*J. D. Davies**

CONSTRUCTIVE TRUSTS, CONTRACT AND ESTOPPELS: PROPRIETARY AND NON PROPRIETARY REMEDIES FOR INFORMAL ARRANGEMENTS AFFECTING LAND**

1. The Variety of Informal Arrangements

The aim of this article is to discuss informal arrangements that purport to confer a variety of benefits and rights in and over land. By "informal", not an exact word at all — "muddled" might be better, I have in mind particularly arrangements which are intended by the parties to them to be protected by the law in some manner or other but which do not obviously fit into a category of right.

There is enormous variety to such arrangements. A may transfer land to B on an informal understanding that A is to remain the owner in fee, or that A is to have a life interest in it or the right to reacquire it in certain circumstances or the right to use it in some limited manner. A may transfer land to B on an understanding that C is to have analogous benefits. A may contribute to the purchase price of land bought by and in the name of B on an understanding that A is to own proportionately to his contribution or in some other proportion or that he is to have the right to buy B out or that he is to have the right to live in it or part of it for life. A may contribute to the purchase price of land bought by B on an understanding that C is to have analogous benefits. A may transfer land to B in return for B undertaking that A or C is to have a life interest or other right of user in some other but specific land. A may transfer land to B at D's request on an understanding that C is to have a life interest or other right of user in it, D having paid A the purchase price. A may pay for improvements to, or himself improve, B's land on an understanding that A or C is to have a life interest or other right of user in it. A may sell land to B at an undervalue so that B can improve it for C to live in for life. A may sell his own land on an understanding that, if A looks after B, A is to have a life interest or other right of user in B's land.

Many such arrangements will involve transfers, but not all. Furthermore, the "understandings" may be difficult to prove and, when proved, be vague. I want to look critically at how the law presently deals with these problems. We frequently interpret these arrangements in an artificial way, forcing them, in order to provide some remedy, into categories to which they do not naturally belong. Consequently, the remedies that follow are also sometimes inappropriate. In particular, remedies of a proprietary nature predominate, which does not always correspond with what the parties meant to achieve.

2. Right and Wrong Approaches to the Subject

Before, however, turning to what the real intentions of the parties are likely to be, and what is the best way of implementing them, I want to look at the writing requirements that the law stipulates as necessary for the creation and transfer of interests in land, and particularly equitable interests

---

* Fellow of St. Catherine's College, Oxford.

** This article is based upon a lecture given while a Visiting Lecturer at the University of Adelaide. My most grateful thanks are due to Mr. J. F. Keeler, Reader in Law in the University, for his assistance in the preparation of this article.

in land. There are a number of reasons for approaching the subject in this way. First, it is necessary to know when writing is *and* when it is *not* required for trusts and contracts affecting land (this of course is a distinct meaning of informality from that stated already). Second, the role of resulting and constructive trusts (and the alternative to writing of part performance) should be seen in relation to the ambit of the need for writing. Constructive trusts in particular have different roles depending upon whether they substitute for writing or not. Third, it is advantageous to know what the writing, if required, must consist of and achieve. Fourth, the variations of intent that different writing requirements reflect need to be appreciated before informal arrangements are subjected to them. The subject is excessively complex but I make no apology for introducing it at some length as I believe that a failure to see the relationship between interests in land, formalities, and constructive trusts (to put it another way, between intentions, writing, and remedies) has contributed significantly to the difficulties that the judges[1] have experienced in trying to find a solution to cases of informal arrangements; more difficulty, I believe, than needed to be faced if the subject had been less identified with the law of property.

It should not be doubted, though, that transactions intended to bring proprietary interests in land into being ought to be in writing. Nor is this just a matter of what is intended and reliable evidence of it, for there are other policy issues too. Enforceable property rights need to be protected against third parties and third parties against them, a matter which usually depends on the registration system in force in a particular jurisdiction. And another problem, though one more commonly met with in money transactions than in relation to land, is presented by the ease with which assets can be moved around, sometimes to give a false appearance of affluence, but subject to a hidden right to claim them back in preference to general creditors.[2]

I also want, in order to get rid at this stage of an analogy that is frequently not helpful, to discuss what a "secret" arrangement may be. So-called "secret" trusts *inter vivos* are often discussed as if they were an extension of the secret trusts that equity engrafts on to the provisions of a will, but this is misleading. All testamentary provisions are required to be in a particular form, in writing that is signed and witnessed and admitted to probate — a public step — on death. Any obligation imposed on a legatee following an arrangement made outside the will and not admitted to probate is thus in a real sense "secret". The requirements for writing for the creation and transfer of interests in or over land are less public, less comprehensive and less consistent. "Secret" in this context lacks both a clear meaning and a sufficiently clearly demarcated relation to the various policy issues. An analogy drawn to secret trusts in wills could cause insufficient attention to be paid to the fact that writing is not always required for *inter vivos* transactions. There is further scope for confusion too, though it concerns intentions rather than writing, in assuming that "secret" provisions will be of the same calibre in testamentary and in *inter*

1. *E.g., Last* v. *Rosenfeld* [1972] 2 N.S.W.L.R. 923, *Ogilvie* v. *Ryan* [1976] 2 N.S.W.L.R.. 504, cases which, together with *Hussey* v. *Palmer* [1972] 1 W.L.R. 1286 and *Dalton* v. *Christofis* [1978] W.A.R. 42 suggest the examples given above and reveal the range of social as well as legal problems involved.
2. *Barclays Bank* v. *Quistclose Investments* [1970] A.C. 567; *Re Kayford* [1975] 1 W.L.R. 279. It would be a mistake to see vice in all cases in which resulting trusts have served this end.

vivos situations. It may not be inappropriate to assume that the benefit to be passed to a secret beneficiary through a legatee is intended to be a proprietary interest, though this need not necessarily be so.[3] But it is less appropriate to make either this assumption or any assumption that the law of trusts is involved for the *whole* of the much wider range of informal arrangements that are now commonly made *inter vivos*. In a great number of such cases, what exactly the benefit to be provided is and what legal mechanism, if any, was intended to secure it should be looked at carefully.

3. *The Requirement of Writing*[4]

(i) Introduction

To begin with, a contract affecting land will need writing if it concerns an interest in land, *e.g.* a life interest or an interest over land, *e.g.* an easement S.40 of the Law of Property Act, 1925 (U.K.) provides that "no action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged."[5] This is a requirement of evidence not of form.[6] It applies to contracts by absolute owners and owners of equitable[7] interests for transfers of their interests and also to a contract by an absolute owner for the creation of an equitable interest in another.[8] The evidence is not public knowledge however. Contracts usually cease to be totally secret only when they are registered to protect priorities. Furthermore, written evidence is only one means of enforcement and is not needed where Equity will use its doctrine of part performance[9] to provide an alternative.

But "interests" are finite in number and s.40 is not relevant at all if the contract is for a right less than an interest in or over land. Contractual licences are provable by oral evidence.[10] And an oral contract can vary

3. There is no reason why the benefit provided should not be a life interest or a licence. A non-property approach to the problems generated by *Ottoway* v. *Norman* [1972] Ch. 698 might also have advantages.
4. Not every doubtful point can be gone into, of course, and in general the views followed are those in Meagher, Gummow and Lehane, *Equity—Doctrines and Remedies* (1975); and in Jacobs, *On Trusts* (4th ed., 1977).
5. Law of Property Act, 1925 (U.K.), s.40(1). Ss. 53 and 40 with minor amendments are in force throughout Australia. Interest "in" land does not exclude easements. A life licence giving exclusive occupation can be seen as an equitable interest "in" or "over" land. I prefer the latter view and it seems more the context of Lord Upjohn's remarks in *National Provincial Bank* v. *Ainsworth* [1965] A.C. 1175, 1239. Such licences should be seen as the top end of a scale of benefits over the land of another depending upon intent. A duration "for life" should not turn the licence needlessly into an interest attracting the Settled Land Act, 1925 (U.K.). *Cf. infra* n.14.
6. There can be joinder of documents to satisfy s.40(1) and s.53(1): *Re Danish Bacon Co.'s Staff Pension Fund* [1971] 1 W.L.R. 248.
7. *Horton* v. *Jones* (1935) 53 C.L.R. 475.
8. Outside licences of exclusive occupation for life, the contract is not very likely to be in that form but will *itself* constitute a trust. But in *Ogilvie* v. *Ryan* [1976] 2 N.S.W.L.R. 504, *infra*, text to nn. 45-50, if Mr. Ogilvie intended to give Miss Ryan a property interest and contracted with her to that effect, the writing requirement should be the same whether the interest to be given is a fee simple or a life interest.
9. S.40(2). Equity's assumption of jurisdiction here has been based at various times on equities arising from acts done on the basis that a contract existed, on some notion of equitable fraud (the view I prefer), and on the significance of the alternative factual evidence. See *Steadman v. Steadman* [1976] A.C. 536 and *Last* v. *Rosenfeld* [1972] 2 N.S.W.L.R. 923.
10. *E.g. Tanner* v. *Tanner* [1975] 1 W.L.R. 1346. Whether a contractual licence can *lead to* a constructive trust being imposed is irrelevant to this point.

the terms of *e.g.* a lease that is about to be executed, without itself being evidenced in writing[11] There is controversy, however, on whether some contractual licences giving a right of exclusive occupation can be "interests" in which case they would not only be capable as such of binding third parties, but would presumably attract s.40 also. I believe, however, that licences are best left as what they are ordinarily intended to be, namely contractual, though that need not prevent their protection through injunctions.[12] In England the controversy has centred on licences for life. At one time, these were forced into the category of interests *in* land thus attracting the requirements of the Settled Land Act, 1925 (U.K.)[13] but there has recently been a welcome change of mind, it being recognized that what the parties really mean to happen is to be given more weight and life licences not mechanically turned into property rights.[14]

Contracts within s.40 usually anticipate a subsequent formal transfer of the legal interest — if only an equitable interest is to be transferred, a formal transfer may not be anticipated. An equitable interest may arise however in the transferee *prior* to the formal transfer at law, for instance on payment of the purchase price, under the notion of *constructive*[15] trusteeship — a use of the concept that needs distinguishing from the constructive trusts discussed later.

