Equitable ownership after the Judicature Act

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Equitable ownership arises in some, but not all, circumstances when legal title is held on trust. Prior to the procedural fusion of the law and equity in the late nineteenth century, equitable ownership arose only from the creation of express trusts and in limited circumstances where a constructive or resulting trust was recognised. The use of equitable ownership was not widespread. Being unknown to the common law, equitable ownership was not a concept that was utilised as part of the remedial response to common law torts like conversion or as a response to a payment made by mistake. The author examines the development of equitable ownership since the late nineteenth century and argues that the introduction of the Judicature Act opened the way for equitable ownership to be used as a response to common law wrongdoing. In addition, contracting parties began to see the flexibility inherent in having two levels of ownership and as a result equitable ownership has become widespread. This widespread use of equitable ownership has made it difficult to maintain that a trust creates only obligations and not property rights.

Introduction

Prior to 1875 the rules and practices of law and equity were administered in different courts. As a result the operation of the institution of the trust was limited to courts of equity. Under this approach there was only a limited role for trusts in relation to common law relationships like contract and trusts were not used as a remedial response to torts or mistaken payments. This limited use of trusts meant that any notion of equitable ownership arose only in the limited circumstances where a trust existed and it was arguable that trusts were only a source of obligations owed by a trustee and did not represent two levels of property rights to the same item of property. There was no widespread development or use of equitable ownership as a remedy or as a means of structuring contractual relationships.

However, the restrictions on the development of equitable ownership were removed when the Judicature Acts came into effect in 1875 thereby providing for the concurrent administration of law and equity in the same courts. It will be argued in this article that this fusion of the administration of common law and equity in 1875 opened the way for equitable proprietary remedies to be used in response to common law causes of action. As Meagher,

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1 See, eg, Lysaght v Edwards (1876) 2 Ch D 499.
2 Judicature Act 1873 (UK) and Supreme Court of Judicature (Commencement) Act 1874 (UK).
3 Supreme Court of Judicature Act 1873 (UK) s 2 provided an effective date of 2 November 1874. The effective date was extended to 1 November 1875 by s 2 of the Supreme Court of Judicature (Commencement) Act 1874 (UK).
Heydon and Leeming have observed there were no provisions in the Judicature Act ‘to preserve equity from the hands of the common lawyers’.  
Examples of the use of the second level of ownership in this way include cases of conversion and mistaken payments. In addition the courts have used the second level of ownership to further develop the response to equitable actions. For example, equitable ownership is used by the courts to create automatic equitable ownership rights in cases of equitable wrongdoing. The use of equitable ownership is a particularly powerful device when the court’s intention is to strip a wrongdoer of any gain from their wrongdoing. However, the use of the second level of ownership is controversial as it can lead to a favourable treatment in some cases. For example, if used in relation to mistaken payments it can give a mistaken payer priority in the insolvency of the recipient. Such priority would be unlikely in a system with only one level of ownership. In relation to wrongdoers, a victim of a wrong can gain a substantial windfall even in cases where the victim has suffered no loss. This typically arises where the wrongdoer makes an additional gain from the breach by investing the initial gains.

As the use of the second level of ownership became more widespread during the twentieth century contracting parties began to recognise the increased flexibility available to them. Having two levels of ownership provides significantly more flexibility for contracting parties than a system that has only one level of ownership. Two examples of this contractual flexibility are the Quistclose trust and trusts over proceeds used in conjunction with retention of title clauses. In both cases contracting parties are using the second level of ownership to structure their contractual arrangements.

Under a Quistclose trust a lender can structure a loan so that they have a legal right to be repaid pursuant to the loan contract and also have an equitable right to vindicate their equitable ownership of the money lent. In the absence of the flexibility available under a system with a second level of ownership a lender would have no ownership rights in the money paid to a borrower. A trust over proceeds used in conjunction with retention of title clause allows a seller of goods to obtain equitable ownership of the proceeds of any sale of those goods by the purchaser. This is designed to strengthen the rights of the seller in the event that the buyer becomes insolvent before paying for the goods.

