論　説

MEANING OF THEORIES ON THE LAW OF TRUSTS

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CHAPTER 1 Purpose and Topics

<1> This article is to consider the status of the law of trusts in the systems of law and equity, through the consideration of the role of the theories of trusts in construing the law of trusts, to be specific, analyzing the backgrounds of conflicts of theories regarding the law of trusts in the U.K., the U.S. and Japan.

However, it might be orthodox to study the contents of the law of trusts through analyzing the major cases and statutes and comparing them with the relationships similar to trusts in proceeding this kind of research, this article is to apply another method due to the following reasons.

<2> For considering the status of some laws or institutes in the system of law and equity by the orthodox method successfully, it is needed that the theoretical basis regarding the laws or institutes under the consideration should be established without divergence. In other words, for considering the features of the laws or institutes after making clear the contents of them, the contents of the laws or institutes should be evaluated from the firmed theoretical aspect, and be considered the relationship to the theoretical feature of them. Also, for considering the status of the laws or institutes by comparing

them with the relationships similar to them successfully, the aspect for evaluating how similar these laws to the laws or institutes should be established.

Of course, such the theoretical basis does not have to be exact the same one in the research fields. It might be sufficient that main definitions and basic theoretical structures of the laws or institutes are established without divergence, because it will be agreeable that the consequence of the evaluation regarding the features and similarities of the laws or institutes should be considered similar if the main definitions and basic theoretical structures are the same.

Since almost all laws or institutes in Japan have been imported from other countries, such as the U.K., the U.S., Germany and France, there may be no divergence of the main definitions and basic structures between the theory of Japan and the one from which the theory is imported. Therefore, in general, it is not needed to check the effect of laws or institutes when considering the status of the laws or institutes in the system of law and equity, since the theoretical aspect could be assumed as presupposition of a research.

<3> However, regarding the law of trusts, there is no established theoretical aspect, even for the main definitions or basic theoretical structures. There has been and are several theories regarding it and there are many conflicting points among them. As these theoretical conflicts have different backgrounds in the U.K., the U.S. and Japan, they should not be compared as they are. Rather, one should compare them by analyzing the basis of each theory as well.

This article intends to make clear, (1) what are the theoretical basis of the law of trusts? (2) how they are different each other in the U.K., the U.S. and Japan? (3) what are the backgrounds and the meaning of such difference in the system of law and equity in each country, of course in each era also?

<4> As explained above, this article tries to clarify the backgrounds of theoretical conflicts of the law of trusts in the U.K., the U.S., and Japan, for considering the status of the law of trusts in the systems of law and equity in each country. From Chapter 2 to Chapter 4, the backgrounds of theoretical conflict in the U.K., in the U.S., and in Japan are analyzed and in Chapter 5, the backgrounds and meanings of the theoretical conflicts among these three countries are compared and studied.

<5> Since it should be easy to start mainly analyzing theories in the U.K. and the U.S. because of the similarity of their historical backgrounds, this article start from it. The outlines of theories of trusts in the U.K. and the U.S. are as follows.

<6> In the U.K., the turning point is the Court System Reform in the 19th century and theories of trusts are different before and after the Reform. Before the Court System Reform, there are two theories of trusts. One most orthodox theory was “the Double Ownership theory”, which explains the trustee has legal or Common Law ownership to the trust property and the beneficiary has equitable ownership to the same property. The other was so called “the Beneficiary Ownership theory”. This explains that the trustee, who has a kind of power to administer the trust property subject to the purpose of trusts, has only a legal title and “trust ownership”, and the real and substantial owner of the trust property is the beneficiary.

After the Court System Reform in 19th century, “the Maitland theory” by F. W. Maitland emerged and gave great impact on the theories especially in and outside of the U.K., that is, in the U.S. and in Japan. The Maitland theory explains that the trustee is the sole owner of the trust property and owes the obligations to administer the trust property for the benefit of the beneficiary and the beneficiary is not

the owner of trust property but has only a claim to the trustee. However, the theories in the U.K. after Maitland, even recently, do not explain the theoretical relationships between the trustee and the beneficiary.

<7> In the U.S., until the end of the 19th century, there had not been any discussion regarding the theoretical features of the trusts and only accepted the theories was the one imported from the U.K.

After the end of the 19th century, the theories in the U.S. has diverted from the ones of the U.K. Between the end of the 19th century and the beginning of the 20th century, the theories of J. B. Ames or C. C. Langdell were leading. They stated that the owner of trust property was the trustee and the right of beneficiary was the claim to the trustee, although these theories have different features from the theory of Maitland, who also stated that the right of beneficiary is a claim to the trustee. After the 1910s, the theory of A. W. Scott became influential. He stated that the beneficiary had the rights to the trust property, but not to the claim to the trustee. The predominance of the theory of Scott has been confirmed after the 1930s, as the Restatement of Trusts accepted the theory of Scott, who was a reporter of the Restatement. But the feature of the theory of Scott was greatly different from those in the U.K., which stated the owner of trust property was the beneficiary.

<8> These theories of trusts, both in the U.K. and the U.S., conflicted most clearly in the situation when the breach of trust occurred, in which the interest of the beneficiary and of the third party who received the trust property from the trustee were directly conflicted. In the U.K. and the U.S., the doctrine applied to such situation is "Purchase for Value without Notice", or "the Bona Fide Purchaser". That is, when the trustee transferred the trust property to the third party in breach of trusts, if the third party is "the Bona Fide Purchaser", who receives the trust property for value and without notice of the breach of trusts, the third party has no liability to the beneficiary. Otherwise, when the third party receives the trust property for no value or with notice of the breach of trusts, the beneficiary can trace the trust property to the third party, by invalidating the transfer of the trust property, or by settling the constructive trust. The beneficiary can enforce the trust to the third party for the administration for the beneficiary by restoring the trust property or by paying the value including the interests from the trust property. This Bona Fide doctrine was developed in the U.K. in the 15th or the 16th century and, although a part of which has been modified by the legislature, is the predominant doctrine of the law of trusts both in the U.K. and the U.S. even now.

The doctrine was applied for making decisions regarding the conflicts between the beneficiary and the third party based on whether the third party receives the trust property for value without notice or not, and the theoretical nature of the right of beneficiary, or the conflict of the theories of trusts do not give effect on such decisions of the doctrine directly in practice. Therefore, conventional theories in Japan accepted only the results of the doctrine in detail, since the conflict of the theories of trusts are unproductive "conceptual discussions".

<9> However, such conventional theory in Japan should not be supported, because the nature of the right of beneficiary is not directly connected to the result of the Bona Fide doctrine. Under the doctrine, the beneficiary can enforce the third party the trust relationships in several ways, such as enforcing constructive trusts, compelling to restore the property or to pay the value of the property. Theoretically, the feature of the trust relationships, i.e., why such several remedies are accepted to the beneficiary in the breach of trusts under the dominant doctrine, should be considered. As stated in the preceding section, the relationships between the theoretical features of trusts and the judgements under the Bona

Fide doctrine, including the backgrounds and theoretical meanings of the conflicts of theories on trusts, should be considered.

Moreover, although conventional theories in Japan tended to discuss the trusts in the U.K. and the U.S. in the same category, such discussion should not be supported. The Bona Fide doctrine in the U.K. and in the U.S. are consisted with the same standards in appearance, in such a point as whether the third party is the bona fide purchaser or not, but the theoretical meanings and the backgrounds of such standards are not the same between the U.K. and the U.S., and this difference should be the cause of a practical effect.

<10> For the reasons as discussed above, this article try to consider the backgrounds and theoretical meanings of the conflicts of theories on trusts in the U.K., the U.S. and Japan. The following is the structure of this article.

First, this article analyzes the conflicts of theories on trusts in the U.K. and the U.S. having the theoretical backgrounds that relates to the whole legal and equitable system, including the relationships of the Common Law and Equity, the notion "trust property" or "property", the relationships between the intent of the parties of trusts and the judgements by the courts.

Secondly, this article analyzes the conflicts of theories on trusts in Japan. This has rather practical meaning, since the superior theoretical model for the interpretation of codified Trust Law in Japan, which should be coordinated with the general Japanese civil legal system, were imported and inserted as the new system to the Japanese laws. This new system was constructed with the elements coming from the theories on trusts in the U.K. and the U.S.

CHAPTER 2 Conflict of Theories in the U.K.

<1> In the U.K., the original doctrine of Bona Fide Purchaser on "Use", which is the predecessor of modern trusts, was established by the Court of Equity or the Chancery in the 15th or 16th century. The standards of the doctrine have never been changed up to the present time.

After that, during the latter half of the 19th century to the beginning of the 20th century, the Courts System Reform, which united the Common Law Court and the Court of Equity, was implemented and this gave the great impact on the theoretical features on trusts in the U.K.

Therefore, considering the relationships between the Bona Fide doctrine and the theories of trusts, the following two topics are examined before analyzing the features and the meanings of the theory of Maitland, which is one of the main themes of this article.

<2> First, since the Bona Fide doctrine was already established long before the discussions of theories on trusts in the U.K., the features of the original doctrine of Bona Fide Purchaser did not do anything with the conflicts of theories on trusts and it might be different from the features of the present time. Therefore, the features of the Bona Fide doctrine before the Court System Reform should be examined first.

Second, since the theories on trusts in the U.K. were contemporaneous with the Court System Reform, the traditional features of the Bona Fide doctrine and the role of theories on trusts might be changed and received theoretical impact by the Court System Reform. Therefore, the theoretical impact backgrounded by the Court System Reform to the traditional features of the Bona Fide doctrine, and the change of the relationships between the Bona Fide doctrine and the theories on trusts should be examined also.

Section 1 Traditional Features of the Bona Fide Doctrine

<1> The original doctrine of Bona Fide Purchaser was established by the Court of Equity or the Chancery in 15th and 16th century.

In the case in 1453[1], it was stated that a transferee, who was transferred property by the last will of transferor, transferred the property to others. In this case, it was sentenced that a subpoena should not be issued to the second transferee, because the second is a stranger to the confidence between the original transferor and the transferee and when the property in confidence is transferred to others, the original transferor gets the subpoena to the second; and, if the second is transferred the property in bona fide, there are no remedies to the original transferor. In the cases in 1465[2] and in 1471[3], it was stated that a transferee transferred the property to others, if the notice regarding the intent of use was given to the second, should follow the purpose of the original use and should be enforced by the subpoena.

Regarding the executor of the transferee with confidence or the heir, and the transferee without consideration, the case in 1468[4] stated negatively on a matter whether the subpoena should be enforced or not. The case in 1474[5] stated that the heir of the transferee of the property in use should be enforced by the subpoena, and the case in 1522[6] stated that not only the heir of the transferee of the property in use but also the third party in general who was transferred the property without consideration should be effected by the original use.

As noted above, the standards regarding the relationship between the beneficiary of the use of the property and the third party stated by the Court of Equity are that, when the transferee of the use (the trustee) transfers the property in use (the trust property) to the third party in breach of the purpose of the use (in breach of trust), the confidential or fiduciary relationships between the transferee of the use (the trustee) and the beneficiary of the use (the beneficiary) should have effect on the third party who received the notice of such relationships or who was transferred without consideration. Thus it is clear that such standards focused on whether the value and notice of the third party to the original use was enforced. Therefore, such standards stated by the Court of Equity in the 15th and the 16th centuries are the same, in the basic structure and the fundamental results, as the Bona Fide doctrine in modern times. In both the U.K. and the U.S., the origin of the Bona Fide doctrine, which standards stated by the Court of Equity[7] as above, has never been questioned.

<2> The Bona Fide doctrine noted above is considered as one of the most fundamental and consistent principles by the Court of Equity and it is the established case law of the modern U.K. and it is applied as the standards between the beneficiary and the third party in breach of trust by the trustee.

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1 Note (1453), FITZHERBERT'S ABRIDGEMENT, fol.129 pl.19, translated in AMES, CASES ON TRUSTS, p.282; SCOTT, CASES ON TRUSTS, p.614.

2 Anonymous (1465), Y.B. 5 Edw. Fourth, fol.7 pl.16, FITZHERBERT'S ABRIDGEMENT, fol.128 pl.2, translated in AMES, CASES ON TRUSTS, p.351; SCOTT, CASES ON TRUSTS, p.614.

3 Anonymous (1471), Y.B. 11 Edw. Fourth, fol.8 pl.13, translated in MAITLAND, COLLECTED PAPERS, vol.3 p.345.

4 Anonymous (1468), Y.B. 8 Edw. 4., fol.6 pl.1, FITZHERBERT'S ABRIDGEMENT, fol.129 pl.8, translated in AMES, CASES ON TRUSTS, p.345; SCOTT, CASES ON TRUSTS, p.615.

5 Anonymous (1474), FITZHERBERT'S ABRIDGEMENT, fol.129 pl.14, translated in SCOTT, CASES ON TRUSTS, p.615.

6 Anonymous (1522), Y.B. 14 Hen. Eighth, fol.4 pl.5, translated in AMES, CASES ON TRUSTS, p.283; SCOTT, CASES ON TRUSTS, p.615.

7 MAITLAND, EQUITY, pp.117-119; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.1 p.432; SCOTT ON TRUSTS, s.284 pp.36-37.

In accordance with this doctrine, when the trustee transferred the trust property to the third party in breach of trust, the beneficiary has remedies of equity against the third party, who received notice of the trusts or was transferred the property for no value. But, the beneficiary has no remedies and cannot enforce the trust to the third party who purchased the trust property for value and without notice of the trust, and was transferred the legal title of the property[8].

However, the third party who purchased the property for value without notice on purchase should be enforced the trust if the third party got the notice of the trust before the legal title of the property was transferred3[9]. And, if the trust property transferred were equitable property or rights, the purchaser cannot be transferred the legal title of such property or rights because they were not legal but equitable. The reason is that, under the doctrine "Qui prior est tempore potior est jure", that is, the parties have the equal equitable rights between each of them, the party who has the prior right prevails and the beneficiary who has the prior equitable property or rights to the trust property prevails to the third party, even though the third party purchased the property for value and without notice of the trust[10]. When the property transferred was a chose in action under the Common Law and the chose in action should not be transferred by traditional Common Law, the third party cannot escape from the equitable liability of the chose in action transferred, even though the third party was transferred the chose in action for value without notice of the trust[11].

As noted above, the Bona Fide doctrine in the modern U.K. was the same as the standards stated by the Court of Equity in the 15th and 16th centuries and the basic structure of the standards between the beneficiary and the third party should be decided by the value of the purchase and the notice of the trust to the third party.

<3> The traditional Bona Fide doctrine stated by the Court of Equity before the Court System Reform has also theoretical features as follows. Therefore, even though such the traditional Bona Fide doctrine and the Bona Fide doctrine in the modern U.K. have the same basic structure, they should not be considered as the same theoretical features through the stream of the history in the Law of Trusts in the U.K.

First, it should not be considered that the Court of Equity preceded the systematic "Law of Trusts" in modern times, even though each case stated by the Court of Equity in 15th and 16th centuries came

8 Harding v. Hardrett, Rep.Temp.Finch, 9, 23 Eng.Rep. 5, 6 (1673); Basset v. Nosworthy, Rep.Temp.Finch, 102, 103, 23 Eng.Rep. 55, 56 (1673); Stanhope v. Verney, 2 Eden. 81, 85, 28 Eng.Rep. 826, 828 (1761); Jerrard v. Saunders, 2 Ves.Jun. 454, 457, 30 Eng.Rep. 721, 723 (1794); Wallwyn v. Lee, 9 Ves.Jun. 25, 34, 32 Eng.Rep. 509, 513 (1803); Payne v. Compton, 2 Y.&C.Ex. 457, 461, 160 Eng.Rep. 476, 477 (1837); Attorney-General v. Wilkins, 17 Beav. 285, 292, 51 Eng.Rep. 1043, 1046 (1853).

9 Tourville v. Naish, 3 P.Wms. 307, 24 Eng.Rep. 1077 (1734); Wigg v. Wigg, 1 Atk. 382, 384, 26 Eng.Rep. 244, 245 (1739); Mackreth v. Symmons, 15 Ves.Jun. 329, 335, 33 Eng.Rep. 778, 781 (1808); Whitworth v. Gaugain, 3 Hare 416, 428, 67 Eng.Rep. 444, 448 (1844).

10 Brace v. Marlborough, 2 P.Wms. 491, 496, 24 Eng.Rep. 829, 831 (1728); Rice v. Rice, 2 Drewry 73, 77, 61 Eng. Rep. 646, 647 (1853); Rooper v. Harrison, 2 K.&J. 86, 108, 69 Eng.Rep. 704, 713 (1855); Phillips v. Phillips, 4 De G.F.&J. 208, 215, 45 Eng.Rep. 1164, 1166 (1861); Stackhouse v. Jersey, 1 J.&H. 721, 730, 70 Eng.Rep. 933, 937 (1861); Cory v. Eyre, 1 De G.J.&S. 149, 167, 46 Eng.Rep. 58, 65 (1863); Thorpe v. Holdsworth, 7 Eq.Cas. 139, 147 (1868).

11 Tourville v. Naish, 3 P.Wms. 307, 308, 24 Eng.Rep. 1077 (1734); Ord v. White, 3 Beav. 357, 366, 49 Eng.Rep. 140, 143 (1840); Mangles v. Dixon, 1 Mac.&G. 437, 443, 41 Eng.Rep. 1334, 1336 (1849), 3 H.L.C. 702, 731, 10 Eng.Rep. 278, 290 (1852); Cockell v. Taylor, 15 Beav. 103, 118, 51 Eng.Rep. 475, 481 (1852); Clack v. Holland, 19 Beav. 262, 274, 52 Eng.Rep. 350, 355 (1854); Athenaeum Life Assurance Society v. Pooley, 3 De.G.&J. 294, 302, 44 Eng.Rep. 1281, 1284 (1858).

to be called “the Law of Trusts” recently.

It was after the mid-16th century or the 17th century that the cases of the Court of Equity were edited systematically[12] and the case books, in which the cases noted above as the original or traditional Bona Fide doctrine and considered as the precursor works, were edited[13]. However, even though a lot of cases stated by the Court of Equity could and should be edited and systematically called as “the Law of Trusts” from the modern point of view, it does not mean that the Court of Equity gave verdicts in each case in considering the systematic “Law of Trusts”. It is difficult that the Court of Equity in the 15th and 16th centuries stated each case intentionally predicting the systematic “Law of Trusts” or “the Bona Fide doctrine” which would be followed by many cases after several hundred years.

Furthermore, in the Court System Reform in the 19th century, defects of the Court of Equity, such as the lack of systematic thinking, the delay for giving decisions, and the expensive of the procedure, were pointed out[14]. The existence of such criticism shows that the case law was edited systematically in the 19th century and that the cases stated by the Court of Equity from the 15th and 16th centuries to the 19th century could not be edited systematically. Those individual cases from the 15th and 16th centuries to the 19th century should be considered as independent of each other looking for the solution for each dispute.

The cases consisting the traditional Bona Fide doctrine should be considered as the number of cases for the solutions of the specific disputes and it is difficult to consider that the Court of Equity formed clearly the systematic “Law of Trusts” in determining each case, at least in the 15th and 16th centuries.

<4> Second, from the discussions of the theories on trusts, there are almost no relationships between the Bona Fide doctrine stated by the Court of Equity and the theories on trusts before the Court System Reform.

Both before and after the Court System Reform, all theories regarding the Equity or the Court of Equity explained the trusts as the most preeminent principle of equity and mentioned the Bona Fide doctrine as the basic principle for solving disputes on trust relationships. However, as shown in the following discussion, it should be considered that the theories and discussions for the basic structures of trusts and the Bona Fide doctrine before the Court System Reform had different theoretical features from the theories and discussions after the Court System Reform.

The typical discussion of the theories regarding the Bona Fide doctrine before the Court System Reform is as follows. The Bona Fide doctrine is the most basic equitable doctrine which was stated and maintained by the Court of Equity. The Court consists the two equitable doctrines. First, where the equities are equal, the law prevails. Second, between the parties who have equal equitable rights, the party who has the prior right prevails (Qui prior est tempore potior est jure). Therefore, when the trustee transferred the trust property to the third party in breach of trusts, the bona fide purchaser is free from trust under the first doctrine. On the other hand, if the third party had notice of trust or paid no value for

12 HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.1 p.468; MAITLAND, EQUITY, p.8. In “English Reports” which consists after several cases in the U.K. after 1220, the oldest case in equity was 1557. See INDEX CHART ISSUED FOR THE ENGLISH REPORTS, pp.5−11.

13 HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.2 pp.544−545; BOERSMA, INTRODUCTION TO FITZHERBERT’S ABRIDGEMENT, pp.15−17, p.31 et seq.

14 KERLY, HISTORICAL SKETCH OF CHANCERY, p.266 et seq.; BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, pp.109−111; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.1 pp.467−469. As to the Court System Reform and the criticisms for the courts “defects”, see Section 2 <2> et seq. of this chapter.

the property, the beneficiary can enforce the trust to such third party. In case when the third party who purchased the trust property was not transferred the legal title of the property, the beneficiary who has prior equitable right prevails to the third party under the second doctrine[15].

As noted above, in the discussions of theories before the Court System Reform, the general standards and typical results for the disputes between the beneficiary and the third party under the Bone Fide doctrine, with two equitable doctrines to which the Court of Equity, have reliance. In other words, in these discussions, the Bona Fide doctrine is explained only as the doctrine stated and applied by the Court of Equity. And, in these discussions, nothing is stated regarding the theoretical relationships between the standard of the Bona Fide doctrine and the basic structure of the trusts.

Furthermore, by examining the discussions of the theories before the Court System Reform in relation to the definition of trusts, they should be considered different in their theoretical features from the theories after the Court System Reform. In the theories before the Court System Reform, trusts are the relationships between the Court of Equity decreed from the aspect of the conscience and equilibrium to the trustee who has the legal title of the property to administer such property for the benefit of the beneficiary. This is the relationships in which the trustee has equitable duties and liabilities to the beneficiary regarding the property in trust[16]. Under such definition, the important feature of trusts is whether the Court of Equity enforces the duties and liabilities to the trustee for the beneficiary regarding the property in trust or not. In this regard, it is theoretically unimportant and irrelevant whether the creation of such relationships is based on the intent of the parties or only on the decrees or decisions by the Court. Indeed, although the theories before the Court System Reform provisionally distinguished "the express trusts" created by the expression of intent of the parties, "the implied trusts" created by the implied intent of the parties, and "the constructive trusts" admitted by the Court irrelevant of the intent of the parties[17], it did not discuss the theoretical relationships among such distinction of the types of trusts and the effect of the Bona Fide doctrine by which the third party is enforced by the trust.

As discussed above, the theories before the Court System Reform presuppose the Bona Fide doctrine as "the Case Law" stated by the Court of Equity. Therefore, the main purpose of such theories is making a clear explanation regarding the details of the Bona Fide doctrine as "the Case Law" and it does not give theoretical effects on such case law from the theoretical aspects regarding the trusts.

<5> Third, the decisions of the Court of Equity regarding the Bona Fide doctrine were greatly influenced by the historical and political character of the Court of Equity. It should be recognized that the basis of the legitimacy of standard of the Bona Fide doctrine is the historical and political authority of the Court of Equity itself.

The Court of Equity was consisted with the Chancellor, who was originally authorized by the King to give equitable remedies by the conscience and equilibrium regarding the petitions to the King, then

15 FRANSIS, MAXIMS OF EQUITY, p.61 et seq.; SPENCE, EQUITABLE JURISDICTION OF CHANCERY, vol.2 p.733; GILBERT ON USES AND TRUSTS, p.14 n.6; FONBLANQUE, TREATISE OF EQUITY, vol.1 p.320, vol.2 p.147 et seq.; ROBERTS'S PRINCIPLES OF EQUITY, pp.164-167; SANDERS'S ESSAY ON USES AND TRUSTS, vol.1 p.319 et seq.

16 SPENCE, EQUITABLE JURISDICTION OF CHANCERY, vol.2 p.875; GILBERT ON USES AND TRUSTS, pp.1-4; FONBLANQUE, TREATISE OF EQUITY, vol.2 pp.7-9; ROBERTS'S PRINCIPLES OF EQUITY, pp.132-133; SANDERS'S ESSAY ON USES AND TRUSTS, vol.1 p.267.

17 SPENCE, EQUITABLE JURISDICTION OF CHANCERY, vol.2 p.193 et seq.; GILBERT ON USES AND TRUSTS, p.11 et seq.; FONBLANQUE, TREATISE OF EQUITY, vol.2 p.116 et seq.; ROBERTS'S PRINCIPLES OF EQUITY, p.136; SANDERS'S ESSAY ON USES AND TRUSTS, vol.1 p.319.

gradually acquiring the functions as a Court[18]. The remedies provided by the Court of Equity regarding the trust relationships enforced by the decree to "the trustee" who has legal title of the property to administer the property for the benefit of "the beneficiary"[19]. Such structure of the remedies for the beneficiary by the Court of Equity should be applied not only to the trustee but also to the third party, who was transferred the legal title of the property from the trustee. Indeed, the cases regarding the Bona Fide doctrine by the Court of Equity was consisted with the same structure, that is, whether the third party, who has legal title of the trust property, should be enforced by the decree of the Court of Equity or not, to administer the property for the benefit of the beneficiary. Therefore, under the structure which protects the beneficiary by the provision of the remedies through the issue of the decree of the Court of Equity, the remedies to the trustee and to the third party should be theoretically equal.

As discussed above, the standard of the Bona Fide doctrine applied to the relationship between the beneficiary and the third party, indeed, are results of judgements of the Court of Equity, not only in practice but also in theory. Besides, as discussed above also, the judgements by the Court of Equity are based not on the theoretical and systematical structure, but the independent result for each specific dispute. Furthermore, the discussions regarding the theories before the Court System Reform did not intend to examine the relationships between the basic structure of trusts and the Bona Fide doctrine from the theoretical aspect, but intended to explain the results and general tendency of the Court of Equity. Through these considerations, it can safely be said that the legitimacy regarding the standard of the Bona Fide doctrine are not based on some theoretical aspects, but on the historical and political authority of the Court of Equity itself.

<6> Fourth, the Bona Fide doctrine before the Court System Reform presupposed the systems of the Courts and the relationship of Common Law and Equity.

The remedies by the equitable decree issued by the Court of Equity were independent from the jurisdiction of the Common Law Court not only in procedure but also their historical origin. Thus, the conflict of the decisions between these two kinds of courts regarding the same case or dispute was neither illegal nor unusual. Indeed, the notion of "trusts" regarding the property itself can be said that the typical "conflict of decisions" between these courts. For example, the Common Law Court states that the trustee is the legal owner of the property, but the Court of Equity enforces the trustee to administer the property for the benefit of the beneficiary.

On the other hand, even though the decree by the Court of Equity could be enforced only to the parties themselves in equity, the decree did not affect the procedure nor decision of the Common Law Court[20]. And, such conflict of decisions between the courts was at last resolved in the 17th century as the decree of the Court of Equity prevails, which was a kind of political resolution of the political dispute between the Court of Equity and the Common Law Court[21].

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18 KERLY, HISTORICAL SKETCH OF CHANCERY, pp.23-25; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.1 p.395 et seq.; BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, p.97 et seq.

19 KERLY, HISTORICAL SKETCH OF CHANCERY, p.78 et seq.; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.1 pp.454-455; BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, p.103.

20 KERLY, HISTORICAL SKETCH OF CHANCERY, p.107 et seq.; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.1 p.459 et seq.; MAITLAND, EQUITY, p.2 et seq.; BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, p.108 et seq.

21 KERLY, HISTORICAL SKETCH OF CHANCERY, p.113 et seq.; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.5 pp.236-238; MAITLAND, EQUITY, p.9; BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, pp.108-109.

The judgements of the Court of Equity regarding the Bona Fide doctrine presupposed the system of the courts and the relationship between Common Law and Equity in which the decisions of these court were independent not only practically but also theoretically. The decisions of the Court of Equity were the ones issued for providing the resolution for each specific case, and the ones intended to build the united system of Common Law and Equity.

<7> Fifth, it should be noted that the Bona Fide doctrine is the doctrine used for adjusting the relationship between the legal title of the third party admitted by Common Law and the equitable title of the beneficiary created by the Court of Equity.

As discussed above, the standard of the Bona Fide doctrine applied to the conflict between the beneficiary and the third party by the Court of Equity was whether the Court of Equity enforced the decree to the third party who had legal title of the property to administer the property in equity for the benefit of the beneficiary. Moreover, the jurisdiction of the Court of Equity regarding Common Law has been strictly limited and the decree or decision of the Court of Equity never affected the legal title of the property. Therefore, when the Court of Equity enforced the decree to the third party to administer the property for the benefit of the beneficiary, it should presuppose that the third party had the legal title of the property[22].

