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Rochefoucauld v Boustead (1897)

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A. INTRODUCTION

Over the century or so since *Rochefoucauld v Boustead*[1] was decided, the case has become central to the application of the maxim 'equity will not allow a statute to be used as an instrument of fraud' in the context of section 53(1)(b) of the Law of Property Act 1925. By virtue of section 53(1)(b), 'a declaration of trust respecting any land … must be manifested and proved by some writing signed by some person who is able to declare such a trust'.[2] However, in the appropriate circumstances, a trust may still be enforced against one who receives land subject to an oral declaration of trust despite the lack of proof of writing. Indeed, so central has *Rochefoucauld* been in this area of law that the enforcement of such a trust has come to be known as an application of 'the doctrine in *Rochefoucauld v Boustead*'.

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[1] The report commonly cited is [1897] 1 Ch 196 (CA). However, various other reports – which are largely consistent between themselves – supplement this main report with vital information for the purposes of this chapter. At the Court of Appeal level, these are: (1896) 13 TLR 118, (1896) 45 WR 272, (1897) 75 LT 502 and (1897) 66 LJ Ch 74. Only the Law Times report will be cited below where it is necessary to depart from the Official Report.

[2] This more succinctly replaced s 7 of the Statute of Frauds 1677, which provided that 'all declarations … of trusts or confidences of any lands … shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust'. References in this chapter to s 7 instead of s 53(1)(b) are merely contextual, and can otherwise be read interchangeably.

Unfortunately the exact facts of *Rochefoucauld* have eluded many legal scholars. As a result, a number of potentially damaging analytical gaps exist in our understanding of this seminal case. For instance, while most scholars consider that the trust which arose in *Rochefoucauld* was a constructive trust, some have contended that the trust was an express trust. This uncertainty not only frustrates taxonomical efforts to rationalise the law governing various types of trust; it also obscures the true meaning of 'fraud' when this term is used in the context of the *Rochefoucauld* doctrine.

This chapter aims to plug these analytical gaps by re-analysing *Rochefoucauld* and the doctrine to which the case gives its name. Part B. closely scrutinises the facts of the case and concludes that the trust which arose there was constructive in nature. Part C. then explores the theoretical basis of this constructive trust. This discussion then forms the basis of the analysis of the *Rochefoucauld* doctrine in parts D. and E., which suggest a definition of 'fraud' and establish the relationship between 'fraud' and the constructive trust imposed in the case.

B. REJECTING THE EXPRESS TRUST CONCLUSION IN *ROCHEFOUCAULD*: AN ANALYSIS OF THE FACTS

The essence of the doctrine in *Rochefoucauld v Boustead* is rooted in the oft-quoted words of Lindley LJ's judgment in the Court of Appeal[3]:

> [T]he Statute of Frauds does not prevent the *proof of a fraud*; and … it is a fraud on the part of a person to whom land is *conveyed as a trustee*, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and statute, in order to keep the land himself.

As Lindley LJ indicates, a defendant must have taken a conveyance of land 'as a trustee' before 'fraud' – whatever this term means – can come into play. In most cases, it is clear that the defendant *did* take 'as a trustee'. However, close analysis of the unusual facts of *Rochefoucauld* reveals that an express trust could not possibly have arisen.

(1) The Facts

In 1868, the claimant, the Comtesse de la Rochefoucauld, was the registered owner of certain coffee estates in Ceylon known as the Delmar estates. The estates were subject to a mortgage vested in a Dutch company. This was most likely a mortgage in the classical sense where the legal title to the land was transferred to the mortgagee, leaving the mortgagor with nothing more than an equity of redemption.[4] The mortgagee wanted to call in the mortgage, but the Comtesse was unable to repay the mortgage debt. So she entered an agreement with the defendant, Boustead, and another man, Duff, under which they agreed to purchase the estates from the Dutch

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[3] *Rochefoucauld* (CA) (n 1) 1 Ch 206 (emphases added). His Lordship delivered the joint judgment of the Court of Appeal which also included Lord Halsbury LC and AL Smith LJ.

[4] K Gray and SF Gray, *Elements of Land Law*, 5th edn (Oxford, OUP, 2008) para 6.1.6, fn 2.

company and to hold these on trust for her, subject to her repayment of their outlay.[5] Duff later pulled out of the arrangement, but Boustead went ahead. It was agreed that he would bid at the Dutch company's auction of the estates. If and when he won the bidding, the Comtesse would not insist on her equity of redemption, with the result that he would only have to pay the Dutch company the price sufficient to cover her mortgage debt and expenses.[6]

It is unclear why the Comtesse wanted the estates to be sold by auction instead of securing an agreement with the company to the same effect from the start,[7] since the classic context of an auction of a mortgaged property is a forced sale.[8] Nonetheless, it is clear that the company was not a party to the initial agreement, although it did later sign an agreement to sell the estates at the agreed price.[9]

The arrangement was carried out and Boustead became the registered owner of the estates in 1873.[10] He financed the bulk of his payment by an immediate remortgage of the estates to the Dutch company.[11] Without the Comtesse's

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[5] Throughout this chapter, this agreement will be referred to as the 'initial agreement'.

[6] *Rochefoucauld* (CA) (n 1) 1 Ch 197–98.

[7] The headnote of the Official Report merely states that the arrangement involving the auction was made '[t]o obviate some difficulties which arose': *ibid*.

[8] In recounting the facts, Lindley LJ observed that the parties' arrangement was designed to avoid the Comtesse's recently-divorced husband, Mr Cavendish, enforcing the interest he acquired in the estates under the decree of the Divorce Court: *Rochefoucauld* (CA) (n 1) 75 LT 504–05. It is thus a plausible explanation that the sale by auction was to give an appearance to Mr Cavendish that the estates were being sold absolutely to Mr Boustead, with the Comtesse retaining no interest in the estates.

[9] *Rochefoucauld* (CA) (n 1) 75 LT 505.

[10] *Rochefoucauld* (CA) (n 1) 1 Ch 205–06.

[11] *Ibid*, 198.

knowledge, Boustead then repeatedly mortgaged – and eventually sold – the estates.[12] A considerable surplus remained from the sale on which she sought an account,[13] and the Court held that Boustead could not invoke section 7 to deny her beneficial interest, for that would be to use the statute as an 'instrument of fraud'.[14]

(2) The Analysis

In a recent essay,[15] William Swadling has suggested that section 53(1)(b) merely provides a 'rule … of evidence'[16] which is 'disapplied' on a finding of 'fraud', 'with the result that there would be nothing standing in the way of the express trust's "validity".'[17] He concludes that section 7 was indeed 'disapplied', thus leading the Court in *Rochefoucauld* to enforce the oral express trust directly.[18] However, there appears to be no express oral trust which the Court in *Rochefoucauld* could have enforced at all. For an express trust to exist, whether it is declared orally or in written form, there must be a settlor who declares the trust, and a settlor can only declare a trust over an interest which he owns: he cannot declare a trust of property that he does not have. On the facts of *Rochefoucauld* it appears that none of the parties could

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[12] *Ibid*, 204.

[13] *Ibid*, 204.

[14] *Ibid*, 206.

[15] W Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart Publishing, 2010) 95.

[16] *Ibid*, 104.

[17] *Ibid*, 105.

[18] See too JE Penner, *The Law of Trusts*, 7th edn (Oxford, OUP, 2010) para 6.10.

possibly have acted as settlor. The three possible candidates for the role of settlor will now be considered.

(a) The Comtesse as the Settlor?

One possibility is that the Comtesse was the settlor of the oral express trust. She would have been capable of settling the trust if she was indeed the transferor of the estates to Boustead. This view is given some credence by Simon Gardner's analysis of *Rochefoucauld*, although he treats the trust as constructive.[19] His observation that the Comtesse who was 'the stipulated beneficiary was also the transferor',[20] leaves open the possibility that it was she who settled the oral express trust.

This possibility proves to be unsustainable on the facts, because the Comtesse was not capable of transferring – let alone settling – the estates. At first sight, the reports of the appellate decision say little concerning the Comtesse's substantive rights, leaving room to speculate that she still had full ownership of the property. However, the reports of the first-instance decision not only reveal that the Dutch company was 'in possession as mortgagees'[21]; they also confirm that it sold the estates to Boustead using its 'power of sale as mortgagees'.[22] The inevitable inference from this is that the Comtesse's interest was limited to an equity of redemption. Her limited rights in the estates all along made it impossible for her to have transferred to Boustead what he obtained in 1873 – the absolute title of the estates free from the

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[19] S Gardner, *An Introduction to the Law of Trusts*, 2nd edn (Oxford, OUP, 2003) 90.

[20] *Ibid*, 87, fn 12.

[21] *Rochefoucauld v Boustead* (1896) 65 LJ Ch 794 (Ch D).

[22] *Rochefoucauld v Boustead* (1896) 74 LT 783 (Ch D).

mortgage. Thus, her consent to – and even her initiation of – the conveyance to Boustead could not result in her being the settlor of an express trust.

It is noteworthy that Gardner has since admitted to 'overlook[ing] the fact that the intended beneficiary in [*Rochefoucauld*] was not also the transferor'.[23] Equally, nothing in Swadling's article[24] suggests that the Comtesse was the settlor of the trust. This possibility can, therefore, be ruled out.

