter vivos* deed of gift or constituted a testamentary instrument admissible to probate. Although the deed purported to effect an immediate grant to a friend of money in a savings bank account, Hannen P held that, having regard to the extrinsic evidence of the testator's intentions, the document was in reality a will. A fact of note here is that after executing the deed the testator asked the friend to give £10 to a named beneficiary and the friend promised to make the payment. Significantly Hannen P pointed to this secret trust instruction by the testator as a manifestation of his testamentary intention. Admittedly this does not positively determine that a secret trust agreement as such is testamentary, since neither the probate nor the enforceability of the agreement itself were in issue. Nonetheless this provides confirmation from a probate court that a secret trust agreement is to be understood as a testamentary disposition.

*Early secret trust case law: trusts declared *inter vivos* grafted onto a formal will*

6.37 When we turn to the first cases on secret trusts, we find that, in so far as they are based on finding a valid *inter vivos* trust rather than establishing fraud, their approach when properly analysed merely harks back to the mistaken assumption that any (uncommunicated) informal trust might be grafted onto a formal will.

6.38 An early authority which apparently supports the conventional *de hors* the will theory of secret trusts is *Pary v Juxon.* In that case the defendant was the executor of an Archbishop whose property had included entitlement to present the

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63 *Ibid*, 158. See further the cases in paras 8.41-8.42 where a suspected secret trust carried the same implication.

64 (1669) 3 Chan Rep 38; *sub nom* Porey *v* Juxon Nelson 135 (Bridgman LK).
Mastership of St Cross. The plaintiff alleged that the Archbishop in his lifetime had instructed the defendant to present the plaintiff. Following a direction by Bridgman LK, the matter was tried in the Court of King’s Bench where it was held that a trust of the presentation could arise by parol and that the executor could become a trustee of the presentation despite the absence of a trust in the Archbishop’s written will. The decision of the King’s Bench lends itself easily to a de hors construction of a secret trust in favour of the plaintiff: a trust of the presentation was declared by the Archbishop inter vivos and the trust was constituted on his death by the will which (as the Statute of Wills, then in force, required for a devise) vested the real right to present in the defendant executor.

6.39 However, the decision in Pary v Juxon is susceptible to criticism. Firstly, the Court of King’s Bench in this case was not merely the forum for determining as a matter of fact whether the plaintiff’s allegation was well-founded. The common law court seems also to have determined the relevant question of law - whether the secret trust obligation was efficacious - and thus pre-empted the point of trust law belonging to the equity jurisdiction which properly fell to be resolved in Chancery. Moreover, although the facts as alleged established a secret trust, it is possible that the court in Pary v Juxon did not have the doctrine of secret trusts in mind at all. The fact that no stress seems to have been laid on the fact that the executor had agreed to the Archbishop’s informal direction suggests that the court based its decision instead on the fallacious notion that a parol trust might be unilaterally engrafted by a testator onto a formal testamentary disposition. We have already seen in chapter 2 that this mistaken approach to testamentary trusts re-emerged. In Boson v Statham it was wrongly supposed that a signed but unattested declaration of a testamentary trust of land might be treated as a formal inter vivos declaration of trust validly constituted by a formal will in favour of the trustee. We also noted that this approach has subsequently been emphatically rejected as unsound. The disposition of the
beneficial interest under a trust to arise on the disponor’s death is a testamentary matter not contained within the disposition to the trustee. It would seem that underlying the decision in *Pary v Juxon* is the same misconceived notion that a parol testamentary trust of land was not required to satisfy the statutory formality for testamentary dispositions of realty; it would take effect as an inter vivos declaration of trust65 constituted on the testator’s death by the devise to the trustee. If the early enforcement of secret trusts was predicated on the dehors the will theory, rather than fraud, then it was founded on a fallacy which has long since been dismissed from English law. In seeking to justify the enforcement of the secret trust on the basis it is declared inter vivos but constituted by the will, the modern de hors theory may be only a repetition of this fundamentally spurious notion.

6.40 The decision of Lord Macclesfield LC in *Jones v Nabbs*66 seems to confirm this. It will be recalled from discussion of the case in chapter 5 that a daughter had bequeathed all her personalty to her mother but orally instructed her to give £180 to her niece. Properly analysed this instruction was merely precatory, but it was treated as giving rise to a valid secret trust. Lord Macclesfield LC held that there was no effective legacy because the daughter’s oral direction was not reduced into writing within six days, as required under the Statute of Frauds for a valid nuncupative will.67 He further held, however, that the plaintiff could insist on her claim to the £180 because the defendant, the deceased’s mother, had admitted her obligation. The admission by the mother took the matter outside the Statute of Frauds.68 The analysis thus far clearly proceeds on the basis that the informal instruction to the

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65 Since *Pary v Juxon* predated the Statute of Frauds, the declaration of trust of land would have been valid as an inter vivos declaration even though it was oral.

66 (1718) Gilb Rep 146; sub nom. *Nab v Nab* 10 Mod 404.

67 s. 19.
mother was the purported creation of a testamentary trust: the instruction would have been governed by the testamentary provisions of the Statute of Frauds were it not that an implied exception to the statute enabled it to be enforced under the secret trusts doctrine. However Lord Macclesfield LC also held that it was not necessary that the trust be in writing since it related to personalty. This involved a direct contradiction of his reasoning. Only a parol trust of personalty created inter vivos would be valid. As he had already noted, a testamentary trust of personalty had to comply with the Statute of Frauds or the secret trusts doctrine. Lord Macclesfield LC appears to have wrongly imagined that a trust declared by parol and satisfying the formalities for an inter vivos declaration of trust might be grafted onto a formal will.

Later case law: muted recognition of the testamentary character

6.41 Despite more recent cases superficially endorsing the dehors the will theory, discussed below, the general tenor of dicta in the secret trust case law affirms the proposition that the secret trust is testamentary, that it ought to comply with the Wills Act and that its enforcement involves an apparent conflict with the Wills Act which must be explained. The assumption that a secret trust is testamentary emerges in those cases where the court has been concerned to limit the ambit of the apparent freedom from formality which the secret trusts doctrine has generated.

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68 On this point, see para. 3.5.

69 The flaw in Lord Macclesfield LC’s judgment is not eradicated even if this was directed at £180 given to the mother as trustee in the daughter’s own lifetime rather than a sum to be paid out of the general bequest. The daughter intended the niece to acquire an interest only on her death. The disposition of the equitable interest was suspended (and apparently revocable) during the daughter’s life and constituted a testamentary assignment.
particularly in relation to half-secret dispositions. In *Re Hetley*Joyce J held that there could not be a half-secret power of appointment, even if the testator’s wishes were communicated to the donee of the power before the will was executed, because the admission of parol evidence as to the testator’s wishes would be an alteration to the will impermissible in view of the Wills Act. We are not concerned here with the question whether, within the logic of the current law, this was a sound limitation of the secret trusts doctrine. The significant point is merely that the creation of a half-secret power of appointment was considered to be a testamentary disposition. Joyce J clearly proceeded on the basis that the secret undertaking of the donee was not sufficient to convert a *prima facie* testamentary transaction into an *inter vivos* one.

6.42 In *Balfe v Halpenny* Barton J, rejecting the admissibility of a half-secret trust which had not been alluded to in the will, contended that by the half-secret agreement the testator was attempting to establish a species of nuncupative codicil which should properly have been executed by will or codicil. Barton J was commenting specifically in the context of a half-secret trust which was accepted but which failed because the will merely imposed a bare trusteeship without allusion to the existence of the secret trust. It is difficult to see how a valid secret trust could be distinguished. Whether the will does or does not allude to the secret trust, the nature

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70 [1902] 2 Ch 866.
71 Ibid, 869.
72 Joyce J was anxious to distinguish *Re Fleetwood* (1880) 15 Ch D 594 (Hall VC), whose authority had yet to be confirmed in *Blackwell v Blackwell* [1929] AC 318 on the narrow ground that the latter concerned a trust. No substantial reason was offered for why this distinction was material. For the contrasting decision in relation to fully-secret powers, see *Tharp v Tharp* [1916] 1 Ch 142 (Neville J).
73 [1904] 1 IR 486.
of the secret trust agreement remains the same. It is a transaction entered into by the
testator with a donee in order to modify the effect of the formal provisions of the
will.

6.43 A similar point emerges from Lord MacDermott LCJ's judgment in Re
Blackwood where (on grounds which have been criticised) the Northern Irish
Court of Appeal held that an apparently precatory expression in a will, directing the
defendant to apply the testatrix’s estate in accordance with her wishes for the
benefit of friends and relatives, created a trust which failed and resulted in favour of
the next of kin. It was inferred that the testatrix had contemplated communicating
certain wishes to the defendant. There was no actual evidence of a secret trust, but
Lord MacDermott LCJ pointed out that an effectual testamentary trust could not be
created by communicating instructions in the fashion provided for by the testatrix -
in other words, by half-secret trust communicated after execution of the will. This
implies that a properly communicated and accepted secret trust is a valid form of
testamentary trust.

6.44 However, it was in Re Pitt Rivers, where the enforceability of a fully-secret trust
was in issue, that the testamentary nature of the secret trust was most clearly
affirmed. Vaughan Williams LJ’s explained that:

[T]he court never gives the go-by [...] to the provisions of the Wills Act
by enforcing upon any one testamentary intentions which have not been

74 Ibid, 490.
75 [1953] NI 32 (NI Court of Appeal, affirming Curran J).
76 Ibid, 37.
77 [1902] 1 Ch 403
expressed in the shape and form required by that Act, except for the prevention of fraud. That is the only ground upon which it can be done.78

In the view of Vaughan Williams LJ, the secret trust is a testamentary disposition which would fall within the terms of the Wills Act were it not excepted from the Act by the necessity to prevent fraud. Given the generally mutually exclusive nature of the fraud and dehors the will theories of secret trust, the mere invocation of the fraud principle signals an assumption that the trust is testamentary.

Judicial application of the dehors the will theory

6.45 The foregoing theoretical and juridical analysis gives strong support to the view that a secret trust is an informal testamentary trust which, unless protected by the fraud principle, ought to be governed by the Wills Act. Turning now to those secret trust cases which have purported to apply the dehors the will theory, it will emerge that there is no compelling reason to abandon the orthodox analysis set out above.

Half-secret trusts and Blackwell v Blackwell

6.46 Among the supposed expositions of the dehors the will theory, dicta of Lords Sumner and Warrington in Blackwell v Blackwell79 are pre-eminent. If personal fraud cannot justify the enforcement of a half-secret trust, some other explanation was called for to support their Lordships’ decision confirming the validity of a half-secret trust. What seems clear is that no complete explanation was provided.

78 Ibid, 407.
6.47 Lord Sumner attempted to explain the secret trust doctrine in these terms:

For the prevention of fraud, equity fastens on the conscience of the legatee a trust, [...] which would otherwise be inoperative; [...] it makes him do what the will itself has nothing to do with; it lets him take what the will gives him and then makes him apply it, as the Court of conscience directs, and it does so in order to give effect to the wishes of the testator, which would not otherwise be effectual.80

Similarly, Lord Warrington argued that:

[T]he parol evidence is not adduced for the purpose of altering or affecting the will itself, the legatee still takes under the will, but is under a personal obligation the breach of which would be a fraud on the testator.81

6.48 So far from being an affirmation of the dehors the will theory, these are a denial of it, for as we have just noted a reliance on fraud is the antithesis of treating the secret trust agreement as an inter vivos disposition. The crucial point in Lord Sumner’s explanation is that, but for equitable intervention to prevent fraud, the trust would be void ("inoperative"). That can only be on the basis that, as an informal express trust declared by the testator, the secret trust is testamentary. This would seem to

81 *Ibid*, 341. This was directed at fully-secrets, but see also at p. 342 where he states in relation to half-secret trusts that the trust which is enforced is "not a trust imposed by the will but one arising from the acceptance by the legatee of a trust communicated to him by the testator".
reflect the consensus among their Lordships in *Blackwell v Blackwell*. Lord Buckmaster, with whom Lords Hailsham LC\(^{82}\) and Carson\(^{83}\) agreed, phrased the question in issue as being “to what extent is it possible to give effect to testamentary intentions that are not contained in a written document duly executed as a will”.\(^{84}\) Admittedly Lord Buckmaster’s assumption does not necessarily mean that the trust which is enforced under the secret trusts doctrine must itself be conceived in testamentary terms, but it makes that description more likely. Some explanation must be given for why a trust which arises to give effect to testamentary intentions is not itself testamentary.

6.49 It is the fact of fraud alone which, in Lord Sumner’s formulation, binds the legatee to the testator’s wishes and this finds its echo in Lord Warrington’s reference to fraud. That fraud is an indispensable part of the reasoning is evident from fact that there is no other basis on which the legatee could be made a trustee of his legacy. It is not an explanation of the secret trusts doctrine merely to say that, having permitted him to take under the will, the legatee is obliged to carry out the trust.\(^{85}\) The testator’s express trust, as Lord Sumner noted, is void as an informal testamentary disposition. The trust cannot therefore be grafted onto the legatee merely because that was the testator’s intent. The basis of equitable intervention must be the conduct of the prospective legatee and not the mere will of the testator. That points to redress for the legatee’s unconscionable behaviour in reneging on a trust which he has promised to execute and for which he has inherited the subject matter.

\(^{82}\) *Ibid*, 325.

\(^{83}\) *Ibid*, 343.

\(^{84}\) [1929] AC 318 at 325.

\(^{85}\) *Contra* Fleming, p. 29.
6.50 A striking point in Lord Sumner’s reasoning is his assertion that “the [secret trusts] doctrine must in principle rest on the assumption that the will has first operated according to its terms.” The trust enforced in equity is one which attaches to the interest of the legatee under the will. The oddity is that in the half-secret scenario the application of that principle prevents any possibility of a binding secret trust arising. If the will is to take effect according to its terms, it creates a trust void for uncertainty and a resulting trust for the residuary legatee or next of kin. There is no beneficial property vested by the will in the legatee which can be subjected to a trust in favour of the secret beneficiary. This is precisely the reason given in chapter 4 for why purported half-secret trusts ought to fail automatically.

6.51 It should not surprise us that the dicta in Blackwell v Blackwell, so far as they offer any effective explanation of the secret trusts doctrine, are best accounted for as an appeal to the fraud theory. It is unlikely that their Lordships were putting forward the conventional dehors the will theory since it was an earlier case concerned with a failed half-secret trust which had already exposed the fundamental flaw in the dehors the will theory. In Johnson v Ball Parker VC expressly rejected the view that letters created by the testator after the execution of the will (and not in accordance with it) to evidence the half-secret trust could operate as an inter vivos settlement. The letters, doing no more than referring to a bequest to be made by will, were merely in furtherance of a testamentary disposition; if the will was revoked, the letters would drop with it. To speak, thus, of an inter vivos settlement constituted by a testamentary disposition in the will is erroneous: the

86 [1929] AC 318, 334.
87 (1851) 5 De G & Sm 85 (Parker VC).
88 Ibid, 91.
declaration of trust, precisely because it is only to be constituted through the legacy in the will, is equally a testamentary act.

Legacy duty and *Cullen v AG for Ireland*

*The decision in Cullen v AG for Ireland*

6.52 A founding statement of the *dehors* the will approach to secret trusts was articulated in *Cullen v AG for Ireland*\(^\text{89}\) by Lord Westbury.

[W]here there is a secret trust, or where there is a right created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to a fraud, the title of the party claiming under the secret trust, or claiming by virtue of that personal confidence, is a title *dehors* the will, and which cannot be correctly termed testamentary. [...] If there be, therefore, a gift to A, and if there be a collateral matter which renders A bound to apply the subject of the gift to some purpose not to be found within the expression of the gift, and the obligation arises, not on the face of the will, or by virtue of the will, but arises from something *aliunde*, it follows of necessity that the [...] purpose to be benefited cannot, with any correctness of language, be denominated a [...] testamentary purpose.\(^\text{90}\)

6.53 When the meaning of Lord Westbury’s *dictum* is scrutinised, it becomes evident that the proposition is merely self-affirming. ‘The secret trusts is an obligation

\(^{89}\) (1866) LR 1 HL 190

\(^{90}\) Ibid, 198.
*dehors* the will,' Lord Westbury argues, 'and therefore ("it follows") the disposition is not testamentary'. At best this is merely circular reasoning, taking as its premise the non-testamentary nature of the secret trust in order to conclude that it is non-testamentary. In fact, however, Lord Westbury may not even have succeeded that far. He appears to fall into the error of confusing the two different (dispositive and instrumental) senses of will. What needs to be shown is that there is no necessity for the secret trust to be contained in a formal will under section 9 (the instrument) because it is not a testamentary disposition (the dispositive will). What Lord Westbury in fact argues is that because the secret trust "arises [...] aliunde" - *dehors* the will (the instrument) - it cannot be termed testamentary (a dispositive will). This begs the very question of why a secret trust obligation without the will form is enforceable. Lord Westbury was not justifying the effectiveness of the secret trust as a non-testamentary disposition: he was simply assuming it.

6.54 If the *dictum* of Lord Westbury is placed in the context of the decision in *Cullen* the logic of the *dehors* the will theory further unravels. In *Cullen* the testatrix bequeathed the residue of her estate (consisting only of personalty) jointly to two legatees. In her lifetime the legatees accepted a secret trust of the residue for certain purposes and, as to the remainder, for the foundation of a convent school. This trust was set out in letters to the legatees signed by the testatrix. The taxpayer, who was the executor of the surviving legatee, was contesting the payment of legacy duty under the Stamp Duties (Ireland) Act 1842 on the remainder interest in the fund on the ground it was held on secret trust for charity and fell within an exemption from duty. The question for the court was thus whether regard was to be had to the enforceable secret trust in determining for tax purposes the character of the legacy
to the fully-secret trustees. The exemption from duty was for "any legacy [...] for any purpose merely charitable" and the Act defined "legacy", so far as material, as "every gift by any will or testamentary instrument". Both in the Irish Court of Exchequer and on appeal to the House of Lords the taxpayer's claim failed.

6.55 In support of the Crown's claim to duty, the Attorney-General argued, in effect, that since section 37 of the Act required executors to make deductions for legacy duty from the various legacies to be paid, it had to be possible for the executors to calculate that duty from the face of the will alone. For that reason, "[t]he will is the only test of the character of the legacy, and the only proof of [...] the object for which it is given." This reasoning was adopted by Lord Cranworth LC.

6.56 Lord Chelmsford decided in favour of the Crown simply on the ground that the language of the revenue statutes extended only to gifts specifically disclosed in the will. This was broadly the ground of decision in the Exchequer. It was not an

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91 S. 2, applying to Ireland the legacy duties in the Stamp Act 1815, Sched, Part III, Division II, including the duty claimed here on a "legacy, or residue [...] to or for the benefit of any stranger in blood to the deceased".
92 S. 38, second proviso.
93 S. 38. A confirmatory definition in very similar terms was contained in the Revenue Act 1845, s. 4, applying to both the British and Irish legislation imposing legacy duties.
94 AG v Cullen (1864) 14 Ir CLR 137.
95 Cullen v AG for Ireland (1866) LR 1 HL 190.
96 Ibid, 194. The reference to s. 38 in the report must be in error.
97 Ibid, 194-195.
98 See ibid, 195.
99 Ibid, 196.
100 See, similarly, AG v Cullen (1864) 14 Ir CLR 137 at 148-149 per Pigot CB. Fitzgerald B merely asserted that the secret trust was not a gift by will; ibid, 150. Deasy B
especially convincing one. In the first place, since a secret trust is constituted by the legacy contained in the will (even though declared outside), it was arguably within the literal terms of the definition. Moreover, the statutory definition was expressly extended to include legacies by testamentary instruments to gifts mortis causa. This might be thought to reinforce the view that a disposition not contained in a formal will was not a legacy for the purposes of the Act unless expressly included. It was equally arguable, however, that having made one express incursion into the principle that a disposition for duty purposes had to be in the will the legislature had shown principle was not sacrosanct and left the door ajar for a wider construction of the definition. Whatever its merits, however, it is evident that decision on this ground was governed by the specific provisions used by the legislature and was limited to the legacy duty context.

6.57 Significantly, therefore, the argument of the Attorney-General, the decision at first instance and the opinions of Lords Cranworth and Chelmsford went no further than deciding that for legacy duty purposes the undertaking of the legatees which was absent from the face of the will could not be coupled with the gift to them contained in the will in order to treat the whole as in substance a legacy to the secret beneficiaries.101 Lord Westbury's dictum that the secret trust is not testamentary went further than was strictly necessary and did not represent the dominant strand of reasoning in the case.

6.58 A further point of note is how the approach to secret trusts advocated in this thesis would give stronger support to the decision reached in Cullen, despite the fact that concurred in the decision without giving a separate judgment (ibid, 151) and Hughes B gave no judgment on account of his absence during counsel's argument (ibid).

101 See especially the manner in which Lord Cranworth phrases the question in issue: (1866) LR 1 HL 190, 195.
it involves the rejection of an automatically binding secret trust enforceable at the instance of the secret beneficiary. Under the secret trusts model suggested in this thesis, if the legatee chooses to honour his secret promise, no trust will arise; he will be making an *inter vivos* gift out of his own property. There is no question of the secret beneficiary gaining *ab initio* under the legacy and the existence of the secret trust is thus quite irrelevant to any question of taxation of the legacy.102

*Tax avoidance*

6.59 The explanatory strength of the new approach to secret trusts as a defence of the decision in *Cullen* is enhanced if we consider the question of tax avoidance. Lord Cranworth LC appreciated that his decision allowed possibility for avoiding duty, as where an entire estate would be left to a wife (for no duty) or a child (at reduced rate of duty) on a secret trust for various strangers, in place of a will in favour of the strangers dutiable at full rate.103 Lord Cranworth considered that Parliament had

102 While the secret trust is not to be recognised for tax purposes, this does not mean that the trustee must pay the legacy duty personally. There would be no fraud in appropriating part of the trust property in order to meet the duty. The legatee has promised to act as a trustee and that entitles him to all the benefits of trust office including, for example, reimbursement under the Trustee Act 1925, s. 30(2). The testator cannot place the legatee in a worse position than a trustee of an express trust stated in the will merely by choosing to effect his will by agreeing the trust informally with the legatee.

103 (1866) LR 1 HL 190, 196. See similarly *AG v Cullen* (1864) 14 Ir CLR 137 at 149 *per* Pigot CB. The point would be particularly important where a classic half-secret trust of residue was created. Assessing duty by reference only to the will, the beneficiary of the trust would appear to be the next of kin. As the next of kin would usually be a spouse or in a close degree of consanguinity with the testator, a low rate of duty would apply. If the secret beneficiary was a mistress, the testator would have avoided the higher rate payable on a legacy to a stranger.
simply not contemplated this case.\textsuperscript{104} Presumably he thought the problem was one to be rectified, if at all, by Parliament and not avoided by the judiciary in its construction of the Act. There was nothing inherently wrong in this scope for tax avoidance. It is in fact merely the converse of the 'over-taxation' in \textit{Cullen} itself, when the exemption in favour of charitable gifts could not assist because the charitable purpose was excluded from the will.

6.60 Nonetheless, there is an underlying difficulty here. Although the secret trust on current doctrine is substantively the same, in beneficial effect, as an express trust contained in the will, the secret trust in \textit{Cullen} was invisible to the tax system due to want of formality. If the secret trust is not inherently binding, as this thesis advocates, that difficulty could not have arisen. The gift taken by the secret beneficiary on the new model of secret trusts is substantively different from an interest under a formal testamentary trust: it is an \textit{inter vivos} gift made by the legatee out of his own property. A gift from testator to legatee coupled with a subsequent gift by the legatee out of his inheritance to the secret beneficiary will certainly be treated differently by the tax system from an outright legacy to the same beneficiary made directly by the testator in his will. If that is the case, however, it will be because these are substantively different transactions, differing in kind, number and parties. Any discrepancy in taxation arises because of the conscious choice of the legislature in how it discriminates between taxation of testamentary and \textit{inter vivos} transfers of wealth and the conscious choice of the testator in choosing to make use of a go-between legatee. The difference in fiscal outcome is entirely justified. It would not depend, as it did in \textit{Cullen}, on the fact the courts having recognised a binding trust which can take effect on the testator's death with

\textsuperscript{104} (1866) LR 1 HL 190, 196.
the same dispositive effect as a testamentary trust despite its exclusion from the will.

6.61 The point taken by Lord Cranworth was tackled differently by Fitzgerald B\textsuperscript{105} and in a way which throws us back to an appreciation of the functions of section 9 of the Wills Act and of how these are neglected in recognising the binding nature of a secret trust. In contrast to Lord Cranworth, Fitzgerald B thought it possible that equity might counter the anticipated tax avoidance by denying assistance to the secret beneficiaries.\textsuperscript{106} This would seem to be a belated recognition of the fact that testamentary formality serves third party interests (in this case the Revenue's) besides those of the testator and legatee and that by enforcing the secret trust despite its informality equity undermines these third party interests. While an informal transaction might give rise to rights and duties in equity as between the parties to it, the creation of those rights and duties ought not to prejudice the position of third parties who are entitled to expect those rights and duties to be created with due form. Having overlooked these purposes of the formality when assuming that the secret trust could be held enforceable in favour of the intended beneficiary, Fitzgerald B suggests that the deficiency of the initial juridical calculus be ameliorated by superimposing additional rules to substitute for the lost third party protection afforded by the Wills Act formality.

\textit{Priority in the discharge of the testator's debts and Re Maddock}

\textsuperscript{105} \textit{Ibid}, 151.

\textsuperscript{106} \textit{Ibid}. Presumably this would be a denial on terms; a beneficiary agreeing to a proportionate payment out of their share of the trust property towards the additional duty (in excess of the duty payable on the apparently absolute legacy) would be permitted to enforce the trust to the extent of their interest.
6.62 Subsequent approval of Lord Westbury’s *dictum* in *Cullen* in *Re Maddock*¹⁰⁷ was unnecessary to the decision in that case as it was to the resolution of *Cullen* itself. In *Re Maddock* the question was whether cognisance was to be taken of the secret trust in determining the order of priority as between different testamentary dispositions in discharging debts of the testator. The testatrix had left her residuary estate to Washington who agreed to a secret trust of all the money which the testatrix had saved; these funds were to go to specified persons. On an earlier summons the court determined that the secret trust extended to all the deceased’s residuary property except a specified freehold house (the only realty), her life interest in certain trust funds and certain other property. The debts of the estate were to be paid out of the residue left to Washington in priority to a specific legacy of a share of personality appointed by the will to the executors on a specified trust. The question was whether the gift of residue in the will was itself to be seen as divisible into a specific bequest consisting of the portion to be applied on secret trust and an ultimate residue taken by Washington personally (as the secret trust beneficiaries argued). In that case the debts would fall first on the balance of the residue to which Washington was beneficially entitled before recourse could be had to the secret trust property.¹⁰⁸ If, alternatively, the secret trust was to be disregarded, the loss falling on the residue would be shared out rateably between the secret trust and Washington.

6.63 Kekewich J, while acknowledging that it was mere *obiter*, adopted the view of Lord Westbury in *Cullen* that a secret trust takes effect *de hors* the will and is not testamentary.¹⁰⁹ Accordingly, although the secret trust was a specific gift, it was

¹⁰⁷ [1901] 2 Ch 372 (Kekewich J); [1902] 2 Ch 220 (CA).
¹⁰⁸ See now the Administration of Estates Act 1925, s. 34(3) and Sched. 1, Part II.
¹⁰⁹ [1901] 2 Ch 372, 374-375.
not a specific bequest. The legatee was accountable for (and held on secret trust) only that property, net of deductions, which she actually received as residuary legatee.

6.64 This decision was reversed by the Court of Appeal. Stirling LJ considered that as against specific legatees or devisees in the will, the part of the residue attributable to the secret trust would have to carry the burden of the estate’s expenses, but that as between Washington and the beneficiaries of the secret trust, the former would be burdened first. He agreed with Kekewich J that the beneficiaries took dehors the will, but considered that this was not conclusive and that the testatrix intended to give priority to the secret trust part of the residue. Cozens-Hardy LJ merely asserted that regardless of the justification for secret trusts, as between the secret trustee and secret beneficiaries, all the same consequences must follow as would follow if the memorandum had formed part of the will. This enabled him to approach the question in the same manner as Stirling LJ. Collins MR questioned Kekewich J’s approach because it might enable the legatee to insist upon a mode of administration which, for his own advantage, would exhaust the legacy and thus defeat the obligation imposed by the testator.

110 Ibid, 375.
111 Ibid, 376.
112 Ibid, 228-229.
113 Ibid, 229.
114 Ibid, 229-230.
115 Ibid, 232.
117 Ibid, 225.
The reasoning of Collins MR is not compelling because it is doubtful that equity would allow a secret trustee to procure a self-interested administration. An analysis in terms of the fraud principle would suggest otherwise. The personal representative is bound to conduct the administration properly and without partiality because he is a fiduciary as regards the devisees and legatees who may hold him to that obligation. The rights which a legatee has to a proper administration of the estate, when he is also a secret trustee, can be seen as held by him on trust for the secret beneficiaries (or for himself and the secret beneficiaries as the case may be). Certainly, until the trust is constituted after administration, there is no substantive secret trust of the legacy itself; but there is a right to due administration. Since the legacy was only given in view of the promise to perform the trust, the right to the legacy is likewise acquired only for the purpose of executing the secret trust and just as it is a fraud in the legatee to claim that legacy beneficially, so it would be a fraud for the legatee to treat himself as personally entitled to the right to a proper administration. If fraud is to be avoided, the obligation to treat the secret beneficiary as entitled to the benefit of the right to a due administration will preclude hankering after a partisan administration to the trustee’s advantage.

Nonetheless the decision of the Court of Appeal seems sound. As against other legatees, the loss ought to fall on the residue without regard to the secret trust, since the secret trust is not contained in the will. Taking account of the secret trust at this stage would operate to the prejudice of specific legatees in the will. It might involve them in litigation to disprove the existence (or extent) of a secret trust of the residue, a matter in which they otherwise have no interest. To acknowledge the secret trust would be another instance in which third parties are adversely affected by the omission of the trust from the formal will. However, as between the personal interest of the secret trustee and the secret trust property contained within the residue, the position must be otherwise, at least where the secret trust property is
specific (as was the case in *Re Maddock*) and not a mere fraction of the residue. If the loss suffered by the residue was to be shared out proportionately between the part to be held on secret trust and the personal interest of the secret trustee, the legatee would be committing fraud. In allowing the secret trust to be reduced to the same priority in discharging the estate’s debts as his own part of the residue he would be treating the secret trust part as if it were not a distinct specific gift and as if it formed part of his own disposable residue. This would be a breach of his obligation to hold those assets on secret trust from which he would derive personal gain in the form of a partial transfer of loss to the secret trust property - a subsidy to his own part of the residue from out of the secret trust.

6.67 The decision of the Court of Appeal is therefore sound, but it is not an endorsement of the *dehors* the will theory. Despite the approval of that theory by Stirling LJ, it was really irrelevant to the decision. This is demonstrated by Kekewich J’s employment of the *dehors* the will theory at first instance to reach an opposite result, by the fact that Cozens-Hardy LJ was able to reach the same conclusion as Stirling LJ without relying on the theory at all and by the fact that the fraud theory, as explained above, provides an adequate explanation. It is significant that in *Reech v Kennigale*¹¹⁸ Lord Hardwicke LC was able to decide the same question, prospectively on the litigation before him, in the same manner, having earlier expounded the fraud theory as the basis of secret trusts.

*Section 15 of the Wills Act and Re Young*

¹¹⁸ (1748) 1 Ves Sen 123 at 126; *sub nom.* *Reech v Kennigale* 1 Wils KB 227 at 229. The case was not cited in *Re Maddock.*
6.68 In *Re Young*\(^{119}\) Danckwerts J held that that a secret beneficiary who had witnessed a will was not precluded by section 15 of the Wills Act from taking a beneficial interest under a half-secret trust. He reached a decision opposite to that of Hall VC in *Re Fleetwood*,\(^{120}\) a comparable half-secret trust case, on the principle that:

> The whole theory of the formation of a secret trust is that the Wills Act has nothing to do with the matter because the forms required by the Wills Act are entirely disregarded, since the persons do not take by virtue of the gift in the will, but by virtue of the secret trusts imposed upon the beneficiary, who does in fact take under the will.\(^{121}\)

6.69 We need not concern ourselves here with whether Danckwerts J or Hall VC reached a sounder decision on the applicability of section 15 to a secret trust, although it can be noted in passing that the question ought to turn on a construction of the purpose and width of the provision and whether a secret disposition falls within its mischief and terms. The significant point is that Danckwerts J was not relying on the *dehors* the will theory in reaching his decision; he was merely relying on the existence of the secret trusts doctrine which does give effect to a disposition *dehors* the formal will.

6.70 Section 15 is parasitic on section 9: in striking down gifts to attesting witnesses or their spouses, it assumes the disposition is contained within a formal will for the elementary reason that section 9 ostensibly requires every testamentary disposition to be made in the form required. In contrast to the rule that coercion vitiates a will,

\(^{119}\) *[1951] 1 Ch 344.*

\(^{120}\) *(1880) 15 Ch D 594, 609.*

\(^{121}\) *[1951] 1 Ch 344, 350.*
section 15 protects the testator from imposition in respect of his testamentary designs only indirectly by regulating the execution of the will - the exclusive means to give those designs dispositive force. To the extent that there is a hole in section 9 whereby testamentary dispositions take effect dehors the will (for whatever reason), there is necessarily a corresponding erosion of the scope of section 15. The secret trusts doctrine, in recognising an informal disposition of the beneficial interest to the testator’s nominee, undermines section 15 because it bases itself on section 9 which the doctrine directly challenges. If section 15 has no wider ambit than regulating the content of a formal will, it is immaterial what theory explains secret trusts; their mere existence determines the matter.

6.71 All difficulty in the matter is entirely removed if the secret trust does not give the intended beneficiary an enforceable interest, as this thesis advocates. The legatee takes the property in the will both in form and substance as his own property and the application of section 15 of the Wills Act where the legatee or his spouse attested the will would conform to usual principles. The secret beneficiary, taking no interest either under or (as the current law allows) round the will, is entirely dependent on the generosity of the legatee and his sense of honour in discharging his commitment to the testator. She has no interest which can be forfeited under section 15 if she attests the will: she acquires nothing on the testator’s death. Moreover, if the legatee attests the will, it is for a sound reason that he will forfeit the secret trust property. He can only retain the legacy by resisting the contingent claim of the estate to restitution, which requires him to avoid fraud and perform the secret trust. These are the only terms on which he can assert a beneficial interest. Conversely, the existence of a beneficial interest is indispensable for the performance of the secret obligation and, where the legatee has attested the will, section 15 is inconsistent with the assertion of this interest.
Conclusion

6.72 On a sound appreciation of principle it seems that the secret trust is a testamentary disposition. The \textit{dehors} the will theory, embedded in the fallacy that an \textit{inter vivos} trust can be informally engrafted onto a formal legacy, is mistaken. Equitable intervention in enforcement of the secret trust must be rationalised as implying a trust on the footing of some cause besides the testator’s dispositive expression. The focus of our analysis therefore turns now to an examination of the fraud theory as a means of justifying the enforcement of an informal testamentary trust.

\textsuperscript{122} See, to the same conclusion L. A. Sheridan, "English and Irish Secret Trusts", p. 327 (nomination of a beneficiary in a half-secret trust). \textit{Contra} Delany, p. 121 (half-secret trust).

\textsuperscript{123} See, in agreement, Hodge, pp. 346-347; Penner, para. 6.44.
CHAPTER 7: THE FRAUD THEORY: (I) - THE FRAUD PRINCIPLE

Introduction

7.1 Behind both the fraud theory of secret trusts and the new approach to secret trusts outlined in chapter 4 lies the assumption that equity is justified in imposing a trust in order to prevent or redress fraud. This chapter examines from a broad perspective the basis of that jurisdiction. Our concern is to identify in general terms the nature of secret trust fraud and its location within the Chancery jurisdiction. In particular we will be concerned to assess the relationship of secret trust fraud to fraudulent misrepresentation. It will be seen, however, that in order to obtain a sure understanding of equity's fraud jurisdiction in relation to wills it will be necessary to examine more closely the relationship between actual fraud and probate. That exercise is undertaken in the following chapter, enabling us to pursue the search for a precise meaning to secret trust fraud in chapter 9.