The purpose of this article is to explore the development of equitable ownership after the introduction of the Judicature Act and in particular its expansion into the law of tort and contract. It will be argued that as a result of this expansion it is now extremely difficult to argue that trusts are restricted

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5 Black v S Freedman & Co Ltd (1910) 12 CLR 105; Creak v James Moore & Sons Pty Ltd (1912) 15 CLR 426.
8 Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567; [1968] 3 All ER 651.
9 See, eg, Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (2000) 202 CLR 588; 171 ALR 568.
to obligations owed by trustees. This is because the courts now widely accept
that trusts can be used to create equitable ownership of property and that such
property rights co-exist with obligations owed by a trustee.

This article is divided into two parts. In Part One the evolution of two levels
of ownership in our legal system is examined. It will be shown that equitable
ownership developed as a concept incrementally. Initially the rights of a
beneficiary under a trust were not considered to be property rights. However,
these rights evolved and came to be accepted as proprietary and finally, in
some circumstances, as ownership rights. In Part Two the expansion of
equitable ownership after the Judicature Act will be examined. It will be
shown that the increased use of equitable ownership as a remedial response by
the courts, and as a flexible method of structuring contractual arrangements,
has resulted in a widespread notion of equitable ownership. It is argued that
this widespread development of equitable ownership was a direct result of the
introduction of the Judicature Act in the late nineteenth century. Cases will be
examined that demonstrate that the continued expansion of equitable
ownership continues in the early twenty-first century. The view that trusts
should be seen as solely giving rise to obligations\(^\text{10}\) will be examined and
rejected as untenable because of the extensive development of equitable
ownership and its recognition by the courts as a second level of ownership.

**Part one: The evolution of two levels of ownership**

The origin of equitable ownership can be traced to the fifteenth century when
equity developed the concept of the trust and 'turned the interest of the
beneficiary into a new kind of ownership'.\(^\text{11}\) The process of establishing the
interest of a beneficiary as a property right, and thereby potentially a form of
ownership, occurred in stages over several centuries. Maitland\(^\text{12}\) explains the
steps as follows:

1. The first step was the recognition that the *cestui que trust* had a
   remedy against the trustee;
2. Then it was held that the trust could be enforced against those who
   inherited the legal property rights to trust assets from the trustee.
   Such a person remains under the same obligation as the original
   trustee;
3. It was then held that the trust could be enforced against the trustee’s
   creditors;
4. The rights of a *cestui que trust* could be enforced against any person
   who obtained the legal property rights to trust assets as a volunteer
   even if they had no notice of the trust;
5. The trust could be enforced against a person who paid for legal
   property rights to trust assets provided they had notice of the trust;

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\(^{10}\) P Parkinson, ‘Reconceptualising the Express Trust’ [2002] *CLJ* 657.
p 251.
p 107.
6. Constructive notice of the existence of a trust was introduced so that
a recipient of trust assets could not simply close their eyes to the
obvious.\textsuperscript{13}

Maitland argued that this should have been the limit of the steps taken by
the courts. He was opposed to the idea that a final step be taken to the effect
that these rights taken together amounted to some form of ownership. It is
possible to have a concept of trusts without having two levels of ownership as
favoured by Maitland. Honoré argues that under any system of law that
utilises the concept of the trust it is not essential to have dual ownership.\textsuperscript{14}
Honoré and Maitland are right to recognise that only one level of property
rights and one level of ownership is required. However, our legal system
considered this issue on two occasions and on both occasions decided to
continue with a dual system of property rights.

The first occasion when a single level of property rights was advocated
occurred in the middle of the eighteenth century. In \textit{Burgess v Wheate}\textsuperscript{15} Lord
Mansfield advocated a single level of property rights. Referring to legal and
equitable estates, Lord Mansfield argued that the ‘\textit{forum} where they are
adjudged is the only difference between trusts and legal estates’.\textsuperscript{16} He went on
to hold that a beneficiary under a trust ‘is actually and absolutely seised of the
freehold in consideration of this court’.\textsuperscript{17} What Lord Mansfield intended was
that common law courts would recognise equitable estates as legal estates so
that the holder of an equitable estate would be considered the owner at law and
thus be entitled to the remedies available to an owner at law. This is consistent
with the proposition that Lord Mansfield intended to recognise only one level
of property rights and one level of ownership rights. Only one person would
be recognised as the true owner. However, Lord Mansfield was unsuccessful
and the common law courts did not proceed to recognise the holder of an
equitable estate as the owner at law. The holder of a legal estate, whether a
trustee or not, continued to enjoy all the rights of legal ownership.

