

EQUITY, OBLIGATIONS AND THIRD PARTIES

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In some circumstances, common law or equitable rules may allow the presence of an initial duty owed by A to B to have an effect on a third party, C. This is the case, for example, where C is under a duty not to procure a breach by A of a contractual duty owed by A to B; it is also the case where A's initial duty gives B an "equitable property right". Such cases may seem to call into question the fundamental distinction between personal rights and property rights. Nonetheless, this article argues that we can account for the common law and equitable methods by which an initial duty is allowed to affect a third party whilst preserving that fundamental distinction. To do so, we need to recognise one other category of rights (here called "persistent rights") and a sub-division of personal rights (here called "protected personal rights").

I. INTRODUCTION

A. *Obligations and Third Parties*

One of the goals of the law of obligations is to define the circumstances in which the presence of A's initial duty to B may have an effect on a third party, C. Of course, C can choose to arrange his affairs so that his legal position depends, at least in part, on an initial duty owed by A to B: C does so, for example, when making a contract with B to guarantee the performance of A's duty to B.¹ However, it is also clear that, regardless of C's consent, an initial duty owed by A to B can have an effect on C.

Example 1a: A makes a contractual promise to B to sing in a series of operas at B's theatre. C, knowing of that promise, induces A to breach that contract by offering A more money to perform at C's theatre instead.

In such a case, as recognised in *Lumley v. Gye*,² C commits a wrong: the existence of A's initial contractual duty to sing at B's theatre imposes a duty on the rest of the world not to procure a breach by A of that duty. Equity has recognised a similar

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¹ Formality rules may regulate the enforcement of such a contract of guarantee: see for example *Statute of Frauds 1677* (U.K.), c.3, s. 4.

² (1853) 2 El & Bl 216 (KB) [*Lumley*].

wrong: where A owes duties to B as a trustee, C is under a duty not dishonestly to assist A in breaching those duties.³

Example 1b: A holds an account with Z Bank. A declares that he holds that right on trust for B. A then withdraws £100 from the account and gives that money to C as a birthday present. The terms of the trust do not give A the power to make such a disposition.

In such a case, by having declared a trust in B's favour, A comes under duties to B. Those duties include the core trust duty: a duty not to use the bank account for his (A's) own benefit.⁴ The existence of that duty has an important effect on C: if C still holds the £100 received from A or its traceable product, B has a power to impose that same core trust duty on C. That is the case even if C, when receiving the money, did not know of, and could not reasonably have been expected to know of, A's initial duty to B. This means by which B can impose a duty on C seems to be peculiarly a creation of equity: in a case such as Example 1b, B is said to have an "equitable property right".

Example 1c: A owns a car. A makes a contractual agreement with B: on payment of £100, B is to acquire A's ownership of the car. B pays the £100 to A. C then carelessly damages the car.

In such a case, C commits a wrong against B. It does not matter that C is not a party to the sale concluded by A and B. However, whilst the sale depends on A's initial contractual duty to B, Example 1c is very different from Examples 1a and 1b. In each of Examples 1a and 1b, the existence of A's initial duty to B is crucial in C's being under a duty to B. In Example 1c, the existence of A's initial duty to B is irrelevant in considering C's position. C commits a wrong simply because, at the time when C carelessly damages the car, B has a property right in the car.

Equally, there are important differences between Examples 1a and 1b: the existence of these differences is captured by the fact that, in Example 1b, but not in Example 1a, B is said to have an "equitable property right". It is through the recognition of such rights that equity has played a peculiarly significant role in allowing A's initial duty to B to have an effect on C.⁵ However, it will be argued here that the term "equitable property right" is deeply misleading: whilst it alerts us to the *existence* of the differences between Examples 1a and 1b, it tells us very little about the nature of, or justifications for, those differences.

³ See *e.g.*, *Royal Brunei Airlines v. Tan* [1995] 2 A.C. 378 (P.C.). It may well also be the case that, if A is under a fiduciary duty to B, the rest of the world is under a duty not dishonestly to assist A in breaching that duty: see *e.g.*, *Statek Corp v. Alford* [2008] EWHC 32; *per* Lord Nicholls in *Royal Brunei Airlines v. Tan*, *ibid.* at 39. See too the analysis of Potter L.J. in *Twinsectra v. Yardley*, [1999] Lloyd's Rep. 438 (CA). See further Tettenborn, "Quistclose Trusts" [2000] L.M.C.L.Q. 459 at 465; Mitchell, "Assistance" in Birks & Pretto, eds., *Breach of Trust* (Oxford: Hart, 2002) at 160-165; Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121 L.Q.R. 452 at 479.

⁴ The concept of the "core trust duty" is explored further in McFarlane, *The Structure of Property Law* (Oxford: Hart, 2008) at 216-217 [*The Structure of Property Law*].

⁵ L. Smith, "Fusion and Tradition" in Degeling & Edelman, eds., *Equity in Commercial Law* (Sydney: Lawbook Co, 2005) at 32-35 [*Fusion and Tradition*] notes that equity is particularly committed to enforcing the norm of "respect for other people's obligations"; and that the recognition of equitable property rights demonstrates that commitment.

B. A Possible Problem

The usual focus of the law of obligations is on the questions of: (i) whether A is under a duty to B; and, if so (ii) what effect that duty has on A and B. The different question of the effect on C of A's initial duty to B raises a seemingly awkward problem. The law of obligations is often viewed as the law of personal rights: the basic position is that if A comes under a duty to B, B has a right against A and against A alone. In contrast, rights of B that may have an effect on third parties are seen as property rights and thus the preserve of the law of property.

The undoubted fact that A's initial duty to B may have an effect on C can be used as an argument against the traditionally fundamental distinction between the law of obligations and the law of property (or, more precisely, between personal rights and property rights).⁶ So, in Example 1a, B's contract with A does not give B, on the traditional view, a property right; yet the existence of that contract is crucial in allowing B to assert a right against C. Conversely, even in Example 1c, it can be argued that B's ability to assert a right against C cannot prove that B has a property right: after all, B has the same ability in Examples 1a and 1b. In Example 1b, B's ability to impose a duty on C is said to come from the fact that A's initial duty to B gives B an "equitable property right". However, that explanation raises a number of difficult questions. For example, is it logical for any legal system to have two different sets of property rights, one arising at common law, the other in equity?⁷ Further, there is a long-running debate as to whether "equitable property rights" are in fact better seen as personal rights.⁸ The difficulty of classifying those rights may tell us as much about the classification system as the rights themselves: it can be used as evidence that the system itself is flawed.⁹

A key question addressed in this article is whether an undoubted fact (that A's initial duty to B may have an effect on C) can be reconciled with a traditional distinction (that between personal rights and property rights). It will be argued that the distinction can and should be maintained. However, to understand Example 1b properly, we also need to recognise that the categories of personal rights and property rights may not exhaust the field of private law rights.