(b) The Dutch Company as the Settlor?

Another possibility is to view the Dutch company as the settlor of the oral express trust. A measure of support for this view may be gleaned from another of Gardner's works, despite his constructive trust analysis. He suggests that 'the transferor (the Dutch company) *intended* the transferee (Boustead) to hold the property on trust for the Comtesse de la Rochefoucauld'.[25] Proponents of the express trust analysis might surmise that this intention made the Dutch company the settlor. After all, the Court of Appeal did say that Boustead was 'conveyed' the land 'as a trustee',[26] and it was the Dutch company which conveyed the land to Boustead.

(i) A factual analysis

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[23] S Gardner, 'Reliance-Based Constructive Trusts' in Mitchell (ed) (n 15) 68, fn 19.

[24] Swadling (n 15).

[25] *Ibid*, 68 (emphasis added).

[26] *Rochefoucauld* (CA) (n 1) 1 Ch 206. The phrase 'as a trustee' surely leaves open the prior question of the *nature* of the trust which makes the defendant a trustee; but for the sake of argument we shall proceed as if this referred to an express trust.

It is undisputed that a settlor of an express trust must have a sufficiently certain intention to create the trust.[27] It is not at all obvious that such an intention can be attributed to the Dutch company. On the facts as recounted by Lindley LJ,[28] the initial agreement was reached between the Comtesse and Boustead sometime between 1868, when the Dutch company wished to call in the mortgage, and 1871, when Boustead and the Dutch company signed an agreement for sale to effectuate the initial agreement. The Dutch company's involvement would thus appear to be separate from, subsequent to, and subject to the initial agreement between the Comtesse and Boustead: it was not a party to the initial agreement. In fact, the Dutch company appears to have been a disinterested party vis-à-vis the trust arrangement. This is seen in that it sold the estates by auction, whereby Boustead had to submit the winning bid before he could 'enter into an agreement with the company to purchase the estates … at a price sufficient to cover their mortgage debt and expenses'.[29] Clearly, therefore, the Dutch company was only interested in recouping its mortgage debt, and did not intend to create a trust for the benefit of the Comtesse.

(ii) A theoretical analysis

Could it be argued that it does not matter what the Dutch company actually wanted, provided that it *agreed* – as it did – to give effect to the initial agreement by selling the estates to Boustead for the sum owing on the Comtesse's security? It is a trite observation that a settlor may declare a trust over property only up to the extent of his own initial interest in that property; and one cannot grant an interest wider than the

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[27] *Knight v Knight* (1840) 3 Beav 148, 49 ER 58.

[28] *Rochefoucauld* (CA) (n 1) 75 LT 505.

[29] *Rochefoucauld* (CA) (n 1) 1 Ch 197.

interest that one owns. In finding for the Comtesse, the Court of Appeal in *Rochefoucauld* recognised her absolute equitable interest in the Delmar estates. '[A]lthough [the Comtesse] admit[ted Boustead's] lien on the property for his advances,' the Court clearly viewed her 'as the defendant's cestui que trust'.[30] In addition, the account of Boustead's dealings with the Delmar estates was to 'be an account as between a trustee and his cestui que trust, not an account as between mortgagor and mortgagee'.[31] It follows that, for the Dutch company to have been the settlor, it must first have been the absolute beneficial owner of the estates. However, this precondition is not met on the facts of *Rochefoucauld*, as seen through two different but related perspectives.

First, the sale of the Delmar estates through the exercise of the Dutch company's power of sale[32] may be contrasted with the situation where land is being sold pursuant to an order of foreclosure. An order of foreclosure may be obtained only with the court's permission,[33] and it 'vest[s] the ownership of, and the *beneficial title* to, the land, *for the first time*, in the [mortgagee]'.[34] Had the Dutch company obtained an order of foreclosure, it would, as the absolute owner of the estates, have been capable of settling the property upon trust. Given that it sold as mortgagee, however, it is clear that no such order was obtained by the Dutch company.

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[30] *Ibid*, 209.

[31] *Ibid*, 212.

[32] See the text to n 22.

[33] *Ness v O'Neil* [1916] 1 KB 706 (CA) 709.

[34] *Heath v Pugh* (1881) 6 QBD 345 (CA) 360 (emphases added), affd (1882) LR 7 App Cas 235 (HL).

Secondly, the Comtesse's equity of redemption subsisted all along in the Delmar estates, even up to the point when the estates were transferred to Boustead. Unless a mortgagor's equity of redemption is foreclosed, '[t]he interest of the land … remain[s] in the mortgagor'.[35] Furthermore, '[a]n equity of redemption has always been considered as an estate in the land … and therefore cannot be considered as a mere right only'.[36] As Bowen LJ observed in *Marquess of Northampton v Pollock*,[37] 'equity regards the mortgaged property as security only for money, and will permit of no attempt to clog, fetter, or impede the borrower's right to redeem and to rescue what was, and still remains in equity his own.' Therefore, the Dutch company could not have expressly settled the Delmar estates on an express trust, even though it possessed the legal title to the estates as mortgagee. It was obliged to respect the Comtesse's equity of redemption in this regard; and the obligation remained binding throughout, even though the Comtesse gave up that equity pursuant to her agreement with Boustead.

(iii) A further analytical inconsistency

There is further evidence from the development of the law post-*Rochefoucauld* that rules out the analysis of the Dutch company as the settlor. In trusts texts, two factual situations are distinguished when discussing the 'fraud' exception to section 53(1)(b): the bipartite case, where A conveys land to B on an oral trust for A; and the tripartite case, where X conveys land to Y on an oral trust for Z. If the Dutch company were the settlor then *Rochefoucauld* would be a tripartite case, involving the Dutch company as

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[35] *Casborne v Scarfe* (1737) 1 Atk 603, 605–06; 26 ER 377, 380.

[36] *Ibid*.

[37] *Marquess of Northampton v Pollock* (1890) 45 Ch D 190 (CA) 215.

settlor (X), Boustead as trustee (Y) and the Comtesse as the beneficiary (Z). *Rochefoucauld* would then be conclusive authority for supporting Z's claim to the trust property. However, the application of the position in tripartite cases is far from settled, the dominant view even appearing to be against third party enforceability.[38] Thus, for instance, John Feltham warns that, if Z may enforce the oral trust where Y refuses to carry it out, 'then the operation of section 53(1)(b) is correspondingly reduced, biting only in a case where [Y] orally declares himself trustee of Blackacre for [Z].'[39] Indeed, *Rochefoucauld* has only ever been considered as an authority which affects bipartite cases. As *Hanbury and Martin* observes[40]: '*Rochefoucauld v Boustead* should not be regarded as [an authority to support Z's claim] because effectively [X] arranged with [Y] that [Y] would buy from the mortgagee and hold on trust for [X].' Hence the treatment afforded by these commentators to *Rochefoucauld* is also consistent with the view that the Dutch company could not have been the settlor.

(c) John Boustead as the Settlor?

The last possibility is the most promising for those who favour the express trust analysis. This takes the defendant, Boustead, to be the settlor of the trust. On this

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[38] See TG Youdan, 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*' (1984) 43 *CLJ* 306; JD Feltham, 'Informal Trusts and Third Parties' [1987] *Conveyancer* 246; TG Youdan, 'Informal Trusts and Third Parties: A Response' [1988] *Conveyancer* 267. See also JE Martin, *Hanbury and Martin: Modern Equity*, 18th edn (London, Sweet & Maxwell, 2009), para 3-005, fn 23; Penner (n 18) para 6.11; D Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* 18th edn (London, LexisNexis Butterworths, 2010) paras 12.70–12.72; C Mitchell, *Hayton and Mitchell: Commentary and Cases on the Law of Trusts and Equitable Remedies*, 13th edn (London, Sweet & Maxwell, 2010) paras 3.64–3.66.

[39] Feltham (n 38) 247.

[40] *Hanbury and Martin* (n 38) para 3.005, fn 25.

view, Boustead declared himself trustee for the benefit of the Comtesse after[41] the estates were transferred to him from the Dutch company. This approach is endorsed by James Penner, who takes *Rochefoucauld* to be 'a self-declaration case' in which 'Boustead … was the settlor of the trust'.[42] Swadling also takes this view when he states that the Comtesse's oral testimony proved 'a declaration of trust *by the defendant* in her favour'.[43]

(i) Inconsistency on the facts

From the facts recounted by Swadling, it may not be immediately obvious that Boustead could not have declared the oral express trust over the Delmar estates. He notes that Boustead bought the estates in 1873, and subsequently mortgaged the estates 'in 1876, 1877 and 1879, without the knowledge of the claimant'.[44] This account appears to rely solely on the headnotes of the Official Reports.[45] However, it fails to note that Boustead had 'immediately remortgaged the estates to the Dutch company for £53,000, so that his actual payment out of pocket was under £5,000'.[46] Even assuming that this arrangement was done with the full knowledge of the Comtesse, the immediacy of the remortgaging would have made it impossible for

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[41] It is not possible to endorse an express trust analysis if we say that the relevant declaration occurred *prior to* Boustead's obtaining the transfer of the estates, since an express declaration of trust of future property is void. See further, part C(2).