Indeed, as discussing below, when the third party who does not have the legal title of the property, such as that the third party received the property from the party who had no title of the property or the third party had only equitable rights to the property, the adjustment of the relationship between the beneficiary and the third party was not governed under the Bona Fide doctrine. That is, when the third party, who was transferred the property, was not transferred the legal title of the property, both the beneficiary and the third party had the equitable rights regarding the trust property. In such a case, the equitable doctrine "between the parties who have equal equitable rights, the party who has the prior right prevails (Qui prior est tempore potior est jure)" is applied and the beneficiary, who has prior equitable right, that is, the beneficial rights to the trust property, prevails, and the third party cannot escape the enforcement of the trust[23].

Moreover, when the transferor of the property has no legal title of the property, the Bona Fide doctrine is not applied to the cases between the transferee of the property from the transferor and the original title holder of the property. In this case, the doctrine of "No legal right can be added to the transferee by the transferor who did not have (Nemo plus juris ad alium tranferre potest quam ipse habet)" should be applied and the transferee would never receive the legal title regarding the property. Therefore, the transferee, who was transferred the property for value and without notice of that the transferor, did not have legal title, could not refuse the claim for restoration by the original title holder of the property[24].

<8> There is an important exception to the standard noted above regarding the transfer of the goods in market overt. In transferring the goods in market overt, when the transferor has no legal title and the

22 KERLY, HISTORICAL SKETCH OF CHANCERY, pp.49−50; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.1 pp.452−453.

23 Tourville v. Naish, 3 P.Wms. 307, 24 Eng.Rep. 1077 (1734); Wigg v. Wigg, 1 Atk. 382, 384, 26 Eng.Rep. 244, 245 (1739); Mackreth v. Symmons, 15 Ves.Jun. 329, 335, 33 Eng.Rep. 778, 781 (1808); Whitworth v. Gaugain, 3 Hare 416, 428, 67 Eng.Rep. 444, 448 (1844).

24 Farrant v. Thompson, 5 B.&Ald. 826, 828, 106 Eng.Rep. 1392, 1393 (1822); Load v. Green, 15 M.&W. 216, 221, 153 Eng.Rep. 828, 830 (1846).

transferee received the goods for value and without notice on which the transferor did not have legal title of the property, the transferee can refuse the claim for restoration by the original title holder of the property[25]. When this exceptional standard applied to the goods in market overt, the Bona Fide purchaser can be free from claims by the others, and the results are the same as the standard in breach of trust under the Bona Fide doctrine between the beneficiary and the third party.

However, the standard regarding the goods in market overt has utterly different theoretical meanings from the standard in breach of trust under the Bona Fide doctrine.

As discussed above, in applying the Bona Fide doctrine to the cases regarding the breach of trust, it should be presupposed that the beneficiary has the equitable right, that is, the beneficial right, to the trust property, and the third party has the legal title of the property. The standard of whether the third party is the Bona Fide or not should be applied under such presupposition.

On the other hand, the standard regarding the goods in market overt should be related to the remedies of the transferee from the transferor who did not have legal title of the goods and the standard does not have to do with the legal title which the transferee was transferred. Rather, in the standard regarding the goods in market overt, the legal title was granted to the transferee because the purchase was for value and without notice. Therefore, this standard regarding goods in market overt should have utterly different theoretical meanings from the Bona Fide doctrine in cases of the breach of trust.

Furthermore, in relation to the standard regarding the goods in market overt, in addition to the condition that the purchase is for value and without notice, there are two more conditions, that is, "the goods" are transferred "in market overt" for the transferee protected. So, for example, in the cases that "the goods" transferred was ship which was not transferred in market overt[26], or that the transfer was a sample transaction which was not "the transfer in market overt"[27], such standard should not be applied, and the transferee cannot have legal title under such standard.

As discussed above, the reason that the transferee can hold legal title of the goods transferred in market overt from the transferor who does not have legal title of the property is a kind of political judgement to protect the safety of the transfer in market overt, in which many goods are transferred not only un-repeatedly but also immediately. Therefore, the standard regarding the goods in market overt does not presuppose that the Common Law and the Equity are divided and independent, and does not adjust the relationship between the legal title and the equitable rights in the same property. It should have an utterly different theoretical meaning from the standard between the beneficiary and the third party in cases of the breach of trust by the trustee applied by the Bona Fide doctrine.

<9> The traditional features of the Bona Fide doctrine created by the Court of Equity, and the relationships between the Bona Fide doctrine and the theories of trusts, examined in this section, should be summarized as follows.

The Bona Fide doctrine regarding cases of the breach of trust, presupposing the third party has the legal title of the trust property, under the historical and political authority of the Court of Equity, it created equitable rights of the beneficiary on the trust property, and adjusted between the legal title of

25 Parker v. Patrick, 5 T.R. 175, 176, 101 Eng.Rep. 99 (1793); Bailiffs, Burgesses, &c. of Tewkesbury v. Diston, 6 East. 438, 451, 102 Eng.Rep. 1355, 1360 (1805); Irving v. Motly, 7 Bing. 543, 551, 131 Eng. Rep. 210, 214 (1831); Crane v. London Dock Company, 5 B.&S. 313, 319, 122 Eng.Rep. 847, 849 (1864). cf. JONES, BONA FIDE PURCHASER OF GOODS, p.33 et seq.

26 Hooper v. Gumm, (1866) 2 Ch. 282, 290.

27 Hill v. Smith, 4 Taunt. 520, 533, 128 Eng.Rep. 432, 437 (1812).

the third party and the equitable rights of the beneficiary. In this point of view, the theoretical features of trusts are the system in which the equitable rights can be created, independent of the property in Common Law, by the conscience and equilibrium of the Court of Equity on individual decisions to the specific cases.

The main purpose of the theories on trusts before the Court System Reform, presupposing legitimacy of "the Case Law" as the amounts of individual cases by the Court of Equity, was to explain the contents of such Case Law clearly. On the other hand, these theories scarcely intended taking the role of the theories on trusts, examining the relationships between the basic structure of trusts and the Bona Fide doctrine or stating the theoretical basis of legitimacy of the judgements by the courts.

Section 2 Court System Reform and the Bona Fide Doctrine

<1> The Court of Equity, especially in the 19th century, was strongly criticized due to the defects in its procedures and decisions. Through the Court System Reform in the 19th century, the last being in 1873, by the "Supreme Court of Judicature Act of 1873"[28], it was united with the Common Law Court and disappeared.

This section examines the Court System Reform itself first. Second, it analyzes "the defects" of the Court of Equity in detail, and, third, the effects of the Court System Reform for the traditional features of the Bona Fide doctrine are considered and, forth, it examines the relationships between the theories on trusts and the Bona Fide doctrine.

<2> There are two aspects of the Court System Reform in the 19th century. First is the increasing or creating of the courts and the judges, and the second is the revision of the procedure and the organization of the Court of Equity.

First, in 1813, a Vice Chancellor was appointed by the Chancellor and the person judged all equity cases alone[29]. In 1831, the jurisdiction of bankruptcy cases was transferred from the Chancellor to the Chief Judge in Bankruptcy[30]. In 1833, the power of the Master of Rolls was enlarged[31]. Then in 1842, when the jurisdiction under the Court of Exchequer was transferred to the Court of Equity, two more Vice Chancellors were appointed[32]. In 1851, the Court of Appeal in Chancery was created, which judged the cases appealed from the decisions of the Vice Chancellors or the Master of Rolls as first trials[33]. In 1869, the London Bankruptcy Court was created as the first trial court of bankruptcy cases[34].

In 1833, the power for the appointment of Masters was transferred to the King, and the salary of the Masters was fixed, and it was prohibited for the Masters to earn any income from the procedures and decisions of the court. The commissions for the procedures and decisions of the courts themselves were also fixed and reduced. Besides, the parties were not compelled to use the Copies by the Court

28 Act for the constitution of a Supreme Court, and for other purposes relating to better Administration of Justice in England; and to authorize the transfer to the Appellate Division of such Supreme Court of the Jurisdiction of the Judicial Committee of Her Majesty's Privy Council, 36&37 Vict. c.66, 8 L.R.Stat. 306 (1873).

29 Act to facilitate the Administration of Justice, 53 Geo.Third c.24, 53 Stat.at Large 120, 121 (1813).

30 Act to establish a Court in Bankruptcy, 1&2 Will.Fourth c.56 s.1, 71 Stat.at Large 363 (1831).

31 Act for the Regulation of the Proceedings and Practice of certain Offices of the High Court of Chancery in England, 3&4 Will.Fourth c.94 ss.13, 24, 73 Stat.at Large 905, 909, 911 (1833).

32 Act to make further Provisions for the Administration of Justice, 5 Vict. c.5 s.19, 82 Stat.at Large 6, 11 (1841).

33 Act to improve the Administration of Justice in the Court of Chancery and in the Judicial Committee of the Privy Council, 14&15 Vict. c.83 s.1, 91 Stat.at Large 467 (1851).

34 Act to consolidate and amend the Law of Bankruptcy (The Bankruptcy Act of 1869), 32&33 Vict. c.71, 109 Stat. at Large 277 (1869).

Clerks[35]. Due to this reform, the number of the Clerks were reduced from six to two, and at last abolished in 1842 with other useless positions[36]. In 1852, as accepted by the Reports of the Committee for the Reform of the Court of Equity, the organization of the Court of Equity was substantially revised, and the administrations of the court became supervised under judges, that is, the Vice Chancellor or the Master of Rolls[37].

The legislations for the reform of the Court of Equity had direct purposes, that was, to diminish the works of the Chancellor by increasing the judges and the courts, and to make the procedures and judgements more reasonable by revising the procedures and the organization of the Court of Equity. Due to the needs of such reform, the long-existing defects of the Court of Equity became worse in the 19th century.

<3> The delays in procedures and judgements, the expensive commissions, the complicated procedures, and the indefiniteness of the Equity itself were enumerated as "the defects" of the Court of Equity generally. These defects were not individual and independent causes, but related to each other, and the total defects of the Court of Equity became worse.

Regarding the delay of procedures and judgements of the Court of Equity, the judgement of the Court of Equity should be done by the conscience and equilibrium by the Chancellor who should know all the situations and circumstances of both parties. Due to this understanding, in the procedure of the Court of Equity, several unimportant and miscellaneous situations and circumstances were also being heard by the Chancellor, which caused the delay of procedures and judgements[38].

Moreover, in such original situations, although the cases brought to the Court of Equity increased year by year, the number of the Chancellor did not increase until in 1813 when a Vice Chancellor was appointed, and the delay of the Court of Equity became unrecoverable. Especially at the time of Lord Eldon, in the beginning of the 19th century, the delays in procedure and judgements became extremely. Due to this delay, the Court of Equity, which should be the court for speedy judgements, was severely called, not "the Circuit Court with judgement (the Oyer and terminer)", but "the Circled Court without judgement (the Oyer sans terminer)"[39].

However, the committee for the reform of the Court of Equity organized in 1824 under Lord Eldon reported that the cause of such delay was not the Court of Equity itself, but some useless actions and thoughts for the cases on the part of the parties and their attorneys[40]. This report was severely criticized it as a bad excuse for the defects of the procedures and judgements of the Court of Equity, and as unfair

35 3&4 Will.Fourth c.94 ss.16, 19, 33, 41, 73 Stat.at Large 905, 909, 910, 913, 916 (1833).

36 3&4 Will.Fourth c.94 s.28, 73 Stat.at Large 905, 912 (1833); Act for abolishing certain Offices of the High Court of Chancery in England, 5&6 Vict. c.103, 82 Stat.at Large 691 (1842).

37 Act to abolish the Office of Master in Ordinary of the High Court of Chancery, and to make Provision for the speedier and efficient Dispatch of Business in the said Court, 15&16 Vict. c.80, 92 Stat.at Large 363 (1852); Act to amend the Practice and Course of Proceeding in the High Court of Chancery, 15&16 Vict. c.86, 92 Stat.at Large 454 (1852); Act for the Relief of the Suitors of the High Court of Chancery, 15&16 Vict. c.87, 92 Stat.at Large 471 (1852).

38 HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.1 pp.437−438; KERLY, HISTORICAL SKETCH OF CHANCERY, pp.264, 270−272; BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, pp.112−113.

39 KERLY, HISTORICAL SKETCH OF CHANCERY, p.183; BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, p.113.

40 REPORT OF THE CHANCERY COMMISION OF 1826, p.113, cited in HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.1 p.438.

for intentionally ignoring the need for reform[41]. In the reports by the committee for the reform of the Court of Equity reorganized in 1850, it was clearly noted that the delay of procedures and judgements of the Court of Equity mainly caused the defects of the organization of the Court of Equity, and, for removing the defects, the organizations of all courts, including the creation of the united system of the Common Law Court and the Court of Equity, should be reformed totally[42].

<4> The second "defects" of the Court of Equity were its complicated procedures. Originally, the Court of Equity had a role to give remedies for parties who could not be protected by the Common Law Court because of its complicated procedures. The procedures of the Court of Equity were far simpler than those of the Common Law Court[43]. However, with the changing times, the procedures of the Court of Equity became complicated, in some points, more than the Common Law Court. As a matter of course, such complicated procedure spurred the delay of procedures and judgements of the Court of Equity. Regarding this point, in the Report in 1852 by the committee for the reform of the Court of Equity, it was stated that all the procedures, that is, the bills, the pleadings, the evidence, the decrees or the orders, had practical abuse or defects, and the administration of the system or the system itself should be reformed[44].

<5> Third, with the defects related to above, there was the problem regarding the commissions of the Court of Equity. In those days, the commissions of the Court of Equity should be paid by the parties for each additional procedure, and the administration of the Court was based and supported by such commissions[45]. Therefore, the complicated procedures and the delay of procedures and judgements meant that the parties should incur expensive commissions and, at the same time, the Court could have reflective interests earning more commissions. Under such circumstances, the clerk of courts issued many "procedural documents" which were unimportant for solution of the case and, in substantially, duplicated and redundant expressions. The issuance of many documents, which was severely criticized as "mountains of costly non-sense[46]" by the great author Charles Dickens, caused the judgements to be complicated and, as the result, the procedures and the judgements delayed further more[47].

In addition to those points mentioned above, such commission system would become a hotbed for unfairness by the court clerk. Indeed, it had been said that the bribes accepted by the court clerk were frequent, and the purchase of position of the court clerk was not unusual[48]. And more, after the South Sea Bubble in 1725, a shocking scandal revealed that over 100,000 pounds of commission was illegally

41 PARKES, HISTORY OF THE COURT OF CHANCERY, p.359 et seq.; Times, September 14, 1826, cited in PARKES, HISTORY OF THE COURT OF CHANCERY, p.530; KERLY, HISTORICAL SKETCH OF CHANCERY, p.274.

42 BRITISH PARLIAMENTARY PAPERS, pp.14, 45-47, 58.

43 KERLY, HISTORICAL SKETCH OF CHANCERY, p.48 et seq.; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.9 pp.336-337; BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, pp.103-104.

44 BRITISH PARLIAMENTARY PAPERS, pp.16-29, p.47 et seq.

45 BRITISH PARLIAMENTARY PAPERS, p.74; KERLY, HISTORICAL SKETCH OF CHANCERY, pp.267-268; BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, p.112.

46 DICKENS, BLEAK HOUSE, p.19. cf. Holdsworth, Bleak House and the Procedure of the Court of Chancery, in HOLDSWORTH, CHARLES DICKENS AS LEGAL HISTORIAN, p.79 et seq.

47 BRITISH PARLIAMENTARY PAPERS, p.49.

48 BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, p.112; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.1 p.439.

speculated[49].

<6> Furthermore, "the Equity" based on the judgement by the Court of Equity itself was not so definite. As examined above, "the Case Law" of the equity itself was not systematized based on some theories and the legitimacy of judgements were based on the notion of "the conscience and the equilibrium" of the Court of Equity, or rather, each Chancellor who judged each case. Therefore, as the number of cases dealt by the Court of Equity increasing, the serious conflicts and confusions in the case law of the equity were inevitable.

It was pointed out in the 17th century by John Selden that the judgements of the equity had no consistency as the case law, and the notion of "conscience and equilibrium" was changed by each Chancellor, as if the foot of each Chancellor varied[50]. Also, Lord Eldon, who was the Chancellor for about twenty years in the beginning of the 19th century, and who caused the delay of procedures and judgements of the Court of Equity to some part, deplored the inconsistency of the equity of previous Chancellors in one of his decision, using almost the same expression[51].

As noted above, "the Case Law" based on the judgements of the Court of Equity itself was not systematized. This meant that, when the Court of Equity tried to resolve the cases, in addition to the complicated procedures noted above, for the construction of the legal problems for the case resolved, more procedures and judgements should be needed for interpretation of the Case Law. In this way, the procedures and judgements of the Court of Equity needed more procedures and judgements, causing more delays in procedures and judgements, and it was utterly a vicious circle[52].

<7> It should be obvious from the discussion above that the causes of "the defects" of the Court of Equity were related to each other and underwent a vicious circle, making the defects more serious. In addition to these "the defects", there was another defect caused by the Court System Reform, which was actually the essence of "the defects" of the Court of Equity.

Regarding the essence of the Court System Reform, the most popular theory stated that the Court System Reform purposed the efficiency of the whole system of courts. This means that "the defects" of the Court of Equity noted above, i.e., the delays in procedures and judgements because of few judges, complicated procedures, expensive commissions, and inconsistency or vagueness in the Equity itself, were all obstacles for the predictability and efficiency of the judgements. In addition, in the 19th century of the U.K., affected by the Civil Code and the Commercial Code created in France, there were the needs of the predictable standards for cases between the merchants, along with the development of the commercial transaction. The Court System should be reformed for the efficient administration of the whole system of courts, that is, more definite equity as the Case Law and the resolving the delays and unfairness of procedures and judgements were unnecessary[53].

Indeed, the Court System Reform was made by legislation which revised the organization, the jurisdiction, and the procedures of the Court of Equity. Such legislation would contribute to the predictability, the efficiency, and the resolution of the delays of procedures.

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49 BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, p.112; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.1 p.440.

50 SELDEN'S TABLE TALK, 37. Equity, p.61 n.1.

51 Gee v. Pritchard, 2 Swans. 402, 414, 36 Eng.Rep. 670, 674 (1818).

52 BRITHSH PARLIAMENTARY PAPERS, pp.45–46; HOLDSWORTH, HISTORY OF ENGLISH LAW, vol.9 pp.347–348.

53 KERLY, HISTORICAL SKETCH OF CHANCERY, pp.264–265.

<8> However, if the efficiency of the court system was the only purpose of the Court System Reform, it should be sufficient to comply the previous cases regarding the Equity to edit the systematic Case Law for the definiteness of the Equity and raising the predictability of the cases. Regarding the delays of procedures and judgements, they were caused only by the lack of judges, and it should be sufficient to increase the staff of the court. But, in reality, in addition to editing the case laws and increasing the staff of the courts, further reform, such as the unification of system of the Common Law Court and the Court of Equity, was necessary.[54] At last in 1873, the Court of Equity disappeared with the Judicature Act 1873.

Regarding this point, the previous theory gave the explanation that, by the time the Common Law Court and the Court of Equity were united, the Common Law and the Equity themselves became united, both in substantive and in procedural aspects, and the united court system was a part of the measures taken for pursuing the efficiency of administration of the whole court system[55]. However, this explanation could be applied only to the phenomenon that the systems of case law in the U.K. was not destroyed by the Court System Reform. In reality, this explanation should not be appropriate when one asked the question regarding the real needs of the united system of the Common Law Court and the Court of Equity in the Court System Reform.

The equity was created originally as the remedies for each case by the conscience and equilibrium of the Court of Equity. The basis of the legitimacy of the Equity was based on the historical and political authority of the Court of Equity itself. From these points, the disappearance of the Court of Equity itself via legislation surely meant the disappearance of the basis of legitimacy of the Equity itself, and it should change fundamentally the relationships between the Equity and the Court of Equity.

In other words, by explaining the needs of the united system of the Common Law Court and the Court of Equity by the needs of "the efficient administration of the court system", as a theoretical presupposition, the basis of the legitimacy of the Equity should be explained not by the authority of the Court of Equity but by other theories or standards of abstract fairness. However, from such explanation, even before the Court System Reform, the basis of the legitimacy of the Equity should not be on the authority of the Court of Equity, but on other base such as fairness, and it should be considered that the Court of Equity created the Equity as the Case Law under the consistent aspect of fairness for hundreds of years. But such a discussion should be theoretical contradiction or confusion regarding the traditional features of the Equity.

As discussed above, in relation to the previous theory regarding the trust, the efficiency of administration of the court system and increasing the predictability of the parties could explain apart of important effects of the Court System Reform, but should not be appropriate for the theoretical essence of the Court System Reform.

<9> In other word, the essential cause of the criticism for "the defects" of the Court of Equity and the needs of the fundamental reform of the whole system of courts should be considered that such "defects" of the Court of Equity were substantially contradicted to the meaning of the Court of Equity regarding the whole legal and equitable system. This means that the original role of the Court of Equity, i.e., resolving each case by conscience and equilibrium would be substantially destroyed since the historical and political authority of the Court of Equity regarding the legitimacy of cases was denied by the reform.

54 BRITISH PARLIAMENTARY PAPERS, pp.45-47.
55 KERLY, HISTORICAL SKETCH OF CHANCERY, p.292.

As noted above, several problems noted as "the defects" of the Court of Equity, i.e., the severe delays in procedures and judgements, the complication of procedures, the expensive commissions, and the indefiniteness of the Equity itself, were related to each other. And it should be obvious that these problems, as per the following discussion, were all substantially contradictory to the original role of the Court of Equity, i.e., resolving each case by conscience and equilibrium.

First, the delays of procedures and judgements impairs the interests of parties who hope the speedy resolution of disputes, but also cause the commissions to become more expensive. And the reason why the parties hope for the speedy resolution of disputes would be mainly that they could not bear expensive commissions, and the delays in procedures and judgements, along with expensive commissions, should make actual disadvantage regarding the interests of parties who were not wealthy. In other words, the delays in procedures and judgements of the Court of Equity might tend to resolve disputes not by conscience and equilibrium, but on actual economic wealth. It should be obvious that such tendency would be contradict to the original purpose of the Court of Equity noted above.

Second, the complicated procedures of the Court of Equity would be related directly to the delays in procedures and judgements, and mean that the parties should ask for the professionals of dispute resolution. The economic costs the parties incurred would be added more because of the needs of parties asking for the professionals. Furthermore, the expensive commissions and the commission system for procedures were related to each other, and made a hotbed for unfairness of the clerk of court as criticized before. It should be obvious that such expensiveness of the procedural commissions and the prevalence of unfairness by the court clerk should invite unreliability as to the legitimacy of judgements of the Court of Equity.

Third, as discussed above, the vagueness of the Equity shown as the Case Law caused delays of procedures and judgements, complicated procedures, and expensive commissions. Moreover, the decisions of the Court of Equity were not consistent and the notion of "the conscience and equilibrium" was different by each Chancellor. These would mean that the decisions were not the desirable resolution for each case but tended to be unequal among similar cases. Therefore, the vagueness of the Equity and the unreliability of legitimacy of judgements of the Court of Equity should be deeply related to each other.

Fourth, as noted above, the Court System Reform, in which the organization, jurisdiction, and the procedures of the courts through the 19th century changed, was accomplished neither by the self-effort of the Courts themselves nor by the revisions of the Case Law itself, but by the legislature created by Parliament. From the fact that the Court System Reform was accomplished by the legislatures of Parliament, that is, by the enforcement from the outside of the Court, it should be proved that "the defects" of the Courts, including the Court of Equity, destroyed the authority and the reliability regarding the legitimacy of judgements of the Courts. For the removal of such unreliability, it was necessary to take control by the legislatures from the outside of the Court, not wait for the self-recovery of the Courts themselves.

<10> As discussed above, the "defects" of the Court of Equity destroyed the historical and political authority of the Court of Equity, which was the basis of the legitimacy of the Case Law on the Equity. But, as in the following discussion, creating a united system of the Common Law Court and the Court of Equity was not enough to remove such unreliability of the Courts.

First, as discussed above, the Court System Reform was accomplished by the legislation of Parliament, not by the self-effort of the Courts themselves. From the fact that the Court System Reform

was accomplished by enforcement from outside of the Courts and the Court of Equity and the Common Law Court was united to become a new Court, it was difficult to recover authority and reliability for the legitimacy of the Equity for the united new Court.

Second, the united system of the Common Law Court and the Court of Equity by the Judicature Act 1873, though the purpose of the united system, streamlined the procedures of the Courts, it caused new confusions in procedure, especially just after the reform. Both in Common Law and in Equity, the cases would be judged in the same court and the judges should know the Common Law and the Equity both in substance and in procedure. But, many judges just after the System Reform knew either the Common Law or the Equity, due to their carrier before the System Reform. Sir Arthur Underhill, who was a judge in the time of the Court System Reform, noted in the memoirs that all judges should study the procedures of the new Court actually again, and there were some confusions because of the difference between the Common Law and the Equity in procedures and judgements[56].

<11> Third, the provision, providing the relationship between the Common Law and the Equity in the Judicature Act 1873, caused the confusion of judgements and Courts.

The Judicature Act 1873, s.25 para.11, provided as follows.

"Generally, [omitted] as to the same topic, where there might exist the Rules of Equity and the Rules of Common Law conflict or variance, the Rules of Equity prevail.[57]"

In understanding of this clause, it should be obvious that the interpretation of the word "the Rules" is problematic. If "the Rules" in this clause means only the procedural rules of the Courts after the System Reform, the Bona Fide doctrine, in which the results would be changed as to whether the right of the third party was based on the Common Law or of the Equity, have nothing to do with the procedural rules, and the results should be maintained even after the System Reform[58]. On the other hand, if "the Rules" in this clause means not only the procedural rules but also the substantive rules, the standard under the Bona Fide doctrine should be fundamentally changed. That is, under a typical case between a beneficiary who has an equitable right and a third party who has a legal title of the same trust property, the right of Common Law and the right of Equity would be in "conflict and valiance", if s.25 para.11 of the Judicature Act 1873 applied and "the Rules of Equity" should prevail. This means that the rights of beneficiary should always prevail compared to the rights of the third party.

<12> In reviewing the cases after the Court System Reform in this problem, the standard of the Bona Fide doctrine would not be considered the case having the conflict or variance regarding the Rules of Common Law and the Rules of Equity in applying s.25 para.11 of the Judicature Act 1873. In Cave v. Cave[59], for example, a dispute between the beneficiary of a trust property, the legal mortgagee, and the equitable mortgagee, without reference to s.25 para.11 of the Judicature Act 1873, it was decided that the bona fide legal mortgagee should prevail as the beneficiary, but the equitable mortgagee should not prevail as the beneficiary[60]. In accordance with whether the rights of the third parties were the legal rights or the equitable rights, the priority to the beneficiary who has the equitable right to the property was decided under the traditional standard of the Bona Fide doctrine in this case. Also in other cases regarding the Bona Fide doctrine, s.25 para.11 of the Judicature Act 1873 was neither mentioned nor

56 UNDERHILL, CHANGE AND DECAY, p.76 et seq.
57 36&37 Vict. c.66 s.25(11), 8 L.R.Stat. 306, 321 (1873).
58 CHUTE, EQUITY UNDER THE JUDICATURE ACT, pp.1-2, 64.
59 15 Ch.D. 639 (1880).
60 Id. pp.646-647.

applied as the standard applied between the beneficiary and the third party[61]. Therefore, it can be said that these cases did not fall under s.25 para.11 of the Judicature Act of 1873 as the substantive rules.

On the other hand, in some cases not relating to the Bona Fide doctrine, the standard between the Rules of Common Law and the Rules of Equity under s.25 para.11 of the Judicature Act 1873 was applied as the substantive rules. In Walsh v. Lonsdale[62], regarding the effects of the lease of land, which consisted of a legal lease effected by paying for the lease year by year and an equitable lease effected by the agreement, it was stated that, since the Judicature Act 1873 was enacted, it should not be effected as a double lease on the same land and the equitable lease should be effective[63]. In this case, both the legal property and the equitable property were compared in the same aspect and it was decided that only the equitable property is legally effective. This should presuppose that s.25 para.11 of the Judicature Act 1873 could be applied for the substantive rules. As noted above, although this case was not on the Bona Fide doctrine, it should be obvious that the structure and presupposition of this case could be applied to situations involving the Bona Fide doctrine.

