Cambridge Law Journal, **58(2),** July 1999, pp. 294–302
Printed in Great Britain

SHORTER ARTICLE

CONSTRUCTIVE TRUSTS AND CONSTRUCTIVE TRUSTEES

LIONEL SMITH*

IN the law reports, cases about "constructive trusts" and about "constructive trustees" are not hard to find. They multiply year by year, in contexts as diverse as commercial fraud,[1] armed robbery,[2] mistaken payments,[3] breach of confidence,[4] and breach of public trust.[5] But these are slippery terms. What is constructive about a constructive trust? And about a constructive trustee? What do these terms mean in the modern world? Does the language of constructive trusts and constructive trustees help us, or does it get in the way of the rational development of this branch of the law?

I. "CONSTRUCTIVE"

We have quite a lot of "constructive" in different parts of our law. In personal property we have constructive possession and constructive delivery.[6] In the criminal law we have, or have had, constructive manslaughter and constructive malice.[7] When we are concerned about what people may or may not have known, we have constructive knowledge and constructive notice. What does it mean? In 1990, Sir Robert Megarry said, " 'Constructive' seems to mean 'It isn't, but has

* St. Hugh's College, Oxford. This article is a revised version of a paper first given at a Workshop on the New Equity, Faculty of Law, University of Hong Kong, in September 1998. I am grateful to the organiser of the Workshop, Ms Judith Sihombing, for inviting me and for permitting the separate publication of this paper. I am also grateful to Dr. Neil Jones of Magdalene College for his comments, though remaining errors are my own.

[1] *Agip (Africa) Ltd.* v. *Jackson* [1990] Ch. 264, aff'd [1991] Ch. 547 (C.A.).
[2] *Brinks Ltd.* v. *Abu-Saleh (No. 3)* The Times, 23 Oct 1995, noted R. Stevens [1996] Conv. 447.
[3] *Box* v. *Barclays Bank plc,* The Times, 30 April 1998, noted L.D. Smith (1999) 14 Banking and Finance Law Review (forthcoming); *McDiarmid Lumber Ltd.* v. *C.I.B.C.* (1993) 94 D.L.R. (4th) 227 (B.C.S.C.).
[4] *LAC Minerals Ltd.* v. *International Corona Resources Ltd.* (1989) 61 D.L.R. (4th) 14 (S.C.C.).
[5] *Attorney-General for Hong Kong* v. *Reid* [1994] 1 A.C. 324 (P.C., N.Z.).
[6] R. Goode, *Commercial Law,* 2nd ed. (London 1995), at pp. 48, 277–278.
[7] J.C. Smith and B. Hogan, *Criminal Law,* 8th ed. (London 1996), at pp. 358, 378.

https://doi.org/10.1017/S0008197399002020 Published online by Cambridge University Press

to be treated as if it were' ".[8] Or, to put it another way, it has to be construed as if it were.

Sometimes concepts originate as legal fictions; that is, the pretence of something which, if true, would lead to a desired result under accepted principles.[9] The best-known example lies in the action of ejectment, which gave a lessee of land a form of legal recourse which was superior to that available to a freeholder. Inevitably, the plaintiff claiming under a freehold would allege that he had leased the land to John Doe, and that John Doe had been dispossessed by the defendant; so John Doe would sue in ejectment.[10] What is the point of such fictions? They allow lawyers to change the law without admitting it. In the words of Maine, "They satisfy the desire for improvement . . . at the same time that they do not offend the superstitious disrelish for change which is always present."[11] In the case of ejectment, the desired improvement, dictated by logic, was that freeholders should be as well served by the law as leaseholders; but no argument of mere logic was any match for the weight of history, which insisted that the relatively informal action of ejectment was for leaseholders only, and that freeholders must use more cumbersome processes.[12] By allowing a hidden change to the law, fictions also excuse lawyers from the need to justify the change theoretically.[13]

"Constructive" is a little more honest than a full-blown legal

[8] Rt. Hon. Sir Robert Megarry, "Historical Development" in *Special Lectures of The Law Society of Upper Canada 1990—Fiduciary Duties* (Toronto 1991) 1, 5.