---

11. *City and Westminster Properties* v. *Mudd* [1959] Ch. 129. No question of enforcing this secret collateral contract against third parties arose. Unilateral contracts that will lead to a disposition of an interest in land are within s.40, however: *Daulia* v. *Four Millbank Nominees* [1978] 2 W.L.R. 621.
12. *Cowell* v. *Rosehill Racecourse* (1937) 56 C.L.R. 605 looms large here and has slowed the development of a flexible law of licences. But the ratio of the case is very different from the question of protecting occupational licences through injunctions as suggested by Megarry J. in *Hounslow L.B.C.* v. *Twickenham Garden Developments* [1971] Ch. 233, and need not impede altogether this discretionary form of remedy. It is more difficult to argue for injunctions against third parties as suggested in *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346, 1350, especially in a Land Registration scheme which emphasises indefeasibility and discourages the use of caveats for interests that are not clearly proprietary. In England, cautions on the register may be available more readily than caveats under the Torrens system. If practice here cannot be eased, the licensee can still have a claim against the licensor, see *infra*, text to nn. 70-85.
13. *Bannister* v. *Bannister* [1948] 2 All E.R. 133; *Binions* v. *Evans* [1972] Ch. 359; *Dodsworth* v. *Dodsworth* [1973] E.G.D. 233. *Cf. supra* n.5.
14. *Chandler* v. *Kerly* [1978] 1 W.L.R. 693. There is some support for this view in *Re Potter* [1970] V.R. 352 where, however, the settlement system was held to be attracted. The danger of freedom of alienation if life licences outside the settlement system are recognised can be overemphasized and should be set against parties' intentions to confer substantial degrees of benefit and security in land without creating property rights, intentions which are quite rational when seen in the context of the need to provide, in all classes of society, and in a housing shortage, for *e.g.* the elderly and the incapacitated. To overprotect in such situations by imposing a property interest where it is not intended has its own dangers.
15. There is great scope for confusion here. S.53(2) which renders constructive *trusts* immune from writing, does not apply to *contracts* within s.40 though payment of a purchase price can both cause a constructive trust to arise and be evidence of part performance. It would see wrong to use s.53(2) where there was no compliance with s.40; thus the controversy surrounding oral contracts for the transfer for value of equitable interests in personalty and the immediate coming into effect of constructive trusts that so divided the judges in *Oughtred* v. *I.R.C.* [1960] A.C. 206 would not seem to affect oral contracts for the transfer for value of equitable interests in land which should be enforceable only under the doctrine of part performance. Constructive trusts can be imposed where there are insufficient acts of part performance if there are *further* factors than the contract itself: see *infra* n.41.

S.40 may also overlap with s.53 of the same statute which deals with the immediate *creation* of interests in land. A contract may *itself*[16] constitute a declaration of trust which thereby attracts the requirements of s.53(1)(b) or can in other ways bring about a consequence within s.53(1)(a) or s.53(1)(c). In these circumstances, the transaction would seem to attract both s.40 and s.53 but ought to be effective if it satisfies either.[17] The opportunity for confusion is great, but so is the confusion with s.53 itself, to which I must now turn.

When an absolute owner transfers land to trustees upon trust, the documents that accompany the transfer ordinarily make clear that the transferees are trustees and who are the beneficiaries. Hence the statutory requirement that "no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same"[18] is satisfied. A trust of land is such an interest and is created and declared by the transferor.

But the requirement of writing can be satisfied without the writing being part of documents of transfer. A declaration of trust may be used, for which the requirement is that "[A] declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust".[19] An absolute owner can just declare himself trustee in writing and retain the evidence, for no communication to the beneficiary is required.[20] All that writing must do in this case is to *evidence* the trust sufficiently; it has not to be in any particular form. For s.53(1)(a) and (c) on the other hand the writing must be *in* a particular form that achieves a desired effect; though the writing does not now need to contain (by way of evidence) all of the material facts of the trust.[21]

A declaration of trust can also be combined with a transfer. The transfer may be in form absolute; provided the transferee knows that he is a trustee, the rest of the trust may be evidenced by separate writing. This may also be true when the transfer includes the fact of the trust.[22] In either case, this method of declaration is effective if the declaration of trust in contemporaneous with the transfer; or if the transferor's declaration precedes the transfer, the declaration is confirmed subsequent to it; or, if the declaration is subsequent to the transfer, it evidences that it took effect at the time of the transfer.[23]

A transfer can also be subject to an obligation undertaken (wholly without writing) by the *transferee* to declare himself a trustee. The transferee may know, in advance of the transfer, who the beneficiaries

16. *I.e.* on construction of the transaction as a whole as distinct from equity's introduction of a constructive trust between payment of price and formal transfer.
17. *Adamson* v. *Hayes* (1973) 130 C.L.R. 276, a difficult case to determine the *ratio* of—but it at least illustrates the point.
18. S.53(1)(a). *Re Tyler* [1967] 1 W.L.R. 1269 suggests that the names of the transferees are required to be in writing under s.53(1)(c) but not the names of the beneficiaries. The context, however, is that of a disposition of an existing equitable interest in personalty to a person who had already agreed to hold as a trustee. For land, s.53(1)(a) may well require the names of the beneficiaries to be in writing in all cases.
19. S.53(1)(b). *Cf. supra* n.6.
20. *Middleton* v. *Pollock* (1876) 2 Ch.D. 104.
21. See Jacobs, *op. cit.* (*supra* n.4), *para.* 707 but *cf. supra* n.18.
22. *Cf.* the situation where there is no sufficient writing, discussed *infra* n.38.
23. *Permanent Trustee Co.* v. *Scales* (1930) 30 S.R. (N.S.W.) 391.

are to be or may be told later, but in either event it is the transferee who must now declare the trust in writing as the equitable title has passed to him subject only to the *obligation* to declare a trust. This obligation is not itself a trust, and the writing evidencing the transferee's declaration of trust will again be a separate document. Another different situation occurs when a covenantor obligates *himself* under seal to transfer land to a person named as trustee in the covenant. The subject matter of the trust is now the chose in action vested in the trustee, and maybe in this case no written evidence of the identity of the beneficiaries is required at all. The equitable interest in the chose vests in the beneficiaries by the trustee accepting the chose on their behalf, and the chose may not be at that stage an "interest" in land, though land will result from it.

To complete the picture, a transfer of an equitable interest in land that is *already* divorced from the legal estate must "be in writing signed by the person disposing of the same."[24] This is so whether it is a direct transfer to a new beneficiary or takes the form of a surrender by the old beneficiary to the trustee on an undertaking by him to hold for a new beneficiary.[25] But no writing is required to shift the equitable interest up to the trustee if the old beneficiary's instruction to the trustee is to convey the legal and equitable title to a new beneficiary *and* he does so.[26]

(ii) Resulting and constructive trusts

The situations discussed so far assume a new beneficiary. But trusts of land can also be brought into being without writing under the guise of resulting trusts. Many resulting trusts merely fill an unanticipated gap in the declaration of equitable interests and do not depend on intent. But others range from a clear intent[27] to produce a resulting trust to presumed or inferred intent. *Hodgson* v. *Marks*[28] provides a striking example of a secret resulting trust of land that furthered an intent to retain a proprietary interest. Mrs. Hodgson transferred her home to her lodger fearing that a relative would turn the lodger out. She should have feared her lodger more, for he sold it over her head. It was held, however, that she had always intended to retain the equitable title so that the lodger had always held on