As discussed above, since the Court System Reform was consisted of legislation of Parliament, and the Court of Equity disappeared, the Court just after the System Reform could not easily recover authority for the basis of legitimacy of judgements as possessed by the Court of Equity historically. Moreover, from the fact happened just after the Court System Reform, some confusion on procedures occurred, though they were not the same as before the System Reform. And furthermore, from the fact based on the understanding regarding the clause of s.25 para.11 of the Judicature Act 1873, it led to confusion on the presupposition of the Case Law between the substantive rules in the Equity and the Common Law. It can also be said from this fact as well that the Court just after the System Reform, could not easily recover the authority for the legitimacy of judgements.

<13> From the discussion stated above, it can be said that the essence of the criticism aimed at the Court of Equity and the need for the Court System Reform had been substantial, based on fundamental unreliability of the legitimacy of the Case Law created by the Court of Equity.

As discussed, there were some vagueness of the understanding regarding the standard applied between the Rules of Common Law and the Rules of Equity in accordance with s.25 para.11 of the Judicature Act 1873, and there were some confusions about procedures of the Court after the Reform. Therefore, such unreliability regarding the Court of Equity would disappeared through the Reform of the Court System only, and the Court after the Reform could not easily recover historical and political authority for legitimacy of the Case Law. Moreover, the Bona Fide doctrine and the Law of Trusts, which based their traditional legitimacy on historical and political authority of the Court of Equity, could not maintain such basis of legitimacy after the Court System Reform.

<14> On the other side, such change of situations regarding the basis of legitimacy of the Bona Fide doctrine and the Law of Trusts should be an important motive for producing the theories on trusts, which was expected to take a new theoretical role.

As discussed above, the Bona Fide doctrine and the Law of Trusts could not easily maintain their legitimacy based only on historical and political authority of the Court of Equity. Furthermore, the

61 In re Vernon, Ewens, & Co., 32 Ch.D. 165, 191 (1886), aff'd, 33 Ch.D. 402, 411 (1886); Carritt v. Real and Personal Advance Company, 42 Ch.D. 263, 269 (1889); Taylor v. London & County Banking Co., [1901] 2 Ch. 231, 262.

62 21 Ch.D. 9 (1882).

63 Id. at 14.

Court, just after the System Reform, could not easily recover the authority for legitimacy of the Case Law, because of the problem of understanding s.25 para.11 of the Judicature Act of 1873, or because of the confusion in procedures. In these situations, to maintain the reliability based on the Case Law and the stability of the whole legal and equitable systems, it should not be sufficient only to explain the Case Law based on authority of the Court. It would be needed to explain legitimacy of the Case Law based on a consistent theory on trusts, and discuss the relationships between the basic structure of trusts and the Bona Fide doctrine, for the reasonable predictability of the results of judgements in the future.

As discussed in the following section, at the time of the Court System Reform in the U.K., the most succeeded theory was the Maitland theory, stated by F.W. Maitland. This theory took a new role of the theories on trusts, which explained the relationships between the basic structure of trusts and the Bona Fide doctrine, and gave great impact on theories and legislations, not only in the U.K., even in the U.S. and Japan.

Section 3 The Bona Fide Doctrine under the Maitland Theory

<1> Maitland theory by F.W. Maitland was produced at the time of disappearance of the Court of Equity, which was united with the Common Law Court by the Court System Reform, and explains the basic structure of the trust relationships. It explains that the owner of the trust property is the trustee, and the right of the beneficiary is the claim to the trustee, that is, "jus in personam[64]". As discussed in previous section, at the time of the Court System Reform in the U.K., the historical and political authority of the Courts for the legitimacy of the Case Law was destroyed, and could not easily recover the reliance for such authority. The new role of the theories on trusts was expected explaining the legitimacy of the Case Law from the consistent theoretical aspect, and showing the theoretical structure of the relationships between the basic structure of trusts and the Bona Fide doctrine. As shown below, the Maitland theory was the most prominent theory for such new role, since this explained that the basis of the trust relationships should be agreement of the parties of trust relationships, which could be consistent in almost all aspects[65].

<2> The Maitland theory defines the trusts as the relationship between those who holds the property or the interests under some purpose for the benefit of others, i.e., "the trustee" and those who are "the beneficiary" and such relationships for administering the property are "the trust relationships"[66]. The trust relationships are created, except by the declaration of trusts", when the settlor makes a proposal to the trustee for creation of the trust relationships and the trustee makes the accept or the undertaking, that is, by the agreement for creation of the trust relationships between the settlor and the trustee[67]. However, in one hand, The Maitland theory explains that the creation of trusts consists the agreement of the parties of the trust relationships and, on the other hand, it does not support the understanding that such agreement for the creation of trusts between the settlor and the trustee is the same as "the contract" between them. Although it should be admitted that trusts and contracts are resemble, historically the trusts have been enforced by the Court of Equity and distinguished from the contracts enforced by the Common Law Court, and it should be difficult to make the explanation regarding the declaration of

64 Distinction of the notions between "jus in rem" and "jus in personam", see AUSTIN, LECTURES ON JURISPRUDENCE, p.175 et seq.

65 Examination of my previous article, see Yutaka Hoshino, Interpretation of s.31 of the Original Trust Code from the Viewpoint of the Claim theory, 198 Shintaku 53 (1999).

66 MAITLAND, EQUITY, pp.43-44.

67 MAITLAND, EQUITY, pp.53-54.

trusts[68]. In any cases, when the trust relationships are created by the agreement between the settlor and the trustee, or by the declaration of trusts, the reliance or the confidence regarding the administration of trusts property exists between the settlor and the trustee, not between the beneficiary and the trustee, and the receipt of benefit by the beneficiary should not be indispensable for the creation and the continuance of the trust relationships[69].

And the Maitland theory explains originally the relationships between the trustee and the beneficiary on the trust property that all administrations of the trust property by the trustee, regardless of the breach of trusts or not in relation to the purpose of the trust relationships, should be valid administrations by the title holder of the property, because all titles and interests of the trust property are belonging to the trustee. In other words, the restraint on the trustee to administer the trust property for the benefit of the beneficiary is the result from the enforcement by the purpose of the trust for the benefit of the beneficiary under administration of the trust property, and this is not the restraint from the title which was held by the trustee on the property[70]. Therefore, when the trustee has transferred the trust property to the third party in breach of trusts, such transfer should not be void as the transfer by the untitled, but resolved between the beneficiary and the third party by the application of the Bona Fide doctrine. However, the administrations of the trust property by the trustee are valid in general, the breach of trusts such as transferring it to the third party or spending the trust property consists the malpractice for damaging the interests of the beneficiary in breach of trusts, not the larceny or the embezzlement of the trust property[71].

On the other hand, the right of the beneficiary in the trust relationships should be resemble to the real right or jus in rem of the trust property in appearance, which theoretically is the claim or jus in personam to the trustee. In other words, the beneficiary can claim to the trustee for administering the trust property under the purpose of the trust relationships created and such claim to the trustee should be the right of the beneficiary[72]. The right of the beneficiary should be created by the agreement between the settlor and the trustee or by the declaration in creating the trusts, and its contents should be determined by the purpose of the trusts or the terms of trusts in the agreement or the declaration for the creation of trusts[73].

<3> However, from the Maitland theory, those who should be claimed or enforced by the beneficiary for administering the trust property under the purpose of trusts, theoretically, is the trustee who accepted or undertook the trust relationships by the agreement for creating the trusts[74]. Therefore, it is difficult to explain theoretically the Case Law in which some third parties, having notice of the breach of trusts,

68 MAITLAND, EQUITY, pp.54, 115-116. Some theory in the U.S. in these days which states that the trust is contract discusses the Maitland theory as the pioneer of such theory. See Langbein, Contractarian Basis of the Law of Trusts, 105 Yale L.J. 625, 644-645 (1995). As to the discussion of this theory, See Section 5 <5> of Chapter 3.

69 MAITLAND, EQUITY, p.54.

70 MAITLAND, EQUITY, p.45.

71 MAITLAND, EQUITY, pp.46-48. However, the recent legislature in the U.K. provides that the intended breach of trusts of trustee consist not only the malpractice, but also the larceny or the embezzlement of the trust property. See UNDERHILL & HAYTON, TRUSTS AND TRUSTEES, p.907 et seq.

72 MAITLAND, EQUITY, pp.111-112.

73 The purpose of trusts prevails to the personal interests of the beneficiary. See MAITLAND, EQUITY, pp.50-51.

74 Although it should be called not by "the agreement" but by "the intent for creating trusts" in case when the trust was created by the declaration, such difference should not effect to the standard of the Bona Fide doctrine, and this article will use the expression "the agreement", which could represent the feature of the Maitland theory more clearly.

transferred the property for no value, and not transferred the legal title of the property, should be also enforced by the effects of the right of the beneficiary.

In relation to this point, the Maitland theory tries to explain the standard applied between the beneficiary and the third party as follows. Basically, the standard applied between the beneficiary and the third party is based on the two equitable doctrines[75]. First, "between the parties who have the equal equitable rights, judged by the Common Law relationships", so between the Common Law and the Equity, the Common Law relationships prevails. Second, "between the parties who have the equal equitable rights, the prior right prevails", so between the conflict of the equitable rights, the prior right prevails the latter.

The basic structure of the Maitland theory on the standard between the beneficiary and the third party under these two doctrines should result as follows.

Under the Maitland theory, a trustee has the status of the owner of trust property, i.e., the legal title of trust property, and a beneficiary has beneficial rights to the trustee, i.e., the equitable rights of claim to the trustee for administering the trust property under the purpose of the trusts. In this situation, when the trustee transfers the trust property to the third party in breach of trusts, whether the legal title of the trust property transfers to the third party or remains with the trustee should be examined. In this step, if the trustee has the legal title of trust property, and the right of third party is the equitable right to the trustee for claiming to transfer the legal title of the trust property, the standard applied between the beneficiary and the third party is the standard between the conflicted equitable rights. Therefore, applied the second doctrine noted above, the beneficiary who has the prior equitable right prevails the third party who has the latter equitable right.

On the other hand, if the legal title of trust property was already transferred to the third party, the legal relationship was altered between the trustee and the third party, and the equitable relationships between the beneficiary and the trustee remains on the trust property, applied the first doctrine noted above, the Common Law relationships, that is, the transfer of the trust property from the trustee to the third party, should not be argued by the beneficiary because of the equitable relationships between the beneficiary and the trustee. Therefore, how the beneficiary enforces the equitable right to the trustee or to the third party who has the legal title on the trust property becomes the problem.

In this step, the Maitland theory examines whether the third party, who was transferred the trust property, should be considered as equal to the trustee. If the third party should be equal to the trustee, the third party should undertake the duties and liabilities of the trustee under the trust relationships, and should owe the duties and liabilities to the beneficiary in place of the trustee. And when the third party was transferred the trust property for no value, or has been given the notice of the breach of trusts, the third party should be as equal to the trustee.

As discussed above, the third party who was transferred the trust property for no value, who was given notice regarding the breach of trusts, and who was not transferred the legal title of the trust property, should be enforced the effects of the beneficial right of the beneficiary.

<4> Such theoretical structure of the Maitland theory fits best on the situation when "the third party has succeeded the persona of the original trustee[76]", i.e., the third party, who succeeded the whole rights and duties of the trustee generally in a way such as an inheritance, the executor or the administrator. The second fitting situation is that the trust property was transferred to the third party regardless of the intent

75 MAITLAND, EQUITY, pp.130−131.
76 MAITLAND, EQUITY, p.117.

of the trustee, i.e., the third party who has a chose in action to the trustee seizes the trust property. Regarding the third party who was transferred the trust property for no value, as the trustee had an intent to transfer the trust property to the third party, the common factor with the two prior situations, that is, that the trust property was transferred for no value, should be legitimate to enforce the beneficial right to the third party.

On the other hand, for the third party who was given notice of the breach of trusts, neither the inexistence of the intent to transfer the trust property nor the transfer for no value should be basis for the enforcement of the beneficial right. In this case, the third party recognizes the breach of trusts by the trustee or the breach in trusts to the beneficiary in conspiracy with the trustee, and the third party should owe the duties and liabilities of the trustee to the beneficiary[77]. More precisely, the third party, who was given the notice in the breach of trusts, does not "undertake" the duties and liabilities of the trustee to the beneficiary under the trust relationships, but should owe the new duties and liabilities to the beneficiary, equal to the trustee but other than the trustee, because of the conspiracy with the trustee in breach of trusts.

However, when there is the conspiracy with the trustee in breach of trusts, it should become difficult to admit the conspiracy with the third party and the trustee should be considered as being given "the constructive notice", who was transferred the trust property without knowledge of the breach of trusts due to the carelessness. From the Maitland theory, the reason for the enforcement to such third party must be explained as the political judgments for the protection of the benefit of the beneficiary more and to enlarge the range of the third party who should be enforced it by the beneficial right[78]. The Maitland theory concludes that, as the Court of Equity has set the very high quality for the care of the third party who was transferred the trust property, the beneficial right might be considered as the right in rem of the trust property in appearance[79].

The Maitland theory mentions the enforcement by the beneficial right to the heir, the executor or the administrator first, then, the seizure, the transferee for no value, the third party who has the actual notice of the breach of trusts, and at last the third party who has the constructive notice because of the carelessness, and stated in such order the range of the third party enforced by the beneficial right are enlarged[80], although the order of the actual time transition when the Bona Fide doctrine was created by the Court of Equity[81]. This explanation by the Maitland theory coincides with the order of the cases regarding the theoretical structure in the standard between the beneficiary and the third party under the Bona Fide doctrine as discussed above, and it should be considered also as the trial of the Maitland theory to explain the creation of the Bona Fide doctrine.

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77 MAITLAND, EQUITY, p.118.

78 MAITLAND, EQUITY, pp.118−119.

79 MAITLAND, EQUITY, p.122 et seq. At this point, the beneficial right can be registered by Land Charges Act [1972, c.61, [1972] 2 L.R.Stat. 1805]), and it might become the problem that effects to the Bona Fide doctrine. However, some facts, which would be consist with the breach of trusts such as "prohibited to speculate", could not be distinguished by the registration, and some equitable rights, such as the beneficial right of the constructive trusts, could not be registered. Therefore, the registered system of the beneficial rights would indeed affect the standard of the care of the third party practically, even though it never alters the theoretical structure and meanings of the Bona Fide doctrine.

80 MAITLAND, EQUITY, pp.117−118.

81 The first case which enforced the third party with notice of the breach of trusts was earlier than the first case which enforced the third party for no value. See section 1 <1> of this chapter.

<5> As discussed above, under the Maitland theory, it should be decided basically whether the third party, who was transferred the trust property, should be considered as equal to the trustee. In case the third party should be considered as equal to the trustee, the third party should owe the duties and liabilities which the trustee should owe on the trust relationships to the beneficiary, with the co-trustee or in place of the trustee. In this explanation, the theoretical reason why the beneficiary can enforce the beneficial right to the third party is not due to the enforcement power of the beneficiary to the third party which should be newly created, but due to that the third party should be considered as equal to the trustee and as one of the parties of the trust relationships from the equitable aspect. Therefore, it should not be considered as the theoretical contradiction that the effects of the beneficial right to some third parties should be admitted while the Maitland theory regarding the trust relationships should be considered based on the agreement by the parties regarding such trust relationships.

From these discussions above, there are relationships which are equal to the trust relationships by the Bona Fide doctrine[82]. Therefore, the reason why the third party should be enforced the beneficial right on the transferred trust property, be compelled to return the property to the beneficiary or the trust property administered by the trustee, or be compelled to recover the damage of the beneficiary or the trust property administered by the trustee, would be also explained as the effects of the constructive trusts by the Bona Fide doctrine between the beneficiary and the third party.

Moreover, from the aspect that the Bona Fide doctrine should be considered as the standard of creating the constructive trusts between the beneficiary and the third party, the law of constructive trusts should be considered as the main parts of the standard between the beneficiary and the third party, which should be the most important feature of the Law of Trusts. Therefore, the Law of Constructive Trusts should be considered as not only relating inseparable to the Law of Express Trusts with each other, but also the main part of the Law of Trusts[83].

Section 4 Other Theories Around the Maitland Theory

<1> One of the meaningful method to consider the theoretical feature of the Maitland theory would be to compare the feature of the Maitland theory with other theories on trusts. This article would examine other two theories on trusts in the U.K. at those times, that is, “the Double Ownership theory” and “the Beneficiary Owner theory”. The Maitland theory criticized them in the discussion on the basic structure of the trust relationships and the Bona Fide doctrine.

<2> The Double Ownership theory was accepted by many scholars in the U.K. before the Court System Reform. Under this theory, the basic structure of the trusts and the Bona Fide doctrine are considered as follows.

First, the trust relationships regarding some properties means that the trustee has the legal ownership of the property and the beneficiary has the equitable ownership of the same property independently from the ownership of the trustee[84]. When the double ownership should be admitted on

82 MAITLAND, EQUITY, pp.83-84.

83 This is tentative, and further examination regarding the relationships between the Law of Constructive Trusts and the Law of Express Trusts is required. It should be obvious from the discussion of this article that the close relationships between the Law of Constructive Trusts and the Law of Express Trusts should exist under the Maitland theory.

84 SPENCE, EQUITABLE JURISDICTION OF CHANCERY, vol.2 p.875; GILBERT ON USES AND TRUSTS, p.1; FONBLANQUE, TREATISE OF EQUITY, vol.2 p.7; ROBERTS’S PRINCIPLES OF EQUITY, pp.132-133; SANDERS’S ESSAY ON USES AND TRUSTS, vol.1 p.267.

some properties, the Court of Equity enforces the trustee to administer the trust property for the benefit of the beneficiary. Thus, the basic feature of the trusts is that the Court of Equity enforces the trustee to hold or to exercise the legal property by the decree under the conscience and equilibrium regarding the double ownership created on the trust property[85].

Since the right of the trustee and the right of the beneficiary regarding the trust property should be the independent rights or titles in each other, it should be valid that the trustee transfers the trust property irrespective whether such transfer should be the breach of trusts or not. The Court of Equity might enforce the third party, who was transferred the legal title of the trust property from the trustee, to administer the property transferred for the benefit of the beneficiary.

As in the case above, that the Court of Equity enforces by the decree the third party means that the beneficial right can be enforced to the third party. Examining the previous cases of the Court of Equity, the third party who was given the notice regarding the breach of trusts or who was transferred the legal title of the property for no value should be enforced the trust relationships by the Court of Equity. When the third party was transferred the legal title of the property for value without notice of the breach of trusts, the Court of Equity gives no remedies to the beneficiary[86]. And when the third party was not transferred the legal title of the trust property, the third party should be enforced the trust relationships[87]. Therefore, the third party who was transferred the trust property for no value or who has the notice of the trust relationships should be enforced by the beneficiary, while the third party who is the purchaser for value without notice can escape from the trust relationships.

<3> As noted above, the standard of the Double Ownership theory between the beneficiary and the third party should be decided in accordance with whether the Court of Equity enforces the third party, who was transferred the legal title of the trust property from the trustee to exercise the legal title for the benefit of the beneficiary by the decree or not. The theories regarding trusts before the Court System Reform only stated the Bona Fide doctrine as the doctrine created by the Court of Equity, and explained the results of the Bona Fide doctrine as the general tendency of the Case Law[88].

From the discussions above, it should be obvious that the Double Ownership theory would not at all accept the idea that the effects of the beneficial right to the third party should be based on some rules or principles and be enforced actually by the decree of the Court of Equity. Rather, the explanation of the Double Ownership theory presupposed the facts that the beneficial right was protected to the third party through the enforcement of the trust relationships by the decree of the Court of Equity. In other words, the enforcement by the Court of Equity itself is the basis of the legitimacy regarding the effects of the beneficial right.

This presupposition of the Double Ownership theory would be appropriate not only to the

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85 SPENCE, EQUITABLE JURISDICTION OF CHANCERY, vol.2 p.25; GILBERT ON USES AND TRUSTS, pp.2−3; FONBLANQUE, TREATISE OF EQUITY, vol.2 pp.7−9; ROBERTS'S PRINCIPLES OF EQUITY, p.133; SANDERS'S ESSAY ON USES AND TRUSTS, vol.1 pp.265−267.

86 SPENCE, EQUITABLE JURISDICTION OF CHANCERY, vol.2 p.733; GILBERT ON USES AND TRUSTS, p.13 et seq.; FONBLANQUE, TREATISE OF EQUITY, vol.2 p.147 et seq.; ROBERTS'S PRINCIPLES OF EQUITY, pp.164−167; SANDERS'S ESSAY ON USES AND TRUSTS, vol.1 p.319 et seq.

87 SPENCE, EQUITABLE JURISDICTION OF CHANCERY, vol.2 p.745; GILBERT ON USES AND TRUSTS, p.13 n.5; FONBLANQUE, TREATISE OF EQUITY, vol.1 p.320; ROBERTS'S PRINCIPLES OF EQUITY, p.163.

88 SPENCE, EQUITABLE JURISDICTION OF CHANCERY, vol.2 p.733; GILBERT ON USES AND TRUSTS, p.14 n.6; FONBLANQUE, TREATISE OF EQUITY, vol.2 pp.147−155; ROBERTS'S PRINCIPLES OF EQUITY, pp.164−167; SANDERS'S ESSAY ON USES AND TRUSTS, vol.1 p.319 et seq. See section 1 of this chapter.

relationships between the beneficiary and the third party but also to the relationships between the parties of the trust relationships each other. From the explanation of the Double Ownership theory regarding the basic structure of the trusts, the legal title of the trust property and the equitable beneficial right of the trust property are independent property each other and the legal title of the trustee cannot be restrained in Common Law. The reason why the beneficial right can be protected should be considered as the enforcement by the decree of the Court of Equity for the trustee to exercise the legal title of the trust property for the beneficiary. As discussed above, originally between the trustee and the beneficiary, the basis of the protection of the beneficial right should be considered as the enforcement of the trust relationships to the trustee by the Court of Equity itself.

<4> As discussed above, under the Double Ownership theory, the enforcement of the trust relationships to the third party by the Court of Equity itself should be considered as the basis for the legitimacy of the Bona Fide doctrine. It should be also considered that the feature of the Court of Equity based on the system of Common Law and Equity, and on the theoretical features, of the Law of Trusts, of the Bona Fide doctrine, and of the Double Ownership theory.

As discussed above, the jurisdiction of the Court of Equity before the Court System Reform was only on the equitable cases, and the jurisdiction on the Common Law cases belonged to the Common Law Court. Moreover, both the judgements of the Court of Equity and the Common Law Court were decided independently and the decisions of each court was never restrained the judgements of the others. Due to this situation, the judgements of the Court of Equity could be enforced only to the parties individually. Additionally, the solution of these conflicts of the judgements between the Common Law and the Equity was provided politically in the beginning of 17th century when the political dispute occurred, and not at all based on the theoretical solution. From these facts, before the Court System Reform, the Common Law and the Equity should be existed as the independent systems, and the legitimacy of the creation of the trust relationships should be based on the decree of the Court of Equity itself[89]. Therefore, also in the Double Ownership theory, the Common Law and the Equity should be naturally presupposed the independent systems, and the legitimacy of the protection of the beneficial right should be based on the enforcement of the effect of the trust relationships to the third party itself.

<5> From the discussion regarding the Double Ownership theory, it should be obvious that the Double Ownership theory and the Maitland theory are utterly irreconcilable in the theoretical basis presupposed for the construction. Examining the system of law and equity presupposed by the Maitland theory, the standard applied between the beneficiary and the third party under the Bona Fide doctrine should be constructed as the combination of the general rules and principles which provide the relationships between the legal title and the equitable right and between the equitable rights with each other. Therefore, in the discussion of the Maitland theory, the Common Law and the Equity should not be presupposed as the independent systems, but as the general system united and supported with each other. Regarding the basic structure of the trust relationships, the Maitland theory set its basis on the agreement of the parties of the trust relationships for the creation of trusts. Under such aspect, what the court enforces the trust relationships to the trustee or the third party itself should not be the basis of the legitimacy of the enforcement of the trusts. The effects of the agreement for the creation of trusts to the trustee should be admitted and enforced actually by the Court. These conclusions could be evidenced by the discussion of the Maitland theory, who stated that the basis of the Equity should not be on the

89 See section 1 <5><6> of this chapter.

enforcement by the Court, and the new theoretical aspect should be discovered regarding the whole relationships between the Common Law and the Equity[90].

<6> As discussed above, the Maitland theory has the theoretical meaning as follows, in relation to the Double Ownership theory.

First, Maitland theory denied the presupposition of the Double Ownership theory regarding the system of Common Law and the Equity, but presupposes the united system of Common Law and the Equity supported with each other. Second, regarding the theoretical structure of the trust relationships, the Maitland theory opposed the presupposition of the Double Ownership theory. The Maitland theory explained that the legitimacy of the protection of the beneficial right should be based on the enforcement of the trust relationships by the Court of Equity. But, at the same time, this stated that the effects of the agreement regarding the creation of the trust relationships by the parties should be the true basis of the legitimacy of the protection of the beneficial right, and the enforcement by the court should be considered as only the admission and actual enforcement subject to the agreement of the parties. These discussions of the Maitland theory should be considered as the great and magnificent trial to convert the presupposition of the system of law and equity.

As examined in section 2 in this chapter, at the times of the Court System Reform in the U.K., the authority of the Court was destroyed and the new role of the theories of trusts, explaining the legitimacy of the Case Law from the consistent theoretical aspect, was required. The Maitland theory, explaining the legitimacy of the Law of Trusts and the Bona Fide doctrine based on the agreement by the parties of the trust relationships, should be considered as the great statement from the theoretical aspect, especially in the presupposition of the discussion, for providing the standard and the legitimacy regarding the judgements of the courts after the Court System Reform.

<7> Another theory which the Maitland theory criticized is “the Beneficiary Owner theory”. This theory explains that the beneficiary should be considered as the substantial owner of the trust property and the trustee has the “trust ownership”, that is, only the power for administering the trust property for the benefit of the beneficiary and representing the trust property in relation to the third parties. This theory explains that such division of the belongings between the substantial ownership and the trust ownership should be considered as the feature of the trusts[91]. Although this theory is sometimes called as “the Beneficial Real Right theory”, it should be better called as “the Beneficiary Owner theory” due to the structure of this theory[92].

In accordance with the discussion regarding the basic structure of the trusts, the basis of the duties and liabilities of the trustee to the beneficiary regarding the trust relationships under the Beneficiary Owner theory was the feature of the trust ownership of the trustee on the trust property itself. In other words, the trustee is the fictitious representative of the trust property to the third party, not the owner to the beneficiary and the trustee should owe the duties and liabilities on the trust relationships to the beneficiary[93].

On the other hand, the theoretical structure of the Bona Fide doctrine under the Beneficiary Owner

90 MAITLAND, EQUITY, pp.1−2.

91 SALMOND ON JURISPRUDENCE, pp.230−233.

92 In the previous discussions in Japan, the Beneficiary Owner theory in the U.K. and Scott theory in the U.S. were not distinguished. However, as discussed in detail in section 3 of Chapter 3, the theories in the U.K. and the theories in the U.S. should be considered utterly different, in the basic notions and theoretical features.

93 SALMOND ON JURISPRUDENCE, p.230.

theory was as follows. When the trustee transferred the trust property to the third party in breach of trust, the right which the third party was transferred from the trustee should be the trust ownership of the trustee, not the whole ownership of the trust property. Therefore, the substantial ownership of the beneficiary should not be affected by the transfer of the trust ownership from the trustee to the third party and the third party should be generally enforced by the beneficial right. However, when the third party was transferred the trust property for value without notice of the breach of trusts, as the trust ownership of the trustee is in appearance the ownership of the trust property to the third party, the beneficiary exceptionally cannot enforce the beneficial right, that is, the substantial ownership of the trust property to the third party[94]. From the discussions above, the third party, who was transferred the trust property for value without notice of the breach of trusts, can escape from the enforcement by the beneficial right and the other third party, and who was given the notice of the breach of trusts and was transferred the trust property for no value, should be enforced by the beneficial right.

<8> However, the discussions of the Beneficiary Owner theory regarding the basic structure of the trust relationships and the Bona Fide doctrine is theoretically ambiguous. The Beneficiary Owner theory explains regarding the declaration of trusts that those having direct ownership of the property can create the trust relationships on that property[95]. Considering from this explanation, the Beneficiary Owner theory explains that, as the Maitland theory should, the agreement of the parties of the trust relationships create the trust relationships, and this is the division of the trust ownership and the substantial ownership of the trust property.