The relevance of fraud: fraud as the foundation of the secret trusts doctrine

7.2 There is nothing peculiar to equity in admitting parol evidence in order to prevent fraud which might arise because of the formality requirements in section 9 of the Wills Act. Testimony may be admitted in probate proceedings in suitable cases for the same end. In Re Vere-Wardale the testatrix had executed a will which contained an attestation clause implying it had been signed and witnessed in accordance with the Act. The attesting witnesses confessed that they had signed before the testator and in issue was whether other witnesses might be admitted to

\[1\] [1949] P 395.
give evidence that the will had in fact been properly executed. Willmer J held that the testimony was admissible:

[T]he object of the legislature in imposing the strict formalities required by the Wills Act 1837 was to prevent fraud. My duty here is to do all that I can to see than no fraud is perpetrated; and if I exclude further evidence such a ruling can only assist the possibility of the perpetration of fraud.²

It is important to note, however, the limited role performed by the oral evidence in this case. On the face of the document itself, the will was well executed. Testimony was admitted for the narrow purpose of confirming this and the fraud that was prevented by looking to evidence outside the document was a false imputation against a validly executed will. The fraud lay within the family of frauds that is perjury and at the heart of the Wills Act as successor to the Statute of Frauds. This is distinguishable from the exercise which equity performs when it enforces the secret trust disclosed by informal evidence dehors the will. In supressing secret trust fraud, equity is concerned with fraud in a less specific sense and admits the parol evidence to uphold the testator's informal testamentary disposition. Both of these aspects require justification, but it is the latter which is most problematic.

Equity will not allow a statute to be used as an instrument of fraud

7.3 It is almost axiomatic that equity has a general jurisdiction to intervene to prevent or redress fraud. In the traditional (and overlapping) threefold classification of fraud,

² Ibid, 397.
accident and breach of trust, the suppression of fraud is marked out as a primary object of equity's jurisdiction. "However legal rights may have been acquired, the Court of Chancery has interposed its authority to repress attempts to use them for the purposes of fraud." The judicial intervention in respect of secret trusts has predominantly been rationalised as constituting part of this broad fraud-based jurisdiction.

7.4 Imposition of a trust on the legatee's testamentary gift in a secret trust scenario can be justified by reference to the maxim that equity will not allow a statute to prevent fraud to be used as an instrument of fraud. As chapter 3 showed, the Wills Act, like the preceding provision in section 5 of the Statute of Frauds, was enacted

3 Charles Viner, A General Abridgement of Law and Equity Alphabetically Digested under Proper Titles with Notes and References to the Whole, 22 vols (Aldershot: [no pub.], 1742-1753), vol. IV, p. 386; Bath v Sherwin (1706-1707) Prec Ch 261; Gilb Rep 1; 10 Mod 1 per Lord Cowper LK, reversed by the House of Lords (1709) 4 Bro PC 373 on the substantive question of whether the application for a perpetual injunction should be refused, but not so as to affect this point.


5 Allen v Macpherson (1847) 1 HLC 191 at 228-229 per Lord Langdale. The opinion was a dissenting one, but this general principle was not in dispute.


7 The point is alluded to in Ballow, vol. I, pp. 186-187.
primarily (though not exclusively) in order to prevent fraud and the affinity between this object of the legislation and a fundamental aspiration of the Chancery jurisdiction vindicates the case for equitable relief to supplement the statute consistent with its policy. One purpose of the statutory formality was to prevent the plundering of the testator's estate by setting up false wills. Any rule whereby a legatee, in circumstances in which his conscience is affected, is prevented from taking from the testator that which the testator intended for another pursues a closely analogous objective. To take advantage of the effect of the statutory formalities in avoiding the informal trust and so assert an unencumbered title is to set up a false will in order to take beneficially from the testator's estate. This is a sufficient foundation for a fraud-based principle in equity which prevents a secret trustee from retaining beneficially in breach of his secret promise to benefit another a legacy which was given in reliance on the promise. Equally, however, it may be argued that the protection of the statutory formalities against false wills was directed not against the wrongful gain of the fraudulent but the unjust loss of those the testator truly intended to benefit. In that case equitable intervention to enforce a secret trust in favour of the intended beneficiary would better assist the statutory policy. Clearly the critical question is whether it is the interest of the estate or the 'true' beneficiaries which the legislature was seeking to protect. As chapter 3 has already implied, the answer may lie in the fact that the other purposes of the statute are best fulfilled when all informal wills - including true ones - fail. This suggests that the solution most coordinated with the legislature's mix of objectives is a restitutionary remedy to prevent the unjust enrichment of the legatee rather than a perfectionary remedy to enforce the informal will in favour of the secret beneficiary.

7.5 Unfortunately, in seeking to rationalise judicial intervention in respect of secret trusts on this basis, the judiciary has left the relationship between the maxim, the
fraud and the statute largely obscure. Enlarging on his similar observation in
*Muckleston v Brown,*\(^8\) Lord Eldon LC observed in *Stickland v Aldridge*\(^9\) that “[t]he statute was never permitted to be a cover for fraud upon the private rights of individuals.”\(^{10}\) The nature of the fraud in the secret trusts context is left unexplained. In particular Lord Eldon LC indicates nothing definitive about who is defrauded by the secret trustee, although the mortmain context to the case provides disputable reason for assuming that Lord Eldon LC had the beneficiaries of the secret trust in mind. Lord Eldon LC presumes that there are rights which are affected by the fraud and logically precede it. If, however, the secret trust is void for want of formality, then the intended beneficiaries take no equitable rights under the informal trust; such right can vest only *after* the fraud principle is invoked, when an enforceable secret trust is created by operation of law.

7.6 A second limitation of the case law, in adopting the maxim as a basis for the secret trusts jurisdiction, is the failure to identify explicitly the mode in which the principle that the Wills Act should not be an instrument of fraud finds application. As Sheridan has noted in the context of the Statute of Frauds, the principle may operate in one of three senses:

First, it may be an exception to the rule that equity is bound by statutes [...] . Secondly, the maxim may mean that equity has a special rule for the construction of statutes, i.e. an Act [...] will be read as if it included an exception in cases of fraud. [...] Thirdly, it may be that although the

\(^8\) (1801) 6 Ves Jun 52 at 69: “The principle is that the statute shall not be used to cover a fraud.”

\(^9\) (1804) 9 Ves Jun 516 (where, however, it had yet to be established that a secret trust had been created).

\(^{10}\) *Ibid,* 519.
application of a statute to a claimed right will defeat that right, equity will hold that in cases of fraud the party has another right, to which the statute does not apply, i.e. the defendant is charged, not upon the right to which the statute applies, but on different equities arising out of the fraud.\(^{11}\)

An obiter dictum of Page Wood VC in *Wallgrave v Tebbs\(^{12}\)* touches on this question in a characteristically terse and ambiguous manner:

\[T\]he court does not violate the spirit of the statute; but for the same end, namely, prevention of fraud, it engrafts the trust on the devise, by admitting evidence which the statute would in terms exclude [...]\(^{13}\)

This identifies the fraud principle as operating consistent with the policy of the Act, but it is unclear as to whether it operates by overriding the statute, within the Act and modifying its literal terms, or after the Act has applied.

7.7 The first of Sheridan's descriptions of the relation of the maxim to the statute cannot possibly stand. "[F]or the Chancery to relieve against the express provision of an Act of Parliament would be the same as to repeal it"\(^{14}\) and the notion that equity can be liberated from the shackles of an Act of Parliament by anything other than rules of European Union or international law duly incorporated within English law is a palpable constitutional heresy. Admittedly the secret trusts doctrine has not


\(^{12}\) (1855) 2 K & J 313.

\(^{13}\) Ibid, 322.
been reversed by the legislature, but the re-enactment and amendment of the statutory formalities for wills since the development of the doctrine after 1677 does not establish a legislative acquiescence in the secret trusts doctrine.\textsuperscript{15} In theoretical terms it is doubtful whether anything in the nature of estoppel can operate between organs of the state as a foundation in constitutional law for the erosion of Parliamentary supremacy. In evidential terms it is equally doubtful whether acquiescence is established. The legislative efforts of Parliament in revising the will formalities - most recently in the Administration of Justice Act - confirm evident satisfaction with the core formalities of signed attested writing which have been continually preserved. It cannot be argued with the same vigour that the legislature by its \textit{laissez faire} failure to reverse the secret trusts doctrine has impliedly endorsed a judicial law-making power: the failure to make new legislation to reverse judge-made law is qualitatively different from failing to amend an explicit provision in an existing statute. To assume legislative acceptance of the doctrine from non-intervention would erode the freedom of Parliament to decide for itself whether mistaken incursions on statutory rules are to be instantly eradicated by fresh legislation or whether the incursion will be tolerated until such time as the judiciary returns its case law to order. In any case, even if a legitimation of the secret trusts doctrine might be inferred, it would be constitutionally sounder to treat this as justifying a construction of the statute which excepts the secret trusts doctrine rather than as acknowledging a limited power to set the Act aside. An enactment passed against a background of pre-existing judicially-erected legal rules may be understood as preserving intact those rules which it has not expressly or necessarily reversed. Besides these overwhelming constitutional concerns, the notion that

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\textsuperscript{14} Ballow, vol. 1, pp. 17-18.

\textsuperscript{15} Contra Gardner, p. 83 n. 20.
\end{flushleft}
equity set the Wills Act aside in applying the maxim was rejected by Lord Westbury in *McCormick v Grogan*.\(^{16}\)

7.8 Sheridan favours the second view on the ground that this best explains why equity applies the maxim only in respect of certain statutes and to varying degree.\(^{17}\) There is clear support for this view in Shadwell VC’s comment in *Podmore v Gunning*\(^{18}\) that “the very worst method of construing the Statute of Frauds would be that which would give rise to frauds instead of preventing them”,\(^{19}\) which invites the inference that the statute is construed purposively to give effect to the fraud principle - an implied exception in the Act, therefore. Also in support can be cited Vaughan Williams LJ’s pronouncement in *Re Pitt Rivers*\(^{20}\) that the court never gives the “go­by” to the Wills Act by enforcing informal testamentary intentions except to prevent fraud.\(^{21}\) If the “go-by” cannot be achieved by setting the Act to one side, because that is constitutionally unsound, it must be by virtue of a construction of the Act which embraces the fraud principle.

7.9 However, in opposition to Sheridan’s view, it is suggested that the maxim ‘equity will not allow a statute to be used for fraud’ does not operate by way of an implied exception to the Act. If that explanation were the correct one, then the trust which would be enforced in equity is the one intended by the testator because - by reason of the legatee’s fraud - the matter falls within an implied exception to the Statute of Frauds and is thus unaffected by it. The secret trust enforced in equity would be an

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\(^{16}\) (1869) LR 4 HL 82, 97, quoted in para. 7.14.


\(^{18}\) (1836) 7 Sim 643

\(^{19}\) *Ibid.*, 655.

\(^{20}\) [1902] 1 Ch 403.
express one: since the Wills Act does not apply, the express testamentary trust remains valid notwithstanding its informality. Indeed Vaughan Williams LJ asserts as much: within the exception for the prevention of fraud, the go-by is given to the Wills Act and the testamentary intention of the testator (the express trust) is enforced. It is difficult to see how this implication is to be reconciled by Sheridan with his view that the secret trust is constructive. Moreover, the fact that the maxim applies unevenly across the statute book is no argument for assuming this can only be related to the extent to which individual statutes accommodate implied exceptions on account of fraud. An uneven application of the maxim is equally to be expected if the maxim really applies as a distinct body of equitable rules which are ancillary to particular statutes. The extent to which such ancillary rules are desirable will depend in part on the purpose of the statute and the unintended mischiefs to which its provisions give rise. The maxim is never free standing and can only operate as an adjunct to the relevant Act. In any particular context its application will be moulded by the nature of the Act just as much as if the Act had expressly provided for an exception along the lines developed by equity.

7.10 The better view is that Sheridan's third enumerated mode of application explains how equity gives effect to the maxim. The Wills Act strikes down the testator's informal testamentary trust. The secret trust recognised in equity is not this express trust shielded from the Act by an implied exception, but a constructive trust born out of equitable fraud practised by the legatee in exploiting the annulling effect of the Act.


22 *Fraud in Equity*, p. 46.
7.11 Stronger support can be found in a *dictum* of Lord Westbury in *McCormick v Grogan*:23

> [I]f in the machinery of perpetrating a fraud an Act of Parliament intervenes, the court of equity [...] does not set aside the Act [...], but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud.24

The Act is “not set aside”; it applies. Indeed it is the legatee who has applied it. The testator’s testamentary intentions do not pass safely through the castle of the Wills Act by the secret passage walled by the protective fraud maxim: they are captured within it, though the very act of the testator lowering the portcullis to imprison the testator’s wishes is the unchivalrous conduct that prompts equity’s rebuke. If it were an implied exception within the Act which is operative, we would have expected Lord Westbury to explain the policy of the Wills Act and how the doctrine operates to foster that policy. Instead (as Lord Westbury presupposes) the Wills Act operates to grant an unencumbered title to the legatee and it is *after* the Act has taken effect, according to its literal terms, that the maxim is brought into play. The constructive trust imposed by equity is redress for the legatee’s exploitation of the advantage afforded to him by the (unaffected) formality provision of the Wills Act in annulling the informal trust.

7.12 Although this application of the maxim might appear more liberated from the immediate concerns of the Wills Act than an application based on an implied

23 (1869) LR 4 HL 82.
exception, it is important that sight is not lost of the limits set out in chapter 3 which control equity's freedom to burden the legatee with a trust obligation. While independent of the Act rather than implied by it, the maxim still operates only in order to serve the Act - or, more precisely, to fulfill the law in buttressing and complementing the Act. To apply the maxim merely in order to recognise the very rights which the Act negates and in the very circumstances in which the Act avoids them, simply in order to reverse the substantive effect of the Act out of some notion of superior political judgment in the matter, would amount to as wilful and unconstitutional an act as a direct refusal to recognise the statute *ab initio*. The fraud principle exists to support the scheme of the Act, not to destroy it, and it presupposes an amelioration of the Act's defects, not a negation of its basic endeavour. It is for this reason that the maxim is most clearly consistent with the implication of a merely restorative trust in favour of the testator's estate in contrast to a binding trust for the intended beneficiary which grants the same equitable rights informally intended by the testator. A conception of the fraud principle which is invoked by equity merely to permit a substitute mode of testamentary trust creation, in opposition to the formal mode exclusively postulated by the Act, is a conception which has lost sight of the proper limits of judicial creativity.

7.13 In this regard it is of particular note that Lord Hatherley LC in *McCormick v Grogan* considered the secret trusts doctrine involves "a wide departure from the policy which induced the legislature to pass the Statute of Frauds".25 This supports our conclusion that the fraud principle operates outside the Wills Act, rather than implicitly within it: if the policy of the secret trusts doctrine diverges widely from that of the statute, it can hardly be maintained that it sits comfortably within it as an implied but integral part thereof. However, by whatever mode the fraud principle

25 (1869) LR 4 HL 82, 89.
operates, it is presupposed that a constructive trust arises, despite the express terms of the Act, because the fraud principle assists the statutory policy. Lord Hatherley LC's *dictum* confirms the conclusion of chapter 3 that in the current law of secret trusts the fraud principle is not being applied to achieve an outcome consistent with the statutory goals.

**Judicial recognition of fraud as the basis of the secret trusts doctrine**

7.14 Despite the controversy as to the precise meaning of fraud in the secret trusts context, considered in detail in chapter 9, it is abundantly clear that from its inception the secret trusts doctrine has primarily been founded on equity's jurisdiction to intervene in respect of fraud. An early expression of the fraud theory was voiced in *Devenish v Baines*. The defendant intimated to her husband that if she was nominated to succeed him to a copyhold estate she would ensure (as the husband wished) that a certain part of it went to the plaintiff, the husband's godson. To the plaintiff's claim to enjoy the land, the defendant pleaded the Statute of Frauds. The Lords Commissioners found for the plaintiff, "not as an agreement or a trust but as a fraud." Since that decision the fraud theory as an explanation of the secret trusts jurisdiction has enjoyed an overwhelming weight of judicial endorsement as far as the beginning of the present century. A classic expression

26 (1689) Prec Ch 3 (Lords Commissioners).

27 Ibid. 4.

28 See *Sellack v Harris* (1708) 2 Eq Ca Abr 46 *per* Lord Cowper LC; *Marriot v Marriot* (1725) Gilb Rep 203 at 209; 1 Str 666 at 673 *per* Gilbert LCB, *obiter*; *Podmore v Gunning* (1832) 5 Sim 485 at 494-495 and similarly (1836) 7 Sim 643 at 655 *per* Shadwell VC (where the secret trust was held to be merely precatory); *Briggs v Penny* (1849) 3 De G & Sm 525 at 547 *per* Knight Bruce VC (where it was held the will imposed a trust); *Lomax v Ripley* (1855) 3 Sm & Giff 48 at 73 and 81 *per* Stuart VC; *Wallgrave v Tabb* (1855) 2 K & J 313 at 322 *per* Page Wood VC, *obiter* (where the
is that of Lord Westbury in *McCormick v Grogan* explaining equity's jurisdiction founded on "personal fraud":\(^{29}\)

It is a jurisdiction by which a court of equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud.\(^{30}\)

7.15 In fact, as is evident from the last chapter, even in the supposedly leading expositions of the *de hors* theory in *Cullen v AG for Ireland*\(^{31}\) and *Blackwell v Blackwell*\(^{32}\) the element of fraud was brought into play. Academic analysis has followed the judicial trend.\(^{33}\) The central task is to ascertain precisely what this means: what is the content of the ‘fraud’ concept in the secret trusts doctrine?

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\(^{29}\) See also (1869) LR 4 HL 82, 88-89 *per* Lord Hatherley LC and *per* Bacon VC in *Norris v Frazer* (1873) LR 15 Eq 318, 330.

\(^{30}\) (1869) LR 4 HL 82, 97.

\(^{31}\) (1866) LR 1 HL 190, 198 *per* Lord Westbury. If his *dictum* in *Cullen* showed any affection for the *de hors* the will theory, it was a short-lived infatuation. By the time of *McCormick v Grogan* (1869) LR 4 HL 82 his theorising had hardened into "personal fraud".

\(^{32}\) [1929] AC 318 at 335 *per* Lord Sumner and at 341 *per* Lord Warrington, quoted in para. 6.47.

\(^{33}\) See Ballow, vol. II, p. 38; Hovenden, vol. I, p. 495; Strahan, p. 67; Maitland, p. 61; Bailey, p. 141; *Williams*, p. 318 n. e.
The meaning of fraud in equity

Chancery's versatile portmanteau: equitable fraud

7.16 Fraud has a very wide and less than coherent meaning in equity. Indeed fraud in equity seems at times to have an almost elastic quality, stretching over "a scale of moral obliquity from the depths of depravity to the misplaced kindly intention". This might be attributed in part at least to the search within equity for legitimisation of an expanding jurisdiction. Straining a term which carries overtones of serious misconduct lends itself - at the bar as much as on the bench - to buttressing a more dubious case for relief against some less heinous wrong. Its meaning, at once both diverse and unparticularised, may be the result of borrowing a concept from a well-established jurisdiction to overcome hostility to its enlargement in another quarter. It is for this reason, perhaps, that the term fraud has been used by equity practitioners as nomen generalissimum.

34 Sheridan, *Fraud in Equity*, p. 214.
35 Sheridan doubts this on the basis that there is no evidence 'fraud' was used with the conscious object of extending the equitable jurisdiction and that the principle equity acts *in personam* was a formula ready to hand to address any such concern: see *Fraud in Equity*, pp. 210-211. In relation to secret trusts, however, this alternative formula could not have sufficed. Raising up an *in personam* obligation in order to create a trust would only lead to a brush with the statute which had annulled the *in personam* obligation the testator had intended to impose by way of his informal declaration of the testamentary trust. The question would remain how this fresh *in personam* obligation giving rise to a trust could be reconciled with the statute. The *in personam* formula was of no use where legislation had already sought to regulate equitable rights and the issue was how equity might overcome its apparent restrictions. In this context fraud would have a much greater explanatory power.

36 Frederick Pollock, "Nocton v Lord Ashburton", (1915) 31 LQR 93, 93.
7.17 The Chancery judges have shied away from a definition, mostly from a concern that any definition could not exhaustively capture the infinite varieties of fraudulent misdemeanours of which incorrigible human nature is capable of undertaking and might serve only to hamper the court’s ability to redress wrongs.\(^{37}\) Into this intellectual vacuum commentators have entered without self-evident success. What definitions have been offered have tended to be so wide as to be virtually meaningless. Typical of this Indermaur offers the following:

Fraud in Equity may be described as such conduct on the part of a person as is either deliberately wrong, or is considered by the Court as wrong, and which therefore forms a ground for the assistance of the Court, to set aside a transaction tainted with it, or a ground upon which to resist liability in respect of it.\(^{38}\)

7.18 This definition goes little further than associating fraud in equity with ‘wrongdoing’, echoing the very general use of that term by the judiciary to the like effect.\(^{39}\) In this broad form the definition can cast little light on the particular form equitable fraud will assume in the secret trusts context; it simply begs the question of what constitutes the requisite wrongful or unconscionable element and who is the victim of the wrong. That such definitions should descend into generality is unsurprising if, as Sheridan has argued, no conscious policy beyond that of

\(^{37}\) See, to this effect, Hovenden, vol. 1, pp. 13-14 (praising this “prospective sagacity’’); Indermaur, p. 228 (implicitly); Kerr, p. 1. For cogent criticism of this misplaced fear that definition would harden the suppleness in the fraud concept essential for future development, see Sheridan, *Fraud in Equity*, p. 2.

\(^{38}\) Indermaur, pp. 227-228. See similarly Bogert and Bogert, § 471 (fraud in its broadest sense includes all conduct which equity treats as unfair, unconscionable and unjust).

\(^{39}\) See, for example, *Nocton v Lord Ashburton* [1914] AC 932, 963 *per* Lord Dunedin.
remedying injustice dominated in settling the rules of what amounts to fraud. If fraud as an umbrella term within equity has been defined by no other guiding concern than a desire to prevent some particular injustice, it is unlikely that any distinct meaning of fraud in the secret trusts context can be deduced a priori. However, if a principled definition of fraud in equity does not really exist, it may be useful to consider how equity groups areas of its jurisdiction falling under the general concept of fraud. It may be possible to obtain an outline of those qualities essential to secret trust fraud by considering its possible relation to other heads of fraud recognised in equity. This may provide useful insight because of a contrasting nature (as in the case of actual fraud) or because of boundaries with neighbouring domains (fraud in obtaining a will).

Classes of fraud in equity

7.19 In contrast to a definition, Lord Hardwicke LC in Chesterfield v Janssen set out a classification of fraud in matters of contract involving five divisions which may be re-stated as follows:

(i) actual fraud - in other words, fraudulent misrepresentation

(ii) unconscionable bargains - in other words, agreements, howsoever innocently procured, whose terms are so unfair and disadvantageous to one party that it would be unconscionable for the other to enforce the agreement

(iii) undue influence

40 Sheridan, Fraud in Equity, pp. 213-214.

41 (1750) 2 Ves Sen 125 at 155-157.
(iv) transactions to defraud third parties\textsuperscript{42} (such as voluntary conveyances intended to deprive the donor's creditors of the benefit of any subsequent judgment on the outstanding debts); and

(v) catching bargains.

7.20 This categorisation of fraud in equity, which is hardly exhaustive, sheds little light on the branch of fraud relevant to secret trusts. On its own terms it has little to commend it, since the fifth heading of catching bargains savours of undue influence and unconscionable bargains and therefore resembles a sub-heading rather than a main class of fraud in its own right.\textsuperscript{43} Sheridan is no doubt right that secret trust fraud is not contained within this classification.\textsuperscript{44} More helpful is Sheridan's own re-classification of three broad themes in equitable fraud:

(i) improperly obtaining consent

(ii) abuse of lawful procedure

(iii) abuse of authority for self-interest.\textsuperscript{45}

We will see shortly that the secret trusts doctrine requires nothing more to procure the legacy than the legatee's promise to the testator to perform the secret trust: deceit is not an a required element of secret trust fraud. Since there is nothing

\textsuperscript{42} Sheridan sees this category as extending more widely to include other rules of public policy: \textit{Fraud in Equity}, p. 7.

\textsuperscript{43} Lord Hardwicke LC himself conceded that his classification permitted of mixed cases: see (1750) 2 Ves Sen 125 at 157.

\textsuperscript{44} \textit{Fraud in Equity}, p. 9.

\textsuperscript{45} \textit{Ibid}, p. 214. Cf. p. 203, where Sheridan offers \textit{four} types of fraud, which are based on the three above, but in which the first category is sub-divided between misrepresentation (improperly misleading) and the unconscientious use of power over another.
improper in a promise as a means of extracting a gift, it follows that secret trust fraud is not a form of procuring a donation by improper means. Nor is a secret trust an abuse of lawful procedure, but rather the exploitation of a statutory provision for the legatee’s gain and the secret beneficiary’s prejudice. It is thus Sheridan’s third category which most naturally embraces secret trust fraud. The legatee who has induced the secret trust has only been given the property for the purpose of performing that promise and the refusal to do so is an abuse of his power over the legacy for his own advantage. This very broad brush examination of the classification of equitable fraud suggests, consistent with this thesis, that secret trust fraud is best understood as based on the benefit acquired by the trustee in default of performing the secret promise.

7.21 Finally, it is possible to divide fraud in equity along traditional lines into, on the one side, actual fraud (that is, deceit and other misrepresentation for which compensation may be payable, forming the first of Lord Hardwicke LC’s categories) and, on the other side, constructive fraud - an open-ended grouping embracing all other varieties of fraud in equity.46 The term “constructive fraud”, as the residue of the ‘fraud’ spectrum after actual fraud, cloaks a multitude of grounds for intervention. In keeping with this breadth Lord Haldane LC in Nocton v Lord Ashburton47 described the term as denoting the violation of an equitable obligation, such as a trustee purchasing the trust estate or a solicitor bargaining with a client.48 Correspondingly, but at a more abstract level, Indermaur gives as examples of constructive frauds secret profits made by fiduciaries and the abuse of confidential

46 On the distinction between actual and constructive fraud, see Melville M. Bigelow, “Definition of Fraud”, (1887) 3 LQR 419, 422-423.
47 [1914] AC 932.
48 Ibid, 954: “[B]reach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience.”
relationships by procuring an advantage through undue influence. Sheridan's classification obscures this traditional distinction, since a number of constructive frauds (including, chiefly, undue influence) fall into his first class along with actual fraud (fraudulent misrepresentation). It will be seen that the distinction between actual and constructive fraud in equity is relevant to a resolution of the meaning of 'secret trust fraud' and for this reason it is important to maintain this traditional division for schematic purposes. In the remainder of this chapter we are concerned with whether secret trust fraud is to be distinguished from actual fraud and to identify the implications of that contrast.

**Actual fraud**

**Deceit**

7.22 It is confirmed below that deceit is not a requirement for the establishment of a valid secret trust and for this reason it is not necessary to dwell on the detail of differences between actual fraud at law and actual fraud in equity. Nonetheless an outline of actual fraud in equity is essential, since the contrast between actual fraud and constructive fraud (embracing secret trust fraud) is a point of continual reference and, in particular, assumed importance historically in the context of fraud in obtaining a will.

7.23 The tort of deceit in common law is committed where:

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49 Indermaur, pp. 240-248.

50 Supporting this summary see, for example, *Bradford Third Equitable Benefit BS v Borders* [1941] 2 All ER 205, 211A-E *per* Lord Maugham. For a more detailed statement of the elements of the tort, see Bower's Code, especially Art. 28: George
(i) a defendant makes a material false representation of fact to a plaintiff,\(^1\)

(ii) the defendant does not believe the representation to be true - in other words, he knew or believed it to be untrue or was reckless as to whether it was true,\(^2\)

(iii) the defendant intended the plaintiff should rely on the representation\(^3\) and

(iv) the plaintiff materially relies on the false representation and suffers consequential damage.\(^4\)

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\(^1\) *Peek v Derry* (1887) 37 Ch D 541, 585 per Lopes LJ (unaffected on this point by the reversal of the Court of Appeal’s decision by the House of Lords). The representation was held false at all stages of the litigation, save that exceptionally Lord FitzGerald considered it was essentially true: see 14 App Cas 337, 356.

\(^2\) *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 465-466 per Denman J; *Derry v Peek* (1889) 14 App Cas 337 at 356 per Lord FitzGerald and especially at 374 per Lord Herschell. In *Derry v Peek* the House of Lords unanimously rejected the view of the Court of Appeal (see 37 Ch D 541 at 566 and 587 per Cotton LJ, at 578 and 582 per Sir James Hannen) that fraud was also established if the defendant had formed a genuine belief without reasonable grounds: see 14 App Cas 337 at 344 per Lord Halsbury LC, at 345 per Lord Watson, at 352 per Lord Bramwell, at 358 per Lord FitzGerald and at 373 and 375 per Lord Herschell. See, confirming this, *Nocton v Lord Ashburton* [1914] AC 932, 947 per Lord Haldane LC.

\(^3\) *Peek v Derry* (1887) 37 Ch D 541, 585 per Lopes LJ, asserting the point was beyond argument on the facts of the case. The decision on this point is not affected by the later reversal of the Court of Appeal’s decision on other grounds of law and fact, although Lord Bramwell, in support of his position, urged that the plaintiff was not in fact influenced by the misrepresentation: 14 App Cas 337, 353.

\(^4\) *Peek v Derry* (1887) 37 Ch D 541, 558-559 per Stirling J, holding that there had been no reliance on the facts of the case; *ibid*, 585 per Lopes LJ. The Court of Appeal differed from Stirling J in the inferences drawn from the facts of the case, stressing that the inducement by the representation need only be material, not necessarily exclusive: see *ibid*, 574 per Cotton LJ, at 584-585 per Sir James Hannen and at 588-589 per Lopes LJ.
The common law remedy for the tort is damages. Equity has a concurrent jurisdiction with the common law in respect of fraudulent misrepresentation. However, its jurisdiction is wider in two essential aspects. Firstly, as regards remedies, a transaction induced by misrepresentation is voidable at the instance of the deceived party who may thus seek rescission to set the transaction aside. Secondly, outside the concurrent jurisdiction, financial compensation could be awarded in equity only by means of an account of profits, so that the wrong is actionable only where a financial benefit accrues to the deceiver. However, where property is acquired by fraudulent misrepresentation, equity might grant specific relief to the defrauded party by imposing a constructive trust.

Secondly, equity will redress as actual fraud not merely fraudulent misrepresentation, but also negligent misrepresentation if the defendant who mistakenly believes in the truth of his representation is under a fiduciary duty to the plaintiff to take care, as settled by the House of Lords in *Nocton v Lord Ashburton*. That the common law under *Derry v Peek* restricts actual fraud to cases of want of belief in the truth of a misrepresentation does not affect this aspect of actual fraud in equity which forms part of its exclusive jurisdiction. Prior to that decision it had been suggested in the context of wills that negligent...

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55 *Colt v Woollaston* (1723) 2 P Wms 154 at 156 per Jekyll MR; *Sowerby v Warder* (1791) 2 Cox 268 at 270 per Eyre LCB; *Hill v Lane* (1870) LR 11 Eq 215 at 220-221 per Stuart VC; *Nocton v Lord Ashburton* [1914] AC 932, 951 per Lord Haldane LC.

56 The equitable remedy of rescission extends to non-fraudulent misrepresentation: *Redgrave v Hurd* (1881) 20 Ch D 1, 12-13 per Jessel MR; *Derry v Peek* (1889) 14 App Cas 337 at 347 per Lord Bramwell and at 359 per Lord Herschell, obiter.

57 Bogert and Bogert, § 473.

58 [1914] AC 932 at 945 and 956-957 per Lord Haldane LC.

59 (1889) 14 App Cas 337.
misrepresentation might suffice to constitute fraud.\textsuperscript{60} However, if Nocton v Ashburton establishes the threshold for equitable relief, it seems doubtful that merely negligent misrepresentation could ever justify setting a will aside\textsuperscript{61} in the absence of some fiduciary relationship between the testator and the party negligently making the misrepresentation. Actual fraud within the understanding of the Court of Chancery extended beyond deceit but “imported breach of a duty to which equity had attached its sanction”,\textsuperscript{62} negligent misrepresentation could only be actionable in equity, therefore, if it constituted misfeasance in a pre-existing relationship recognised in equity.

Fraudulent misrepresentation as an element of the secret trusts doctrine

7.26 In the earliest secret trust case law, where the nature of the fraud was never elucidated, there is no explicit support for the view that it was an essential ingredient for the creation of a binding secret trust that the testator should have been deceived by any fraudulent misrepresentation by the legatee. A \textit{dictum} of Lord Hardwicke LC in Addlington v Cann\textsuperscript{63} weakly supports the view that it might have been considered a requirement. In that case land was devised to the defendants as joint tenants. A note signed by the testator found after his death among his effects recited his aspiration that the property be applied for a charitable purpose. The defendants were held not to be bound by the secret trust of which they had been unaware, but Lord Hardwicke LC indicated, \textit{obiter}, that there would have been a binding trust if a devisee had fraudulently represented to the testator that he could

\begin{itemize}
\item \textsuperscript{60} Browne, vol. I, p. 336 n. 117.
\item \textsuperscript{61} Assuming even that equity would have power to do so, on which subject see chapter 8.
\item \textsuperscript{62} [1914] AC 932, 953 \textit{per} Lord Haldane LC.
\item \textsuperscript{63} (1744) 3 Atk 141.
\end{itemize}
devise absolutely by his will and then leave a note afterwards as a sufficient declaration of trust.\textsuperscript{64} However, Lord Hardwicke LC's \textit{dictum} may be explained as suggesting that a misrepresentation as to the legal consequences of an informal testamentary trust, \textit{whether or not communicated to the legatee}, justifies the imposition of a trust on the basis of actual fraud as an \textit{alternative} to the secret trusts doctrine. It cannot be assumed that Lord Hardwicke meant a communicated and accepted secret trust could only be enforced in equity if, additionally, the legatee had committed actual fraud - for example, by misrepresenting his intentions in respect of the execution of the secret undertaking. This seems to be the sounder view since in the earlier case of \textit{Harris v Horwell}\textsuperscript{65} Lord Cowper LC had enforced a secret trust notwithstanding, as he noted, that express fraud had not been proven. Furthermore, as will be argued in chapter 7, Lord Hardwicke LC overstepped the mark in suggesting that the court would enforce the secret trust if the legacy was procured by actual fraud: even where there is actual fraud \textit{ante mortem}, in contrast to the \textit{post mortem} weaker fraud of secret trusts, enforcement of the informal trust is not justified. The proper outcome is a revocation of the will to the extent of the fraudulently induced gift and a restitution to the testator's estate, not the secret beneficiary.

\textbf{7.27} Although the point has been rarely addressed in the case law since \textit{Addlington v Cann}, it seems settled that the legacy need not be brought about by any actual fraud by the legatee. A secret trustee who genuinely intends to fulfil his promise at the time he undertakes to perform the trust, and who therefore makes no fraudulent statement about his state of mind inducing creation of the secret trust, will

\textsuperscript{64} See \textit{ibid}, 152.

\textsuperscript{65} (1708) Gilb Rep 11.
nonetheless be held to his secret promise. In *Barrow v Greenough* the defendant
maintained that when he promised the testator to perform his wishes he had also
urged the testator to make a new will and Arden MR considered this showed the
defendant had had no intention at the relevant time of committing fraud, but this
did not preclude Arden MR from holding the defendant to be a secret trustee. A
subsequent attempt by counsel for the defendants in *Podmore v Gunning* to
convince the court that it was necessary for the plaintiffs to show that compliance
with the Statute of Frauds was fraudulently prevented fell on stony ground: the
protracted analysis of that case by Shadwell VC seems to have proceeded on the
conventional footing that fraud in procuring the legacy is not required.

7.28 Admittedly in their formulation of the law in *McCormick v Grogan* their
Lordships inclined towards the view that there must be actual fraud - a “fraudulent
inducement” by the legatee, a “malus animus” in the legatee, and a testator
“beguiled and deceived” by the legatee. However, no reference was made to the
erlier cases which tended to negate that proposition. In any case their Lordships
in *McCormick v Grogan* determined that there was no communication of the trust
intention and further that the testator had intended only a precatory trust obligation.

66 (1796) 3 Ves Jun 153 (Arden MR).
67 Ibid, 154.
68 (1832) 5 Sim 485; (1836) 7 Sim 643; Donnelley 72 (Shadwell VC).
69 See 7 Sim 643 at 651.
70 (1869) LR 4 HL 82, 89.
71 Ibid, 89 per Lord Hatherley LC.
72 Ibid, 97 per Lord Westbury, referring also to the criminal character of fraud.
73 Ibid, 98 per Lord Westbury.
Their observations on the necessity for fraudulent misrepresentation were not material to the decision, are certainly not supported by the authorities and are best seen as a collective but isolated aberration. The better and more modern view is that actual fraud is not a necessary element of a secret trust.75

7.29 The fraud involved in secret trust cases is therefore different from deceit.76 If proven deceit were a requirement for equitable intervention, the fraud would be constituted by wrongfully inducing the informality. The true notion of fraud in secret trusts law turns instead on the legatee’s personal gain in exploiting the absence of formality for the trust. This is a fraud in exploiting the informality. It is consequential and not antecedent to the will.