II. DEFINING PROPERTY RIGHTS

Before examining in more detail how A's initial duty to B can have an effect on C, we first need to set out the distinction between the law of obligations and the law of property. Clearly, there is no general divide between obligations and property. If by "property" we mean things or rights that are of value, a contractual promise by A to

⁶ See *e.g.*, Worthington, "The Disappearing Divide between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation" in Degeling & Edelman, eds., *Equity in Commercial Law* (Sydney: Lawbook Co, 2005) [*The Disappearing Divide*].

⁷ For a similar point in relation to obligations, see Burrows, "We Do This at Common Law and That in Equity" (2002) 22 *Oxford J. Legal Stud.* 1.

⁸ For early discussion see *e.g.*, Maitland, *Lectures on Equity* (Cambridge: Cambridge University Press, 1909) Lectures 9 & 10 [*Lectures on Equity*]; Scott, "The Nature of the Rights of a Cestui que Trust" (1917) 17 *Colum. L. Rev.* 269 [*Cestui que Trust*].

⁹ A point hinted at by Hackney, "More than a Trace of the Old Philosophy" in Birks, ed., *The Classification of Obligations* (Oxford: OUP, 1997) at 140 [*Classification of Obligations*].

perform a service for B counts as property precisely because it imposes a duty on A to B. If by “property” we mean things or rights that can be transferred, a contractual promise by A to pay B money will give rise to a duty that, again, in general, counts as property.¹⁰ If we adopt a narrower definition of “property” as rights relating to, or affecting the use of, things (*i.e.*, objects that can be physically located) then duties are clearly important to understanding those rights. For example, if A has ownership of a car, he has the ability to make a valuable contractual promise to B to hire out that car to B. And in Example 1c, the existence of C’s duty not carelessly to damage B’s car is an important part of the protection given to B’s property right. This link between obligations and ownership of a thing is particularly strong in common law systems: the principal means by which B can vindicate a property right is by showing that the defendant, by breaching a duty not to interfere with B’s protected use of a thing, has committed a wrong.

So, if the divide between obligations and property is to have any useful meaning, it must be more specific. This can be done by focussing on the distinction between personal rights and property rights. Yet that step is useless if property rights are to include any right that is of value; or any right that can be transferred. Instead, property rights can be limited to rights that impose a *prima facie* duty on the rest of the world. By focussing on what Birks called “exigibility”,¹¹ we can capture an important difference between, for example, A’s sale of a car to B (as in Example 1c) and A’s contractual promise to sell a car to B. In the first case (A’s sale of the car) B acquires A’s ownership of the car and the rest of the world thus comes under a *prima facie* duty to B. C can breach that duty even if he is entirely unaware of the sale to B. In the second case (A’s contractual promise to sell the car) the rest of the world is under no such duty to B. So, even if C *is* aware of A’s duty to B, C commits no wrong against B when he carelessly damages the car.¹²

Exigibility may be a necessary condition for a property right, but it cannot be sufficient. For example, B’s right to physical integrity imposes a *prima facie* duty on the rest of the world; but it is not regarded as a property right. There are important similarities between the protection given to property rights and rights such as the right to physical integrity. Any deliberate interference with such a right is *prima facie* wrongful, regardless of the state of mind of the defendant. As Professor Robert Stevens puts it:

If without permission I deliberately kiss another, destroy someone else’s car, publish a statement about another which is defamatory, block the public highway, or walk on someone else’s land I am *prima facie* a tortfeasor. I am liable even if I was wholly without fault.¹³

Similarly, any accidental interference with a property right or the right to physical integrity is *prima facie* wrongful if careless. More fundamentally, in common law systems, such rights are generally enforced indirectly: for example, B can no more

¹⁰ Of course, it is possible for A and B to agree that B’s contractual right cannot be transferred: *i.e.*, to agree that A’s duty will end if B attempts to transfer his right: see *e.g.*, *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.* [1994] 1 A.C. 85 (H.L.).

¹¹ See Birks, *Introduction to the Law of Restitution* (Oxford: Clarendon, 1985) at 42.

¹² As noted by Lord Brandon in *Leigh and Sullivan Ltd. v. Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] A.C. 785 (H.L.).

¹³ Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 101.

go to court and merely say “That cow is mine!” than he can merely say “I have a right to physical integrity!”. In either case, the primary evidence of the existence of the right comes from the duties it imposes on the rest of the world. In that way, property rights share a feature with “superstructural”¹⁴ rights such as the right to physical integrity.¹⁵

It is possible to see property rights as a particular category of such “superstructural” or background rights.¹⁶ A property right, as well imposing a *prima facie* duty on the rest of the world, must relate to a thing: an object that can be physically located. This definition allows B’s ownership of a car to be distinguished from B’s right to physical integrity.¹⁷ It cannot account for all the varied ways in which the terms “property” or “property right” are used. For example, an intellectual property right imposes a *prima facie* duty on the rest of the world.¹⁸ Further, in contrast to the right to physical integrity, such a right must be acquired by its holder and can then be transferred to a new holder. It is therefore no surprise that a copyright, trademark or patent may generally be referred to as a property right.¹⁹ However, on the definition adopted here, such rights must be excluded from the category of property rights:²⁰

¹⁴ See Birks, ed., *The Classification of Obligations*, *supra* note 9 at 11-12. Birks calls a duty not to hit another a primary obligation:

We accept the existence of primary obligations not to hit and not to defame, and there are many others of the same kind. Plaintiffs never claim those rights as such. They figure only as the superstructure of actions in respect of wrongs.

Pretto-Sakmann, *Boundaries of Personal Property: Shares and Sub-Shares* (Oxford: Hart, 2005) [*Boundaries of Personal Property*] adopts that analysis, using the term “superstructural rights”. See too Rickett, “Old and New in the Law of Tracing” in Degeling & Edelman, eds., *Equity and Commercial Law* (Sydney: Lawbook Co, 2005).

¹⁵ On Hohfeld’s analysis, a property right and the “right to physical integrity” are each “multital” rights: see *e.g.*, Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919) at 65ff.

¹⁶ See further McFarlane, *The Structure of Property Law*, *supra* note 4 at 133-136.

¹⁷ It could be said that B’s right to physical integrity (unlike *e.g.*, B’s right to his reputation) relates to a physical thing: B’s own body. However, to count as a property right, B’s right must relate to a thing independent of B himself: see Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997) at 111-112.

¹⁸ Although as pointed out by Penner, *The Idea of Property in Law*, *ibid.* at 120 and Spence, *Intellectual Property* (Oxford: Clarendon Press, 2007) at 13-14, the duties imposed on the rest of the world by B’s intellectual property right are more limited than those imposed by, say, B’s ownership of a bike (see *e.g.*, *Copyright, Designs and Patents Act 1988* (U.K.), c. 48, s. 16(1) setting out a specific, *limited* list of the duties imposed on others by B’s copyright). For example, C is permitted to read a book of which B has a copyright; he is not permitted to ride B’s bike.