However, presupposed this explanation, the effect of the agreement between the parties of the trust relationships regarding the belongings of the rights on the trust property should not be effected by the third party who is not the parties of such agreement. Therefore, the trust ownership of the trustee regarding the trust property should be the ownership, even though fictitious, against the third party and the third party who was transferred the trust property, regardless for value without notice of the breach of trusts or not, should be considered as being transferred the ownership of the trust property. In relation to this point, another explanation should be given for the enforcement of the beneficial right to some range of the third party. On the other hand, to avoid such problem discussed above, considering the beneficial right as the property in Common Law which can be effective to the public, it should be difficult to explain why the Court of Equity can enforce the substantial ownership to the trustee or the third party, while the Court of Equity has no jurisdiction on the matter of the Common Law. However, the Beneficiary Owner theory does not make any explanation regarding such theoretical problems.

From these examinations, the Beneficiary Owner theory, stating that the trustee has the trust ownership, the beneficiary has the substantial ownership of the trust property, and the third party, who was transferred the trust property from the trustee, should be enforced by the substantial ownership of the beneficiary except for value without notice of the breach of trusts, should be considered not as on the basis of some theoretical aspect, but as “the reversed inference” from the results of the Case Laws on the trust relationships and the Bona Fide doctrine.

<9> The Maitland theory criticizes the Beneficiary Owner theory from two aspects. First, the Maitland theory criticizes the Beneficiary Owner theory in relation to the historical development regarding the enforcement of the beneficial right to the third party. Such enforcement is admitted only to the trustee at

94 SALMOND ON JURISPRUDENCE, pp.230, 232−233.
95 SALMOND ON JURISPRUDENCE, p.230 n.1.

first. After that, the range admitted was enlarged to the third party gradually but the Beneficiary Owner theory, in which the enforcement of the beneficial right should be generally admitted, might overlook such historical development[96]. Second, the Maitland theory criticizes that the Beneficiary Owner theory contradicted to the standard between the Common Law and the Equity provided in s.25 para.11 of the Judicature Act of 1873[97].

Regarding the first point, the fact that the range of the enforcement was enlarged from the trustee to the third party gradually[98], but it is not concluded only from such fact that the Beneficiary Owner theory overlooked the historical development of the Bona Fide doctrine. Not only the Maitland theory concludes that the beneficial right was effected basically to the trustee only from the fact that the enforcement of the beneficial right was admitted only to the trustee, but also the discussion of the Beneficiary Owner theory can be concluded that the beneficial right should be effected basically to the third party also from the fact that the range of the enforcement admitted was enlarged to the third party gradually. Since both explanations of the Maitland theory and the Beneficiary Owner theory reaches the same conclusion, it is obvious that the first criticism of the Maitland theory to the Beneficiary Owner theory should not be crucial.

<10> Regarding the s.25 para.11 of the Judicature Act of 1873[99], the Maitland theory states that, when the rules of Common Law and the rules of Equity conflict, the rules of Equity prevail. The Maitland theory discusses as follows.

The Judicature Act of 1873 is provided only for adjusting the procedure of the Courts after the System Reform. Since this does not alter the substantive rules of the Common Law or the Equity, it should not be interpreted as the rule regarding the conflict between the rules of Common Law and Equity. If the legal trust ownership of the trustee regarding the trust property should be restrained by the equitable substantial right of the beneficiary, or the equitable ownership and the legal ownership should exist on the same property independently, it should be considered that there occurred "the conflict or the variance" between the legal right of the trustee and the equitable right of the beneficiary on the trust property. In these cases, the s.25 para.11 of the Judicature Act of 1873 should be applied. As such, the equitable right of the beneficiary should only be the right admitted under the system of law and equity, and the legal right of the trustee should not be existed. In this case, the existence of the trust relationships should be denied, which the Judicature Act of 1873 should not expect. Therefore, the Beneficiary Owner theory on the basic structure of the trust relationships cannot be supported[100].

However, presupposed that s.25 para.11 of the Judicature Act of 1873 should not alter the substantive rules as the Maitland theory states, it can be considered that the word "Rules" of the provision means only the procedural rules and the provision should not be applied to "the conflict or the variance" of the substantive rules regarding the relationships of the legal right of the trustee and the equitable right of the beneficiary in the trust relationships. The basis of the second criticism of the Maitland theory regarding the Beneficiary Owner theory should be considered as not the clear interpretation of the Judicature Act 1873, but has another theoretical basis.

<11> Regarding the reason why the contradiction of the s.25 para.11 of the Judicature Act of 1873

96 MAITLAND, EQUITY, pp.117-121.
97 MAITLAND, EQUITY, pp.16-18, 151-154.
98 See section 1 <1> of this chapter.
99 36&37 Vict. c.66 s.25(11), 8 L.R.Stat. 306, 321 (1873).
100 MAITLAND, EQUITY, pp.16-18, 151-154.

should be occurred under the Double Ownership theory and the Beneficiary Owner theory, the Maitland theory discusses as follows. Under the Double Ownership theory and the Beneficiary Owner theory, the legal right of the trustee and the equitable right of the beneficiary can be coexisted on the trust property and "the conflict or the variance" of the legal property and the equitable property should be occurred on the trust property. Under the Maitland theory, all rights of the trust property should belong to the trustee and the right of the beneficiary should not be the right on the trust property but the claim to the trustee personally. The conflict or the variance of the Common Law and the Equity should not be occurred on the trust property[101].

This discussion of the Maitland theory regarding the character of the equitable right should be consistent with the Maitland theory regarding the system of law and equity. The Maitland theory discusses that the Common Law and the Equity should be united and supported each other, although the theoretical difference between the Common Law and the Equity should be maintained. In relation to this point, the Beneficiary Owner theory explains the standard by the revered inference from the cases between the beneficiary and the third party, presupposing the existence of the Case Law by the Court of Equity. Such purpose of the discussion should be fundamentally different from the Maitland theory, which tried to legitimate the Case Law without the authority of the courts.

The purpose of the second criticism of the Maitland to the Beneficiary Owner theory should be considered as proving the legitimacy of the discussion regarding the system in which the Common Law and the Equity should be united and supported each other.

<12> From these examinations, it should be considered that the basis of the conflict between the Maitland theory and the Beneficiary Owner theory should be existed not on the interpretations of the actual problems, but on the basic theoretical presupposition and the notions of the system of law and equity. As discussed above, the Maitland theory considers that the Common Law and the Equity should be united and supported each other, although the difference of the both theories should be maintained, and tries to find the theoretical structure regarding the Bona Fide doctrine and the trust relationships. On the other hand, the Beneficiary Owner theory presupposes the existence of the traditional Case Law created by the Courts and tries to explain the Bona Fide doctrine and the trust relationships through the reversed inference from the actual results of the Case Law.

Since such differences regarding the presupposition and the theoretical basis, from the aspect of the Maitland theory, which tries to explain the relationship between the Common Law and the Equity theoretically, the explanation of the Beneficiary Owner theory should not be the theoretical discussion, but a kind of metaphor.

Section 5 Meaning of the Maitland Theory in the U.K.

<1> The theoretical meanings of the Maitland theory can be as follows.

First, the Maitland theory states that the trust relationships should be created with the agreement of the parties of the trust relationships, and it can be enforced to the third party who should be considered having the equal status with the trustee. The Maitland theory should have the great theoretical meanings, since it reconstructs the basic structure of the trust relationships and the Bona Fide doctrine on the basis of the agreement of the parties of the trust relationships and tried to make the dynamic conversion regarding the traditional and general presupposition of the previous theories of trusts.

Second, the Maitland theory states that Common Law and the Equity should be united and

101 MAITLAND, EQUITY, pp.16-18.

supported each other, although each system is followed by different historical development and such difference should be theoretically maintained. The Maitland theory explains the basic structure of the trust relationships and the Bona Fide doctrine, including the relationship between the legal property and the equitable property, from the consistent aspect based on the notion of the system of law and equity. The Maitland theory should be also considered to have the great theoretical meanings, in such aspect that it tries to make the fundamental conversion of the traditional notion of the previous theories on trusts.

However, the Maitland theory does not intend to alter the actual results of the Bona Fide doctrine which was created by the Court of Equity. Rather, the Maitland theory firmly maintains the standard of the Bona Fide doctrine, that is, the beneficial right can be enforced to the third party who had notice of the breach of trusts, who was transferred the property for no value, or who was not transferred the legal title of the trust property, while not to the third party who was transferred the trust property for value without notice, in spite of the dynamic theoretical conversions regarding the presupposition of the discussions. Therefore, the Maitland theory should be considered as presenting the theoretical structure regarding the trust relationships and the Bona Fide doctrine. It tries to explain the legitimacy of the Law of Trusts by giving the consistent theoretical aspect not on the basis of the authority of the court in time of the Court System Reform in the U.K. The Maitland theory mentions that the legal right and the equitable right should be distinguished and the difference of the Common Law and the Equity should be theoretically maintained[102]. This should indicate what the Maitland theory pursues clearly.

<2> However, the theoretical structure of the Maitland theory should have some restraints due to such theoretical background.

First, since the purpose of the Maitland theory is to explain the traditional Case Law consistently, the actual results of the Bona Fide doctrine decided by the Court of Equity should be principally maintained. And the traditional structure of the system of law and equity, and the basic notion of property should also be maintained since the legitimacy might exist due to them. The Maitland theory states that the united system of law with the Common Law and the Equity should be presupposed on the one hand, the difference of the Common Law and the Equity should be maintained theoretically on the other.

Second, the Maitland theory stated based on the Court System Reform which destroyed the authority of the Court of Equity. Therefore, if the authority or reliability of the Courts after the System Reform is recovered again, the importance of the Maitland theory should be diminished. Actually, since the basis of the legitimacy of the Case Law for the authority of the Courts became unquestioned again and in such circumstances, the Maitland theory might restrain the judgements of the courts. In this case, the legitimacy produced through this theory might not be needed, because the basis of the legitimacy of the judgements should be considered as the authority of the Courts themselves.

<3> The cases regarding the Bona Fide doctrine after the Court System Reform did not follow the Maitland theory.

For example, In re Diplock[103], citing the previous cases only, in which case the property was transferred from the trustee to the third party in breach of trusts, mingled with the property of the third party, and consumed a part, stated regarding the standard between the beneficiary and the third party as

102 MAITLAND, EQUITY, pp.19−20, 43.
103 [1948] Ch. 465.

follows.

First, in case the third party had the fiduciary relationship with the beneficiary, and in case the third party was noticed the breach of trusts, the right of the beneficiary completely prevailed and the beneficiary could restore all properties transferred in breach of trusts from the properties mingled. Second, when the property from several trust relationships was mingled in breach of trusts, the right of the beneficiaries should be divided pro rata. Third, when the trust property was transferred to the third party who was transferred the property for value without notice, the beneficiary could not enforce the liability of the third party. Fourth, when the third party was transferred the trust property for no value but without notice of the breach of trusts, and the property transferred was not mingled yet, the third party should be enforced to restore the property. Fifth, when the third party transferred the trust property for no value but without notice of the breach of trusts, and the property transferred was already mingled, both the third party and the beneficiary should not prevail with each other and the result regarding the rights of the both should be divided pro rata[104].

Under the Maitland theory, in relation to the standard of the Bona Fide doctrine, the reason why the third party, who is transferred the trust property for no value, should be enforced the liability to the beneficiary, is that the third party should be considered as equal to the trustee. That should be considered as undertaking the duties and the liabilities the trustee owes to the beneficiary. The third party should be considered to breach trusts if the third party mingles the trust property transferred for no value with the properties of the third party because such act of the third party should be considered as equal to the act of the trustee. Such act should be blamed as another breach of trusts and the third party should be enforced the liability by the beneficiary, regardless the third party is noticed of the breach of trusts or not.

However, In re Diplock delivered the sentence based on whether the third party mingled the trust property, which was transferred for no value but without notice of the breach of trusts, with the properties of the third party or not, only citing the previous cases. It should be obvious that the case did not follow the standard of the Maitland theory.

<4> The current theories of trusts in the U.K. do not subject to the Maitland theory in relation to the discussions regarding the Bona Fide doctrine and the basic structure of the trust relationships.

The theories on trusts in times of the Court System Reform which are other than Maitland theory explain the definition of trusts and the Bona Fide doctrine in the same way as the theories before the Court System Reform. They explain the definition of trusts only as the Case Law creating the equitable relationships on the trust property[105], neither as the relationships created by the agreement of the parties of the trust relationships, nor as that the whole title of the property should be belonged to the trustee and the beneficial right should be the claim to the trustee. These theories mention that, in case of the breach of trusts, the courts determine whether the third party is transferred the property for value without notice or not[106], and they do not examine the theoretical structure of the Bona Fide doctrine or the relationships

104 In re Diplock, [1948] Ch. 465, 533 et seq. As the cases cited in In re Diplock, In re Hallett's Estate, 13 Ch.D. 696 (1880); In re Guardian Permanent Benefit Building Society, 23 Ch.D. 440 (1882); Sinclair v. Brougham, [1914] A.C. 398, 441.

105 GODEFROI ON TRUSTS AND TRUSTEES, pp.1–3; SNELL, PRINCIPLES OF EQUITY, pp.40, 44–45, 48; UNDERHILL, TRUSTS AND TRUSTEES, pp.1–2; LEWIN ON TRUSTS, pp.13–16; SMITH, PRINCIPLES OF EQUITY, pp.23–24.

106 GODEFROI ON TRUSTS AND TRUSTEES, p.576 et seq.; SNELL, PRINCIPLES OF EQUITY, pp.16–33; UNDERHILL, TRUSTS AND TRUSTEES, p.411 et seq.; LEWIN ON TRUSTS, p.556 et seq.; SMITH,

of the basic structure of the trust relationships and the Bona Fide doctrine.

The theories on trusts after the Maitland theory, explaining the definition of trusts, mentions that the Maitland theory with the traditional theories before the Court System Reform, but neither clearly discuss whether the trust relationships should be created by the agreement of the parties of the trust relationships or not, nor the beneficial right should be considered as the real right of the trust property or the claim to the trustee[107]. These theories only explain the two equitable doctrines shown in cases handled by the court and the actual results of the cases in detail, but not examine the relationship between the Bona Fide doctrine and the basic structure of the trust relationships, as the Maitland theory[108]. Accordingly, the traditional feature of the Law of Trusts and the Bona Fide doctrine in the U.K. is never disappeared in the Court System Reform or by the Maitland theory, and still is maintained in the modern U.K. The traditional feature of the Law of Trusts, in which the equitable relationships can be created by the judgement of the courts, and the traditional features of the Bona Fide doctrine, by which the legal title of the third party and the equitable right of the beneficiary should be adjusted, should be considered as still maintained in the modern U.K., as before the Court System Reform.

<5> Whereas the traditional features of the Law of Trusts and the Bona Fide doctrine should be considered as still maintained in modern times, it should never be considered that the Maitland theory does not affect to the Bona Fide doctrine and the Law of Trusts at all. Rather, the Maitland theory, which is based on the agreement of the parties of the trust relationships regarding the basic structure of trusts, affects the theoretical position of the Law of Trusts in the system of law and equity in the U.K. greatly.

Presupposing that the enforcement by the Court of Equity in each case should be the basis of the Law of Trusts and the standard between the legal title and the equitable right created independently in each system of law and equity are the same theoretically, in relation to whether the trustee or the third party, who had the legal title of the trust property and should be enforced of the trust relationships.

Since the trust relationships should be created by the agreement of the parties of the trust relationships under the Maitland theory, the reason why the trustee should owe the duties and liabilities of the trust relationships to the beneficiary, should be considered as the direct effects of the agreement creating the trust relationships. On the other hand, the reason why the third party who is transferred the trust property from the trustee should be enforced by the beneficial right, should be considered as not by undertaking the trust relationships by the third party, but by the standard regarding the judgement whether the third party should be considered as equal to the trustee or not. Therefore, under the

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PRINCIPLES OF EQUITY, p.356 et seq.; SUGDEN, VENDORS AND PURCHASERS, p.736 et seq. In these theories, LEWIN ON TRUSTS explained the standard of the Bona Fide doctrine as the result of "the privity", but, at the same time, he explained such "privity" should be enforced by the Court of Equity and the presupposition of discussion should be different from Maitland theory. See LEVIN ON TRUSTS, pp.15-16.

107 HANBURY AND MARTIN, MODERN EQUITY, p.17 et seq., p.47 et seq., p.601 et seq.; KEETON, LAW OF TRUSTS, pp.2-6; PARKER & MELLOWS, MODERN LAW OF TRUSTS, p.12 et seq.; RIDDALL, LAW OF TRUSTS, p.1 et seq., pp.291-293; PETTIT, EQUITY AND THE LAW OF TRUSTS, pp.25-26; TODD & LOWRIE, pp.47-48; TODD & WATT, p.1.; UNDERHILL & HAYTON, p.3 et seq. There was the opposition to use the distinguished notions as "jus in personam" and "jus in rem". See TURNER, EQUITY OF REDEMPTION, p.152.

108 HANBURY AND MARTIN, MODERN EQUITY, p.31 et seq., p.682 et seq.; KEETON, LAW OF TRUSTS, p.394 et seq.; PARKER & MELLOWS, MODERN LAW OF TRUSTS, p.794 et seq.; RIDDALL, LAW OF TRUSTS, p.432 et seq.; PETTIT, EQUITY AND THE LAW OF TRUSTS, p.529 et seq.; TODD & LOWRIE, p.422 et seq.; TODD & WATT, p.481 et seq.; UNDERHILL & HAYTON, p.983 et seq.

Maitland theory, the theoretical difference should be obvious between the case that the trustee should owe the duties and liabilities of the trust relationships to the beneficiary and the case that the third party should be enforced by the beneficial right.

<6> Under the Maitland theory, the reason why the third party should be enforced by the beneficial right, can be also considered as the enlargement of the effects of the agreement of the parties regarding the trust relationships to the third party. In this regard, there is a theoretical relevancy between the reasons why the trustee or third party should owe the duties and liabilities to the beneficiary.

There are clear theoretical distinctions under the Maitland theory between the relationships of the trustee and the beneficiary. "The inner relationships of the trusts", and the relationships of the beneficiary and the third party, that is, "the outer relationships of trusts" are different. In other words, under the Maitland theory, the inner relationships of trusts should be resolved only by the agreement creating the trust relationships, while the outer relationships of trusts should not be resolved only by the agreement creating the trust relationships, but should be resolved by the judgement of the equality between the third party and the trustee.

Such theoretical distinction between the inner relationships of the trusts and the outer relationships of the trusts might give the new aspect which can be good for construction of the Law of Trusts in the whole system of law and equity. In considering the relationships between the Law of Trusts and other laws or institutions which are resemble to trusts, it should not be always needed to co-examine the features of the fiduciary relationships between the trustee and the beneficiary, and the features of the Bona Fide doctrine. Under the Maitland theory, only the features of the fiduciary relationships can be discussed theoretically as the inner relationships of the trusts, compared to the laws of administering the property other than trusts, and it cut off the features of the Bona Fide doctrine as the outer relationships of the trusts.

Appearing in the times of the Court System Reform, the Maitland theory has the great meanings as the basis of the discussions regarding the relationships of the Common Law and the Equity and the relationships of the Case Law and the theories on trusts. It tried to convert theoretically the traditional features of the Law of Trusts and the Bona Fide doctrine. The Maitland theory also gives great contribution to the theoretical development on the Law of Trusts, offering several possibilities regarding the features of the Law of Trusts and the Bona Fide doctrine.

CHAPTER 3 Conflict of Theories in the U.S.

<1> The Bona Fide doctrine in the U.S., as in the U.K., is generally considered as originated from the standard of the Case Law created by the Court of Equity in the 15th and the 16th centuries in the U.K[109]. The basic structure of the standard between the beneficiary and the third party under the Bona Fide doctrine in the U.S., is the same as the Bona Fide doctrine in the U.K. In accordance with this doctrine, the third party who is transferred the trust property for value without notice of the breach of trusts of the trustee can escape from the enforcement by the beneficiary and the third party is given the notice of the breach of trusts or the third party who is transferred the property for no value, should be enforced by the beneficiary[110].

109 SCOTT ON TRUSTS, s.284 p.36.

110 RESTATEMENT (2d) OF TRUSTS, ss.284-326; SCOTT ON TRUSTS, ss.284-326.6 pp.35-320. RESTATEMENT (3d) OF TRUSTS does not refer the Bona Fide doctrine. It may mean that the Bona Fide doctrine becomes more general and not only for trust the Bona Fide doctrine and should be maintained in the U.S. Common

<2> However, the standard under the Bona Fide doctrine in the U.S. is transformed in some important part from the Bona Fide doctrine in the U.K.

Moreover, regarding the development of the theories on Trusts in the U.S. occurred from the end of 19th century to the beginning of 20th century, the Ames theory stated by J.B. Ames, which has the same theoretical structure as the Maitland theory in the U.K., was accepted generally.
After 1910s, the objective discussions, which stated that the right of the beneficiary should be considered as the real right of the trust property, emerged gradually regarding the tacking of the mortgage or the feature of the decree by the Court of Equity. In 1930s, the Restatement of Trusts, reported by A.W. Scott, accepted the theoretical structure which considers the beneficial right to be real right of the trust property. The Scott theory was accepted generally in spite of the Ames theory. From these facts, it should be noted that the times of the transformation of the Bona Fide doctrine in the U.S. and the times of the conflict of theories on trusts in the U.S. are very close and there might be some theoretical relationships between the transformation of the Bona Fide doctrine and the conflict of theories on trusts in the U.S.

It should also be noted that the Scott theory states the revision or modification of the traditional standard in the Case Law and the standard of the Case Law could not be the presupposition of the theories on trusts in the U.S. This contradicts to the theories on trusts, which might affect the standard of the Bona Fide doctrine as the Case Law.

<3> From the discussions above, the transformation of the standard of the Bona Fide doctrine in the U.S. might have more theoretical meanings than only the difference of the tendency of the courts in the U.K. and in U.S. These transformations of the Bona Fide doctrine in the U.S. should be based on the difference of the presupposition such as the Law of Trusts and the Bona Fide doctrine, the relationships between the Bona Fide doctrine as the Case Law and the theories on trusts, the notion of the trust property, and the position of the Law of Trusts in the whole system of the Common Law and the Equity.

As discussed above, the Bona Fide doctrine in the U.S., which seems to be the same as the Bona Fide doctrine in the U.K. should be considered to have the unique theoretical features in the U.S. Therefore, the features of the Bona Fide doctrine and the relationships between the Case Law and the theories on trusts in the U.S., should not be considered as the only succession or the continuation, but should be examined independently from those of the U.K.

Section 1 Transformation of Doctrine in the U.S.

<1> The standard between the third party and the beneficiary under the Bona Fide doctrine is almost the same as the Bona Fide doctrine in the U.K., but, in some aspects the transformation of the standard is influenced by the unique feature in the U.S.

When the trust property, transferred to the third party from the trustee in breach of trusts, consisted with the chose in action not on the negotiable instruments, or the equitable interests, the standard between the third party and the beneficiary under the Bona Fide doctrine in the U.S. differs from in the U.K.

<2> In the U.K., when the chose in action as the trust property, not on the negotiable instruments or on the specialty, was transferred to the third party in breach of trusts, the third party should be enforced by the beneficial right even though the third party was transferred the chose in action for value without

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Law and equity system.

notice, in accordance with the traditional doctrine that the chose in action should not be transferred in Common Law[111].

However, the cases in the U.S. vary at this point, as follows.

<3> The leading case in the early times was Murray v. Lylburn[112], in which the trustee, who was brought in action by the beneficiary for selling the land of trust property and purchasing the bonds and the mortgages, transferred such bonds and the mortgages to the co-defendant. Chancellor Kent decided that the third party was given the notice of trusts as the actual solution of the case, but insisted that, as the general principle, the third party without notice of the trusts should not be enforced by the trusts, because the third party who was transferred the chose in action could inquire the existence of "the patent equity" by which the debtor could be demurrable to the transferor, but could not inquire "the latent equity" which was held by the other than the transferor[113].

Other cases in New York Court accepted the distinction between "the patent equity" and "the latent equity" as Chancellor Kent stated[114]. For example, in Bebee v. Bank of New York[115], which was decided before Murray v. Lylburn, stated that the transferee of the chose in action could not be transferred the legal lien of the trust property but only be transferred the equitable lien to the debtor. In this case, the transferee of the chose in action could not be considered as the legal title holder who prevails to the equitable right[116]. Bush v. Lathrop[117], in which the bond and the mortgage, not on the negotiable instruments, was transferred for the security purpose to the third party who was transferred it for value without notice, stated that it could be considered as the case law of New York that the transferee of the chose in action should be enforced by the equity in that chose in action. The case examined the previous cases in New York including Murray v. Lylburn and stated that the statements of Chancellor Kent regarding the distinction of "the patent equity" and "the latent equity" could not be considered as the Case Law in New York, and could not be accepted[118]. Other than New York, there were cases that stated the transferee of the chose in action should be enforced not only by the demurrer of the debtor to the transferor but also by the equitable rights of others[119]. For example, Downer v. South Royalton Bank[120] mentioned the general doctrines which stated that, if there are the equal equities, the Common Law prevails and that, if the both do not have the legal rights, the prior equitable right prevails. The case, citing the cases in the U.K., mentioned that the transferee of the chose in action cannot be considered as

111 Tourville v. Naish, 3 P.Wms. 307, 308, 24 Eng.Rep. 1077 (1734); Ord v. White, 3 Beav. 357, 366, 49 Eng.Rep. 140, 143 (1840); Mangles v. Dixon, 1 Mac.&G. 437, 443, 41 Eng.Rep. 1334, 1336 (1849), 3 H.L.C. 702, 731, 10 Eng.Rep. 278, 290 (1852); Cockell v. Taylor, 15 Beav. 103, 118, 51 Eng.Rep. 475, 481 (1852); Clack v. Holland, 19 Beav. 262, 274, 52 Eng.Rep. 350, 355 (1854); Athenaeum Life Assurance Society v. Pooley, 3 De.G.&J. 294, 302, 44 Eng.Rep. 1281, 1284 (1858).

112 2 Johns.Ch. 441 (N.Y. 1817).

113 Id. at 443.

114 Bebee v. Bank of New York, 1 Johns. 529 (N.Y. 1806); Bush v. Lathrop, 22 N.Y. 535 (1860); David Stevenson Brewing Co. v. Iba, 155 N.Y. 224, 49 N.E. 677, 678 (1898); In re McClancy's Estate, 182 Misc. 866, 45 N.Y.S.2d 917, 922 (1943), aff'd, 268 A.D. 876, 51 N.Y.S.2d 90 (1944), aff'd, 294 N.Y. 760, 61 N.E.2d 752 (1945); In re Knowlton's Will, 17 Misc.2d 333, 185 N.Y.S.2d 843, 844 (1959).

115 1 Johns. 529 (N.Y. 1806).

116 Id. at 548.

117 22 N.Y. 535 (1860).

118 Id. at 547.

119 Downer v. South Royalton Bank, 39 Vt. 25 (1866); State exrel. Rice v. Hearn, 109 N.C. 150, 13 S.E. 895 (1891); Patterson v. Rabb, 38 S.C. 138, 17 S.E. 463, 465 (1893).

120 39 Vt. 25 (1866).

the party who was transferred the legal title for value without notice and the transferee should be compelled to the burden of the equity on the chose in action[121].

There were also cases accepting the distinction of Chancellor Kent, which stated that the transferee of the chose in action who was transferred it for value without notice of the beneficial right should not be enforced by the equitable burden[122]. Losey v. Simpson[123] stated that, although the doctrine that the transferee should be enforced by the equitable right in general, can be supported only regarding the equitable right between the debtor and the transferor, and the transferee should not be enforced by "the latent equity" which other party has[124].

<4> To these conflicts of cases noted above, the Restatement of Trusts provided that it should be considered as the main stream of the Case Law in the U.S. that the third party who was transferred the chose in action for value without notice of the latent equity should not be enforced by such latent equitable right and the Bona Fide doctrine should be applied to the cases of the transfer of the chose in action not on the negotiable instruments[125]. The Restatement of Contracts, citing the Restatement of Trusts, regarding the case that the chose in action as the trust property was transferred to the third party, stated that the third party should not be enforced by the equitable right if the transferee was transferred it for value without notice of such equitable burden[126].

<5> Under the traditional standard of the Bona Fide doctrine, unless the third party, who was transferred the trust property from the trustee, was transferred the legal title of the trust property, the third party should be enforced by the beneficial right. If this traditional standard was applied to the case when the trust property consisted the equitable rights, the third party, who was transferred the equitable right from the trustee, could never be transferred "the legal title" of the equitable right and transferred the equitable right only. Therefore, when the third party was transferred the equitable right in breach of trusts, the beneficiary who had the beneficial right since the prior equitable right should always prevails to the equitable right of the third party transferred from the trustee. In the cases in the U.K., the third party, who was transferred the equitable right of the trust property, regardless for value without notice or not, should be enforced by the beneficial right[127].