The second occasion when a single level of property rights was advocated
occurred late in the nineteenth century after the Judicature Act came into ef fect
on 1 November 1875. The cases to be examined below demonstrate that the
tension between a single level of property rights, and a dual level of property
rights, re-emerged at this time. Section 24 of the Judicature Act provided that
every court should give a plaintif f the same relief as ought to have been given
by the Court of Chancery. All courts were required to take notice of all
equitable estates in the same manner in which the Court of Chancery would
have recognised and taken notice of them. The Judicature Acts make no
reference to equitable ownership and no reference to two levels of property
rights or two levels of ownership. The Judicature Acts required common law
courts to \textit{recognise} and \textit{take notice of} equitable estates. But the Judicature Acts
did not explain \textit{how} the common law courts were to recognise equitable
estates; only that they were to do so.

\begin{itemize}
\item \textsuperscript{13} Ibid, pp 112–13.
\item \textsuperscript{14} A Honoré, ‘Trusts: The Inessentials’ in J Getzler (Ed), \textit{Rationalizing Property, Equity and
\item \textsuperscript{15} (1757-59) 1 Eden 177; 28 ER 652.
\item \textsuperscript{16} Ibid, at ER 670.
\item \textsuperscript{17} Ibid, at ER 671.
\end{itemize}
There are two ways that the common law could have recognised an equitable estate. The first was to continue to recognise the existing rights and remedies available to a legal owner, and then recognise a holder of an equitable estate, not as a substitute for the legal owner, but as an *additional* owner. This approach would see the continuation of two levels of property rights and confirmation of the notion of two levels of ownership rights. The second was to adopt the position advocated by Lord Mansfield in *Burgess v Wheate* and accept that legal estates and equitable estates should now be identical. Under this alternative the common law courts could have recognised a holder of an equitable estate as the owner and thereby give an equitable owner all of the rights and remedies available to a legal owner and in the process adopt a single level of property rights and a single level of ownership.

However, the common law courts decided to recognise equitable property rights in addition to existing common law property rights and remedies. An early example is *Metropolitan Railway Company v Defries* where a vendor contracted to sell land to a purchaser and the contract provided for a completion date in 1869 and that possession would be given to the purchaser on that date. The purchaser was entitled under the contract to 'all rents and profits' after the proposed 1869 completion date. However, the vendor refused to complete the contract and refused to give up possession. The conveyance did not in fact take place until some years later in 1876 when the purchaser finally gained possession. The purchaser claimed to be entitled to the rent for the period that the vendor remained in possession. Field J held that the vendor must pay rent to the purchaser for the relevant period of occupation. Of importance is the way Field J described the rights of the purchaser. He held that from the proposed settlement date in 1869 'the equitable ownership of the property is to vest in the [purchaser]'19 This description of equitable ownership by Field J suggests that it is an additional property right to legal ownership.

The alternative to recognising equitable rights as additional to legal rights is the approach of Jessel MR in *Walsh v Lonsdale*. Jessel MR held that since the Judicature Acts there were no longer two estates but one. Jessel MR understood the Judicature Acts to require that equitable interests be recognised by the common law and to prevail over legal interests. Although Jessel MR’s decision has been condemned as a ‘fusion fallacy’22 it is not an unrealistic interpretation of the Judicature Acts. Prior to the Judicature Acts the holder of an equitable estate was seen as *the owner* in equity. It follows that after the Judicature Acts an equity judge would continue to see the holder of an equitable estate as *the owner*. Given that equity was to prevail over the common law it follows that an owner in equity would be considered not only as *the owner* but *the legal owner*. Accordingly only one level of property rights and one level of ownership would be required. This reflects the model

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18 [1876-77] 2 QBD 189.
19 Ibid, at 193. An appeal of the decision was dismissed: see *Metropolitan Railway Company v Defries* [1876-77] 2 QBD 387.
20 (1882) 21 Ch D 9.
21 Ibid, at 14.
22 Meagher, Heydon and Leeming, above n 4, p 64.
proposed by Honoré outlined above. However, Jessel MR’s argument for a single level of property rights did not prevail.