A rogue's promise as fraudulent misrepresentation

7.30 While deceit is not a necessary component of an enforceable secret trust, the existence or absence of deceit might be material in determining the proper outcome of equitable intervention. Different principles might be thought to apply depending on whether the fully-secret trustee has deceived a testator or is merely unjustly enriched. This question is resolved in chapter 9. If the additional element of deceit is relevant in determining the nature of the constructive trust imposed, it will helpful to know how far short of deceit the essential elements of a secret trust fall. In

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74 These early cases show that the subsequent departure from the view taken in McCormick v Grogan was a restoration of the early law, not an abrupt change of an established condition in the secret trusts doctrine, contra Penner, para. 6.38.

75 See Ottaway v Norman [1972] 1 Ch 698, 712B where Brightman J observed that the argument that deliberate wrongdoing on the part of the trustee must be shown was rightly discarded.

76 In agreement, but omitting this detailed discussion, see Sheridan, Fraud in Equity, pp. 45-46.
particular, is actual fraud inherent in those elements if the legatee from the outset
never intends to perform the trust which he promises to execute? If that were the
case then the secret trust and actual fraud would be separated only by a difference in
the legatee's state of mind at the time of accepting the trust. Clearly there is no
actual fraud if the legatee genuinely intended to perform his promise at the time he
gave it. There is no actual fraud if the legatee later changes his mind; fraud may
arise in the secret trust sense from his breach of promise, but there was no false
representation.77 However, is there any misrepresentation if the promisor gives an
undertaking when he never has any intention to fulfill the testator's wishes?

7.31 If a defendant makes a false representation about his present intentions he makes a
misrepresentation, since the defendant's state of mind at the time of promising is a
fact which is susceptible to misrepresentation.78 The issue is whether the mere act
of promising necessarily contains within it an implied representation that there
exists a present intention to perform the promise. Few rogue promisors will append
to their undertaking a free admission that they intend to breach the obligation to
which they have just agreed, so that we are left with the philosophical question of
the content of a promise.

7.32 There is some judicial support for the view that every promise carries an implicit
assertion that the promisor presently intends to keep that promise, but on close
examination the judicial support seems less than overwhelming. In Ex parte

77 See, to similar effect, Sheridan, Fraud in Equity, pp. 45-46.
78 See Edgington v Fitzmaurice (1885) 29 Ch D 459 at 479 per Cotton LJ, at 483 per
Bowen LJ (making the now infamous comparison with the state of a man's digestion)
and at 484 per Fry LJ. In the context of the criminal offence of obtaining property by
deception, see the Theft Act 1968, s. 15(4), reversing the principle settled by the Court
of Criminal Appeal in R v Dent [1955] 2 QB 590 under the Larceny Act 1916, as
explained in the text below.
Whittaker\textsuperscript{79} an insolvent person had purchased shortly before his imminent bankruptcy goods which he was allowed to take without paying. After the purchaser was declared bankrupt, the seller sought to rescind the contract of sale on the ground of fraud. The County Court judge held that at the time of purchase the bankrupt had had no intention of paying and was guilty of fraud in failing to disclose this. Bacon VC, sitting as Chief Judge in Bankruptcy, reversed that decision on the ground that concealment of insolvency was not a fraud and that there had been no misrepresentation. This view was affirmed on appeal, where Mellish LJ opined that the bankrupt was to be taken as having made an implied representation that he intended to pay for the goods. Since the appellate court was not satisfied that the bankrupt had in fact lacked an intention to pay, this observation on the intrinsic existence of an implied representation is of un compelling weight. Nor does the \textit{dictum} indicate that the implied representation was necessarily to be deduced from the contractual promise to pay, rather than inferred from the circumstance of bidding and promising \textit{at an auction} where chattels are customarily paid for immediately after sale. The case may go no further than affirming the undisputed proposition that a misrepresentation of a present state of mind about future conduct is a misrepresentation of fact sufficient to found fraud. In \textit{Re Eastgate},\textsuperscript{80} a similar case of purchase on credit, Bigham J held that the bankrupt had lacked an intention to pay and therefore ("[i]n other words") falsely pretended that he intended to pay.\textsuperscript{81} In that case, however, the issue in dispute was whether or not it was possible to rescind after bankruptcy was declared. In any event Bigham J does not explain why the misrepresentation may be inferred and assumes rather than establishes the proposition.

\textsuperscript{79} (1875) LR 10 Ch App 446 (Court of Appeal in Chancery), affirming (1875) LR 10 Ch App 447n (Bacon VC).

\textsuperscript{80} [1905] 1 KB 465 (Bigham J).
7.33 The strongest authority is the rather confused judgment of the Court of Criminal Appeal in *R v Dent*. The appellant had been convicted of obtaining cheques by false pretences under the Larceny Act 1916. As part of his pest destruction business he had entered into contracts with farmers to kill vermin, for which he received payment in advance but for which he did no work. The evidence showed that he had never intended doing the work and in the relevant charges it was alleged that he had misrepresented an intention to carry out his contractual obligations, which misrepresentation was inferred from his contractual promise. Giving the judgment of the court, Devlin J asserted that no distinction could be made between a promise and a statement of intention: "Every promise by a person as to his future conduct implies a statement of intention about it". The actual decision of the court, however, was that the convictions should be quashed because for the purposes of the criminal law a misrepresentation of intention in respect of future conduct would not suffice as an ingredient of the *actus reus*. Whether or not the promise gave rise to such a misrepresentation was therefore immaterial: it would not be a misrepresentation of the type which could constitute an element of the crime.

7.34 Against this slender authority must be set later decisions which remind us of the orthodox proposition that a promise is not *per se* a statement of fact, cannot be true or false at the time it is made and can only be kept or broken. So, for example, section 14 of the Trade Descriptions Act 1968, which creates an offence of intentionally or recklessly making in the course of trade or business certain false

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82 [1955] 2 QB 590.
83 S. 32. See now the Theft Act 1968, s. 15.
84 [1955] 2 QB 590, 596.
statements as to services, accommodation or facilities provided, has no application to promises as such. 86 Moreover, although undoubtedly a promise may simultaneously convey a representation of present intention as to future performance and so lead to fraud, 87 the notion that it must imply such a representation seems wrong in principle, notwithstanding academic endorsement. 88 The better view is that there is no such necessary implication; the existence of an implied representation depends upon the circumstances in which the promise is communicated. 89 A promise as such does not import anything other than an undertaking to do the thing promised; any inference that the promisor actually intends to do the thing promised is a deduction from the manner and context in which the promise is delivered, supplementing that which is literally uttered. The

85 Ibid, 595.

86 Beckett v Cohen [1972] 1 WLR 1593 (Divisional Court); approved and explained in R v Sunair Holidays Ltd [1973] 1 WLR 1105, 1112H-1113C by Mackenna J for the Court of Appeal and see also at 1109G-H and 1110A-B where it is explained that the orthodox principle that a promise may contain an implication as to present intention to keep it applies equally to the general civil law of deceit.

87 See, for example, Colt v Woollaston (1723) 2 P Wms 154 (Jekyll MR), where promoters of a hopeless radish oil extraction project advertised after failure of the project that they would return contributors' payments with interest within six months.


89 See in support of this view Bower, Code, Art. 2, p. 3 ("any statement as to a matter in futuro which was intended or expressed [...] to constitute, or which can only be construed as constituting, a promise, is not a representation"); and further, B. S. Markesinis and S. F. Deakin, Tort Law, 3rd edn (Oxford: Clarendon Press, 1994), p. 373; R. F. V. Heuston and R. A. Buckley, Salmond and Heuston on the Law of Torts, 21st edn (London: Sweet & Maxwell, 1996), p. 370.
promise is primarily a transactional matter, conferring on the promisee the moral
or legal entitlement to expect the thing to be done, on pain of appropriate sanction.
A representation about the state of mind is an informational matter and logically, for
the efficacy of the promise in creating an obligation, there is little information
which must be bound up with the transactional attribute of the promise. Once a
promise is given, the promisee is entitled to performance by virtue of that promise,
regardless of whether at the time of promising the promisor did or did not intend to
perform his obligation. (Indeed even if at the time of promising he does not intend
to perform, the ethical compulsion towards compliance generated by a promise may
reverse the rogue promisor’s recalcitrant state of mind.) In making a promise the
promisor certainly asserts a current intention to be subject to an obligation. The act
of making a genuine promise represents that the promisor intends to bind himself by
it. This is essential to the transactional quality of the promise: a promisor who does
not intend to incur an obligation is not promising at all, but simply making a
declaration. An intention to be bound, however, is perfectly consistent with an
intention to commit a breach of the promise which one intends to be binding. Such
an intention is simply an intention to incur the risk that the promisee might subject
the promisor in the event of breach to such sanctions (of law or morals as the case
may be) which lie within the promisee’s power. It is quite possible to intend to
subject oneself to an obligation (with all associated sanctions for breach), while
intending at the same time to reserve full freedom as a matter of fact to commit a
breach of that obligation (and thus trigger the contemplated sanctions). This may
not be the most honourable mode in which to enter an engagement, but it is not a
fraudulent one.

90 Bower, para. 2 (a representation and a promise are mutually exclusive of and
antithetical to one another).
Information about the promisor's state of mind in respect of performance - irrelevant as it is to the promisee's entitlement - is functionally immaterial to the transaction of promising. The only other necessary informational aspects of a promise are those which constrain performance, such as matters affecting the ability of the promisor to satisfy his undertaking, since in order to create a meaningful obligation the act of promising implies that the promise can - but not necessarily will - be fulfilled. To intend an obligation impossible of execution is to intend an obligation which the law cannot uphold. By the very act of promising in any serious transaction intended or represented to have legal effect, the promisor must represent that he does not intend his promise merely as empty words beating the air. The promisor therefore represents all that is necessary to make the promise binding. This is, however, not strictly inherent in the content of the promise itself, but in its context, in the delivery of the promise with apparent serious intent. To extract from the promise per se a representation about the promisor's state of mind in respect of future performance is to infer more than is actually there. In short, whether or not a legatee intends at the time of his secret promise to renege, he does not mislead the testator as to his present state of mind by the mere act of promising.

It may therefore be pressed that a promise to sell does imply a representation that the promisor either has or has capacity to acquire a title to the subject-matter of the sale or otherwise has or may acquire power to alienate in the manner promised to the promisee. Thus far we may agree with Devlin J's observation in *R v Dent* [1955] 2 QB 590, 597 that:

[T]here can in the nature of things be few promises intended to be performed immediately which do not import some statement about the promisor's readiness to perform, that is, that he has as an existing fact the power and means to perform his promise.

It is this context to a promise - undertaking to pay within a context bounded by a conventional expectation of immediate payment - which may explain the ease with which an implied representation was inferred in *Ex parte Whittaker* (1875) LR 10 Ch App 446 and *Re Eastgate* [1905] 1 KB 465.
An actual fraud analogy

7.36 The erroneous assumption that a promise inherently contains a representation of intention to perform may nonetheless provide some explanation for the development of secret trust fraud. In the context of part performance, Bigelow sets out a concept of quasi-fraud where the promisor genuinely intended to perform his obligation (under an informal and presumptively unenforceable contract for the disposition of land) but has subsequently changed his mind and sought to exploit the informality by retaining, without recompense, benefit conferred under the contract by the other party:

The party about to take the unjust advantage may not have intended in the outset to violate the confidence expressed in the extra-legal way;

but what matters that if he afterwards entertain the purpose?92

The same could be said of secret trust fraud, which likewise involves an obligation rendered unenforceable by statute and an "unjust advantage". If this is an accurate description of secret trust fraud then it is a fraud which is based on an analogy with actual fraud. The promisor is treated as if they had misrepresented their intention to renege at the time of their promise because, as events have turned out, the promisor has reneged.93

92 Bigelow, "Definition of Fraud", p. 425.

93 See in this regard Sheridan, Fraud in Equity, p. 185, where, in contradiction of his earlier distinction between deceit and secret trust fraud, Sheridan wrongly treats cases of inequitable claims to property of a secret trust type as in effect cases of fraudulent misrepresentation of intention, conflating (in error) representations of intention which are not carried out with broken promises. This conflation illustrates how the analogy suggested in the text may be said to articulate latent premises in this branch of equitable fraud.
7.37 Assuming for present purposes that this analogy is an appropriate one, it has a number of noteworthy implications for secret trust fraud. In the first place, the fraud - by analogy with fraudulent misrepresentation - is practised on the testator, since it is the testator who is the promisee and, by analogy, the party to whom the misrepresentation is made. This supports the view that equitable relief is to be granted in the interests of the testator and, therefore, his successors, rather than the secret beneficiary; it points towards a restorative trust rather than enforcement of the informally agreed trust.

7.38 Secondly, it is necessary that benefit should be conferred on the secret trustee. There must be something of which the secret trustee may take advantage. This should be unsurprising in so far as equity had no inherent power to award damages and equitable redress for fraud required the fraudulent party to take some benefit at which a trust or an account of profits might grasp. There must be some property beneficially acquired by the legatee on which a trust can bite. This immediately suggests that in the half-secret trust scenario, where the will itself imposes a trust nominatim and denies the legatee any benefit, the enforcement of the half-secret trust could be justified only on the basis that the testator’s successors (who are beneficially entitled under the resulting trust generated by the will) would otherwise profit from the legatee’s fraud. We have already noted, however, that the testator’s successors take in their own right as successors to the victim of the fraud and not as third party profiteers. The enforcement of the half-secret trust is not justified.

7.39 Thirdly, just as a fraudulent misrepresentation of intention must induce reliance, so, by analogy, the testator must be materially influenced by the promise of the secret trustee. It is of course the case, as the opening quotation from Page Wood VC’s
judgment in *Wallgrave v Tebbs*\(^{94}\) indicated, that an element of causation linking the secret promise and secret trust plays a necessary if usually silent role as part of the essential fabric of a valid secret trust.\(^{95}\) The analogy goes further. Once a secret promise is made, there is a rebuttable presumption that this influenced the testator.\(^{96}\) This parallels the equivalent presumption in actual fraud that a misrepresentation, shown to be of such a nature that it would be likely to influence a reasonable person, did indeed induce the representee to rely on it.\(^{97}\)

7.40 Finally, the fraud - the retrospectively deemed misrepresentation of intention - is triggered by the violation of the 'extra-legal confidence' entrusted to the promisor. Without a breach of the informally agreed obligation, there is no "quasi-fraud": the legatee has neither initially nor subsequently entertained the required *malus animus*. Equally there could not be said to be any loss on the testator's part if the secret promise is not violated, since its execution furnishes the testator with the outcome he desired. If the legatee complies with the terms of the secret trust there is no cause for intervention by equity. The quasi-fraud, if any, will occur *post mortem* and is not automatic. This leaves the legatee with a freedom to choose between the commission of fraud, entitling the testator's successors, and the avoidance of fraud,

\(^{94}\) (1855) 2 K & J 313.

\(^{95}\) Exceptionally an absence of proven causation was one ground for Lord Hardwicke LC's decision in *Whitton v Russell* (1739) 1 Atk 448 at 448.

\(^{96}\) See Lord Hardwicke LC's judgment in *Drakeford v Wilks* (1747) 3 Atk 539 at 540-541, 26 ER 1111 at 1112; *Re Boyes* (1884) 26 ChD 531, 535-536 per Kay J; *Blackwell v Blackwell* [1929] AC 318, 341 per Lord Warrington. See also *Chamberlain v Agar* (1813) 2 V & B 259 at 262 where Plumer VC impliedly adopts the view that causation need not be specifically pleaded, at least if this element emerges from the facts of the case.

\(^{97}\) For a recent affirmation, see *County NatWest Bank Ltd v Barton* (1999) Times, 29 July (Court of Appeal).
benefiting the secret beneficiary as the testator was promised. The analogy with actual fraud supports the position taken in this thesis.

Conclusion

7.41 The most that can be deduced at this stage in the analysis of secret trust fraud is that the secret trusts doctrine, liberated as it is by its case law from the necessity to make out a fraudulent misrepresentation, is a species of constructive fraud arguably supporting an analogy with actual fraud. The precise meaning of secret trusts fraud cannot be deduced a priori but can only be ascertained from an analysis of the case law. This exercise is undertaken in chapter 9.

7.42 However, one further point emerges from this simple division of equitable fraud into ‘actual’ and ‘constructive’. The former category marks out territory where the defendant has strayed furthest from the conscionable path. His conduct is relatively more reprehensible. The disposition gained by deception in moral terms may be said to have the same relationship to undue influence or mere breach of fiduciary duty as a theft has to a cheat and a robbery to a pilfering. In broad terms the fraudulent misrepresentation amounts to a more direct assault on the disponor’s will than a constructive fraud. It is of course precisely the higher sense of outrage which actual fraud provokes that led to its protection within the common law. Misconduct left by the law to be redressed in equity is almost by definition less venial since it is not such an affront to justice as to require incorporation within the basic legal skeleton which the common law built before equity fleshed it out. Some notion of secret trust fraud may thus be obtained by considering actual fraud in obtaining a will. If the latter is to be viewed more seriously, one would not expect equitable intervention for secret trust fraud to exceed the (actual or hypothetical) bounds that exist for equitable intervention to redress actual fraud in obtaining a will. Moreover, if secret
trust fraud is based on an analogy with actual fraud, the nature and limits of the latter will again be influential in determining the content and scope of secret trust fraud. It is this exercise in comparison and contrast to which we now turn by examining in detail equity's jurisdiction in respect of wills obtained by actual fraud.
CHAPTER 8: THE FRAUD THEORY: (II) - ANTE-MORTEM FRAUD

Introduction

8.1 There is no intrinsic reason why equity's jurisdiction in respect of fraudulently obtained wills should be any more restricted than in respect of contracts or conveyances procured by fraud. Unconstrained one would have expected equity to develop a general power of intervention to revoke testamentary dispositions and prevent a party from profiting by inheritance whenever a fraudulent misrepresentation induced a testator to make a disposition. For reasons concerned with the structure of the legal system, however, the jurisdiction of equity to grant relief where fraud was practised in procuring a will was, historically, a limited one. It constituted an isolated and significant exception to equity's capacity to relieve against every species of fraud in the civil law.\(^1\) The precise limits of that jurisdiction are considered in this chapter over the historic time-frame relevant to the birth and nourishment of the secret trusts doctrine. These limitations are important in that they may define the maximum boundaries of the equity jurisdiction within which the secret trusts doctrine can exist. The analysis proceeds by first setting out the historic limit to the equitable jurisdiction. Subsequent parts of the chapter consider the merits of that limitation, whether it endures in the present law and the extent to which it restricts the secret trusts doctrine.

The limits of the equitable fraud jurisdiction: the rule in Allen v Macpherson

The general principle
8.2 Historically, the ecclesiastical courts had jurisdiction over probate of wills of personalty. The temporal courts were excluded from considering the validity of such wills: the ecclesiastical jurisdiction to determine the grant, refusal or revocation of probate was an exclusive one. The probate jurisdiction of the ecclesiastical courts was, however, limited to wills of personal property, so that their opinion as to whether an instrument constituted a testamentary disposition of realty was not binding on the temporal courts.

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1 Hovenden, vol. I, pp. 17 and 252; Real Property Commissioners, Fourth Report, p. 69; Spence, vol. I, p. 625, especially n. (a). In Chesterfield v Janssen (1750) 2 Ves Sen 125 at 155 Lord Hardwicke LC overlooked this exception.

2 Benson v Cartwright (1614) Cro Jac 345; 2 Bulstrode 207; sub nom. Cartwright's Case Godbolt 246, where a unanimous Court of King's Bench accepted that the temporal courts had no jurisdiction to determine whether certain parol directions constituted a valid testamentary disposition and granted an order of prohibition to prevent the Court of Requests from intermeddling with the exclusive jurisdiction of the spiritual courts to decide this point; AG v Ryder (1686) 2 Chan Cas 178, where Lord Jeffreys LC refused to determine whether a will containing a legacy which the executor refused to pay had been revoked; Sir Richard Raine's Case (1697) 1 Ld Raym 262 per Holt CJ, where a unanimous Court of King's Bench ordered supersedeas to prevent the execution of an order of mandamus previously issued to compel a judge of the Prerogative Court to grant letters of administration to the next of kin; Atkins v Hill (1775) 1 Cowp 284 at 287 per Lord Mansfield CJ, obiter; Jones v Jones (1817) 3 Mer 161 at 171 per Grant MR; Jones v Frost (1818) 3 Madd 1 at 8 per Leach VC; (1822) Jacob 466 at 467 per Lord Eldon LC. For Ireland, see Segrave v Kirwan (1828) Beatty 157, 163 per Hart LC, obiter.

3 See, for example, Hawtre v Wallop (1668) 1 Chan Rep 265 (Court of Chancery, affirming Grimston MR), upholding as a valid devise an unsealed paper which the ecclesiastical court had rejected as a codicil. For dicta see also Noell v Wells (1668) 2 Keble 337 (Court of King's Bench). The point was maintained even when equity came to disown its own general power to assess the validity of a devise: Clark v Dew (1829) 1 Russ & M 103 at 109 per Lord Lyndhurst LC.
8.3 So long as probate of a will of personalty remained unrevoked, it was not to be contradicted or opposed by the judgment of a temporal court. The decision of the ecclesiastical courts was thus conclusive and a court of common law or equity could not determine the validity of probate or admit evidence to impeach it. As Dr Lushington expressed it in Sheldon v Sheldon:

[T]he Ecclesiastical Courts, in the exercise of ecclesiastical jurisdiction, had always to determine what papers a probate should contain; all other courts were bound by that probate: they could not give effect to anything out of it, nor refuse or avoid to give effect to everything in it.

8.4 The problem for relations between Chancery and the probate courts lay in the exclusivity of this jurisdiction with regard to factors, such as the use of force, duress, coercion or fraud in procuring a testamentary disposition, which vitiated the will. If such matters justified refusal of a probate actually granted, they justified revocation of the grant in the probate court. Consequently a grant of probate of a will which had been obtained by deceit could be set aside in the probate court. If,  

4 See Tiffin v Tiffin (1681) 2 Chan Cas 55 per Lord Finch LC; R v Raines (1697) 12 Mod 136, sub nom. Sir Richard Raine's Case 1 Ld Raym 262 per Holt CJ; Sheffield v Duchess of Bucks (1739) 1 Atk 628 at 630 per Lord Hardwicke LC, obiter; Allen v Dundas (1789) 3 TR 125 at 130 per Buller J and at 132 per Grose J; Toller, pp. 50-51; Real Property Commissioners, Fourth Report, p. 38; Boyse v Rossborough (1854) 3 De G M & G 817 at 855 per Turner LJ, obiter; Meluish v Milton (1876) 3 Ch D 27, 33 per James J. For Ireland, see Segrave v Kirwan (1828) Beatty 157, 163 per Hart LC, obiter.

5 (1844) 1 Rob Ecc 81 at 85.

6 The point was assumed in the course of argument in Allen v Macpherson (1847) 1 HLC 191 at 196 by Lord Cottenham LC and later asserted explicitly by Lord Lyndhurst LC at pp. 209 and 211. See similarly Meluish v Milton (1876) 3 Ch D 27, 33 per James J.
however, the vitiating factors were also to be recognised in other courts as giving rise to rights operative against the probate before any such revocation, the exclusivity of the ecclesiastical probate jurisdiction would be challenged. The temporal court giving relief on such grounds would pre-empt the right of the probate court to determine for itself and all other courts within the legal system whether the vitiating factor did indeed destroy the validity of the will. Such vitiating factors thus lay within the exclusive jurisdiction of the ecclesiastical courts so far as they related to wills of personalty. It followed as a matter of principle that the spiritual court had exclusive jurisdiction to consider matters impugning the will and thus probate of the will.

8.5 This was the model which generally prevailed through to the creation of the modern High Court. A litigant was therefore not allowed to submit evidence at law or in equity that the will or part of the will on which an executor or legatee relied was a forgery if probate had been obtained of the will. The exclusive remedy lay in the

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For an example, see Barton v Robins (1775) 3 Phillim 455n (Sir George Hay, affirmed by the Court of Delegates), where an attorney had drafted a will for an elderly poor-sighted testatrix which appointed him executor and, contrary to her wishes, bequeathed him her residuary estate. The clause bequeathing the residue was not read over to the testatrix when she executed it and, when the testatrix subsequently became suspicious, the attorney used pretences to retain the will in his possession. Probate was revoked, the clauses benefiting the attorney were expunged from the will and an administration with the will annexed was decreed.

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7 Noell v Wells (1668) 2 Keble 337; 1 Sid 359; sub nom. Noel v Wells 1 Lev 235 (Court of King's Bench); Plume v Beale (1717) 1 P Wms 388 (Lord Cowper LC), where the plaintiff-executor was refused relief against the defendant's claim for a pecuniary legacy interlined in the will in a different handwriting, allegedly inserted in the will by the defendant after the testator's death.

At common law the incontrovertability of probate was taken to such an extreme that for nearly a century it bound the criminal as well as the civil courts and hence there could be no indictment for forgery of a proven will: see, inter alia, R v Rhodes (1725) 2 Stra 703 per Raymond CJ (probate had first to be revoked). This line of authority was
spiritual court in seeking a revocation of the grant of probate or a partial reservation from the existing grant. The same principle was applied where a will of personalty was obtained by (coercive) undue influence exerted on the testator.  

8.6 Actual fraud, by means of fraudulent misrepresentation to the testator, was treated by equity in this orthodox manner. Proceedings on a bill in equity seeking to set aside a will allegedly obtained by fraud would be dismissed or suspended and the plaintiff advised to pursue his claim in the ecclesiastical courts. For equity to pronounce the will void on the ground of fraud would be a usurpation of the probate jurisdiction. The principle was affirmed by the House of Lords in *Bodmin v Roberts*, reiterated and put beyond doubt by a further decision of their Lordships overruled by Lord Ellenborough CJ in *R v Gibson* (1802) Russ & Ry 343

overruled by Lord Ellenborough CJ in *R v Gibson* (1802) Russ & Ry 343n, and that modern approach was confirmed in *R v Buttery* (1818) Russ & Ry 342, where, in a case reserved from the Old Bailey, the decision of Garrow B to overrule the defendant's objection that the probate was conclusive was approved.

8 *Archer v Mosse* (1686) 2 Vern 8 (Lord Jeffreys LC), where the inadmissible evidence of the alleged gross practice in procuring the proven will from the testator on his deathbed established the plaintiff's case (although it was also alleged in any event that the testator had lacked the necessary mental capacity at the time the will was executed); *Nelson v Oldfield* (1688) 2 Vern 76 per Lord Jeffreys LC, but see further the summary of this case in n. 34 below; *James v Greaves* (1725) 2 P Wms 270 *per* Lord Commissioner Jekyll.

9 *James v Greaves* (1725) 2 P Wms 270 *per* Lord Commissioner Jekyll; *Stephenton v Gardiner* (1725) 2 P Wms 286 (Lord King LC); *Sheffield v Duchess of Bucks* (1739) 1 Atk 628 at 630 *per* Lord Hardwicke LC; *Bennet v Wade* (1742) 2 Atk 324 (Lord Hardwicke LC); *Barnesly v Powel* (1749) 1 Ves Sen 284 at 287 *per* Lord Hardwicke LC; *Thompson v Judge* (1854) 2 Drewry 414 (Kindersley VC), where leave to amend a bill was refused on the ground, *inter alia*, that even if fraud could be shown (for which it was held there was insufficient evidence), this would necessitate a declaration in opposition to the probate.

10 Recited by Powel B in *Bath v Montague* (1693) 3 Chan Cas 55 at 61.
in *Kerrich v Bransby*¹¹ and accepted by dissenting Lords as well as the majority in
*Allen v Macpherson*.¹²

**Exceptions to the general principle**

**Devises**

8.7 Against this general principle must be set a number of instances where equity would
have regard to fraud. Firstly, where the fraud related to a will of land equity could
entertain jurisdiction to consider the point, since the matter then lay outside the
exclusive domain of the probate court.¹³ While the law was still evolving, equity
exercised a general and original jurisdiction to consider the validity of a devise.¹⁴

¹¹ (1727) 7 Bro PC 437 (House of Lords, reversing Lord Macclesfield LC). The testator
had executed a will leaving all his estate to his father, the plaintiff. By a later will he
bequeathed his residuary personality to the defendant and devised his realty to the
defendant on trust to pay debts. The later will was proven in solemn form in the
Prerogative Court, but the plaintiff alleged it had been obtained by fraud in that it had
been intentionally misread to the testator. Lord Macclesfield LC held that fraud was
established and that the defendant ought not to profit from the will; he directed the
defendant to convey the property he took under the will to the plaintiff. The defendant
appealed, both on the merits of the case and as to jurisdiction. The House of Lords
reversed his decision and dismissed the plaintiff’s claim. *Contra* Lord Abinger LCB in
*Middleton v Sherburne* (1841) 4 Y & C Ex 358 at 378-379, the claim was dismissed on
appeal not on the merits but for want of jurisdiction in equity.

¹² See (1847) 1 HLC 191 at 220 *per* Lord Cottenham LC and at 228 *per* Lord Langdale.
See also *Ex parte Fearon* (1800) 5 Ves Jun 633 at 647, where Lord Loughborough
laments but recites the rule in *Kerrich v Bransby*; and *Meluish v Milton* (1876) 3 Ch D
27 at 34 *per* Mellish LJ, stating the decision in *Allen v Macpherson*.

¹³ *Welby v Thornagh* (1700) Prec Ch 123 where Wright LK indicated, *obiter*, that the
devise could have been set aside if the fraud had been established on the facts.

¹⁴ This equity jurisdiction may have been founded initially on the mistaken assumption
that the fraud was not recognised in law, so that in setting aside in equity a will which
was valid at law there was no perceived conflict with the jurisdiction of the common
but subject to the proviso that the matter should first be directed for trial at law.\footnote{15}

This was a partial recognition of the common law’s claim to jurisdiction in determining the validity of a devise, since equity delegated the resolution of questions of fact to the common law by employing a trial before a jury but otherwise preserved a concurrent jurisdiction since it was Chancery which set the will aside after trial. In later law, Chancery acknowledged the reality of this encroachment\footnote{16} and the general incursion of the common law jurisdiction was repudiated, the jurisdiction becoming subordinate and incidental.\footnote{17} The direction of

\footnote{15} It has been asserted that this procedural rule dates from before the Statute of Frauds: see \textit{Boyse v Rossborough} (1853) Kay 71 at 84-85 \textit{per} Page Wood VC. For later authority, see \textit{Kerrich v Bransby} (1727) 7 Bro PC 437 (House of Lords, reversing Lord Macclesfield LC); \textit{Webb v Claverden} (1742) 2 Atk 424 (Lord Hardwicke LC); \textit{Bennet v Vade} (1742) 2 Atk 324 (Lord Hardwicke LC); \textit{Anon.} (1743) 3 Atk 17 (Lord Hardwicke LC); \textit{Bates v Graves} (1793) 2 Ves Jun 287 where Lord Thurlow LC had accepted that the will could not be set aside without directing an issue. See also \textit{Pemberton v Pemberton} (1805) 13 Ves Jun 290 at 297-298 \textit{per} Lord Eldon LC, where a new trial was directed to determine whether a will had been cancelled; \textit{Bootle v Blundell} (1815) 19 Ves Jun 494 at 500; G. Coop 136 at 137 \textit{per} Lord Eldon LC.

\footnote{16} See \textit{Middleton v Sherburne} (1841) 4 Y & C Ex 358 at 378 (Lord Abinger LCB).

\footnote{17} \textit{Semble Knight v Duplessis} (1749) 1 Ves Sen 324 at 326; (1751) 2 Ves Sen 360 at 363 where Lord Hardwicke LC, rejecting on the facts an application for appointment of a receiver, asserted that the court could not bring an imputation upon the will and the heir at law’s title had to be established at law; \textit{Jones v Jones} (1819) 7 Price 663 at 665 (Court of Exchequer Chamber); \textit{Jones v Frost} (1822) Jacob 466 at 467 \textit{per} Lord Eldon LC; \textit{Middleton v Sherburne} (1841) 4 Y & C Ex 358 at 372 (Court of Exchequer), where the point was conceded by plaintiffs’ counsel; \textit{Boyse v Rossborough} (1854) 3 De G M & G 817 at 847 and 856 \textit{per} Turner LJ, affirmed \textit{sub nom. Rossborough v Boyse} (1857) 6 HLC 1, 10 ER 1192 (House of Lords), attributing this change to an analogy with the loss of jurisdiction in respect of wills of personality (although if that is the explanation the analogy was tardily drawn); \textit{Jones v Gregory} (1863) 2 De G J & S 83 at 87 \textit{per} Turner LJ (with whom Knight Bruce LJ concurred), affirming (1863) 4 Giff 468 at 471 \textit{per} Stuart VC.
an issue *devisavit vel non* was confined to those cases where on the facts of the case the complainant would not be able to obtain relief in the common law courts and therefore relief in equity was necessary or, somewhat dubiously, where the parties consented. Equity therefore retained jurisdiction if the disputed rights under the will were equitable, since the common law courts could never have competence. Moreover, unlike the probate courts which might establish the validity of a will of personalty by a grant of probate, the common law offered no comparable order declaring the effectiveness of a devise, so that resort to equity for a declaration was necessary whenever the facts of the case precluded a contest based on a substantive right emanating from testate or intestate title to the land. An exceptional case for proceedings in equity would therefore arise if there existed some impediment to a trial at law. For example, the relevant freehold devised under

The change seems to have been gradual. It does not seem to have been fully grasped by the Real Property Commissioners: see Fourth Report, p. 35. See also *Paine v Hall* (1812) 18 Ves Jun 475, where Lord Eldon LC assumed that the plaintiff heir, unable to produce evidence of a secret trust, was entitled to the direction of an issue, if so desired, in pursuit of the alternative allegation that the will was obtained by fraud. Even as late as *Hindson v Weatherill* (1854) 5 De G M & G 301 at 312 Knight Bruce LJ seemed to accept that an issue might be freely directed by a court of equity.

18 *Middleton v Sherburne* (1841) 4 Y & C Ex 358 at 382-383 per Lord Abinger LCB; *Hindson v Weatherill* (1854) 5 De G M & G 301 at 313 per Turner LJ, *obiter*.

19 *Buckland v Soulten* (1824) 4 Y & C Ex 373 n. g, (Lord Eldon LC), explained thus by Lord Abinger LCB in *Middleton v Sherburne* (1841) 4 Y & C Ex 358 at 376. This exception was doubtful because, while it indulged the parties and promoted the public policy against proliferation of litigation, it did not address the root objection that the common law monopoly of decision on the issue was eroded for reasons unrelated to the deficiencies of the common law.

20 *Middleton v Sherburne* (1841) 4 Y & C Ex 358 at 383 per Lord Abinger LCB, giving the example of the equity of redemption. The existence of a subsisting legal mortgage necessarily moved the matter into equity: either the mortgagee held the legal estate in the land and the rightful successor took only an equitable interest, or else the mortgagee had taken a term of years as security and was entitled to possession, precluding a common law action for ejectment between the disputing parties.
the disputed will might be subject to an outstanding leasehold interest which had bound the testator in his life-time, so that the heir at law could not establish his claim against the devisees by an action for ejectment.\textsuperscript{21} According to the general principle of the developed law, however, the narrowing of this exceptional jurisdiction was such that in equity a claim that a devise was obtained by fraud was often as inadmissible as much as if the fraud concerned a legacy.

\textit{Ancillary relief}

8.8 Secondly, Chancery might make orders for ancillary relief, even though the substantive question as to the will’s validity fell to be decided in the ecclesiastical (or, as the case may be, common law) courts, since this procedural order would not usurp the probate court’s jurisdiction to determine the correctness of the grant of probate (or the similar common law jurisdiction in respect of devises).\textsuperscript{22} As part of

\begin{footnotesize}
\textsuperscript{21} Shewen \textit{v} Lewis (1815) 3 Mer 168 n. 3 (Grant MR); Middleton \textit{v} Sherburne (1841) 4 Y & C Ex 358 at 383 \textit{per} Lord Abinger LCB. See also the following authorities where this exception was confirmed, although the court applied the general rule declining jurisdiction because the existence of an outstanding interest in possession was denied: Armitage \textit{v} Wadsworth (1815) 1 Madd 189 (Plumer VC); Wright \textit{v} Wilkin (1859) 4 De G & J 141 at 146 \textit{per} Lord Chelmsford LC and at 147-148 \textit{per} Turner LJ, affirming the decision of Kindersley VC dismissing the bill.