[42] Penner (n 18) para 6.12. However, he says little else to justify this view.

[43] Swadling (n 15) 113 (emphasis added).

[44] *Ibid*, 97.

[45] *Rochefoucauld* (CA) (n 1) 1 Ch 198.

[46] *Rochefoucauld* (CA) (n 1) 75 LT 505.

Boustead to have declared a trust over the unencumbered beneficial interest of the estates for the Comtesse's benefit.

There are two possible replies to this. The first is based on the fact that '[t]he estates were sold … many years ago' and the Comtesse claimed to be entitled only to the 'considerable surplus [which] remained [from the proceeds of sale]'.[47] This may appear to indicate that the Comtesse had admitted that her beneficial rights were held subject to the Dutch company's rights under the remortgage, leaving open the possibility of concluding that Boustead had declared the trust *after* remortgaging the estates to the Dutch company. However, the Court clearly held that the Comtesse was an absolute beneficiary of the estates[48]; and also held that Boustead's trusteeship commenced from the moment the estates were conveyed to him.[49] These findings mean that there is no possibility based on the timing of events that Boustead could have settled the full beneficial interest of the Delmar estates on the Comtesse.

Secondly, did Boustead have, for a *scintilla temporis*, the unencumbered title to the Delmar estates? The cases which have dealt with this issue have emerged from a similar factual pattern, where property is purchased with the aid of a charge or mortgage from the outset. Essentially, the question to be determined is whether there exists a moment in time wherein the purchaser may be said to have owned the unencumbered fee simple of the estate. If the answer is in the affirmative, it would at least be theoretically possible for Boustead to have declared an oral express trust

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[47] *Rochefoucauld* (CA) (n 1) 1 Ch 204.

[48] *Ibid*, 212. Of course, the Court also held that the Comtesse was subject to a lien in Boustead's favour for his expenditures and expenses; but this does not mean that her interest was subject to the Dutch company's interest obtained through Boustead's remortgaging of the estates.

[49] *Ibid*, 206.

during that slice of time. The only case deciding the point before *Rochefoucauld* was *Meux v Smith*,[50] which essentially decided that no such *scintilla temporis* exists. *Meux* was followed by the Court of Appeal in *Re Connolly Bros (No 2)*,[51] which held that there is no *scintilla temporis*.[52] In *Church of England BS v Piskor*,[53] Evershed MR distinguished *Re Connolly Bros* and *Meux* and came to the opposite conclusion. However, the House of Lords in *Abbey National Building Society v Cann*[54] held this ground of distinction to be invalid,[55] preferring instead to view the purchaser as never having acquired anything more than an equity of redemption. Ultimately, therefore, the decision in *Meux* has proven accurately to reflect the law; and the second possible reply also fails.

(ii) Inconsistency with the judgment

Furthermore, the Court's judgment did not refer to any occurrence after the transfer which could be interpreted to be a declaration of the trust. Instead, the emphasis was in no uncertain terms on the initial agreement between the Comtesse and Boustead which *preceded* the transfer. It was held to be 'quite clear that the conveyance to the defendant grew out of the arrangement which he and Duff were to have carried out,

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[50] *Meux v Smith* (1843) 11 Sim 410, 59 ER 931.

[51] *Re Connolly Bros (No 2)* [1912] 2 Ch 25 (CA).

[52] Although *Re Connolly Bros (No 2)* did not explicitly rely on *Meux*, the effect of this was noted by Evershed MR in *Church of England BS v Piskor* [1954] Ch 553 (CA) 564.

[53] [1954] Ch 553 (CA) 564.

[54] *Abbey National Building Society v Cann* [1991] 1 AC 56. In coming to this conclusion, the HL approved *Re Connolly Bros (No 2)*; *Coventry Permanent Economic Building Society v Jones* [1951] 1 All ER 901 (Ch) and *Security Trust Co v Royal Bank of Canada* [1976] AC 503 (PC); and overruled *Piskor*.

[55] [1991] 1 AC 56, 91.

and was made for precisely the same purpose'.[56] Although Duff later 'refused to carry it out',[57] the Court emphasised that the transfer to Boustead was pursuant to that initial agreement, and not to any subsequent act or declaration by him after receiving the estates. Not only did the Court speak of the defendant as having taken the conveyance 'as a trustee',[58] in its final order it also 'declared that the defendant purchased the Delmar estates as a trustee for the plaintiff'.[59] These statements conclusively demonstrate that the Court was not enforcing a trust self-declared by Boustead; otherwise he would not have been said to have purchased the estates *as a trustee*.

(iii) A further analytical inconsistency

The analysis of Boustead as the settlor is also inconsistent with the development of the law since *Rochefoucauld*. Commentators agree that no 'fraud' arises when B, an owner of land, orally declares himself as trustee for A but fails to give effect to the declaration. As a result, section 53(1)(b) operates to prevent A from enforcing the orally-declared trust in this situation.[60] Although there appears to be only one English decision on this point,[61] a host of Commonwealth decisions[62] adopt this position,[63]

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[56] *Rochefoucauld* (CA) (n 1) 75 LT 505.

[57] *Ibid*, 505.

[58] *Rochefoucauld* (CA) (n 1) 1 Ch 206.

[59] *Ibid*, 212.

[60] See eg Feltham (n 38) 247; Youdan, 'Formalities' (n 38) 325; *Hanbury and Martin* (n 38) para 3.005; M Pawlowski and K Everett, 'Declarations of Trust and Unmarried Couples' (1999) 29 Fam Law 721, 723; R Pearce, J Stevens and W Barr, *The Law of Trusts and Equitable Obligations*, 15th edn (Oxford, OUP, 2010) 227; *Underhill and Hayton* (n 38) para 12.70; *Hayton and Mitchell* (n 38) para 3.66.

[61] *Smith v Matthews* (1861) 3 De G F & J 139, 45 ER 831.

and appear to be based on sound principle. As Timothy Youdan points out, the 'fraud' exception does not apply here because 'the general statements of the doctrine, including that of Lindley LJ in the *Rochefoucauld* case, refer to the trustee acquiring the property subject to a trust'.[64] Indeed, 'to hold otherwise would wholly frustrate the functions carried out by section 7',[65] leaving no room for that provision to apply.

C. THE BASIS OF THE CONSTRUCTIVE TRUST IN *ROCHEFOUCAULD v BOUSTEAD*

Given that none of the parties in *Rochefoucauld* could have possibly declared an oral express trust, this leads to the conclusion that the trust which was enforced in the case could not have been express. It is now necessary to consider the reasons why the constructive trust arose, on which Boustead was said to have taken the conveyance of the Delmar estates 'as a trustee'.

(1) Agency

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[62] *Morris v Whiting* (1913) 15 DLR 254 (Manitoba KB); *Organ v Sandwell* [1921] VLR 622 (SC Vic) 630; *Permanent Trustee Co v Scales* (1930) 30 SR (NSW) 391 Eq; *Beemer v Brownridge* [1934] 1 WWR 545 (Sask CA) 555–56 and 567; *Last v Rosenfeld* [1972] 2 NSWLR 923 (NSW Sup Ct) 928, 933; *Wratten v Hunter* [1978] 2 NSWLR 367 (NSW Sup Ct).

[63] The cases cited in nn 60–61 come from Youdan, 'Formalities' (n 38) 325, fn 2, and Feltham (n 38) 247, n 6.

[64] Youdan, 'Formalities' (n 38) 325.

[65] *Ibid*, 325–26.

It may be observed that an agency relationship arose from the initial agreement between the Comtesse and Boustead. It is difficult to provide a precise definition of agency,[66] but it is at least clear that, pursuant to their agreement, Boustead did act 'on behalf of'[67] the Comtesse.[68] As Griffith CJ subsequently commented in the High Court of Australia, in *Cadd v Cadd*,[69] 'in [*Rochefoucauld*] the agency relied upon was proved. There was no question really raised about it, and the other consequences followed.'

(a) The Agency in *Rochefoucauld*: Agent for the Purchase of Land

Unlike the situations where an agent holds his principal's property on the principal's behalf[70] and where an agent misuses his fiduciary position to make unauthorised gains,[71] *Rochefoucauld* falls within the category of agency relationships involving an agent purchasing property from a third party vendor on behalf of his principal. Where the agent is an 'agent for the purchase of land',[72] section 53(1)(b) may pose a potential hurdle to the principal's case. Interestingly, the courts have made a

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[66] See eg GHL Fridman, *The Law of Agency*, 7th edn (London, Butterworths, 1996) ch 1; FMB Reynolds, *Bowstead and Reynolds on Agency*, 18th edn (London, Sweet & Maxwell, 2006) Art 1.

[67] *Underhill and Hayton* (n 38) para 1.13.

[68] See too the headnote of the Law Times report which states that the Comtesse 'alleged that [Boustead] bought the property as her agent': *Rochefoucauld* (CA) (n 1) 75 LT 502.

[69] *Cadd v Cadd* (1909) 9 CLR 171, 178. Feltham (n 38) 247 also treats *Rochefoucauld* as a case of agency.