It is submitted that the continuation of dual property rights and dual ownership rights after the introduction of the Judicature Acts was inevitable because of the doctrine of precedent. The common law courts could only continue with a single level of ownership if they abandoned their own previous decisions that recognised the legal owner to be the person who held the legal estate. The only alternative for a common law court to continue to follow precedent and implement the Judicature Acts was to recognise an equitable estate as an additional estate and recognise equitable ownership as additional to legal ownership. To have two owners recognised in the same court, and given different remedies in the same court, logically requires the recognition of two levels of ownership — legal ownership and equitable ownership.

This analysis demonstrates that in the period after the Judicature Acts the courts had to decide between two alternatives. The first was to have a single level of property rights (and therefore a single level of ownership) or continue with two levels of property rights and two levels of ownership rights. A clear choice was made to continue with two levels of property rights and two levels of ownership.

There is an important implication of having two levels of property rights including two levels of ownership rights. The rights held at each level must be different; that is, the content of the rights must be different. If the rights were identical then there could not be two levels of rights. However, the different content of legal ownership rights and equitable ownership rights is beyond the scope of this article and it is therefore not proposed to examine the content of those rights. In the following part the expansion of equitable ownership will be examined.

**Part two: The expansion of equitable ownership**

**Tort**

A number of torts cases provide examples of the courts utilising the dual level of ownership rights to deny a wrongdoer full ownership rights in certain circumstances. The leading case is *Black v S Freedman & Co Ltd*. John Black was an accountant employed by Freedman & Co and he had been convicted of stealing cash from his employer. In the High Court O’Connor J held that where money is stolen it is trust money in the hands of the thief. O’Connor J’s conclusion would suggest that a trust will arise from a theft even in the absence of a fiduciary relationship. He also held that, when given to a third party without consideration, the money retained its character as trust money. O’Connor J offered no explanation as to why he adopted an equitable remedial response to the tort of conversion although the plaintiff originally sought a declaration that they had legal title to the money in

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24 Ibid, at 110.

25 Ibid, at 111.
Mrs Black’s bank account which had been deposited into her account by John Black from the money he stole from his employer.

The use of an equitable response to the tort of conversion was extended further by the High Court in *Creak v James Moore & Sons Pty Ltd*. Watson, an employee of the respondent, stole cash and galvanised iron from his employer. Quine, an accomplice of Watson, then sold the iron to the appellant and deposited the proceeds in a bank account in the name of Watson. Watson was subsequently arrested by the police who arranged for Watson to withdraw the funds from the bank account and the police then delivered those funds to the respondent. The respondent, therefore, had received the proceeds of the sale of the stolen goods but continued to pursue a claim for conversion against the appellant. Griffith CJ held that the respondent acquired equitable title to the proceeds of the sale of the iron. As the respondent had equitable ownership of the proceeds and continuing legal title to the iron the respondent was required to elect to forgo one of these property rights. The case demonstrates the use of the second level of ownership to deny a thief full ownership rights, this time in the proceeds derived from the theft. Although the thief obtained legal ownership of the proceeds from the sale of the iron the rule adopted by the court immediately created an equitable ownership right in favour of the victim. In *Cashflow Finance Pty Ltd v Westpac Banking Corporation* Einstein J referred to the principle derived from *Black v Freedman* as the ‘theft principle’. Cases since *Black v Freedman and Creak* have developed the theft principle further so that it now operates in relation to intangible as well as tangible personal property.

In *Halley v Law Society* the English Court of Appeal, in a different context, developed a principle identical to the theft principle developed in *Black v Freedman and Creak*. In *Halley* money was paid pursuant to what the payer believed to be a valid contract. A number of persons were persuaded to make payments for various investments. However, the reality was that the transactions were entirely fraudulent. Counsel for the Law Society argued that in this case the usual position that a contract must first be rescinded to revest title did not apply because the transaction was akin to theft. In discussing this submission Carnwath LJ stated that ‘[w]here property is stolen, no beneficial interest passes to the thief’. Carnwath LJ’s position is identical to the theft principle established in Australia in *Black v Freedman*. The theft principle has also developed independently in Canada in *Re Kolari* where a bank teller stole money from her employer. The teller then purchased assets with the

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26 (1912) 15 CLR 426.
27 Ibid, at 433.
32 Ibid, at 862.
stolen money. Stortini DCJ held that ‘a resulting trust arises where property is obtained by fraud or theft’.34

The rationale for the theft principle can easily be justified. Equity recognises that the thief obtains legal title but responds by ensuring that all that the thief will obtain is legal title. Equitable title to stolen goods will not be obtained by a thief. A thief holds their property right to stolen goods on trust and any proceeds of sale form part of that same trust. For current purposes it is important to note that the theft principle developed in Australia, England and Canada as a response to common law wrongdoing only after the introduction of the Judicature Acts.