¹⁹ Spence, *Intellectual Property*, *ibid.* at 15-16 argues that intellectual property rights are property rights: property rights in the very right held by B: “the object of the relevant property right is the legal right itself.” So, if B has a copyright, B has: (i) a right; and (ii) a right in that right. That analysis is very hard to follow. Certainly, B’s copyright of a book does not impose a *prima facie* duty on the rest of the world in relation to B’s copyright; rather, it imposes such a duty in relation to the particular ways in which B is allowed to make exclusive use of that protected form of expression (*e.g.*, the rest of the world is under a *prima facie* duty to B not to make a film out of B’s book).

²⁰ The definition of property rights given here is based on that developed by Pretto-Sakmann, *Boundaries of Personal Property*, *supra* note 14. However, Pretto-Sakmann at 104-105 categorises intellectual property rights as property rights on the basis that the idea or form of expression to which an intellectual property right relates can count as a thing. Instead, it is more consistent simply to define a “thing” as a physical object that can be located in a particular place. For example, under the German system an intellectual property right does not count as Ownership (*Eigentum*) as it does not relate to a physical

as they do not relate to an object that can be physically located, they form a different category of background rights.²¹

A property right is therefore defined here as a right that: (i) imposes a *prima facie* duty on the rest of the world; and (ii) relates to a thing (an object that can be physically located). There is a clear link between property rights and the law of obligations: property rights can be discerned by the duties they create. However, a property right remains fundamentally different from a personal right: rather than merely imposing a duty on a specific person, it imposes a *prima facie* duty on the rest of the world.

III. INITIAL PERSONAL RIGHTS AND NEW, DIRECT RIGHTS

This article examines two particular challenges to the distinction, set out above, between personal rights and property rights. Each challenge involves a situation where an initial duty of A to B has an effect, *volens nolens*, on C. The first comes from the fact that, even if B has only a personal right against A, it may be possible for B to assert a right against C.

A. *New, Direct Rights*

Example 2: A has a freehold of land. A makes a contractual promise to allow B to share occupation of the land with B for the next six months. Two months later, A sells his freehold to C. C makes a promise to A to allow B to remain in occupation of the land for the next four months. As a result of that promise, C pays a lower price for A's freehold.

In such a case, C comes under a duty to B.²² It does not matter that A's initial promise to B gives B only a personal right against A. The point is that, as a result of C's conduct in making the promise to A, B acquires a new, direct right against C. The analytical irrelevance of B's initial right can be seen if we change the example. Let us say that, at A's insistence, C makes a contractual promise, when buying the land, to allow B2 to occupy that land for the next six months. At the time of C's promise, B2 has no right against A. However, that does not prevent B2 acquiring a new, direct right against C, arising as a result of C's promise to A.²³

Some means by which B can acquire a new, direct right against C were initially recognised by courts of equity. For example, in England, the principle applied in Example 2 was developed in equity long before the passing of the Contract (Rights

object: see Mincke, "Property: Assets or Power?" in Harris, ed., *Property Problems: From Genes to Pension Funds* (London: Kluwer Law International, 1993) at 79.

²¹ This distinction is not merely pedantic, as it has important practical consequences: see McFarlane, *The Structure of Property Law*, *supra* note 4 at 136.

²² See e.g., *Binions v. Evans* [1972] Ch. 359 (C.A.) [*Binions*] (as interpreted in *Ashburn Anstalt v. Arnold* [1989] Ch 1 (CA)) [*Ashburn Anstalt*]. For further discussion see Bright, "The Third Party's Conscience in Land Law" [2000] Conv. 398 [*The Third Party's Conscience*] and McFarlane, "Constructive Trusts Arising on a Receipt of Property *Sub Conditione*" (2004) 118 L.Q.R. 667. If C's promise to A is contractually binding, it can now give B a statutory right against C under the *Contract (Rights of Third Parties) Act 1999* (U.K.), c. 31.

²³ C comes under a duty to B if, in his agreement with A, C takes on a new duty, not previously existing: see *per* Sir Christopher Slade L.J. in *Lloyd v. Dugdale* [2002] 2 P. & C.R. 13 (C.A.) at para. 52. See too Bright, *The Third Party's Conscience*, *ibid.* at 406-7 and 413-4.

of Third Parties) Act 1999.²⁴ Although the need for the principle has been reduced by that Act, it seems the principle still has a role to play: for example, it can assist B even where C has made a non-contractual promise to A.²⁵ This raises the question of whether there is anything peculiarly equitable about the principle or, more widely, about the very concept of a new, direct right.

First, it is clear that the recognition of new, direct rights has never been the sole preserve of equity. For example, if C were to make a direct contractual promise to B in a case such as Example 2, B would acquire such a right at common law. Second, the jurisdictional origin of the principle seems now to make little, if any, practical difference. For example, whilst the principle applying in Example 2 is said to depend on unconscionable conduct by C,²⁶ B cannot argue that C is under a duty to B simply because C, in a general sense, has behaved badly; rather, B must show that the specific requirements of the principle have been met. As Professor Lionel Smith has noted, the concept of unconscionability is used as a conclusion rather than as a test.²⁷ However, the notion of restraining the exercise of a right, often associated with equity,²⁸ may be useful. The principle applying in Example 2 may be referred to as the “receipt after a promise” principle. It certainly seems to be limited to cases where: (i) C acquires a right²⁹; and (ii) as a result of a promise, C acquires an advantage in relation to that right; and (iii) the content of C’s promise relates to the use of that right.³⁰ In such a case, equitable rules then ensure that C does not act inconsistently with his promise.

B. *New, Direct Rights and Protected Personal Rights*

Example 3: A buys a car from X and makes a contractual promise, both to X and B, not to sell that car within the next year. C is aware of that promise but, six months later, buys the car from A.

In such a case, B has no pre-existing property right and C has made no promise to confer a benefit on B. Nonetheless, it may be that C has breached a duty to B. In *British Motor Trade Association v. Salvadori*,³¹ the essential facts of which were identical to Example 3, Roxburgh J held that C committed a wrong against B: the wrong of procuring a breach by A of A’s contractual duty to B. That finding depends on the not entirely straightforward idea that C can commit that wrong, even in a case where A has already resolved to breach his contractual duty, if C actively facilitates

²⁴ See e.g., *Bannister v. Bannister* [1948] 2 All E.R. 133 (C.A.). *Rochefoucauld v. Boustead* [1897] 1 Ch. 196 (C.A.) can also be analysed (contrary to the reasoning of the Court of Appeal in that case) as an application of the principle.

²⁵ It may therefore be particularly important where C’s promise to A is oral and a formality rule (see e.g., *Law of Property (Miscellaneous Provisions) Act 1989* (U.K.), c. 34, s.2) prevents that promise imposing a contractual duty on C.