\textsuperscript{22} See Andrews \textit{v} Powys (1723) 2 Bro PC 504 (House of Lords, affirming Lord Macclesfield LC). The testator had executed a will making the respondent the residuary legatee. A subsequent will favouring the appellant’s children was admitted to probate on the appellant’s application; the appellant was using probate to obtain the assets of the testator. The respondent alleged that the proven will had been fraudulently or otherwise improperly procured and sought orders from the ecclesiastical courts that funds be brought into court. The Prerogative Court, reversing the decision of the Court of Delegates, held that they lacked the power to make those orders and the respondent therefore turned to equity for assistance. The appellant’s defence based on title to probate inviolable in equity was dismissed. See also the analogous case Anon. (1743) 3 Atk 17, 26 ER 813 (Lord Hardwicke LC), where the appointment of a receiver was not
equity's discretionary jurisdiction, relief would only be granted in suitable cases and, arguably, only where the applicant for ancillary relief had commenced or undertook to commence proceedings in the probate court for revocation or an action for ejectment. An absence of equitable jurisdiction pendente lite to secure the status quo ante, so far from preserving a coherent legal order, would have blasted a cavernous expanse in which artful rogues who prayed on testators might freely roam until probate could finally be revoked.

Decisions on testamentary status for purposes unrelated to probate

8.9 A third exception was that a temporal court might have to consider the substantive question whether an instrument was testamentary in order to resolve other legal points where neither the propriety of a grant or refusal of probate nor the validity of rights under the will was directly in issue. An illustration of this exception is the decision of the Court of Exchequer in AG v Jones, discussed earlier in chapter 6, where a deed had purported to settle personalty for the settlor for life with

precluded by the fact that fraud in obtaining a devise was to be established by trial at common law.

23 For instances where the case for appointment of a receiver was not made out, see Knight v Duplessis (1749) 1 Ves Sen 324; (1751) 2 Ves Sen 360 (Lord Hardwicke LC); Jones v Frost (1818) 3 Madd 1 (Leach VC); affirmed (1822) Jacob 466 (Lord Eldon LC); Clark v Dew (1829) 1 Russ & M 103 (Lord Lyndhurst LC), where there was no evident danger in the property remaining in the defendants' possession pending resolution of validity at law.

24 The importance of actively and expeditiously pursuing an action in the probate court or at common law to establish the validity or invalidity of the will as a prerequisite for equitable ancillary relief was voiced by Grant MR in Jones v Jones (1817) 3 Mer 161 at 173 and similarly at 175.

25 A jurisdiction to determine the validity of a devise where the point arose incidentally was assumed by the Real Property Commissioners: see Fourth Report, p. 35.

26 (1817) 3 Price 368 (Court of Exchequer).
remainder interest specified and the Crown sought legacy duty in respect of the remainder interest on the ground that this was actually a testamentary gift of residue. The existence of the duty thus turned on whether the deed constituted a “will or testamentary instrument” within the meaning of the taxing legislation. The court described its predicament as one of having by necessity to draw on the jurisprudence of the probate court to decide the point, since it came before them under the legislation, it required resolution and there was no power to drive the parties to the spiritual court as the proper forum for deciding whether the paper was testamentary. At first glance this appears to express an unwarranted caution in determining the point. The reason why the court had to decide if the instrument was testamentary was only in order to assess whether duty was payable and the decision on the narrow point of testamentary status did not usurp the ecclesiastical jurisdiction to decide the more involved question of whether that instrument was admissible to probate. The question of whether or not the instrument was testamentary in nature would be a matter which the probate court would have to address; but an affirmative decision on that point alone would not in itself determine whether it should be accepted for probate since a document’s testamentary character is a necessary, but not a sufficient condition for admission to probate. The document might be inadmissible to probate for a number of other reasons which showed it was not the testator’s last and genuine will, such as the fact the testator

27 This was under the Probate and Legacy Duties Act 1808, s. 2 and Sched., Part III, as a legacy to a stranger in blood to the deceased.

28 Legacy Duty Act 1796, s. 7, defining a legacy for the purposes of legacy duty as “any gift by any will or testamentary instrument” satisfied out of personal estate.

29 (1817) 3 Price 368 at 379 per Richards B and at 390-391 per Graham B.

30 It is for this reason that Dr Lushington’s criticism of AG v Jones in Sheldon v Sheldon (1844) 1 Rob Ecc 81 at 83 was partially misplaced: adjudication by the Court of Exchequer on the question whether the instrument was testamentary did not as such settle the probate question for which the court had admittedly no authority to decide.
lacked capacity or the will was procured by imposition. However, legacy duty would only have arisen if all the requirements of a valid legacy held in respect of the ostensible gift of remainder interest in the deed. Although the court focused only on the narrow question of whether the deed before them constituted a testamentary instrument, this was no mere pre-emption of one element of the probate question. The efficacy of the gift and thus its admissibility to probate was in all other regards assumed: duty payable on a valid legacy presupposed the legacy was contained within a fully effective will.31 On this broader view, the admission of the court that it was trespassing on matters within the probate jurisdiction was a justified one.

Admission of fraud

8.10 Fourthly, a party might be prevented from relying on a fraudulently obtained will if the fraud had been admitted as an incident of Chancery proceedings, notwithstanding that probate of the will could not otherwise be directly challenged. This exception seems to emerge by parity of reasoning with the decision in Sheffield v Duchess of Bucks.32 That case followed unreported litigation to which the defendant was a party. The Court of Chancery had made an order relating to the will which was affirmed by the House of Lords on the defendant’s appeal on a question of construction of the will. In the later litigation a perpetual injunction was granted to prevent the defendant from taking proceedings in the Prerogative Court for contesting probate of the will. Lord Hardwicke LC considered that while it was for the ecclesiastical jurisdiction to determine the validity of the probate, a party could

31 This was the converse of litigation in equity where fraud in obtaining the will was alleged, since in those cases the testamentary character of the instrument passed undisputed, while it was the existence of a vitiating factor which was in issue.

32 (1739) 1 Atk 628 (Lord Hardwicke LC).
be bound by an admission made as to the validity of the probate if the point arose as an incident in litigation in Chancery.\textsuperscript{33} Since the defendant had accepted the validity of the will in the course of previous litigation, the injunction was granted. The case is somewhat exceptional, since it is a rare instance where equity's interference with the jurisdiction of the ecclesiastical courts served to uphold rather than impugn probate. This should not disguise the fact that the court order did indeed operate to restrict the ecclesiastical jurisdiction. While the Prerogative Court retained the theoretical ability to revoke the probate, Chancery's \textit{in personam} order compelling a party (on pain of punishment for contempt of court) to desist from pursuing an action for revocation of probate amounted to a nullification of that jurisdiction in practical terms. \textit{Sheffield v Duchess of Bucks} may be better explained on the basis of issue estoppel: the defendant was to be prohibited from re-opening the question of the will's validity, since this had been declared in Chancery in litigation to which the defendant had been a party. That explanation at least draws on the full history of the previous litigation, although it is a narrower ground than the one Lord Hardwicke LC expressed and it suffers from the defect that the Court of Chancery was not a competent court to settle the question of the will's validity. However, if Lord Hardwicke LC's broader point was right, then by parity of reasoning it would seem that a converse admission - that the will was void for fraud - would bind a party in Chancery, notwithstanding that the probate remained unrevoked. A party might be ordered not to resist an action in the Prerogative Court for revocation of the probate or, perhaps, to act in relation to the estate or benefits under the will as if probate of the will had been revoked.

\textit{Refusal of assistance}

\textsuperscript{33} \textit{Ibid}, 630.
8.11 Finally, while a Court of Chancery would not controvert the grant of probate on the
ground of proven fraud in obtaining the will, it could decline to assist the fraudulent
party in any claim which might be pursued in equity on the ground that the plaintiff,
by reason of the fraud, lacked clean hands. This was clearly the most
controversial development. It was not a positive rejection of the probate court’s
exclusive jurisdiction since the probate was not set aside. Nonetheless, because the
fraud went to the validity of the will and the soundness of the probate, the refusal to
assist the party claiming under the will amounted to a dismissal of its efficacy in
equity and thus a negative rejection of its validity. If the Court of Chancery was
fully bound by the decision of the probate court, it was bound in an active as well as
passive sense and obliged to assist the party claiming under a proven though
fraudulently obtained will. It was an exception of doubtful validity.

Fraud in obtaining probate

8.12 A further exception to the prohibition on equitable redress - which stands in a
distinguishable category of its own - was where the fraud was committed in
procuring the probate, rather than the will. In such cases the fraud was on other

34 Nelson v Oldfield (1688) 2 Vern 76. The plaintiff was executrix and beneficiary of the
entire estate under a will of personality proved in the spiritual court. The testatrix had
been dominated by the plaintiff who by coercion compelled her to execute the will and
to swear not to revoke it. The evidence showed that the testatrix had wished to revoke
the will but was afraid to do so. Lord Jeffreys LC refused to assist the plaintiff in her
action in favour of the deceased’s estate against trustees of a term of years. Although
the case concerned undue influence rather than fraud, the principle seems to be a
general one.

35 Compare the dictum of James LJ in Meluish v Milton (1876) 3 Ch D 27 at 33 that “no
other court can listen to the allegation that the will was obtained by fraud”. If the
evidence of fraud in procuring the will was inadmissible in all circumstances, equity
actual or potential litigants, having an interest in the outcome of an action for probate in solemn form, rather than a fraud on the testator in his lifetime. In *Barnesly v Powell* the plaintiff - the testator’s son and therefore his heir and next of kin - alleged that the will admitted to probate was a forgery, and Lord Hardwicke LC directed an issue to a jury in the Court of King’s Bench which found for the plaintiff on this point. As regards the realty, the plaintiff could be granted relief on establishing this fact alone since the matter fell outside the jurisdiction of the Prerogative Court and a jury had established the forgery. In his claim to the personalty, the plaintiff succeeded because he established in evidence that the defendant had taken advantage of him in obtaining the grant of a power of attorney which was exercised by the defendant to give the plaintiff’s formal consent to the probate for which the defendant applied. This constructive fraud in obtaining probate Lord Hardwicke LC considered could not be set aside in the ecclesiastical court and fell outside its jurisdiction. It was appropriate for equity to intervene and involved no conflict with the Prerogative Court in so doing.

**Extension of the general principle: the rule against imposition of a constructive trust**

8.13 The greatest area of controversy lay in those claims where the plaintiff sought from Chancery not its assistance in setting the will aside, but merely the imposition of trusteeship on the ground of fraud in obtaining the will. It is this development of the general principle limiting the equity jurisdiction which provides the informative reference point for the secret trusts doctrine. The initial leaning of the Court of

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36 (1748) 1 Ves Sen 119; (1749) 1 Ves Sen 284; Ves Sen Supp 74 and 143 (Lord Hardwicke LC)

37 1 Ves Sen 284 at 288.
Chancery was in favour of intervention. In *Marriot v Marriot*\(^{38}\) the plaintiffs, sons of the testator, alleged that the residuary legacy in favour of the testator's wife had been obtained by fraud. The wife objected that the matter lay within the exclusive jurisdiction of the probate court, but Gilbert LCB, on behalf of the Court of Exchequer, expressed the view that a court of equity could declare a legatee who obtained their legacy by fraud to be a trustee.\(^{39}\) Similarly, in *Barnesly v Powel* Lord Hardwicke LC expressed his position in broad terms which saw no interference with the jurisdiction of the Prerogative Court in a decree making the defendant a trustee of his rights under the probate by reason of his fraud.\(^{40}\) However, these dicta were of slender weight. *Marriot v Marriot* was determined before the decision of the House of Lords in *Kerrich v Bransby* had confirmed the basic point that probate could not be revoked in equity. In any case, although the court acted on its assumption of jurisdiction to the extent of directing a trial, no judgment was delivered because the case was compromised by the agreement of the parties to divide the residue. Furthermore, as we have just seen, *Barnesly v Powel* was actually decided on the point of fraud in obtaining probate and was rightly considered distinguishable on this ground by Lord Lyndhurst LC in *Allen v Macpherson*.\(^{41}\) Nor did Lord Hardwicke LC's order in *Barnesly v Powel* depend on trusteeship in substance since he merely decreed that the defendant executors were

\(^{38}\) (1725) *Gilb Rep* 203; 1 *Str* 667.

\(^{39}\) *Gilb Rep* 203 at 208; 1 *Str* 667 at 673.

\(^{40}\) 1 *Ves Sen* 119 at 120; and see also 1 *Ves Sen* 284 at 289.

\(^{41}\) (1842) 1 *Ph* 133 at 145; (1847) 1 *HLC* 191 at 212. See similarly *Meadows v Kingston* (1775) *Amb* 756 at 762 where Lord Apsley LC distinguishes between fraud on the testator, where a court of equity could not interfere, and fraud after his death, where it might and had done so in *Barnesly v Powell*. Contrast *Segrave v Kirwan* (1828) *Beatty* 157, 164-165 where Hart LC relies on *Barnesly v Powel* to support a wide view of the equity jurisdiction touching the ecclesiastical one, but failed to appreciate this difference.
to consent to a revocation of probate in the ecclesiastical court. Such an order, when complied with, would lead to the termination of the defendants' title to the deceased's estate, rather than its transfer to the plaintiff as would have been envisaged in the performance of a trust obligation.

8.14 Later authority in *Gingell v Horne*[^42] inclined to the view that just as a court of equity could not directly set aside the probate, so it should not seek to do so indirectly by imposing a trust. The point was put beyond dispute by the decision of the House of Lords in *Allen v Macpherson*.[^43] In this case the testator's ninth codicil admitted to probate had revoked bequests granted to the plaintiff by the will and an earlier codicil. The plaintiff sought a declaration that the residuary legatee under the codicil was a trustee for the plaintiff to the extent of the amount of the revoked bequests. It was alleged that the defendant had procured the execution of the final codicil by the exercise of undue influence over the testator and, in conspiracy with others, by misrepresenting to the testator the character of the plaintiff. The plaintiff had been prevented from raising these allegations in the ecclesiastical court. Although successful before Lord Langdale MR, the plaintiff's claim failed on appeal by the defendants to Lord Lyndhurst LC on the ground that it was an attempt to review the proceedings of the ecclesiastical court. The Lord Chancellor's decision was affirmed by a three-two majority of the House of Lords, holding that

[^42]: (1839) 9 Sim 539 where Shadwell VC upheld the defendant's objection to equitable jurisdiction. The case was not in fact one of fraud. The plaintiff next of kin prayed that the executors be declared trustees of the residue for their benefit on the ground (as they alleged) that the testator was not of sound mind when the disputed codicil was executed and they had not known this fact when probate was granted. However, the authority of *Kerrich v Bransby* was noted and the decision is clearly applicable to any claim of trusteeship by reason of factors vitiating the testamentary intention.
the exclusive course of redress for the plaintiff was an appeal within the probate jurisdiction from the ecclesiastical court to the Judicial Committee of the Privy Council.44

8.15 Before turning to the merits of that decision, it is necessary to consider the exact import of the rule in *Allen v Macpherson* since in *Hindson v Weatherill*45 Stuart VC sought to raise a sideward against it. Basing himself on the doctrine of *Gingell v Horne*, as he interpreted it, Stuart VC asserted that probate only bound a court of equity not to impeach the validity of the *whole* will, that the court was not precluded from challenging the validity of part of the will on the ground of fraud and that *Allen v Macpherson* was confined to the case where the plaintiff sought to impugn the entire will. Acting on these propositions, Stuart VC held that the defendant solicitor, on the basis of undue influence, constituted himself a trustee in respect of a devise and also a promissory note, the *inter vivos* gift of which had been confirmed by the will.

8.16 This attempted restriction of *Allen v Macpherson* cannot hold for several reasons. In the first place Stuart VC’s decision was reversed by the Court of Appeal in Chancery and his statement of the law was not endorsed.46 Secondly, Stuart VC’s

43 (1847) 1 HLC 191 (Lords Cottenham LC and Langdale dissenting); affirming (1842) 1 Ph 133 (Lord Lyndhurst LC) which reversed the decision of Lord Langdale MR (1841) 5 Beav 469.

44 See (1847) 1 HLC 191 at 209 and 211 *per* Lord Lyndhurst, at 224 *per* Lord Brougham and at 234 *per* Lord Campbell.

45 (1853) 1 Sm & Giff 604 at 613-614.

46 See (1854) 5 De G M & G 301. Neither Lord Justice addressed Stuart VC’s argument directly. Turner LJ considered the plaintiff’s claim failed on the evidence, leaving the matter of law open. Knight Bruce LJ did not consider there was any equity in the plaintiff’s case.
central proposition that the rule against contradiction of probate - both before and after *Allen v Macpherson* - was confined to challenges to the whole will can be disputed on authority as well as on principle. *Allen v Macpherson* itself concerned a prayer for trusteeship to be imposed over part only of the testator's gift in the will (the residuary personalty) and to a limited degree (the extent of certain bequests revoked by the final codicil). Nor could any such distinction be accepted in practice. Save for optional matters such as an appointment to the office of executor, directions for disposal of the body and requests not intended to have legal effect in respect of either property given or the material care of persons and animals surviving the testator, the will merely consists of a set of dispositions, and it is because of its dispositive effect that probate is necessary. If it were possible to challenge a part of a will, probate could be entirely undone by admitting a set of claims to the individual dispositions which together made up the will, leaving the grant of probate a court order devoid of much of its original significance. Stuart VC had entirely misconceived the nature of the distinction drawn in *Gingell v Horne*, as will be seen later, and had he appreciated that proper distinction he might have reached his decision on a sound basis which did not purport to fly in the face of *Allen v Macpherson*.

**Was Allen v Macpherson rightly decided?**

8.17 The decision in *Allen v Macpherson* rested on a bare majority, which rarely induces confidence in the convincing quality of the reasoning, and when the decision is considered on its merits it is promptly exposed to doubt. The majority opinion was that the imposition of trusteeship was simply an indirect means of setting aside the grant of probate and thus of usurping the jurisdiction of the ecclesiastical courts.\(^47\)

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\(^47\) (1847) 1 HLC 191 at 234 *per* Lord Campbell.
Relative to the Court of Chancery the argument is certainly a curious one. In formal terms the imposition of trusteeship does not revoke the grant of probate. Indeed, since the probate confirms the title of the legatee-trustee, the imposition of a trust presumes its formal survival. Constructive trusteeship was not an overturning of probate but a parasitic acknowledgement of it. The revocation of probate occurs only in a substantive sense, since the legatee in being converted into a trustee is deprived of the right he would otherwise possess to enjoy the beneficial fruits of the probate. This is a usurpation of the jurisdiction of another court only in the same sense that equity had historically tampered with the practical value of common law rights through orders in personam while leaving the nominal legal entitlement untouched. The whole history of equity has been marked by a process of asserting practical supremacy over the common law; the development of the trust is mapped by the superimposition of equitable obligations on the common law property rights of an owner. This process presupposed the jurisdiction of another court rather than impeached it and merely directed that the benefits of that other jurisdiction should not be taken by the defendant for himself in view of the collateral circumstances which created the equity. Why should the probate jurisdiction be immune from the supplementary operation of equity in the way that the common law courts had not? It was this very logic pointing towards trusteeship of the benefits of probate which underpinned the dissenting opinions of Lord Cottenham LC\textsuperscript{48} and Lord Langdale.\textsuperscript{49} It was the same logic which Lord Hardwicke LC invoked in Sheffield v Duchess of Bucks and which reinforced his decision there that an injunction could be granted to prevent litigation in the ecclesiastical court for revoking the probate of a will if its validity had previously been admitted by the defendant.\textsuperscript{50}

\textsuperscript{48} Ibid, 220.

\textsuperscript{49} Ibid, 228-229.

\textsuperscript{50} See (1739) 1 Atk 628 at 630.
8.18 Only Lord Campbell specifically addressed this aspect of the dissenting minority’s argument and his counter-argument is not compelling. He sought to attack the imposition of a trust based on the absence of an estate in the trustee which could be made the subject matter of the trust.\(^1\) In his view the legitimacy of a trust proceeded on the fallacious supposition that the legatee had a legal estate in the property acquired under the will. As he understood it, if the fact that the will was fraudulently obtained was proven, probate should have been refused and in that case the legatee had no right under the propounded (false) will. This argument founders because it involves a contradiction of the fundamental premise on which Lord Campbell’s majoritarian position was based. The objection to the imposition of a trust was that the grant of probate was to be respected, notwithstanding the fraud, that the proper and exclusive remedy was to seek revocation in the ecclesiastical court and that the trust was an indirect revocation. This proceeds on the footing that pending revocation the probate is to be acknowledged as fully effective in the temporal courts: it confirms rights which are recognised at common law and those legal rights are recognised in equity. Since probate has to be respected, a fraudulently obtained will admitted to probate does vest the legal estate in the legatee. Either probate binds and the subject matter for a trust subsists, or else (contrary to *Kerrich v Bransby*) equity was never bound by the probate at all. There was no *via media*.

8.19 Admittedly, as we noted in chapter 2, a strictest understanding of probate is that its grant never *confers* an interest and only serves to authenticate or evidence title. In that sense Lord Campbell was correct in asserting that a fraudulently obtained will vests no legal right in the legatee: legal title is derived from the will and only the

\(^1\) HLC 191 at 235.
true will confers that title. However, this does not alter matters because it is not this sense of title which is relevant here. Lord Campbell was contemplating legal title in an abstract sense - the title which would emerge if all the relevant evidence were before the court. On the hypothesis that the will was obtained by fraud, title in this abstract sense lies with those taking under a previous revoked will (if any) or the next of kin. Probate is irrelevant to this abstract understanding of title. Title under the proved will may or may not coincide with this abstract title; it all depends on whether the judge in the probate court, acting from the limited evidence tendered before him, reaches the same judgment that an omniscient judge would make. An obvious case where probate and abstract titles will diverge is where the litigants compromise the probate action in favour of a will which was fraudulently obtained. In determining the limits of equity's jurisdiction, however, it is title in a concrete sense which matters - the title which has been established by the partial evidence, compromises and admissions of parties before the probate court. It is concrete title under the will admitted to probate which is conclusively established until probate is revoked and it is this title that would be made the subject matter of a constructive trust. The question in Allen v Macpherson was how the just supremacy of the abstract title over the concrete title could be achieved. Unarguably this might be by annulling the defendant's concrete title (revocation of probate). The question was whether alternatively a court of equity might burden the defendant's concrete title with equitable rights in the plaintiff rendering concrete his abstract claim (imposition of a trust). Lord Campbell, in identifying the defendant's want of abstract title as an objection to a trust of his concrete title, was merely indulging in a slight of hand.

Does the rule in Allen v Macpherson still apply?
8.20 Irrespective of whether the right principle was adopted in *Allen v Macpherson*, the further question arises whether it has survived the reform of the judicial system by the Judicature Act. The *Allen v Macpherson* principle was based on the assumption that the probate court had an exclusive jurisdiction in determining whether probate should be granted and that the imposition of a trust was an unwarranted interference with that jurisdiction. Here it is necessary to sketch out the evolution of probate administration in order to ascertain whether those underlying assumptions in *Allen v Macpherson* still hold in the modern law.

The development of the judicial system affecting the probate jurisdiction

8.21 It had been settled during the first half of the seventeenth century that the ecclesiastical courts had an exclusive jurisdiction with respect to probate of wills of personalty (including leaseholds as chattels real). By the Court of Probate Act 1857, the probate jurisdiction of the ecclesiastical courts was removed and vested in a new Court of Probate. As was noted in paragraph 8.2, the jurisdiction of the ecclesiastical courts did not extend to wills so far as they devised land (other than leaseholds). The Court of Probate, however, was from its inception granted a contentious probate jurisdiction over wills of realty, subject to minor exceptions.

8.22 The exclusive jurisdiction of the probate court had developed on an evolutionary basis. Historically Equity had possessed concurrent jurisdiction over the validity of

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52 Supreme Court of Judicature Act 1873.
54 Ss. 3-4.
55 Ss. 61-63. The devisee and heir were to be joined as parties and probate in solemn form or a decree refusing probate of the will bound all persons interested in the realty as conclusive evidence of the will's validity or invalidity, as the case may be.
wills of personalty. The jurisdiction had been exercised on a pragmatic basis in order to suppress unnecessary litigation. Although in Kerrich v Bransby the House of Lords had set its face against allowing Chancery to re-capture or resume this lost historic jurisdiction, the potential for a concurrent administration of probate remained conceivable until statute vested an exclusive jurisdiction in the Court of Probate. By section 3 of the Court of Probate Act the probate jurisdiction of every court other than the Court of Probate was abolished. At its outset, therefore, in conformity with the clear Parliamentary intention, the jurisdiction of the Court of Probate was exclusive. Nor could any court re-acquire a probate jurisdiction since section 4 provided that the jurisdiction of the ecclesiastical and other courts was to be exercised in the Court of Probate, and section 3 prohibited any court from exercising a probate jurisdiction in terms which spoke for the future.

8.23 It therefore ceased to be possible from 1858 for the Court of Chancery to re-establish its concurrent jurisdiction to set aside a probate of a will. However, as

57 Indermaur, pp. 455-456.
58 The section referred to “all Ecclesiastical, Royal [...] and other Courts” then having probate jurisdiction, expressly envisaging inter alia the manorial courts as well as the ecclesiastical courts, but stated in terms wide enough to take in courts of equity. See, however, n. 61 below.
59 The Preamble to the Act provided that it was “expedient that all jurisdiction in relation to the grant and revocation of probates of wills [...] in England should be exercised [...] by one court.”
60 Exceptionally, contentious probate of small estates was to be dealt with in the County Court, but there was a right of appeal to the Court of Probate: see ss. 54 and 58.
61 The point is not entirely free from doubt, however. A proviso to s. 23 of the Act stipulated that suits for legacies or distribution of residues were not to be entertained by the Court of Probate or any court whose jurisdiction as to testamentary causes was abolished by the Act. It is hardly to be doubted that the Act did not intend to (or have
we have already noted, a trust imposed on a legatee who induced his legacy by fraud is not an obligation which sets aside the probate, but one which instead assumes its endurance. There was therefore nothing in the establishment of the Court of Probate which prevented equity from developing rules which merely deprived the legatee of the benefit of the probate, an indirect or de facto revocation. It was only the decision in Allen v Macpherson itself which prevented equity from claiming for itself a de facto concurrent jurisdiction in this manner.

8.24 By the Judicature Act 1873 the jurisdiction of the Court of Probate was vested in the High Court. Matters previously within the exclusive cognisance of that court were assigned to the Probate, Divorce and Admiralty Division of the High Court. This position remained unchanged when the Judicature Acts were consolidated. Following the enactment of the Land Transfer Act 1897, probate (whether in solemn or common form) fulfilled the same function for realty as it did for personalty. since the Act provided that title to freehold land on the death of the testator vested not in the devisees or, failing them, the heir, but in the deceased's personal representatives. Although non-contentious probate business is now assigned to the Family Division while solemn form probate is assigned to the

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the effect of abolishing equity's jurisdiction in respect of the administration of estates, and it follows from the language of the proviso that courts of equity were not apparently courts whose jurisdiction to grant probate was abolished.

62 S. 16(6).
63 S. 34.
64 See the Supreme Court of Judicature (Consolidation) Act 1925, ss. 20 (vesting probate jurisdiction in the High Court) and 56(3)(a) (assigning probate matters to the Probate, Divorce and Admiralty Division).
65 Ss 1-2. See now the Administration of Estates Act 1925, ss. 1-2.
Chancery Division, the current law otherwise reflects the position reached at the end of the nineteenth century.

The significance of the changed judicial structure

8.25 The judicial framework governing the grant of probate which applied at the time of *Allen v Macpherson* was altered profoundly by the Judicature Act. The jurisdictions of the Court of Probate and the Court of Chancery, along with the common law courts, were fused and brought within one High Court. The principles of probate law evolved in the ecclesiastical courts, of equity and of the common law, while remaining distinct as separate bodies of law, fall to be applied in a unitary court. If probate is revoked by the operation of equity setting a will aside, there is no longer any room for arguing that one court would be usurping the jurisdiction of another court: there is only a single court with an all-embracing jurisdiction. This is unaffected by the fact that for reasons of convenience common form probate business and trust law matters are assigned to different divisions of the High Court. Any particular division of the court is entitled to the full jurisdiction of the court and effect must be given in civil matters to the rules of equity.

The merits of *Allen v Macpherson* in the changed judicial structure

66 Supreme Court Act 1981, s. 61(1) and Sched. 1, paras 1(h) and 3(b)(iv). This transfer was introduced by the Administration of Justice Act 1970, s. 1(4). S. 1 of that Act also renamed the Probate, Divorce and Admiralty Division as the Family Division.

67 Supreme Court Act 1981, s. 25(1) (confering probate jurisdiction on the High Court).

68 Supreme Court Act 1981, s. 5(5), giving effect to the explicit proviso inserted into the Supreme Court of Judicature (Consolidation) Act 1925, s. 4(4), by the Administration of Justice Act 1928, s. 6.
8.26 The essential platform on which *Allen v Macpherson* was founded is thus gone, leaving only the bare question of whether equity ought to possess the freedom to impose a trust on a fraudulently obtained legacy which is admitted to probate. This is clearly a question to be settled on a balance of convenience. Before the decision in *Allen v Macpherson* the Real Property Commissioners had dismissed the option of a *de jure* concurrent probate jurisdiction in Chancery. However, this was in the context of their recommendations that the probate jurisdiction of the ecclesiastical courts be abolished and replaced by a general register for wills for non-contentious cases with a contentious jurisdiction vested in courts of equity. Moreover, the Commissioners were anxious that Chancery should have a jurisdiction to set aside any will or real or personal estate on ground of fraud.

8.27 The weaknesses of any concurrent jurisdiction are that it may enable a party unsuccessful in one arena to litigate the same matter in another or that two sets of inconsistent and ultimately conflicting principles may develop. However, these weaknesses can be exaggerated. The decision of a court on a particular question (such as whether a will was obtained by fraud) may estop the disappointed party from re-opening it elsewhere. We have already seen that before the Judicature Act estoppel, or something akin to it, had been invoked in *Sheffield v Duchess of Bucks* to justify an order in Chancery injunctioning a party from proceeding in the

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69 See s. 49(2).

70 *Fourth Report*, pp. 62-65


72 *Ibid*, p. 69 (realty) and p. 80, proposition 33.

73 In *Meluish v Milton* (1876) 3 Ch D 27 at 35 Mellish LJ seems to have overlooked this point when indicating the danger of matters being tried twice over if, *contra Allen v Macpherson*, a concurrent jurisdiction had existed.

74 (1739) 1 Atk 628 (Lord Hardwicke LC).
ecclesiastical court for revocation of probate. Moreover, while the case concerned fraud in obtaining probate rather than fraud in obtaining the will, the point was amply illustrated after the Judicature Act by the litigation in Priestman v Thomas.75 There the plaintiff had propounded a will apparently executed in April 1881 while the defendants propounded an earlier will dated in March. Probate proceedings were compromised and the March will was admitted to probate. Subsequently the plaintiff discovered that the proved will had been forged and commenced an action in the Chancery Division against the defendants to impugn the compromise in probate. A jury was instructed and found that the will was forged and that the first defendant was a party to it. Manisty J accordingly granted a declaration that the compromise was obtained by fraud and void as regards the first defendant’s interest under the will. In a fresh action in the Probate Division, Hannen P held that the defendants were estopped from contending that the probate should not be revoked and that decision was affirmed on appeal.

8.28 Secondly, there was no reason historically to suppose that the judiciary could not have achieved satisfactory consistency of approach in the matter of circumstances vitiating a will. By the time Allen v Macpherson was decided, the appellate jurisdiction of the Court of Delegates had been transferred to the Privy Council.76 The Privy Council (hearing probate appeals from the Prerogative Courts after 1832) and the House of Lords (considering Chancery appeals) would have been able to promote harmony in the law. Even before that time there was scope for a universal approach to prevail since it was possible for a commission of review to be brought into Chancery from the Court of Delegates. After the creation of the Court of

75 (1884) 9 PD 70 (Hannen P), affirmed (1884) 9 PD 210 (Court of Appeal).
76 Privy Council Appeals Act 1832, s. 3.
Probate, from whence appeals were heard by the House of Lords, and under the modern court structure, the point can hardly arise. In any case, any conflict between the probate court and Chancery would have been settled by the fact that the probate court had no trust jurisdiction and the equity court could not actually grant probate, so that the most liberal understanding of grounds vitiating a will would have prevailed. The decision of the probate court which refused to revoke could be irreversibly ‘undone’ if equity considered the proven facts justified the imposition of a trust; the refusal in Chancery to imply a trust could be nullified by the probate court accepting such circumstances as a justification for the revocation of probate.

Against these perceived weaknesses must be set the advantages which an equity jurisdiction could offer. There are practical as well as aesthetic benefits in unifying in one court or one division of a court the jurisdiction as to private law fraud in respect of instruments. It facilitates the efficient function of judicial office, since it allows expertise in the matter of fraud to be concentrated in one arena. Equally it assists litigants in the efficient conduct of their dispute. Where a property dispute arose which touched on a will allegedly obtained by fraud, the absence of a concurrent jurisdiction required that a claim or defence based on the fraud in obtaining the will had to be dismissed until, after litigation in the probate court, the party could return with the probate revoked or revised. The opportunity to address both the property and probate matters in the one Chancery case would have promoted the public policy of reducing delay in litigation and multiplicity of actions, necessitated by insisting the probate question be examined in another arena.

77 Court of Probate Act 1857, s. 39.

78 The potential utility of extending Chancery’s jurisdiction to embrace fraudulent obtained wills of personality and reality did not pass unnoted: see Jones v Gregory (1863) 4 Giff 468 at 472 (Stuart VC). It may explain why equity held onto to its concurrent jurisdiction in respect of fraudulently obtained devises for so long.
as a preliminary matter. It was doubtless exactly this purpose which had fostered the historic concurrent jurisdiction of Chancery to set aside wills before it lapsed in favour of the ecclesiastical courts’ exclusive jurisdiction. Although the court structure reformed by the Judicature Act no longer necessitates resort to another court, the absence of an equity jurisdiction to impose a trust on the fraudulent legatee would still have required that the matter be assigned from Chancery to the Probate, Divorce and Admiralty Division of the High Court in order that the revocation of probate might be considered there. Under the present law, however, contentious probate matters are assigned to the Chancery Division, which points even more strongly towards the notion that a trust might be implied where fraud procured the will: the question of whether a trust should be imposed falls to be decided in the same arena as the disputed question of whether probate is to be granted or, if previously granted, revoked.

The assumed survival of *Allen v Macpherson*

8.30 The outcome of this argument is that in a case before the Chancery Division of the High Court *either* a grant of probate might be revoked *or* a trust might be imposed. In case law since the Judicature Act, however, the courts have ostensibly proceeded on the opposing assumption that the rule in *Allen v Macpherson* continues to apply, while academic commentaries have followed in this assumption.79 In *Meluish v Milton*80 the testator had bequeathed all his estate (which consisted of personalty) to his wife. The next of kin sought a declaration that the wife was a trustee of the


80 (1876) 3 Ch D 27 (CA, affirming Hall VC).
estate on the basis that she had fraudulently concealed from the testator the fact that
she had married him bigamously and the concealment of the fact she was not
lawfully married to the testator had been material in inducing the will in her favour.
At first instance Hall VC dismissed the plaintiff’s claim on the basis that fraud was
not established: the testator had known at the time of marriage that the wife’s first
husband might still be alive, and her status as his lawful wife had not been the
motive for his gift. Hall VC therefore made no comment on the matter of
jurisdiction to impose a trust, had fraud been established. The question of
jurisdiction was addressed on appeal where the principle of *Allen v Macpherson*
was applied on the ground that if the will had been obtained by fraud the case was
within the exclusive jurisdiction of the court of probate. In reaching that
conclusion no account was taken of the fact that since the Judicature Act the equity
and probate jurisdictions fall to be administered by a solitary unified court. The
decision of the Court of Appeal is therefore uncompelling on this point.

8.31 The significance of the Judicature Act was subsequently considered by Jessel MR in
*Pinney v Hunt*. Under a will which had never been proved and which was
retained by her, the defendant took a half-share in certain leaseholds which she
occupied. The remaining half-share was divided equally between the second
plaintiff and Pinney, who had contracted to sell his quarter share to his co-plaintiff.
The defendant refused to pay an occupation rent and in an action in the Chancery
Division the plaintiffs sought sale or partition and a grant of probate. The defendant
objected that probate should be dealt with in the Probate, Divorce and Admiralty
Division and Jessel MR upheld that objection, standing the action over and allowing

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82 *Ibid* at 33 *per* James LJ and at 34 *per* Mellish LJ. Baggallay LJ (*ibid*, 36) gave a
concurring judgment.
application to be made to the Probate Division. Significantly, if unsurprisingly, Jessel MR accepted the plaintiff's argument that a judge in the Chancery Division, having the same jurisdiction as any other judge and possessing a discretion to retain matters assigned to another Division, might grant probate.84 This acknowledged the very point as to jurisdiction which had been overlooked - if not negated - in Meluish v Milton. That this principle was not applied on the facts of Pinney v Hunt should not detract from the judge's acceptance of the point. Jessel MR declined to exercise his jurisdiction purely for reasons of convenience. The advantage of trial in the Probate Division was that the matter would be tried before an appropriately experienced judge in a division accustomed to the required procedure and possessing the necessary administrative machinery.85 Although these were undoubtedly sound reasons for generally insisting that the matter be tried in the Probate Division, they must be set against the fact that requiring additional proceedings introduced a delay and further expense into the litigation. Moreover, while it was not evidently established on the facts of this case, it is always possible that a sufficient nexus could exist between the facts of a substantive claim and the probate supporting title such that the convenience of trial of the two distinct issues in the same forum could outweigh the benefits obtained from separate trial. Furthermore, while similar arguments of practical convenience might have been raised against allowing indirect revocation of probate in the Chancery Division by imposition of a trust, the subsequent statutory re-assignment of contentious probate matters to the Chancery Division has deprived that argument of validity.