[70] This includes cases where the agent has sold the principal's property according to his instructions and holds the proceeds of sale (eg *Burdick v Garrick* (1870) LR 5 Ch App CA (Ch) 233); and where property is given to an agent to be used in the course of performing a service for his principal (eg *Shallcross v Oldham* (1862) 2 J & H 609, 70 ER 1202).

[71] See generally *Bowstead and Reynolds* (n 66) para 6.041; *Underhill and Hayton* (n 38) Art 27.

[72] *Bowstead and Reynolds* (n 66) para 2.037.

distinction between cases where the agent has only entered into a contract for sale with the vendor, and cases where he has proceeded to take the conveyance of the land.

(i) Where the agent has merely contracted with the vendor

Where an agent has merely entered into a contract with the vendor, 'the estate in equity passes to the real purchaser'[73] – that is, the principal – once the vendor signs the contract,[74] regardless of whether the principal is disclosed by the agent to the vendor.[75] This conclusion is reached by extension from the case involving contracts for the sale of land between two parties. Here, 'the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into',[76] 'to the extent to which [the vendee] has paid the purchase-money'.[77] This is based on the premise that equity 'considers all things to be done which ought to have been done'.[78] This is extended to tripartite cases where the purchaser is an agent: 'following a long line of authorities',[79] the agency may be proved by parol evidence without contravening any statutory requirement of writing.[80] The conclusion, therefore, is that

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[73] *Cave v Mackenzie* (1877) 46 LJ Ch 564 (Ch) 567.

[74] See eg *Wilson v Hart* (1817) 7 Taunt 295, 129 ER 118; *Heard v Pilley* (1869) 4 Ch App 548 (CA); *Cave* (n 73).

[75] *Bowstead and Reynolds* (n 66) para 2.037.

[76] *Lysaght v Edwards* (1876) LR 2 Ch 499 (Ch) 510. This conclusion was reached after considering the case of *Shaw v Foster* (1872) LR 5 HL 321.

[77] *Shaw* (n 76) 349 (Lord O'Hagan).

[78] *Ibid*, 357 (Lord Hatherley LC).

[79] *Cave* (n 73) 567.

[80] In relation to s 4 of the Statute of Frauds, see eg *Cave* (n 73) 566 and *Heard* (n 74) 551. In relation to s 40 of the Law of Property Act 1925 and s 2 of the Law of Property (Miscellaneous Provisions) Act 1989, see eg *Target Holdings Ltd v Priestley* (1999) 79 P&CR 305 (Ch) [53] and *McLaughlin v Duffill* [2008] EWCA Civ 1627, [2010] Ch 1 [15]–[24].

'[t]he moment [the defendant] is agent he has not got the land at all. It is in equity vested in the principal, while at law it remains in the vendor.'[81]

(ii) Where the agent has taken a conveyance

In contrast, a different approach is taken where the agent has proceeded to take a conveyance of the land from the vendor. In this situation, 'the agent holds as trustee and … the difficulty of [the statutory writing requirement] is not avoided simply because the original appointment as an agent did not require to be in writing.'[82] More specifically, where 'there had been a conveyance to the defendant … so that he was legal owner … the case [comes] within the 7th section [of the Statute of Frauds].'[83] As *Bowstead and Reynolds* observes, '[t]he assumption behind this rule is that … in the case of land, [a principal cannot] claim that conveyance to the agent vests property in the principal.'[84] This view was taken in cases which pre-dated *Rochefoucauld*,[85] and was also assumed in *Rochefoucauld* itself.

(b) Resolution of the Issue after *Rochefoucauld*

The difference in approach is based on an apparently sound distinction in the courts' interpretation of section 4[86] and section 7 of the Statute of Frauds. In the case of a

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[81] *Cave* (n 72) 567.

[82] *Du Boulay v Raggett* (1989) 58 P & CR 138 (Ch) 151. See also *Bowstead and Reynolds* (n 65) para 2.037; G Thomas and A Hudson, *The Law of Trusts* (Oxford, OUP, 2004) para 1.63.

[83] *Cave* (n 72) 565.

[84] *Bowstead and Reynolds* (n 65) para 6.109.

[85] See eg *Mortlock v Buller* (1804) 10 Ves Jun 292, 311; 32 ER 857, 864; *Heard* (n 74) 553; *Cave* (n 73) 567.

[86] Section 4 of the Statute of Frauds provided that 'no action shall be brought … upon any contract or sale of lands … unless the agreement… shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.'

mere contract, the potential obstacle to the principal's case – the oral appointment of the agent – is simply overcome by the view that '[section 4] shews, first, that it is not necessary that the agency should be proved by writing; and secondly, that you can prove the agency by parol and enforce the contract.'[87] Conversely, where the agent has taken a conveyance of the land, the courts take it that there is a 'trust or confidence of the land in the agent',[88] thus setting the case squarely within the scope of section 7.

On the other hand, it would be troubling if the two cases yielded different results. As counsel for the plaintiff in *James v Smith* forcefully submitted, 'it cannot … be contended that a man is to get into a better position by exaggerating his fraud by taking a conveyance.'[89] In the eighteenth-century case of *Bartlett v Pickersgill*,[90] the Statute of Frauds was indeed taken to prevent the principal from demanding the land from his agent who had taken a conveyance; and in *James v Smith*[91] Kekewich J refused to overrule *Bartlett*. However, there were also authoritative decisions which cast serious doubts on the *Bartlett* approach. In *Heard v Pilley*,[92] the Court of Appeal was strongly of the opinion that *Bartlett* was inconsistent with the rule that equity will not allow a statute to be used as an instrument of fraud[93]; and in *Cave v Mackenzie*, Jessel MR said that 'where there has been a conveyance, different considerations [as

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[87] *Cave* (n 73) 566.

[88] Ibid 567.

[89] *James v Smith* [1891] 1 Ch 384 (Ch) 386.

[90] *Bartlett v Pickersgill* (1760) 1 Cox 15, 29 ER 1041.

[91] *James v Smith* (n 89).

[92] *Heard* (n 74).

[93] *Ibid*, 552 and 553.

compared to the case of a mere contract] probably arise; and that is shewn by the proviso which excepts a conveyance from the 7th section'.[94] When *Rochefoucauld* came to be decided, the Court of Appeal laid the issue to rest by expressly rejecting *Bartlett*.[95] Today, therefore, once an agency is proved, even if by parol evidence, the courts will never allow the agent to take advantage of section 53(1)(b), whether or not the agent has taken a conveyance.[96] As Feltham observes, '[i]f B buys Blackacre from A and takes a conveyance, acting in whole or in part as agent for C, C's interest will be enforced although the agency is entirely oral.'[97]

Whilst it is undeniably true that cases involving an agent for the purchase of land after *Rochefoucauld* are essentially reconciled, this does not explain the basis of the trust which was enforced in *Rochefoucauld*. One possibility is to analyse the case in terms of a declaration of trust of future property.

(2) Trust of Future Property

The law concerning the disposition of future property is well established.[98] At law, a purported assignment of future property is wholly void and conveys nothing to the

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[94] *Cave* (n 73) 567. The 'proviso' was clearly in reference to s 8 of the Statute of Frauds, which, in its more concise form in s 53(2) of the Law of Property Act 1925, reads '[s 53] does not affect the creation or operation of resulting, implied or constructive trusts'.

[95] *Rochefoucauld* (CA) (n 1) 1 Ch 206–07.

[96] This position seems to be anticipated in *Bowstead and Reynolds* (n 66) paras 2.37 and 6.108, fn 67.

[97] Feltham (n 38) 247.

[98] See generally Gardner (n 19) 156–59; AJ Oakley, *Parker and Mellows: The Modern Law of Trusts*, 9th edn (London, Sweet & Maxwell, 2008) para 5.088; *Hanbury and Martin* (n 38) para 4.023; Penner (n 18) para 8.10; *Underhill and Hayton* (n 38) paras 10.6–10.7 and 30.78–30.79; *Hayton and Mitchell* (n 38) paras 15.07–15.08.

intended assignee.[99] Similarly, where future property is made the subject-matter of a declaration of trust, the trust is void for uncertainty.[100] But where valuable consideration is given, equity will treat the assignment or declaration of the future property as a contract to assign the property. This becomes enforceable when the assignor receives the property.[101] Since a trust of future property is void, the enforcement of the agreement will never involve enforcing the express trust. Rather, a constructive trust arises[102] if there is consideration to secure the 'transfer [of] the beneficial interest to the … purchaser immediately on the property being acquired',[103] pursuant to the maxim that 'equity considers as done that which ought to be done'.[104] It is necessary to consider how the facts and the judgment in *Rochefoucauld* might fit within this category of constructive trusts, which analyses Boustead as having declared the trust.

(a) The Facts

The basis of the initial agreement between the Comtesse and Boustead was that Boustead would hold the estates 'for the benefit of the plaintiff'.[105] Yet, at that time, he had not acquired the estates from the Dutch company, neither did he have any

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[99] *Holroyd v Marshall* (1862) 10 HL Cas 191, 11 ER 999; *Re Tilt* (1896) 40 Sol Jo 224 (Ch).

[100] *Re Ellenborough* [1903] 1 Ch 697 (Ch); *Williams v CIR* [1965] NZLR 395.