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121 Id. at 30−31.

122 Losey v. Simpson, 11 N.J.Eq. 246 (1856); People's Banking Co. v. Fidelity & Deposit Co., 171 A. 345 (Md. 1934); Lasser v. Philadelphia Nat. Bank, 183 A. 791, 792 (Pa. 1936); Getz v. City of Harvey, 118 F.2d 817, 821 (7th Cir. 1941), cert. denied, City of Harvey v. Getz, 314 U.S. 628, 62 S.Ct. 59 (1941).

123 11 N.J.Eq. 246 (1856).

124 Id. at 254.

125 RESTATEMENT (2d) OF TRUSTS, s.284 cmt.b; SCOTT ON TRUSTS, s.284.1 pp.42−43.

126 RESTATEMENT (1st) OF CONTRACTS, s.174. As the cases supported this, see Peoples Banking Co. v. Fidelity & Deposit Co., 171 A. 345, 346 (Md. 1934); Maryland Casualty Co. v. Bank of Germantown & Trust Co., 320 Pa. 129, 182 A. 362, 364 (1936); Lasser v. Philadelphia Nat. Bank v. 183 A. 791, 792 (Pa. 1936); First Nat. Bank v. Mayor and City Council of Baltimore, 27 F.Supp. 444, 452 (D.C.D.Md. 1939), aff'd, 108 F.2d 600, 602 (4th Cir. 1940). And see, RESTATEMENT (2d) OF CONTRACTS, s.343.

127 Brace v. Marlborough, 2 P.Wms. 491, 496, 24 Eng.Rep. 829, 831 (1728); Rice v. Rice, 2 Drewry 73, 77, 61 Eng. Rep. 646, 647 (1853); Rooper v. Harrison, 2 K.&J. 86, 108, 69 Eng.Rep. 704, 713 (1855); Phillips v. Phillips, 4 De G.F.&J. 208, 215, 45 Eng.Rep. 1164, 1166 (1861); Stackhouse v. Jersey, 1 J.&H. 721, 730, 70 Eng.Rep. 933, 937 (1861); Cory v. Eyre, 1 De G.J.&S. 149, 167, 46 Eng.Rep. 58, 65 (1863); Thorpe v. Holdsworth, 7 Eq.Cas. 139, 147 (1868); Spencer v. Clarke, 9 Ch.D. 137, 140 (1878); Cave v. Cave, 15 Ch.D. 639, 647 (1880); Carritt v. Real and Personal Advance Company, 42 Ch.D. 263, 269 (1889); Isaac v. Worstencroft, 67 L.T. 351, 352 (1892); Taylor v. London & County Banking Co., [1901] 2 Ch. 231, 262; Cloutte v. Storey, [1911] 1 Ch. 18, 24 (1910); Hill v. Peters,

<6> The cases in the U.S. vary on this point. Some cases before the Restatement of Trusts, as in the U.K., stated that the Bona Fide doctrine should not be applied to the cases between a beneficiary and a third party who was transferred equitable rights[128]. For example, Briscoe v. Ashby[129], citing the doctrine "the vendor cannot transfer the title over the title the vendor had (Nemo plus juris ad alium tranferre potest quam ipse habet)", stated that the third party, who was transferred the equitable right, should be enforced by the beneficial right, since the trustee as the transferor should owed the duties and liabilities in equity to the beneficiary[130].

There were also the cases stating that the third party, who was transferred the equitable right of the trust property, should not owe the liability to the beneficiary if the third party was transferred it for value without notice[131]. For example, Luckel v. Phillips Petroleum Co.[132], in which the equitable right of the trust property was transferred in breach of trusts to the third party for value without notice, stated that the standard applied to this case should not be the one regarding the relationship between the legal title and the equitable right but the one regarding the relationship between the equitable rights with each other. The case stated that the reliance of the third party, who was subject to the business practice regarding the rational of the transaction, should be protected, and stated that it should be unjust and unequitable not to protect the interests of the third party only because the right of the third party was equitable[133].

<7> Regarding these conflicts of the cases, the Restatement of Trusts states that, since the equitable right can also be the trust property, when the equitable right of the trust property is transferred to the third party for value without notice in breach of trusts, the third party should not be enforced the trusts[134].

As the result of the Restatement of Trusts, the notion that a third party, who is transferred a trust property even for value without notice, should be enforced by a beneficiary, would be limited as follows.

First, cases in which a third party is transferred an equitable right, as a trustee does not transferred the legal title to the third party and promises to transfer the title in the future, or as a trustee creates a trust for a third party on the original trust property[135]. Second, cases in which a third party is transferred

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[1918] 2 Ch. 273, 280; Assaf v. Fuwa, [1955] A.C. 215, 229 (1954).

128 Woods v. Dille, 11 Ohio 455, 458 (1842); Briscoe v. Ashby, 65 Va.(24 Gratt.) 454 (1874); Henry v. Black, 213 Pa. 620, 63 A. 250, 253 (1906); Wasserman v. Metzger, 105 Va. 744, 54 S.E. 893, 895 (1906); Hendrick v. Lown, 132 Misc. 498, 230 N.Y.S. 141, 142 (1928).

129 65 Va.(24 Gratt.) 454 (1874).

130 Id. pp.475, 478.

131 Preston's Adm'r v. Nash, 76 Va.(1 Hans.) 1, 10 (1881); Luckel v. Phillips Petroleum Co., 243 S.W. 1068 (Tex. Com.App. 1922); Loring v. Goodhue, 259 Mass. 495, 156 N.E. 704, 705 (1927); Goodhue v. State Street Trust Co., 267 Mass. 28, 165 N.E. 701, 705 (1929).

132 243 S.W. 1068 (Tex.Com.App. 1922).

133 Id. at 1069.

134 RESTATEMENT (2d) OF TRUSTS, s.285 cmt.a; SCOTT ON TRUSTS, s.285 pp.50-51. The equitable right can be created as the trust property, see RESTATEMENT (2d) OF TRUSTS, s.83; SCOTT ON TRUSTS, s.83.

135 Villa v. Rodriguez, 79 U.S.(12 Wall.) 323, 338 (1870); Bergengren v. Aldrich, 139 Mass. 259, 29 N.E. 667, 668 (1885); Peay v. Seigler, 48 S.C. 496, 26 S.E. 885, 892 (1897); Johnson v. Hayward, 74 Neb. 157, 103 N.W. 1058, 1060 (1905); Wenz v. Pastene, 209 Mass. 359, 95 N.E. 793, (1911); Bisbee v. Mackay, 215 Mass. 21, 102 N.E. 327, 329 (1913); Long Lake Lumber Co. v. Stewart, 88 P.2d 414, 416 (Wash. 1939); Hartford National Bank and Trust Company v. Westchester Federal Savings & Loan Association, 422 F.Supp. 203, 204 (S.D.N.Y. 1976), rev'd on other grounds, 555 F.2d 1122, 1124 (2d Cir. 1977); RESTATEMENT (2d) OF TRUSTS, s.286.

an equitable right which is unenforceable (that is, rights created by fraud or rights created by the judgement in which a procedural mistake exists)[136]. Third, the cases in which a third party is transferred an equitable right as a trustee who has the equitable right transferred as successive conveyance of that equitable right[137]. The Restatement of Trusts explains the reason why the third party, who is transferred it for value without notice, should not be protected in such cases. It states that, although in these three cases the third party is transferred the equitable right from the trustee, other than the case regarding the equitable right of the trust property, there is the beneficial right prevailing equitable right on the trust property and the third party should not be protected even the third party is transferred it for value without notice[138].

<8> The standard between the beneficiary and the third party under the Bona Fide doctrine in the U.S. differs in some points from the Bona Fide doctrine in the U.K. These differences between the U.K. and the U.S. occurred regarding the application of the Bona Fide doctrine for the specific cases. When the chose in action which is not on the negotiable instruments or the equitable right is transferred in breach of trusts, whether the third party who is transferred the trust property for value without notice should be protected or not is different. Such the difference of the Bona Fide doctrine in the U.K. and in the U.S. might be based on the difference of the presupposition in the U.K. and in the U.S. regarding the notion of "the trust property" or the relationships between the legal title and the equitable right.

The transformation of the Bona Fide doctrine in the U.S. is accomplished not by the amount of consistent cases by the courts in the U.S. Rather, the Restatement of Trusts provided one results to the conflict of the various cases, which transformed the Bona Fide doctrine in the U.S. formally. The difference of the Bona Fide doctrine in the U.K. and in the U.S. might be affected by the difference of the basic notion regarding the Law of Trusts and the Bona Fide doctrine in the U.K. and in the U.S.

<9> For considering the features of the Bona Fide doctrine in the U.S. through examining the background and the reason of the transformation of the Bona Fide doctrine, it should be better to examine the theories on trusts in the U.S., in relation to the notion of the trust property or the relationships between the legal title and the equitable right, rather than to examine the details of the

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136 United States v. Laam, 149 F. 581, 585 (C.C.N.D.Cal. 1906); La Belle Coke Co. v. Smith, 221 Pa. 642, 70 A. 894, 896 (1908); Duncan Townsite Co. v. Lane, 245 U.S. 308, 312, 38 S.Ct. 99, 101 (1917); Starck v. Goodman, 288 Ill.App. 347, 6 N.E.2d 503, 506 (1937).

137 RESTATEMENT (2d) OF TRUSTS, s.285 cmt.b 3.; SCOTT ON TRUSTS, s.285 p.47. The standard regarding the cases in which the beneficiary transferred the beneficial right with the successive conveyance, see Putnam v. Story, 132 Mass. 205, 211 (1882); Tingle v. Fisher, 20 W.Va. 497, 510 (1882); Meier v. Hess, 32 P. 755, 756 (Or. 1893); Central Trust Co. of New York v. West India Imp. Co., 169 N.Y. 314, 62 N.E. 387, 392 (1901); Moorestown Trust Co. v. Buzby, 157 A. 663, 664 (N.J.Ch. 1931); RESTATEMENT (1st) OF CONTRACTS, s.173; RESTATEMENT (2d) OF CONTRACTS, s.342; RESTATEMENT (2d) OF TRUSTS, s.163. Regarding the cases on the successive conveyance of the contractual right, as the leading cases stating the former prevails, see Salem Trust Co. v. Manufactures' Fin. Co., 264 U.S. 182, 197, 44 S.Ct. 266, 270 (1924). However, until the beginning 20th century, there have been many cases that stated the party who sent the notice to the debtor (in the cases of the beneficial right, the trustee) should prevail, which might accept the leading case in the U.K., Dearle v. Hall, 3 Russ. 1, 24, 38 Eng.Rep. 475, 484, 3 Russ. 48, 58, 38 Eng.Rep. 492, 495 (1828). See, Judson v. Corcoran, 58 U.S. (17 How.) 612, 615 (1854); Spain v. Hamilton's Administrator, 68 U.S.(1 Wall.) 604, 624 (1863); Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 P. 627, 628 (1899); In re Phillips' Estate, 205 Pa. 515, 55 A. 213, 215 (1903); Lambert v. Morgan, 110 Md. 1, 72 A. 407, 408 (1909); Jenkinson v. New York Finance Co., 79 N.J.Eq. 247, 82 A. 36, 39 (1911); In re Hawley Down-Draft Furnace Co., 233 F. 451, 453 (E.D.Pa. 1916).

138 RESTATEMENT (2d) OF TRUSTS, s.285 cmt.b.; SCOTT ON TRUSTS, s.285 pp.44−47.

actual standard under the Bona Fide doctrine in relation to cases in the U.S.

The theories on trusts in the U.S. were developed during the period from the end of 19th century to the beginning the 20th century when the Ames theory was generally accepted. But after the 1910s, the Scott theory started to become popular gradually, and now it is accepted generally in spite of the Ames theory. The Restatement of Trusts 1st and 2nd was reported by A.W. Scott. and it included the basic structure of the Scott theory[139]. Therefore, in examining the relationships between the transformation of the Bona Fide doctrine and the theories of trusts in the U.S., it should be obvious that the Scott theory should be examined most. However, since the transformation of the Bona Fide doctrine in the U.S. might be affected by the theories on trusts in the U.S., the Ames theory should be also examined before the Scott theory examined in detail.

Section 2 The Bona Fide Doctrine under the Ames Theory

<1> Until the end of 19th century, the theories on trusts were emphasized on the explanation or the summarization of the Case Law through in the U.K. and in the U.S. The theories on trusts until the end of the 19th century in the U.S. had explained that the Law of Trusts was the Equitable Case Law belonged to the Court of Equity and the trusts were the relationships in which the trustee should owe the equitable duties and liabilities to the beneficiary enforced by the decree of the Court of Equity, and the beneficial right is the equitable property independent from the property of the trustee in the Common Law[140].

Regarding the Bona Fide doctrine, the theories on trusts until the end of the 19th century in the U.S. explained the standard between the beneficiary and the third party under the transfer of the trust property in breach of trusts as follows. When the third party, who was transferred the property for value without notice, should not be enforced by the beneficial right, it should owe the liabilities to the beneficiary. The theories explained the details of the standard under the actual cases, without discussing the relationships between the Bona Fide doctrine and the basic structure of the trust relationships[141].

In the discussions from the end of the 19th century to the beginning of 20th century, stated by the scholars such as J.B. Ames [142], the relationships between the Bona Fide doctrine and the basic structure of the trust relationships were dealt more. The Ames theory has almost the same theoretical structure as the Maitland theory in the U.K., but has the unique feature in the basic notions.

<2> The theoretical structure of the Ames theory regarding the basic structure of the trusts and the Bona Fide doctrine is as follows.

The trust relationships are generally created with the agreement of the parties of the trust relationships. In the trust relationships created as such, the beneficiary does not have the right or the power to administer the trust property, but only the right to claim to the trustee to administer the trust property for the benefit of the beneficiary. Therefore, the beneficial right is the claim to the trustee, not the real right of the trust property. Since the trust relationships are created with the agreement of the

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139 RESTATEMENT (1st) OF TRUSTS, s.130(b); RESTATEMENT (2d) OF TRUSTS, s.130(b); SCOTT ON TRUSTS, s.130.

140 STORY'S EQUITY JURISPRUDENCE, vol.2 s.964 p.165; POMEROY'S EQUITY JURISPRUDENCE, vol.1 ss.151-155 pp.133-138; PERRY, TRUSTS AND TRUSTEES, vol.1 s.13 pp.10-11; BIGELOW ON EQUITY, p.13.

141 STORY'S EQUITY JURISPRUDENCE, vol.1 s.64c pp.56-57, vol.2 s.977 p.177; POMEROY'S EQUITY JURISPRUDENCE, vol.2 ss.677-785 pp.126-243; PERRY, TRUSTS AND TRUSTEES, vol.1 ss.14, 217-226 pp.11-12, 313-335, vol.2 ss. 815c, 828-834 pp.498-499, 513-522; BIGELOW ON EQUITY, pp.180-193.

142 As the supporter of Ames, C.C. Langdell, W.A. Seavey and H.F. Stone.

parties of the trust relationships, any real rights cannot be created by the private agreement of the parties and the beneficial right should be the claim to the trustee [143].

As the trust relationships exist between the trustee and the beneficiary due to the effect of the agreement of the parties of the trust relationships, those who should be enforced by the agreement is principally the trustee only. The third party, who is transferred the trust property for value without notice of the breach of trusts, should not be effected by the agreement of the trusts and the beneficiary does not have remedies at all. However, the third party who had the notice of the breach of trusts, should be enforced by the beneficial right of the constructive party of the agreement of the privity. The third party, who takes the trust property for no value, should be affected by the agreement of the privity as the third party with notice, since taking the trust property for no value could be supposed the notice of the breach of trusts. The third party, who is transferred it for value without notice of the breach of trusts, should not be enforced by the beneficial right. since the third party, who has the notice of the breach of trusts or took the trust property for no value, should be enforced by the beneficial right[144].

Such theoretical structure of the Ames theory is almost the same as the Maitland theory. However, the Ames theory should be considered to have the different feature from the Maitland theory in the basic notions or the main purpose.

<3> As examined in the previous chapter, the Maitland theory regarding the Bona Fide doctrine should be considered that the third party, who is not transferred the legal title of the trust property, should not be prevailed to the beneficiary who has the prior equitable right of the trust property, whereas the third party, who takes the legal title of the trust property, should be decided by the equality of the third party to the trustee[145]. In the Maitland theory, the third party is presupposed to have the legal title of the trust property and the equality between the third party and the trustee should be decided.

Whether the Bona Fide doctrine should be applied or not to the chose in action not on the negotiable instruments or the equitable right held in the trust property, require to be discussed. Since the chose in action regarding the negotiable instruments cannot be transferred under the Common Law, the third party, who was transferred the chose in action, cannot hold the legal title of the chose in action[146]. As the equitable right should be created independent from the rights of the Common Law, the third party cannot hold the legal title of the property transferred, because the legal title cannot exist on the equitable right[147].

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143 AMES, LECTURES ON LEGAL HISTORY, p.262; LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION, pp.5−7.

144 LANGDELL, SUMMARY OF EQUITY PLEADING, pp.210−211.

145 See section 3 <3> et seq. of Chapter 2.

146 Tourville v. Naish, 3 P.Wms. 307, 308, 24 Eng.Rep. 1077 (1734); Ord v. White, 3 Beav. 357, 366, 49 Eng.Rep. 140, 143 (1840); Mangles v. Dixon, 1 Mac.&G. 437, 443, 41 Eng.Rep. 1334, 1336 (1849), 3 H.L.C. 702, 731, 10 Eng.Rep. 278, 290 (1852); Cockell v. Taylor, 15 Beav. 103, 118, 51 Eng.Rep. 475, 481 (1852); Clack v. Holland, 19 Beav. 262, 274, 52 Eng.Rep. 350, 355 (1854); Athenaeum Life Assurance Society v. Pooley, 3 De.G.&J. 294, 302, 44 Eng.Rep. 1281, 1284 (1858).

147 Brace v. Marlborough, 2 P.Wms. 491, 496, 24 Eng.Rep. 829, 831 (1728); Rice v. Rice, 2 Drewry 73, 77, 61 Eng. Rep. 646, 647 (1853); Rooper v. Harrison, 2 K.&J. 86, 108, 69 Eng.Rep. 704, 713 (1855); Phillips v. Phillips, 4 De G.F.&J. 208, 215, 45 Eng.Rep. 1164, 1166 (1861); Stackhouse v. Jersey, 1 J.&H. 721, 730, 70 Eng.Rep. 933, 937 (1861); Cory v. Eyre, 1 De G.J.&S. 149, 167, 46 Eng.Rep. 58, 65 (1863); Thorpe v. Holdsworth, 7 Eq.Cas. 139, 147 (1868); Spencer v. Clarke, 9 Ch.D. 137, 140 (1878); Cave v. Cave, 15 Ch.D. 639, 647 (1880); Carritt v. Real and Personal Advance Company, 42 Ch.D. 263, 269 (1889); Isaac v. Worstencroft, 67 L.T. 351, 352 (1892); Taylor v. London & County Banking Co., [1901] 2 Ch. 231, 262; Cloutte v. Storey, [1911] 1 Ch. 18, 24 (1910); Hill v. Peters,

When the third party is transferred the chose in action not on the negotiable interests or the equitable right as the trust property, the third party should be enforced by the beneficial right even the third party took the trust property for value without notice of the breach of trusts.

How the Ames theory can explain the transformation of the Bona Fide doctrine in the U.S. required to be discussed. Even the chose in action which is not on the negotiable instruments or the equitable right, is transferred in breach of trusts, the third party, who takes the property for value without notice of the breach of trusts, should not be enforced by the beneficial right, and should not be considered since the third party has only the equitable right and should be always enforced by the beneficial right[148].

<4> Regarding this problem, the Ames theory discusses as follows.

When a trust property is transferred from a trustee to a third party in breach of trusts, the notion that "the trust property" transferred from the trustee to the third party should be considered as "the right of ownership or other to the property as the object of the trusts". From this notion, theoretically, the kind of "the object of the trusts" transferred from the trustee to the third party, such as the legal title or the equitable right, land, chose in action or money, should not affect the applicability of the Bona Fide doctrine. Therefore, regarding the cases in which the chose in action which is not on the negotiable instruments or the equitable right, is transferred to the third party in breach of trusts, it should be considered as one of cases that "the right of ownership or other to the property as the object of the trusts" is transferred to the third party. Regarding the standard between the third party and the beneficiary, it should be the desirable result that the third party, who is transferred it for value without notice, should not be enforced by the beneficiary. The Ames theory states that it is not only from the practical fairness but also from the theoretical consistency[149].

<5> Regarding the notion of the property and the system of law and equity, the Ames theory in the U.S. has the features as follows.

First, the Ames theory considers that the legal title of the trustee on the trust property as "the rights or the powers regarding the trust property"[150]. The rights and the powers of the trustee are theoretically distinguished from "the object of the trusts" as the object of the rights or the powers. The Ames theory regarding the standard between the beneficiary and the third party under the Bona Fide doctrine observes mainly whether the third party is transferred "the rights or the powers regarding the trust property".

Under the notion of "the trust property" as such, the Ames theory explains consistently regarding the standard between the beneficiary and the third party who was transferred the equitable right for value without notice.

Under the Bona Fide doctrine transformed in the U.S., the third party who is transferred the equitable right for value without notice of the breach of trusts should not be enforced by the beneficial right, whereas the third party, who is not transferred the legal title of the property, should be enforced by the beneficial right although the third party is transferred it for value without notice[151]. The transformation of the Bona Fide doctrine could not be theoretically explained if these two cases should

[1918] 2 Ch. 273, 280; Assaf v. Fuwa, [1955] A.C. 215, 229 (1954).

148 See section 1 <2> et seq. of this chapter.

149 AMES, LECTURES ON LEGAL HISTORY, pp.262−264.

150 AMES, LECTURES ON LEGAL HISTORY, pp.263−264.

151 See section 1 <6> et seq. of this chapter.

be considered equally as the cases in which the third party is transferred the equitable right from the trustee for value without notice, because the standard under the both cases should be the same.

However, under the Ames theory, which distinguishes "the rights or the powers of the trust property" from "the object of the trusts", the equitable right transferred to the third party should be theoretically distinguished as "the equitable right as the object of the trusts" and "the equitable right as the rights or the powers regarding the trust property", and it can be explained consistently regarding the application of the Bona Fide doctrine in the U.S. When the equitable right as the object of the trusts is transferred to the third party, the third party, who took the equitable right for value without notice, should not be enforced by the beneficial right, whereas the third party, who is transferred the equitable right as the rights or the powers regarding the trust property, should be enforced by the beneficial right regardless for value without notice.

Considering the notion of "the trust property" not as the practical object of the trusts but as the abstract interests regarding the trust property, the transaction between the trustee and the third party pursues theoretically not to hold the practical object of the trusts but to hold the abstract interests regarding the trust property. Therefore, in the Ames theory, the notion of "the property" holds on the trusts might be theoretically considered not as "holding the practical object actually" but as "the right for receiving the value inherent in the property as the object".

As discussed above, the notions in the Ames theory regarding "the trust property" and "the property" should be considered as different from the Maitland theory, and the actual standard of the Bona Fide doctrine should be affected by such notions theoretically.

<6> Second, regarding the relationships between the Common Law and the Equity, the presupposition of the Ames theory should be considered different from the Maitland theory.

In the Maitland theory, the Common Law and the Equity should be consisted with the united system of law and equity, and supported with each other, although the theoretical difference of the both systems should be maintained[152]. From such presupposition, under the Maitland theory, the legal right and the equitable right should be always distinguished, and the difference of the both rights should be always insisted in the interpretation of the actual cases applying the Bona Fide doctrine.

On the other hand, the Ames theory does not have such absolute presupposition regarding the relationships of the Common Law and the Equity in the theoretical structure of the Bona Fide doctrine or in the interpretation of the actual cases applied the Bona Fide doctrine.

The Ames theory states that the standard of the Bona Fide doctrine should not be different in accordance with whether the trust property is consisted with the legal right or the equitable right[153]. This statement of the Ames theory presupposes the theoretical distinction of the notions "the rights or the powers regarding the trust property" and "the right as the object of the trusts", regarding "the trust property" transferred in breach of trust. Under such presupposition, the Ames theory states that the distinction of the legal right and the equitable right regarding "the right as the object of the trusts" should be led to undesirable results for the standard of the Bona Fide doctrine both in theory and in practice.

Although it is theoretically meaningless for the Ames theory to distinguish the Common Law and the Equity in relation to "the right as the object of the trusts", such distinction cannot be considered as the evil for the standard of the Bona Fide doctrine. In the Ames theory, regarding "the rights or the

152 MAITLAND, EQUITY, pp.19–20, 43. See section 4 <6> of Chapter 2.
153 AMES, LECTURES ON LEGAL HISTORY, pp.262–264.

powers on the trust property, the legal right or power and the equitable right or power should be distinguished as affecting the standard of the Bona Fide doctrine. Therefore, the theoretical distinction of the Common Law and the Equity is still remained in the Ames theory. But, under such presupposition of the Ames theory, the distinction of the Common Law and the Equity is diminished in relation to the notion of the property, because such distinction is theoretically meaningless for the essence of the property as receiving the value inherent in the property as the object.

<7> In the criticism of the Ames theory to other theories on trusts, the Ames theory does not theoretically presuppose the absolute distinction between the Common Law and the Equity.

As examined in the previous chapter, the criticism of the Maitland theory to other theories on trusts is the one from the aspect of theoretical consistency of the whole system presupposing the theoretical distinction of the Common Law and the Equity[154]. On the other hand, in the criticism of the Ames theory to other theories on trusts, it could not be found such aspect as the theoretical consistency of the whole system of law and equity. Rather, regarding the reason for the nature of the beneficial right as the claim to the trustee, the Ames theory states that, since the beneficial right should be created by the private agreement of the parties, the real right of the property cannot be created only by the private agreement[155], or, that the beneficiary does not have the direct power to administer the trust property but only to claim to the trustee for the benefit of the beneficiary[156]. In other words, the basis of the legitimacy of the Ames theory should be the interpretation regarding the effect of the right or the power created by the private agreement of the parties, and the interpretation of the agreement creating the trust relationships. In this regard, it should be obvious that such reasons do not presuppose the theoretical distinction of the Common Law and the Equity.

As examined above, the Ames theory does not have the presupposition regarding the system which absolutely distinguish the Common Law and the Equity.

<8> Third, regarding the purpose, the Ames theory has the unique feature regarding the theory on trusts in comparison to the Maitland theory.

As examined in the previous chapter, the purpose of the Maitland theory should be to explain the legitimacy of the Case Law regarding the Law of Trusts and the Bona Fide doctrines from the aspect other than the authority of the courts. The Maitland theory states that the reasonable standard for the judgement after the Court System Reform, in which the historical and political authority of the Court of Equity was destroyed. For such purpose, the Maitland theory needs to maintain in its theoretical structure the results of the traditional cases and the notion of the system such as the relationships of the Common Law and the Equity[157].

On the other hand, the Ames theory does not pursue to explain the consistency of the actual cases decided by the courts. Indeed, the Ames theory can explain the Bona Fide doctrine in the U.S. as the Case Law in the U.S. consistently, including the transformation of the Bona Fide doctrine in the U.S. However, as examined above, it should be obvious that the Ames theory does not follow the traditional presuppositions or the notions regarding the trust property, and the relationships between the Common Law and the Equity.

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154 See section 4 <9> et seq. of Chapter 2.
155 LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION, pp.5–7.
156 AMES, LECTURES ON LEGAL HISTORY, p.262.
157 See section 5 <1><2> of Chapter 2.

Noting the times when the Ames theory was stated, i.e., from the end of 19th century to the beginning 20th century, the Case Law in the U.S. was varied especially regarding the cases in which the chose was transferred in breach of trusts[158], until the Restatement of Trusts supported the different standard from in the U.K. in the 1930s[159].

<9> The Ames theory does not state its theoretical structure in the future predicting the transformed standard of the Bona Fide doctrine supported by the Restatement of Trusts in the 1930s. Rather, the Ames theory, in the variance of the Case Law, stated that the essence of the property should be considered as the amount of the value and tried to state the reasonable standard for the actual disputes and indicated the direction of the Case Law in the future in the U.S., which was supported by the Restatement of Trusts in 1930s. There was a criticism to the Ames theory from other theories on trusts since the Ames theory is not consistent with the traditional Case Law[160]. Moreover, the Ames theory insisted its theoretical clearness and the reasonable results in practice[161]. Therefore, the main purpose of the Ames theory should be considered to state the reasonable standard to the actual cases in practice.