[9] There is a narrower sense of "fiction", well-known to Roman and English lawyers alike, which is confined to matters of pleading but which is also accurately described by the formulation in the text. This narrower sense refers to the making of a false allegation which the other party is not permitted to deny. On the two senses, see H. Maine, *Ancient Law* (London 1917), at pp. 15–16 (this is a repaginated reprint of a book originally published in 1861). For another classification, see L.L. Fuller, "Legal Fictions" (1930–31) 25 Illinois L.R. 363 and 513 and 877, 366–369.

[10] In fact he might allege that John Doe had been dispossessed by Richard Roe, fictional lessee of the real defendant. See J.H. Baker, *Introduction to English Legal History,* 3rd ed. (London 1990), at pp. 341–343.

[11] Maine, note 9 above at p. 16; S.F.C. Milsom, "Trespass from Henry III to Edward III" (1958) 74 L.Q.R. 195 and 561, discussing (at p. 223) fictions in the narrower sense (on which see note 9 above): "The aim of fictions . . . is to keep records straight"; J.H. Baker, "The History of Quasi-Contract in English Law" in W. Cornish *et al.,* eds., *Restitution[:] Past, Present and Future* (Oxford 1998) 37, 40.

[12] It should always be remembered that no contemporary lawyer was actually deceived by the fiction. This presents a fascinating question, but one which is sociological or psychological rather than legal: who are lawyers trying to fool when they use fictions? The answer seems to be, another part of themselves. See L.L. Fuller, "Legal Fictions" (1930–31) 25 Illinois L.R. 363 and 513 and 877, 369, 518–528. Even though contemporary lawyers knew they were false, still fictions can lay dangerous traps for legal historians; see *e.g.* Milsom, *ibid.*, at pp. 220–221, 586, positing that a series of actions in trespass for injuring horses "with force and arms" actually involved negligence by farriers; Baker, *ibid.*, discussing generally how fictions conceal the development of the law of unjust enrichment.

[13] Baker, *ibid.,* at pp. 40–41; J.H. Langbein, "The Later History of Restitution" in W. Cornish *et al.*, eds., *Restitution[:] Past, Present and Future* (Oxford 1998) 57, 58. For more on the functions of fictions, see Fuller, *ibid.*, at pp. 513–518.

https://doi.org/10.1017/S0008197399002020 Published online by Cambridge University Press

fiction. Take constructive knowledge. Knowledge of something may suffice for some result; for example, knowledge of another's equitable interest may be a sufficient condition for making a defendant liable for interfering with that interest. Then we must consider the case of someone who has no knowledge of another's interest, but only because he has been careful not to remove the doubt upon which he now relies. We might well decide that this person should be treated as if he knew. We say he had constructive knowledge. It is not quite a fiction. A fictional approach would be to say, "He knows", and not allow him to say that he did not *really* know, just as the defendant in ejectment was not allowed to say that John Doe did not exist. " 'Constructive' seems to mean 'It isn't, but has to be treated as if it were'." By calling it *constructive* knowledge we admit up front that it is not knowledge. What this means is that we have to say what it is; some explanation is required.

While the "constructive" approach is not completely fictional, still it smacks of mystery, obscurity, difficulty. If the relevant effect is triggered by genuine knowledge *or* by closing one's eyes to the obvious, then genuine knowledge is sufficient but not necessary. This is obscured if we say that what is necessary is "knowledge, actual or constructive". So why do we do it? It is not a trick to conceal a change in the law, since "constructive" admits to the ruse. It appears to be a different kind of trick: one which yields a spurious simplicity. If we have "knowledge, actual or constructive", then we have only one triggering concept: knowledge. If the bailor in a bailment at will is in "constructive possession", while the bailee is in actual possession, then we can go on saying that a pledge requires possession by the pledgee, even while we allow a pledgee to give up possession to his pledgor.[14] At common law the mens rea for murder was "malice aforethought", meaning an intention to kill or cause serious harm. If one who kills unintentionally while committing a robbery has "constructive malice", then that person can be convicted of murder even while we insist that malice aforethought is required.[15] "Constructive" allows us to multiply operative, triggering concepts, even while we pretend that we are only subdividing them.