83 (1877) 6 Ch D 98 (Jessel MR).
84 Ibid, 101.
85 Ibid.
8.32 Similarly there is nothing in *Priestman v Thomas*\(^8\) which, properly considered, compels the view that equity cannot now imply a trust or formally revoke a grant of probate. In that case, as we have already noted, it was established in an action in the Chancery Division that a will which had been admitted to probate in a compromised action in the Probate, Divorce and Admiralty Division had been forged. In a subsequent action in the Probate Division for revocation of the grant of probate the defendants contended that if (as was in fact held) the plaintiff was entitled to revocation, he ought to have claimed it in the action in the Chancery Division. Hannen P denied this on the ground that the plaintiff could not properly have pressed his claim there, the grant or revocation of probate being assigned (as it then was) to the Probate Division.\(^7\) In contrast to *Meluish v Milton*, however, there was no assertion by Hannen P that there had been a want of *jurisdiction* in the Chancery action. For the plaintiff to have sought revocation in the Chancery Division would have been improper only in a procedural sense. The Chancery Division might permissibly have entertained the claim, but, as a general rule of practice operating internally in the allocation of litigation within the High Court, it ought to have directed the point be pursued in the Probate Division. In view of the procedural rule, to seek such relief in the Chancery action would have been purely speculative litigation and it could hardly be countenanced that the plaintiff should have been under an obligation to undertake it. As is evident from *Pinney v Hunt*, such litigation at that time would in all probability have been rewarded with abject failure.

8.33 Equally, the decision on appeal affirming the judgment of Hannen P does not demonstrate a want of jurisdiction in the Chancery Division to revoke probate or,

\(^8\) (1884) 9 PD 70 (Hannen P), affirmed (1884) 9 PD 210 (Court of Appeal).

\(^7\) *Ibid*, 76.
alternatively, to imply a trust to give the substantively equivalent relief. Cotton LJ did accept the argument that there was no power of revocation in the Chancery Division, but this did not play a determining role in either his judgment or those of his brethren who declined to commit themselves on that point. The court unanimously found for the plaintiff on the ground that the parties before them were the same as those who were bound by the Chancery judgment and that the question which had been material in the Chancery action was the same one raised in the probate action. All that the court actually decided was that issue estoppel can be made out if an issue is properly before the same parties in another action, even if that action was for different objects. This was no more than a rejection of the narrow view contended for by the defendants that the issue had to be properly before a court for the same object. Given this decision, an assessment as to whether revocation of probate might have been claimed in the Chancery Division was entirely beside the point.

8.34 The better view therefore remains that probate may be revoked in any division of the High Court and a trust may be imposed in later proceedings when a will admitted to probate was secured by wrongdoing vitiating the animus testandi. There is later authority to support this view. In Birch v Birch the plaintiff sought revocation of probate which had been granted in solemn form in an action to which the plaintiff had been a party. It was alleged that in conspiracy with others the husband of a beneficiary under the will had forged the will, fabricated evidence of its genuineness and perjured himself in court. The probate had thus been obtained by fraud, the executors propounding the will innocently. The defendants sought to

88 Ibid, 214.

89 See ibid, 213 per Baggallay LJ, at 214 per Cotton LJ and at 215 per Lindley LJ.
stay the proceedings for revocation on the ground of *res judicata* and, relying on *Barnesly v Powel*, urged that the appropriate forum for the plaintiff's relief was in the Chancery Division by way of action against the fraudulent party or the benefiting spouse.91 Barnes J rejected that argument. The Probate Division now formed part of the High Court with the Chancery Division, so that it could not be maintained that this was not the right court for relief: the suit was in the one court into which the Courts of Probate and Chancery had been amalgamated.92 By implication it was possible in probate proceedings to offer equitable relief in accordance with *Barnesly v Powel* by way of a trust imposed on those benefiting from the fraud procuring the probate. Indeed Barnes J considered that bringing an action in the Division responsible for probate was easier than using the former Chancery machinery. That the final decree revoked the probate rather than imposed a trust was only a matter of greater practical convenience. The point was decided that the Probate Division of the High Court had jurisdiction to revoke a probate obtained by fraud and to grant equitable relief as alternative redress to revocation. In accepting that there is now a concurrent jurisdiction in probate and Chancery proceedings to impose a trust on those who benefit from a probate procured by fraud, *Birch v Birch* confirms by parity of reasoning that the Judicature Act granted to a Chancery judge a power to revoke the probate as such in cases where the will itself was obtained by fraud and consequently that a Chancery might give relief in such a case by way of imposing constructive trusteeship.

**Should the rule in *Allen v Macpherson* have limited the secret trusts jurisdiction?**

90 [1902] P 62 (Barnes J). See also *Betts v Doughty* (1879) 5 PD 26 (High Court), discussed in para. 9.48.

91 [1902] P 62, 63.
When considering the potential constraint imposed by the rule in *Allen v Macpherson*, there are three relevant periods of time. Although it had been settled relatively early in *Kerrich v Bransby* that equity could not intervene in respect of a fraudulently obtained will by setting probate aside, it was not until *Allen v Macpherson* that it was resolved that equity could not intervene *by way of imposing a constructive trust* to effect the true will. It was during this crucial early period that the doctrine of secret trusts was firmly established. The basis and validity of the secret trusts doctrine, assumed in *McCormick v Grogan* to be based on fraud, was never re-considered after the authoritative decision of the House of Lords in *Allen v Macpherson* had completed the boundary of equity’s jurisdiction in respect of wills obtained by fraud. Since the establishment of the High Court, it seems that despite suggestions to the contrary the restriction of *Allen v Macpherson* when properly analysed can no longer bind. It follows from this analysis that if there ever was an inconsistency between the rule in *Allen v Macpherson* and the secret trusts doctrine, this was not an historical obstacle to the development of the doctrine (in the initial time period), nor can it be considered a reason for doubting the doctrine in the modern law (the third and contemporary time period); but during the intermediate era, it might have been questioned whether the secret trusts doctrine was compatible with the decision in *Allen v Macpherson*. If the secret trusts doctrine is born out of fraud, was the parentage illegitimised by *Allen v Macpherson*?

The relationship between *Allen v Macpherson*, fraud and the probate jurisdiction

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92 *Ibid*, p. 62 (interjecting in counsels' argument) and at p. 70.

93 (1869) L.R 4 HL 82.
8.36 In fact the principle of *Allen v Macpherson* and intervention in respect of secret trusts on the ground of fraud can be securely reconciled since *Allen v Macpherson* and the secret trusts doctrine are not looking at the same conception of fraud and the distinction between these two different notions of fraud justifies different treatment in equity. The fraud relevant to *Allen v Macpherson* is fraud which vitiates the testamentary intention, such as deceitful misrepresentation (actual fraud) or coercive undue influence (a species of constructive fraud). In these instances the deceiver or coercer in effect substitutes his volition for that of the testator's.\(^{94}\) A will obtained by fraud is therefore not the will of the testator and is void as a testamentary disposition.\(^{95}\) It is an abuse of the testator which causes the will to be made when it would otherwise not have been. The fraud is one of *inducing* a dispositive benefit. In the creation of a secret trust, the testator is likewise caused to make a will which he otherwise would not have made, but this similarity should not blind us to a difference in the nature of the legatee's wrongdoing. The legatee's promise induces the creation of the secret trust, but, as we noted in the previous chapter, a promise to execute the secret trust (unless containing a threat of injury or supporting an implied misrepresentation) is not in itself a wrong done to the promisee. In contrast to deceit and coercion, the testator is abused *after* the execution of the will, when the promise is unfulfilled and the property retained beneficially. It is a fraud in *keeping* a dispositive benefit. Such a species of fraud assumes rather than vitiates the genuineness of the *animus testandi* expressed in the will. As a fraud arising after the will has taken effect rather than at the time of execution, secret trust fraud lay outside the domain of the ecclesiastical court (which was concerned only with the will's validity) and properly remained a matter

\(^{94}\) See Holdsworth and Vickers, p. 68.\(^{95}\) *Nelson v Oldfield* (1688) 2 Vern 76 *per* Lord Jeffreys LC; *Bennet v Vade* (1742) 2 Atk 324 *per* Lord Hardwicke LC; *Meluish v Milton* (1876) 3 Ch D 27, 33 *per* James L.J.
for equity. In Reech v Kennegaft\textsuperscript{96} Lord Hardwicke LC, after noting that the ecclesiastical court could give relief for fraud in obtaining a will, observed that the fraud equity was relieving against in the secret trust case before him was one against which the ecclesiastical court could not relieve. Moreover, in Gingell v Horne\textsuperscript{97} Shadwell VC distinguished his own decision in the precatory secret trust case of Podmore v Gunning\textsuperscript{98} on the very ground that in enforcing the secret trust the court acted not against the probate of the will, but with it. Similarly, in Allen v Macpherson itself Lord Lyndhurst referred critically to a \textit{dictum} of Gilbert LCB in Marriot v Marriot\textsuperscript{99} which had juxtaposed the enforcement of secret trusts with the enforcement of a trust of a legacy obtained by fraud. In Lord Lyndhurst’s view, the two scenarios were entirely distinguishable; the secret trust did not concern fraud - meaning, it is suggested, fraud in this sense of actual or constructive fraud destroying the testamentary intention.\textsuperscript{100} It was a failure to appreciate this distinction and the consequent mistaken juxtaposition of these two distinct frauds - on the one hand the secret trust fraud which is \textit{post mortem} and outside the ecclesiastical jurisdiction, on the other hand actual fraud which is \textit{ante mortem} and

\textsuperscript{96} (1748) 1 Ves Sen 123 at 125.

\textsuperscript{97} (1839) 9 Sim 539 at 545. His comment, however, that the trust enforced appeared on the face of the will is clearly incorrect, since the trust terms were secret, and was ultimately inconsistent with the distinction he drew.

\textsuperscript{98} (1832) 5 Sim 485; (1836) 7 Sim 643; (1836) Donnelley 72.

\textsuperscript{99} (1725) Gilb Rep 203 at 209; 1 Str 666 at 673.

\textsuperscript{100} 1 Ph 133 at 145; 1 HLC 191 at 212. See also Thompson v Judge (1854) 2 Drewry 414 at 416 where Kindersley VC makes a similar distinction between cases where the enforcement of a trust is permissible and cases where this would negate the probate, which accords with the distinction made here but was not explicitly directed towards secret trusts.
within the probate domain - on which Lord Langdale MR had based his judgment in

*Allen v Macpherson*.101

8.37 All that the principle in *Allen v Macpherson* established was that fraud in procuring
the will lay outside the Chancery jurisdiction. Fraud cognisable in determining the
correctness of a grant of probate was to be dealt with exclusively as part of the
probate process. The principle was confined to that species of fraud because it was
only that type of fraud which would be recognised by the ecclesiastical court as
vitiating the testamentary intention supporting the will. It was only where the fraud
was cognisable in the probate court that recognition in equity would operate as a
usurpation of the probate jurisdiction. Equity’s power to intervene in cases of fraud
was limited only to the extent necessary to prevent this jurisdictional conflict.
Weaker notions of fraud not giving rise to a claim for revocation of probate could
not affect matters in the Prerogative Court. The ecclesiastical courts were denied a
general jurisdiction to intermeddle in questions of breach of faith or trust between
laymen in civil matters.102 In contrast to actual fraud and with the exception of
coercion, constructive fraud in equity would not justify redress in the probate court.

Equitable constructive frauds and probate: undue influence and secret trusts fraud
compared

101 5 Beav 469 at 483. Arguably Hart LC in *Segrave v Kirwan* (1828) Beatty 157, 163-164
fell into the same error when he approved the principle of *Marriot v Marriot* that
probate could not be controverted, but a trust might be engrafted on a legatee in all
cases of fraud recognised in equity. After *Allen v Macpherson* the principle could hold
only for constructive frauds in equity which fell short of a ground for formal revocation
of probate.

Ecclesiastical Court is not the proper court for equity in England.”
The point is illustrated by considering undue influence as a vitiating factor. In the probate court it must amount to coercion in obtaining the will before it can give rise to relief. This is a much more stringent requirement than that which equity demands before rescinding an imposed inter vivos instrument; undue influence in the weaker sense would not vitiate the animus testandi. Undue influence of a non-coercive character is a type of constructive fraud in equity which could not be acted upon in the probate court. A will obtained by such lesser undue influence is valid. Predictably this particular divergence between the approach of the probate and equity courts posed some difficulty for Chancery. The possibility existed for equity to accept the binding nature of probate, but nonetheless to recognise a trust imposed on a legatee who obtained the will by non-coercive undue influence. This would have done no more than give effect to redress for an equitable constructive

103 See Williams v Goude (1828) 1 Hagg Ecc 577 at 581 per Sir John Nicholl; Stutz v Schaeffle (1852) 16 Jur. 909 at 911 per Dr Lushington; Parfitt v Lawless (1872) LR 2 P & D 462 at 465 (intervening in counsels' argument) and at 470-471 per Lord Penzance, holding that persuasive influence short of coercion was lawful and an impressed volition of the testator was effective if it was not overborne and subjected to the domination of another; Wingrove v Wingrove (1885) 11 PD 81 at 82 per Hannen P, addressing a jury on the point and formulating the law in terms applied in Baudains v Richardson [1906] AC 169 at 184-185 by Lord Macnaghten for the Privy Council. The same degree of undue influence was required to impugn wills of realty: see Middleton v Sherburne (1841) 4 Y & C Ex 358 at 389 per Lord Abinger LCB.

104 See Parfitt v Lawless (1872) LR 2 P & D 462 at 465 (intervening in counsels' argument) and at 468-469 per Lord Penzance; Craig v Lamoureux [1920] AC 349, 356-357 per Lord Haldane for the Privy Council. See also Stutz v Schaeffle (1852) 16 Jur 909 at 918 where Dr Lushington distinguishes coercion and undue influence; Hall v Hall (1868) LR 1 P & D 481 at 482 where Sir J. P. Wilde, in directing a jury on the point, explains that a will is void only if the pressure overpowers the testator's volition. The distinction is one of degree. Compare Hacker v Newborn (1654) Styles 427, where Rolle CJ considered a will made by a sick husband to obtain peace from his "over-importuning" wife to be void, with Williams v Goude (1828) 1 Hagg Ecc 577 at 595-596, where Sir John Nicholl held that the general influence of an "active, bustling,
fraud lying outside the domain of the probate court. However, equity resolved not to advance that step. In *Hindson v Weatherill* the testator had made gifts to his solicitor, the defendant, which the plaintiff sought to impeach. In earlier probate proceedings the plaintiff had abandoned his claim against the validity of the will on the basis of undue influence and probate was granted. His claim in equity could succeed only on the basis that a trust might be imposed to give relief for non-coercive undue influence. At first instance, for reasons which were shown in paragraph 8.16 to be misdirected, Stuart VC held that there was presumed undue influence which was not rebutted on the facts and declared the defendant a trustee. Despite substantially misstating the nature of the distinction drawn in *Gingell v Horne*, this would have been a permissible application of that distinction (correctly understood): the trust gave effect to relief against an equitable fraud which could not be redressed in the probate court. On appeal, however, Turner LJ considered the facts of the case exonerated the solicitor, while Bruce LJ rejected the view that the doctrine of presumed undue influence could apply to testamentary gifts to solicitors, although he left open the case of actual undue influence.

8.39 This development was not inevitable, but it was certainly justifiable. It was not sufficient, in keeping with *Allen v Macpherson*, that a constructive fraud for which equity might provide relief by way of a trust over the legacy or devise should be one recognised exclusively in equity. The fraud should also be founded on some objectionable quality distinct from those which the probate court or the common

105 (1854) 5 De G M & G 301 (Court of Appeal in Chancery), reversing (1853) 1 Sm & Giff 604 (Stuart VC).

106 5 De G M & G 301 at 312.

107 *Ibid* at 310.
law court would have considered in determining the validity of the will. Since the probate court would dismiss non-coercive undue influence in determining the validity of the will, any other approach in equity would merely have enabled Chancery to substitute its view of the necessary gravity of misconduct sufficient to vitiate testamentary consent for the view of the probate court.

8.40 Constructive frauds recognisable only in equity would also include the secret trust type of fraud. This could not be recognised in the probate court as vitiating a will, not merely because it would be a matter of equity (if anything) but because the trust presupposed the efficacy of the will in constituting the trust by transferring the legacy to the trustee. No remedy could be provided in the ecclesiastical court for the secret trust,\(^{108}\) which could not impose a trust and at most could only defeat the testator’s intention to bequeath on an informally agreed trust by revoking the probate. It followed that in such cases equity was free to offer relief to the victim of the constructive fraud, provided the relief operated in a way which accepted and respected the decision of the probate court.\(^{109}\) *Allen v Macpherson* has never therefore denied equitable jurisdiction where the fraud would arise *after* the will has fully taken effect. The fact that equity would only find that fraud after the testator’s death was established partly because of certain matters arising in his lifetime - such as a promise inducing the will - should not mislead us on this fundamental distinction. Moreover, in contrast to undue influence, there was no necessity for equity to decline to act out of deference to the standards of the probate court. Unlike

\(^{108}\) See to this effect Lord Lyndhurst LC in *Allen v Macpherson* (1842) 1 Ph 133 at 145, commenting on a *dictum* of Gilbert LCB in *Marriot v Marriot* (1725) Gilb Rep 203 at 209; 1 Str 666 at 673.

\(^{109}\) This sits comfortably with the rationalisation of the decision in *Allen v Macpherson* (1847) 1 HLC 191 at 235 by Lord Campbell who observed that on the facts of the case revocation of probate would have done complete justice and indicated that the situation would have been different if there had been no remedy unless a trust was imposed.
a disposition extracted by undue influence, a secret agreement with the legatee for
trusteeship was something running with and not against the testator's free volition.

8.41 The contrast between on the one hand fraud in equity which was also recognised by
the probate court and went to the validity of a will and on the other hand secret trust
fraud dependent on the will's validity is encapsulated in the leading case of Parfitt v
Lawless. In Parfitt v Lawless the testatrix had bequeathed her residue to the
plaintiff, a Roman Catholic priest who had lived in the testatrix's home and acted as
her confessor. There was no evidence of actual undue influence, but the defendant
argued the onus was on the plaintiff to establish the innocence of the gift. Lord
Penzance (with whom Brett J and Pigott B concurred) held that the evidence of
confidence between plaintiff and testatrix was insufficient to establish a case of
coercion to go before a jury, rejecting the view that undue influence of a type
recognised in equity would vitiate a will. Lord Penzance noted that on the facts
of the case (which are not elaborated in the report) there was a suspicion that the
testatrix had bequeathed to the plaintiff on a secret trust for religious purposes.
Like the presumption of undue influence arising in that case, the existence of a
secret trust did not impair the testatrix's animus testandi. On the contrary the fact
was notable because it affirmed the testatrix's intention to make the bequest: it

110 (1872) LR 2 P & D 462 (Lord Penzance, Brett J and Pigott B).
111 The actual decision in Parfitt v Lawless only established that a will is not affected by
presumed undue influence, but the tenor of the dicta clearly extended to (non-coercive)
actual undue influence.
112 (1872) LR 2 P & D 462, 476. The bequest included realty and the gift may have been
motivated by a desire to avoid the restrictions imposed by the Mortmain Act.
revealed that the testatrix was achieving her own ambition in making the bequest and was inconsistent with the notion she acted under the dictation of another.  

8.42 The necessity to observe this fundamental difference between secret trust fraud which presupposes the efficacy of the testamentary disposition and grounds which impugn it has prompted some rather gymnastic pleading in cases where, Gatling style, plaintiff’s counsel have been determined to fire off all grounds of challenge no matter how difficult this must have made the presentation of the plaintiff’s case. In *Middleton v Sherburne*, on facts reminiscent of *Parfitt v Lawless*, the plaintiff heiresses sought unsuccessfully to have the validity of the will tried based on allegations that the deceased lacked the requisite mental capacity for a testament and that the first defendant, the testator’s confessor, had exerted undue influence. As an alternative allegation, however, it was asserted that the specific and residuary devises, *if valid*, were taken by the defendant on secret trust for charitable purposes void under the Mortmain Act or at any rate superstitious purposes void in equity on public policy grounds.  

**Conclusion**

113 It may be objected that it was always possible the creation of a secret trust was itself induced by the domination of the legatee. Lord Penzance’s inference was not necessarily justified, but the underlying point remains that undue influence prompting a secret trust in favour of a secret nominee whom the testatrix wished to benefit is to be distinguished from a benefit given to another (free of any secret trust obligation) against the real wishes of the testatrix.

114 (1841) 4 Y & C Ex 358 (Court of Exchequer).

115 See in particular 4 Y & C Ex 358 at 370-371 where defending counsel elaborates on how the secret trust claim presupposed the *animus testandi* which the claim of fraud vitiating the will denied. For similar pleading, see *Paine v Hall* (1812) 18 Ves Jun 475; *Wright v Wilkin* (1859) 4 De G & J 141.
What our examination of the principle in *Allen v Macpherson* has shown is that if the principle is accepted as remaining law, and at any rate given that it at least was once law (despite its demerits), the concept of fraud which supports the secret trusts doctrine, if that doctrine remained compatible with the *Allen v Macpherson* principle, is one based on wrongdoing not in procuring the will but *after it has come into effect*. A notion of fraud in *obtaining* a will simply leads us back to the *Allen v Macpherson* principle. A stronger notion of fraud destroys the will and is remediable by revocation of probate. Fraud in the secret trust sense must be of a lesser character which *preserves* rather than undermines the will of the testator necessary for the efficacy of the legacy to the trustee and thus the constitution of the secret trust. On this point the current law does seem to be consistent, since as we have already noted deceit is not required as an element of the secret trust. We will see in the following chapter that revisiting this contrast between fraud in obtaining a will and secret trust fraud is useful in determining who should benefit under the trust enforced to prevent a legatee from benefiting from the informality of the secret trust.
CHAPTER 9: THE FRAUD THEORY: (III) - POST-MORTEM FRAUD

Introduction

9.1 This chapter seeks to defend the thesis of chapter 4 that the fraud concept governing equity’s jurisdiction to impose in secret trust cases is properly conceived in terms of gain by the legatee in breach of his secret promise and that this concept of fraud implies a restorative trust in favour of the testator’s estate.

9.2 The positive case for this narrow concept of fraud is best established by considering, as an antithesis, the case for the fraud theory as an explanation for the current law enforcing the secret trust in favour of the testator’s nominated beneficiary. In order to show that enforcing the secret trust is essential to prevent fraud, it must be established that the legatee commits a fraud, that this is a wrong done to the secret beneficiary and that this wrong is best redressed by enforcing the secret trust rather than compelling restitution to the testator’s estate. This chapter therefore commences with an examination of the nature of the legatee’s fraud and the identity of the victims of the wrong done. These two propositions are clearly interrelated since fraud which is easily perpetrated lends itself to being treated as a fraud on a wider class of persons. Of assistance here as our point of departure is the conclusion of chapters 7 and 8 that the fraud does not involve an element of deceit and must be a form of post-mortem constructive fraud. From this review it will be seen that the wider notion of fraud as mere breach of the secret promise is to be rejected. The further question is the appropriate redress for the secret trust fraud. This is controlled by the nature of the wrong and the identity of the victim, but a further material factor is the relationship of equitable relief to the formality of the will. In this regard it will be helpful to pursue the analysis of equity’s jurisdiction in respect of fraud in obtaining a will, developed in the last chapter. This illuminates
constraints on equitable relief in other cases of fraud affecting wills and points to a solution of secret trust cases consistent with an overall framework governing equity's relationship to probate of wills.

The elements of the secret trust fraud and the victim of the wrong

9.3 Since fraud in the secret trusts sense does not require a fraudulent misrepresentation and is constituted by some lesser wrong, the critical issue is to identify the element or combination of elements which constitute the more venial constructive fraud provoking equity to impose a constructive trust. In one sense the elements of the fraud are apparent: secret trust fraud may be defined as obtaining property on the basis of an understanding which it would be inequitable to go back on.¹ A definition of fraud in such terms, however, is merely circular. It implies the requirements of the secret trusts doctrine (acceptance of the secret trust and causation of the disposition on secret trust), but it fails to explain how a rationale is to be constructed from these elements for why it is inequitable, why it is a fraud, if the secret trust is not enforced. Secret trust fraud must be extricated from a mere re-statement of the secret trust doctrine. Similarly we cannot rest content with equating secret trust fraud to unconscionability.² This begs as many questions as the fraud label itself.

9.4 Determining the meaning of the fraud concept will have a reflexive effect on the question of what trust should be imposed in equity in order to give relief for the fraud, since the identity of the victim of the fraud may be defined or implied in part

¹ See Sheridan, Fraud in Equity, pp. 45-46, and similarly his "English and Irish Secret Trusts", p. 323.

² Cf. Williams, p. 318 n. e.
by the ingredients of the conduct constituting the wrong. If fraud is to be analysed in terms of a benefit wrongfully retained by the trustee, the victim of the fraud may be either the testator as the person who has provided the benefit or it may be the intended beneficiary who has been wrongly kept out from enjoying it and who therefore suffers an expectation loss. If, on the other hand, the fraud merely consists of the failure to perform the secret trust obligation, it may be easier to argue, by analogy with a valid express trust, that the intended beneficiary must be entitled to enforce a trust imposed to prevent fraud. Trust obligations are ordinarily only enforceable at the instance of those entitled under the trust and not, in the capacity of settlor, by those who created it. However, it is the legitimacy of drawing an analogy between the void express trust and the implied trust which is open to question. It is equally arguable that in all cases only the testator should be able to enforce the trust because a trust duty which lay in promise only and not in the formality of a valid express trust should be enforceable only at the instance of the promisee. Any other approach improperly nullifies the distinction between valid and void trusts and perfect and imperfectly constituted gifts. An implicit comparison between binding and informal express trusts is to be avoided.

The nature of the legatee’s fraud

Mere breach of promise as fraud

9.5 At one extreme is the notion that the mere breach of the secret promise amounts to fraud.\(^3\) This must be doubtful as a matter of principle. If the legatee’s promise is voluntary, it is difficult to see why equity should single out this type of promise for exceptional treatment in defiance of the maxim that equity will not assist a

\(^3\) See Gardner, p. 83.
volunteer. Even a breach of a fiduciary duty or contractual promise is not an equitable fraud, unless, for reasons extrinsic to the contract or confidence or in consequence of the breach (such as the accrual of profit), the circumstances are such as to found some particular head of fraud.\(^4\) Equally this understanding of fraud was not entertained in the early case of *Whitton v Russell*,\(^5\) where the secret trust claim failed on several grounds including the fact that the first defendant’s promise to the testator had not actually induced the omission to encumber the devise in his favour with a charge for the benefit of the plaintiff. Lord Hardwicke LC was forthright that “every breach of promise is not to be called a fraud”.\(^6\) This of course only indicates that reneging on an informal agreement, *without more*, is not fraud. While some further element is essential, that might be provided by the fact the promise which is breached had previously induced a gift in reliance on the promise. Is the additional element of having caused the secret trust to be constituted sufficient to convert mere breach of the secret promise into fraud?

9.6 Some affirmative support appears in Kay J’s explanation of the secret trusts doctrine in *Re Boyes*.\(^7\) A fraud would be committed if the legatee’s promise was not enforced “because it is to be presumed that if it had not been for such promise the testator would not have made or would have revoked the gift.”\(^8\) This emphasises the

\(^4\) See, in agreement, Sheridan, *Fraud in Equity*, p. 216; *contra* Lord Abinger CB in *Cornfoot v Fowke* (1840) 6 M & W 358 at 378. Lord Abinger CB was dissenting in *Cornfoot v Fowke*, but in holding that a non-fraudulent misrepresentation inducing a contract might preclude its enforcement his judgment is more in keeping with the modern law of rescission.

\(^5\) (1739) 1 Atk 448, supplemented in Ves Sen Supp 78 (Lord Hardwicke LC).

\(^6\) 1 Atk 448 at 449.

\(^7\) (1884) 26 Ch D 531.

\(^8\) *Ibid*, 535-536. See similarly *Chamberlain v Agar* (1813) 2 V & B 259 at 262 where Plumer VC refers to fraud “which consists in not complying with a promise on which
fact of the testator’s (presumed) reliance as a reason for finding fraud in the legatee’s breach of promise. In similar vain, Fleming stresses as the basic consideration behind the fraud “the notion that the confidence placed in [...] acceptance of the obligation has changed the position of the parties”. However, insistence on (detrimental) reliance may be of different significance. The fact the testator has conducted his affairs on the basis the promise will be fulfilled also demonstrates that the legatee was not intended to have the bequest on any other terms. Viewed in this light, reliance is not the element which converts breach of promise into fraud. It is material because it demonstrates the illegitimacy of the legatee’s personal claim to the property and, as is argued below, it is legatee’s attempt to keep the property in breach of promise which makes out the fraud.

9.7 It is suggested, therefore, that mere breach of promise, even if the promise was the cause of a proprietary transfer, does not amount to fraud in equity. Supportive of that principle is the decision of Page Wood VC in Stewart v Austin. The plaintiff had purchased shares in a company on the faith of a prospectus reciting the objects of the company as the acquisition of a specified ironworks in Russia. In fact the company’s memorandum of objects authorised the acquisition and operation of any ironworks in Russia and manufacturing with iron. The plaintiff had successfully applied under the Companies Act 1862 for his name to be taken off the register of

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9 See, supporting this, French v French [1902] 1 IR 171, 230 where Lord Davey describes the fraud in these terms of betrayal of confidence in reliance on which the bequest was made.

10 Fleming, p. 34.

11 (1866) LR 3 Eq 299.

12 S. 35. See now Companies Act 1985, s. 359.
members. In this litigation the plaintiff sued the company and its directors for restitution on the ground that he had been induced by the misstatement in the prospectus to subscribe and the company therefore held his contribution on trust. Page Wood VC rejected the plaintiff's claim. The intention of the directors at the time of contribution had been bona fide and in accord with the prospectus. The most that could be said was that an agent had received money for the purpose stated in the prospectus and expended it in breach of duty on the wider objects of the company memorandum. There was no equitable fraud:

[I]t is not fraud in the view of this court where a person takes your money for a given purpose, and then, without your authority, applies it to a larger and more extensive purpose which he may think equally for your benefit [...] not attempting to apply it to his own use, but merely applying to purposes which you have not authorized.14

9.8 The same elements of transfer for an agreed purpose coupled with subsequent breach of duty inherent in the creation of a secret trust were present in Stewart v Austin where the departure from the agreement did not constitute equitable fraud. Of course Stewart v Austin may be distinguished as it concerned an inter vivos transfer for valuable consideration within a contractual relationship, but Page Wood VC did not base his judgment on any of those points and his assertion might equally apply to a voluntary testamentary disposition. It is certainly a doubtful ground for distinction that in Stewart v Austin the disposition was not on trust: a legacy to a fully-secret trustee is only a disposition on trust if regard can be had to the binding

13 *Re Russian (Vyksounsky) Ironworks Company* (1866) LR 1 Ch App 574 (Court of Appeal in Chancery), affirming (1866) LR 1 Ch App 578n (Page Wood VC).

14 (1866) LR 3 Eq 299, 307.
nature of the secret agreement - the very point which the claim of fraud in equity is intended to establish. The significant distinction between the secret trust scenario and *Stewart v Austin* is that the testator intends the secret trustee should not have the benefit of the legacy, while the purchaser of corporate shares intends a beneficial transfer to the company of his capital contribution in return for his interest in the company. In the latter case the breach of duty by the company does not infringe the testator's intentions for the beneficial interest in his contribution to the company. In the secret trust case, the breach of duty materially alters the destination of the beneficial interest: the default of the legatee rebounds to his own advantage. It is this material difference which explains secret trust fraud. In this regard the language of Page Wood VC is admittedly somewhat unfortunate. Whenever the company departed from the terms of the prospectus which delimited the authority of the plaintiff, the company applied the plaintiff's contribution to its own use. This is an example of enrichment by disposition, as explained in chapter 4. The important point, however, was that such enrichment was consistent with the testator's intentions: he intended at the outset to give his cash to the company beneficially in exchange for allotted shares. Equitable fraud in the sense relevant to secret trusts arises only where departure from the terms of an agreement contravenes the donor's intentions in respect of the beneficial interest.

9.9 This point seems to have been overlooked in the earlier case of *Harrison v Gardner* where analogy was drawn with secret trusts and the language of fraud was used too loosely. In that case the defendant received £500 from the plaintiff as his share of the goodwill of a cheesemonger's business from which the defendant was retiring. The payment was based on a valuation made by arbitrators on the understanding that the defendant would not set up a rival firm in the immediate

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15 (1817) 2 Madd 198.
vicinity. The defendant objected to including any restrictive clause in the agreement for dissolution, but gave a solemn promise to the same effect. He subsequently set up a competing business in the same street and the plaintiff sought an injunction to restrain him. It was urged for the plaintiff that it was a fraud on him for the defendant to breach the solemn promise which had induced the plaintiff not to insist on an express contractual term; an analogy was drawn with a residuary legatee inducing a testator not to make a legacy by a promise to pay it from the residue, whose refusal to pay was a fraud.\(^{16}\) Plumer VC adopted this argument and the secret trust analogy: it was a fraud on the plaintiff to receive the money for not doing what was afterwards done corresponding to the fraud on an intended legatee.\(^{17}\) The analogy, however, was hardly compelling. The payment to the defendant was given outright and intended for the defendant's own benefit, as in *Stewart v Austin*, and not as agent for the benefit of a third party, as in the secret trust scenario. In fact, the case was more remote from the secret trust scenario than in *Stewart v Austin* since here the payment was given not to enable the promisor to satisfy the promisee's expectations, but merely to reward him for doing so. Moreover, the secret trust analogy and the language of fraud were entirely unnecessary. The decision would have been justified on the ground that a collateral contract was agreed in which the defendant's undertaking not to trade competitively was consideration for concluding a purchase of the defendant's share in the goodwill at the (otherwise inflated) price nominated by the arbitrators.

*Repudiation of trust as fraud*

\(^{16}\) *Ibid*, 210-211.

\(^{17}\) *Ibid*, 221-2.
9.10 A related assertion is that fraud consists of the legatee's breach or repudiation of the trust. This may be read as implying no more than the breach of the secret promise. However, it is possible to resolve a breach of a fully-secret trust into component elements of which the mere omission to act in accord with the informally agreed fiduciary duty is merely one aspect. Breach of a fully-secret trust occurs in a setting in which the legatee has an apparently absolute ownership. In this context breach of the informal trust imports the retention by the trustee of all the beneficial rights flowing from legal title in the absence of some countervailing equity. Repudiation of a fully-secret trust amounts to more than mere non-performance of duty: it is default in duty resulting to one's own advantage. It is this aggravating factor which converts the unconscionable element of failing to do one's duty into fraud.

9.11 This emphasis is captured in Sheridan's description of the fraud concept relevant to secret trusts. Seeking to describe the type of fraud applicable to cases where equity intervenes to prevent unjust exploitation of the formality requirements derived from the Statute of Frauds - specifically embracing the doctrine of part performance and inter vivos secret trusts but by its nature applicable also to testamentary secret trusts - Sheridan states:

18 Re Gardner [1920] 2 Ch 523, 529 per Lord Sterndale MR ("The breach of trust, or the fraud would arise when he attempted to deal with the money contrary to the terms on which he took it."); Blackwell v Blackwell [1929] AC 318, 341 per Lord Warrington ("[R]efusal after the death of the testator to give effect to it [the trust] would be a fraud on the part of the legatee.") and at 342 ("[I]t would be a fraud on the part of the legatees to refuse to carry out the trust [...] "). See also Melville M. Bigelow, "Definition of Circumvention", (1889) 5 LQR 140, 142 n. 1, where Bigelow treats breach of trust as a fraud in the context of preference for a creditor.
It is equitable fraud for a person who acquires property, knowing that he acquires it subject to some restriction or obligation, to set up a title free from that restriction or obligation.\textsuperscript{19}

Disowning the agreed trust is unconscionable because the result is to maintain a beneficial title to the trust property for oneself. However noble the motives and whatever the ultimate ends, a breach of secret promise is a departure from confidence which is in one’s private interest. This formulation is particularly attractive because it reinforces the view that the fraud is not automatic and arises \textit{after} the testator has died. Property is acquired with the knowledge and agreement that it was for the benefit of another, but the fraud arises in the later act of laying claim to enjoy the legacy as if the secret trust did not exist and not in the mere act of inducing reliance on the agreement.