24. S.53(1)(c). *Cf. supra* n.6.
25. *Grey* v. *I.R.C.* [1958] Ch. 690; [1960] A.C.1. In *Comptroller of Stamps* v. *Howard-Smith* (1936) 54 C.L.R. 614, 622, Dixon J. in a controversial passage indicates that no acceptance by a transferee is required; *sed quaere*, especially in the context under discussion.
26. *Vandervell* v. *I.R.C.* [1967] 2 A.C. 291. The logic of this decision is not clear, though the sense is: there is a rational document of transfer to which the old beneficiary's written assent would be an odd adjunct. If the decision is correct for share transfers, it seems equally applicable to land. S.53(1)(a) would apply to the creation by the trustee of a new separate equitable interest but this is a different question from the passing up of the old equitable interest to a trustee (usually in this context only a nominee) to enable him to dispose of it along with the legal interest. Whether writing is required to pass the equitable interest up to the trustee is not clear, if the instruction to the trustee is to create a new trust without himself as trustee.
27. See the cases cited *supra* n.3.
28. [1971] Ch. 892. The trial judge had to consider whether Mrs. Hodgson had intended to retain the equitable title throughout or had, under undue influence from the lodger, conveyed it to him with the legal title. The narrowness of the line on the facts is unfortunate when the consequences are so different. A finding of undue influence would have given Mrs. Hodgson only an equity—*cf. Cresswell* v. *Potter* [1978] 1 W.L.R. 255, but the judge's finding gave her a title in equity capable of binding third parties. The English registration system over-protects those in occupation of land under such a resulting trust as this. The greater emphasis on indefeasibility under the Torrens system is preferable.

resulting trust for her. Being a resulting trust, it could be proved orally (as in the familiar case of joint contributions to the purchase of a house conveyed into the name of one only of the contributors), for writing under s.53(1) is not required for "resulting, implied, or constructive trusts".[29]

But is this because[30] it is a resulting trust and resulting trusts are by definition immune from s.53(1)? Or is it more correct to say that writing is required whenever an equitable proprietary interest is intended to arise but that oral evidence of it may be given if it would be "fraud" in a transferee to rely on the legal title which he has obtained to defeat the trust?[31] Either way it seems that the resulting trust, whether based on intention or not, is such a familiar tool that the notion that it can be subject to a requirement of writing at all has ceased to strike one. The impression is of course confirmed by the comparative rarity of cases in which the parties have actually thought in terms of this law of trusts and the frequency of cases in which an intention to hold a proprietary interest is inferred — even in Mrs. Hodgson's case — from the circumstances. But does this way of looking at s.53 apply to the constructive trust also? Can s.53 be side-stepped in the case of a purported disposition to a new beneficiary simply by labelling a particular situation as "fraudulent" and therefore regarding it as a "constructive" trust?

(iii) The use of "fraud"

The best-known illustration of the "fraud" doctrine is that of secret trusts engrafted onto wills. If a legatee under a will agrees with the testator that a benefit to be received by him absolutely under the will is meant for a secret beneficiary, Equity will not allow the legatee to deny the trust. Nor does it matter whether it was the testator or the legatee who suggested the agreement — there does not have to be an inducement, as distinct from acquiescence, by the latter. The agreement does not immediately constitute a trust and it is not regarded as a contract. The provisions of a will are required to be in writing; but Equity will allow a secret trust to be proved in these circumstances by informal[32] evidence in order to negate the fraud, and will then enforce it in favour of the beneficiary. The "fraud" in relying on title under the will could be purged

29. S.53(2). It is quite misleading to think that these are known definable categories of trust. They can be understood only through illustrations of when they occur. "Resulting trust" is used to describe the consequence of Equity's intervention. When there is a projection forward to a new beneficiary, "constructive trust" is preferred to "implied trust" even in cases where the "constructive" trust implements a clear intention. The line between resulting and constructive trusts cannot be explained in terms of intent. Resulting trusts sometimes depend on it but not always—see Megarry J. in *Re Vandervell's Trusts No. 2* [1974] Ch. 269, 289; constructive trusts are more commonly independent of it but not totally—*cf. infra.* n.58. The otherwise welcome effect of the decision in *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685 is diminished by the attempt to ascribe general characteristics, *e.g.* the presence or absence of intention, to resulting and constructive trusts as if they were categories *e.g.* 698-699 *per* Samuels J.A. quoting Jacobs, *op. cit. (supra* n.4), *para.* 1301. Glass J.A. more realistically sees that a "constructive" trust may give effect to genuine intentions: *id.*, 693.

30. As Russell L.J. appears to say in *Hodgson* v. *Marks* [1971] Ch. 892, 933.

31. See, for instance, the emphasis in *Organ* v. *Sandwell* [1921] V.R. 622 and *Dalton* v. *Christofis* [1978] W.A.R. 42.

32. It is sometimes argued, *e.g.* in Hanbury and Maudsley, *Modern Equity* (10th ed., 1976), Ch. 8 that, since the trust takes effect outside the will, it must comply with s.53. If it is conceived of as a declaration of trust situation, writing will then be required in the case of land but not in the case of personalty to which s.53(1)(b) does not apply. But there is no support for a distinction to this effect in the authorities; anyway, oral evidence is also available to prove secret trusts of land created *inter vivos.*

by making the legatee hold on resulting trust for those entitled under the will to residue, but Equity has always projected the interest forward to the secret beneficiary;[33] and as a proprietary interest too, never treating it, though based on fraud, as a mere equity. Whether this is really an express, or an implied, or a constructive trust is usually dodged by calling it secret.[34] An analogous result follows where those entitled under an intestacy agree with a person who wishes to make a will to pass benefits on to particular beneficiaries. Equity also extends its protection in some cases to secret beneficiaries where a will has given assets to a legatee "on trust."[35] In both fully and half-secret trusts, the rationale for equitable intervention is said to be "fraud", but is made to include "fraud on the beneficiaries".[36]

The doctrine is not confined to wills. A transferor, at his own or the transferee's wish, may convey land on the transferee's agreement to hold the land for a secret new beneficiary. Oral evidence can be given of the undertaking which will be enforced in favour of the beneficiary. Whether the intent to confer a proprietary interest is clear, or is inferred, Equity justifies its intervention on the ground that it is "fraud" on the part of the transferee to rely on the absence of writing.[37] It thus does not matter whether the writing that is absent is a testamentary requirement or a requirement of *inter vivos* transactions.[38] But if the same[39] view, namely that writing is simply not required, is taken of resulting trusts and of constructive trusts that are imposed in situations where an equitable interest was intended but not properly created, the consequence is that "fraud", through the imposition of constructive trusts, is an alternative to writing under s.53[40] as part performance is to writing under s.40(1).

---

33. This was necessary in the very early cases of *Thynn* v. *Thynn* (1684) 1 Vernon 296, as otherwise the "trustee" would merely have taken on an intestacy.
34. I prefer the view that it is express, a trust that fails to comply with statutory requirements, but which is enforced through equitable intervention.
35. But in this case of "half-secret" trust, the acceptance must not only be in favour of a specific beneficiary (also required in fully secret trusts) but must have occurred not later than the date of making the will (date of death in fully secret trusts). There is no logic in the distinction but it is usually taken to be the rule, following the unsatisfactory judgment of Lord Wright M.R. in *Re Keen* [1937] Ch. 236.
36. *Blackwell* v. *Blackwell* [1929] A.C. 318, which also shows the whole initiative for the secret trust coming from the testator: the legatees were merely assenting parties. Earlier formulations of the doctrine put more emphasis on inducement, for instance *McCormack* v. *Grogan* (1869) 4 H.L. 82.
37. *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 196, *i.e.* esp. 206 *per* Lindley L.J. See *infra* nn. 58-61, 83-85 for the problems that arise if the intention is not really to confer a proprietary interest.
38. It is less clear whether similar indulgence will be granted to a transfer of land "upon trust" and the only evidence of the trust is oral. Assuming that s.53(1)(a) requires the beneficiaries to be named in the writing—see *supra* n.18—whether oral evidence of them and of the trustee's acceptance of the trust in their favour will be allowed to displace the resulting trust that arises on the face of the document would depend on the "fraud on the beneficiaries" notion being extended from wills to cover the case. When the transferor has died before the issue arises, the merits are not dissimilar for the transfer cannot now be repeated.
39. *Cf.* Upjohn J. in *Oughtred* v. *I.R.C.* [1958] Ch. 383, 390 and Russell L.J. in *Hodgson* v. *Marks* [1971] Ch. 892, 933.
40. But not with the requirement of writing under s.40 in contract situations where s.40 is vital: see n.41 *infra*. Though part performance and the imposition of a constructive trust have a common basis in "fraud", *cf.* Lord Reid in *Steadman* v. *Steadman* [1976] A.C. 536, 540, factors that cause them to become operative are not the same. Part performance is certainly the more technical. Nor are the consequences the same: part performance provides the means of enforcing a contract, the constructive trust leads to a distinct remedy.

(iv) Summing up the requirement of writing

The complexity of the situation is remarkable, and to relate the vague informal arrangements that we are concerned with to it without a great feeling of artificiality is impossible. The variants are as numerous as they are unlikely to correspond with anything in the parties' minds.