[101] *Ellison v Ellison* (1802) 6 Ves Jun 656, 31 ER 1243; *Holroyd* (n 99) 210; *Tailby v Official Receiver* (1888) 13 App Cas 523 (HL) 530; *Re Lind* [1915] 2 Ch 345 (CA).

[102] S Worthington, *Proprietary Interests in Commercial Transactions* (Oxford, Clarendon Press, 1996) 199; C Rotherham, *Proprietary Remedies in Context* (Oxford, Hart Publishing, 2002) 11.

[103] *Holroyd* (n 99) 1007.

[104] *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1, 16. See Gardner (n 19) 157; *Underhill and Hayton* (n 38) para 30.79.

[105] *Rochefoucauld* (CA) (n 1) 75 LT 505.

present right to it. The merely expectant nature of the acquisition is emphasised by the fact that the carrying out of the agreement was contingent on Boustead submitting the winning bid at the auction of the estates.[106]

It is also necessary to identify the 'valuable consideration' given by the Comtesse to justify treating the void trust as a contract to assign the estates. Such consideration 'is sufficient if there be a benefit to the defendant *or* a detriment to the plaintiff'.[107] This exercise is challenging if reference is made solely to the Official Report,[108] which omits the Court's statement of facts in its judgment. It might mislead one to assume, as Swadling assumes, that 'the plantations were managed for [the Comtesse] by [Boustead]' from the very beginning.[109] In fact, the other reports consistently reveal that Boustead 'was brought into the matter by Duff or by Mr Sabonadiere, the [Comtesse's] agent in Ceylon'.[110] Boustead was approached because he 'had experience in the management of coffee estates and in receiving and disposing of consignments of coffee from them, and had business transactions with Mr Sabonadiere.'[111]

It should be noted that Boustead was not initially an employee or a 'friend'[112] of the Comtesse, but a manager of coffee estates and a businessman with a vested interest in making a profit out of the arrangement. He decided to proceed with the

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[106] *Rochefoucauld* (CA) (n 1) 1 Ch 197–98.

[107] *Edgeware Highway Board v Harrow Gas Co* (1874) LR 10 QB 92, 95 (emphasis added).

[108] *Rochefoucauld* (CA) (n 1) 1 Ch 205.

[109] Swadling (n 15) 96.

[110] *Rochefoucauld* (CA) (n 1) 75 LT 505.

[111] *Ibid*, 505.

[112] See Penner (n 18) para 6.9 for this mistaken view.

agreement even after Duff had pulled out because he 'hoped to become the [Comtesse's] representative in England and the consignee of the produce of her estates, and he did not wish to break faith with the Dutch company.'[113] It is unclear from the judgment whether Boustead did in fact become the Comtesse's representative; but it is at least clear that, as part of the initial agreement with the Comtesse, she promised to hire Boustead 'to work [the Delmar estates] as coffee plantations after he had acquired them'.[114] The arrangement was not gratuitous: unlike Duff's initial involvement, which was motivated by 'considerations of friendship for the [Comtesse]',[115] Boustead did receive valuable consideration through being benefitted by the promise of employment.[116]

Furthermore, the Court observed that 'the Delmar estates were worth far more than the amount due to the Dutch company upon their mortgage'.[117] There was surely no shortage of interest in the estates. Had the normal course of events taken place and the estates been sold without Boustead's intervention, the Comtesse would have received a significant sum from the surplus of the sale. As part of the arrangement with Boustead, however, she gave up her equity of redemption to allow Boustead to purchase the estates at a price 'sufficient to cover the debt, interest, and

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[113] *Ibid*.

[114] *Rochefoucauld* (CA) (n 1) 1 Ch 205.

[115] *Rochefoucauld* (CA) (n 1) 75 LT 505.

[116] *Rochefoucauld* (CA) (n 1) 1 Ch 205. The giving of employment has long been viewed as constituting valuable consideration: see eg *Hartley v Cummings* (1847) 5 CB 247, 136 ER 871; *Mumford v Gething* (1859) 7 CB (NS) 305, 141 ER 834.

[117] *Rochefoucauld* (CA) (n 1) 75 LT 505.

costs of the Dutch company'.[118] The Comtesse's act of giving up her equity of redemption was a detriment incurred pursuant to the agreement with Boustead.

Indeed, the Comtesse's giving up of her equity of redemption appears to have conferred yet another benefit on Boustead. It was earlier noted that 'his actual payment out of pocket was under £5,000', with the balance to the sum of £53,000 coming from remortgaging the estates to the Dutch company.[119] It is unlikely that the Dutch company, which was in liquidation,[120] and which auctioned the estates in the first place because it wanted to call in the Comtesse's mortgage, would have advanced a much higher sum to Boustead on the remortgage. By giving up her equity of redemption, therefore, the Comtesse may have benefitted Boustead, since he might not have been capable of financing the purchase of the estates had the price been significantly higher.

(b) The Judgment

Much of the judgment in *Rochefoucauld* was spent dismissing Boustead's defences based on section 7 of the Statute of Frauds[121] and the Statute of Limitations or laches.[122] It was assumed to be unnecessary to determine the precise ground upon which the trust arose: it was sufficient that it *did* arise, loosely speaking, from 'the circumstances under which the Delmar estates were conveyed to the defendant'.[123]

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[118] *Rochefoucauld* (CA) (n 1) 1 Ch 198. See also *Rochefoucauld* (CA) (n 1) 75 LT 505.

[119] See the text to n 45.

[120] *Rochefoucauld* (CA) (n 1) 75 LT 505.

[121] *Rochefoucauld* (CA) (n 1) 1 Ch 205–07.

[122] *Ibid*, 208–12.

[123] *Ibid*, 205.

Nonetheless, the judgment makes two clear points about the trust: first, the events which occurred *before* Boustead purchased the estates made him a trustee upon receipt[124]; and, secondly, an intention to create a trust was integral to the existence of the trust.[125] The 'trust of future property' analysis accounts for these two points. The initial agreement between the Comtesse and Boustead evinced the latter's intention to create a trust; and since the declaration over what was at that time merely future property was coupled with valuable consideration, Boustead took the estates 'as a trustee' of a constructive trust which bound him to carry out the initial agreement.

Ultimately, however, this analysis does not satisfactorily explain the basis of the trust enforced in *Rochefoucauld*, which has never been understood as a trust of future property. Take *Bannister v Bannister*,[126] for instance. The defendant, an elderly woman, conveyed two cottages to the claimant, her brother-in-law, on the understanding that she would be allowed to live rent-free in one of them for as long as she desired. Although *Rochefoucauld* provided authority for the proposition that a constructive trust had arisen for the claimant's benefit,[127] the decision was not based on a declaration of trust of future property.[128] In addition, there are other categories of constructive trusts – the doctrine in *Pallant v Morgan*[129] is one obvious example – where, similarly, a constructive trust arises in situations where an agreement is

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[124] *Ibid*, 205, 206, and 209.

[125] *Ibid*, 208.

[126] *Bannister v Bannister* [1948] 2 All ER 133 (CA).

[127] *Ibid*, 136.

[128] Indeed, neither did the case involve the brother-in-law acting as an agent for the purchase of land. This, too, signifies the need for analysing *Rochefoucauld* in terms broader than either the agency or the trust of future property analysis.

[129] *Pallant v Morgan* [1953] Ch 43 (Ch) 48.

reached prior to the defendant obtaining the property in question. However, rather than characterising the defendant as having declared a trust over future property, the courts enforce the constructive trust based on some other, much broader grounds. It is thus necessary to explore what those grounds are.

(3) Explaining *Rochefoucauld*: Constructive Trusts Responding to Intention and Reliance

(a) Intention and Reliance

In other categories of constructive trusts, such as those arising in the context of secret trusts,[130] mutual wills[131] and the doctrine in *Pallant v Morgan*,[132] the constructive trusts arise in response to the elements of intention and reliance. In all of these cases, A transfers – or allows to be transferred – property to B pursuant to an oral promise by B to hold some beneficial interest in the property for A or C. The element of intention is shown by the agreement between A and B, where B promises to benefit A or C. The element of reliance arises through A's transferring of (or allowing to be transferred) the property to B, where A suffers a detriment and/or B is conferred an advantage through the transfer.

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[130] In these cases, the testator manifests to the apparent legatee his intention to benefit an ultimate beneficiary. The testator then leaves his will unchanged until his death in reliance on the apparent legatee's agreement to fulfil the testator's intention. A constructive trust binds the property received by the apparent legatee.

[131] In these cases, two testators agree to benefit an ultimate beneficiary upon their death; and the first testator to die leaves his will unchanged in reliance on the survivor's promise to do the same. A constructive trust binds the survivor to his promise.

[132] In these cases, one bidding party agrees to cede some part of the to-be-acquired property to another bidding party; and in reliance on this, the latter refrains from attempting to procure the property. A constructive trust binds the former party to his promise.