\textit{Breach of promise coupled with retention of benefit}

9.12 The position contended for in this thesis is therefore that the fraud of the legatee consists of reneging on the secret trust agreement for his own benefit. Statements can be found in the case law which apparently or explicitly equate breach of promise with fraud,\textsuperscript{20} but such statements often pass as shorthand for the notion

\textsuperscript{19} Sheridan, \textit{Fraud in Equity}, p. 172. The broad Statute of Frauds context to this type of fraud (including testamentary secret trusts) is stated at p. 180. See similarly \textit{ibid}, p. 148 (“If property is vested in a person apparently beneficially, but which he knows he is not to keep beneficially, it is said to be a fraud on his part to set up his beneficial title.”), explained at p. 149 as applicable to testamentary secret trusts.

\textsuperscript{20} Consider \textit{Wallgrave v Tebbs} (1855) 2 K & J 313 at 322 where Page Wood VC states that for the prevention of fraud the trust is engrafted to prevent the legatee applying the property to a purpose foreign to that for which he undertook it, implying that departure from the trust terms is the fraud prevented.
that breach of promise combined with consequential personal gain constitutes the fraud. This sense of fraud is most easily reconciled with the manner in which the maxim ‘equity will not allow a statute to be used as an instrument of fraud’ applies, as Lord Westbury indicated in *McCormick v Grogan.* The fraud is perpetrated by invoking the “machinery” of the Wills Act to get a title under that Act. Resort to the statute contains the twin elements of denying the trust and asserting a beneficial gift under the will.

9.13 This is the traditional sense of secret trust fraud which historically has dominated in judicial *dicta* and earlier literature. In *Reech v Kennaegal* Lord Hardwicke...

21 See, for example, the observation of Lord Westbury in *McCormick v Grogan* (1869) LR 4 HL 82 at 99, which must be read in conjunction with his earlier observation, *ibid,* 97, that legatees are converted into trustees “on the principle that an individual shall not be benefited by his own personal fraud”. Similarly, Porter MR’s *dictum* in *French v French* [1902] 1 IR 171, 191 that it is fraudulent “if a man obtains property by holding out that he will dispose of it in a certain way, and does not do so”, implying personal fraud consists of no more than breach of trust after inducing the legacy, was really directed at unjust retention of the property as his later observation in *Sullivan v Sullivan* [1903] 1 IR 193, 200 makes explicit: “[I]t would be a fraud if a person obtained a legacy [...] and then closed upon it himself.”

22 See para. 7.11 above.

23 See *Juniper v Batchelor* (1868) 19 LT 200 at 201 (Giffard VC), referring to fraud in retention of the trust property; *French v French* [1902] 1 IR 172, 203 per FitzGibbon LJ (the foundation of relief is the legatee’s unconscientious use for his own purposes of property he knows he ought to hold for another) and at 212-213 per Walker LJ (“the party is converted into a trustee upon the principle that an individual shall not be benefited by his own personal fraud”); *O’Brien v Condon* [1905] 1 IR 51, 56 per Porter MR; *Re Gardner* [1920] 2 Ch 523, 534 per Younger LJ (a fraud to have kept the fund); *Re Williams* [1933] 1 Ch 244, 251 where Farwell J suggests equitable intervention is justified “because it is against conscience for the beneficiary [in the will] to take the property, and disregard the obligation” (emphasis added). See also references to personal fraud as the basis of the doctrine: *Scott v Brownrigg* (1881) 9 LR Ir 246, 257 per Sullivan MR. See in similar spirit, establishing unconscionability rather than fraud, *Sweeting v Sweeting* (1864) 10 Jurist (NS) 31 where Kindersley VC asserts that the
LC, setting out the principle for enforcing secret trusts, identified the trustee’s own benefit, in breach of trust, as an object redressed by equity:

[T]he court has already adhered to this principle, that the statute should never be understood to protect fraud; and therefore whenever a case is infected with fraud [...] the court will not suffer the statute to protect it, so as that any one should run away with a benefit not intended.26

Subsequently, in McCormick v Grogan27 Lord Hatherley LC, addressing obiter the case where an heir induced a devise, stated that:

if [...] the heir has kept the property for himself, without carrying those instructions [of the intestate] into effect, the Court of Equity has interposed on the ground of the fraud thus committed by the heir.28

In Balfe v Halpenny29 Barton J saw fraud as the basis of the secret trusts doctrine and considered it depended on the secret trustee taking beneficially.30 Indeed, in

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24 See, for example, Strahan, p. 67 (legatee will not be permitted “to repudiate the trust and hold the property for his own benefit”) (emphasis added); Maitland, p. 61.
25 (1748) 1 Ves Sen 123; sub nom Reech v Kennigale Amb 67; sub nom Reech v Kennigale 1 Wils KB 227 (Lord Hardwicke LC).
26 (1748) 1 Ves Sen 123 at 125 (emphasis added).
27 (1869) LR 4 HL 82.
28 Ibid, 88 (emphasis added).
29 [1904] 1 IR 486.
view of this, Barton J in substance stated the complete argument against half-secret trusts.

9.14 These dicta are not decisive in determining the character of secret trust fraud. It may be argued that there is fraud in retaining property because in treating the property as beneficially one’s own, one commits a breach of promise and that by itself is a fraud committed against the intended beneficiary. However, it is noticeable that the language of the judgments concentrate on the benefits accruing to the legatee or devisee, rather than the loss to the testator’s secret nominee or objects. The emphasis on diversion of the property to the legatee, rather than away from the intended beneficiary, implies that the fraud lies in the legatee’s exploitation of the induced gift retained in breach of promise, rather than in destroying the expectations of the intended beneficiary by allowing the promise to remain unfulfilled.

**Fraud and the half-secret trustee**

9.15 On this definition of fraud, which requires a prospect of gain accruing to the legatee by failure to observe the secret trust, it is difficult to see how there can be any fraud committed by the trustee of a half-secret trust. If the will is to be given its effect, a resulting trust automatically arises which precludes all freedom of action on the part of the trustee. There is no betrayal by the half-secret trustee of his informal promise; the testator, by including a trust in the will, has deprived him of the beneficial estate and thus the means to fulfill it. The problem for the current law in the half-secret trust context is to explain why, in the absence of a formal express trust, the interest of the secret trust beneficiaries is to be given priority to the apparent right of the estate. If the promise is given to the testator, why must the successor to the promisee yield enforcement of the promise to those whose standing is merely that they would have benefited by its performance?
9.16 The attempt was made in *Blackwell v Blackwell* to circumnavigate this difficulty by showing that in some sense the half-secret trustee commits fraud directly on the intended beneficiaries so as to justify enforcing the secret trust in their favour in priority to a restitutionary trust for the testator's estate. We return to this argument later, but it of interest here since it depends on a notion of fraud other than one containing an element of personal gain by the legatee, which is precluded whenever the will itself imposes trusteeship. Lord Buckmaster, with whom Lords Hailsham LC\(^3\) and Carson\(^3\) agreed, suggested a re-statement of the fraud principle with a view to showing its applicability to half-secret as well as fully-secret trust cases on the basis that in both scenarios the faith on which the testator relied is betrayed and the intended beneficiaries are defrauded.\(^3\) His argument was that a fully-secret trustee "cannot defraud beneficiaries for whom he has consented to act by keeping the money for himself".\(^3\) Lord Buckmaster thus identifies the intended beneficiaries of the secret trust as victims of fraud, a point of relevance in determining in whose favour the remedial trust to counter the fraud is to be enforced. However, the character of the fraud is the one urged in this thesis consistent with earlier *dicta* - retention by the legatee of the trust property for his own benefit. Lord Buckmaster justified bringing half-secret trusts within the fraud fold on the basis that "the trustee is not at liberty to suppress the evidence of the trust and thus destroy the whole object of its creation, in fraud of the beneficiaries."\(^3\) This shifted the emphasis away from the legatee's gain, but it is difficult to see just what the half-secret trustee does which defrauds the intended

\(^{31}\) [1929] AC 318, 325.  

\(^{32}\) *Ibid*, 343.  

\(^{33}\) *Ibid*, 328.  

\(^{34}\) *Ibid*.  

beneficiaries if the will is to be given effect according to its terms. It is legal principle coupled with the secretive terms of the will which creates the resulting trust, not the trustee. The reference to a suppression of evidence by the trustee is a rhetorical flourish, since there is no circumstance in which the trustee is in a position to volunteer evidence of the secret trust in order to change the terms of the trust on which he holds the legacy. The identity of the beneficiaries of the trust should be determined in accordance with implications of law arising from the will and for that purpose the secret trust is immaterial. The trustee never possesses any relevant liberty which he abuses: the terms of the will impose trusteeship on him in favour of the residuary legatee or next of kin. It is precisely for this reason that even a wide meaning of fraud is of no assistance. Even if it is fraud to defeat the testator's informal intention, as Chatterton VC maintained in the Irish half-secret trust case *Riordan v Banon*, it is the testator himself, not the trustee, who has defeated that intention; the trustee is bound by the resulting trust which the testator has created by his incomplete will.

9.17 Despite his earlier formulation of the fraud principle in more traditional terms, Lord Buckmaster concluded, with a view to justifying the enforcement of half-secret trusts, that the personal benefit of the legatee was not the sole determining factor in the admission of evidence of the secret trust. His reason lay in the assumption that if a fully-secret trustee disclaimed, equity would prevent defeat of the secret trust even if the disclaimer was not to the trustee's own benefit. Proceeding form

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36 (1876) 10 Eq 469, 478.
38 *Ibid.*, 328; "[T]he legatee might defeat the whole purpose by renouncing the legacy and the breach of trust would not in that case ensure to his own benefit, but I entertain no
a false hypothesis as to the current law, this does not establish Lord Buckmaster’s proposition that the potential for personal benefit by the trustee is not an essential element of the fraud justifying enforcement of the trust. Within the present law, the disclaimer should be prevented from defeating the fully-secret trust on the same basis that the trustee should be prevented from defeating it on acceptance of the legacy. As we noted in chapter 4, a disposition, whether of the right to the legacy or of the legacy itself, is an appropriation of the benefit of the property transferred since the disposition is a usurpation of an owner’s unrestricted right to alienate. Fraud, in the traditional sense of personal fraud, is present in disclaimer of a fully-secret trust as much as in retention of fully-secret trust property in defiance of the trust obligation. There is nothing in Lord Buckmaster’s argument which challenges the proposition that personal fraud is to be found only in those secret trust cases where the bequest could have been accepted for the legatee’s own gain.

The redress for fraud: enforcement of the secret trust

9.18 The preceding analysis has demonstrated that fraud is to be understood in a sense distinct from fraudulent misrepresentation and arises after the will has taken effect, not in procuring the will. It has been shown further that fraud depends on gain to the legatee and is not established by the mere breach of secret promise.39 We turn now to identifying the appropriate mode of redress for fraud: in whose favour is a trust to redress or prevent fraud to be enforced? This thesis maintains that fraud gives rise to a restorative trust in favour of the testator’s estate and discussion primarily focuses on critically reviewing those arguments which may be mounted in support of a binding trust in favour of the secret beneficiary. Ex hypothesi the secret trust
has failed, both as a formally binding express trust, because it was not contained in the will as required for a valid testamentary trust, and as a de facto trust binding in honour, because the trustee has reneged on his promise and committed fraud. Relief is to be granted to the person with the best equity.\textsuperscript{40} Our starting point ought to be the general proposition that on trust failure no one has a better entitlement to the beneficial interest than the trust creator.\textsuperscript{41}

9.19 Establishing that the governing sense of fraud is the narrow one of personal gain and not the wider one of mere breach of the secret promise does not necessarily imply that judicial intervention in respect of the secret trust must be in favour of the testator’s estate. The further question arises as to whether the fraud is committed against the testator, whose property the legatee has acquired and retained, or the secret beneficiary, who is deprived of enjoyment of the property by the legatee’s breach of obligation. The identity of the victim of the fraud is necessarily a controlling factor in determining the nature of the redress equity should provide for the wrong done.

9.20 Were the secret trust formally constituted and valid, the trust obligation would be owed to the beneficiary. That the trust property was bequeathed by another and the promise to perform the trust obligation given to another would be immaterial. However, the very fact that there is no valid express trust where a secret trust is created should caution us against drawing an analogy. The fraud which justifies relief in equity is a fraud arising from exploitation of a statutory requirement for formality. It may not suffice to show the basic mischief which equity sought to

\textsuperscript{39} Contra Hodge, pp. 345 and 348.

\textsuperscript{40} Sheridan, “English and Irish Secret Trusts”, p. 324.

overcome when it first recognised and enforced an express use and to reason from this that *here too* equity must vest a right in the intended beneficiary because the common law provides inadequate redress. The purpose of the statutory formality is to restrict the circumstances in which the intended beneficiary can acquire a right to the enforcement of a trust, for cautionary, channeling and certainty reasons as well as evidential ones. Applying the analogy of a formal express trust in order to favour the secret beneficiary tends to negate rather than uphold the legislative intention in imposing a trust formality. The fraud principle, whether as implied exception to the Wills Act or ancillary assistance, cannot be so broad.

9.21 If the fraud consists in a wrongful retention of the secret trust property, then the victim of the fraud is the party against whom the legacy is retained. In Spence's summary:

> The modern doctrine may be stated to be that civil fraud is cognizable by the Court of Chancery to reinstate the party defrauded [...] 42

This principle finds an echo in the words of Lord Westbury in *McCormick v Grogan*, quoted earlier, asserting that the legatee is a trustee for the party injured by the fraud.43 The question is who has suffered the loss which the constructive trust implied by equity is to reinstate. Theoretically both testator and secret beneficiary can fit this description in different ways. The testator has given to the legatee property which he was allowed to have solely for the purpose of fulfilling the secret trust. The legacy may be retained by the secret trustee against the testator in the sense that the breach of the obligation puts the legatee in a beneficial position which

43 (1869) LR 4 HL 82, 97
the testator has created but did not intend. Equally the fraud may be said to be against the secret beneficiary in the sense that the property enjoyed by the legatee was intended for the beneficiary: by retention in breach of promise the legatee avails himself of that which, if he were not fraudulent, would have been enjoyed by the intended beneficiary. In short, the fraud may be on both those who relied and those who expected. Considered, from the perspective of the property which is to form the subject matter of the constructive trust, the primary loss is that of the testator who was once the beneficial owner and may be reinstated. The secret beneficiary may be reinstated in the sense that prior to breach of secret promise there was an expectation of benefit which the breach destroyed and the constructive trust will restore. This is a reinstatement of economic prospect; but in so far as there was no actual trust immediately before the fraud, it achieves more than a mere reinstatement. The trust grants to the secret beneficiary an enforceable right and property in equity which, in the interval between death of the testator and breach of secret promise, the beneficiary never had.

Fraud on the testator

9.22 We have noted the emphasis of the judicial dicta on the gain of the legatee rather than the loss of the intended beneficiary. Consistent with this it may be argued that the fraud is practised primarily on the testator, as donor of what the legatee takes, rather than the intended beneficiary. That view is supported by more specific observations. In Reech v Kennegal, while he alluded to fraud on the secret beneficiary, Lord Hardwicke LC placed primary emphasis on fraud on the
testator.\textsuperscript{44} In *Lomax v Ripley* both counsel for the plaintiff\textsuperscript{45}, alleging a secret trust void under the Mortmain Act, and the Solicitor-General,\textsuperscript{46} successfully refuting the existence of the trust, considered the question on which judicial intervention depended turned on whether the legatee would be committing a fraud on the testator. Stuart VC seems to have adopted this view.\textsuperscript{47} Even in *Cullen v AG for Ireland*\textsuperscript{48} and *Blackwell v Blackwell*\textsuperscript{49} where the *dehors* the will theory was supposedly articulated, we find fraud expressed in terms which suggest the testator as the ‘betrayed’ party. Lord Westbury in *Cullen* referred to “a right created by a personal confidence [...] the breach of which confidence would amount to a fraud”;\textsuperscript{50} it is the testator, not the secret beneficiary, who has placed confidence in the legatee for the fulfilment of his wishes and who extracted the promise and bequeathed in reliance. Lord Warrington in *Blackwell v Blackwell* referred to “a personal obligation the breach of which would be a fraud on the testator”.\textsuperscript{51}

**Fraud on the secret beneficiary**

\textsuperscript{44} (1748) 1 Ves Sen 123 at 125. See also 1 Wils KB 227 at 228, where only “a plain fraud upon the testator” is noted, and Amb 67 at 68, referring to manifest fraud on the testator but only *breach of promise* to the secret beneficiary.

\textsuperscript{45} (1855) 3 Sm & Giff 48, 62 and similarly at 71 and 73.

\textsuperscript{46} *Ibid*, 63 and 65.

\textsuperscript{47} *Ibid*, 78-79. Unanimity on this point is admittedly less compelling since counsel seemed to have considered the fraud lay in *inducing* the testator to confer on the legatee bounty which he would otherwise not have conferred, rather than repudiation of the secret promise after the testator’s death.

\textsuperscript{48} (1866) LR 1 HL 190.

\textsuperscript{49} [1929] AC 318.

\textsuperscript{50} (1866) LR 1 HL 190, 198. See similarly *Re Keen* [1937] 1 Ch 236, 244 where Lord Wright MR appears to equate fraud with breach of faith and to treat them as synonymous reasons for judicial intervention.

\textsuperscript{51} [1929] AC 318, 341.
Secret beneficiary as collateral victim

9.23 Merely because it is exclusively the testator who has placed confidence in the legatee, it does not follow that the confidence must be owed exclusively to the testator and that its breach cannot be a wrong inflicted on the secret beneficiary.\(^5\) The notion of fraud on the testator is itself ambiguous. A testator may be defrauded in two senses: there is a deprivation of his property (receipt by the legatee for a purpose not fulfilled) and a frustration of his intentions (a deprivation of the person he wished to see enriched).\(^5\) Adopting the latter view, the fraud may be re-stated as defeating the beneficial interest which it was agreed would be created.\(^5\) From here it is a short step to the proposition that the fraud is committed on the secret beneficiary by depriving her of her intended benefit.\(^5\)

9.24 This argument, however, brings us back to the flawed analogy with the formal express trust. The (voluntary) promise is given only to the testator and the duty of

\(^{52}\) Cf. Boardman v Phipps [1967] 2 AC 46, 112D where Lord Hodson considered that a solicitor as agent to a trust and owing fiduciary duties to the trustees as principal might owe them through the trustees to the beneficiaries. The material differences in the secret trust case, however, are that (i) there is no valid express trust and (ii) the fiduciary duty to be extended to the beneficiary is owed to the settlor with whom the beneficiaries have no subsisting legal relationship.

\(^{53}\) See similarly Waters, p. 58.

\(^{54}\) Riordan v Banon (1876) IR 10 Eq 469, 478 per Chatterton VC, approved by Hall VC in Re Fleetwood (1880) 15 Ch D 594, 608; Hodge, p. 344.

\(^{55}\) Hodge, p. 344. See also Feltham, p. 248; David Hayton, “Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?”, p. 219; Todd, p. 203 (all adopting Hodge) and Matthews, “The True Basis of the Half-Secret Trust?”, p. 360 (fully-secret trustee sets up an absolute title in fraud of the intended beneficiaries).
Confidence can be owed only to the testator unless and until a valid trust exists. The absence of any act in relation to the intended beneficiaries precludes the assertion that they have any entitlement to performance before the trust is extant. To argue that there is fraud on the secret beneficiaries thus involves a logical circularity. According to this argument the trust arises in favour of the intended beneficiaries because non-performance of the trust is a fraud against them, and the fraud arises because they are owed a duty of performance; but in the circumstances the duty of confidence owed to the secret beneficiaries can only arise on the testator’s death on the basis of an analogy made with a valid express trust. To the extent of this analogy with a trust formally declared in a will, the secret trust is assumed to be efficacious vis-à-vis the beneficiaries in order to establish the very thing in dispute: that the secret trust is binding in favour of the beneficiaries. By such reasoning the constructive trust is little more than a cloak for the void informal express trust. The promise to the testator, if it has any significance at all, is material only in demonstrating the necessary confidence which transmutes in favour of the secret beneficiaries on the testator’s death.

9.25 The argument is flawed for a related reason. It treats the testator’s intentions, frustrated by the breach of secret promise, as fully effectual not merely between testator and legatee but also between testator and secret beneficiary. Since they are only informally manifested, the testator’s estate cannot be treated as bound by the trust vis-à-vis the nominated beneficiary. To hold otherwise perfects an imperfect gift in favour of a volunteer; it denies to the deceased’s general testate or intestate successor inheritance of the deceased’s right to choose whether to perfect those intentions or seek restitution. The better view, therefore, is that the secret trust

57 See to the same conclusion Penner, para. 6.42.
obligation is owed only to the testator as promisee and that breach of this obligation by the legatee combined with retention of the trust property constitutes a fraud on the testator and his estate.

Secret beneficiary as independent victim

9.26 The secret beneficiary may be cast in the role of independent victim. A person who is wrongfully caused to lose an expectation interest may merit compensation and this may hold even where the loss is of an expectancy under a will. So much was accepted by the dissenting minority in Allen v Macpherson. In contemplating the terms of the trust which they would have imposed on a party fraudulently obtaining a will, the dissenting judges identified as the beneficiary the plaintiff legatee under an earlier will which had been revoked. What this legatee had lost as a result of the fraud practised on the testator was not a vested interest, but a mere expectation of inheriting under a will which the testator could have chosen to revoke of his own volition. Implicitly, Lord Cottenham LC considered he had been wrongfully deprived of the legacy.

9.27 This point does not carry weight, not just because this opinion was a dissenting one, but also because no other rival claim (from the heir and next of kin) was mounted in competition with the plaintiff's claim. Nonetheless the description may hold for the intended beneficiary under a secret trust, so that the breach of promise by the

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58 Contra Bigelow, who argues that fraud must be perpetrated on legal rights and that where A by intentional misrepresentation induces B to alter a will in favour of C to C's prejudice, C cannot sue A on B's death: Melville M. Bigelow, “Definition of Fraud”, 425-426.

59 (1847) 1 HLC 191.

60 Ibid, 222.
legatee-trustee may be said to deprive the beneficiary of her expectation and inflict damage on her. Accepting this position, however, does not necessarily establish that the secret trust should be enforced in favour of the informally agreed beneficiary. It is necessary to show not only that there is damage suffered by the nominated beneficiary, but that this damage was inflicted by conduct which was a *wrong vis-à-vis* the beneficiary. Lord Langdale MR in *Allen v Macpherson* sought to do this by asserting there had been a fraud on the plaintiff legatee as well as on the testator, but he did not explain why this is so. There was no suggestion that the misrepresentation inducing the will which revoked the legacy to the plaintiff was made to anyone other than the testator or that anyone other than the testator relied on it. It follows that the “fraud” perpetrated on the legatee was not the same as that inflicted on the testator, who was actually deceived. It is not clear what precisely was the nature of the fraud on the legatee. In any event, assuming that these distinct frauds cannot both be redressed in favour of a trust for the plaintiff legatee (or, correspondingly, the beneficiary under a secret trust), there is the further question of why the fraud on the legatee (or beneficiary) is to be remedied in priority to the fraud on the testator. As soon as the nature of the *wrong* is considered, we are brought back to the breach of promise and the independent claim of the would-be legatee or secret beneficiary falls under the shadow of the testator’s freedom from imposition or right of confidence. Where the wrongful conduct is also a wrong on the testator, the most that can be said in the secret beneficiary’s favour is that a person who loses a potential interest by reason of fraud perpetrated on another constitutes a secondary victim of the fraud.

*Profiting by fraud on failure of the secret trust*

9.28 Although the secret beneficiary has no independent claim against the trustee for compliance with the confidence owed to the testator, the fraud certainly amounts to a wrong which inflicts damage on the secret beneficiary. Is there anything exceptional in secret trust fraud or its context which displaces the usual principle that the remedy should follow the right, so that relief is to be granted for the protection of the rightless volunteers who are in fact damaged? An argument based on the rule in *Huguenin v Baseley* was put forward by Lord Warrington in *Blackwell v Blackwell*. The contention was that if the property falls back to the testator’s estate, “the residuary legatees [or next of kin] cannot take advantage of and thus make themselves parties to [the trustee’s] [...] fraud”. It would follow that since no one could take property which would pass to the estate by virtue of the trustee’s fraud, the property would have to be held, for want of other parties, for the intended beneficiary. According to this argument, it is not necessary that the secret beneficiary has their own distinct claim to relief; it is merely necessary that the rule in *Huguenin v Baseley* preclude the only other viable resolution to the problem of fraud - a restorative trust.

9.29 The argument is attractive, but it is wrong to consider a restorative trust solution excluded on this basis. In the half-secret trust scenario, in issue in *Blackwell v Blackwell*, there is no scope for fraud by the trustee, as we have already noted. The trustee does not commit fraud in breaching the terms of the half-secret trust and acting as trustees for the testator’s estate. There is no fraud in the sense adopted in this thesis, because the will excludes personal gain by the legatee. There is no fraud in the wider sense of breach of promise because the legatee is bound by the

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62 *Contra* Elias, p. 58.
63 (1807) 14 Ves Jun 273.
64 [1929] AC 318, 342.
directions and implications of the will and must hold on a resulting trust, in
fulfilment of the testator's *formal* instructions which take priority over the *informal*
instructions in the secret trust. The secret promise is frustrated by the testator's own
act, not breached. Consequently, the residuary legatees or next of kin taking under
the resulting trust on failure of the void (half-secret) trust are not parties to any
fraud. They simply claim the beneficial interest which the will by implication gives
them, secret trust or no secret trust.

9.30 Turning to fully-secret trusts, Lord Warrington's argument falters here too. If a
restorative trust is imposed to prevent the legatee from retaining the property in
breach of his undertaking, the beneficial rights acquired by the testator's estate are
not the profits of the legatee's fraud. This is true even where (as this thesis urges)
the trust arises *in consequence* of the legatee's fraud in dishonouring his promise, as
much as if an automatic resulting trust were to be imposed on the testator's death to
prevent fraud by the legatee. The rights of the residuary legatee or next of kin
represent compensation for the fraud, not its product. The application of *Huguenin v
Baseley* would proceed on a misconception. The residuary legatee or next of kin is
not a third party to the transaction. They merely stand in the testator's shoes as
successor in title to his rights and claim the benefit of the specific redress for fraud
afforded to the testator's estate. The argument of Lord Warrington overlooks the
fact (which he had himself stated65) that the testator is the victim of the fraud. Re-
absorption of the legacy into the estate is only the satisfaction of that wrong.

_Summative analysis_

65 _Ibid_, 341.
9.31 The predicament of the secret beneficiary suffers from an evident weakness. She is a mere volunteer who obtains no vested interest in equity until a trust is constituted in her favour - the very point in issue. This tends to preclude an assertion by the beneficiary of fraud based on breach of the confidence owed by the legatee to the testator. The beneficiary is entitled to redress at most derivatively, by a specious analogy, and subject to the superior claim of the testator’s estate.

**Judicial redress for fraud in obtaining a will**

9.32 The preceding discussion noted the minority view in *Allen v Macpherson* favouring the beneficiary whom, according to his true intentions, the testator intended to benefit and whose benefit was obstructed by the fraud. Putting to one side the objections just raised, the minority view in *Allen v Macpherson* represents one strand of support for a binding trust in favour of the intended beneficiary. Before safely concluding that fraud in the secret trusts context gives rise to a merely restorative trust, it is necessary to consider the strength and limits of that minority view to determine whether - notwithstanding the apparent theoretical shortcomings - there is a case for analogous treatment of a legatee’s breach of secret promise. In this section, therefore, we consider what remedy is appropriate where a will is procured by actual fraud. For present purposes it is possible to disregard the exact status of the minority view in *Allen v Macpherson* before and after the Judicature Act: our interest is only in the analogy. The task is to identify who should be the proper beneficiary under a trust imposed on someone who wrongly obtains a will and to ascertain the reason which justifies imposing a trust in this manner.

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9.33 Actual fraud, like duress for a coerced will, vitiates the will against the party who has fraudulently induced the testator to make it. It strips from the will the necessary animus testandi and the will may be set aside. Similarly, where the fraud has been practised to prevent revocation of a will, the unrevoked will is rendered void to the extent of the fraud. In either of these cases the fraud would justify revocation of the probate with respect to the fraudulently obtained benefits in the will. The outcome for the destination of the property affected would depend on the type of disposition which was rendered void and whether there had been a previous will which could be admitted to probate. If a specific legacy was struck out of the will on grounds of fraud, the personalty would fall into residue; residuary personalty fraudulently obtained might pass in accordance with a previous will if the revocation of the gift of residue in the earlier will was a consequence of the execution of the fraudulently induced disposition. The probate court could revoke probate of the disposition in the fraudulently obtained will and grant probate for the

66 Hacker v Newborn (1654) Styles 427 per Rolle CJ. Duress will also vitiate the will against those for whom the coercer procures a benefit: Swinburne, fol. 241. This is a correct application of the principle recognised in Huguenin v Baseley, since the constructive fraud of the coercer procures the legacy for the third party.

67 Swinburne, fols 10 and 242. His exclusion of well-intentioned deceit of testators to dissuade them from favouring immoral persons at the expense of the moral and needy (ibid, fols 242-242) is, however, an unwarranted attempt to found the law on principles of social engineering.

68 Hence, a will executed by a testator after a deliberate misreading on the truth of which the testator relied is not the will of the testator: see Stephenton v Gardiner (1725) 2 P Wms 286 per Lord King LC, obiter.

69 See Lord Donegal’s Case (1752) 2 Ves Sen 407 per Lord Hardwicke LC, obiter.

70 Swinburne, fol. 273. The point is expressed in relation to duress, but duress and fraud were rightly treated by Swinburne as comparable in this context: see ibid, inter alia at fol. 242.
earlier will as appropriate. If no such previous will existed, a fraudulently obtained gift of residue should pass to the next of kin.

9.34 If equity had developed for itself a jurisdiction to impose trusts for fraud, then any trust imposed ought to have granted substantively the same redress as would have been obtained if probate was formally revoked in the ecclesiastical courts. Where the previous will ought to have been admitted to probate in lieu of the forged will, the trust law solution in equity which matched in beneficial terms the outcome of the probate proceedings would have imposed a trust on the beneficiary of the fraudulent will to give effect to the previous will. The trust would be a performative one, intended to give effect to the real testamentary intention of the testator so far as these were contained in an instrument which should have been admitted to probate. That would necessarily be so because the whole purpose of the trust would be to implement the result of a more informed judicial decision on probate and the function of probate is to ascertain what formal instruments give effect to the real testamentary intention of the deceased.

9.35 It may be helpful here to consider what outcome would arise if the function of the trust was merely restorative, calculated only to deprive the fraudulent party of his benefit under the will and return it to the testator’s estate. In that case, where a fraudulently procured will revoked an earlier testamentary disposition, the trust terms could not merely replicate the provisions of the earlier will. The trust depends on the title of the beneficiary under the probate of the fraudulently obtained will. Aside from intervention for fraud, equity would leave the operation of the proven will otherwise unaffected. This would include the revocation of the earlier will contained in the fraudulently obtained will. Thus, the fraud would justify the prevention of gain by the deceitful beneficiary, but it would not authorise trust terms which contradicted the will on which the trustee’s title was founded. If fraud was
cognisable to effect restitution and not to implement the testator's 'real' intention, then equity would be bound by the fact that the testator had revoked his earlier will. The beneficial interest under the trust imposed for fraud in obtaining the will would therefore fall to the residuary legatee under the proven will or the testator's next of kin, as the case may be. Such a trust would not benefit someone who would have taken under an immediately prior will unless they took in this other capacity.

9.36 In the historic cases where a jurisdiction to impose a trust for fraud in obtaining the will was assumed, the court rightly leaned towards the performative approach. Here it is important to distinguish between the rhetoric and the resolution of some of the judgments. In *Barnesly v Powel*[^71] Lord Hardwicke LC seems to have emphasised that equity's role was to prevent the fraudulent party from profiting by his wrong doing. He contrasted setting aside a will of personalty for fraud (a matter within the probate court's exclusive jurisdiction) with "taking from the party the benefit of a will established in the ecclesiastical court by his fraud" in obtaining probate.[^72] The relief in equity was intended to deprive the fraudulent party of his gain[^73] and this limited object is suggestive of a restorative rather than a performative solution. The observations are all the more remarkable because of their context. Where fraud is exercised in order to procure *probate*, the fraud is practised on the next of kin or on the legatees entitled under other testamentary instruments whose rights are improperly prejudiced. This is distinguishable in remediable terms from fraud on a testator and justifies a performative solution to protect the expectant rights which other legatees were wrongly induced to prejudice. In fact in *Barnesly v Powel* the plaintiff who took under the imposed trust had been the residuary legatee under a

[^71]: (1748) 1 Ves Sen 119; (1749) 1 Ves Sen 284 (Lord Hardwicke LC)

[^72]: 1 Ves Sen 284 at 287.

[^73]: See similarly, *ibid* at 289.
previous will which would have taken effect but for the forgery. The forged will was thus treated as *non scripta* in beneficial terms and the effect of the ostensibly revoked will was restored. A solution which did justice to the plaintiff’s case in this manner (as opposed to a trust established in favour of intestate successors) was performative, despite the implication from the *dicta* in the case that a more limited restorative objective was at work.

9.37 Earlier and later case law supported the performative approach, applied in *Barnesly v Powel*, where it is the will rather than the probate which is obtained by fraud. In *Kerrich v Bransby* the earlier ‘true’ will had left all the testator’s estate to the plaintiff, who was the testator’s father and not the heir or next of kin. Lord Macclesfield LC directed the defendant to convey to the plaintiff. This involved a rejection of the argument in favour of a restorative solution which was in fact raised on behalf of the heir in respect of freehold property devised under the fraudulently obtained but proven will. Since the jurisdiction to impose a trust was denied by the House of Lords, the correctness of Lord Macclesfield LC’s decision on this point was not addressed. However, the same approach was expressed in *Allen v Macpherson* in Lord Langdale MR’s decision at first instance and in Lord Cottenham LC’s dissenting opinion in the House of Lords (although in that case there was no rival claim from the intestate successors): the trust to be imposed on a party fraudulently obtaining a will was for those persons who would have been entitled to it if that fraud had not been practised. The trust was therefore intended to give effect to the testator’s true intentions and, on the facts, would have benefited

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74 (1727) 7 Bro PC 437.
75 *Ibid*, 442.
76 (1841) 5 Beav 469 at 483, where it is clear that depriving the fraudulent party of their benefit under the will is merely a first step; (1847) 1 HLC 191 at 220.
the plaintiff who was to have taken under the earlier instrument revoked by the fraudulently obtained will.

Constructive fraud in obtaining a will

9.38 Additional support for this analysis of performative trust solutions can be found by considering other wrongs inducing a will, falling short of actual fraud, where the wrongdoer acquires an interest under the will. Particularly helpful here are the decision of the House of Lords in Bulkley v Wilford\(^77\) and the persuasive Irish authority of Segrave v Kirwan\(^78\) which their Lordships approved. In these two cases the wrongdoer was a legal adviser and the wrong which resulted in a will of benefit to the lawyer was a negligent breach of the professional duty of care. In Segrave v Kirwan a barrister prepared a will for a friend in which he was appointed executor. Contrary to the testator’s intention, who merely wished the barrister to undertake the onerous office, the appointment entitled the barrister under the then prevailing common law to the residuary personality which was not disposed of by the will. The barrister professed his ignorance at the time of preparing the will of the doctrine favouring executors,\(^79\) but after the testator’s death he insisted on the rights granted

\(^77\) (1834) 8 Bligh NS 111; 2 Cl & Fin 102. Lord Langdale MR in Allen v Macpherson made the same comparison: see (1841) 5 Beav 469 at 483. As a justification for intervention, the analogy was misleading for the reason already given: as in breach of a secret trust, the fraud involved in Bulkley v Wilford is a constructive one and falls outside the ecclesiastical jurisdiction, whereas actual fraud fell within it. However, as regards remedies predicated on an equitable ground for intervention, the analogy is apposite: in each case the fraud (be it deceit or, as in Bulkley v Wilford, negligence within a fiduciary relationship) is the reason why the testamentary benefit is obtained, in contrast to the secret trust cases where the fraud is post mortem.

\(^78\) (1828) Beatty 157 (Hart LC).