²⁶ See e.g., per Fox L.J. in *Ashburn Anstalt*, *supra* note 22 at 26.

²⁷ L. Smith, *Fusion and Tradition*, *supra* note 5 at 24.

²⁸ See e.g., per Lord Denning M.R. in *Crabb v. Arun District Council* [1976] 1 Ch. 179 (C.A.) at 187-8; and in *Binions*, *supra* note 22 at 367-9.

²⁹ See e.g., per Lord Scott in *Yeoman’s Row Management Ltd v. Cobbe* [2008] UKHL 55 at paras. 30-37.

³⁰ This explains why, for example, the defendant’s promise in *Pallant v. Morgan* [1953] Ch 43 bound the defendant only in relation to the land that the claimant had planned to bid for.

³¹ [1949] Ch. 556. See too *Esso Petroleum Co. Ltd. v. Kingswood Motors Ltd.* [1974] Q.B. 142.

that breach. For our purposes, however, it demonstrates that B's initial right may be crucial in allowing B to acquire a new, direct right against C. Example 3 differs from Example 2 as C's duty is not imposed simply as a result of C's conduct; instead, C's duty also depends on the fact that B had an initial right against A. B's personal right against A, arising as a result of A's contractual promise, can therefore be seen as a *protected* personal right: the existence of A's initial duty imposes a *prima facie* duty on the rest of the world. In Example 3, the presence of A's contractual duty to B means that C, along with the rest of the world, is under a *prima facie* duty not to procure a breach by A of that contractual duty.

The existence of a personal, contractual right, like the existence of a property right, can thus affect C: it imposes a *prima facie* duty on the rest of the world not to procure a breach of that contract. As noted in section IA above, A's initial duty to B can have the same effect where it is a duty owed as trustee: the rest of the world is then under a *prima facie* duty not to dishonestly assist A in breaching that duty to B. The first question is whether these protected personal rights can be distinguished from property rights. Despite some suggestions to the contrary,³² such a distinction is easy to make. There are two clear analytical differences between the two types of right. First, a protected personal right need not relate to a thing. So, in *Lumley*,³³ A's contractual duty to sing at B's theatre, although unrelated to a thing, imposed a *prima facie* duty on the rest of the world not to procure a breach by A of that contract. Second, if B has a protected personal right, the *prima facie* duty imposed on the rest of the world differs from the initial duty of A to B.³⁴ So, in *Lumley*, C, unlike A, did not have a duty to sing at B's theatre. In contrast, if B has a property right then: (i) B's right relates to a thing; and (ii) the rest of the world is under the same *prima facie* duty to B.

This second analytical difference has an important practical effect. It seems that, if B has a protected personal right, C's duty to B is not a strict one: C can only breach his duty if, at the very least, C is or ought to be aware of A's initial duty to B.³⁵ For example, to commit the wrong of procuring a breach of contract, C must be aware of A's contractual duty to B; to commit the wrong of dishonestly assisting in a breach of trust, C must at least be aware, or culpably have shut his eyes to, the fact that A's action constitutes such a breach.³⁶ It may be that there are good reasons for this: for example, given the difficulty of discovering A's initial contractual or trust duty to B, as well as the infinite number of actions that may constitute a breach of such a duty, it would be unduly harsh to impose liability on C whenever he acts in a way that has the effect of procuring or assisting in a breach of A's duty. Certainly, it means that B's protected personal right against A, whilst it can affect C, nonetheless has a very different effect from background rights (such as a property right, the right to physical integrity, or an intellectual property right) that impose the same strict duty on the rest of the world.

The second question raised by the existence of protected personal rights is whether *all* personal rights receive such protection. That question cannot be fully examined

³² See e.g., Worthington, *The Disappearing Divide*, *supra* note 6.

³³ *Supra* note 2.

³⁴ As noted by e.g., Stevens, *supra* note 13 at 281.

³⁵ *Ibid.*

³⁶ See e.g., *Barlow Clowes International v. Eurotrust* [2006] 1 W.L.R. 1476 (P.C.).

here; but two points will be made. First, if A's initial duty is one that arises automatically, without any particular conduct by A, it would be odd to think of that duty as giving rise to a protected personal right. For example, if C is liable to B for assisting A to deliberately injure B, it would be strange to say that C's wrong is dependent on B having a protected personal right against A; rather, C can be said to have directly interfered with B's background right to physical integrity.³⁷ In contrast, if A's initial duty arises because of particular conduct by A (e.g., A's entry into a contract with B), it is possible to see C's duty (e.g., a duty not to procure a breach by A of that contract) as a consequence of B's initial personal right.

Second, whatever the scope of protected personal rights, it is clear that: (i) common law and equity have picked out some initial duties as worthy of that ancillary protection; and (ii) in doing so, neither common law nor equity has challenged the fundamental distinction between personal rights and property rights. There has however been some uncertainty as to whether equity should go further than the common law in providing protection to an initial personal right of B. The well-known dictum of Knight Bruce L.J. in *de Mattos v. Gibson*³⁸ suggested that if: (i) C acquires a right from A with knowledge of B's pre-existing personal right against A; then (ii) C can be prevented from acting inconsistently with B's right. That suggestion was no mere straw in the wind: for example, the very same principle was applied in *Tulk v. Moxhay*³⁹ and was adopted by Lord Shaw in *Lord Strathcona Steamship Co Ltd v. Dominion Coal Co Ltd*.⁴⁰

The principle suggested in *de Mattos*,⁴¹ like that examined in Example 2, can be seen as an application of the general equitable notion of restraining C's use of a right. It does not challenge the *conceptual* coherence of the distinction between personal rights and property rights as B's initial personal right does not impose a strict *prima facie* duty on the rest of the world. However, the problem with the *de Mattos* principle is that it undermines the *practical* usefulness of the distinction between personal rights and property rights. If B's initial right relates to a thing then the legal system has a choice to make: will B's right count as a property right? It seems that, in the abstract, there is no right answer to that question: a decision simply needs to be made as to whether the advantages of allowing B's right to impose a strict *prima facie* duty on the rest of the world outweigh the disadvantages.⁴² The default position is that B's right should not count as a property right: why should a right

³⁷ This point is re-inforced by an analysis that, in such a case, the actions of A are attributed to C: see e.g., Stevens, *supra* note 13, ch. 11.

³⁸ (1858) 4 De. G. & J. 276 (Q.B.) at 282 [*de Mattos*].

³⁹ (1848) 2 Ph. 774 (Ch. D.). The decision in *Tulk v. Moxhay* is now seen as resting on B's assertion of a pre-existing right (arising under a restrictive covenant) against C. However, the reasoning of Lord Cottenham L.C. did not rest on that basis: indeed, his Lordship stated at 777-8 that: "the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." See further McFarlane, "Identifying Property Rights: A Reply to Mr Watt" [2003] Conv. 473 [*Identifying Property Rights*].