In the U.S., since there is no background such as the Court System Reform in the U.K., the reasonable standard between the beneficiary and the third party under the circumstances, in which the commercial trusts rose, should be more important. For such purpose of the theories on trusts in the U.S., the mount of traditional standards created by the courts should not be needed to maintain, unless such standards are the reasonable to resolve the actual disputes. Also, the traditional notion of the system, which divided the Common Law and the Equity, should be modified in accordance with the new notion of the system of law and equity, and the new presuppositions regarding the trust property and the property and it should be stated for the reasonable solutions of the actual disputes. Furthermore, the reasonableness should be added because the theoretical structure of the Ames theory itself would be flexible to several notions and presuppositions regarding the system of law and equity or the property and the traditional notion and the presupposition should not be needed to maintain theoretically.

<10> As examined above, the Ames theory states almost the same theoretical structure as the Maitland theory, but has the unique feature in the U.S. different from in the U.K., presupposing the new notion regarding the system of law and equity or the property. Such unique feature in the U.S. should be considered because the purpose of the Ames theory, not as in the U.K., would be to state the reasonable standard of the Case Law in the U.S. for the actual cases in practice, supporting theoretically the rising transformation of the Bona Fide doctrine in the U.S. under the variance of the courts.

These new presuppositions and the purpose stated by the Ames theory are more completed by the Scott theory.

Section 3 The Bona Fide Doctrine under the Scott Theory

<1> After the 1910s in the U.S., the theories stating a beneficial right as a real right of a trust property

158 See section 1 <2> et seq. and <6> et seq. of this chapter.

159 See section 1 <4><7> of this chapter.

160 Kenneson, Purchase for Value without Notice, 23 Yale L.J. 193 (1914). The re-criticism regarding several theoretical structures should be stated for the discussion, see Seavey, Purchase for Value without Notice, 23 Yale L.J. 447 (1914).

161 AMES, LECTURES ON LEGAL HISTORY, p.269.

started to discuss a tacking of a mortgage[162] or the feature of an equitable decree by the court[163]. A.W. Scott stated such theory in his famous thesis regarding the general nature of beneficial rights in 1917 (the Scott theory)[164], and the theory was widely accepted by the Restatement of Trusts in 1930s[165].

The arguments between the Ames theory and the Scott theory, however, might not be persuasive, since both theories only ex parte insists the reasonableness and the superiority regarding the interpretation of the historical development of the Bona Fide doctrine. Furthermore, the explanation of the Ames theory and the Scott theory regarding the basic structure of the trusts or the Bona Fide doctrine are almost equal and it might not be the unreasonable comment from the conventional theories in Japan, which evaluates this discussion between the theories on trusts as unproductive "conceptual discussions"[166].

However, the standard between the beneficiary and the third party of the Scott theory, using the explanation of the Ames theory in appearance, is utterly different from the Ames theory in substance and the Scott theory should be fundamentally different from the Beneficiary Owner theory in the U.K. criticized by the Maitland theory[167].

<2> The Scott theory defines the basic structure of the trusts as follows. The trusts are the relationships between the trustee, who has the legal title to the specific property and should owe the equitable duty, and the beneficiary who has the equitable interests. Such trust relationships are the fiduciary relationships created by the manifestation of intention of the parties of such relationships[168]. The reason why the trustee should owe the duties and liabilities to the beneficiary regarding the trust relationships created to the specific property, should be that the trustee undertakes the duties and liabilities[169]. From such definition, the difference of the agreement creating the trusts and the contracts for the benefit of the third party might be problem. The Scott theory explains that the substantive effects of both relationships are actually equal in practice but it states that there are some differences in the procedure for the remedies by the court[170].

The Scott theory states differently from the Ames theory regarding the basic structure of the trust relationships that the nature of the right of the beneficiary should be considered as the equitable interest of the trust property[171]. But the Scott theory also points out the difference of the theoretical structure between the Double Ownership theory and the Beneficiary Owner theory in the U.K. The Scott theory states that the right of the beneficiary should be "the equitable interests", not "the equitable property",

162 WILLOUGHBY, THE LEGAL ESTATE, pp.94–95. As the review of this book, see Pound, Book Review, 26 Harv.L.Rev. 462, 463 (1913).

163 HUSTON, ENFORCEMENT OF DECREE IN EQUITY, p.115 et seq. As the introduction and support this book, see Durfee, Equity in Rem, 14 Mich.L.Rev. 219 (1916).

164 Scott, Nature of the Rights of Cestui Que Trust, 17 Colum.L.Rev. 269, 275, 289–290 (1917). As the objection to Scott, see Stone, Nature of the Rights of Cestui Que Trust, 17 Colum.L.Rev. 467, 500 (1917).

165 RESTATEMENT (1st) OF TRUSTS, s.130(b). There is an opinion in Japan, indeed, that provision of the Restatement of Trusts should be considered as strictly different from the conflicts of the theories on trusts. See HIGUCHI, FIDUCIARY, p.57 et seq.; HIGUCHI, NOTE 1, p.137 et seq.

166 KINOSHITA, p.280.

167 Regarding the expression of the theories on trust in the U.K. and in U.S. which are resemble, see section 4 of Chapter 2, note 9.

168 RESTATEMENT (2d) OF TRUSTS, s.2; SCOTT ON TRUSTS, ss.2.4–2.8.

169 Scott, Fiduciary Principle, 37 Calif.L.Rev. 539, 540 (1937).

170 SCOTT ON TRUSTS, s.14.3 pp.193–194.

171 SCOTT ON TRUSTS, s.130.

although the beneficial right should be considered as jus in rem of the trust property[172].

The reason of such expression should be due to the attention of the Scott theory to the criticism from the Maitland theory to the Double Ownership theory and the Beneficiary Owner theory. The Maitland theory criticized that it should induce the theoretical contradiction or the disorder in the system of law and equity regarding the ownership of the property. The Scott theory explains, as the Ames theory does, that the ownership of the trust property should be belonged to the trustee, and that the right of the beneficiary as jus in rem of the trust property should be neither the equitable ownership stated by the Double Ownership theory nor the substantial ownership stated by the Beneficiary Owner theory. The Scott theory also explains that there should not be the theoretical contradiction regarding the belonging of the ownership of the trust property[173].

The explanation of the Scott theory regarding the standard between the beneficiary and the third party under the Bona Fide doctrine is the same as the Ames theory in general. When the trust property is transferred to the third party from the trustee in breach of trusts, the third party, who takes the property for value without notice of the breach of trusts and is transferred the legal title of the property, should not be enforced by the beneficial right, and hold the property free from the trusts[174]. The third party, who is given the notice of the breach of trusts[175], or who is transferred the property for no value[176], or who is not transferred the legal title of the property[177], should be enforced by the effect of the right of the beneficiary.

The Bona Fide doctrine consists with the two equitable doctrines. First, between the parties who have the equal equitable rights, the party who has the legal right prevails. Second, between the parties who have the equal equitable rights, the party who has the prior right prevails[178].

<3> As noted above, the Scott theory are almost equal to the Ames theory. It states that the trust relationships basically created by the agreement of the parties and the reason of the duties and liabilities of the trustee to the beneficiary for undertaking of the trustee, except as the nature of the beneficial right, should be jus in rem of the trust property and not jus in personam to the trustee. Regarding the basic structure and the basic equitable principles of the Bona Fide doctrine, the Scott theory uses the same explanation as the Ames theory. Furthermore, the standard judged by the court under the Bona Fide doctrine should be the notice of the third party, the value of the transaction, and the transfer of the legal title to the third party. Therefore, the explanation of the Scott theory and the Ames theory regarding the basic structure of the trust relationships and the Bona Fide doctrine is almost the same and it seems to be meaningless to distinguish the Scott theory and the Ames theory.

However, the reason why the theoretical structures of the Scott theory and the Ames theory are almost the same and both theories have the same presuppositions regarding the notion of the property or the relationships of the Common Law and the Equity, and that the Scott theory uses the explanation of the Ames theory only in appearance, the substantial standard between the beneficiary and the third party under the Scott theory is quite different from the explanation in appearance.

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172 SCOTT ON TRUSTS, s.1 p.4.
173 Ibid.
174 RESTATEMENT (2d) OF TRUSTS, s.284; SCOTT ON TRUSTS, s.284.
175 RESTATEMENT (2d) OF TRUSTS, s.288; SCOTT ON TRUSTS, s.288.
176 RESTATEMENT (2d) OF TRUSTS, s.289; SCOTT ON TRUSTS, s.289.
177 RESTATEMENT (2d) OF TRUSTS, s.311; SCOTT ON TRUSTS, s.311.
178 SCOTT ON TRUSTS, s.286 pp.53-54.

<4> First, regarding the notion of the trust property and the system of law and equity as the presupposition, the Scott theory has the common basis with the Ames theory, not with the Maitland theory.

As examined in the previous chapter, in the Maitland theory, the Bona Fide doctrine should be the effect of the constructive trusts between the beneficiary and the third party[179]. In other words, in the Maitland theory, the crucial point of the standard under the Bona Fide doctrine should be whether the third party is enforced to administer the trust property which is transferred in breach of trusts for the benefit of the beneficiary in spite of the trustee. Therefore, in the Maitland theory, it should be necessarily decided to whom the trust property, which is transferred by the trustee, belongs in the standard between the beneficiary and the third party. In this discussion, as the notion of "trust property", it should be generally considered as "the transferred, unique in practice and actual property".

On the other hand, as examined in the previous section, the Ames theory distinguishes "the rights or the powers regarding the trust property" and "the objects consisted of the trusts property" and such theoretical distinction should be related to the notion of "the property", which is changed from "holding the practical object actually" to "the right for receiving the value inherent in the property as the object". The Scott theory has the same presupposition as the Ames theory and defines the standard of the Bona Fide doctrine theoretically, not as "the belonging of the unique in practice and actual property", but as the modification or the adjustment of "the share of the value of the trust property fluctuated by the breach of trusts of the trustee".

<5> First, as examined in section 1 of this chapter, the Bona Fide doctrine in the U.S. modified the application of the two equitable doctrines. When the equitable right of the trust property is transferred to the third party in breach of trusts, as third party takes never the legal title of the equitable right, the applied equitable doctrine should be only "between the parties who have the equal equitable rights, the party who has the prior equitable right prevails". However, the Bona Fide doctrine in the U.S. limits the notion of "the equal equitable rights". When the equitable right of the trust property is transferred, since the legal right of the trust property is transferred, the third party, who took the property for value without notice of the breach of trusts of the trustee, should not be enforced by the beneficial right[180]. From such result, it should be obvious that the presupposition regarding this transformation of the Bona Fide doctrine is quite different from the Maitland theory, which pursues the adjustment between the Common Law and the Equity as different systems.

In other words, the Scott theory, as the Ames theory, does not presuppose the distinction of the legal right and the equitable right under the application of the Bona Fide doctrine. Rather, the Scott theory should presuppose all the properties or the rights of the trust property, regardless in Common Law or in Equity, transferred in breach of trusts, as "the rights for the value equivalent to the transaction".

<6> Second, regarding the reason and the range of the liability of the third party who took the trust property for no value, the Scott theory has different presupposition from the Maitland theory.

Under the Maitland theory, the third party, who took the trust property for no value, should be as equal to the trustee. In this regard, when the constructive trust between the beneficiary and the third

179 See section 3 <5> of Chapter 2.
180 RESTATEMENT (2d) OF TRUSTS, s.285; SCOTT ON TRUSTS, s.285.

party is created, the third party should be enforced by the beneficial right[181]. The reason of the liability of the third party, who took the trust property for no value, should be considered as holding of the trust property as the trustee would, regardless the interests received by the third party.

On the other hand, in the Scott theory, the reason for the liability of the third party should be that the third party, who takes the trust property for no value, would have unjust enrichment from receiving the trust property by the breach of trusts of the trustee, which is the wrong doing to the beneficiary and which damages the beneficiary[182]. From such aspect, the range of the liability of the third party, who takes the trust property for no value, should be limited to the actual interests held by the third party and there would be the case in which the third party, who holds the trust property, can escape from the liability to the beneficiary[183].

The Scott theory should be considered to pursue "the modification or the adjustment of the share of the value of the trust property fluctuated by the breach of trusts of the trustee".

<7> Third, regarding the results of the standard under the Bona Fide doctrine, the Scott theory has the quite different purpose from the Maitland theory.

Under the Maitland theory, the results of the standard between the beneficiary and the third party under the Bona Fide doctrine should be led through the combination of the two equitable doctrines, i.e., the one party would always prevail to the other. In other words, when the trustee transferred the trust property in breach of trusts, the trust relationships should already be existed and the beneficial interests usually should already exist. Therefore, except when both equitable rights are created at the same time, such as holding or receiving of the property by the trustee for the creation of trusts caused the creation of the constructive trust for others at the same time, the relationships between before and after the equitable rights should always be existed and the one party should always prevail perfectly to the other. Such results should be considered as theoretically consistent with the standard under the Maitland theory from the aspect to decide the belonging of the trust property transferred.

On the other hand, the Scott theory states the several types of results regarding the standard between the beneficiary and the third party, including not only a party would prevail perfectly to the other, but also the so called intermediate solution.

First, when the third party, who has only paid a part of the value, has been given the notice of the breach of trusts, under the traditional Case Law, the third party should not be considered as the bona fide purchaser and should be enforced by the beneficial right[184]. The Scott theory criticizes this traditional Case Law under the fairness of the actual transaction since the third party might suffered the loss one-sidedly and it should be resolved as pro tanto basis which the third party has not paid yet, so long as the trust property can be divided.

Regarding the method of the standard, the Scott theory states the intermediate solution as

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181 See section 3 of <3> Chapter 2.

182 SCOTT ON TRUSTS, s.289. p.70.

183 RESTATEMENT (2d) OF TRUSTS, s.292.

184 Bush v. Collins, 11 P. 425, 429 (Kan. 1886); McCauley v. Smith, 132 N.Y. 524, 30 N.E. 997, 998 (1892); Davis v. Ward, 41 P. 1010, 1011 (Cal. 1895); Mackey v. Bowles, 98 Ga. 730, 25 S.E. 834, 835 (1896); Yarnell v. Brown, 170 Ill. 362, 48 N.E. 909, 911 (1897); Spiers v. Whitesell, 27 Ind.App. 204, 61 N.E. 28 (1901); Wiles v. Shaffer, 175 Mich. 704, 141 N.W. 599, 600 (1913); Gleaton v. Wright, 149 Ga. 220, 100 S.E. 72, 73 (1919); Schwarz v. Munson, 121 A. 619, 620 (N.J. 1923); Ross v. Rambo, 23 S.E.2d 687, 695 (Ga. 1942); RESTATEMENT (2d) OF TRUSTS, s.303.

reasonable, citing Durst v. Daugherty[185], such as admitting the third party to hold the part of the property for the value paid, or creating the lien of the third party on the property for preserving the value paid, or admitting the third party to hold the whole property in exchange for paying the rest of the value, bearing the actual circumstances of the cases[186].

Second, when the third party only promises to pay the value of the trust property as drawing the negotiable instruments, or that the third party waives the chose in action to the trustee in exchange of the trust property, under the traditional Case Law, such third party should not be considered as the bona fide purchaser[187]. The Scott theory also criticizes this traditional Case Law as unfair, because, under such solution, the third party should be suffered the risk of the fluctuation of the value of the property as the securities and the interests of the third party should be protected in part. In this case, the Scott theory states that the third party may select the solution either to restore the property to the beneficiary or to pay the value to the beneficiary, bearing the reasonable share of the risk under the actual transaction[188].

From these discussions above, the Scott theory does not presuppose the absolute legitimacy of the Bona Fide doctrine in the traditional Case Law. Rather, the Scott theory criticizes the traditional Case Law and recommends the flexible solutions. Such flexible solutions which the Scott theory states mean the intermediate solutions bearing the share of the risk under the actual transaction.

From these examinations above, the Scott theory should be considered to presuppose the notion of the trust property, not as “the unique in practice and actual property”, but as “the amount of value exchanged by the transaction”. And under such presupposition, the Scott theory should state the Bona Fide doctrine as the doctrine not for deciding “the belonging the unique in practice and actual property”, but for “modifying or adjusting the share of the value fluctuated by the breach of trusts”.

As discussed above, the Scott theory should be considered as quite different from the Maitland theory, in the presupposition of the notions and the main purpose.

<8> As examined above, the Scott theory should be considered to have the same presupposition as the Ames theory, and to complete the purpose of the Ames theory. Therefore, for the Scott theory, to use the same explanation as the Ames theory regarding the basic structure of the trust relationships and the Bona Fide doctrine, should be considered not as the theoretical disorder, but as reasonable in the main purpose or the presupposition.

However, the Scott theory should not be considered to have the same theoretical meaning as the Ames theory from the discussion above. Rather, although the Scott theory uses the explanation of the Ames theory, the substantial standard of the Scott theory should be quite different from the Ames theory.

As discussed above, the Scott theory regarding the nature of the beneficial right is fundamentally

185 81 Tex. 650, 17 S.W. 388, 389 (1891).

186 SCOTT ON TRUSTS, s.303 pp.164−165.

187 Rush v. Mitchel, 71 Iowa 333, 32 N.W. 367, 369 (1887); Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 A. 232, 234 (1893); Reed v. Brown, 89 Iowa 454, 56 N.W. 661, 663 (1893); Halloran v. Holmes, 13 N.D. 411, 101 N.W. 310, 313 (1904); Bridgewater v. Ocean City Ass'n, 85 N.J.Eq. 379, 96 A. 905, 908 (1915), aff'd, 88 N.J.Eq. 351, 102 A. 1052 (1917); Gleaton v. Wright, 149 Ga. 220, 100 S.E. 72, 74 (1919); Falk v. Fulton, 262 P. 1025, 1027 (Kan. 1928); Ringo v. McFarland, 24 S.W.2d 265, 268(Ky. 1930); First Nat. Bank of Union City v. Leslie, 151 A. 501, 502 (N.J.Ch. 1930); Coastal Transit Co. v. Springfield Bus Terminal Co., 20 N.E.2d 1, 4 (Mass. 1939); Biondo v. Biondo, 179 S.W.2d 734, 738 (Mo. 1944); Fraser v. Lewis, 187 So.2d 684, 688 (Fla.App. 1966); RESTATEMENT (2d) OF TRUSTS, s.302.

188 SCOTT ON TRUSTS, s.302 pp.152−153.

different from the Ames theory since the beneficial right should be considered as jus in rem of the trust property. But, at the same time, the beneficial right under the Scott theory should be considered neither as the equitable property under the Double Ownership theory nor as the substantial ownership of the trust property under the Beneficiary Owner theory. It should be considered as "the right for receiving the value from the trust property" based on the presupposition that the trust property should be independent both from the property of the trustee and from the property of the beneficiary.

<9> First, as discussed above, the Scott theory, stating the beneficial right as "the equitable interest" of the property, neither as "the equitable property" regarding the trust property, nor as "the substantial ownership" of the trust property, insists the difference from the Double Ownership theory and the Beneficiary Ownership theory[189]. The reason of this statement might be considered that the beneficial right cannot be theoretically stated as the beneficial property easily, because of the theoretical criticism from the Maitland theory to the Double Ownership theory and the Beneficiary Owner theory regarding the notion of the system of law and equity[190].

However, as discussed above, under the Scott theory, the Bona Fide doctrine should be considered to pursue mainly, not for deciding the belongings of the unique in practice and actual property, but for modifying or adjusting the share of the value fluctuated by the breach of trusts of the trustee. Therefore, the reason why, under the Scott theory, the beneficial right is stated as "the equitable interests" of the trust property might be considered as that the Scott theory states the beneficial right theoretically, not as "the right for holding the unique in practice and actual property", but as "the right for receiving the value from the trust property".

<10> Second, regarding the remedies admitted to the beneficiary to enforce the beneficial right to the third party under the Bona Fide doctrine, it should be considered that the Scott theory states the beneficial right not as the substantial ownership of the trust property but as the right for receiving the value from the trust property.

If the beneficial right should be considered as the substantial ownership of the trust property, the principal remedy admitted to the beneficiary against the third party who is transferred the trust property in breach of trusts should be the claim for the third party to restore the property to the beneficiary, which is the most direct way to affect the substantial ownership of the beneficiary.

However, under the Scott theory, the claim to restore the property to the beneficiary directly should be limited in the exceptional cases such as when the beneficial right consists the right to hold the trust property directly[191]. Rather, the principal remedy admitted to the beneficiary is to restore the property transferred or the same value to the trust property, not to the beneficiary. Moreover, regarding the power to reserve the enforcement to the third party, the beneficiary should not be admitted to restore the trust property directly, but only to have the equitable lien, which should be the priority for receiving the value of the trust property transferred[192].

The purpose of the Bona Fide doctrine under the Scott theory should be the modification or the adjustment of the share of the value fluctuated by the breach of trusts and the Scott theory presupposes the trust property as independent from the property of the trustee or the beneficiary, and states the

189 SCOTT ON TRUSTS, s.1 p.4.
190 See section 4 <9> et seq. of Chapter 2 et seq.
191 RESTATEMENT (2d) OF TRUSTS, s.294 cmt.b; SCOTT ON TRUSTS, s.294.1 pp.100-101.
192 RESTATEMENT (2d) OF TRUSTS, s.291(2) cmt.n; SCOTT ON TRUSTS, s.291.4 pp.82.

beneficial right as the right for receiving the value of the trust property. The beneficial right under such theoretical structure, created by the agreement of the parties of the trust relationships, should be considered not as the right to the trustee, but as "the right to the trust property". Therefore, when the trust property is transferred to the third party in breach of trusts, the beneficial right should be valid as the right to the trust property, which means the beneficial right as "jus in rem of the trust property".

<11> From the examinations above, the standard of the Bona Fide doctrine under the Scott theory should be quite different from the standard under the Ames theory, which should be decided by the range of the effect of the agreement of the parties of the trust relationships.

Since the trustee has the legal title of the trust property, the transfer from the trustee to the third party should be valid in Common Law and the third party could hold jus in rem as the legal title of the trust property. However, regarding the trust property, the beneficial right is created by the agreement establishing the trust relationships for receiving the equitable interests from the trust property. Therefore, regarding the trust property, both the beneficiary and the third party should have jus in rem. Under such situation, the Scott theory compare the right of the beneficiary and the right of the third party, bearing the actual circumstances of the case, and decide which should have the better title to the trust property, the beneficiary or the third party.

As discussed above, the basic standard of the Bona Fide doctrine would be that the third party, who is given notice of the breach of trusts, who takes the property for no value, and who is not transferred the legal title of the property, should be enforced by the beneficial right regarding the trust property transferred. From the aspect of the substantial standard under the Scott theory, such basic results should be the results of the comparison between the rights of the beneficiary and the third party to the trust property.

The actual circumstances for the comparing should include all the circumstances affecting the priority of the rights, such as the notice of the breach of trusts, the value on the transaction, the act against the doctrine of estoppel on the beneficiary, existence of the recording statutes regarding the property transferred, and etc. The standard between the beneficiary and the third party, that is, the comparison between the rights of the beneficiary and the third party, should be decided bearing all the circumstances noted above.

<12> The substantial standard between the beneficiary and the third party under the Scott theory, not as under the Ames theory, should be considered as comparing between the rights of the beneficiary and the third party to the trust property. Due to this difference, the interpretations of the actual results under the Scott theory should be different also from those under the Ames theory.

For example, the reason why the third party should be enforced by the beneficial right under the Ames theory would be different by cases. The third party, who does not have the legal title of the trust property, should be enforced by the beneficial right because the right of the third party should be prevailed by the right of the beneficiary. The third party, who took the trust property for no value, should be equal to the trustee, and because the third party, who is given the notice of the breach of trusts, should be considered to cooperate the breach of trusts by the trustee, the effect of the beneficial right should be enforced[193].

On the other hand, under the substantial standard of the Scott theory, the reason should be simple regarding any third party who should be enforced by the beneficial right. The reason why the third

193 See section 3 <3> of Chapter 2 and section 2 <2> of this chapter.

party, who is given the notice of the breach of trusts, who takes the trust property for no value, or who is not transferred the legal title of the property, should be enforced by the beneficial right, should be decided the right of the third party not as the better title to the right of the beneficiary, compared between the rights of the both parties.

Even under the substantial standard of the Scott theory, the range of superiority to the third party enforced by the beneficial right, that is, the remedies admitted to the beneficiary against the third party, should be relatively different by the cases. For example, the range of the priority of the beneficial right regarding the trust property should be different to the third party who is given the notice of the breach of trusts from the third party who takes the trust property for no value. The range of the liability of the third party, who is given the notice of the breach of trusts, should be decided by the choice of the beneficiary, from the restoration of the trust property transferred, the creation of the constructive trusts on the property transferred, or the compensation of the same value as the property[194]. On the other hand, the range of the liability of the third party, who takes the property for no value, should be decided in accordance with whether the third party is given the notice of the breach of trusts or not. If there is a third party, who took the trust property for no value but without notice of the breach of trusts, the third party should be compelled by the trusts only to the actual interests remained by the choice of the third party, not by the beneficiary[195]. Otherwise, the third party, who takes the trust property for no value and is given the notice of the trusts, should owe the liability to the beneficiary as the third party who is given the notice of the trusts[196]. As noted above, such difference of the range of the liability of the third party under the cases should be considered as the difference of the priority of the beneficial right to the right of the third party by the cases.

Regarding the third party who is given the notice of the breach of trusts, it should be reasonable that the third party with the actual notice, who actually knows the breach of trusts, and the third party with the constructive notice, who does not know the breach of trusts by carelessness, would be distinguished of the range of the liability. Therefore, the legislature provides the different liability of the third party in accordance with whether the notice of the third party is actual or constructive and, for example, only the third party, who has actual notice, should be enforced by the beneficiary[197]. This should be consistent with the substantial standard of the Bona Fide doctrine under the Scott theory.

Furthermore, from the substantial standard of the Scott theory, it could be possible as the intermediate solutions, and this is not only the results that the one party prevails perfectly to the other. For example, the third party, who already pays for the property but has not been transferred the legal title of the property, should be enforced to restore the property to the trusts in exchange of the indemnity from the beneficiary for the value paid by the third party to the trustee. The third party, who only promised the value of the property, can choice whether the transaction should be valid or not. The third party, who pays a part of the value, should be enforced only to the part which the third party has not paid. These results of the cases could be consistent with the substantial standard of the Scott theory[198].

It could be explained consistently that, in the modern Bona Fide doctrine in the U.S., the third party should not be enforced by the beneficial right although the third party has not been transferred the legal title of the trust property. For example, when a change of circumstances which should be against

194 RESTATEMENT (2d) OF TRUSTS, s.291; SCOTT ON TRUSTS, ss.291−291.9.
195 RESTATEMENT (2d) OF TRUSTS, s.292(1)(2); SCOTT ON TRUSTS, ss.292−292.2.
196 RESTATEMENT (2d) OF TRUSTS, s.292(3) cmt.l; SCOTT ON TRUSTS, s.292.3.
197 Typically, see Uniform Trustees' Powers Act, s.7.
198 See <7> of this section.

the doctrine of estoppel[199] or the acts and procedures of the side of the third party had already done[200], the third party can restore the trust property.

As discussed above, the Scott theory compares substantially between the rights of the beneficiary and the third party regarding the trust property. The actual judgements of the substantial standard should be decided, bearing several circumstances of the actual cases, in a way that could be consistent with the actual standards of the Bona Fide doctrine stated by the theories on trusts in the U.S.[201]

<13> However, the actual standards of the Bona Fide doctrine under the Scott theory, i.e., all circumstances of the cases should be considered, has the theoretical limits at the same time.

The substantial standard of the Bona Fide doctrine under the Scott theory should be explained as the judgements comparing between the rights of the beneficiary and the third party regarding the trust property. Such "substantial standard" should be only the abstract standard for the explanation of all cases and it presupposed the existence of the Bona Fide doctrine as the confirmed Case Law. In other words, by comparing between the rights of the beneficiary and the third party, it cannot lead to any theoretical reason or basis of legitimacy for the actual standards of the Bona Fide doctrine. The right of third party, who is transferred the trust property for value without notice of the breach of trusts, should be the better title to the right of the beneficiary and the right of the third party, who is given the notice of the breach of trusts or who takes the property for no value, should be prevailed by the right of the beneficiary.