**Unlawful killing of a joint tenant**

The remedial use of equitable ownership has also extended to circumstances where a joint tenant kills another joint tenant. Like the theft principle, the concern of the court is to ensure that the wrongdoer does not benefit from the wrong committed.35 The issue of what remedial response is appropriate arises because upon the death of a joint tenant the rights of the surviving joint tenants are enlarged. If a joint tenant is responsible for the death of another joint tenant then they stand to benefit from the survivorship rule unless another legal response deprives them of that benefit.

Initially the response of the courts was to provide a special rule to sever the joint tenancy and proceed on the basis that the joint tenancy had been converted to a tenancy in common. This was the approach adopted by Napier J in *Re Barrowcliff*.36 A husband killed his wife and as a result he stood to benefit because their real and personal property were held as joint tenants. Napier J held that the husband could be prevented from benefiting either by ‘an exception to the right of survivorship, or that the unlawful homicide of one joint tenant by the other effects a severance of the joint tenancy’.37 Ultimately Napier J considered that a severance of the joint tenancy was appropriate and held that the property passes ‘as though these co-owners had been tenants in common’.38

However, this approach did not find favour in New South Wales. In *Re Thorp*39 Jacobs J expressly rejected the approach taken by Napier J in *Re Barrowcliff*. Jacobs J held that ‘where one joint tenant kills another, whether or not that act is felonious, the legal title passes to the surviving joint tenant’.40 Instead of altering the legal title by way of severance of the joint tenancy Jacobs J considered that the appropriate approach was to use a trust to create equitable ownership rights in the property through the imposition of a constructive trust.41

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34 Ibid, at 478.
36 [1927] SASR 147.
37 Ibid, at 151.
38 Ibid.
39 (1961) 80 WN(NSW) 61.
40 Ibid, at 65.
41 Ibid.
In Rasmanis v Jurewitsch Jacobs JA held that in a two person joint tenancy a constructive trust would be imposed whereby half the interest in the property was held on trust for the victim’s estate without any severance at law or in equity. But in a three person joint tenancy Jacobs JA held that a severance in equity was necessary. The approach taken in Re Thorp and Rasmanis was also preferred by Young J in Public Trustee v Evans.

In Queensland the approach of Napier J in Re Barrowcliffe initially found favour and was expressly approved by Hanger J in Kemp v Public Curator of Queensland in preference to the equitable approach. However, in the later decision of Re Stone McPherson J favoured the equitable approach adopted in New South Wales in Re Thorp and Rasmanis. In favouring the equitable approach McPherson J noted that it had the advantage of certainty in regards to the legal title. This approach was also preferred most recently in Queensland by Atkinson J in Re Nicholson.

It is submitted that the equitable approach in these cases provides another example of the second level of ownership being utilised to respond to wrongdoing. Without a second level of ownership rights the approach of severing the joint tenancy into a tenancy in common adopted by Napier J in Re Barrowcliffe would most likely be the appropriate response. However, the flexibility available from having two levels ownership allows the existing rules of legal ownership to remain intact and be supplemented by equitable rules.

### Breach of fiduciary duty

If a fiduciary makes a secret commission or accepts a bribe the fiduciary will be stripped of any gain received. This was initially achieved through the equitable remedy of an account of profits. This was the case both before and immediately after the Judicature Act. In Lister & Co v Stubbs an employee accepted secret commissions from a firm from whom he purchased materials for use in his employer’s business. The court held that the employee was liable to account to the firm but that the firm did not acquire equitable ownership of the secret commissions. Essentially the introduction of the Judicature Act did not bring about any immediate change in remedy for this equitable wrongdoing.