II. "Constructive Trust"

There is one place where this view of "constructive" appears not to fit, and that is constructive trusts. The reason is that a constructive

[14] *Reeves* v. *Capper* (1838) 5 Bing. N.C. 136, 132 E.R. 1057 (C.P.).
[15] Constructive malice was abolished in England by section 1 of the Homicide Act 1957.

https://doi.org/10.1017/S0008197399002020 Published online by Cambridge University Press

trust is really a trust.[16] The only way to make sense of this appears to be in historical perspective. The roots of the phrase lie in the late seventeenth century, and in particular in the work of Lord Nottingham, a great systematiser of equity. In his period, and much earlier,[17] resulting trusts arose where property was conveyed without consideration; this of course reflected the legacy of uses.[18] Also building on the law of uses, a transferee of trust property who was not a purchaser for value in good faith without notice was of course a trustee.[19] Newly appearing in the late seventeenth century was the principle that property acquired by a trustee in breach of trust would itself be held on trust.[20] Lord Nottingham took the view that in all of these cases, the trust arose by operation of law.[21] This is confirmed by the language of section 8 of the Statute of Frauds 1677, drafted by Lord Nottingham.[22] It exempted from writing requirements trusts which "arise or result by implication or construction of law". The phrase "arise or result" describes patterns among settlor, trustee, and

[16] This, I take to be the orthodox English view; although it does not follow that the trustee of a constructive trust owes fiduciary obligations: see L.D. Smith, "Constructive Fiduciaries?" in P.B.H. Birks, ed., *Privacy and Loyalty* (Oxford 1997) 249, 263–267. In the U.S. and Canada, it is argued by some that a constructive trust is not really a trust at all. See D.B. Dobbs, *Law of Remedies,* 2nd ed. (St. Paul 1993), at p. 401: "The constructive trust is not in fact a trust, but a remedy which is explained by analogy to trusts." *Cf.* American Law Institute, *Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts* (St. Paul 1937), §160, comment a; D.W.M. Waters, "The Constructive Trust in Evolution: Substantive *and* Remedial" in S. Goldstein, ed., *Equity and Contemporary Legal Developments* (Jerusalem 1992), 457; this paper is also at (1991) 10 E.T.J. 334. On this view, "constructive trust" makes perfect sense: "it isn't [a trust], but has to be treated as if it were".

[17] See N. Jones, "Trusts in England after the Statute of Uses: A View from the 16th Century" in R. Helmholz and R. Zimmermann, eds., *Itinera Fiduciae* (Berlin, 1998), at p. 177 n. 30.

[18] See Lord Nottingham's *Prolegomena of Chancery and Equity* (in D.E.C. Yale, ed., *Lord Nottingham's Two Treatises* (Cambridge 1965)), ch. XIV, §5.

[19] *Ibid.*, ch. XIV, §§1–2.

[20] See D.E.C. Yale, ed., *Lord Nottingham's Chancery Cases,* Vol. II, Selden Society, Vol. 79 (London 1961), at pp. *124–128*.

[21] In the *Prolegomena of Chancery and Equity,* note 18 above, ch. XIII is entitled "Where Trust Shall be Raised by Construction and Implication of Law, and Where Not"; its §6 shows that resulting trusts are considered an example of such, while ch. XIV, §5, to which ch. XIII, §6 refers, confirms that resulting trusts were seen to arise by operation of law. See also Nottingham's manuscript report of his judgment in *Cook* v. *Fountain* (1676) 3 Swans. 585, 591, 36 E.R. 984, 987 (also in D.E.C. Yale, ed., *Lord Nottingham's Chancery Cases,* Vol. I, Selden Society, Vol. 73 (London 1954), 362, 365). Note too that in his manuscript report of his judgment in *Grey* v. *Grey* (1677) 2 Swans. 594, 36 E.R. 742 (also in D.E.C. Yale, ed., *Lord Nottingham's Chancery Cases,* Vol. II, Selden Society, Vol. 79 (London 1961), 481), Lord Nottingham refers to what we would now call a resulting trust as a constructive trust. Whatever may be the present position, the view that resulting trusts arose by operation of law still prevailed in 1737 at the time of publication of the treatise attributed to Henry Ballow: J. Fonblanque, ed., *A Treatise on Equity,* vol. 2 (London 1794), ch. V (for discussion of the book, see M. Macnair, "The Conceptual Basis of Trusts in the Later 17th and Early 18th Centuries" in R. Helmholz and R. Zimmermann, eds., *Itinera Fiduciae* (Berlin, 1998), esp. at p. 210 n. 9, p. 220); see too *Lloyd* v. *Spillit* (1740) 2 Atk. 148, 150, 26 E.R. 493, 494, Barn. C. 384, 388, 27 E.R. 689, 690.