\(^79\) The barrister’s claim, while in any event no defence to the failure to meet the required professional standard of care to which a testator is entitled, was flatly implausible. If the
by the will. Hart LC held that the barrister was a trustee of the residue for the next of kin, applying the principle that a lawyer ought to know the effect of making himself an executor in a will of personalty which did not dispose of residue, that he was under a duty to inform his client of this and that consequently he was not to benefit from his professional default. The decision rested not on actual fraud, but on the removal of an unauthorised profit acquired by breach of a fiduciary duty of care. The trust solution was restorative, being directed merely at preventing the gain of the barrister. On the facts of the case there was nothing at which a performative solution might grasp. In a former will, the testator had bequeathed the whole of his estate to his illegitimate daughter, but a trust in favour of the illegitimate daughter instead of the next of kin would not have been justified. The testator intended to provide for the daughter by a codicil, so that it is evident there was no causative connection between the revocation of the former will on the one hand and on the other hand the defendant’s equitable wrong - his failure to advise that the undisposed of residuary personalty would pass to the executor. He actually desired the revocation of the last will since he looked forward to executing a fresh testamentary instrument in the daughter’s favour. The testator simply had no

barrister had assumed he had no right to the surplus personalty, it is barely imaginable that he did not tax himself with the question who would be entitled to the residue. If he was not entitled, the only alternative was the next of kin, in which case it is an incredulous wonder that the barrister did not advise his friend of this fact and the possibility of expressly bequeathing the residue if he was dissatisfied with that prospect. It is hardly to be supposed that a barrister would hope to draft the will as an exhaustive list of specific bequests governing all the personalty, down to the testator’s last buttons, so that the question of residue would not arise.

80 Beatty 157 at 166. See also 8 Bligh NS 111 at 138-139; 2 Cl & Fin 102 at 172-173, where Lord Eldon explains the decision.

81 Beatty 157, 162; see also Lord Eldon’s observation on the case, cited in the preceding note.
formally manifested positive intentions as to the disposition of the residue which might be effected by the constructive trust. A restorative solution was inevitable.

9.39 In *Bulkley v Wilford*, in contrast, the trust was imposed to remedy the wrong done by the lawyer for performative ends. The testator had devised his realty to his wife. Subsequently he contracted to sell part of his Ranelagh estate. Title being complicated, the purchaser insisted that a fine be levied to ensure it was clear of previous beneficial interests. On the advice of Bulkley, who was both the testator’s solicitor and his heir, a fine was levied on all the testator’s realty. The effect was to destroy the devise to the wife.82 Bulkley did not advise the testator of this and subsequently inherited the land. Lord Lyndhurst LC directed Bulkley to convey to the widow and the House of Lords affirmed that decision, applying the principle of *Segrave v Kirwan* that the solicitor ought to have given sound and sufficient advice, was under a duty to inquire whether his client had made a will and was not to gain an advantage out of his failure of professional duty.83

82 The fine operated as a conveyance so that the title to the land held by the testator at his death was derived from a transaction subsequent to his will. All his land, in relation to the devise, became after-acquired property. Prior to the enactment of s. 24 of the Wills Act, which directed that a will should speak from death, a devise was effective only in relation to titles owned at the time of the will, so that the devise to the wife was left to clutch at the air. The particular problem of re-conveyances of property owned before execution of the will was addressed by s. 23 of the Act.

83 8 Bligh NS 111 at 143 and 145; 2 Cl & Fin 102 at 177 and 179 per Lord Eldon. Lord Wynford stated the principle in terms of intentional self-advancement by a lawyer, since a jury directed by Leach VC to decide the issue in the Court of King’s Bench had concluded that Bulkley deliberately omitted to inform the testator of the consequence of levying the fine. Lord Wynford considered it unnecessary to determine whether Bulkley would have been liable for mere negligence. See 8 Bligh NS 111 at 151 and 156; 2 Cl & Fin 102 at 1184-185 and 189. However, Lord Wynford did incline towards the view that it was not as onerous to order an advantage acquired by negligence to be given up as it was to order compensation (*ibid*) and he expressed agreement with Lord Eldon (see 8 Bligh NS 111 at 148; 2 Cl & Fin 102 at 182). The conclusion that Lord Eldon’s
Bulkley v Wilford as exception to the principle in Allen v Macpherson

9.40 Before considering the validity of the performative trust solution effected in Bulkley v Wilford, two points of note emerge which tend to confirm conclusions reached in our earlier analysis of fraud in equity and secret trust fraud in particular. Firstly, the decision in that case has a bearing on the limits of the fundamental principle of Allen v Macpherson. In contrast to Segrave v Kirwan the solicitor’s negligence in Bulkley v Wilford did not directly induce a beneficial testamentary disposition in his favour. Nor did the final testamentary instrument misstate the testator’s true intentions. Indeed, had a comparable problem arisen in regard to a will of personalty, it could not have been redressed by revocation of probate in regard to any final testamentary instrument. Even if the solicitor’s fraud had been actual rather than constructive, it was of a type for which only an equitable court could give relief. The solicitor’s wrong was not causative in obtaining the will, so that the validity of the will was not in issue, whereas rejection of the validity of the will was the only means by which an ecclesiastical court might grant relief against fraud. What the solicitor had wrongfully done was to induce the unintended revocation of the will by a non-testamentary instrument. His misconduct was causative in obtaining the intestate inheritance.84 Moreover, there was no testamentary act of

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84 The case is thus analogous to the fraud after the testator’s death by the next of kin who agrees to act as a secret trustee and thereby induces the testator not to make a will. The only difference is that the constructive fraud is committed here before the testator dies, by negligently failing to advise of the necessity of a new will, whereas the next of kin
revocation by the testator which a probate court might have set aside. *Bulkley v Wilford* thus demonstrates, by analogy, one instance where actual fraud could be committed on a testator *ante mortem* and the matter would fall outside the ecclesiastical jurisdiction and, consequently, the restriction of the rule in *Allen v Macpherson*. The revocation here was indirect. The will was not deprived of formal efficacy which might be resuscitated by another court of competent jurisdiction. It was deprived only of a practical effect by virtue of the common law rule of construction for devises. In those circumstances equity might impose a trust to redress actual fraud which had induced an intestate succession and which had not involved direct revocation of a formal will. Such relief could be seen as buttressing the justice provided in other cases where probate of the will could be revoked for actual fraud in procuring the will. Equally, however, it might be argued that the legitimacy of this particular trust imposed for fraud in procuring an inheritance was a reminder of the potential benefits of a general concurrent jurisdiction, *contra* *Allen v Macpherson*, to provide justice whenever and howsoever succession was procured by fraud.

*Bulkley v Wilford* as confirmation of the profit-based meaning of fraud

9.41 The second point of note about the decision in *Bulkley v Wilford* is its tendency to support the view that secret trust fraud turns on the existence of benefit by the secret trustee. Both this decision of the House of Lords and the earlier decision of Hart LC in the approved Irish case of *Segrave v Kirwan* establish that a person can be liable to another where in breach of a duty of confidence owed to that other they negligently advise a transaction from which the adviser derives a benefit. Pollock has justified this principle on the basis that someone should not profit from their commits fraud *qua* secret trustee only *post mortem* when the secret promise is
slackness when they have professed competence (as a solicitor does in advising a client). It is possible to draw an analogy between this principle and the secret trusts doctrine. A legatee who promises a testator that he will act as a trustee dehors the will puts forward their own competence to hold trust office - an invitation to the testator to rely on their performance of the trustee duty. Admittedly the solicitor is in a fiduciary relationship to the testator, which is why the self-advancing default of the agent is to be redressed by equity, but no less is true of the prospective legatee who volunteers to act as trustee and enters into an obligation of confidence for no reward. Comparable to the negligent advice of a solicitor to the testator, the promise of the secret trustee as a profession of competence induces a transaction which benefits the legatee, a benefit which is realised when the legatee reneges on the promise. If this analogy holds, the necessity for judicial remedy clearly depends on the opportunity of the legatee to profit from the secret trust if he declines to perform his promise.

9.42 There is, however, an alternative mode of analysis by which the content of the principle in Bulkley v Wilford may be seen as indicative for the secret trusts doctrine and confirming a notion of fraud in secret trusts which clings to the potential benefit accruing to the legatee. It may be argued that both of these equitable developments - the secret trusts doctrine and the principle in Bulkley v Wilford owe some analogy to common law actual fraud as well as to each other. We have already seen that an analogy can be forged between actual fraud and the secret trusts doctrine and that this implies that fraud depends upon trustee gain. The same emerges in the analogy between Bulkley v Wilford and actual fraud. Pollock explains this connection as based on an underlying note of judicial incredulity as to the honesty of people breached.

85 "Nocton v Lord Ashburton", p. 94.
making blunders operating in their own favour. Self-interested negligence is suspicious and is placed in equity on a par with intentional wrong-doing. In other words, having produced a suspicious outcome, the party who has failed to discharge their duty properly is treated as if they had defaulted out of a bad conscience, regardless of whether in fact the solicitor only misadvised out of negligence or whether the secret trustee induced the secret trust innocently without thought of future gain. The suspicion depends, however, on the coupling of default in discharging the agreed duty with the element of self-gain. The breach of duty in Bulkley v Wilford out of mere negligence is not enough, any more than the (analogous) mere breach of promise by the secret trustee. If the secret trustee’s abandonment of his undertaking is to be treated as if it were a species of dishonest conduct, equity’s suspicion of dishonesty must be fostered by benefit resulting to the legatee from the neglect of his duty to the testator.

Bulkley v Wilford and performative trust solutions

9.43 Turning to the identity of the beneficiary under the trust imposed in Bulkley v Wilford, no distinction is to be drawn between fraud procuring a will and fraud procuring intestate succession. The same material element - a fraud ante mortem on the deceased inducing the inheritance - is present, although in this case the fraud was constructive, taking the form of negligent breach of professional duty, and would not have invalidated the will either at law or in the ecclesiastical court. The element which determines whether the trust is to be performative or restorative is the existence or absence of a formal testamentary intention revoked by the fraud. The redress in equity for the fraud is to treat the revocation as if it had never occurred and to allocate the beneficial interest accordingly. Whether this produces a

86 Ibid.
trust for a third party or merely an intestate successor necessarily turns on the simple matter of whether there is any formal testamentary instrument which would have taken effect if the beneficially nullified revocation had never taken place. In Bulkley v Wilford the devise to the wife was formally executed; the negligence of the solicitor merely robbed it of its substantive significance. A performative trust was fully justified. The conveyance to the widow which was ordered by Lord Lyndhurst LC, and affirmed by the House of Lords as the execution of a trust for the devisee under the will,87 was in keeping with those principles. It was functionally the same as if the heir had improperly procured a formal revocation of the devise: the conveyance directed by the court merely gave effect to an earlier formal testamentary instrument which had been undermined by the heir’s wrongdoing. There is nothing in Bulkley v Wilford which implied a trust in such circumstances should ever give effect to informal testamentary intentions; its sole function was to undo the consequence of a negligently induced revocation by an excessive inter vivos transaction. This is reflected in Lord Eldon LC’s opinion which asserts that the trust is “for the benefit of that person who would have remained entitled to it if you had known what you as an attorney ought to have known”88 and, one may add, if that knowledge had been used. Lord Eldon LC’s formulation presupposes some expectant right - whether by operation of law or some ambulatory instrument - which is prejudiced by the attorney’s act of negligence. This is very different from the case where the wrongful conduct has entirely forestalled the creation of an instrument which would generate actual or expectant rights. The formulation would imply a restorative trust if, as was the case on the contrasting facts of Segrave v Kirwan, there had never been a formal devise which was prejudiced by the professional breach of duty.

87 See 8 Bligh NS 111 at 148; 2 Cl & Fin 102 at 182 per Lord Eldon LC.
88 8 Bligh NS 111 at 143; 2 Cl & Fin 102 at 177.
The implications for secret trust fraud

9.44 The fact that a performative solution could be warranted in both the preceding contexts does not imply that a performative solution is correct in the case of fraud giving rise to a secret trust. In fact it is possible to distinguish between two classes of cases and it is this very distinction which points to the opposite solution for secret trust fraud. Where a will or inheritance is obtained by actual fraud, a trust to effect a previous will would be justified because the fraud vitiated the entire will and the constructive trust implements a prior will which, if appropriate litigation had been undertaken, would have been admitted to probate as the true will of the deceased. A performative solution in this instance grants no more than could have been obtained by another route through the courts. The same solution is justified for those cases of either actual or constructive fraud where the testator was induced to revoke a valid will in circumstances in which a probate court could not provide redress by disregarding the revocation and giving effect to the revoked will. Bulkley v Wilford is an example of this type of case where the fraud effected a substantive but not a formal revocation of the will, altering its effect but not disturbing its validity. A performative solution by way of constructive trust in this case prevents an injustice arising from the formally limited horizons of the probate court. This deficiency arises either because the probate court has a short-sighted regard for pertinent actual fraud (as where the fraud has induced an inter vivos act which impacts on the will but is not relevant for probate purposes) or because the probate court takes too narrow a view of fraud as such (and thus fails to act on constructive fraud). There remains as a point of reference the fraudulently revoked testamentary instrument. Equity is always able to show that if it had a properly tender regard for conscience, the probate court might have adopted a will setting out the terms which equity has decreed.
9.45 On the other side of the divide lie all other cases of constructive fraud in equity, including *Segrave v Kirwan* and secret trusts, where the testator's dispositive intentions are never formalised in a testamentary instrument cheated of its place in probate by the fraud of the legatee. In the secret trust scenario the intentions of the deceased contained in the informal agreement cannot be admitted to probate because they do not comply with the Wills Act. The constructive fraud does not vitiate the formal will because the fraud is not of the deceit type; it is of a lesser order which is *post mortem* and presupposes the validity of the will. There is no formal instrument, admissible to probate, which represents the true will of the deceased and there is thus no means by which a probate court, even assuming it had a more generous regard for fraud, might give effect to the secret trust intentions. For these reasons the trust enforced by equity to prevent secret trust fraud can only properly assume a restorative character.

9.46 More generally, while a performative solution is justifiable where the fraud procured the revocation of a will, it cannot be adopted to impose a trust for giving effect to a testamentary intention in favour of the plaintiff that was never formalised. This would be the case where the fraud - whether actual or constructive - had been practised in order to induce a testator *not* to make a will, thus ensuring an intestacy from which the defendant would gain, or in order to prevent alteration or revocation of an existing will which favoured the defendant. The performative solution must be bounded by the limitation that the trust should not give effect to a testamentary intention that has never been formally expressed and could not be countenanced in probate. The function of imposing a trust is only to replicate the effect of revoking probate of a will whose retention was fraudulently induced or to nullify the benefit of rights of intestate succession wrongly secured. The fraud having forestalled the creation of a formal will or codicil, no instrument exists
which could be admitted to probate. There can be no constructive trust for a party who would have benefited if a will had been made. In this scenario, restorative relief is the only redress properly available in equity. Where a residuary legacy is preserved by fraud, the legatee should hold it for the next of kin in replication of the beneficial effect of expunging that legacy from the probate. Equally, where an intestate successor has forestalled a will to his advantage, the next of kin cannot be allowed to keep the spoils of their wrongdoing. The logic of a restorative remedy is to vest the beneficial interest in collateral members of the entitled class of next of kin or, if none, the members of the next class.

9.47 This analysis gains support from the report of Lord Loughborough LC in Ex parte Fearon. The testator had appointed Fearon his executor, who stood entitled under the will to the remainder interest in the unallocated residuary personality. Evidence tendered by the next of kin, the testator’s sister, established that Fearon had exercised coercive undue influence over the testator so as to obstruct the execution of a codicil which would have vested the remainder interest in the testator’s illegitimate daughter. Accepting that evidence, Lord Loughborough LC reported, on a petition for a commission of review, in favour of the sentence of the Court of Delegates which had set the entire will aside. This outcome was not sound in principle. It was only the grant to the executor of the remainder interest in the residue which had been procured by constructive fraud; the testator’s animus testandi was in all other regards unimpeached. The Court of Delegates, however, could not uphold the will while at the same time declaring the executorship to be a

89 Contra T. G. Youdan, “Acquisition of Property by Killing”, (1973) 89 LQR 235, 257-258, suggesting a performative constructive trust to prevent unjust enrichment in favour of the party the testator intended to benefit where the unlawful killing prevented the testator from changing his will.

90 (1800) 5 Ves Jun 633 (Lord Loughborough LC).
bare one: the beneficial entitlement of the executor was a matter for the temporal
courts and outwith the ecclesiastical jurisdiction. The resort to the more drastic
conclusion that the impeaching factor undermined the entire will is therefore
explicable, though not justifiable. The desired outcome could have been reached if
the will was undermined as to the appointment of the executor, so that
administration could have been granted with the (otherwise valid) will annexed.91
However, that would still have been unsound in principle, since it was the gift of
residue and not the appointment as executor which was procured by constructive
fraud. The proper solution would have been for the will to be upheld, but for the
executor to be declared a trustee of the remainder. This was recognised, implicitly,
by Lord Loughborough LC, but the solution was precluded, as he noted, by the rule
in *Kerrich v Bransby* preventing a court of equity from having regard to fraud in
procuring a bequest.92 It excluded by analogy relief based on coercive undue
influence or any other matter which impeached the validity of the will and thus fell
within the competence of the probate court. It is clear that Lord Loughborough LC
would otherwise have imposed a trust of the remainder interest if the will had been
held valid. Such a trust would have provided relief for undue influence in
preventing the formal execution of a codicil. If a restorative trust were imposed, the
benefit of the remainder would have fallen to the next of kin; if a performative trust
were upheld, the illegitimate daughter would have taken. Lord Loughborough LC in
fact reported in favour of allowing the entire will to fail, to the advantage of the next
of kin. His expression of regret at this solution, however, and his lament that
*Kerrich v Bransby* tied the hands of justice seems to have been directed not at the
fact that the next of kin would take the remainder in preference to the illegitimate

91 This had been done in *Barton v Robins* (1775) 3 Phillim 455n (discussed in chapter 8 n. 6), which was cited in the Court of Delegates.

92 5 Ves Jun 633 at 647.
daughter, but at the necessity for the whole will to suffer in order to prevent the 
executor profiting from his wrong in procuring one part of it. Even when 
considering an alternative trust law solution to the problem before him, Lord 
Loughborough LC’s attention was directed towards preventing the gain of the 
executor rather than upholding the testator’s informal testamentary intentions.

9.48 It is for this reason that the decision in the probate case of Betts v Doughty93 must 
be considered with care. The last will of the deceased was dated in 1853 and left her 
property equally to the plaintiffs (children of the testatrix’s sister) and the 
defendants and interveners (children of two of her brothers). In 1874 the testatrix 
gave instructions for the preparation of a will to exclude the plaintiffs and got so far 
as to approve a draft. The testatrix, who was 80 years old, was allegedly coerced 
into not executing this will by the plaintiffs’ threat that if she did she could no 
longer reside with them. The defendants sought leave to amend their defence to pray 
that the plaintiffs be declared trustees of their shares under the 1853 will, by reason 
of their undue influence over the testatrix, in favour of the defendants and 
interveners. The court allowed this amendment. That decision appears to endorse 
the proposition that a trust may be upheld for the benefit of persons whose claim 
rests on an informal instrument inadmissible to probate. However, such authority as 
the case provides on this point is extremely weak. The court was only allowing an 
amendment to pleadings; no trust was actually declared, the case being 
compromised. The only order was a confirmation of the validity of the 1853 will.

9.49 Moreover, it is by no means clear that decreeing trusteeship of the plaintiffs’ shares 
in favour of the other parties would have been a performative solution. If the 
defendants had been able to show coercive undue influence as they alleged, they

93 (1879) 5 PD 26.
would have established that the gift in favour of the plaintiffs was not the testatrix’s true will. In terms of revocation of probate, the proper remedy would have been to except this gift to the plaintiffs from probate. Whether or not a trust solution to achieve that object should have created an intestacy as to the plaintiffs’ beneficial interest in the estate is not apparent, since the exact terms of the will are not stated in the report. If the plaintiffs took distinct shares under the will, revocation of probate as to those shares would have created a partial intestacy. If, however, the testatrix had bequeathed a class gift, revocation of the plaintiffs’ interests might simply have augmented the interests taken by the other parties, so that a trust of the plaintiffs’ shares as the defendants prayed would have replicated a probate solution.

9.50 In any event, it is possible that on the particular facts of Betts v Doughty the same outcome might have resulted whether a restorative or a performative trust solution were imposed. This is because the plaintiffs, defendants and interveners were all nephews and nieces of the testatrix, as well as her legatees, and collectively they may have constituted her next of kin. (The fact that the testatrix was residing with the plaintiffs suggests at least that she had no closer relations able to support her in her old age.) If the plaintiffs’ beneficial share resulted to the testatrix’s estate, the plaintiffs, defendants and interveners would have been entitled to the lapsing share under the intestacy rules. Further, if the plaintiffs were not to be permitted to take any advantage procured by their fraud, they might be denied their rights qua next of kin. This would apply recursively the rule against personal gain by fraud. The property would pass to the next of kin excluding the plaintiffs and thus to the defendants and the interveners. By this means, albeit for different reasons, the entire benefit of the plaintiffs’ half-share would ultimately have vested in the defendants and interveners, just as if a trust to effect the draft of the will had been imposed. This is a reminder of the fact that it should not be assumed a failure to give effect to the informal wishes of the deceased will necessarily produce an undesirable
outcome. Circumstances may be such that the same outcome is reached by different principles.

**Actual fraud in procuring secret trusts**

9.51 Before concluding on the subject of fraud, it is necessary to address the question of whether a distinction should be drawn in secret trust law depending on whether the legatee has deployed fraudulent misrepresentations (or, by parity of reasoning, coercive undue influence) in inducing the testator to create the secret trust. The predominant view of North American commentators is that whereas a secret trust ought ordinarily to give rise to a resulting trust, enforcement of the intended trust is justified where the legatee's deceit prompted the existence of the secret trust.94 Should actual deceit in procuring the secret trust preclude the testator's successor from benefical entitlement? It has been argued here that actual fraud can only justify specific enforcement of the testator's true wishes where these are in a form susceptible to admission to probate. English law does not at present distinguish between cases where the testator was and where he was not deceived into establishing the secret trust. As regards specific enforcement of the secret trust, no distinction ought to be made. Whether the testator is or is not deceived, there is no formal will containing the secret trust and it is this alone which should govern whether or not equity can imply a performative rather than merely restorative trust. This does not exclude possible relief for the intended beneficiary in tort law, but it is no reason to effect a trust of the legacy to satisfy an informal will and override the claim of the estate to restitution.

94 See sources cited in chapter 4 n. 19. See similarly Penner, para. 6.63.
9.52 One argument distinguishing between fraudulent and innocent inducement of secret trusts may be formulated by resort to the rule in *Huguenin v Baseley*. This seeks to justify a performative trust on the basis that the testator's successor, entitled under the restorative trust, will profit by the actual fraud of the legatee. Writing before the decision in *Blackwell v Blackwell*, Strahan implicitly raised this argument when he asserted that a semi-secret trust would not generally be enforced, but exceptionally it would be upheld if the legatee had obtained the disposition on trust to him by means of actual fraud. The application of resulting trust principles which benefits the residuary legatee or next of kin has been brought about by the trustee's fraud in procuring the disposition on trust.

9.53 A comparable argument was considered and rejected in the context of (innocently procured) half-secret trusts and the same conclusion follows here. The resulting trust does not give to the residuary legatee or next of kin a profit at the testator's expense derived from the fraud of the trustee. Any restorative trust in favour of the testator's estate achieves both the prevention of fraudulent gain by the legatee as well as restitutionary relief for the testator as victim of the deceit. The testator's successors are entitled to retain the beneficial interest in the property, howsoever it passes to them, in their character as successors to the testator's right to redress for the actual fraud which was practised on him. The beneficial interest is thus mere compensation, not the proceeds of fraud.

9.54 Nonetheless, and albeit for the wrong reasons, American commentators have been right to draw a distinction between cases of actual deceit in procuring the secret trust and all other cases of secret trust. In the latter case the fraud arises only at the point of breach of secret promise as a *post mortem* equitable fraud, assuring to the

95 Strahan, p. 68.
legatee the freedom to choose between keeping his promise or restoring the trust property to the testator’s estate. In contrast where the legatee fraudulently misrepresents either the law or his present intention as to his future conduct, fraud is committed ante mortem in procuring the legacy. There exists a fraud which vitiates the legacy and justifies its omission from probate. In this case, where the fraud affects the animus testandi, a restorative trust implied by equity will arise automatically on the testator’s death. Since the fraud goes to the very validity of the legacy intended to constitute the secret trust, the legatee is deprived of the opportunity to advance the bequest to the intended beneficiary. The legatee is not permitted to perform his moral duty to fulfil the secret trust because he has already committed a wrong against the testator which entitles his estate to recovery of the legacy. Superficially it seems odd that the testator’s secret trust in this case will necessarily be frustrated, but if the fraud vitiates the testator’s will it cannot properly be said that the testator intended the secret trust at all. Exceptionally, where the legatee has by actual fraud procured a secret trust by inducing the testator to revoke a will in favour of the secret beneficiary, a performative trust can be imposed. However, this performative trust gives effect not to the secret trust, but to the revoked will, replicating in beneficial terms the outcome of an action to cancel probate of the fraudulently obtained will and reinstate the revoked will.

Conclusion

9.55 This chapter has sought to establish the nature of secret trust fraud. It is suggested the fraud lies not in mere failure to perform the secret trust but in breach of the secret trust coupled with enjoyment or disposal of the trust property by the legatee as if he took the legacy for his own benefit. It is the assertion of a beneficial title inconsistent with the trust obligation which constitutes the fraud. Moreover, this fraud is committed on the testator and his residuary legatee or next of kin, as
successor to his residual rights, is entitled to demand restitution of the property bequeathed if the legatee commits fraud. The fundamental problem with the fraud theory of the secret trusts doctrine can be encapsulated in a sentence. Whether or not the secret beneficiary is a victim of fraud, the testator is a victim and the specific enforcement of the secret promise depends on a confiscation of the right to redress which vests in the testator's estate.

9.56 This analysis of secret trust fraud can be set into the wider context of fraud in equity procuring or benefiting from a testamentary disposition. Ante mortem actual fraud - fraud in obtaining or preserving a will - justifies a trust in favour of a party who would have taken the property affected under an earlier formal will, if such exists, and in favour otherwise of the testator's estate. In the absence of a formal will in their favour, a given party could not claim the beneficial interest in the fraudulently obtained legacy, even though it was the legatee's fraud that had prevented the execution of an attested instrument in the claimant's favour. The performative solution is unwarranted where it would uphold an informal will. Set in that context, the proper outcome in the fully-secret trust scenario is that the legatee who refuses to discharge his secret promise to the testator must hold on trust for the testator's successors. A table setting out in simplified form the appropriate judicial response to the various types of fraud arising in a testamentary context is reproduced on the following page.
<table>
<thead>
<tr>
<th>Nature of fraud</th>
<th>Time of fraud</th>
<th>Product of fraud</th>
<th>Probate outcome</th>
<th>Trust law outcome</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actual fraud or Constructive fraud in the form of coercive undue influence (including actual fraud or coercion inducing a secret trust)</td>
<td>Ante mortem</td>
<td>Induces new will</td>
<td>Fraud impugns the validity of the will: new will, if any, is refused probate; revoked will, if any, is admitted to probate, notwithstanding revocation.</td>
<td>If new will admitted to probate, performative trust imposed in favour of beneficiaries under revoked will, if any, or otherwise a restorative trust is imposed</td>
<td>The ability of equity to impose a trust is dependent on the notion that Allen v Macpherson is no longer good law.</td>
</tr>
<tr>
<td>Any actual or constructive fraud altering the substantive effect of a will, e.g. its construction or application, but not its formal validity. or Any other constructive fraud (other than undue influence)</td>
<td>Ante mortem</td>
<td>Induces new will</td>
<td>New will (if any) admitted to probate; otherwise an intestacy. (Revoked will cannot be admitted to probate, as probate court disregards the fraud.)</td>
<td>Performative trust is imposed in favour of beneficiaries under the revoked will, if any; otherwise a restorative trust is imposed.</td>
<td>Bulkley v Willford (performative) Segrave v Kirwan (restorative)</td>
</tr>
<tr>
<td>Any</td>
<td>Ante mortem</td>
<td>Prevents new will</td>
<td>Existing will, if any, admitted to probate. (Probate court disregards the new informally expressed testamentary intentions or the unfulfilled intention to revoke, as the case may be.)</td>
<td>Restorative trust is imposed.</td>
<td></td>
</tr>
<tr>
<td>Secret trust fraud (secret trust not induced by actual fraud or coercion)</td>
<td>Post mortem</td>
<td>Breach of promise to execute informal (fully-secret) trust</td>
<td>Existing will, if any, admitted to probate. (Probate court disregards the informal secret trust.)</td>
<td>Restorative trust is imposed.</td>
<td></td>
</tr>
</tbody>
</table>
CHAPTER 10: CONCLUSION

Introduction

10.1 This thesis has attempted to demonstrate that neither of the two dominant explanations for secret trusts - the dehors the will theory and the fraud theory - justifies the current law enforcing secret trusts in favour of the testator's intended beneficiary. Placed in its historical context, it appears from chapter 6 that the dehors the will theory is merely the perpetuation in less explicit terms of an early fallacy that an inter vivos trust may be engrafted by a testator onto a disposition in his formal will. The fraud theory fails, as we have just seen, because it cannot explain how the secret beneficiary suffers from the legatee's wrong in some sense justifying perfection of the trust in priority to the claim of the testator's estate to restitution. It is for the same reason that the specific claim to the legacy of the secret beneficiary, a third party to the secret trust agreement of testator and legatee, is likely to founder if the claim is based in contract or tort, but developments in both those areas¹ may in time herald new prospects and re-draw the frontiers of theorising about secret trusts.

10.2 Confined to relief on trust law principles, the current favouritism of equity for the secret beneficiary is unjustified and, for the reasons given in chapter 3, this offends the policy of the Wills Act by giving effect to an informal testamentary disposition. The purported half-secret trust should give rise to an automatic resulting trust for failure of trust objects. As regards fully-secret trusts, personal fraud may arise, but only at the point in time when the legatee unjustly enriches himself by dealing with the bequest in a manner inconsistent with the secret trust. The legatee is therefore

vested with a power to elect between making a gift of his own property in
performance of his promise to the testator and generating an obligation under a
constructive trust to restore the legacy to the testator's estate. The principle of
recursive intervention outlined in chapter 4 suggests concern that the trustee might
profit under a restitutionary resolution is misplaced. In this final chapter we review
this solution from the critical perspective that, in contrast to the current law
enforcing the trust in favour of the testator's secret nominee, the testator's wishes
are not fulfilled.

10.3 Whether or not the new approach to secret trusts contended for here is accepted,
the analysis of the law which supports it has given cause to re-consider whether it
is based on sound assumptions. Chapter 8 showed reason to doubt the consensual
understanding that the House of Lords' decision in *Allen v Macpherson*, of
questionable merit even in its own time, continues to restrict the scope of equity's
trust law jurisdiction. Even if equity does not let go of secret trusts, revisiting the
historic rules which define their context has shown that even in the realm of
established law, the map of equity may yet come to be re-drawn.

**Passivity defended: the failure of the informal disposition**

10.4 Subject to debts burdening his estate and the constraints of the Inheritance
(Provision for Family and Dependants) Act 1975, the function of a will is to give
effect to the testator's choices in the exercise of his freedom of testamentary
disposition. The proper anxiety of the judiciary in a liberal society is to give effect
to those choices consistent with the rights of others, although equity has not always
maintained an ardent affection for the testator's preferences. It is understandable, therefore, that in cases where a testator's secret trust designs were not successfully executed for want of proper communication of the trust, the judiciary has lamented their failure.  

10.5 If these expressions of regret reflect a consensual aspiration in the secret trust law that effect should be given to the testator's informal will, the regret is misplaced. The goal of the legal system is to recognise the testator's dispositive freedom within the boundaries of the Wills Act. A desire to uphold a testamentary trust regardless of its form is misdirected, because the recognition of a testamentary freedom unbridled by formality overlooks the functions of section 9 in defining and limiting that freedom, as chapter 3 demonstrated. Giving effect to informal wills undermines the facilitative effect which section 9 provides. If a secret trust may take any form, the channeling benefit of section 9 is eroded. If a secret beneficiary can become entitled under an informal agreement between testator and legatee, the testator has lost the cautionary benefit of section 9. This prejudices the position for future testators who depend on the strictness of formality for the assurance that

2 See Aynsworth v Pollard (1635-36) 1 Chan Rep 101 (Court of Chancery). The report of the case is not satisfactorily explicit, but it appears the will declared a trust for the mistress and the court exceptionally decided it was not conclusive, enforcing a trust in favour of the testator's child. The court expressed disapprobation of a gift away from the deceased's child to a woman who had been married to another man at the time of the will. See similarly Maundy v Maundy (1638-39) 1 Chan Rep 123 (Court of Chancery), where a will was declared "very inofficious" for preferring strangers to those of the same name and blood as the deceased.

3 Johnson v Ball (1851) 5 De G & Sm 85 at 92 per Parker VC ("There can be no doubt that it was the testator's deliberate intention to make a provision [...] for the plaintiff and her children; and it is with regret that the court is compelled to declare that he has failed in carrying his intention into effect."); Re Boyes (1884) 26 Ch D 531, 537 per Kay J; Re Keen [1937] 1 Ch 236, 248 per Lord Wright MR ("It is always with reluctance that a Court refuses to give effect to the proved intention of the testator.")
their informal unguarded discussions will not burden their final scheme of disposition. Section 9 guarantees to testators a realm of non-dispositive freedom. The enforcement of the secret trust extends the testamentary power by encroaching on this freedom from wills and intrudes on the domain in which testator may freely contemplate their intentions safe in the knowledge they have no legal effect. The refusal to enforce an informal will is not a matter of regret: it is to uphold a protective barrier.

10.6 This does not mean that the law should necessarily frustrate the testator’s informal testamentary intentions, as would occur if in every secret trust case an automatic restitutionary trust was to be implied. The protection of the Wills Act is upheld merely by not giving effect to informal wills. Since the informal disposition is only cognisable for the purpose of preventing fraud, the law may justifiably permit the legatee’s execution of a secret trust if this is consistent with whatever formal exercise of his testamentary freedom the testator has made. However, the lament for the unfulfilled wishes of one testator wrecked on the Wills Act is placed in context. It is the song of a siren, endangering the proprietary safety of others.

10.7 The potential failure of the intended gift to the secret beneficiary is therefore a necessary rather than regrettable corollary of the law’s reserving validity to formally executed dispositions. As soon as the testator relies on a scheme not wholly contained in an attested will, he has withdrawn to a domain in which the law will not perfect his wishes and he carries the risk of failure in his own hands. As Vaisey J explained in Re Rees:
If people wish to make wills [...] they must not hide the intentions which they have in mind behind a barrier or curtain of concealment.4

10.8 Finally, however, it should not be assumed that the testator's informal disposition must necessarily fail whenever the legatee refuses to perform the secret trust and the law implies a restitutionary trust on grounds of fraud. In some cases the principle of recursive restitutionary intervention may, coincidentally, give indirect effect to the secret trust. This would have been the case, for example, if the new approach to secret trusts had been applied in Sellack v Harris.5 In that case an eldest son promised his father that land which he was to inherit would be enjoyed by his younger brother and after the father's death a secret trust was enforced in the second son's favour. Under the approach to secret trusts mooted in this thesis, a trust imposed on the eldest son to prevent unjust enrichment would have benefited the person who would have been entitled to the land on intestacy if the eldest son is disregarded. Under the rules of primogeniture applicable at the time, therefore, the younger son would have been beneficially entitled under the restitutionary trust.

The moral obligation of the secret trustee

10.9 A secret trust, communicated or otherwise, binding or precatory, always imposes a moral obligation on the legatee. The existence of an unenforceable moral obligation in cases were no binding secret trust is created has been judicially

4 Re Rees' W. T. [1949] 1 Ch 541, 543. Approval of this sentiment, however, should not be understood as an endorsement of the actual decision of Vaisey J, affirmed on appeal ([1950] 1 Ch 204), which is questionable.

5 (1708) 2 Eq Ca Abr 46 (Cowper LC, reversing Wright LK and Trevor MR). The actual decision, however, may be better explained on the basis of a purchase money resulting
noted, and this quality of secret trusts assumed significance in the criticism of *Re Boyes* in chapter 4. The supposition that a testator intends his secret trust to be legally binding has often been pursued against the facts, as chapter 5 demonstrated. This suggests that legal thinking may have overestimated the necessity to enforce a secret trust in order to give effect to the intentions of testators informally expressed to legatees. Leaving the legatee to the constraint only of his conscience may achieve precisely what the testator desires more often than the courts have tended to presume. In such cases, if the legatee deviates from the honourable path by betraying the testator’s confidence, he may disappoint the testator’s hope but still act within an intended freedom from the law.

10.10 A further point of significance emerging from chapter 5, however, was the extent to which morality may provide an adequate means for the fulfilment of the testator’s wishes. An unsung feature of many of the litigated secret trust cases is the well-placed faith of the testator: the legatee has set himself against any beneficial claim and sought to execute the secret trust or expressed his willingness so to do, so far as the law will allow, regardless of legal compulsion. Just as it is fallacious to

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6 See, for example, *Re Pitt Rivers* [1902] 1 Ch 403, 409-410 per Stirling LJ referring to “an honourable obligation”; *Re Snowden* [1979] 1 Ch 528, 539G-540A (Megarry VC) (1884) 26 Ch D 531.