However, over a century later a change can be seen in Attorney-General v Reid. Reid, a fiduciary, received bribes during the performance of his duties as a public prosecutor in Hong Kong and invested some of the bribe money in properties in New Zealand. The Privy Council awarded a proprietary

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43 Ibid.
44 (1985) 2 NSWLR 188.
46 Ibid, at 149.
47 [1989] 1 Qd R 351.
48 Ibid, at 352.
49 [2004] QSC 480 (unreported, 3 February 2004, BC200409705) at [10].
50 (1890) 45 Ch D 1.
remedy in the form of a constructive trust.\textsuperscript{52} As a result Reid’s employer became the equitable owner of the ultimate proceeds of the bribe. As in the case of theft, the innocent employer obtains a strong property right in the form of equitable ownership. If the errant fiduciary were to become bankrupt, the proceeds of his gains would not form part of his assets. This change in approach to breach of fiduciary duty brings the remedial response in line with the response to conversion outlined in *Black v Freedman* and *Creak*. Commenting on the decision in *Attorney-General for Hong Kong v Reid*\textsuperscript{53} when it was before the New Zealand Court of Appeal, prior to the appeal to the Privy Council, Sir Peter Millett noted that ‘a fiduciary who receives a bribe and invests it at a profit will retain an advantage’.\textsuperscript{54} Arguing that a proprietary response was required to prevent this occurring Millett argued that a ‘fiduciary cannot be allowed to retain any advantage from the violation of his fiduciary duty’.\textsuperscript{55} Stripping a fiduciary of the second level of ownership rights achieved this objective.

### Mistaken payments

The courts have also used the flexibility of a second level of ownership in the case of mistaken payments. In *Chase Manhattan Bank v Israel-British Bank*\textsuperscript{56} the plaintiff made a clerical error and paid US$2,000,000 twice to the defendant just before the defendant became insolvent. Goulding J held that a person ‘who pays money to another under a factual mistake retains an equitable property in it’\textsuperscript{57} and the recipient of a mistaken payment immediately becomes a trustee and holds the money on trust for the payer. However, the validity of that decision has been questioned. In *Re Goldcorp Exchange Ltd*\textsuperscript{58} the Privy Council seem to have considered that the decision should be confined to cases where the payer makes the same payment twice.\textsuperscript{59} In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*\textsuperscript{60} Lord Browne-Wilkinson went further and expressly rejected\textsuperscript{61} the reasoning of Goulding J in *Chase Manhattan*. These decisions suggest that the use of the second level of ownership as a remedial response in mistaken payment cases has not yet been settled.

The proprietary remedies awarded by the courts in the cases discussed above can only be fully understood in the context of a dual level of property rights and a dual level of ownership rights. Different outcomes between cases can be understood when it is recognised that the remedial use of equitable ownership is still developing. It has developed significantly in relation to cases of theft and breaches of fiduciary duty. However, the rules that will apply are

\textsuperscript{52} It is arguable the trust is better described as an automatic resulting trust.

\textsuperscript{53} [1992] 2 NZLR 385.


\textsuperscript{55} Ibid, p 63.

\textsuperscript{56} [1981] Ch 105; [1979] 3 All ER 1025.

\textsuperscript{57} Ibid, at Ch 119.

\textsuperscript{58} [1995] 1 AC 74; [1994] 2 All ER 806.

\textsuperscript{59} Ibid, at AC 103.

\textsuperscript{60} [1996] AC 669; [1996] 2 All ER 961.

\textsuperscript{61} Ibid, at 714.
yet to fully develop in cases of mistaken payments.

**Contractual payments made for a purpose**

When money is paid by a lender to a borrower pursuant to a loan contract legal ownership of the money will pass to the borrower. However, despite legal ownership transferring to a borrower, the use of a trust allows a lender to create equitable ownership rights in the money and simultaneously have the benefit of a loan contract. This situation was accepted as valid in *Barclays Bank Ltd v Quistclose Investments Ltd* where a lender provided a loan to the borrower, Rolls Razor Ltd, for the stated purpose that it would be used to fund the payment of a dividend by Rolls Razor Ltd to its shareholder.

In *Twinsectra Ltd v Yardley* Lord Millett, commenting on the *Quistclose* trust, concluded that the “property remains the property of the lender unless and until it is applied in accordance with his directions, and insofar as it is not so applied it must be returned to him”. On this analysis when the money is advanced an equitable ownership right is created and the lender acquires equitable ownership of the money in its new form.

The lender therefore has two rights: a contractual right to be repaid the amount of the loan and equitable ownership of the funds lent. Again, this duplication of potential remedies is available only because our legal system provides two levels of ownership. The *Quistclose* trust arguably provides the greatest complexity because it involves both levels of ownership and contract within the same transaction. In other circumstances where the two levels of ownership arise, such as in *Creak*, the victim of a theft is simply asked to elect between two proprietary rights. The additional complexity of contractual rights is absent.