[22] C.D. Hening, "The Original Drafts of the Statute of Frauds and Their Authors" (1913) 61 U. Penn. L.R. 283 shows that Lord Nottingham drafted what became section 8, and that the phrase quoted in the text was essentially unchanged from his initial bill. This was first read in the House of Lords in 1673, just about the time that Nottingham was writing the *Prolegomena*: D.E.C. Yale, ed., *Lord Nottingham's Two Treatises* (Cambridge 1965) at p. 76. See also G.P. Costigan, "The Date and Authorship of the Statute of Frauds" (1913) 26 Harv. L.R. 329.

https://doi.org/10.1017/S0008197399002020 Published online by Cambridge University Press

beneficiary; "by implication or construction of law" describes the reason for the existence of the trust. "Implication" here means implication of law, not fact.[23] All trusts which are now called resulting or constructive trusts were seen as arising "by implication or construction of law".

The only way to fit constructive trusts in with the usual idea of "constructive" is to suppose that when the phrase originated, the context was that "trust" connoted "entrustment" or "express trust". To the ears of a seventeenth century lawyer, then, "constructive trust" would unpack as "constructive express trust". To modern ears, this might seem like a contradiction in terms, but it actually aligns with the way we use "constructive" elsewhere. The view outlined above was that "constructive" allows us to multiply operative or higher-order concepts while pretending that we are dealing with a static number and merely subdividing them. In line with that, if the paradigm trust in the seventeenth century was the (express) family settlement, then the relatively small number of trusts arising by operation of law were treated as a subdivision: "it isn't [an express trust], but has to be treated as if it were". In the modern world, we acknowledge more fully that there can be perfectly good trusts which are not express trusts; and yet we continue to call some of them constructive.[24]

III. "Constructive Trustee"

Sometimes a defendant is alleged to be "liable to account as a constructive trustee". There are three main categories of cases: trustees de son tort, who have taken it upon themselves to act as trustees; "knowing assisters", those who dishonestly assist in a breach of trust; and "knowing recipients", those who receive trust property with some level of cognition that the property is subject to the rights

[23] Note 21 above. Trusts arising by implication of fact were called by Lord Nottingham "presumptive trusts"; see D.E.C. Yale, ed., *Lord Nottingham's Chancery Cases,* Vol. II, Selden Society, Vol. 79 (London 1961), at pp. *128–129*. It would not make sense for section 8 to extend to trusts created intentionally; its function was to disapply the writing requirement imposed by section 7 on intentionally created trusts of land.

[24] Another way of looking at this development is that the consensus as to what is connoted by "trust" has changed; it has ceased to include the idea of voluntary creation. But it is not totally clear that there is a stable consensus as to what is left. On one view (*Hardoon* v. *Belilios* [1901] A.C. 118, 123 (P.C., H.K.)), the essence of the trust is the split between beneficial title and administrative title; on another view (*Westdeutsche Landesbank Girozentrale* v. *Islington London B.C.* [1996] A.C. 669, 705–707 (H.L.), *per* Lord Browne-Wilkinson), more is required, namely that the trustee be subject to personal obligations similar to those of an express trustee. See P.B.H. Birks, "Trusts Raised to Reverse Unjust Enrichment" [1996] R.L.R. 3, 11–12; Smith, note 16 above, at pp. 265–266; J.H. Baker, "The History of Quasi-Contract in English Law" in W. Cornish *et al.*, eds., *Restitution[:] Past, Present and Future* (Oxford 1998) 37, 41.

https://doi.org/10.1017/S0008197399002020 Published online by Cambridge University Press

of a beneficiary.[25] These claims are personal ones, which establish a liability on the part of the defendant to pay a sum of money; they are not proprietary claims, which establish that the defendant holds property on trust for the plaintiff. Because there is no allegation that there is a constructive trust, or any kind of trust, anywhere in the picture, there is a tendency to deprecate the traditional form of pleading which alleges that the defendant is "liable to account as a constructive trustee".[26]

The interesting thing is that an allegation that the defendant is a constructive trustee makes more sense than the allegation of a constructive trust. We have already seen that "constructive trust" represents a non-standard usage of "constructive". If the allegation that the defendant is a constructive trustee were to fall in line with the usual understanding of "constructive", it would be an allegation that "[he] isn't [a trustee], but has to be treated as if [he] were". Why might a plaintiff plead his case that way?