(a) To create equitable interests affecting land expressly usually requires writing under s.53 but this is not invariably so;
(b) what the writing must contain varies;
(c) what the writing does varies;
(d) who has to bring the writing into being varies;
(e) who will know about the matter varies;
(f) contracts to create an equitable interest affecting land require writing under s.40, but whether licences can ever constitute such an interest is debatable;
(g) contracts may constitute a declaration of trust and be within s.53(1)(b);
(h) contracts may constitute a trust within s.53(1)(a) and (c);
(i) part performance is an alternative to s.40;
(j) resulting trusts do not require writing, even when intended;
(k) a variety of situations including some reflecting intentions in some manner or other, under the head of constructive trusts do not require writing.

There is everything to be said for making these writing requirements more comprehensive, more consistent and more intelligible. If they were so, it might be possible to work out a rational policy for the cases where, exceptionally, a writing requirement could be dispensed with on, *e.g.*, the ground of fraud. But it is clearly impossible to relate the present diffusion of the requirements to the basic policy issue of certain evidence or to any other policy. It can also be seen that "secret" means nothing. Not only do some "secret" arrangements affecting land not require writing, *e.g.* contractual licences and resulting trusts, but others require writing only in an indirect form, *e.g.* choses in action giving a right to a transfer of land. But also, there are many situations in which writing is required but can be satisfied without the writing becoming in any sense public or even divulged to anyone. Priorities apart, secrecy seems the rule rather than the exception.

4. Extending the Use of Fraud and of Constructive Trusts

In the *inter vivos* transfers so far discussed, an intent to create a proprietary interest in land was assumed. Thus the requirement of writing was attracted, and the "fraud" that justified a constructive trust was linked to "missing" writing. But the fraud doctrine is not, apparently, to be confined by such a consideration nor made dependent on unduly[41] technical grounds. It is available to show, for instance, that an apparently absolute transfer was made only as security for a loan or that a recital in a conveyance that the purchase price has been paid is in fact untrue, or that

41. But Hope J. in *Last* v. *Rosenfeld* [1972] 2 N.S.W.L.R. 923, 934-935 emphasizes that a constructive trust cannot be imposed where there is nothing more than an unenforceable contract. *Cf. Ogilvie* v. *Ryan* [1976] 2 N.S.W.L.R. 504, 525-526 *per* Holland J.: "The true position is that, if the facts proved are such that, in Equity, a constructive trust would arise, a court of Equity will enforce that trust, notwithstanding that *amongst* the facts relied upon to establish it there is an agreement proved of which specific performance could not have been ordered because of [s.40]". "Amongst" (italics supplied) is vital here.

a conveyance was not meant to include all the land transferred.[42] The decision in *Rochefoucauld* v. *Boustead*[43] to admit oral evidence of a trust fits naturally into this context. But it is possible to state the doctrine without reference to writing at all. It can be stated in a more general form that, in the particular circumstances of a case, it is "fraud" to rely on the manner in which a legal title has been acquired. In this form it can explain intended resulting trusts whether or not the view is taken that writing is required under s.53(1).[44] But it has to be stated in even wider form to explain a number of cases in which constructive trusts have recently been imposed without, I think, the full nature of the expansion in the use of "fraud" having been appreciated.

In *Ogilvie* v. *Ryan*,[45] Miss Ryan agreed orally with Mr. Ogilvie, on leaving the house of which she was tenant (and in which Mr. Ogilvie also lived), that she would not acquire another property but would live in a house to be bought by Mr. Ogilvie. She would look after him for the rest of his days and be entitled to reside there for the rest of her life. She complied with her side of the bargain but his executor sued for possession of the house after his death. Viewed as a contract for an interest in land, the arrangement lacked writing as required by s.40 and there were insufficient acts of part performance. Holland J. imposed a constructive trust in her favour, which the presence of an unenforceable contract did not inhibit. It did not matter that Miss Ryan had not contributed to the purchase by money or work contributions, nor that it was not a transfer from her or from anyone else who made the arrangement for her. She had earned her reward and it would be "an unconscientious use of the legal title" to deny it: it was not just enforcing a contract.[46]

In *Hussey* v. *Palmer*,[47] Mrs. Hussey paid £607 for an extension to her son-in-law's house, expecting to be able to live there for the rest of her life. There was unpleasantness, she left and, under some form of trust, successfully claimed the £607 back. There was no transfer or acquisition of title to the house, only physical extension and an informal unwritten arrangement. Again, to produce this result from this arrangement calls for a most generalized "unconscientious use of legal title".

The link or absence of it between the "fraud" doctrine and statutory requirements of writing needs noting. In these cases it is not at all obvious that the parties intended an arrangement within the bounds of property. The finding of fact in *Ogilvie* v. *Ryan*[48] is that Miss Ryan "would be entitled to live in the home rent free as long as she wished". Does such a finding have to be seen as a contract to create an interest in land? Again, is it likely

42. *Lincoln* v. *Wright* (1859) 4 D G. & J. 16; *Haigh* v. *Kaye* (1872) 7 Ch. D. 469; *Booth* v. *Turtle* (1873) 16 Eq. 182.
43. *Supra* n.37.
44. Subject to s.53(2) of course. *Supra*, text to nn. 29-40.
45. [1976] 2 N.S.W.L.R. 504. It is sometimes argued that parties who do not pay for good legal advice deserve the muddle into which they fall. But how many advisers would find it easy to meet the parties' real needs in this case, even if they had been consulted right at the beginning?
46. See particularly 518, 528-529 and *cf. supra* n.41. The argument on the ambit of constructive trusts that prevailed has not yet been advanced with equal width in England.
47. [1972] 1 W.L.R. 1286. Lord Denning M.R. thought it a constructive trust, Phillimore L.J. a resulting trust. Cairns L.J. dissented.
48. [1976] 2 N.S.W.L.R. 504, 512. There is no explanation of how this becomes the "beneficial proprietary interest" referred to *id.*, 519.

that both Mrs. Hussey *and*[49] her son-in-law envisaged her acquisition at any stage of a proprietary interest in the house or the extension? The answer in both cases would seem to be No. But if no proprietary interest in land was intended, a constructive trust solution is being used where no writing was "missing" because it was not required, where in fact there was just an informal arrangement and no more.

This point was not taken in either of the above cases, however. Holland J. for instance, in *Ogilvie* v. *Ryan,* though conscious of extending the ambit of constructive trusts, does so by equating the facts of the case with those of cases in which a constructive trust implemented an arrangement that could be seen as proprietary in character. The point was anticipated, however, in *Last* v. *Rosenfeld.*[50] Land was transferred absolutely subject to an oral agreement entitling the transferor to demand re-conveyance, on payment of a certain sum, if the transferees did not reside in the property within 12 months. The oral agreement was a crucial part of the transaction and there were sufficient further factors to justify the imposition of a constructive trust to prevent "fraud". Hope J. indicated that this was so, "whether the [transferee's obligation to re-sell] can properly be described as a trust or not".[51] If this is right, the constructive trust is a remedy available in a variety of situations not all of which are situations envisaged as being within the notion of property. In other words, the constructive trust is not limited as a remedy to cases where a proprietary interest was intended but its creation not accomplished through lack of writing.

Another development is also apparent, especially in *Hussey* v. *Palmer,* and brings us back to the relation between intentions and constructive trusts. Resulting trusts are imposed following an understanding or arrangement: the understanding is not to be confused with a contract but it must be possible to infer it.[52] The trust does not happen just because it is fair but because it reflects what the parties arranged. The same is true of the constructive trusts that arise in this context. They are not independent of intentions. They happen because it is wrong for a defendant to rely on a legal title which was obtained subject to some arrangement; not just because it would be fair. Like resulting trusts, they depend on proof of the arrangement. It cannot be argued that intentions are crucial where the trust is a resulting trust referring backwards but irrelevant where the trust is a constructive trust projecting forwards. But how precise and clear does the arrangement have to be? The constructive trust that was imposed in *Hussey* v. *Palmer* really substitutes for Mrs. Hussey's vagueness. This was fortunate for her as, if the arrangement had constituted a contract, it is difficult to see how, by leaving the house, she became entitled to the £607, unless the doctrine of frustration could be prayed in aid.

---

49. Which would seem necessary if *Burgess* v. *Rawnsley* [1975] Ch. 429 applies.
50. [1972] 2 N.S.W.L.R. 923.
51. *Id.,* 937. The obligation seems proprietary however, as in *Timber Top Realty* v. *Mullens* [1974] V.R. 312, so it is difficult to claim the remark as more than *dictum.*
52. The criticism of recent extensions in England of the technique of inferring, or imposing, resulting trusts is indeed that the finding of fact that a proprietary interest was intended is based on inadequate evidence of an understanding to that effect. *Cf. Eves* v. *Eves* [1975] 1 W.L.R. 1338 and *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685, the latter preferring, rightly in my view, the stricter view of *Gissing* v. *Gissing* [1971] A.C. 886. To transmute informal arrangements too readily into proprietary rights could prejudice the need to protect genuine proprietary interests created informally.

Both in relation to purported creation of rights in land and contracts for their creation, constructive trusts thus seem to be aiding the enforcement not only of arrangements that needed writing but lacked it, but also arrangements that did not need it and arrangements which the parties never properly worked out. It seems to be done however under a mask of being within a familiar property protection, a mask which gives it a false appearance of respectability and also distorts the real intentions.