⁴⁰ [1926] A.C. 108 (P.C.) at 125.

⁴¹ *Supra* note 38.

⁴² That is why the list of property rights cannot be rationally determined: see e.g., Gray & Gray, "The Rhetoric of Realty" in Getzler, ed., *Rationalizing Property, Equity & Trusts: Essays in Honour of Edward Burn* (London: LexisNexis 2003); McFarlane, *The Structure of Property Law*, *supra* note 4 at 139.

acquired through B's dealings with A impose a strict *prima facie* duty on a stranger to that transaction, such as C? Further, the recognition of a property right can limit the marketability of things: not only in cases where B does in fact have a property right but also in cases where C, before dealing with A, has to carry out checks to see if anyone other than A has such a right.

The desire to protect third parties and to promote the marketability of things has an importance beyond the question of whether B's initial right counts as a property right. If it is decided that B's initial right, although relating to a thing, is a personal right, it would be odd if the ancillary protection afforded to that right were so strong as to undermine the protection of third parties and the marketability of the thing concerned. This point, which of course applies whether the ancillary protection is provided by common law or equity, seems to lie behind the attempts of later courts to reject,⁴³ or explain away,⁴⁴ the *de Mattos* principle. The property law system, when deciding if B's initial right is a personal right or property right, has to balance a basic tension between the needs of B and those of third parties such as C.⁴⁵ The prevailing view seems to be that the balance would tilt too far in B's favour if C were under a duty to B whenever C acquires a right relating to a thing with the knowledge that B has a pre-existing *personal* right in relation to that thing.

C. Conclusion

It is true to say that B's contractual right against A that A will sing at B's theatre shares some features with a property right. Like B's ownership of a car, that right imposes a *prima facie* duty on the rest of the world. However, this does not undermine the distinction between personal rights and property rights. Instead, it shows that certain types of personal right ("protected personal rights"), as well as imposing an initial duty on A, also impose an ancillary duty on the rest of the world. However, unlike property rights: (i) a protected personal right need not relate to a thing; and (ii) the ancillary duty imposed on the rest of the world by a protected personal right differs from A's duty to B; and (iii) a protected personal right does not impose a strict duty on the rest of the world.

IV. EQUITABLE PROPERTY RIGHTS

A. Equitable Property Rights as Property Rights?

Example 4: A holds an account with Z Bank. A declares that he holds that right on trust for B. A then withdraws £100 from the account and gives that money to C as

⁴³ See e.g., per Lord Brougham L.C. in *Keppell v. Bailey* (1834) 2 My. & K. 517 (Ch. D.) at 546-548; *Port Line Ltd. v. Ben Line Steamers Ltd.* [1958] Q.B. 146.

⁴⁴ Browne-Wilkinson J in *Swiss Bank v. Lloyds Bank* [1979] Ch. 548 at 573 described the "*de Mattos* principle" as the "equitable counterpart" of the wrong of procuring a breach of contract. In doing so, his Lordship used the limits of the wrong to *restrict* the application of the "*de Mattos* principle"; he did not use the width of the "*de Mattos* principle" to extend the application of the wrong: see McFarlane, Identifying Property Rights, *supra* note 39.

⁴⁵ See McFarlane, *The Structure of Property Law*, *supra* note 4 at 137-9.

a birthday present. The terms of the trust do not give A the power to make such a disposition.

This Example is identical to Example 1b. In such a case, as we saw in section IA above, it is clear that the initial duty owed by A to B can have an effect on C. It is generally thought that there are two possible explanations for this. The first, more popular explanation is that B has an “equitable property right”.⁴⁶ This account can explain the fact that, in Example 4, C can come under a duty to B even if, when acquiring the money from A, he has no idea, and no reason to believe, that A has acted beyond his powers as a trustee. However, there are a number of problems with this view. First, on the definition of a property right given in section II above, B cannot have such a right in a case such as Example 4: B’s right does not relate to a thing. It is true that a trust, like any equitable property right, needs to have identifiable subject matter;⁴⁷ but, as in Example 4, that subject matter need not be a physical object. Rather, the key feature of an equitable property right is that: (i) A is under a duty to B; and (ii) A’s duty relates to a specific *right* held by A. As noted above, on one definition of property, a right that is of value and/or can be transferred (such as a bank account) counts as property; on that view, it can be said that, in Example 4, A’s personal right against Z Bank is the “trust property”. However, that approach blurs the important distinction between rights and things. For example, if A has ownership of a car and declares that he holds that car on trust for B, it is important to recognise that A does not hold the car on trust for B; rather, he holds *his right to the car* on trust for B.⁴⁸

Example 4a: A owns a car. A declares that he holds the car on trust for B. X then carelessly damages the car.

Example 4b: A owns a car. A declares that he holds the car on trust for B. X then steals the car.

In each case, it is vital to note that A does not hold the car itself on trust for B; rather, he holds his *right to the car* on trust. By declaring a trust, A does not give away his property right in the car: A retains that right and so, in each of Examples 4a and 4b, X commits a wrong against A. As a result of that wrong, A acquires a right to sue X: that right is a product of the right that A holds on trust for B and so A is under a duty to B to use that right to sue X (and the products of that right) for B’s benefit. This means that B can: (i) compel A to sue X; and (ii) compel A to hold any money received from X on the terms of the initial trust. However, B has no direct right to sue X. It is true that, if A refuses to sue X, B can use an expedited procedure to combine his action compelling A to sue X with A’s claim against X;⁴⁹ but this cannot disguise the fact that two separate claims are involved.⁵⁰ The point is that B’s acquisition of an equitable property right does not mean that the rest of the world has a *prima facie* duty to B not to interfere with the car. This means that, on

⁴⁶ See e.g., Scott, *Cestui Que Trust*, *supra* note 8; R. Nolan, “Equitable Property” (2006) 122 L.Q.R. 232.

⁴⁷ See e.g., *Re London Wine Co.* [1986] P.C.C. 121 (U.K.) [*London Wine*]; *Re Goldcorp’s Exchange* [1995] 1 A.C. 74 (P.C.) [*Goldcorp’s Exchange*].

⁴⁸ See e.g., Swadling, “The Law of Property” in Burrows, ed., *English Private Law*, 2d ed. (Oxford: OUP, 2007) at 4.140ff [*The Law of Property*].

⁴⁹ This is commonly referred to as the *Vandepitte* procedure and is named for the case: *Vandepitte v. Preferred Accident Insurance Corp’n of New York* [1933] A.C. 70 (P.C.).

⁵⁰ See e.g., *per* Waller L.J. in *Barbados Trust Co. Ltd. v. Bank of Zambia* [2007] EWCA Civ 148 at paras. 30 and 35.

the definition of a property right adopted in section II above, a beneficiary of a trust does not in fact have a property right.