(b) Intention and Reliance as Independent Causative Events in *Rochefoucauld*

It is clear enough that the case of *Rochefoucauld* falls within this category of constructive trusts which responds to the elements of intention and reliance. Through the initial agreement, the parties' intention was that Boustead would benefit the Comtesse with the equitable title of the estates. Pursuant to that intention, and relying on Boustead's promise, she detrimentally gave up her valuable equity of redemption, allowing Boustead to purchase the estates at the amount outstanding on her mortgage rather than the full market price. She also incurred a detriment through ceasing to pursue other means of achieving the result she intended, and instead relied on Boustead to achieve the same. Furthermore, the Comtesse's reliance not only conferred an advantage on Boustead by allowing him to obtain the legal title to the estates; he also benefitted from being allowed to manage the estates and to pursue his business interests pursuant to the arrangement.[133]

(c) Explaining the Preference for the Intention and Reliance Analysis over the Trust of Future Property Analysis

It was suggested earlier that the decision in *Rochefoucauld* could have been analysed on the trust of future property analysis.[134] Indeed, many cases which fall to be analysed within the doctrine may be analysed in terms of a declaration of trust of future property, since the transferee in the cases always undertakes to hold property on trust prior to taking conveyance of that property. However, the fact that *Rochefoucauld* – and the doctrine it represents – has not been analysed on these terms is explicable in the light of the elements of intention and reliance.

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[133] This was noted in part C(2)(a).

[134] See part C(2).

While trusts of future property appear to be contracts enforced pursuant to the 'equity considers as done …' maxim, on a closer look, it is more accurate to view the analysis as fundamentally requiring the element of reliance. A declaration of trust of future property will be *re-characterised* as a contract if, and only if, the intended beneficiary has given valuable consideration. It follows that it is a precondition for him to have relied on the settlor's declaration before equity will intervene to enforce the declaration.[135] However, reliance in the form of consideration is less compelling than reliance which arises through the transfer of the very property to which the promise relates. The giving up of property in reliance on the transferee's promise is always more detrimental to the transferor and more advantageous to the transferee than reliance which arises through the giving of consideration, because the latter lacks an obvious link between the transferee's promise (or intention) and the transferor's reliance. As such, it is no surprise that the doctrine considers it unnecessary to react to the less certain form of reliance, and will always respond to the most certain form of reliance which arises through the transfer of property as reflected in the doctrine.

D. THE DOCTRINE IN *ROCHEFOUCAULD v BOUSTEAD*: WHAT IS 'FRAUD'?

In considering oral declarations of trust over land, the existence of 'fraud' is often seen as the crucial element which determines whether the *Rochefoucauld* doctrine will apply to give rise to a constructive trust, negating the requirement for writing. From the analysis of the doctrine as responding to the elements of intention and reliance,

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[135] As Buckley J observed in *Re Ellenborough* (n 100) 700, 'an assignment for value *binds the conscience* of the assignor' (emphasis added).

'fraud' appears to have merely an auxiliary role, since it is not an event to which the doctrine responds. However, it is undeniable that the language of 'fraud' prevails in the doctrine, not least because it is used in the Court of Appeal's statement of the doctrine in the case of *Rochefoucauld* itself. It is thus necessary to examine what 'fraud' really means in the doctrine. First, however, a discussion of the nature of section 53(1)(b) is required, since 'fraud' is closely linked to the requirements of that section.

(1) Nature of Section 53(1)(b)

(a) The General View

The phrase 'manifested and proved by some writing' in section 53(1)(b) has long been taken to 'require the declaration to be evidenced by a signed writing and [that] in the absence of such writing the trust is valid although unenforceable'.[136] Proponents of the constructive trust categorisation take the view that an enforceable 'express trust is created by the settlor's *properly manifested intention* to create that trust'.[137] Thus, the lack of the requisite writing conclusively precludes the orally-declared trust from being enforced *qua* an express trust. Where the *Rochefoucauld* doctrine applies, these commentators claim that the courts are enforcing a constructive trust, the operation of which is exempted from the requirement for written evidence by section 53(2).[138]

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[136] Youdan, 'Formalities' (n 38) 320–21, and see the cases cited there at fnn 76–77.

[137] R Chambers, 'Constructive Trusts in Canada' (1999) 37 *Alberta Law Review* 173, 183. See also R Chambers, *Resulting Trusts* (Oxford, Clarendon Press 1997) 220 ff; P Birks, *An Introduction to the Law of Restitution*, revised edn (Oxford, Clarendon Press, 1989) 65.

[138] This provides: 'This section does not affect the creation or operation of resulting, implied or constructive trusts.' This more succinctly replaced s 8 of the Statute of Frauds 1677, which provided that, '[w]here any conveyance … shall or may arise or result by the implication or construction of law

(b) The Disapplication Thesis

Opposed to this analysis is the 'disapplication thesis' most cogently developed by William Swadling and Paul Matthews. This provides the most sophisticated case made for the express trust characterisation. Swadling takes the view that section 53(1)(b) is not a rule of 'enforceability'[139] but one of 'proof'[140]: it is 'a rule of evidence'.[141] To prevent the statute from being used as an instrument of fraud, the evidential requirement of writing is 'disapplied' on a finding of 'fraud', 'with the result that there would be nothing standing in the way of the express trust's "validity".'[142] The 'disapplication' of the requirement of writing removes any 'barrier to the admission of the claimant's oral testimony' to prove the oral express trust,[143] 'and so whatever section 7 said, it could not have stood in the way … of the express trust'.[144] This view is endorsed by Matthews, who says that, in *Rochefoucauld*, section

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… then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made'.

[139] Swadling (n 15) 107.

[140] *Ibid*, 108.

[141] *Ibid*, 113.

[142] *Ibid*, 105.

[143] *Ibid*, 105.

[144] *Ibid*, 107. See also W Swadling, 'The Proprietary Effect of a Hire of Goods' in N Palmer and E McKendrick (eds), *Interests in Goods*, 2nd edn (London, LLP, 1998) 511–12; W Swadling, 'A Hard Look at *Hodgson v Marks*' in P Birks and F Rose (eds), *Restitution and Equity, Vol 1: Resulting Trusts and Equitable Compensation* (Oxford, Mansfield Press, 2000) 66. In his most recent work, Swadling admits that his express trust conclusion of *Rochefoucauld* is not the 'dominant view' and so he undertakes a point-for-point rebuttal of the 'arguments for classifying the *Rochefoucauld* trust as constructive' in order to show that the trust was express: Swadling (n 15) 95 and 100–13.

7 of the Statute of Frauds did 'not apply, on the basis that otherwise it would enable a fraud to be perpetrated'.[145] He goes on to criticise the general view by remarking[146]:

> It is a complication that in some cases the judges who rely on the principle that equity will not allow the statute to be used as an instrument of fraud sometimes go on also to rely on s 53(2) of the Law of Property Act 1925, on the basis that this is a 'constructive' trust … However, that is just inconsistent and wrong. It is one or the other; it cannot be both simultaneously.

In his view, therefore, disapplying section 53(1)(b) leads to the direct enforcement of the oral express trust: it is inconsistent to justify the enforcement of the trust further by reference to section 53(2) through categorising it as a constructive trust. James Penner, too, contends that such reasoning is 'fallacious'.[147]

(2) Rejecting the Disapplication Thesis

(a) Inconsistency with the Facts of *Rochefoucauld*

Taken at face value, the disapplication thesis may seem plausible. After all, section 53(1)(b) does not require declarations of trust over land to be created *in writing*; instead, such declarations must only be *evidenced* by some signed writing. Indeed, the general view admits that an oral declaration *does* create an express trust, albeit one not enforceable by the courts. However, given that there was no express trust which arose on the facts of *Rochefoucauld*, whether orally declared or otherwise, the case did not fall within the ambit of the formality requirements at all. This is to say, there

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[145] P Matthews, 'The Words Which Are Not There: A Partial History of the Constructive Trust' in Mitchell (ed) (n 15) 21.

[146] *Ibid*, 21, fn 89.

[147] Penner (n 18) para 6.10. A similar view is taken in PH Pettit, *Equity and the Law of Trusts*, 11th edn (Oxford, OUP, 2009) 98.

were no (express) 'declarations … of trusts … of any lands' that had to be 'manifested and proved by some writing'. Even assuming that section 7 provided a rule of proof, its 'disapplication' in *Rochefoucauld* would prove nothing in the determination of the nature of the trust, since there was no (oral) express trust that could be enforced anyway.

(b) Inconsistency with the Judgment in *Rochefoucauld*

The analysis of section 7 as a rule of proof also does not sit well with the judgment in *Rochefoucauld*. According to Penner and Swadling[148]:

> [Section 7] is not concerned with enforceability but with proof, a logically prior question. If a declaration of trust is alleged to have been made but an application of the statute means that that allegation cannot be made good, there will in the eye of the court be no trust at all, not a valid but unenforceable one.

This, taken with the disapplication thesis, suggests that the analytical sequence for determining whether section 53(1)(b) is 'disapplied' is that 'fraud' must be determined prior to the issue of proof. However, this is not reflected by the analysis in *Rochefoucauld*, where the Court of Appeal said that 'it is a fraud on the part of a person to whom land is conveyed as a trustee … to deny the trust'.[149] According to the judgment, then, it is a precondition for 'fraud' that the defendant is 'a trustee'. Surely, it is only *after* considering all the relevant evidence that a court can determine whether he is or is not a trustee. The disapplication thesis thus mistakenly treats the existence of 'fraud' as a prerequisite for admitting the relevant evidence: *Rochefoucauld* clearly shows that evidence of the alleged trust is admitted, and the

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[148] J Penner and W Swadling, *Law of Trusts* (London, University of London Press, 2007) para 7.1.2.