An even further step appears from *Timber Top Realty* v. *Mullens*.[53] The defendant wished to sell a block of rural land to the plaintiff company but minus a small area of land on which stood the defendant's house. Subdivision of the whole site was not possible, however, without a local government consent that was not forthcoming. It was held that the parties proceeded with the sale of the whole site because of an inducement by the defendant company that the small area would be sold back to the plaintiff as soon as possible and that meanwhile the defendant could occupy it. If this "inducement" had been a contract it would have been void under statute. But this did not prevent Nelson J. imposing on the defendant company a constructive trust "to transfer the area containing the house as soon as the necessary plan of subdivision was approved and, in the meantime, to permit the defendant to retain possession of it".[54] The policy of the relevant Acts was not, in his view, prejudiced by this consequence of the arrangement but it is nevertheless the imposition of a constructive trust where an express one would have been void. The possessory content to the right under the trust is also of interest.

5. The Significance of "Property"

A number of problems must follow if constructive trusts are to be imposed for "fraud" in as wide a variety of situations as is envisaged above. There is the inevitable problem that it can seem to be a wide ranging discretion available on call. Like rescission, its scope needs watching, though not so much through rules defining its applicability as through the factors that must be weighed before its exercise.[55] Another problem is that constructive trusts must not be imposed regardless of other legal categories, *e.g.* contract, which the parties to an arrangement may have attracted by their intentions and other remedies that may consequently be available.[56] This indeed is the main point to which I want to come but I first want to look at another problem, the flexibility of remedy that is available under the constructive trust itself: and to one aspect in particular — the question of property.

---

53. [1974] V.R. 312.
54. *Id.*, 319.
55. It has always proved easier to do this for remedies that work in fairly defined areas, such as undue influence, than in remedies such as rescission which are very general in application but may have to be used more sparingly in some areas than others according to the policy issues in those areas themselves. Insufficient care has been taken in this respect, for instance in cases of rescission for mistake *alone*. But we need not disapprove of *Copper* v. *Phibbs* (1876) 2 H.L. 149 because we disapprove of *Magee* v. *Pennine Insurance* [1969] 2 Q.B. 507.
56. Again the analogy to rescission for common mistake is of interest. That remedy should not be given if it would give a plaintiff a more extensive remedy than if a defendant had warranted or represented the truth of a matter that was in fact untrue. A classic example of suggesting just this occurs in Denning L.J.'s judgment in *Oscar Chess* v. *Williams* [1957] 1 W.L.R. 370, 373-374. Constructive trusts cannot ignore what responsibilities were undertaken any more than rescission. Neither is palm-tree justice.

If parties create, or contract to create, an interest in or over land and comply with the requisite formalities, of course the appropriate proprietary interest will arise. If the writing requirements are not complied with, assuming now that the intention was to bring a proprietary right into being, the arrangement will only become effective through constructive trusts or part performance. In each case Equity's help is based on "fraud", but the remedy that will be given will be proprietary in consequence as in the familiar cases of resulting trusts and secret trusts in wills. Ungoed-Thomas J.'s judgment in *Hodgson* v. *Marks*[57] upholding Mrs. Hodgson's right to rely on her resulting trust against an assignee of the lodger emphasizes this. Though the "fraud" arises when the absence of writing is pleaded, it does not matter that the person pleading it is himself innocent. The question is whether his pleading of it is aimed at the exclusion of evidence of fraud, albeit the fraud of another. But despite the emphasis placed on the time of the pleading, the consequence is not that the trust commences its existence at that time. It will, it seems, have been in existence from the time it was intended to have been brought into existence. The "fraud" enables its proof to occur, not its constitution, and so it is capable of binding third parties as an equitable interest. It is not a mere equity, though a wiser Land Registration scheme than the English one may bring such a result about in other ways.

But at least Mrs. Hodgson did intend to own something. A new problem arises if the same proprietary consequences have inexorably to follow the imposition of a constructive trust in cases where the arrangement was not, or was not clearly, one that envisaged the creation of a proprietary right at all. Such consequences would distort parties' intentions and lead to inappropriate remedies both as between the parties themselves and against third parties. It would be a form of word magic. "Fraud" becomes "trust" which becomes "property" irrespective of what was anticipated. The words "constructive trust" would indeed be a misnomer for they could further a clear intention manifestly not an intention to create a proprietary right.

Where there is a need to impose a constructive trust to prevent repudiation of an informal arrangement that did not[58] represent at attempt

57. [1971] Ch. 892, 908-909. *Cf. supra* n.28. *Last* v. *Rosenfeld* [1972] 2 N.S.W.L.R. 923, 934 and *Timber Top Realty* v. *Mullens* [1974) V.R. 312, 319 also show that the fraud arises only when the arrangement is denied effect.

58. I would wish to be able to argue for the remedies consequent upon the imposition of constructive trusts being flexible and not of necessity proprietary in most situations including those in which a proprietary interest was intended. Such a contention is unlikely to win acceptance at the present time and the contentions that follow all assume an intention to confer less than a proprietary right. It is easier to argue the case for flexibility of remedy in cases where a constructive trust is being imposed on a situation that is not an expressly created trust but is one that just contains a fiduciary or a "fraud" element. Frequently the trust remedy here overlaps with, for instance, contract, and differences in remedy are often not justified (but *cf. Selangor United Rubber Co.* v. *Cradock* [1968] 2 All E.R. 1073, 1146-1147). The need for not imposing the full consequences of a proprietary remedy can occur, however, even in cases of express trusts. To take the extreme case, the plaintiff estate in *Williams* v. *Barton* [1927] 2 Ch. 9 can, without feeling a bad conscience about it, enjoy having its valuation work done at half-price due to the defendant executor's fiduciary dilemma. But why should it keep this windfall against the defendant's general creditors if he became bankrupt before action was brought? There is a real problem in making the cause of a constructive trust being imposed correlate with the effect of imposing it, owing to the plaintiff not having to show loss in order to succeed. *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378 is one of the most striking examples of an undeserving plaintiff being able to wage a constructive trust against defendants who were probably not the real malefactors.

to confer a proprietary right, the remedy given should be related to the actual intent and take into account the arrangement that requires its imposition. There should be emphasis on the whole circumstances of the "fraud" and not on a supposed proprietary "interest". This can be seen from a simple example. A transfers property to his brother B on an understanding that B is to provide a home for life in that or some other property for their invalid brother C. Let it be supposed that the understanding is perfectly clear and is to secure a home for C, not to give C exclusive possession of any particular property or part of it; for B may need to move house. It would be wrong to allow B to repudiate the arrangement but inappropriate to turn C into the owner of a proprietary interest in any particular property. Holding B to be a constructive trustee can however be a way of ensuring that C is protected, the degree of protection being related to the arangement and being no greater, probably, than a right of occupancy.

The same point must also occur, assuming the intent is to create less than a proprietary right, whether an informal arrangement is intended to benefit C, a stranger, or A, a contributor or transferor. If A did not expect to receive a proprietary right but some lesser degree of protection, it would be odd indeed if the only protection available for him were proprietary. It is easy for this to be overlooked, however. The terminology of a "resulting trust" tends to be used in all cases where a benefit returns to a contributor or transferor, and a resulting trust, even more than a constructive trust, is assumed to be proprietary.[59] Yet the need for a discretionary rather than a necessarily proprietary remedy seems here apparent.

I want to advance the contention that in both these cases, where the intent is not to confer a proprietary right, the *constructive* trust should be available where the need for it arises. As in other contexts, it should here be seen as a "formula for equitable relief"[60] leading to a discretionary remedy and not as an institution necessarily leading to, or as being in itself a justification for, a proprietary remedy. The discretion need not be thought of as wholly at large though, for it will relate to, though not be governed by, the circumstances that require it.

Writing, or the absence of it, is not the crucial factor in these cases. The intent to create less than a proprietary right may be clear or the circumstances so vague that a proprietary interest is not to be easily supposed, but in both cases any remedy to be given must be independent of writing requirements and equitable doctrines alternative to them. A's arrangement with B to provide a home for C may indeed be written as well as clear, but is not for that reason to be regarded as attracting ss.40 or 53. Yet confusion can so easily occur. A proprietary remedy ought not of course follow an arrangement[61] that was clearly not proprietary though written. But unless carefully avoided, a proprietary remedy could follow an unwritten arrangement, also not intended to be proprietary, on a supposition that anything "secret" and engrafted on to a legal title must depend on constructive trusts and because of this lead to a proprietary

59. Where a resulting trust fills a gap in the declaration of equitable interests, it must of necessity be proprietary. But the mere fact of a benefit *returning* to a contributor or transferor should not pre-determine its character as proprietary where the intention is not to that effect.
60. *Per* Ungoed-Thomas J. in *Selangor United Rubber Co.* v. *Cradock* [1968] 2 All E.R. 1073, 1097.
61. But *cf.* the tortuous findings and inapt result in *Binions* v. *Evans* [1972] Ch. 359.

remedy. An analogy drawn here to "secret trusts" would be most misleading. The arrangement between A and B not being intended to confer a proprietary right upon C, has nothing in it to correspond with "secret" agreements engrafted, despite statutory requirements of writing, onto wills.