B. Equitable Property Rights as Personal Rights?

A second explanation of a case such as Example 4 is that: (i) the creation of the trust gives B only a personal right against A; but (ii) when C acquires the money from A, B acquires a new, direct right against C. This view has often been developed from the initial insight that, in a case such as Example 4, B does not have a property right.⁵¹ However, this article does *not* accept the view that equitable property rights are best seen as personal rights. In particular, we have seen that, in a case such as Example 4, C can come under a duty to B even if he initially has no idea, and no reason to believe, that A has acted beyond his powers as trustee. If B's initial right under the trust is simply a personal right against A, then C's liability can be explained only by finding that B has a new, direct right against C. Yet, in such a case, it is difficult to formulate a basis on which C's conduct can be said to justify the acquisition by B of such a new, direct right against C.⁵² One possibility is to say that C comes under a duty to B because of C's *eventual* knowledge of the fact that A, when giving C his right, acted beyond his powers as trustee. As we will see, it is true that C's liability to B depends on his knowledge of that fact. However, this demonstrates that B's initial right must be more than a personal right against A. For, as we saw in section IIIB above, C's knowledge of B's pre-existing *personal* right against A, by itself, never suffices to impose a duty on C to B.

Example 5: A holds an account with Z Bank. A declares that he holds that right on trust for B. A then withdraws £100 from the account and gives that money to C as a birthday present. The terms of the trust do not give A the power to make such a disposition. C, when he receives the money, has no idea, and no reason to believe, that A held the money on trust. C spends the money on his monthly groceries. B then informs C that the money came from an account held on trust for B and that A acted beyond his powers as trustee when giving the money to C.

In such a case, as in Example 4, C gives nothing in return for his £100; he therefore cannot use the "*bona fide* purchaser" defence to escape a duty to B. However, C does not need such a defence: he is under no *prima facie* duty to B. First, there is no point at which C held the £100 (or its product) on trust for B. For such a trust to arise, C must be under the core trust duty to B: a duty not to use the £100 for C's own benefit. And that duty can only arise if C knew, or at least suspected, that A was not free to use the £100 for his own benefit. This analysis follows that of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington LBC*:⁵³ no trust arises until C

⁵¹ See e.g., Maitland, *Lectures on Equity*, *supra* note 8, c. 9 at 117-21; Stone, "The Nature of the Right of the Cestui Que Trust" (1917) 17 Colum. L. Rev. 467 at 474ff.

⁵² L. Smith, "Unravelling Proprietary Restitution" [2004] Can. Bus. L.J. 317 suggests that, originally at least, B's new right against C was based on C's unjust enrichment at B's expense. However, Smith does not suggest that analysis can be used today: in Example 4, any enrichment acquired by C comes from A, not B (see e.g., L. Smith, "Unjust Enrichment, Property and the Structure of Trusts" (2000) 116 L.Q.R. 412 [*Unjust Enrichment*] and the discussion below of *Farah Constructions Pty. Ltd. v. Say-Dee Pty. Ltd.* [2007] HCA 22).

⁵³ [1996] A.C. 669 (H.L.) at 705:

has sufficient awareness of the facts that are capable of imposing the core trust duty on C.

This analysis of Example 5 is also consistent with the law of “knowing receipt”. The nature of liability for knowing receipt is disputed, but its traditional formulation can be defended: if C is liable to B in knowing receipt, he is under a duty “to account as a constructive trustee”.⁵⁴ The duty to account is a key part of the core trust duty: if the defendant has held a right on trust for B, the defendant must either produce that right or show that he has dealt with it in an authorised way. In Example 5, C can only come under that duty to account if there is a point at which he both: (i) held the £100 or its traceable product; and (ii) had sufficient awareness of the fact that A was a trustee with no power to give C the £100. This explains why “knowing receipt” – or, as it could more accurately be called, knowing holding⁵⁵ – does not impose a strict duty on the rest of the world not to acquire a right, or the product of a right, initially held on trust for B.

It could be argued that, in Example 5, even though C cannot be liable in knowing receipt, C should be under a duty to B as a result of his unjust enrichment at B’s expense.⁵⁶ However, as demonstrated by the decision of the High Court of Australia in *Farah Constructions Pty. Ltd. v. Say-Dee Pty. Ltd.*,⁵⁷ that argument has not been accepted by the courts.⁵⁸ Whilst it is impossible to explore that question fully here, the current position certainly seems defensible.⁵⁹ It is true that C, in Example 5, has retained the benefit of the £100. However, it is not unreasonable to conclude that any enrichment of C comes from A, not from B: after all, it is A rather than B who had a property right in the money received by C.⁶⁰

This analysis demonstrates a further difference between an equitable property right and a true property right. Example 5 shows that, even if: (i) A holds a right on trust for B; and (ii) C acquires a right that depends on that right held by A; then (iii) C is not under a *prima facie* duty to B. Rather, C only comes under such a duty if he holds his right with sufficient awareness of the fact that A was under an initial duty to B. On this analysis, the statement that B’s equitable property right is *prima facie* binding on anyone who acquires a right that depends on A’s right is best understood as a statement that, in such a case, B has a *power* to impose a duty on C: that power may be exercised by giving C sufficient awareness of the fact that A was under the

Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, *i.e.*, until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.

⁵⁴ See *e.g.*, *per* Lord Selborne L.C. in *Barnes v. Addy* (1874) L.R. 9 Ch. App. 244 (C.A.) at 251-2.

⁵⁵ C’s awareness of the fact that A has acted beyond his powers as trustee need not be present as soon as C receives his right: the “knowing” need not accompany the receipt; but it must accompany the holding.

⁵⁶ See *e.g.*, Birks, “Receipt” in Birks & Pretto, eds., *Breach of Trust* (Oxford: Hart, 2002); Nicholls, “Knowing Receipt: The Need for a New Landmark” in Cornish *et al.*, eds., *Restitution, Past, Present & Future* (Oxford: Hart, 1998). For a contrary view, see L. Smith, Unjust Enrichment, *supra* note 52.

⁵⁷ [2007] HCA 22 at paras. 114-122.

⁵⁸ It has been suggested that the decision of the Court of Appeal in *Re Diplock* [1948] Ch. 465 (affirmed as *Ministry of Health v. Simpson* [1951] A.C. 251 (H.L.)) provides support for C’s liability in unjust enrichment. However, as shown by L. Smith, Unjust Enrichment, *supra* note 52, it is not clear that the decision in *Re Diplock* can bear that weight.

⁵⁹ For further discussion see McFarlane, *The Structure of Property Law*, *supra* note 4 at 337-339.

⁶⁰ See *e.g.*, L. Smith, Unjust Enrichment *supra* note 52.

initial duty to B.⁶¹ So, if it is said that, in the period before C acquires such awareness, B retains his equitable property right,⁶² the most this can mean is that B has a power to impose a duty on C in relation to the right C acquired from A.