**Retention of title**

Retention of title clauses are commonplace in contracts for the sale of goods. A seller includes such a clause to ensure that if the buyer becomes bankrupt or insolvent before the goods are paid for, the goods will still belong to the seller. Accordingly the seller can repossess the goods rather than join the queue of unsecured creditors. More elaborate retention of title clauses go one step further and provide for the creation of a trust in circumstances where the buyer of the goods either sells the goods or uses them in a manufacturing process and then sells the manufactured goods to a third party. The creation of such a trust was considered by the High Court in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd*. A majority of the High Court comprising Gaudron, McHugh, Gummow and Hayne JJ accepted that a contractual agreement to create a trust over future acquired property was valid. In

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63 Ibid, at AC 581.
Associated Alloys the seller failed because of evidentiary difficulties in demonstrating that a trust was created over the proceeds of sale received by the buyer when steel products were sold to a third party. However, the case confirmed the legitimacy of contracts that create trusts over future proceeds. Like the Quistclose trust there is the complexity of the use of two levels of ownership in conjunction with contractual rights.

Trusts as obligations

Parkinson has argued that ‘the law of trusts is better conceptualised as a species of obligation rather than being understood as a form of property ownership’. This position is consistent with Honoré’s argument that any system of law that utilises the concept of the trust does not need a dual system of ownership. The essence of Parkinson’s argument is that the irreducible core of the trust concept is that a trustee owes obligations in relation to the trust property. Accordingly trusts are better defined by reference to this irreducible core rather than to notions of property rights including ownership rights. There is much to be said for that view. If a single person was asked to design a private law legal system comprising property rights, contract, tort and trusts it is unlikely that such a designer would advocate a system involving two levels of property rights and two levels of ownership rights. The unnecessary complexity of such a system would be immediately evident. It is difficult in such a system to immediately locate the ‘true’ owner of any particular piece of property. But our system of private law has the unique characteristic of being developed in two separate court systems before being administered in a single court system. As outlined in part one, our legal system has had the opportunity to adopt a single level of property rights but such a position was not pursued. To the contrary the courts have given full effect to arrangements that utilise equitable ownership, like Quistclose trusts. In addition, as the cases analysed in this article have shown, the courts have expanded the use of trusts to create equitable ownership rights in cases of tort and equitable wrongdoing.

It is submitted that the development of equitable ownership by common law courts since the passing of the Judicature Acts has now made it impossible to reconceptualise trusts as only involving obligations without rejecting over a century of case law. Those who structure their affairs using contracts and trusts to create equitable property rights rely on the case law to give effect to property rights, including equitable ownership rights, that they have set out to create. Accordingly it is submitted that it would not be desirable to effectively reverse a substantial body of case law to achieve a new conceptualisation of trusts as only a species of obligations. Our legal system has developed a dual system of ownership rights which provides flexibility, albeit with some complexity, and that system cannot be easily reversed. The use of equitable ownership has developed substantially since the late nineteenth century and it is quite possible that the use of equitable ownership will continue to develop as a remedy.

67 Parkinson, above n 10, at 659.
68 Honoré, above n 14, p 9.
69 Parkinson, above n 10, at 682.
Conclusion

It was noted in the introduction that Meagher, Heydon and Leeming have observed that there were no provisions in the Judicature Act ‘to preserve equity from the hands of the common lawyers’. Indeed one of the actions of the common lawyers was to make use of the flexibility available in a system with two levels of property rights. Such a system enables two levels of ownership to exist in relation to the same object. This unique concept has enabled the courts to develop remedial responses to theft and fraud that would not be available in a system that had only a single level of ownership.

A system that has two levels of ownership provides significant flexibility. But with that flexibility comes complexity. That complexity is evident in Quistclose trusts where a lender has both contractual rights and proprietary rights. The complexity is also evident in cases like Creak where a victim of a theft must elect to forego one of their property rights. It is critical in understanding this flexibility and complexity to have an appreciation of how equitable ownership expanded as a result of the introduction of the Judicature Acts in the late nineteenth century. The procedural fusion in the late nineteenth century led to a significant expansion of the use of equitable ownership throughout the twentieth century which continues into the twenty-first century.

70 Meagher, Heydon and Leeming, above n 4, p 44.