6. The Right Approach to Informal Arrangements

Informal arrangements are approached, I believe, in the wrong manner. The tendency is to proceed as follows: that they affect land, that they are intended as contracts for or to otherwise create interests in land, that they need writing, that if they lack writing part performance or constructive or resulting trusts may help, and that any remedy that emerges will be a remedy within the law of property. This can produce a number of artificialities. An arrangement affecting land may not obviously be one intended to lead to or to constitute a proprietary interest; if so, to attempt to construe the arrangement into one or the other of the confusing variants under ss.40 and 53 is to miss the point at an enormous cost in complexity; and if a constructive trust is imposed on the supposition of missing writing, the proprietary remedy that will follow is inappropriate and overprotects.

The first question should always be, what did the parties intend? If an interest in or over land, either through contract or immediately, one could wish the writing requirements to be more rational and the remedies more flexible. They are not so, but that is a different question. If not an interest in or over land, however, these requirements do not arise. We need to know now, as precisely as possible, what those intentions were. They may still constitute a contract, albeit for a non-proprietary right. But it may have to be accepted that they never attained the necessary degree of precision. Even so, we can proceed to the question of how they can best be protected without turning them into some category of right to which they do not really belong. We thus need to bear in mind the variety that informal arrangements can take; and, I believe, to accept also that their protection or enforcement needs a discretion as to its form and extent. Constructive trusts can be one such remedy but they should not be seen as occupying the whole of the picture, or as necessarily linked to missing writing or the law of property. Their role will vary according to whether writing is missing or whether there is a contract for a non-proprietary right, or whether no contract was concluded at all.

Writing requirements are thus not always relevant, nor are they the only trigger for the imposition of constructive trusts. The account I have given of them may seem over-long, but the central place they occupy in recent cases suggests that the relationship between writing requirements and constructive trusts and between constructive trusts and other remedies has not been sufficiently clearly seen. I am indeed sometimes tempted to think that the solution which a court gives in this area depends more on what precedents counsel will have chosen to cite than on a comprehensive consideration of the alternatives that are appropriate or possible. But it is easy to criticise; pleading such cases prior to adjudication on the evidence is difficult. Not only may the facts be in dispute, but the weight to be given to the facts found may be uncertain; and comparatively slight shifts in emphasis can produce very different legal results.

I want to take one example which shows some, obviously not all, of the possible variants and construe it in what I hope is a natural manner. Of course parties sometimes bring themselves within a legal category without

realising either it or its full consequences; but that is a quite different point from imposing a category on parties when there is but little evidence of it.

(A) THE CASE OF MRS. M

Mrs. M moves from a small house in which she is secure as a tenant to live with her daughter and son-in-law Mr. and Mrs. S who have also sold their small house and bought, for $40,000, a larger house which contains a separate flat in which Mrs. M can live. Mrs. M contributes $5,000 to this purchase but the house is bought in S's name alone. None of the parties has any further spare capital. Four years later Mrs. M remarries, leaves the flat which she has occupied hitherto at no cost to herself, and demands her $5,000 back. The house is now worth $48,000. There is no written record of any agreement between Mrs. M and Mr. and Mrs. S.

The first posibility to consider is that S and Mrs. M are co-owners in the proportion 8 : 1 of the whole house. Mrs. M contributed a share of the cost, so it is possible to argue that S holds on resulting trust for her in the appropriate proportion. Being a resulting trust, no writing is required and the arrangement can be proved orally. But there must have been such an arrangement for a resulting trust to occur. Was such an arrangement likely? It turns Mrs. M into a part owner of the whole house with no particular rights over the flat. She might, as a concurrent owner, be able to force a sale of the whole house but a supplementary agreement between S and herself would be needed to enable her to assert a right to live there.[62] Likewise for S, whose rights in quality (as distinct from *quantum)* are no larger than those of Mrs. M. I would not think this the likely *joint* intent of S and Mrs. M. It emphasizes the ownership side as against the security side; to force a trust for sale solution on the situation becomes artificial; the one fact of a $5,000 contribution is allowed to dominate other aspects of the arrangement.

A second possibility is that a proprietary interest of a different sort was to be vested in Mrs. M; not a concurrent interest in the whole of the house but a life interest in the flat. This would require the conferral on her of a right of exclusive occupation, but assuming this, the writing problem and its concomitants now arise with a vengeance. There are a number of variants depending upon what more precise intentions we care to—which is what it would amount to—attribute to her and S. An agreement to confer such an interest in a property about to be acquired, even if the intention were to be supposed, is unlikely, however, to constitute a declaration of trust for, or to itself constitute the appropriate equitable interest in, Mrs. M: S.53 does not therefore seem the relevant provision. The agreement is more likely to be a contract in which case it would attract s.40. There might, however, be acts of part performance. It might also be possible to argue (independently of any "fraud" doctrine) that a constructive trust arose in Mrs. M's favour on her payment of the $5,000. If there were no sufficient acts of part performance, then her only chance would lie in the "fraud" doctrine and the factors additional to the contract itself that make it fraudulent for S to rely on the absence of required writing. These are formidable difficulties of a technicality out of proportion both to the arrangement itself and the probably very generalized intent of the parties. I think they should arise only if the intent to benefit Mrs. M and her occupancy of the flat through the law of property is clear. To attempt to

62. *Bull* v. *Bull* [1955] 1 Q.B. 234; *Irani Finance Co.* v. *Singh* [1971] Ch. 59, 80; *Jones* v. *Jones* [1977] 1 W.L.R. 438.

bring the arrangement within some part or other of s.40 or s.53 leads to conjecture, whether contract or express creation of an equitable interest is contemplated. Furthermore, whether writing is present, or part performance occurs, or the "fraud" doctrine operates, the consequence is that Mrs. M becomes a tenant for life of the flat with Settled Land Act powers of leasing and selling it. Such a result should only ensue if the conclusion inescapably follows from a real intent to give her protection through the law of property.

If such an intent is not clear, a third possibility arises. Emphasis may be placed on Mrs. M's wish to have security in her declining years. Without raising the question of a proprietary interest and therefore without raising the requirement of writing, it might be possible to construct the basic terms of a contract. "I'll move to the flat and give you $5,000 if I can live securely with you for the rest of my life." But even so, a tremendous amount of the contract would have to be implied. Who pays for heating bills, taxes, redecoration, repairs? These are questions that may solve themselves, but what of remoter imponderables: S's employer may insist that he take promotion and emigrate, Mrs. S may die, Mrs. M may remarry and expect her husband to live with her in the flat. An answer to such complications cannot be *implied*. If the courts wish to proceed on the contract basis, they will have to *impose* solutions. The English Court of Appeal[63] seems recently to have reconciled itself to doing just this, implying or imposing terms that then justify the degree and duration of protection to be awarded and, as need be, secured through injunctions. I find it difficult to see such a process as other than legislating for parties who have not thought out their own affairs properly. Yet a court which resolves to find a basic contract can do little else. For it is also difficult to treat the arrangement as one setting out real metes and bounds to the parties' rights and liabilities and leaving matters not provided for to the rule that gains and losses lie where they fall. If the question is one of whether there is an adequate outline of a contract or no contract, in many cases it may be wiser to recognize that insufficient detail has been worked out to constitute a contract at all and not pursue the contract solution with too much imagination.

Further possibilities easily spring to mind. For instance, Mrs. M may have simply given S the $5,000; and this is quite compatible with a contract if sufficient emphasis[64] is placed on Mrs. M's move from a secure position as a tenant. Mrs. M may have lent the $5,000, but if all had gone as anticipated and she had remained happily in the flat until death, is it likely that her estate could compel repayment? No one solution is satisfactory as a guide to the variety of events that could easily occur. It is much more natural to suppose that the parties never provided for such events, either expressly or by implication. There were expectations, and acts based on expectations, but not more. And if this is so, it is idle to latch on to any one legal category and expect it to provide a remedy appropriate either to whatever events have occurred or to the parties' own anticipations.

If there is no clear intent to contract, or to create a proprietary interest, neither should be created artificially. I prefer *Allen* v. *Snyder*[65] to *Eves* v.

63. *Hardwick* v. *Johnson* [1978] 1 W.L.R. 683.
64. As in *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346, 1352 *per* Brightman J. I am, however, no more keen on artificially emphasizing a link in such a case in order to conjure an offer and acceptance into being than on filling out the terms of an informal arrangement to make it seem a complete contract. In both situations, estoppel may provide a better solution: see *infra*, text to nn. 73-80.
65. [1977] 2 N.S.W.L.R. 685.