The Scott theory uses almost same theoretical structure as the Ames theory in appearance. But it should be quite different in its theoretical structure from the Ames theory in relation to the substantial standard of the Bona Fide doctrine, which gives effect in deciding the actual cases in accordance with such substantial standard.

The reason of such difference regarding the theoretical structure in appearance under the Scott theory, as discussed above, should be that the substantial standard of the Scott theory could not explain the legitimacy of the judgements of the actual cases. As discussed above, the Scott theory and the Ames theory have the same presuppositions in relation to the notion such as the property and the nature of the rights of the trustee regarding the trust property as "the rights or the powers regarding the trust property", which is distinguished from "holding the practical objects of the trusts". The Scott theory could use the theoretical structure of the Ames theory in appearance without any theoretical difficulty. Rather, it should be convenient for the Scott theory to use the same theoretical structure as the Ames theory, since that gives the theoretical legitimacy of the substantial standard of the Bona Fide doctrine.

Section 4 Wider Acceptance of the Scott Theory

<1> As the theoretical feature of the Maitland theory in the U.K. is considered in Chapter 2, it should be effective to compare the Scott theory with the other theories on trusts for considering the theoretical meanings of the Scott theory in the U.S.

As examined in the previous section, the Scott theory has the same presuppositions as the Ames theory regarding the purpose and the basic notions, and uses the explanation of the Ames theory regarding the theoretical structure. In this context, the Scott theory could be affected deeply by the

199 RESTATEMENT (2d) OF TRUSTS, s.302(3) cmt.l, s.304(2)(c) cmt.d, s.305(2)(c) cmt.f; SCOTT ON TRUSTS, ss.302.6, 304.3, 305.5.

200 RESTATEMENT (2d) OF TRUSTS, s.302 cmt.d; SCOTT ON TRUSTS, s.302.5.

201 SCOTT ON TRUSTS, ss.284-326.6 pp.35-320; BOGERT, TRUSTS AND TRUSTEES, ss.881-956 pp.158-604.

Ames theory.

Therefore, this article tries to examine the background of rising the Scott theory in the U.S. by comparing the background of it with the one of the Ames theory.

<2> Scott theory, using the theoretical structure of the Ames theory in appearance, has the substantial standard quite different from the Ames theory, in comparing between the rights of the beneficiary and the third party regarding the trust property in the actual cases[202]. It should be examined first what backgrounds or circumstances make such difference in the discussion of the Scott theory.

As examined in the previous sections, the main purpose of the discussion of Scott theory should be to state the reasonable standard of solutions for the disputes in practice, by presupposing the notion of the property or the system of law and equity flexibly. The reason of such difference between the explanation in appearance and the substance under the Scott theory might be caused not by the theoretical problem in the Law of Trusts but by the practical problems in the actual disputes.

As in the following discussion, there are several cases in the U.S. to which the direct application of the Bona Fide doctrine might cause the practical unfairness and the beneficial right as jus in rem regarding the trust property should be stated.

<3> First, the jurisdiction of the court of the cases is the matter when the trust property is transferred to the third party outside the state by the breach of trusts. When the trust property located in the state is transferred to the third party outside the state by the breach of trusts, the problem should be occurred whether the state court has the jurisdiction to the non-resident third party for enforcing the equitable decree which should be principally limited to the residents[203]. From the principles of the jurisdiction of the state court, it should not enforce the trust relationships to the non-resident third party by the equitable decree, but such results should be practically unfair since the interests of the beneficiary might not be protected sometimes only because of the geographical condition[204].

Regarding this point, under the Case Law and the legislature in the U.S. after the 19th century, the court could enforce the trust relationships to the non-resident third party by the equitable decree when the trust property existed in the state and the transaction had acted mainly inside the state[205]. In Wait v. Kern River Mining, Milling & Developing Co.[206], the court enforced the specific performance to the third party living outside the state, since the main claim of the case was to deliver the property existed inside the state[207].

Under such Case Law and legislature, the standard between the beneficiary and the third party in case of the breach of trusts should be decided by comparing the rights of the beneficiary and the third party, not by the constructive trusts admitted between the beneficiary and the third party. That is, if the constructive trusts between the beneficiary and the third party should be crucial, the equitable decree

202 See section 3 <10> of this chapter.

203 See RESTATEMENT (1st) OF JUDGMENTS, s.15. However, the jurisdiction of the courts to the act or the commercial transaction of non-residents is now admitted. See RESTATEMENT (2d) OF JUDGMENTS, s.5(1)(g)(h).

204 HUSTON, ENFORCEMENT OF DECREE IN EQUITY, p.16.

205 Rourke v. McLaughlin, 38 Cal. 196, 200 (1869); Young v. South Tredeger Co., 85 Tenn. 189, 2 S.W. 202, 205 (1886); Dyer v. Leach, 27 P. 598, 599 (Cal. 1891); Wait v. Kern River Mining, Milling & Developing Co., 106 P. 98 (Cal. 1909); RESTATEMENT OF JUDGMENTS, s.32; RESTATEMENT (2d) OF JUDGMENTS, s.6. As to the legislatures after 19th century, see HUSTON, ENFORCEMENT OF DECREE IN EQUITY, p.17 et seq.

206 106 P. 98 (Cal. 1909).

207 Id. at 100.

should not be enforced to the non-resident third party who should be outside the jurisdiction of the state court, even though the constructive trusts could be admitted. On the other hand, if the rights of the beneficiary and the third party should be compared, so far as the trust property should be under the jurisdiction of the court, the court could enforce the trust relationships by the equitable decree even to the third party outside the state, since the right of the beneficiary should prevail the right of the third party[208].

<4> Second, the point regarding the priority of the equitable rights in the trust relationships pursuing the profits of the transaction should be considered. In the trust relationships pursuing the profits of the transaction, i.e., such as the investment trusts, the rights transacted or invested are not unusually equitable[209]. When the trust property itself is the property in Common Law, it might usually be structured under the terms of trusts for which the trust property itself should belonged to the nominee and the investors get the equitable rights created regarding the trust property for the purpose of gaining more profits, by escaping the costs or the procedures regarding the transfer of the legal title[210]. Under such structure, in which the transaction of the equitable rights should be consistent with the purpose of the trusts, it might cause practically unfair between the parties under the transaction that states the beneficial right as the claim to the trustee or applying the traditional standard regarding the priority between the equitable rights.

<5> Under the explanation of the Scott theory in appearance, the standard between the beneficiaries or the beneficiary and the third party who is transferred the equitable right regarding the trust property should be decided by the equitable doctrine "between the parties who have the equal equitable rights, the party who has the prior right prevails"[211]. Unless the special condition on the terms of trusts or the special agreement by the beneficiary could be admitted, the standard between the beneficiary and the third party should be decided by the time in order when the equitable rights created.

However, in the trust relationships pursuing the profits of the transaction, all the parties, i.e., not only the beneficiary but also the third party, could be considered to invest in the trust property. In such structure, the time in order when the equitable rights created should be considered only as the time when the investment by each party starts. Furthermore, the later investment added in such trust relationships should be the profits, not the damages, for the beneficiary and other third parties who already starts the investment in the trust property, as the total value of the trust property generally gains.

Therefore, it should be considered as practically unfair between the parties under the transaction, applying the traditional standard between the beneficiary and the third party, deciding the case in accordance with the time when the equitable rights created. The party, regardless the beneficiary or the third party, who starts the investment earlier, can gain the profits from the investment added by the party who starts the investment later. Besides, as noted above, since the trustee in such structure should usually be only the nominee who does not have the substantial power to administer the trust property, it should be unreasonable to recognize beneficial right under such structure as the claim to "the trustee".

When the both of the beneficiary and the third party are the investors and the trust relationships is structured for pursuing the profits of the transaction, it should be practically fair between the parties of

208 HUSTON, ENFORCEMENT OF DECREE IN EQUITY, pp.148–154.
209 FOWLER, AMERICAN INVESTMENT TRUSTS, p.68.
210 SCOTT ON TRUSTS, s.179.5 p.521 et seq.
211 SCOTT ON TRUSTS, s.286 p.54.

the transaction to compare the rights of the investors regarding the trust property with the object of the investment. Moreover, it should be reasonable to state the equitable right of the beneficiary or the third party regarding such the trust relationships as jus in rem of the trust property in relation to the object of the investment.

<6> There are cases regarding the trust relationships pursuing the profits, which insisted the fairness between the parties of the transaction and which protected the party who had the equitable right created later.

For example, Luckel v. Phillips Petroleum Co.[212], in which the equitable right as the share of the permit to develop the natural resources was transferred to the third party who received it for value without notice, decided that it should be unjust and unequitable not to protect the reliance of the party to the validity of the transaction. Wicklein v. Kidd[213], in the case that the third party was transferred the mortgage for value without notice of the existence of the prevailing equitable right, bearing several circumstances of the case, decided that the third party, who was transferred it for value without notice, should prevail, applying the doctrine "when one of two persons must suffer loss by action of a third person, the loss should fall on him who has enabled the third person to occasion such loss". Regarding the trust relationships pursuing the profits of the transaction, there were many cases to protect the interests of the third party, who received it for value without notice, applying the standard between the beneficiary and the third party in breach of trusts from the aspect of the conscience and equilibrium, not according with the time when the equitable rights was created[214].

<7> But, regarding the standard between the investors, opposite judgements are not unreasonable.

If the "fairness" regarding the trust relationships pursuing the profits of the transaction means the foreseeability of the risk for the parties, it is clear that the parties who are going to purchase the equitable right should be subject to the standard of the transaction. Since the equitable right is the object, the parties should foresee the application of the standard of the traditional doctrine.

This means that the party, who purchase the equitable right later than the other party, should be prevailed by the other. Therefore, under this statement, it should be just "fair" that the traditional standard foreseeable to the parties should be applied directly to the case. Actually, not a few cases decided that the prior equitable right should prevail by the application of the traditional doctrine[215], although recently in the U.S., as noted in section 1 of this chapter, the third party, who is transferred the equitable right for value without notice of the breach of trusts, should not be enforced by the beneficial

212 243 S.W. 1068, 1069 (Tex.Com.App. 1922).

213 131 A. 780, 784 (Md. 1926).

214 Ward v. Trustees of New England Southern Conference of M.E. Church, 27 R.I. 262, 61 A. 651, 652 (1905); National Hardwood Co. v. Sherwood, 130 P. 881, 885 (Cal. 1913); Security Mortgage Co. v. Delfs, 191 P. 53, 54 (Cal.App. 1920); First Nat. Bank of Antioch v. Fickert, 196 P.112, 114 (Cal.App. 1921); Missouri Pac. R. Co. v. M.M. Cohn Co., 261 S.W. 895, 896 (Ark. 1924), cert. denied, 266 U.S. 627, 45 S.Ct. 126 (1924); Goodwin v. Boutin, 155 A. 738, 739 (Me. 1931); North Detroit Land Co. v. Rominiecki, 257 Mich. 239, 241 N.W. 221 (1932); Counselman v. Pitzer, 79F.2d 707, 710 (App.D.C. 1935), cert. denied, 296 U.S. 650, 56 S.Ct. 310 (1935); Greenbaum v. Werner, 251 App.Div. 891, 297 N.Y.S. 300, 301 (1937); Ava Hardware Co. v. Christensen, 122 S.W.2d 92, 93 (Mo.App. 1938); Keegan v. Kaufman Bros., 156 P.2d 261, 264 (Cal.App. 1945).

215 Woods v. Dille, 11 Ohio 455, 458 (1842); Briscoe v. Ashby, 65 Va.(24 Gratt.) 454, 478 (1874); Henry v. Black, 213 Pa. 620, 63 A. 250, 253 (1906); Wasserman v. Metzger, 105 Va. 744, 54 S.E. 893, 895 (1906); Hendrick v. Lown, 132 Misc. 498, 230 N.Y.S. 141, 142 (1928).

right[216].

<8> As discussed above, in the U.S., there are some practical problems regarding the fairness between the parties of the transaction. The theoretical structure of the Scott theory, stating the beneficial right as jus in rem of the trust property, would be valid as substantial standard applied to the parties of the transaction, comparing the rights of the parties regarding the trust property.

The next to be examined should be the theoretical basis or background of the Scott theory. In this context, it should be examined what the main purpose of the theories on trusts in the U.S., and the theoretical features of the presupposition of the structure of the system of law and equity, or the basic notions should be considered.

<9> Regarding the main purpose of the theories on trusts, the flexible standard to the actual cases in the present time and the cases in the future should be considered.

First, in the theories on trusts in the U.S., the distinction of the Common Law and the Equity should not be considered as the absolute presupposition.

The Ames theory states that it is not required to distinguish the legal right and the equitable right of the trust property in applying the Bona Fide doctrine[217]. Also in the discussion of the Ames theory on the property itself, the legal property and the equitable property are not distinguished absolutely. It should be considered that the Ames theory does not have the theoretical presupposition regarding the absolute distinction of the Common Law and the Equity.

Also the Scott theory directly compared the legal right of the third party and the equitable right of the beneficiary under the substantial standard of the Bona Fide doctrine[218]. In this meaning, the Scott theory should be considered that the distinction of the Common Law and the Equity regarding the rights or the properties are not presupposed absolutely. Moreover, since the Scott theory states the Bona Fide doctrine as the modification or the adjustment of the values of the trust property fluctuated by the breach of trusts of the trustee, it should be considered that the traditional relationships between the Common Law and the Equity or the notion of the property in the U.K. are not paid any attention, apart from the explanation in appearance, in the substantial standard under the Scott theory at all.

From the discussion above, the main purpose of the theories on trusts in the U.S. is to state the flexible standard to the actual cases, not to presuppose the traditional distinction of the Common Law and the Equity.

<10> Second, in the discussions of the theories on trusts in the U.S., the basic notions of the trust property or the property are stated to be different from the traditional understanding and the solutions have become to be unique from the traditional case law.

As examined in the previous sections, the Ames theory theoretically distinguishes the notion of the trust property as “the practical object of the trusts” and “the rights or the powers as to the trust property” and states the solution that the third party, who is transferred the chose in action not on negotiable instruments or the equitable property for value without notice of the breach of trusts, should not be enforced by the beneficial right[219].

Also, the Scott theory, using the explanation of the Ames theory in appearance, not only regarding

216 RESTATEMENT (2d) OF TRUSTS, s.285. See section 1 <7> of this chapter.
217 See section 2 <4> of this chapter.
218 See section 3 <10> of this chapter.
219 See section 2 <5> of this chapter.

the cases of the chose in action on negotiable instruments or the equitable property noted above, but also regarding the cases when the third party paid a part of the value or only promised to pay the value of the property, considering the notion of the value of the transaction and the property flexibly, states the substantial modification of the traditional Bona Fide doctrine[220].

As discussed above, the theories on trusts in the U.S., as considering the basic notions flexibly, modified the traditional standard of the Bona Fide doctrine for the flexible solutions to several and varied actual cases in practice, otherwise the practical unfairness between the parties of the transaction might occurred. Especially the Scott theory, stating the substantial standard between the beneficiary and the third party as comparing the rights of the both parties regarding the trust property, bearing the several circumstances of the actual cases, should be considered as the better theoretical structure than the Ames theory for giving the flexible standard to the actual cases in practice.

Section 5 Meaning of the Scott Theory in the U.S.

<1> The main purpose of the theories on trusts in the U.S. should be to state the flexible standard for the several actual cases and not to explain theoretically the traditional Case Law as in the U.K.

In comparing between the Ames theory and the Scott theory, the Ames theory states the standard which consists of the traditional equitable doctrine regarding the adjustment between the Common Law and the Equity and the judgement whether the third party should be considered as equal to the trustee. The results should be principally that the one party perfectly prevails to the other. The Scott theory states the substantial standard, comparing between the rights of the third party and the beneficiary. It leads to several types of results including intermediate solutions.

The reason why the Scott theory becomes accepted in general in spite of the Ames theory in the U.S. should be that the Scott theory, especially in the substantial standard stated, is more suitable than the Ames theory to the main purpose of the theories on trusts in the U.S., i.e., to solve the actual case by applying the flexible standard.

<2> As examined in the previous sections, however, it should be obvious that the substantial standard under the Scott theory states only the abstract standard for all cases between the beneficiary and the third party and should be mostly dependent on the traditional Case Law for the actual solutions. Besides, the Scott theory uses the theoretical structure almost the same as the Ames theory in appearance[221].

Therefore, the Scott theory can state more suitable standard to the main purpose of the theories on trusts in the U.S., presupposing the basic notions regarding relationships between the Common Law and the Equity and the trust property or the property itself different from the traditional notion in the U.K., but cannot state the independent standard from the traditional Case Law perfectly because of the theoretical features of such standard. The substantial standard under the Scott theory can be applied to all cases, but cannot prove the legitimacy of the results of the standard from some theoretical structures or doctrines and should depend on the traditional Case Law or the theoretical structure of the Ames theory. The standard stated by the Scott theory is flexible in relation to the actual cases, but the legitimacy of such standard should be affected deeply by the feature and the limits of the traditional Case Law.

<3> Since the limit of the Scott theory caused by the traditional Case Law or the Ames theory induces

220 See section 3 <7> of this chapter.
221 See section 3 <12> of this chapter.

the question regarding the legitimacy of the results of the standard unproved theoretically, there might be some theories or doctrines suitable to legitimate the standard under the Scott theory.

The Scott theory tries to find new theoretical basis to restructure the Bona Fide doctrine, independent from the traditional Case Law. For example, the Scott theory criticizes the traditional Case Law as unfair between the parties of the transaction, in relation to the cases in which third party paid a part of the value or only promised to pay the value of the trust property and states the intermediate solutions. This should not be drawn from the traditional Case Law or the Ames theory, but based on the new reasons such as the protection of the reliance of the parties on the validity of the transaction and the fairness in sharing the risk of the transaction[222]. The Scott theory tries to restructure the Bona Fide doctrine in pursuing the new reason for legitimacy based on the fairness in sharing the risk of the transaction, independent from the limit of the legitimacy under the traditional Case Law.

<4> Based on the analysis as discussed above, the influence of the Scott theory to the theoretical features of the Law of Trusts in the U.S. should be examined.

In the substantial standard under the Scott theory, whether the rights of the beneficiary and the third party are under the Common Law or in the Equity should not be crucial factor to the solutions. It should be only one of the factors to be considered for the comparison of the rights. Looking it from the different aspect, all the cases between two parties can be theoretically judged by the Bona Fide doctrine under the Scott theory, even the cases between the rights of the Common Law with each other, which should be out of the application of the Bona Fide doctrine originally.

If one presuppose not to consider absolutely the distinction of the Common Law and the Equity in theory, it could lead not to consider absolutely whether each system in Common Law or in Equity originally. The traditional features of the Bona Fide doctrine in the U.K., as the adjustment between the right of the third party in Common Law and the right of the beneficiary in the Equity presupposed the absolute distinction of the Common Law and the Equity theoretically, should be obvious not to be accepted in the U.S. "the traditional features" of the Law of Trusts in the U.K., creating the equitable rights independent from the legal right regarding the trust property, should not be accepted in the U.S. as the theoretical features of the Law of Trusts. That should be considered as the reason in the U.S. that the structure of the trust relationships themselves becomes considered as the features of the Law of Trusts. The trustee, who has the title and the power of the property, should owe the duties and liabilities to administer the property for the benefit of the beneficiary in accordance with the definition of trusts in the Scott theory[223].

By considering the features of the Law of Trusts as the structure of the relationships itself, and by considering not to be absolute whether each system was originated in Common Law or in Equity, it should not be needed to distinguish theoretically between the Law of Trusts and the other laws or institutions in relation to the administration of the property.

<5> It should also be natural for the theoretical features of the Law of Trusts in the U.S. recently, that the superordinate concepts, including the one such as trusts, agents, bailment and partnerships are created under the Law of Fiduciary[224]. Furthermore, the situation to which the Bona Fide doctrine applies, that is, the cases when the trustee transferred the trust property to the third party in breach of

222 See section 3 <7> of this chapter.
223 RESTATEMENT (2d) OF TRUSTS, s.2; SCOTT ON TRUSTS, ss.2–2.8.
224 RESTATEMENT (2d) OF TRUSTS, s.2 cmt.b; SCOTT ON TRUSTS, s.2.5.

trusts, it should be considered as the situation in which the fiduciary relationships was destroyed and vanished by the breach of duties of the fiduciary. It should not be presupposed the existence of "the fiduciary relationships" between the parties in the cases.

In comparing the rights of the parties, not to consider the distinction absolutely between the Common Law and the Equity, and bearing all circumstances of the actual cases, "the rights" to be compared should not be limited "the rights" or "the properties" strictly, but should include "the interests" which was not considered as "the rights" at the point of the time. Therefore, it should be natural that the Bona Fide doctrine can be applied not only between the beneficiary and the third party in breach of trusts, but also to all the cases between the third party and the party who has the rights or the interests regarding the property.

<6> Based on the examination regarding the influence of the Scott theory to the Law of Trusts in the U.S., the theoretical relationships between the Scott theory and other theories on trusts can be explained consistently.

For example, the Lepaulle theory by P. Lepaulle, which stated the features of the trusts should be considered as the existence of the trust property independent from the properties of the parties of the trust relationships, since all the trust relationships, from the express trusts to the constructive trusts, has common structural features with the existence of the trust property independent from the properties of the parties of the trust relationships[225]. The Scott theory criticizes the Lepaulle theory that the express trusts and the constructive trusts should be different fundamentally and that the Lepaulle theory cannot be supported since it treats the express trusts and the constructive trusts in the same way[226].

However, the theoretical structure of the Lepaulle theory and the Scott theory are not so different as the Scott theory criticizes. The Lepaulle theory distinguishes between the trust property and the property of the beneficiary, and states the beneficial right as the right of the beneficiary regarding the independent trust property[227]. Such statement of the beneficial right should be theoretically the same as the Scott theory[228]. The Lepaulle theory states the standard applied between the beneficiary and the third party under the Bona Fide doctrine as the judgement regarding the range of the privilege of the right of tracing (Droit de suite) by the beneficiary[229] and the case between the beneficiary and the third party should be decided by comparing the rights of both parties regarding the trust property, which should be the same as the Scott theory[230].

<7> The theoretical conflict between the Scott theory and the Lepaulle theory should be considered only as the statement regarding the relationships between the express trusts and the constructive trusts.

Since the Lepaulle theory states the express trusts and the constructive trusts as theoretically same, the difference of creating the trusts should not be important for it. The Lepaulle theory, presupposing the existence of the traditional Case Law relating to the legitimacy of "the Law of Trusts", states the actual standard to apply "the Law of Trusts" to the cases in which the rights of the parties are conflicted regarding the property administered.

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225 Lepaulle, Outsider's View Point of the Nature of Trusts, 14 Corn.L.Q. 52, 55 (1928); LEPAULLE, TRUSTS, pp.30–31.

226 SCOTT ON TRUSTS, s.462.1 pp.312–313.

227 LEPAULLE, TRUSTS, pp.44–45.

228 See section3 <8> of this chapter.

229 LEPAULLE, TRUSTS, pp.94, 308.

230 See section 3 <10> of this chapter.

On the other hand, the Scott theory, although the existence of the Case Law should be one of the reason for the legitimacy of the substantial standard of the Bona Fide doctrine, pursues the new doctrine for the fairness of the transaction, which is other than the authority of the traditional Case Law. In this point, the Scott theory should be different from the Lepaulle theory.

The Lepaulle theory and the Scott theory, although they are very similar in their theoretical structures regarding the Bona Fide doctrine and the basic structure of the trust relationships, are not accepted with each other, because of the difference of the presupposition regarding the existence of the traditional Case Law.

<8> Recently in the U.S., "the Contract theory" stated by Langbein is the one on which we should pay attention. The Contract theory states that the trusts should be considered as the contracts. Although the trusts and the contracts have different histories in their development in the U.K. and in the U.S., it explains that they are similar at the present time[231].

As examined above regarding the theoretical meaning of the Scott theory, under the presupposition regarding the system of law and equity, and the basic notions such as the property, the theoretical feature of the Law of Trusts in the U.S. should be considered as the general relationships regarding the administration of the property. Therefore, it might not distinguish theoretically between the trusts and the contracts at least in practice and it might be a matter of explanation whether the creation of the trust relationships should be considered as the contracts. The Contract theory can be considered as one of the results under the Law of Trusts in the recent U.S.

However, it should be also noted that the Contract theory based on the streams of the presuppositions regarding the system of law and equity, and the notion of the property through in the U.K. and in the U.S. In other words, the Contract theory should presuppose the status quo of the Law of Trusts in the U.S. without any question, and states the historical stream regarding the theoretical features of the Law of Trusts only as "the development" up to the status quo. For example, the Contract theory states that the Maitland theory is the pioneer of the Contract theory, but the Scott theory turned to the worse[232]. But as explained, it should be obvious that every theory on trusts has each theoretical meaning pursuing each purpose under each circumstance in every times and countries, and it should be impossible to decide which theory should be the best or the goal. Therefore, such statement of the Contract theory should be criticized as ignoring the stream of the theoretical meanings of the theories on trusts through in the U.K. and in the U.S., including the meaning of the Contract theory itself. The Contract theory should be considered as one of the theories on trusts in the U.S., giving the flexible standard to the actual cases without depending on the traditional presuppositions, as other theories on trusts in the U.S.

<9> From the discussions through this chapter, and in the discussion of the Scott theory, the traditional features of the Bona Fide doctrine presupposing the distinction of the Common Law and the Equity might be almost vanished and, at the same time, the Bona Fide doctrine can be applied as the general standard to all the cases regarding the conflict between the third party and the party who has the right or the interest of the property, regardless the trust relationships or other relationships[233]. Therefore, as the

231 Langbein, Contractarian Basis of the Law of Trusts, 105 Yale L.J.625 (1995). As introduction in Japanese, Frankel & Higuchi, the Trusts Model and the Contract Model, 115 Hogaku-Kyokai-zasshi 147 (1998).

232 Langbein, Contractarian Basis of the Law of Trusts, p.644 et seq.

233 However, for stating as such, it should be examined all fiduciary relationships regarding the relationships to the trusts in detail. From the examination of this article, it could not well explain whether the notion as fiduciary

theoretical meaning of the Scott theory, it should create or develop the unique features in the U.S., in spite of the traditional features of the Law of Trusts and the Bona Fide doctrine in the U.K.

CHAPTER 4 Comparative Studies and Theories in Japan

<1> In accordance with the explanation as above, it could be said that the conflicts of theories on trusts regarding the basic structure of the trust relationships should be considered reflecting the theoretical features of the relationships between the theories on trusts and the Case Law at every time, both in the U.K. and in the U.S. The conflicts of theories on trusts should not be considered as only conceptual discussions, even though the actual results of the Bona Fide doctrine have not basically changed from the times of the creation to the present times. Rather, the conflicts of theories on trusts should be considered to have the important meaning, not only for the theoretical meaning of the existence of theories on trusts, but also for the actual solutions of the cases between the beneficiary and the third party in practice.

<2> In this part of this article, the meaning of theories on trusts in Japan will be examined in its structure and the background of the conflict of theories in Japan.

The conflicts of theories on trusts in Japan have been discussed mainly in relation to the interpretations of the Japanese Trust Code (Law of No.62 in 1922, fundamentally revised by Law of No.108 in 2006[234]). The Original Trust Code accepted the theoretical structure of "the Claim theory" which studied after the Maitland theory and the Ames theory. The basic idea of it is that the trustee is the owner of the trust property and the right of the beneficiary is the claim to the trustee personally[235]. In theories on trusts in Japan, the Claim theory would be most accepted under the Original Trust Code. But other theories, such as "the Real Right theory" and "the Independent Trust Property theory" were stated cogently. In relation to the theories, since the New Trust Code changed the definition of the trust relationships which is neutral in relation to the conflict of theories on trusts, however, the discussions of the theories should be continued more[236].

On the other hand, regarding the standard between the beneficiary and the third party in case of the breach of trusts of the trustee, s.31 of the Original Trust Code has been provided, but the solutions under s.31 of the Original Trust Code, which admitted the beneficiary to invalidate the transfer of the trust property from the trustee to the third party in case of the breach of trusts, should not contradict to any theories on trusts. Since the New Trust Code s.27, does not change the basic structure of the solution of s.31 of the Original Trust Code[237], the conflict of theories on trusts should not be ended.

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relationships have been stated also in the U.K.

234 In this article, the Japanese Trust Code in 1922 is denoted as "the Original Trust Code" and the Revised Trust Code in 2006 is denoted as "the New Trust Code". Although the New Trust Code has been enacted, the Code has adopted more free stance for the theories on trust relationships than the Original Trust Code (see YUTAKA HOSHINO, THE LAW OF TRUSTS, p.28 et seq. (2011).). Therefore, the examination of this article should focus on the theories on trusts for the Original Trust Code, since such discussions are also appropriate for the New Trust Code, except to the topics which changed fundamentally by the provision of the New Trust Code.