The reason appears to lie in the logic of the trust. Prima facie, the beneficiary of a trust cannot sue anyone except his trustee.[27] This is part of the package of legal incidents which is delivered when parties choose to use the trust institution to order their affairs; in other words, when they choose to entrust assets to their trustee.[28]

[25] See generally C. Harpum, "The Stranger as Constructive Trustee" (1986) 102 L.Q.R. 114 and 267; S. Gardner, "Knowing Assistance and Knowing Receipt: Taking Stock" (1996) 112 L.Q.R. 56.

[26] The phrase is avoided in *Royal Brunei Airlines Sdn Bhd* v. *Tan* [1995] 2 A.C. 278 (P.C., Brunei); and see now *Paragon Finance plc* v. *D.B. Thakerer & Co.* [1999] 1 All E.R. 400, 409g (C.A.). Recent cases which notice that the phrase sometimes refers to a situation where there is no property held in trust, but do not comment adversely upon it for that reason, include *Westdeutsche Landesbank Girozentrale* v. *Islington London B.C.* [1996] A.C. 669, 705EF, *per* Lord Browne-Wilkinson, and *Giumelli* v. *Giumelli,* 24 March 1999 (High Court of Australia), para. 4. For criticism of the phrase, see for example P.B.H. Birks, "Trusts in the Recovery of Misapplied Assets" in E. McKendrick, ed., *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford 1992) 149, 154; A. Burrows, *The Law of Restitution* (London 1993), at p. 151; J.E. Martin, *Hanbury and Martin[:] Modern Equity,* 15th ed. (London 1997), at p. 293; Sir Peter Millett, "Restitution and Constructive Trusts" in W. Cornish *et al.*, eds., *Restitution[:] Past, Present and Future* (Oxford 1998) 199, 200; Lord Millett, "The Law of Restitution: Taking Stock" (1999) 14 Amicus Curiae 4, 6–7.

[27] *Hayim* v. *Citibank NA* [1987] A.C. 730 (P.C., H.K.); *Parker-Tweedale* v. *Dunbar Bank plc (No. 1)* [1991] Ch. 12 (C.A.); *Bradstock Trustee Services Ltd.* v. *Nabarro Nathanson* [1995] 1 W.L.R. 1405. It is no exception to this principle to observe that the beneficiary can force the trustee to pursue a claim which the trustee holds against a third party, by suing the trustee and the third party together. This procedure is just the modern equivalent of obtaining an injunction against the trustee requiring him to sue the third party. It does not disclose any direct claim by the beneficiary against the third party; if anything, it reinforces the view that a beneficiary can generally only sue his trustee.

[28] Here again we see the continuing influence of the original conceptualisation of the trust as extending only to express trusts. The idea that one's remedies should be limited by the logic of the trust makes very little sense to someone whose trust is a constructive one, arising say following a fraud. But on the orthodox view, it is still a trust, and so must have some characteristics in common with express trusts. More importantly, this plaintiff is not bound by the logic of the trust; rather, the (constructive) trust is merely one tool available to her. For example, while the beneficiary of an express trust will not generally be able to deploy a negligence theory against a third party even if the latter was aware of the trust (*Parker-Tweedale* v. *Dunbar Bank plc (No. 1)* [1991] Ch. 12 (C.A.)), the victim of a fraud can simply set aside the

https://doi.org/10.1017/S0008197399002020 Published online by Cambridge University Press

Now, if the beneficiary finds a defendant who has received trust property in such a way that it remained subject to the trust, then that defendant is a trustee of that property for the beneficiary, and so the action for an appropriate declaration and consequential relief is an action against a trustee. But if the beneficiary is trying to make a defendant personally liable for something the defendant has done, it is not so easy. The defendant does not now hold, and perhaps never has held, property in trust for the plaintiff. And here, the logic of the long-winded formula comes into its own: to allege that the defendant is liable to account as a constructive trustee is not to allege that the defendant is really a trustee, nor that he ever was, nor that there is or ever was a constructive trust; it is simply to allege that the defendant should be personally liable to the plaintiff, who is (supposedly) only allowed to sue his trustee.