However, this analysis does not go so far as to mean that, in Example 5, B's initial right under the trust is no more than a personal right against A. As we saw in section IIIB, it is not generally the case that C comes under a duty to B simply because C has acquired a right from A with knowledge of a pre-existing personal right of B. The courts' rejection of Knight Bruce L.J.'s dictum in *de Mattos*⁶³ has thus played a vital role in maintaining the distinction between personal rights and "equitable property rights".⁶⁴

C. Equitable Property Rights as Persistent Rights

We seem to be heading to an uncomfortable conclusion: it seems that, on the definitions adopted here, an equitable property right is neither a property right nor a personal right. It is not a property right as: (i) it need not relate to a thing; and (ii) it does not impose a *prima facie* duty on the rest of the world. And it is not a standard personal right as it gives B a *prima facie* power to impose a duty on C if C acquires a right that depends on A's right. One way out would be to regard an equitable property right as a special form of personal right: not just a protected personal right, but a super-protected personal right. However, we can be clearer than that. The key characteristic of an equitable property right is that A's initial duty to B relates to a specific right held by A. This means that, if a property right is a right against a thing, and a personal right a right against a person, then an equitable property right can usefully be thought of as a *right against a right*.⁶⁵

This formulation explains why, in Examples 4a and 4b, X does not come under a duty to B. X has interfered with the car, but B does not have a right against the car. B does have a right against a right (A's ownership of the car), but X has not acquired a right that depends on A's right. In Example 5, by contrast: (i) B has a right against A's right; and (ii) C has acquired a right that depends on that same right of A. So, in Example 5, B has a power to impose a duty on C. It can also assist in explaining why A's initial duty to B does not usually give rise to an equitable property right. For example, if A simply makes a contractual promise to sell generic goods (*e.g.*, gold bullion or wine) to B, A comes under a duty to B; but that duty does not relate to a specific right held by A. As a result, B cannot show he has a right against a specific right of A; B thus does not have an equitable property right.⁶⁶

It is therefore proposed that the term "equitable property right" should be rejected: it suggests a misleading equation between such rights and true property rights.

⁶¹ Of course, in a case where C independently has such awareness, C comes under a duty to B without B having to exercise any power.

⁶² Indeed, Lord Browne-Wilkinson's statement in *Westdeutsche Landesbank Girozentrale v. Islington LBC*, [1996] A.C. 669 (H.L.) at 707 is consistent with that suggestion.

⁶³ *Supra* note 38.

⁶⁴ See L. Smith, "Transfers" in Birks & Pretto, eds., *Breach of Trust* (Oxford: Hart, 2002) at 127-130; McFarlane, *Identifying Property Rights*, *supra* note 39.

⁶⁵ See McFarlane, *The Structure of Property Law*, *supra* note 4 at 23-32.

⁶⁶ See *e.g.*, *Re London Wine Co.*, *supra* note 47; *Goldcorp's Exchange*, *supra* note 47.

Equally, it is not particularly helpful to see an equitable property right as a super-protected personal right. Instead, the term “persistent right” can be suggested as a replacement: it captures the fact that, where A is under a duty to B in relation to a specific right held by A, B’s ability to make a claim can persist, and be used against C, even if A transfers his right to C, or gives C a right that depends on A’s right.

D. Consequences of the New Analysis

On the analysis adopted here, it is no surprise that there is a long-standing debate as to the nature of equitable property rights. One lesson of that debate is that we need to reject the assumption that all private law rights are either personal or proprietary. The recognition of persistent rights as a discrete category means that we do not need to distort equitable property rights by forcing them into one of two ill-fitting boxes.

It is important to emphasise that the analysis proposed here does not require any change to the fundamental features of “equitable property rights”.⁶⁷ Rather, the purpose of the analysis proposed here is to provide a more satisfactory explanation of those fundamental features. For example, it is not suggested that rights arising under a constructive, resulting (or any other form of) trust should no longer offer B protection in the event of A’s insolvency. Rather, the analysis proposed here can explain that treatment: the trust arises because A is under a duty to B not to use a particular right for A’s own benefit; it is therefore no surprise that the right cannot be used for the benefit of A’s other creditors. Nor does the analysis suggest, for example, that a mortgagor should be unable to assert an equity of redemption against a third party who has received the mortgaged right from the mortgagee. Rather, the equity of redemption arises because the mortgagee (A) is under a duty to the mortgagor (B) in relation to the mortgaged right (a duty to return the right to B if the duty secured by the mortgage is performed). As A is thus under a duty to B in relation to a specific right, B has a persistent right: a right against the right mortgaged to A. This explains why, if A transfers that right to C, C is liable to come under a duty to B.⁶⁸

The analysis proposed here may also assist non-common law jurisdictions that wish to import the trust.⁶⁹ In such systems, a strict *numerus clausus* principle often prevents the right under a trust from being added to the list of recognised property rights. The beneficiary of a trust is therefore often viewed as having a (super-protected) personal right. Difficulties may then arise in determining the extent of the protection given to such a personal right.

If such a jurisdiction wishes to offer a form of right that resembles the right under a trust as closely as possible (and, of course, that may not always be the case), a

⁶⁷ The analysis is, however, inconsistent with the assumption made by the Court of Appeal in *Re Nisbet & Potts’ Contract* [1906] 1 Ch. 386 (C.A.) that B’s restrictive covenant was capable of binding C, a squatter on A’s land. That view seems to have been based on a mistaken analogy between a legal easement (a property right in land) and a restrictive covenant (better seen as a right against A’s right). The reasoning in that case is persuasively criticised by Maitland, *Lectures on Equity*, *supra* note 8 at 169-70. It is also worth noting that the UK Law Commission has recently proposed the prospective abolition of the restrictive covenant as a form of equitable property right in relation to registered land: Law Commission Consultation Paper No. 186 (2008) at 8.98ff.

⁶⁸ See further McFarlane, *The Structure of Property Law*, *supra* note 4 at 214 and 517-8.

⁶⁹ For an example see *e.g.*, Law No. 2007-211 of 19 February 2007, introducing the concept of a “fiducie” into French law.

fruitful first step could be to recognise the concept of a persistent right. And that step may not, in fact, be such a large one to take: for example, Gretton has argued that the forms of security right recognised in non-common law jurisdictions can be seen, in effect, as rights against rights.⁷⁰ Certainly, the analysis adopted here also shows that the distinctive aspects of equitable property rights can be adopted in a system that has not profited from the productive paradox of two separate sets of courts. The key feature of an equitable property right is not its jurisdictional origin in courts of equity; it is rather its conceptual nature as a right against a specific right.

Indeed, the scheme offered here avoids the orthodox, but uncomfortable, position that common law and equity recognise two different lists of property rights. Equitable property rights need not be seen as a weaker version of their common law counterparts. That view underestimates the genius of equity: it did not attempt to set up a rival law of property, but rather invented the concept of a right against a right. Such a concept can have a great elegance and efficiency: in recognising a trust of land, for example, equity does not need to say that, whilst A has a freehold, B has a competing property right in the same land.⁷¹ Rather, it can recognise that A has a freehold, but impose a duty on A to use that right for B's benefit. As A's duty then relates to a specific right held by A, B acquires not just a right against A but also a right against A's right.