[149] *Rochefoucauld* (CA) (n 1) 1 Ch 206.

existence of the trust duly recognised, before the discussion of 'fraud' comes into play.[150]

(c) Failure to Explain 'Fraud'

A fundamental flaw of the thesis is that it does not make clear when a 'fraud' will arise. Proponents of this thesis do not appear to have given an answer, preferring instead to accept 'fraud' as given in the cases. For instance, Swadling acknowledges the fact that 'there is no authoritative statement' for 'what amounts to fraud for the purpose of this doctrine',[151] yet he is content to say that the Court in *Rochefoucauld* 'disapplied [section 7] on perfectly orthodox and long-settled grounds'.[152] Without explaining what those grounds are, the disapplication thesis substantially alters section 53(1)(b) by writing into it a word which is not there: that declarations of trusts over land '"*may*" be manifested and proved by some writing'. This omission has implications for the general analysis of the doctrine – indeed, even affecting cases where an oral express trust can be said to have been declared on the facts such as *Bannister v Bannister*.

(d) Uncertainty in Determining the Parties' Legal Positions

Another difficulty with the disapplication thesis is the confusion it creates for parties who are reviewing their legal position prior to the initiation of proceedings. Suppose

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[150] In fact, Swadling recognises the circularity of the issue: '[I]t is only once the evidence which the statute says is inadmissible is admitted that it will be known that a "trustee" is attempting to use the statute as an instrument of fraud': W Swadling, 'Property: General Principles' in A Burrows (ed), *English Private Law*, 2nd edn (Oxford, OUP, 2007) para 4.208, fn 307. It is surprising, then, that despite noting this circularity, he still incorporates it within the disapplication thesis.

[151] *Ibid*, para 4.208.

[152] Swadling (n 15) 113.

that a transferee who is genuinely in doubt concerning his legal position merely seeks a court's declaration and does not assert that he is the rightful owner of the property in question. Will he be declared to be the absolute owner of the property, given that he has not yet actively relied on the statute as an 'instrument of fraud'? Surely no court would make such a declaration, since, if the case were litigated, the transferee would be held to be a trustee. Yet how will the court justify its declaration otherwise, if the oral express trust is precisely within the ambit of (the yet-to-be-'disapplied') section 53(1)(b)? And what if, instead of the transferee, it is the transferor who seeks such a declaration? Swadling writes that section 53(1)(b) 'was not addressed to settlors at all, but to litigants attempting to prove declarations of trust, who will generally be beneficiaries'.[153] It follows that, since the transferor is the prospective litigant who wishes to prove the transferee's oral declaration of trust, he should be advised by the court that evidence of some writing is necessary to prove the trust, consistently with section 53(1)(b). Should he then, on the strength of this advice, decide not to litigate because he is unable to produce the written evidence needed? It is clear that the disapplication thesis must also be rejected for causing these regrettable confusions in defining the parties' legal standing.

(3) What is 'Fraud'?

(a) Not Relying on Section 53(1)(b)

The first point of principle to be observed is that 'it is not "fraud" to rely on legal rights conferred by Act of Parliament'.[154] Even if it is argued that section 53(1)(b)

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[153] *Ibid*, 104.

[154] *Midland Bank Trust Co Ltd v Green* [1981] AC 513 (HL) 531.

does not confer a 'legal right' but acts merely as a 'rule of evidence', the principle remains, given that it is a valid rule conferred by Parliament.[155] This principle is made clear in the self-declaration cases, where an owner of property, B, orally declares a trust over his property for the benefit of A. As observed earlier,[156] B is able to rely on section 53(1)(b) if he changes his mind, rendering 'fraud' irrelevant in self-declaration cases.[157] Thus, beyond merely relying on the statute, there must be something more in the way the statute is or might be used for a 'fraud' to arise.

(b) Involves a Conveyance

In *Rochefoucauld*, the Court of Appeal observed that a 'proof of a fraud' will involve proving that 'the grantee … is … relying upon *the form of conveyance and statute*, in order to keep the land himself'.[158] This suggests that, in addition to section 53(1)(b), the existence of a conveyance is central to the meaning of 'fraud'. Thus, self-declaration cases never involve a conveyance to A because B already owns the property in question, while such a conveyance is always a feature in the *Bannister*-type cases where B receives A's land on the express oral understanding that B is to hold some beneficial interest in the land on trust for A.[159] Whenever a conveyance

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[155] Thus, it is difficult to defend the argument that courts are allowed to 'disapply' s 53(1)(b) despite no provision by Parliament to that effect.

[156] See part B(2)(c)(iii).

[157] Note, however, that although the *Rochefoucauld* doctrine does not apply, this does not preclude the possibility of A succeeding on a proprietary estoppel argument.

[158] *Rochefoucauld* (CA) (n 1) 1 Ch 206 (emphasis added).

[159] The reference in this section to *Bannister* as the archetype of the *Rochefoucauld* doctrine rather than the case of *Rochefoucauld* itself is due to the fact that there was no oral express trust on the facts of *Rochefoucauld*. This makes it difficult to compare *Rochefoucauld* with the self-declaration cases where

takes place, the true nature of the transaction is fundamental to determining the respective rights and obligations of the parties. This significantly varies depending on whether the true nature of the conveyance is a transfer as a gift, by virtue of a sale, pursuant to a trust arrangement, as a security, etc. In the *Bannister*-type cases, the existence of the conveyance means that the courts must determine whether the true nature of the transaction is an outright transfer to B, or whether there is something more than an absolute conveyance.

(c) Cloaks the True Nature of the Conveyance

To discover the meaning of 'fraud', the possible arguments in the *Bannister*-type cases must be considered. One possible argument in B's favour is to rely on the statute in his attempt to prevent the enforcement of the oral express trust. Since it is not a 'fraud' to rely on the statute per se, in essence B will succeed on this point and the oral express trust will not be enforced. In reply, A may seek to show that the conveyance to B was in reliance on B's manifested intention to hold some beneficial interest in the property for A. If this is shown then A will have established the elements of intention and reliance to give rise to a constructive trust, which may be enforced through section 53(2). The only way in which B may make use of section 53(1)(b) to counter this argument is to combine the wording of the statute with the conveyance deed in hand. The argument is rather persuasive: *if* section 53(1)(b) requires a declaration of trust concerning land to be proved by some writing, and *if* the only proof available is the absolute form of conveyance to B, there can *therefore* be no enforceable trust consistent with the statute. In his attempt to establish himself as

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an oral express trust is a standard feature. On the relevance of 'fraud' in *Rochefoucauld* itself, see part E(3).

the rightful owner of the property, B is essentially attempting to cloak the discovery of the true nature of the transaction. However, the attempt fails to prevent the enforcement of the constructive trust which arises from the circumstances of the transaction, and which is excepted from the formality requirement of section 53(1)(b) by virtue of section 53(2). Furthermore, the law signifies its manifest disapproval of such an attempt by labelling it a 'fraud'. 'Fraud', therefore, relates to the attempt to use the absolute form of the conveyance in combination with section 53(1)(b) to cloak the true nature of the transaction.

(d) 'Fraud' in Context: A Description

There are two ways in which the term 'fraud' may be used in the doctrine. It may act merely as an abridgement of the maxim 'a statute may not be used as an instrument of fraud'; or it may take on a meaning independent of the maxim. The difference between the two, although subtle, is of crucial importance to the proper analysis of the doctrine. The point may be illustrated by reference to Scott LJ's description of 'fraud' in *Bannister v Bannister*, where he observed[160]:

> The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available.

Where the meaning of 'fraud' is divorced from the maxim, it might be thought that the doctrine is engaged if, and only if, the absolute form of the conveyance is positively *used* to cloak the true nature of the transaction. A similar view might be taken of the Court of Appeal's words in *Rochefoucauld* that 'it is a fraud on the part

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[160] *Bannister* (n 126) 136.

of [the transferee] … to deny the trust and claim the land himself'[161]: a positive denial of the trust might appear to be a pre-condition for the application of the doctrine.

This is, however, inaccurate in the light of the maxim. The statement that 'section 53(1)(b) may not be used as an instrument of fraud' remains wholly relevant, even in a case where the transferee has not actively set up the form of the conveyance to deny the transferor's interest. In Scott LJ's terms, the emphasis of the maxim is not on the 'setting up' of the form of the conveyance nor the 'defeating' of the other's interest, but rather on the fact that the statute '*cannot be called in aid*' in such a case. Similarly, the emphasis in *Rochefoucauld* was not on the transferee's active 'denial of the trust', but on the fact that 'the Statute of Frauds *does not prevent* the proof of a fraud'.[162]

Thus, although 'fraud' relates to the attempt to use the absolute form of the conveyance and the statute to cloak the discovery of the true nature of the transaction, the reference to 'fraud' does not presume that the transferee has in fact attempted to do so. Rather, 'fraud' merely *describes* a state of affairs[163] – the cloaking of the true nature of the transaction using the conveyance deed and section 53(1)(b). More specifically, 'fraud' describes the state of affairs which the constructive trust prevents – the 'defeating' or 'denial' of the trust using the conveyance. This is consistent with the analysis of intention and reliance as the causative events of the doctrine, since the causative events are those that would make a denial of the true nature of the transaction a 'fraud', not the occurrence of such an act of denial.