As we saw above, "constructive" multiplies operative categories by nominally subdividing them. In this context, it preserves the appearance that beneficiaries can only sue one type of defendant—their trustees—while in fact adding other categories. But unlike a genuine fiction, its ruse is an open one, proclaimed by the word "constructive". In other words, once we allow such a thing as liability to account as a constructive trustee, we have to start deciding who qualifies as one. A great deal has been written.[29] One long-running controversy is whether a recipient of trust property should be strictly liable, subject to defences, rather than being liable only on the showing of some level of cognition regarding the trust.[30] Such debates are healthful and enlightening, but one recent trend might be doubtful: that is, the desire to distinguish between "receipt-based" liability and liability "as a constructive trustee".[31] The reason it is doubtful is that, as has been discussed above, the function of the phrase "as a constructive trustee" is simply to get around the rule of trust law that beneficiaries can only sue their trustees. "Liability as a constructive trustee" might as well be read as "liability (even though the defendant is not actually a trustee)". In that light, to contrast it with "receipt-based" liability or with "strict liability" would be illogical. This observation, on its own, does not much advance the

---

trust theory, or use it as an alternative, while attempting to rely on negligent causation of pure economic loss.

[29] See note 25 above; and for further citations to articles, L.D. Smith, *The Law of Tracing* (Oxford 1997), at p. 373 n. 16.

[30] See for example P.B.H. Birks, "Misdirected Funds: Restitution from the Recipient" [1989] L.M.C.L.Q. 296; L.D. Smith, "W(h)ither Knowing Receipt?" (1998) 114 L.Q.R. 394. The most recent word from the House of Lords is that cognition is required: *Westdeutsche Landesbank Girozentrale* v. *Islington London B.C.* [1996] A.C. 669, 707D, *per* Lord Browne-Wilkinson.

[31] Lord Nicholls of Birkenhead, "Knowing Receipt: The Need for a New Landmark" in W. Cornish *et al.*, eds., *Restitution[:] Past, Present and Future* (1998) 231; J. Martin, "Recipient Liability after *Westdeutsche*" [1998] Conv. 13.

https://doi.org/10.1017/S0008197399002020 Published online by Cambridge University Press

debate on whether liability should be strict or fault-based: to say that a defendant is "liable as a constructive trustee" is just to say that he is liable even though he is not actually a trustee; it says exactly nothing about what makes someone liable. But it is worth noticing that there is no mileage in a strategy which attempts to sidestep the accumulated authority on what makes someone "liable to account as a constructive trustee" by asserting that "receipt-based" liability is different and so the same conditions need not apply to it.

IV. Constructive Trust and Constructive Trustee

In a simple world, the trustee of a constructive trust would be a constructive trustee. But if what has been said above is correct, that is not our world. The constructive trust is a trust, and its trustee is a genuine trustee, holding property in trust; whereas the one thing that the constructive trustee is *not* is a trustee who holds property in trust. The real world is therefore more complex and confusing than it might be, and the reason is that the word "constructive" is used in a unique sense in the formula "constructive trust". At the very least, we have to distinguish two senses of "constructive trustee": one is its usage in the formula "liable to account as a constructive trustee", and the other is the sense in the phrase "trustee of a constructive trust".

The full quotation from Sir Robert Megarry is, " 'Constructive' seems to mean 'It isn't, but has to be treated as if it were', and the less of this there is in the law, the better."[32] Most lawyers would probably agree with the final sentiment. "Constructive" is not fully fictional, but neither is it fully transparent.[33] Can we dispense with it? On the present state of the law, not in respect of constructive trusts, for as we have seen they are not really "constructive" at all. We could, however, stop talking about "liability to account as a constructive trustee". The phrase is only required so long as we wish to preserve the pretence that beneficiaries can only sue their trustees. Once we discard that pretence, we can dispense with the phrase and concern ourselves with identifying those instances where a defendant is liable to a beneficiary even though that defendant is not a trustee. We seem to be well along this road, a road leading to better terminology and therefore clearer analysis.[34] But it is important to remember that all of the effort which has gone into answering the

[32] Note 8 above.
[33] In the context of fictions, Maine said (note 9 above, at p. 16): "I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order."
[34] Notes 25–26 above.

https://doi.org/10.1017/S0008197399002020 Published online by Cambridge University Press

question, "Who is liable to account as a constructive trustee?" has gone into answering what is the very same question, albeit with improved terminology: "Who is personally liable to trust beneficiaries despite not being a genuine trustee?" This learning cannot be sidestepped by saying that we are going to make a non-trustee defendant liable, but not liable as a constructive trustee; that is a contradiction in terms.

https://doi.org/10.1017/S0008197399002020 Published online by Cambridge University Press