Eves[66] and *Hardwick* v. *Johnson*.[67] This invention of contracts and trusts under a guise of implication and inference is, I believe, worse than facing up to the need in this area for an element of judicial discretion. It is preferable to know when the law can and when it cannot stick to certainty consistently and without artificiality; and outside that area to know how to cope with uncertainty in the least damaging way. For there is a real social problem here which I do not believe should be ignored. A new and inexperienced, and certainly not wealthy, generation of property owners has arisen, given to the making of arrangements to benefit, frequently, the less privileged in society. The law should neither take a superior attitude here by claiming that good advice is always available, nor wrap its solutions up in concepts that only pay lip-service to certainty. Discretions are at their least dangerous if we know what we are doing, and why, and *e converso*.

(B) CONSTRUCTIVE TRUSTS AND MRS. M

Bearing this in mind, a possible fourth way of protecting her is through constructive (as distinct from either resulting or express) trusts. If it is accepted that she and S concluded no firm arrangement, a constructive trust cannot be based on the absence of writing and fraud in relying on it, for no writing was "missing". But it may still be fraud, and unconscientious use of a legal title, to deny effect to an arrangement, clear in some of its outlines, but vague in most of its details. The remedy to be given can then reflect the original circumstances of the arrangement *and* later events. Mrs. M does not have to receive a proprietary interest in the flat or house; S can be held a trustee to the extent that Mrs. M should enjoy a licence in the flat for life. Further variants to the facts can also be taken into account. If Mrs. M leaves because S and Mrs. S made her life in the flat impossible, she could perhaps recover her $5,000. If she wants $6,000, being one eighth of the increased value of the house, rather than the smaller fraction that $5,000 would now represent, that too could be considered, but as a matter of discretion. If on the other hand she leaves after some time to marry a rich husband, S should not be forced to raise capital straightaway to pay her; a lesser sum than $5,000 may now suffice, perhaps payable in instalments. Again, if S succeeeds in selling the whole house with vacant possession and the purchaser insists on Mrs. M leaving the flat, Mrs. M can claim $6,000[68] from S, a possibility which goes some way to mitigating the problem of Mrs. M's probable under-protection against third parties.

It is very far from clear, however, that the expansion of the *ambit* of constructive trusts which has occurred in Australia in *Last* v. *Rosenfeld*[68a] and *Ogilvie* v. *Ryan*[68b] has been matched by the development of a flexible *remedy* along these lines. Some English cases[69] have been very ready to substitute money judgements for licences over land but *Ogilvie* v. *Ryan*[69a] for instance appears to remain immersed in the law of property. It is assumed that Miss Ryan intended protection through a proprietary interest

66. [1975] 1 W.L.R. 1338.
67. [1978] 1 W.L.R. 683.
68. The $6,000 merely represents the most that can be claimed without there being a separate ground of liability. I agree with Holland J. in *Ogilvie* v. *Ryan* [1976] 2 N.S.W.L.R. 504, 518 that there is no need to bring restitution into the picture as an additional source of a liability.
68a. [1972] 2 N.S.W.L.R. 923.
68b. [1976] 2 N.S.W.L.R. 504.
69. *E.g.*, *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346, substituting £2,000 for a contractual licence that had ben abandoned.
69a. [1976] 2 N.S.W.L.R. 504.

in land, so that a writing requirement was attracted; and that, when a constructive trust is imposed in her favour, she will naturally obtain a proprietary right under it.

This seems the result of looking in too narrow a way and in the wrong order at the facts and only one of the possible remedies. It would have been more appropriate to ask *first*, whether Miss Ryan was intended to receive a proprietary interest in land at all, either under a contract for one or under an express trust. If yes, the pattern in Holland J's judgment follows logically. If no, neither part performance, nor the difficulty of imposing a constructive trust despite an unenforceable contract, would have arisen as problems and the task of the court would have been simpler.*Second*, it could then have been asked whether Miss Ryan had received a contractual licence *not* intended to create a proprietary interest. The existence of such a contract need not totally impede the imposition of a constructive trust. If a vague arrangement can be given effect in this way, why not a clear arrangement[70] or a clear contract? But if a contractual obligation is really in existence, and it should not be too readily found to exist, any remedy given through the machinery — which is all that it is — of constructive trusts must respect it.[71] There may be further factors present however than just the contract, so that the trust remedy, though only supplemental, may still be useful. *Third*, assuming no proprietary interest and no contract at all, it would still have been possible for Holland J., on his own wide basis, to impose a constructive trust. And if the result would have been to turn Miss Ryan into a licensee only, that would not on the facts appear at all an unnatural consequence.

The possibility of imposing a constructive trust in either of the last two ways does not, however, seem to have been brought out in the case despite the learning that was devoted to the expansion of constructive trusts within the property context. There was too quick a jump onto constructive trusts at the expense of first considering the more basic questions of the parties' real intentions. The *order* in which the various possibilities are considered, as in the case of Mrs. M, is in fact vital, for constructive trusts have a different role according to which possibility is right on the facts. To start off with constructive trusts is wrong, and leads to the institutional side of the trust dominating the remedial.

The expansion of the ambit of constructive trusts would seem to need, therefore, expansion of remedies also, to take account of the various roles that constructive trusts have to play. Even in the English cases, however, it is often unclear on what basis the courts are proceeding in giving a remedy with a discretionary element in it. Was the "trust" remedy in *Hussey* v. *Palmer*[71a] limited to £607 because of the pleadings, or would the court have given more if the point had been correctly pleaded, or would the court then have felt *obliged* to give more to include a share in any increased value of the house? I hope that a discretion is available in such a case but one cannot yet be sure. Again, did the £2,000 in *Tanner* v. *Tanner*[71b] depend in any way on Lord Cairns' Act? The tendency to think in compartments of liabilities

70. *Cf. Binions* v. *Evans* [1972] Ch. 359. Neither in *Ogilvie* v. *Ryan* [1976] 2 N.S.W.L.R. 504 or in *Hussey* v. *Palmer* [1972] 1 W.L.R. 1286 was the elucidation of the contract side given priority.
71. *Cf. supra* n.56.
71a. [1972] 1 W.L.R. 1286.
71b. [1975] 1 W.L.R. 1346.

with distinct remedies attached to each is still strong, even if means are sometimes found to jump the barriers between them. This remains true of constructive trusts, and indeed there is real awkwardness in the terminology and its property associations. The process is much more one of utilizing the availability of a legal title to allow equitable considerations to be raised against the holder than it is one of constituting a trust. If this is so, is there not a better and more direct way of doing it? Has Mrs. M a fifth string to her bow?

(C) ESTOPPEL AND MRS. M

In England, there has been more use recently of estoppel,[72] and it has been convincingly shown by Scarman L.J.[73] that, in the aspect that concerns us, it too depends on "fraud" in relying on a legal title to deny effect to an informal arrangement lacking the characteristics needed to turn it into a contract or a trust. It is equitable "unconscionability" operating, seemingly, on the basis that the wider ambit for constructive trusts appears to envisage, but with the difference that the consequences do not pretend to be proprietary of necessity. The remedy that is given will be the "minimum equity to do justice",[74] determined by the court in the light of all the circumstances; this could be the conferment of a proprietary right, but frequently it will be money compensation or a right of occupancy to be protected though injunctions.[75]

Extraordinary as it may seem, two different equitable remedies, both based on "fraud", have come to impinge on the same fact situations. But the picture has not been seen comprehensively. In England, estoppel now seems the more favoured, and the discretionary nature of the remedy given under it is unquestioned; constructive trusts have developed in a more confused fashion, however, favoured by Lord Denning M.R.[76] but in a context in which property notions still loom large. In Australia, on the other hand, it is constructive trusts that, after more careful consideration, have been extended, though again property considerations receive undue attention; estoppel has not been so welcomed in Australia. It has been accepted in principle[77] but applied strangely.[78] And the relationship and possible overlap between the ambits of the two doctrines, and between the remedies available under them, seem to have been ignored in both jurisdictions, a patch-work development of the law which makes use of

72. For a more detailed discussion see Davies, "Informal Arrangements Affecting Land", (1979) 8 *Syd. L.R.* 578.
73. *Crabb* v. *Arun D.C.* [1975] 3 All E.R. 686, esp. 875-877, a formulation that I hope may gain wide and favourable currency.
74. *Id.*, 880 *per* Scarman L.J.
75. *Cf. Chandler* v. *Kerly* [1978] 1 W.L.R. 693 referred to *supra* n.14. It may be that such estoppel rights are capable of binding third parties but I would prefer this to be on a discretionary basis, just as the remedy between the two parties is discretionary. I do not think that they are finite "interests" capable as such of binding third parties, nor should they be artificially turned into such interests. But on this basis there is a problem of fitting estoppel into the Torrens system, *cf.* note 12 *supra*. I would hope, however, that caveats could be adapted to the needs of such a situation as cautions have been in the English system—see Ruoff and Roper, *Registered Conveyancing* (3rd, ed., 1972), 768.
76. *E.g. Hussey* v. *Palmer* [1972] 1 W.L.R. 1286. Much reliance is placed on Lord Diplock's dictum in *Gissing* v. *Gissing* [1971] A.C. 886, 905 but I believe it has been unfairly taken out of context.
77. Including the High Court in *Svenson* v. *Payne* (1945) 71 C.L.R. 531 and in *Olsson* v. *Dyson* [1969] 120 C.L.R. 365, though in neither case was the doctrine applied.
78. In *Raffaele* v. *Raffaele* [1962] W.A.R. 29 it is conflated with contract and in *Timber Top Realty* v. *Mullens* [1974] V.R. 312 with constructive trusts.

developments in one jurisdiction in the other more difficult than it need be.[79] It is almost a "fusion" problem, only it is two equitable remedies impinging, not a legal and an equitable.