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[161] *Rochefoucauld* (CA) (n 1) 1 Ch 206.

[162] *Ibid* (emphasis added).

[163] 'Fraud' has also been said to be merely 'a conclusion of law' (*Mountain v Styak* [1922] NZLR 131, 140) which 'follows from the facts found' (*Bannister* (n 126) 136).

E. A CLOSER LOOK AT 'FRAUD'

(1) Not a Causative Event

One danger of giving 'fraud' a meaning divorced from the maxim is that it encourages the 'defeating' or 'denial' of the trust to be viewed as a causative event triggering application of the doctrine. For instance, according to the disapplication thesis, section 53(1)(b) is disapplied only when an act of 'fraud' is actively perpetrated by the transferee. In this vein, Tony Oakley writes, 'what brings about the intervention of equity is the acquisition of property on the strength of an oral undertaking … followed by an attempt to renege on the undertaking … because of the lack of the necessary statutory formalities.'[164] This seems to suggest that the constructive trust arises in response to the recipient's wrong in reneging on the undertaking, when this is clearly not required to give rise to the doctrine. Given that 'fraud' is a malleable concept in equity, taking it to be a causative event may even lead to fundamental misunderstandings of the law. For instance, in *Hodgson v Marks*, Ungoed-Thomas J held at first instance that the 'fraud' exception was available even against a bona fide purchaser who only discovers the trust *after* the purchase.[165] This mistaken view was perhaps prompted by the misconceived idea that it is wrong – and thus a 'fraud' – for a purchaser who later discovers a trust to refuse to honour it.

The conceptualisation of 'fraud' as a causative event leads to inexorable analytical difficulties. Consider the period of time between the conveyance of the

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[164] AJ Oakley, *Constructive Trusts*, 3rd edn (London, Sweet & Maxwell, 1997) 53–54.

[165] *Hodgson v Marks* [1971] Ch 892 (CA) 909. The inconsistency of this view is noted in D Hayton and C Mitchell, *Hayton and Marshall: Commentary and Cases on the Law of Trusts and Equitable Remedies*, 12th edn (London, Sweet & Maxwell, 2005) para 2.27.

property and the transferee's reneging on his undertaking. If the act of reneging is a causative event, it follows that, in this period, A has no rights under a constructive trust, since the doctrine has not yet been engaged, neither can the transferor enforce the transferee's oral express undertaking, since this is prevented by section 53(1)(b). Not only will this put the parties in a state of deadlock, it may also be that any profits made out of the property, for instance pertaining to rents received from the tenants in the meantime, may be kept by the transferee. This perverse state of affairs does not reflect the law.

The point may be put in another way. Suppose that the transferor dies immediately after he conveys the property pursuant to the transferee's undertaking. There is no doubt that the doctrine in *Rochefoucauld v Boustead* will enable the transferor's heirs or estate to enforce the undertaking against the transferee, even though the transferee had not reneged on his undertaking. Or suppose that the transferee dies instead of the transferor immediately after the conveyance.[166] Here, the impossibility of the transferee reneging on his undertaking is indisputable; yet few would deny that the transferor may enforce the transferee's undertaking against his heirs or estate.

These observations demonstrate that the application of the *Rochefoucauld* doctrine entails a substantive interest arising prior to and irrespective of any later act of the transferee. The proprietary right arises to bind the transferee from the outset –

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[166] A less extreme but similar case arose in *Re Duke of Marlborough* [1894] 2 Ch 133 (Ch). The transferee died before re-assigning the property – a leasehold – to the transferor, and had not reneged on the parties' agreement to retransfer the equity of redemption to the transferor. At 146 Stirling J held that, 'if the [transferee] had in his lifetime refused to convey … he could not have set up the statute … [and] the Plaintiff, as claiming under him, is in no better position'.

that is, from the moment the conveyance is completed. As Millett LJ observed in *Paragon Finance plc v DB Thakerar & Co*, the transferee's 'possession of the property is coloured from the first by the trust and confidence by means of which he obtained it'.[167] Such a right, and the corresponding obligation, arises pursuant to a constructive trust which responds to the causative elements of intention and reliance. This analysis allows the parties – and the courts – to determine with certainty that the transferee will *always* be bound by a constructive trust once the true substance of the conveyance reflects the elements of intention and reliance.

(2) The Symbiosis between 'Fraud' and the Constructive Trust

Besides acting as a description of a state of affairs, the concept of 'fraud' (as an abridgement of the maxim) serves as an emphasis of the context in which the doctrine is relevant. In *Rochefoucauld*, the transferee was described as 'a person to whom land is conveyed as a trustee, and who knows it was so conveyed'.[168] 'Fraud' is thus relevant only in situations where the elements of intention and reliance arise on the facts – the intention being reflected in the 'knowledge' of the transferee, and the reliance arising through the transferor's conveyance of the property to him. This serves to accentuate the close link between the term 'fraud' and the existence of the constructive trust. Inasmuch as section 53(2) 'does not affect the creation or operation of … constructive trusts', it allows proof of the causative events of constructive trusts. To the same extent, therefore, it allows 'the proof of a fraud'[169] – that is, proof of the

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[167] *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA) 409. For general discussion of this idea, see ch 22 of the present volume, by Christian Daly and Charles Mitchell.

[168] *Rochefoucauld* (CA) (n 1) 1 Ch 206.

[169] *Ibid*, 206.

elements of intention and reliance – in spite of any attempts to use the form of conveyance to deny this.

(3) 'Fraud' in *Rochefoucauld*

Given the intimate link between 'fraud' and the constructive trust, it follows that the doctrine is not related to, neither does it enforce, the oral express trust on the facts, contrary to the analysis of the disapplication thesis. This point is clearly discernible from the judgment in *Rochefoucauld*. Given that there was no oral express trust on the facts, the case did not fall at all within the ambit of section 7 of the Statute of Frauds, which affects only oral express trusts to render them unenforceable. Even if section 7 ceased to exist, there still would not have been an express trust on the facts. Nonetheless, it was still possible for Boustead to have used the absolute form of the conveyance, together with section 7, to cloak the discovery of the constructive trust. This possibility made it necessary for the Court to speak of 'fraud' – that is, to describe the case as one in which the enforcement of a constructive trust would avoid the cloaking of the true nature of the transaction.

It is, therefore, unnecessary for the facts of a case to fall within the ambit of section 53(1)(b) in order for the doctrine in *Rochefoucauld* to apply. Instead, the facts must give rise to the elements of intention and reliance to engage the doctrine. In order for the term 'fraud' to be relevant in the doctrine, there must also be the possibility of the transferee using the conveyance and section 53(1)(b) to cloak the discovery of the elements of intention and reliance on the facts. Furthermore, given that an act of 'fraud' is not a causative event of the trust, it is seems unnecessary to

couch the emphasis of the doctrine in *Rochefoucauld* in terms of a 'fraud doctrine'[170] or a 'fraud' exception. Rather, it is a more accurate reflection of the doctrine to treat it as a sui generis sub-category of constructive trusts which responds to the elements of intention and reliance.

F. CONCLUSION

Contrary to recent claims, the trust which was enforced in *Rochefoucauld v Boustead* was clearly a constructive trust, since none of the parties involved was capable of declaring an express trust. In the context of agency, *Rochefoucauld* established a new category of constructive trust, where an agent who takes a conveyance from a third party will always be bound by a constructive trust for the benefit of his principal. Arguably, the trust in the case itself might be explained as an example of a constructive trust arising in the context of the 'trust of future property' analysis. However, the lack of support given to this analysis in cases which have relied on *Rochefoucauld* suggests that a better explanation may be proffered: that it gave rise to a constructive trust which responded to the elements of intention and reliance, consistent with other categories of constructive trusts.

The 'disapplication thesis', which favours the view that the doctrine 'disapplies' section 53(1)(b) to allow the enforcement of the oral express trust, is

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[170] In *Singh v Anand* [2007] EWHC 3346 (Ch) [144], HHJ Norris QC attempted to apply 'the pure form of [the 'fraud'] doctrine as applied in *Rochefoucauld v Boustead*' to bind the nominees of the *transferor* of shares; while refusing to impose a constructive trust based on *Bannister v Bannister*, since in that case 'a constructive trust was imposed on the *transferee*' (emphasis added). This is inconsistent, given that the doctrine in *Rochefoucauld* always imposes a constructive trust on the transferee, *Bannister* being merely a case which applies the doctrine. This confusion illustrates the inconsistencies which may arise if the doctrine is misinterpreted as reflecting a 'fraud' rationale.

unworkable. The doctrine in *Rochefoucauld* entails that section 53(1)(b) renders an oral express trust unenforceable; instead, it enforces a constructive trust where the causative elements of intention and reliance are fulfilled on the facts. 'Fraud' is merely a description of the state of affairs which the constructive trust prevents – the transferee's reneging on his undertaking through using the absolute form of the conveyance and section 53(1)(b) to deny the true nature of the conveyance.