This analysis is consistent with the general recognition that the creation of a trust does not consist of a separation of a latent legal and equitable title. As Lord Browne-Wilkinson noted in *Westdeutsche Landesbank Girozentrale v. Islington LBC*,⁷² if A simply owns a car, A does not have separate legal and equitable rights to that car. Instead, A has a right: ownership of the car. If A then declares that he holds that car on trust for B, A keeps that same right; but comes under a duty to B in relation to that right. It is in that sense that a trust, like any equitable property right, is "engrafted" onto A's initial right.⁷³

It seems that there are no examples of common law persistent rights.⁷⁴ This raises the question of why only equity has recognised the important concept of a right against a right. Whatever the historical reasons may be, it is possible to draw an analytical link between the concept of a right against a right and the equitable, "receipt after a promise" principle discussed in IIIA above. The former depends on the idea of a duty-burdened right: due to the nature of A's initial duty to B, C's acquisition of a right gives B a power to impose a duty on C. The latter depends on a similar, but different, idea: due to C's promise, C's acquisition of a right imposes a duty on C. This is not to say that, whenever the principle operates, B acquires a persistent right. For example, in Example 2, C's duty to B (to allow B to share

⁷⁰ Gretton, "Ownership and its Objects" (2007) 71 *Labels Zeitschrift* 802.

⁷¹ It is thus possible to avoid the absurdity, highlighted by Maitland, that is inherent in saying that A is the owner at common law, but B is the owner in equity: see Maitland, *Lectures on Equity supra* note 8 at 17-18.

⁷² [1996] A.C. 669 (H.L.) at 706-7.

⁷³ See *e.g.*, *per* McLelland J. in *Re Transphere Pty. Ltd.* (1986) 5 N.S.W.L.R. 309 (N.S.W. Sup. Ct.) at 311.

⁷⁴ The closest apparent example is the power to rescind recognised at common law in a case such as *Car Universal Finance Ltd. v. Caldwell* [1965] 1 Q.B. 525 (C.A.); indeed, B's right in such a case may best be seen as a right arising under a trust: see McFarlane, *The Structure of Property Law, supra* note 4 at 300-303.

occupation of C's land) does not relate to a specific right held by C.⁷⁵ As a result, B has only a personal right against C.⁷⁶ However, at a general level, the principle, like the concept of a persistent right, depends on the distinctively equitable idea that, given the circumstances in which C acquires a right, C can come under a duty to B in relation to his exercise of that right.

V. CONCLUSIONS

In dealing with the possible effect on C of A's initial duty to B, we have covered two related stories. The first concerns the different forms of initial right that B may have. On the analysis set out here, there are five forms of such right:

1. A personal right: for example, as a result of a judgment, A is under a duty to pay B a sum of money. A is under a duty to B and A's duty does not impose any ancillary duty on the rest of the world.
2. A protected personal right: for example, A makes a contractual promise to B; the rest of the world is under a duty to B not to procure a breach by A of that contractual duty. A's duty to B has arisen because of A's particular conduct; and the existence of A's duty imposes a different, ancillary duty on the rest of the world.
3. A persistent right: for example A has a bank account and, in return for a loan from B, gives B a charge over that account. A is under a duty to B; and A's duty relates to the whole of a specific right held by A. The rest of the world is not under a *prima facie* duty to B. However, if C acquires a right that depends on A's right then, if C gains sufficient awareness of A's initial duty to B, C will *prima facie* come under a duty to B in relation to the right acquired by C. This means that, if C has no defence to B's pre-existing persistent right,⁷⁷ B has a power to impose a duty on C by giving C sufficient awareness of A's initial duty to B.
4. A protected persistent right: for example, A has a bank account and declares that he holds that right on trust for B; the rest of the world is under a duty not to dishonestly assist A in breaching his duties, as trustee, to B. The analysis is as in 3 above, with the difference that the existence of A's duty to B also imposes a different, ancillary duty on the rest of the world.
5. A property right: for example, A sells his car to B. A, along with the rest of the world, is under the same, strict *prima facie* duties to B not to interfere with the car. B has a right in relation to a physical object that imposes identical, strict *prima facie* duties on the rest of the world.

The chief conclusion to be drawn from this first story is that the distinction between the law of obligations and the law of property (or, more accurately, between personal

⁷⁵ It cannot be said that C's duty relates to C's freehold as his duty does not relate to the *whole* of that right: see further McFarlane, *The Structure of Property Law*, *ibid.*, at 207, 371, 508-509.

⁷⁶ This point may be obscured by the court's careless use of the "constructive trust" label in such a case: see e.g., Bright, *The Third Party's Conscience*, *supra* note 22; Gardner, *Introduction to the Law of Trusts*, 2d ed. (Oxford: OUP, 2003) at 161-2; Swadling, *The Law of Property*, *supra* note 48 at 4.125, McFarlane, *The Structure of Property Law*, *ibid.*, at 765.

⁷⁷ The "bona fide purchaser" defence is one example of a defence that may be available to C against B's pre-existing persistent right.

rights and property rights) is analytically coherent. However: (i) we need to recognise that personal rights can be divided into protected and non-protected personal rights; and (ii) equity's recognition of persistent rights means it is a mistake to think that all rights must be either personal rights or property rights.

The second story concerns the contribution of equity, which has taken three significant forms:

1. The recognition of particular means by which B can acquire a new, direct right against C. For example, if: (i) C acquires a right from A; and (ii) as a result of a promise, C has acquired an advantage in relation to the acquisition of that right; then (iii) to the extent that the promise relates to the right in question, C is under a duty to B to keep his promise. This "receipt after a promise" principle can assist B even if A is under no initial duty to B.
2. The recognition of the concept of a persistent right.
3. The recognition that there can be protected persistent rights. For example, if A is under a duty, as trustee, to B, then the rest of the world is under an ancillary duty not dishonestly to assist A in breaching his duties, as trustee, to B.

The chief conclusion to be drawn from this second story relates to the first two of these three points. Equity has built on a general principle that the circumstances in which C acquires a right may lead to C being under a duty in relation to his enjoyment of that right. First, the "receipt after a promise" principle recognises that, due to his promise relating to the use of a particular right, C may be under a duty to B to keep that promise. Second, the concept of a persistent right recognises that, due to the nature of A's initial duty to B, C's acquisition of a right may give B a power to impose a duty on C. Of course, that general principle is not the only basis on which equity may impose a duty on C. However, the general principle does seem to be particularly prominent in equity. Certainly, it has allowed equity to make a distinctive contribution to the question of when A's initial duty to B can also have an effect on C.