In a number of ways, estoppel is a more attractive method of raising equities and protecting informal arrangements than the method of expanding constructive trusts and providing them with a flexible remedy. There are fewer proprietary assumptions and it is easier to start off with a minimum of protection and build it up as needed in a particular case towards a proprietary remedy than to start with proprietary overtones and have to play them down. But it cannot affect every informal arrangement affecting land if emphasis is placed on the requirement of an *inducement*[80] by the representor; this requirement seems to be reflected in constructive trusts by the significantly milder language of "understand". Estoppel cannot therefore replace constructive trusts.

Where it exists however, the inducement will be the source of the estoppel and, together with the circumstances brought about in reliance on it, will be reflected in the remedy given under it. There is no need to force such fact situations into contract or trust; though it is worth emphasizing that there can be a trust, and possibly a contract, present *as well*.[81] It represents a minimum to which larger protections can be added. This minimum remedy given has no necessary associations with property notions, or Lord Cairns' Act, but merely reflects the facts. It may be indeed that it can be forfeited or withdrawn.[82] For Mrs. M it seems totally apposite.

There is consequent, some will say too much, uncertainty in such a remedy. Its opponents will argue that resort will have to be made all the time to the courts to decide when an estoppel has arisen, what the remedy under it is to be, and how long the remedy is to endure; so that a solution to protecting informal arrangements will have been bought at too high a price. But the problem of such arrangements cannot simply be ignored, and it is a complete mistake to think that uncertainty disappears on the issue being seen as part of the law of trusts. Recent attempts to solve the problem within the traditional terminology of trusts have not been notable for either clarity or consistency. Uncertainty is a problem, but can be overstated. Given the need for a discretionary remedy in this area, experience should go a long way to mitigating it. The parties themselves, in the knowledge that the remedy is available, will in many instances find their own answer to their problem. The degree of uncertainty remaining should not be greater than in other areas of the law in which no alternative to discretions has been found satisfactory.

7. Alternative Remedies

Various informal arrangements were referred to earlier.[83] A further look at them should reveal that a remedy is probably available in most if not all

79. The area provides a vivid illustration of how difficult the preservation of any notion of a law common to the United Kingdom and to Australia is going to be unless there is more comprehensive citation in both directions of important decisions and developments, a point that strikes a Visiting Lecturer forcibly.
80. Not only must there be an inducement, but the inducer must not, apparently, be under a relevant misapprehension as to his legal rights: *Armstrong* v. *Sheppard* [1959] 2 Q.B. 384; *Svenson* v. *Payne* (1945) 71 C.L.R. 531. Secret trusts in wills in all probability started with cases of inducement—*cf. Thynn* v. *Thynn* (1684) Vernon 296 referred to *supra* nn. 33, 36—but the modern law requires only communication and acquiescence: constructive trusts are similar.
81. *Jones* v. *Jones* [1977] 1 W.L.R. 348. *Cf. supra*, text to n.41, Section 6.
82. *Williams* v. *Staite* [1978] 2 W.L.R. 825.

of them. For whatever reasoning a court uses to justify its conclusion, the ambit of *Ogilvie* v. *Ryan*[83a] plus the law of estoppel seem sufficiently wide to include those not covered by actual decisions; for instance where A transfers land to B on an understanding that C is to have a life interest in it or may under certain conditions buy B out, or on an understanding that A or C is to have a life interest in different land; or where there has been payment by A or by D in addition to an understanding that C is to have a particular right.

But where the understanding is that A or C is to have a right that is less than proprietary, the discretion of the courts to produce such a non-proprietary result under a constructive trust, or to reflect the existence of a contract, is not yet clearly established. There is a tendency to use the constructive trust wherever there has been a transfer of title; and this creates no problem only so long as the remedy can be flexible and not necessarily proprietary. The constructive trust is also now available where there has been no transfer of title — this indeed is the force of *Ogilvie* v. *Ryan* — but again the remedy needs to be flexible.

But whether or not a transfer of title is involved, there are some arrangements where the element of inducement makes estoppel seem apposite; and the fact that the remedy under it is accepted to be discretionary has advantages also. There is a point here which must not be lost sight of in a careless expansion of constructive trusts. Historically, there are here two separate heads of liability with differing requirements, and apparently differing consequential remedies, impinging on the same fact situations.

To take the liability side first, estoppel puts weight on inducement, constructive trusts on undertakings. But I do not believe, at least in the area of informal arrangements, that a real line exists between such notions, between, in other words, instigation and arrangement. It is a matter of emphasis, not of categories. This should not be prejudiced by the one liability having been conceived of as a form of wrong, the other as giving effect to a type of agreement. An initial classification into "constructive trust situations" and "estoppel situations" could give the impression that the differing requirements of equity in those situations reflect a real line, which is not so.

This becomes even more important when one comes to remedies. Whether it is an inducement or an undertaking situation, the court needs a wide discretion as to the form and extent of the remedy, which should reflect the *full* facts, and not only some of them. There is no justification for confining remedies according to which of those situations it is, or for insisting on a proprietary remedy in some cases.

The variety of informal arrangements is such that neither the above nor any other initial classification of them is desirable. If the parties have not brought their transaction within the ambit of trusts or contract, but "fraud" and an intent to be protected through the law have been found, the precise ground of the fraud — whether there is more or less inducement — should not pre-determine remedies. A court which has found "fraud" on *any* ground should be able to select or devise the remedy that is most appropriate

83. *Supra*, text to Section 1.
83a. [1976] 2 N.S.W.L.R. 504.

in the light of all the facts at the time of adjudication.[84] A party may request a particular remedy but cannot insist on it.[85] This may produce the consequence that money compensation is awarded for breach of an obligation that is equitable in origin. But I no more jib at the historical inelegance here than at the problem of uncertainty discussed earlier. I believe the importance of the area to be a sufficient justification.

8. *The Right Order of Questions*

The great interest of *Ogilvie* v. *Ryan*[85a] is in the closeness of the facts to a variety of legal and equitable categories; and in the recognition that this may be true of a larger number of cases traditionally assigned to a particular category than is generally realised. The various factual possibilities in a case like *Ogilvie* v. *Ryan* need to be considered from the standpoint of intentions before a rush is made to doctrine, and possibly relevant doctrines allowed to colour findings of fact. The whole arrangement should be construed naturally. It is important, too, that *all* the possibilities be considered, and in a relevant order.

One related group of questions is — did the parties intend to contract to create a proprietary interest in or over land? What writing requirement was attracted and was it complied with? If not, can part performance help? Alternatively, can a constructive trust solution help?

A different group of questions is — did the parties intend to constitute a trust? If so, what writing requirement was attracted and was it complied with? If not, can a constructive trust solution help? Here, as in the previous group, the constructive trust remedy is proprietary.[86]

A different group of questions again is — did the parties intend to contract to create a non-proprietary right? If so, how can the court protect it in the circumstances that have arisen? Can the protection take the form of an injunction? If so, against whom? Can there be financial compensation in lieu? Can the protection take the form of a constructive trust? Can facts further than the contract itself affect the constructive trust? Can the facts further than the contract lead to an estoppel? Again, if so, against whom? And can third parties be affected? Here, the remedies need to be discretionary and need harmonizing; but no question of writing arises.

Yet another different group of questions is — did the parties contract at all? If not, what significance is to be attached to what they did and what they undertook? Assuming no intention to constitute a trust either, can a remedy based upon "fraud" help? If there is "fraud", what form should the remedy take? And against whom? Here, whether based on estoppel or on constructive trusts, the remedy needs to be discretionary; and again no question of writing arises.

These are very different groups of questions, though they overlap. I believe that as groups they have not been seen in the right relation to each other, because the *first* question in each group has not been seen as a distinct question requiring an answer before other questions are raised. I

84. I would not fear drawing the analogy here again to rescission, *cf.* nn.*55*, *56 supra* and the remedy devised in *Solle* v. *Butcher* [1950] 1 K.B. 671.
85. As in *Seager* v. *Copydex* [1967] 1 W.L.R. 923, a case which also accepts pecuniary compensation as the consequence of an equitable wrong.
85a. [1976] 2 N.S.W.L.R. 504.
86. But *cf. supra* n.58.

have been more concerned with the last two of these groups, and particularly with the last. My suspicion is that the facts of *Ogilvie* v. *Ryan* lie within the last two groups. But the questions raised and answered in the case itself were ones associated with the first two. Though a remedy was devised, it was a property remedy, and does not seem to me the most appropriate one. A non-proprietary and more appropriate one could have been arrived at, with much less complexity, if the groups of questions above had been kept distinct and the need for flexibility of remedy properly appreciated.