7 See, for example, *Lomax v Ripley* (1855) 3 Sm & Giff 48, noted on this point by Malins VC in *Rowbotham v Dunnett* (1878) 8 Ch D 430, 439 (a further example in itself); *McCormick v Grogan* (1869) LR 4 HL 82; *Springett v Jenings* (1870) LR 10 Eq 488 (Lord Romilly MR); *Rowbotham v Dunnett* (1878) 8 Ch D 430; *Re Boyes* (1884) 26 Ch D 531; *Re Pitt Rivers* [1902] 1 Ch 403, where the defendant’s willingness to perform was noted by Kekewich J at [1901] 1 Ch 352, 359; *Sullivan v Sullivan* [1903] 1 IR 193; *O’Brien v Condon* [1905] 1 IR 51; *Re Falkiner* [1924] 1 Ch 88, 94. See also *Blackwell v Blackwell* [1929] AC 318 at 335, where Lord Sumner noted the trustees’ desire to perform the intended half-secret trust. Admittedly mere expressions of willingness may
assume the testator intends more than a merely moral obligation, so is it equally mistaken to presume a moral obligation will be ineffectual in coercing performance of the trust. As Stuart VC explained in *Lomax v Ripley*:

To a tender and sensitive mind the desire to fulfil the known wishes and intentions of a friend may produce a state of determination which, as a motive of action, may be as strong as any legal obligation.

So effective in practice are secret moral obligations that professional advice has at times favoured reliance on uncommunicated secret trust instructions or merely precatory secret trusts instead of bringing the disposition within the secret trust doctrine and legal enforceability.

The fact that properly communicated and accepted secret trusts generate a legally enforceable obligation obscures the extent to which it is in practice superfluous. Indeed, so far from acknowledging the point, the courts have more often doubted overstate the case. A legatee who intends to breach faith with the testator is unlikely to court the shame that must follow an admission of that intention before a judge in the public arena of a court.

9 (1855) 3 Sm & Giff 48.

10 *Ibid*, 80. See further Stebbings, p. 9, noting that the spiritual obligation superimposed by Roman Catholic teaching on honorary secret trusts and enforced by the Church by means of religious sanctions rendered the trust an effective device for charitable disposition in avoidance of the Mortmain Act.

the honourable strain in human nature and presumed the opposite. This is explicable. A misleading perspective is easily acquired from the bench. The ungracious defence of self-interest posited in litigation will be unrepresentative of the totality of secret trust obligations, many of which may be discharged without dispute. Moreover, if it is suspected that every extra-legal shadow will be inhabited by creatures of dishonest intent, there is an understandable compulsion to illuminate merely moral obligations by converting them into a binding trust.

**Performance of void trusts**

10.12 In some scenarios the new approach to secret trusts in granting to the legatee, subject to the fraud principle, a power to perform the secret promise will actually facilitate the fulfillment of the testator's intentions where the current law frustrates them. Historically this would have been the case where the testator was anxious to avoid the Mortmain Act. Since the secret promise of the devisee would not bind him to a restorative trust on the new model of secret trusts until the promise is repudiated, the devisee would have been able to keep the land for the purpose of making the charitable gift.

10.13 Generalising from the historic case, the new approach to secret trusts assists the testator's ambitions more than the current law whenever the secret trust is void. In *Scott v Brownrigg* a purported half-secret trust for missionary purposes failed because the trust had not been duly communicated. Even if there had been communication, however, Sullivan MR held that the trust would have been void.

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12 Blackwell v Blackwell [1929] AC 318 at 334 where Lord Sumner, suggested that secret trust cases "commonly [...] involve some immoral or selfish conduct on the part of the legal owner".

13 (1881) 9 LR Ir 246.
because it would not have been limited to advancement of religion. On the new approach a power in the legatee to choose between re-payment and advancing missionary purposes would have arisen regardless of when the trust was communicated, had the will not imposed trusteeship. The same point emerges in *Re Pitt Rivers*. It will be recalled from discussion of the case in chapter 5 that the testator had intended to create a secret trust for the purpose of perpetuating a museum to which the public were to have access *de facto* but *no de jure* right to admission. The intention to exclude public rights precluded the secret trust from taking effect as a charitable trust enforceable by the Attorney-General. The testator desired a non-charitable trust. The Court of Appeal therefore held that as the intended trust was unsupportable in law, the trust obligation was merely precatory and the devisee took beneficially. Since the testator had intended a trust obligation (albeit one unrecognised by equity), this decision granted to the legatee more freedom than the testator intended: the legatee could renge on his secret promise with impunity. On the approach to secret trusts advocated here, in contrast, fuller effect could be given to the testator's intentions. If the legatee departed from his undertaking to maintain the museum, he would commit fraud. The fact that the undertaking could never form a binding trust obligation ceases to be material since the undertaking is never specifically enforced.

**Conclusion**

10.14 Adoption of the new approach to secret trusts argued for in this thesis requires equity to relinquish its hold on the secret trust as a legally binding trust and to place faith (with the testator) in the moral obligation which secret trusts impose on


15 [1902] 1 Ch 403.
legatees. It calls for a metamorphosis of the secret trust from a conveyancing
device frustrating the policy of the Wills Act into an undertaking of honour secured
selfless by the fraud principle. In the sphere of secret trusts, equity should move
from law to faith.
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Anon. (1708) 5 Viner Abr 521 (Lord Cowper LC)

Anon. (1743) 3 Atk 17, 26 ER 813 (Lord Hardwicke LC)

Anon. (undated) 2 Freeman 137, 22 ER 1113 (Court of Chancery)

Archer v Mosse (1686) 2 Vern 8, 23 ER 618 (Lord Jeffreys LC)

Armitage v Wadsworth (1815) 1 Madd 189, 56 ER 71 (Plumer VC)

Atkins v Hill (1775) 1 Cowp 284, 98 ER 1088 (Lord Mansfield CJ)

Aynsworth v Pollard (1635-36) 1 Chan Rep 101, 21 ER 519 (Court of Chancery)

Baillie v Wallace (1869) 17 WR 221 (Giffard VC)

Balfé v Halpenny [1904] 1 IR 486 (Barton J)


Bannister v Bannister [1948] 2 All ER 133; [1948] WN 261 (Court of Appeal)
Barnesly v Powel (1748) 1 Ves Sen 119, 27 ER 930; (1749) 1 Ves Sen 284, 27 ER 1034 (Lord Hardwicke LC)

Barrow v Greenough (1796) 3 Ves Jun 153, 30 ER 943 (Arden MR)

Bartholomew v Henley (1820) 3 Phill Ecc 317, 161 ER 1337 (Sir John Nicholl)

Barton v Robins (1775) 3 Phillim 455n, 161 ER 1382 (Sir George Hay, affirmed by the Court of Delegates)

Bates v Graves (1793) 2 Ves Jun 287, 30 ER 637 (Lord Thurlow LC; Lord Loughborough LC)

Bath v Sherwin (1706-7) Prec Ch 261, 24 ER 260; Gilb Rep 1, 25 ER 2; 10 Mod 1, 88 ER 596 (Lord Cowper LC), reversed (1709) 4 Bro PC 373, 2 ER 253 (House of Lords)

Baudains v Richardson [1906] AC 169 (Privy Council)

Beckett v Cohen [1972] 1 WLR 1593 (Divisional Court)

Bennet v Vade (1742) 2 Atk 324, 26 ER 597 (Lord Hardwicke LC)

Betts v Doughty (1879) 5 PD 26 (High Court)

Birch v Birch [1902] P 62 (Barnes J)

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Blackwell v Blackwell [1929] AC 318 (House of Lords), affirming [1928] Ch 614 (Court of Appeal, affirming Eve J)

Boardman v Phipps [1967] 2 AC 46 (House of Lords), affirming [1965] Ch 992 (Court of Appeal), affirming [1964] 1 WLR 993 (Wilberforce J)

Bodmin v Roberts (House of Lords, affirming Court of Chancery), unreported but recited by Powel B in Bath v Montague (1693) 3 Chan Cas 55, 61

Bootle v Blundell (1815) 19 Ves Jun 494, 34 ER 600; G. Coop 136, 35 ER 506 (Lord Eldon LC)

Boson v Statham (1760) 1 Eden 508, 28 ER 783; 1 Cox 16, 29 ER 1041 (Lord Henley LC)
Boyse v Rossborough (1853) Kay 71, 69 ER 31 (Page Wood VC), affirmed (1854) 3 De G M & G 817 43 ER 321 (Court of Appeal in Chancery) and sub nom. Rossborough v Boyse

Bradford Third Equitable Benefit BS v Borders [1941] 2 All ER 205 (House of Lords), partly reversing [1940] 1 All ER 302 (Court of Appeal) and reinstating [1939] 1 All ER 481 (Bennett J)

Brazier v Hudson (1836) 8 Sim 67, 59 ER 27 (Shadwell VC)

Brett v Brett (1826) 3 Add 210, 162 ER 456 (Sir John Nicholl); affirmed (1827) unreported (Court of Delegates)

Briggs v Penny (1849) 3 De G & Sm 525, 64 ER 590 (Knight-Bruce VC); affirmed (1851) 3 Mac & G 546, 42 ER 371 (Lord Truro LC)

Brudenell v Boughton (1741) 2 Atk 268, 26 ER 565 (Lord Hardwicke LC)

Brydges v Chandos (1794) 2 Ves Jun 417, 30 ER 702 (Lord Loughborough LC)

Buckland v Soulten (1824) 4 Y & C Ex 373 n g, 160 ER 1051 (Lord Eldon LC)

Bulkley v Wilford (1834) 8 Bligh NS 111, 5 ER 888; 2 Cl & Fin 102, 6 ER 1094 (House of Lords, affirming Lord Lyndhurst LC)

Cartwright's Case - see Penson v Cartwright

Cary v Cary (1804) 2 Schoales & Lefroy 173 (Lord Redesdale LC)

Chamberlain v Agar (1813) 2 V & B 259, 35 ER 317 (Plumer VC)

Chamberlaine v Chamberlaine (1678) 2 Freem 34, 22 ER 1041 (Lord Nottingham LC)

Chamberlaine v Chamberlaine (1680) 2 Freem 52, 22 ER 1053 (Lord Nottingham LC)

Charlton v Hindmarsh (1859) 1 Sw & Tr 433, 164 ER 800 (Sir C. Cresswell), affirmed sub nom. Hindmarsh v Charlton

Chesterfield v Janssen (1750) 2 Ves Sen 125, 28 ER 82 (Lord Hardwicke LC)

Clark v Dew (1829) 1 Russ & M 103, 39 ER 40 (Lord Lyndhurst LC)
Cleaver v Mutual Reserve Fund Life Association [1892] 1 QB 147 (Court of Appeal, reversing the Divisional Court)

Coles v Trescothick (1804) 9 Ves Jun 234, 32 ER 592 (Lord Eldon LC)

Colt v Wollaston (1723) 2 P Wms 154, 24 ER 679 (Jekyll MR)

Comber's Case (1721) 1 P Wms 766, 24 ER 605 (Lord Macclesfield LC)

Cook v Parsons (1701) Pre Ch 184, 24 ER 89 (Wright LK)


Cornfoot v Fowke (1840) 6 M & W 358, 151 ER 450 (Court of Exchequer)

Cottle v Aldrich (1815) 4 M & S 175, 105 ER 799 (Court of King's Bench)

Countess De Zichy Ferraris v Marquis of Hertford (1843) 3 Curt 468, 163 ER 794 (Sir Herbert Jenner Fust), affirmed sub nom. Croker v Marquis of Hertford

County NatWest Bank Ltd v Barton (1999) Times, 29 July (Court of Appeal)

Craig v Lamoureux [1920] AC 349 (Privy Council)

Creagh v Murphy (1873) 7 Ir Eq 182 (Chatterton VC)

Croker v Marquis of Hertford (1844) 4 Moo PC 339, 13 ER 334 (Privy Council), affirming Countess De Zichy Ferraris v Marquis of Hertford

Crook v Brookeing (1688) 2 Vern 50, 23 ER 643 (Lord Jeffreys LC), reversed sub nom. Crooke v Brookeing (1689) 2 Vern 106, 23 ER 679 (Lords Commissioners)

Croyston v Banes (1702) Prec Ch 208, 24 ER 102 (Trevor MR)

Cullen v AG for Ireland (1866) LR 1 HL 190 (House of Lords), affirming AG v Cullen

Davies v Otty (No. 2) (1865) 35 Beav 208, 55 ER 875 (Romilly MR)

Derry v Peak (1889) 14 App Cas 337 (House of Lords) - reversing Peek v Derry

Devenish v Baines (1689) Prec Ch 3, 24 ER 2 (Lords Commissioners)
Dime v Munday (1663) 1 Sid 362, 82 ER 1158 (Court of King's Bench)
Drakeford v Wilks (1747) 3 Atk 539, 26 ER 1111 (Lord Hardwicke LC)
Edgington v Fitzmaurice (1885) 29 Ch D 459 (Court of Appeal affirming Denman J)
Edwards v Pike (1759) 1 Eden 267, 28 ER 687 (Henley LK)
Emanuel v Constable (1827) 3 Russ 436, 38 ER 639 (Leach MR)
Evers v Owen (1628) Godbold 431, 78 ER 253 (Court of King's Bench)
Ex parte Fearon (1800) 5 Ves Jun 633, 31 ER 778 (Lord Loughborough LC)
Ex parte Paddy (1818) 3 Madd 241, 56 ER 498 (Leach VC)
Ex parte Whittaker (1875) LR 10 Ch App 446 (Court of Appeal in Chancery), affirming (1875) LR 10 Ch App 447n (Bacon VC, sitting as Chief Judge in Bankruptcy)
Fane v Fane (1681) 1 Vern 30, 23 ER 284 (Lord Nottingham LC)
Fenton v Clegg (1854) 9 Ex 680, 156 ER 292 (Court of Exchequer)
Fielding v Walshaw (1879) 48 LJ P 27 (Hannen P)
Forster v Hale (1798) 3 Ves Jun 696, 30 ER 1226 (Arden MR), affirmed (1800) 5 Ves Jun 308, 31 ER 603 (Lord Loughborough LC)
French v French [1902] 1 IR 171 (House of Lords reversing the Irish Court of Appeal and reinstating the decision of Porter MR)
Gingell v Horne (1839) 9 Sim 539, 59 ER 466 (Shadwell VC)
Gloucester Corpn v Wood (1843) 3 Hare 131, 67 ER 326 (Wigram VC), affirmed (1847) 1 HLC 272, 9 ER 760 (House of Lords)
Glynn v Oglander (1829) 2 Hagg Ecc 428, 162 ER 912 (Sir John Nicholl)
Green v Andrews (1877) 41 JP 105 (Hannen P)
Green v Froud (1674) 3 Keb 310, 84 ER 738 (Court of King's Bench); also reported sub nom. Green v Proude (1674) 1 Mod 177, 86 ER 776 (Court of King's Bench)
Green v Nixon (1857) 23 Beav 530 at 535, 53 ER 208 (Romilly MR)

Haas v Atlas Assurance Co. Limited [1913] 2 KB 209 (Scrutton J)

Hacker v Newborn (1654) Styles 427, 82 ER 834 (Court of King’s Bench)

Hall v Hall (1868) LR 1 P & D 481 (Sir J. P. Wilde)

Harris v Horwell (1708) Gilb Rep 11, 25 ER 8 (Lord Cowper LC)

Harrison v Gardner (1817) 2 Madd 198, 56 ER 309 (Plumer VC)

Harwood v Goodright (1774) 1 Loftt 559, 30 ER 798; 1 Cowp 87, 98 ER 981
(Court of King’s Bench)

Hawtre v Wallop (1668) 1 Chan Rep 265, 21 ER 569 (Court of Chancery, affirming Grimston MR)

Hill v Lane (1870) LR 11 Eq 215 (Stuart VC)

Hindmarsh v Charlton (1861) 8 HLC 160, 11 ER 388 (House of Lords),
affirming Charlton v Hindmarsh

Hindson v Weatherill (1854) 5 De G M & G 301, 43 ER 886 (Court of Appeal in Chancery), reversing (1853) 1 Sm & Giff 604, 65 ER 265 (Stuart VC)

Hixon v Wytham (1675) 1 Chan Cas 248, 22 ER 784 (Lord Finch LK)

Horne v Featherstone (1895) 73 LT 32 (Jeune P)

Huguenin v Baseley (1807) 14 Ves Jun 273, 33 ER 526 (Lord Eldon LC)

Humphrey v Ingledon (1721) 1 P Wms 752, 24 ER 599 (Lord Macclesfield LC)

Humphreys v Humphreys (1734) 3 P Wms 349, 24 ER 1096 (Lord Talbot LC)

In the Goods of Coles (1871) LR 2 P & D 362 (Lord Penzance)

In the Goods of Dickens (1842) 3 Curt 60, 163 ER 655 (Sir Herbert Jenner Fust)

In the Goods of Halpin (1874) IR 8 Eq 567 (Rt Hon. Robert Warren)

In the Goods of Montgomery (1846) 5 Notes of Cases 99 (Sir H. Jenner Fust)

In the Goods of Morgan (1866) LR 1 P & D 214 (Sir J. P. Wilde)
In the Goods of Robinson (1867) LR 1 P & D 384 (Sir J. P. Wilde)

In the Goods of Slinn (1890) 15 PD 156 (Hennen P)

IRC v Broadway Cottages Trust [1955] Ch 20 (Court of Appeal)

Irvine v Sullivan (1869) LR 8 Eq 673 (James VC)

James v Greaves (1725) 2 P Wms 270, 24 ER 726 (Lord Commissioner Jekyll)

Johnson v Ball (1851) 5 De G & Sm 85, 64 ER 1029 (Parker VC)

Johnson v Warwick (1856) 17 CB 516, 139 ER 1176 (Court of Common Pleas)

Jones v Bradley (1868) LR 3 Ch App 362 (Lord Cairns LC), reversing (1866) LR 3 Eq 635 (Lord Romilly MR)

Jones v Frost (1818) 3 Madd 1, 56 ER 410 (Leach VC); affirmed (1822)

Jones v Gregory (1863) 2 De G J & S 83, 46 ER 306 (Court of Appeal in Chancery), affirming (1863) 4 Giff 468, 66 ER 790 (Stuart VC)

Jones v Jones (1817) 3 Mer 161, 36 ER 62 (Grant MR); (1819) 7 Price 663, 146 ER 1094 (Court of Exchequer Chamber)

Jones v Lake (1742) 2 Atk 176 n 2, 26 ER 510 (Court of King’s Bench)

Jones v Nabbs (1718) Gilb Rep 146, 25 ER 102 (Lord Macclesfield LC); also reported sub nom. Nab v Nab

Juniper v Batchelor (1868) 19 LT 200 (Giffard VC)

Keigwin v Keigwin (1843) 3 Curt 607, 163 ER 841 (Sir Herbert Jenner Fust)

Kerrich v Bransby (1727) 7 Bro PC 437, 3 ER 284 (House of Lords, reversing Lord Macclesfield LC)

King’s Proctor v Daines (1830) 3 Hagg Ecc 218, 162 ER 1136 (Sir John Nicholl)

Kingsman v Kingsman (1706) 2 Vern 559, 23 ER 962 (Lord Cowper LK)

Knight v Boughton (1844) 11 Cl & Finn 513, 8 ER 1195 (House of Lords) affirming Knight v Knight
**Knight v Duplessis** (1749) 1 Ves Sen 324, 27 ER 1059; (1751) 2 Ves Sen 360, 28 ER 230 (Lord Hardwicke LC)

**Knight v Knight** (1840) 3 Beav. 148, 49 ER 58 (Lord Langdale MR), affirmed *sub nom.* **Knight v Boughton**

**Lambe v Eames** (1870) LR 10 Eq 267 (Malins VC), affirmed (1871) LR 6 Ch App 597 (Court of Appeal in Chancery)

**Lawrence v Kete** (1672) Aley 54, 82 ER 912 (Court of King’s Bench)

**Lea v Libb** (1687-89) Carthew 35, 90 ER 625; *sub nom.* **Lee v Libb** (1687-89) 1 Show KB 68 and 88, 89 ER 454 and 468; Comb 174, 90 ER 413; Holt KB 742, 90 ER 1308; 3 Salk 395, 91 ER 893 (Court of King’s Bench)

**Lemayne v Stanley** (1681) 3 Lev 1, 83 ER 545 (Court of Common Pleas)

**Limbrey v Mason** (1735) 2 Comyns 451, 92 ER 1155 (Court of Delegates)

**Limondson v Sweed** - see Symondson v Tweed

**Lomax v Ripley** (1855) 3 Sm & Giff 48, 65 ER 558 (Stuart VC)

**Longstaff v Rennison** (1852) 1 Drewery 28, 61 ER 362 (Kindersley VC)

**Lord Donegal’s Case** (1752) 2 Ves Sen 407, 28 ER 260 (Lord Hardwicke LC)

**Marriot v Marriot** (1725) Gilb Rep 203, 25 ER 142; 1 Str 666, 93 ER 770 (Court of Exchequer)

**Mathews v Warner** (1798) 4 Ves Jun 186, 31 ER 96 (Lord Loughborough LC)

**Maundy v Maundy** (1638-39) 1 Chan Rep 123, 21 ER 526 (Court of Chancery)

**McCormick v Grogan** (1869) LR 4 HL 82 (House of Lords), affirming (1867) Ir LR 1 Eq 313 (Irish Court of Appeal), reversing (1867) Ir LR 1 Eq 318n (Lord Blackburne LC)

**McPhail v Doulton** [1971] AC 424 (House of Lords)

**Meadows v Kingston** (1775) Amb 756, 27 ER 487 (Lord Apsley LC)

**Meluish v Milton** (1876) 3 Ch D 27 (CA, affirming Hall VC)
Meredith v Heneage (1824) 1 Sim 542, 57 ER 681; 10 Price 306, 147 ER 322
(House of Lords, affirming the Court of Exchequer)

Meyappa Chetty v Supramanian Chetty [1916] AC 603 (Privy Council)

Middleton v Sherburne (1841) 4 Y & C Ex 358, 160 ER 1044 (Court of
Exchequer)

Milnes v Foden. (1890) 15 PD 105 (Hannen P)

Mitchell v Smart (1747) 3 Atk 606, 26 ER 1149 (Lord Hardwicke LC)

Moore v King (1842) 3 Curt 243, 163 ER 716 (Sir Herbert Jenner Fust)

Moss v Cooper (1861) 1 J & H 352, 70 ER 782 (Page Wood VC)

Muckleston v Brown (1801) 6 Ves Jun 52, 31 ER 934 (Lord Eldon LC)

Mussoorie Bank v Raynor (1882) 7 App Cas 321 (Privy Council)

Nab v Nab (1718) 10 Mod 404, 88 ER 783 (Lord Macclesfield LC); also
reported sub nom. Jones v Nabbs

Nash v Edmunds (1587) Cro Eliz 100, 78 ER 358; sub nom. Nash v Edwards
Leonard 113, 74 ER 105 (Court of King's Bench)

Nelson v Oldfield (1688) 2 Vern 76, 23 ER 659 (Lord Jeffreys LC)

New York Breweries Co. Limited v AG [1899] AC 62 (House of Lords),
affirming AG v New York Breweries Co. Limited [1898] 1 QB 205 (Court of
Appeal), reversing [1897] 1 QB 738 (Divisional Court)

Nichols v Nichols (1814) 2 Phill 180, 161 ER 1113 (Sir John Nicholl)

Nocton v Lord Ashburton [1914] AC 932 (House of Lords)

Noell v Wells (1668) 2 Keble 337, 84 ER 210; 1 Sid 359, 82 ER 1156; sub
nom. Noel v Wells 1 Lev 235, 83 ER 385 (Court of King's Bench)

Norris v Frazer (1873) LR 15 Eq 318 (Bacon VC)

O'Brien v Condon [1905] 1 IR 51 (Porter MR)

Orakpo v Manson Investments Ltd [1978] AC 95 (House of Lords)

Ottaway v Norman [1972] 1 Ch 698 (Brightman J)
Paice v Archbishop of Canterbury (1807) 14 Ves 364, 33 ER 560 (Lord Eldon LC)

Paine v Hall (1812) 18 Ves Jun 475, 34 ER 397 (Lord Eldon LC)

Parfitt v Lawless (1872) LR 2 P & D 462 (Court of Probate)

Pary v Juxon (1669) 3 Chan Rep 38, 21 ER 722; sub nom. Porey v Juxon Nelson 135, 21 ER 809 (Bridgman LK)

Peek v Derry (1887) 37 Ch D 541 (Court of Appeal, reversing Stirling J) - reversed Derry v Peek

Pemberton v Pemberton (1805) 13 Ves Jun 290, 33 ER 303 (Lord Eldon LC)

Penson v Cartwright (1614) Cro Jac 345, 79 ER 295; 2 Bulstrode 207, 80 ER 1071 (Court of King’s Bench); sub nom. Cartwright’s Case (1614) Godbolt 246, 78 ER 143

Pinney v Hunt (1877) 6 Ch D 98 (Jessel MR)

Pinney v Pinney (1828) 8 B & C 335, 108 ER 1067 (Court of King’s Bench)

Plume v Beale (1717) 1 P Wms 388, 24 ER 438 (Lord Cowper LC)

Podmore v Gunning (1832) 5 Sim 485, 58 ER 420; (1836) 7 Sim 643, 58 ER 985; Donnelley 72, 47 ER 235 (Shadwell VC);

Priestman v Thomas (1884) 9 PD 210 (Court of Appeal), affirming (1884) 9 PD 70 (Hannen P)

Puleston v Puleston (1677) Rep Temp Finch 312, 23 ER 171 (Court of Chancery)

R v Buttery (1818) Russ & Ry 342, 168 ER 836 (Crown case reserved from the Old Bailey Assize Court)

R v Dent [1955] 2 QB 590 (Court of Criminal Appeal)

R v Gibson (1802) Russ & Ry 343 n a, 168 ER 836 (Lord Ellenborough CJ)

R v Inhabitants of Netherseal (1791) 4 TR 258, 100 ER 1006 (Court of King’s Bench)
\textit{R v Raines} (1697-1700) 12 Mod 136, 88 ER 1218; Carth 457, 90 ER 864; Holt KB 310, 90 ER 1071; 3 Salk 161, 91 ER 752; 1 Ld Raym 361, 91 ER 1138; \textit{sub nom. R v Rains} 12 Mod 205, 88 ER 1265; \textit{sub nom. R v Raynes} 1 Salk 299, 91 ER 265; \textit{sub nom. Sir Richard Raine's Case} 1 Ld Raym 262, 91 ER 1071 (Court of King's Bench)

\textit{R v Rhodes} (1725) 2 Stra 703, 93 ER 795 (Court of King's Bench)

\textit{R v Sunair Holidays Ltd} [1973] 1 WLR 1105 (Court of Appeal)

\textit{Re Anziani} [1930] 1 Ch 407 (Maugham J)

\textit{Re Baillie} (1886) 2 TLR 660 (North J)

\textit{Re Barnett} [1908] 1 Ch 402 (Warrington J)

\textit{Re Beadle} [1974] 1 WLR 417 (Goff J)

\textit{Re Beaumont} [1902] 1 Ch 889 (Buckley J)

\textit{Re Berger} [1990] Ch 118 (Court of Appeal, affirming Warner J)

\textit{Re Blackwood} [1953] NI 32 (Court of Appeal of Northern Ireland, affirming Curran J)

\textit{Re Boyes} (1884) 26 Ch D 531 (Kay J)

\textit{Re Callaway} [1956] 1 Ch 559 (Vaisey J)

\textit{Re Cleaver} [1981] 1 WLR 939 (Nourse J)

\textit{Re Colling} [1972] 1 WLR 1440 (Ungoed-Thomas J)

\textit{Re Dale} [1994] Ch 31 (Morritt J)

\textit{Re Downing's Residuary Estate} (1888) 60 LT 140 (Chitty J)

\textit{Re Eastgate} [1905] 1 KB 465 (Bigham J)

\textit{Re Falkiner} [1924] 1 Ch 88 (Tomlin J)

\textit{Re Fleetwood} (1880) 15 Ch D 594 (Hall VC)

\textit{Re Foord} [1922] 2 Ch 519 (Sargant J)

\textit{Re Gardner} [1920] 2 Ch 523 (Court of Appeal), reversing [1920] 1 Ch 501 (Eve J)

\textit{Re Gardner} [1923] 2 Ch 230 (Romer J)
*Re Giles* [1972] 1 Ch 544, 553C-D (Pennycuick VC)

*Re Goodchild* [1997] 1 WLR 1216 (Court of Appeal), affirming [1996] 1 WLR 694 (Carnwath J)

*Re Hetley* [1902] 2 Ch 866 (Joyce J)

*Re Houghton* [1915] 2 Ch 173 (Joyce J)

*Re Keen* [1937] 1 Ch 236 (Court of Appeal, affirming Farwell J)

*Re Lovett* (1876) 3 Ch D 198 (Malins VC)

*Re Maddock* [1902] 2 Ch 220 (Court of Appeal), reversing [1901] 2 Ch 372 (Kekewich J)

*Re Masonic and General Life Assurance Co* (1885) 32 Ch D 373 (Pearson J)

*Re Miller and Pickersgill’s Contract* [1931] 1 Ch 511 (Clauson J)

*Re Pawley and London and Provincial Bank* [1900] 1 Ch 58 (Kekewich J)

*Re Pitt Rivers* [1902] 1 Ch 403; (1902) 71 LJ Ch 225 (Court of Appeal); reversing [1901] 1 Ch 352 (Kekewich J)

*Re Pitts* [1931] 1 Ch 546 (Farwell J)

*Re Pollock* [1941] 1 Ch 219 (Farwell J)

*Re Rees* [1950] 1 Ch 204 (CA), affirming *Re Rees’ W. T.* [1949] 1 Ch 541 (Vaisey J)

*Re Royse* [1985] Ch 22 (Court of Appeal, affirming Judge O'Donoghue)

*Re Russian (Vyksounsky) Ironworks Company* (1866) LR 1 Ch App 574 (Court of Appeal in Chancery), affirming (1866) LR 1 Ch App 578n (Page Wood VC)

*Re Sigsworth* [1935] Ch 89 (Clauson J)

*Re Spence* [1949] WN 237 (Romer J)

*Re Spencer’s Will* (1887) 57 LT (NS) 519 (Court of Appeal, affirming Bristowe VC)

*Re Stalman* (1931) 145 LT 339 (Court of Appeal, reversing Finlay J)

*Re Stead* [1900] 1 Ch 237 (Farwell J)
Re Stevens [1898] 1 Ch 162 (Court of Appeal), affirming [1897] 1 Ch 422
(North J)

Re Stirling [1954] 1 WLR 763 (Wynn-Parry J)

Re Vere-Wardale [1949] P 395 (Willmer J)

Re Wedgwood [1915] 1 Ch 113 (Court of Appeal, reversing Warrington J)

Re Williams [1933] 1 Ch 244 (Farwell J)

Re Young [1951] 1 Ch 344 (Danckwerts J)

Redgrave v Hurd (1881) 20 Ch D 1 (Court of Appeal, reversing Fry J)

Reech v Kennegal (1748) 1 Ves Sen 123, 27 ER 932; sub nom. Reech v Kennigate
Amb 67, 27 ER 39; sub nom. Reech v Kennigale 1 Wils KB 227, 95
ER 588 (Lord Hardwicke LC)

Right v Price (1779) 1 Dougl 241 at 243, 99 ER 157 (Court of King’s Bench)

Riordan v Banon (1876) IR 10 Eq 469 (Chatterton VC)

Roberts v Wynn (1663-64) 1 Chan Rep 236, 21 ER 560 (Lord Clarendon LC)

Robertson v Smith (1870) LR 2 P & D 43 (Lord Penzance)

Rochefoucauld v Boustead [1897] 1 Ch 196 (Court of Appeal)

Rogers v James (1816) 7 Taunt 147, 129 ER 59 (Court of Common Pleas, upholding Park J)

Rossborough v Boyse (1857) 6 HLC 1, 10 ER 1192 (House of Lords),
affirming Boyse v Rossborough

Rowbotham v Dunnett (1878) 8 Ch D 430 (Malins VC)

Russell v Jackson (1852) 10 Hare 204, 68 ER 900 (Turner VC)

Sale v Moore (1827) 1 Sim 534, 57 ER 678 (Hart VC)

Scott v Brownrigg (1881) 9 LR Ir 246 (Sullivan MR)

Segrave v Kirwan (1828) Beatty 157 (Hart LC)

Sellack v Harris (1708) 2 Eq Ca Abr 46, 22 ER 40 (Lord Cowper LC, reversing Wright LK and Trevor MR)

Serjeant v Puntis (1697) Pre Ch 77, 24 ER 37 (Trevor MR)

Sheffield v Duchess of Bucks (1739) 1 Atk 628, 26 ER 395 (Lord Hardwicke LC)

Sheldon v Sheldon (1844) 1 Rob Ecc 81, 163 ER 972 (Dr Lushington)

Shewen v Lewis (1815) 3 Mer 168 n 3, 36 ER 65 (Grant MR)

Shingler v Pemberton (1832) 4 Hagg Ecc 356, 162 ER 1476 (Sir John Nicholl)

Smee v Bryer (1848) 1 Rob Ecc 616, 163 ER 1155 (Sir Herbert Jenner Fust), affirmed (1848) 6 Moore PC 404, 13 ER 739 (Privy Council)

Smith v Matthews (1861) 3 De GF & J 139, 45 ER 831

Smith v Milles (1786) 1 TR 475, 99 ER 1205 (Court of King’s Bench)

Smith v Smith (1866) LR 1 P & D 143 (Sir J. P. Wilde)

Sowerby v Warder (1791) 2 Cox 268, 30 ER 124 (Court of Exchequer)

Springett v Jenings (1870) LR 10 Eq 488 (Lord Romilly MR)

Stead v Mellor (1877) 5 Ch D 225 (Jessel MR)

Stephens v Gerard (1666) Sid 315, 82 ER 1128; sub nom. Stephens v Gerrard 2 Keble 128, 84 ER 81 (Court of King’s Bench)

Stephenton v Gardiner (1725) 2 P Wms 286, 24 ER 733 (Lord King LC)

Stewart v Austin (1866) LR 3 Eq 299 (Page Wood VC)

Stickland v Aldridge (1804) 9 Ves Jun 516, 32 ER 703 (Lord Eldon LC)

Stokes v Prance [1898] 1 Ch 212 (Stirling J)

Stulz v Schaeffle (1852) 16 Jur. 909 (Dr Lushington)

Sullivan v Sullivan [1903] 1 IR 193 (Porter MR)

Sweeting v Sweeting (1864) 10 Jurist (NS) 31 (Kindersley VC)

Sykes v Sykes (1870) LR 5 CP 113 (Court of Common Pleas)
Symondson v Tweed (1713) Prec Ch 374, 24 ER 169; *sub nom. Limondson v Sweed* Gilb Rep 35, 25 ER 25 (Court of Chancery)

*Tarn v Commercial Banking Co. of Sydney* (1884) 12 QBD 294 (Divisional Court, reversing Field J)

*Tee v Ferris* (1856) 2 K & J 357, 69 ER 819 (Page-Wood VC)

*Tharp v Tharp* [1916] 1 Ch 142 (Neville J), compromised on appeal [1916] 2 Ch 205

*Thompson v Judge* (1854) 2 Drewry 414, 61 ER 780 (Kindersley VC)

*Thompson v Reynolds* (1827) 3 Car & P 123, 172 ER 352 (Court of Common Pleas)

*Thorold v Thorold* (1809) 1 Phill Ecc 1, 161 ER 894 (Sir John Nicholl)

*Tiffin v Tiffin* (1680) 2 Chan Cas 49, 22 ER 840; (1681) 2 Chan Cas 55, 22 ER 844 (Lord Finch LC)

*Tompson v Browne* (1835) 3 My & K 32, 40 ER 13 (Pepys MR)

*Towers v Moor* (1689) 2 Vern 99, 23 ER 673 (Lords Commissioners)

*Wallgrave v Tebbs* (1855) 2 K & J 313, 69 ER 800 (Page Wood VC)

*Wankford v Wankford* (1702) 1 Salk 299, 91 ER 265 (Court of King’s Bench, affirming Court of Common Pleas)

*Webb v Adkins* (1854) 14 CB 401, 139 ER 165 (Court of Common Pleas)

*Webb v Claverden* (1742) 2 Atk 424, 26 ER 656 (Lord Hardwicke LC)

*Welby v Thornagh* (1700) Prec Ch 123, 24 ER 59 (Wright LK)

*Welford v Stokoe* [1867] WN 208 (Malins VC)

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