235 See ss.19, 25, 52 of the Original Trust Code, which provided the beneficial right as "the claim of the beneficiary" or the duties and liabilities of the trustee to the beneficiary as "the obligation to the beneficiary".

236 The New Trust Code has a lot of provisions regarding the details of the trust relationships and the interpretations for the actual cases in practice, but the conflict of theories on trusts would never ended since no codes could eliminate the rooms for the interpretation completely.

237 However some minor conditions of the standard regarding the registration of the trust property and the notice of the trust relationships has added on the New Trust Code, the basic structure and the standard between the

<3> For considering the meaning of the conflict of theories on trusts in Japan, this article should examine the relationships between the theories on trusts and the Japanese Trust Code, including the reason why the Original Trust Code accepted the Claim theory.

Section 1 Features of the Japanese Trust Code

<1> The first code regarding the Law of Trusts in Japan was "the Secured Bond Trust Code in 1905", which led the general law of trusts in Japan[238]. The basic structure of that code was based on the idea of T. Ikeda, the author of the Original Trust Code afterward.

Regarding the change of the provision s.31 of the Original Trust Code, the Bills of the Code had the provisions such as effecting the beneficial right to the third party directly, or such as enforcing the third party to administer the property as the trustee, that is, creating the constructive trusts between the beneficiary and the third party. After the Bill in 1919, as s.31 of the Original Trust Code, only the right of the beneficiary to invalidate the transfer of the property from the trustee to the third party was provided[239]. The reason of such change has not been clarified by the most detailed study regarding the Bills of the Original Trust Code by A. Yamada[240].

<2> The standard between the beneficiary and the third party under s.31 of the Original Trust Code did not reflect the structure of the theories on trusts accepted by Ikeda, but changed only the solutions accepted by Ikeda. Therefore, this article should examine the discussions of Ikeda, especially before the enactment of the Original Trust Code.

Ikeda begins his discussion when there was not the Law of Trusts in Japan. After that, he explained that the Law of Trusts of Japan was originated from the system of property in the U.K. in which the Common Law and the Equity co-existed[241]. Ikeda discusses that the trust was developed in the U.K. and in the U.S., introducing the Law of Trusts in both countries[242].

Regarding "the essence of the trusts", Ikeda defines the trusts should be the system for administering the property for the benefit of others by confidence[243]. After that, in relation to the basic structure of the trust relationships, he states that the Claim theory should be considered as the best, in which the trustee has the ownership of the trust property and should owe the duties and liabilities to the beneficiary for administering the trust property[244].

Such discussion of Ikeda is consistent with the definition of the trust under s.1 of the Original Trust Code.

<3> The definition and basic structure of the trusts in the Original Trust Code should be influenced by the discussion of Ikeda and it based on the discussions on the Law of Trusts in the U.K. and in the U.S. The reason why the Claim theory was accepted in the Original Trust Code should be that Ikeda states as the best theory as the theoretical structure of the trust relationships.

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beneficiary and the third party under the Original Trust Code are maintained almost completely. In this sense, regarding the standard between the beneficiary and the third party in case of the breach of trust by the trustee, the examination of this article should be mainly focused on s.31 of the Original Trust Code.

238 YAMADA, STUDY, pp.3-6.

239 YAMADA, MATERIALS, pp.90-93.

240 YAMADA, STUDY, p.153.

241 IKEDA, THEORY ON TRUSTS, pp.78, 83.

242 IKEDA, THEORY ON TRUSTS, p.108 et seq.

243 IKEDA, THEORY ON TRUSTS, p.115.

244 IKEDA, THEORY ON TRUSTS, pp.115-120.

Since it was the beginning of the 20th century when Ikeda introduced the Law of Trusts in the U.K. and in the U.S., the discussions regarding the theories on trusts in the U.K. and in U.S. were in time when theories on trusts were conflicted both in the U.K. and in the U.S.[245] Therefore, the reason why Ikeda states the Claim theory as the best should be influenced by the conflicts of theories on trusts in the U.K. and in the U.S.

<4> Ikeda explains the conflicts of theories on trusts in the U.K. and in the U.S. as follows[246].

Regarding the essence of trusts, that is, the basic structure of the trust relationships, there are two main theories. One theory is "the Basic Right of Trust theory" stated by Salmond, Pomeroy, and etc., in which the trust property should be double-owned by the trustee and the beneficiary. The Salmond theory stated that the beneficiary had the beneficial ownership on the trust property and the trustee has the trusted ownership. The Pomeroy theory stated that the trustee has the legal ownership and the beneficiary has the equitable ownership on the trust property. However, the Basic Right of Trusts theory should be considered as theoretically incomplete, because the discussions of the Basic Right of Trusts theory only stated the equitable ownership on the trust property without stating the relationships between the trusts and other legal relationships[247].

The other theory is "the Claim theory" stated by Underhill, Pollock, Ames, and etc., in which the trust property should be owned by the trustee and the beneficiary has the claim to the trustee. The discussions of the Claim theory are that the trustee has the duties and liabilities to the beneficiary under the trust relationships because of the agreement of the parties. Sometimes the effect of the agreement should be enlarged to the third party as if the special contracts[248].

Ikeda explains the conflicts of theories on trusts in the U.K. and in the U.S. and states that the Claim theory should be the best theory at that time, not only because the legislatures in these days accepted the Claim theory[249], but also because the double ownership on the property stated by the Basic Right of Trust theory should be considered as "the extraordinary product" created by the "double systems of law" of the Common Law and the Equity in the U.K. He explains that it should not be reasonable for the structure of the Trust Code in Japan at the time[250].

<5> The features of the discussion of Ikeda is as follows.

First, the system of law presupposed by Ikeda should be considered as the united system which does not distinguish between the Common Law and the Equity. It should be obvious as Ikeda stated that the Basic Right of Trust theory should be unreasonable for the Trust Code in Japan because the theoretical structure of the Basic Right of Trust theory existed to explain the creation of the trust relationships under the co-existence of the Common Law and the Equity.

Second, Ikeda considers the importance of the theoretical relationships between the trusts and other relationships, especially between the trusts and the contracts. It should be obvious as Ikeda criticizes that the Basic Right of Trust theory is theoretically incomplete because the Basic Right of Trust theory does not discuss the relationships between the trusts and other relationships. He also insists

245 It was just after the Court System Reform in the U.K., and just before the conflicts of the discussions between the Ames theory and the Scott theory in the U.S.
246 IKEDA, THEORY ON TRUSTS, p.130 et seq.
247 IKEDA, THEORY ON TRUSTS, p.137.
248 IKEDA, THEORY ON TRUSTS, pp.139−141.
249 IKEDA, THEORY ON TRUSTS, pp.141−143.
250 IKEDA, THEORY ON TRUSTS, pp.144−152.

that it is possible to consider the trusts as the special contracts under the Claim theory because the trusts should be created by the agreement of the parties.

Third, in the discussion of Ikeda, the theories on trusts in the U.K. and in the U.S. should be considered as the abstract models for the best theoretically consistent status of the trust relationships in the whole system of law in Japan. It should be obvious that Ikeda does not distinguish the theories in the U.K. and the theories in the U.S. in discussing the conflict of theories on trusts, and states that it should be unreasonable presupposing the co-existence of the Common Law and the Equity for the discussion of trusts, although admitting the origin of the trust relationships was the co-existence of the Common Law and the Equity. In other words, the purpose of Ikeda was not to explain consistently the traditional Case Law in the U.K. and in the U.S. based on the presuppositions of the system of law and equity.

<6> The main purpose of the discussion of Ikeda should be to set the theoretical structure of the trust relationships in the whole system of law in Japan consistently. From this purpose of Ikeda, the system of law presupposed in the discussion should be the united system which does not have a separation between the Common Law and the Equity. Although Ikeda does not mention directly, since the purpose of the discussion should be to set the trust relationships smoothly to the contract system of Japan, the system of law and the notion of the property of Japan should be presupposed.

Ikeda stated the theories on trusts in the U.K. and in the U.S. as the abstract model for the interpretation of Japanese Trust Code, presupposing the system of law and the basic notions in Japan, which is quite different from the system of law and equity, and the basic notions in the U.K. or in the U.S. As explained, the Maitland theory and the Ames theory did not presuppose absolutely the distinction of the Common Law and the Equity, and stated the trust relationships should be created by the agreement of the parties, suggesting the consistent relationships of the trusts and the contracts.

Ikeda could smoothly set the trust relationships to the system of law in Japan without theoretical difficulty under the Claim theory, although presupposing the system of law and the basic notions in Japan as quite different from those in the U.K. and in the U.S.

<7> As discussed above, the reason why the Original Trust Law accepted the Claim theory should be that Ikeda considered the structure of the Claim theory should be the best as the abstract theoretical model to set the trust relationships consistently to the system of law in Japan. For the discussion of Ikeda, it should not be needed that all the discussions and the interpretations of the Trust Code should be explained by the Claim theory, because other theory also can be accepted by the Trust Code as "the best abstract theoretical model" to some part of discussions or interpretations.

It should not be the contradiction that the theories on trusts other than the Claim theory and the provisions of the Original Trust Code would not be theoretically conflicted although the Original Trust Code accepted the Claim theory in general. It should not be the contradiction that some provisions theoretically conflicted to the Claim theory, such as the independence of the trust property from the parties of the trust relationships[251]. Rather, from the purpose of Ikeda, it should not be needed to construct the Trust Code perfectly under the Claim theory. For him it should be needed to find the best theoretical flexible model, regardless the Claim theory or other theories, for setting the trust relationships. Also, the Trust Code consistent with the whole system of law, especially the system of

251 YAMADA, STUDY, p.137 et seq.

contracts in Japan should be needed for him[252].

Section 2 Theories Regarding the Japanese Trust Code

<1> As examined in the previous section, Ikeda, as the author of the Original Trust Code, paid much effort to find the best theory on trusts as the abstract but flexible model for setting the trust relationships consistently to the system of law in Japan.

Such purpose of Ikeda should be common to the discussions of the theories on trusts in Japan after the enactment of the Original Trust Code.

<2> The discussion of the Claim theory in Japan regarding the definition and the basic structure of the trust relationships is as follows.

The Claim theory defines the trust relationships as the institution administering the trust property by the trustee for the benefit of the beneficiary as stipulated in the s.1 of the Original Trust Code[253]. The trusts are originally created under the system of law in the U.K., in which the Common Law and the Equity co-exists. But such system of law and equity should not be insisted recently and the essence of the trusts should be that the trustee, who is the owner of the property, should owe the duties and liabilities to the others[254]. Regarding the basic structure of the trust relationships, the trust property belongs to the trustee and the beneficiary has the right of the claim to the trustee for administering the trust property for the benefit of the beneficiary[255]. The discussion of the Claim theory continues comparing the trust relationships and other institutions, such as the mortgage, the agents, the indirect proxy, the mandate, the bailment, etc., which has already existed in the system of law in Japan[256].

<3> The features of the discussion of the Claim theory should be as follows.

In the discussions of the Claim theory, the origin of the trust relationships should be the system of law in which the Common Law and the Equity co-exists, but such origin should not affect the interpretation of Japanese Trust Code. Rather, the definition of the trust relationships under the Claim theory should be the subject for the discussion of Ikeda as the author of the Original Trust Code and the provision s.1 of the Original Trust Code. Also, regarding the basic structure of the trust relationships, the discussion of the Claim theory should be subject for the discussion of Ikeda, and the existence of the s.1 of the Original Trust Code should be the origin of the legitimacy regarding the discussion of the Claim theory. Furthermore, regarding the relationships between the trusts and other institutions, the discussion is mainly focused on the actual difference of the definitions and the effects, which should be quite different from the discussion of this article regarding "the features of the trusts" theoretically. Such

252 The New Trust Code accepted the neutral definition regarding the trust relationships and the trustee should owe the duties and liabilities to the beneficiary under the Trust Code or the agreement of the parties regarding the trust relationships, which might be similar to the definition under the Restatement of Trusts in the U.S. The reason why the New Trust Code has the neutral provision would be the result of the New Trust Code trying to cover all the types of the trust relationships, regardless the private purpose or the commercial purpose.

253 AOKI, p.9 et seq., IRIE, p.94 et seq., HOSOYA, THEORY, p.9 et seq., MIBUSHI, p.17 et seq., YUZA, CRITICS, p.10 et seq., YUZA, SUMMARY, p.18 et seq.

254 AOKI, pp.16-19, & appendix pp.1-3, IRIE, p.1 et seq., HOSOYA, THEORY, p.41 et seq., MIBUSHI, p.1 et seq., YUZA, SUMMARY, p.120 et seq.

255 AOKI, pp.299-301, IRIE, p.150 et seq. & pp.353-355, HOSOYA, THEORY, p.513 et seq., YUZA, CRITICS, pp.11-13, YUZA, SUMMARY, pp.24-25. MIBUSHI, pp.18-19 states that the trusts should be the mixture of the real right law and the claim law.

256 AOKI, p.353 et seq., IRIE, p.120 et seq., HOSOYA, THEORY, p.253 et seq., MIBUSHI, p.20 et seq., YUZA, CRITICS, p.11 et seq.

comparison of the actual difference of the definitions and the effects would be valid to set the several institutions in the same system of law smoothly and the purpose of the discussion of the Claim theory should be considered as setting the trust relationships smoothly to the system of law in Japan.

Moreover, the theories other than the Claim theory, that is, the Real Right theory and the Independent Trust Property theory should have the same purpose of the discussions, setting the trust relationships smoothly to the system of law in Japan.

<4> The discussion of the Real Right theory is as follows.

The definition of the trusts provided in s.1 of the Original Trust Code does not exclude other definitions than the Claim theory[257]. Rather, in accordance with the interpretations of the provisions regarding the independence of the trust property and the duties of the trustee, the theoretical structure of the Claim theory should be unreasonable, since the ownership of the trust property should substantially belongs to the beneficiary[258]. In the Real Right theory, the mortgage should be a kind of the trust relationships, but the contract for the benefit of the third party should be different from the trust relationships[259].

The features of the Real Right theory should be as follows.

The discussion of the Real Right theory states substantially that the theoretical structure of the Real Right theory should be conflicted neither to the provisions of the Original Trust Code nor to the other institutions under the system of law in Japan, such as the mortgage or the contract for the benefit of the third party. Regarding the system of law in the U.K. in which the Common Law and the Equity co-exists, although mentioned as the origin of trust relationships, the Real Right theory states such double ownerships should not be effective to the interpretation of the laws in Japan[260] and the discussions in the U.K. should not be the basis of the discussion of the Real Right theory. Rather, it should be considered that the Real Right theory states its theoretical structure as the best theoretical model for the basic structure of the trust relationships in Japan, presupposing the system of law in Japan and the existence of the provisions of the Original Trust Code. From the discussion of comparing between the trusts and the mortgage or the contract for the benefit of the third party as well as for the Real Right theory, the main purpose of the discussion should be to integrate the trust relationships to the system of law in Japan.

The discussion of Real Right theory, which seems to be conflict with the Claim theory in appearance, should be common to the discussion of the Claim theory, in relation to the main purpose of the discussion as setting the trusts smoothly to the system of the law of contracts in Japan, and in relation to the presuppositions of the system of law and the basic notions.

<5> The discussion of the Independent Trust Property theory is as follows.

The Original Trust Code is provided after the Claim theory but has the provisions regarding the independence of the trust property and the succession of the trusts, which provides the trust property as the substantial independent entity[261]. The trust relationships should be the relationships between the three substantial parties, that is, the trust property as the substantial independence entity, the trustee who has the name of the title and the exclusive power for administering the trust property, and the

257 IWATA, p.1 et seq.
258 IWATA, p.57 et seq. & p.97 et seq.
259 IWATA, pp.93–96 & pp.101–105.
260 IWATA, p.101.
261 SHINOMIYA, TRUSTS, p.65 et seq.

beneficiary who has the beneficial right practically related with the trust property, in other words, the institution for the administration of the trust property as the substantial independent entity[262]. The feature of the trust relationships, compared with other institutions for administering the property, such as the mandate, the indirect proxy and the bailment etc., should be considered that the trustee has the exclusive power to administer the trust property[263].

The features of the discussion of the Independent Trust Property theory should be considered as follows.

The Independent Trust Property theory states the trust relationships as the institution administering the independent trust property and the trustee as the administrator of the trust property, and the beneficiary as the party enjoying the benefit of the trust property. From this understanding, examining each party analytically and stating the trust relationships as a kind of institution for administering the property, the purpose of the discussion of the Independent Trust Property theory could be integrating the trust relationships to the whole system of law in Japan. Since the Independent Trust Property theory also states as reasonable that the trust property has the substantial independence from the parties of the trust relationships and the trust relationships should be considered as the institution for administering the property, although the provisions of the Original Trust Code might be enacted after the Claim theory and the discussion of the Independent Trust Property theory should be considered as presupposing the system of Law in Japan and the existing of the Original Trust Code as the enacted legislature.

As discussed, the main purpose of the Independent Trust Property theory should be to integrate the trust relationships smoothly to the system of law in Japan, presupposing the system of law and the basic notions, as other theories on trusts in Japan.

<6> The conflict of the theories on trusts in Japan should be quite different from the conflict of the theories on trusts in the U.K. and in the U.S.

All the theories on trusts in Japan, the Claim theory, the Real Right theory and the Independent Trust Property theory in common, has the same purpose for integrating the trust relationships to the system of law in Japan, presupposing the system of law and the basic notions in Japan. All the theories discuss based on the same flexibility as the author of the Original Trust Code, Ikeda, in interpreting the Code and the trust relationships. In other words, all the theories regarding trusts in Japan compete to the best theoretical model of the Original Trust Code enacted by the legislature for setting the trust relationships most smoothly to the system of the law in Japan.

As examined above, the conflict of the theories on trusts in Japan should be the conflict for finding the best theoretical model under the same purpose and presupposition of the discussion, such as the system of law and the basic notions of the trust property or the property. In this regard, there should not be conflicted at all[264].

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262 SHINOMIYA, TRUSTS, pp.7−8 & p.63 et seq., SHINOMIYA, CIVIL LAW, p.43.

263 SHINOMIYA, TRUSTS, pp.8−9, SHINOMIYA, CIVIL LAW, p.47 et seq.

264 Regarding the New Trust Code, the condition of the conflict of theories on trusts might be changed, because the definition under the New Trust Code is provided the neutral structure to all theories on trusts, not after the Claim theory. However, such change of the definition of the trust relationships only means that the Claim theory lost the dominant status in interpretation of the Code. Therefore, even under the New Trust Code, the meaning of the conflict of theories on the trust relationships is not diminished, since all the theories can compete equally for the best model of trust relationships in the system of law in Japan.

Section 3 The Bona Fide Doctrine and Theories in Japan

<1> In Japan, as in the U.K. and in the U.S., the standard between the beneficiary and the third party in case of the breach of trusts by the trustee, on which s.31 of the Original Trust Code and s.27 of the New Trust Code is provided, should be the main topic of the Law of Trusts [265]. Under s.31 of the Original Trust Code, when the trustee transfers the trust property to the third party in breach of trusts, the beneficiary can invalidate the transfer of the trust property to the third party who knows the breach of trusts or does not know by the gross negligence[266]. The conflict of theories on trusts in Japan is discussed in relation to the interpretation of this standard under s.31 of the Original Code and this is quite similar the conflict of theories on trusts in the U.K. and in the U.S. regarding the Bona Fide doctrine.

<2> There are three main theories on trusts in Japan, the Claim theory, the Real Right theory, and the Independent Trust Property theory. All the theories explain the theoretical structure regarding the standard under s.31 of the Original Trust Code respectively.

However, all the explanations by the previous theories regarding the standard under s.31 of the Original Trust Code should be contradicted to the theoretical structure of their theories.

<3> For example, the explanation of the Claim theory is as follows.

Under the Claim theory, the beneficial right should be the claim to the trustee, not to the third party. Since the trustee is the owner of the trust property, the transfer from the trustee to the third party should be valid transaction even if it is the case of the breach of trusts. The beneficiary can only claim to the trustee for the damages by the breach of trusts, not to the third party, unless the transfer to third party should be blamed as the invasion or the fraudulent injury to the claim of the beneficiary. Therefore, the standard under s.31 of the Original Trust Code, which admits the beneficiary to enforce the effect of the claim to the third party, should be the special protection to the beneficiary[267].

However, such explanation should be criticized as the waiver of the theoretical discussion, since the effect of the beneficial right to the third party should be considered since the critical point of the trust relationships and should not be explained as “the political judgement”. As examined, the Maitland theory and the Ames theory explained the standard between the beneficiary and the third party under the Bona Fide doctrine as the judgement of the equality of the third party and the trustee[268], which should be valid for the theories on trusts in Japan.

The explanation of the Claim theory regarding the standard under s.31 of the Original Trust Code should be changed as the enlargement of the effect of the agreement of the trust relationships to the third party who should be judged as equal to the trustee. In this regard, theoretically, the remedies, with which the beneficiary can enforce the third party, should be the creation of the constructive trusts between the beneficiary and the third party and other remedies related[269], so s.31 of the Original Trust

265 The New Trust Code only slightly changes the conditions of the standard regarding the registration of the trust property and the notice of the third party. Accordingly, the discussion in this article should be focused on s.31 of the Original Trust Code, as most theories have focused on.

266 For some kind of the property, such as the real estate, the registration of the trust property should be required if it could be done.

267 AOKI, p.235, IRIE, pp.394-395, HOSOYA, TRUSTS, pp.392-393, MIBUCHI, p.154, YUZA, CRITICS, p.96, YONEKURA, pp.126-127, DOGAUCHI, p.223.

268 See section 3 <3> of Chapter 2 & section 2 <2> of Chapter 3.

269 OSAKADANI, vol.2 p.99 et seq., stating s.31 of the Original Trust Code should be revised for creating the

Code should be considered as providing only a part of the remedies which should be selected by the beneficiary.

<4> The explanation of the Real Right theory is as follows.

Under the Real Right theory, the beneficial right should be the real right of the trust property effective to all others. The trustee has only the power to administer the trust property subject to the purpose of the trust relationships. The transfer from the trustee to the third party in breach of trusts should be void transaction as ultra vires and the third party could not be transferred the property. Therefore, the standard under s.31 of the Original Trust Code should be considered as providing so called the relative void through the invalidation by the beneficiary[270].

However, such explanation should be criticized as not relating to the theoretical structure of the Real Right theory. In relation to the void transaction by ultra vires, the enforcement by the beneficiary to the third party should be always admitted regardless the features of the beneficial right. Moreover, the reason why the void transaction could be turned to valid by the selection of the beneficiary should not be led by the features of the beneficial right as the real right of the trust property. Therefore, the Real Right theory should be considered to fail in making the theoretical explanation regarding the standard under s.31 of the Original Trust Code.

Rather, from the perspective regarding the theoretical structure of the Real Right theory, the reason of the enforcement by the beneficial right to the third party should be the original effect of the beneficial right regarding the trust property and the third party should owe the duties and liabilities to the beneficiary as the trustee owed. Therefore, the remedies which the beneficiary can enforce to the third party in case of the breach of trusts should be considered as the creation of the constructive trusts and other remedies related to, so the standard under s.31 of the Original Trust Code should be considered as providing only a part of the remedies admitted to the beneficiary theoretically.

<5> The explanation of the Independent Trust Property theory is as follows.

Under the Independent Trust Property theory, the trust property is the substantial entity independent from the trustee or the beneficiary, while the trustee has the name of the title and the exclusive power to administer the trust property. The beneficiary has the beneficial right practically related to the trust property and the transfer from the trustee to the third party in breach of trusts should be void transaction as the ultra vires, not affected to the trust property. If the third party is transferred the trust property without notice of the breach of trusts, the third party can state the right regarding the property to be protected by the reliance to the validity of the transaction and the beneficial right should be vanished reflectively. Otherwise, the transfer from the trustee to the third party should not effect to the trust property and the beneficiary can enforce the effect of the beneficial right to the third party. Therefore, the standard under s.31 of the Original Trust Code should be considered as providing the protection of the reliance to the validity of the transaction and giving the option to the beneficiary to invalidate or to confirm the transfer in breach of trusts[271].

However, such explanation of the Independent Trust Property theory should be criticized as not relating to the theoretical structure of the Independent Trust Property theory, as that of the Real Right theory. As discussed above regarding the Real Right theory, from the explanation as the void transaction

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constructive trusts, conferring the Case Law in the U.K.

270 IWATA, p.181. And see, ARAI, p.227.

271 SHINOMIYA, TRUSTS, p.252.

by ultra vires, the enforcement by the beneficiary to the third party should be always admitted regardless the features of the beneficial right. Moreover, the selection whether the beneficiary invalidate or confirm the transfer in breach of trusts cannot be explained from the trust property and it should be the independent from the parties of the trust relationships, including the beneficiary.

As noted in the previous section, the Independent Trust Property theory states that the trust property should be independent from the parties of the trust relationships and that the beneficial right should be the right for receiving the value of the trust property. From such statement, the theoretical structure of the trusts under the Independent Trust Property theory should be considered as similar to the substantial standard of the Bona Fide doctrine under the Scott theory[272] and the theoretical structure of the Lepaulle theory[273].

<6> Therefore, the theoretical standard between the beneficiary and the third party under the Independent Trust Property theory should be considered as follows.

Under the Independent Trust Property theory, the beneficial right should be the right for receiving the value of the trust property and the effect of the beneficial right should be maintained even though the trust property was transferred from the trustee to the third party in breach of trusts. Regarding the trust property transferred in breach of trusts, both the beneficiary and the third party have their rights. Under such circumstances, the standard applied between the beneficiary and the third party should be judged by comparing the rights of the beneficiary and the third party regarding the trust property[274]. The reason why the beneficiary can enforce the beneficial right to the third party should be that the beneficial right is judged as prevailing to the right of the third party regarding the trust property[275].

From the discussion above, the remedies which the beneficiary can enforce to the third party should be considered as any way for the beneficiary to receive the value of the trust property, such as creating the constructive trusts between the beneficiary and the third party, as restoring the property to the original trust relationships, or as indemnifying the damages for the trust relationships, etc. Therefore, the standard under s.31 of the Original Trust Code should be considered as providing a part of the remedies which the beneficiary should enforce theoretically.

<7> As examined above, all the previous theories on trusts in Japan should be criticized as failing to provide the explanation reasonably or theoretically regarding the standard between the beneficiary and the third party under s.31 of the Original Trust Code. They only insist the transfer of the trust property in breach of trusts should be valid or invalid. As examined, the standard under s.31 of the Original Trust Code should be considered as providing a part of the remedies which the beneficiary should enforce to the third party in any theories. The provision should not be contradicted to any theories on trusts in Japan. Furthermore, such theoretical situation is not changed by the New Trust Code, as the standard under s.27 of the New Trust Code should be considered as the same structure as that under s.31 of the Original Trust Law.

<8> As discussed through in this chapter, the conflict of theories on trusts in Japan should be considered as the competition for the theoretical model of the Japanese Trust Code, different from the conflict of the theories on trusts in the U.K. and in the U.S. Therefore, for considering the meaning of the theories

272 See section 3 <8> of Chapter 3.
273 See section 5 <6> of Chapter 3.
274 See section 3 <10> of Chapter 3.
275 See section 3 <10> of Chapter 3.

on trusts in Japan more deeply, all the provisions and the situations regarding the trust relationships and the Japanese Trust Code, especially the New Trust Code, should be examined.

CHAPTER 5 Conclusion

<1> From all the discussions and examinations in this article, the meaning of the conflicts of theories on trusts in the U.K., the U.S. and Japan should be considered as follows.

<2> In the U.K., the traditional theories pursued the explanation of the Law of Trusts or the Bona Fide doctrine as the Case Law, presupposing the existence and the legitimacy of the Case Law and the relationships between the theories and the Bona Fide doctrine.

At the times of Court System Reform, however, because the authority of the Court of Equity was destroyed, the theories on trusts tried to find the theoretical reason other than the authority of the Court to explain the legitimacy of the Law of Trusts and the Bona Fide doctrine. Accordingly, the conflict between the Maitland theory and other theories should be considered as the conflict regarding the fundamental meaning of the theories on trusts in the U.K. But such conflict has diminished its importance since the authority of the Court recovered after the Court System Reform.

<3> In the U.S., the theories on trusts pursued stating the flexible standard for several actual cases in practice and the relationships between the theories on trusts and the Bona Fide doctrine should be the critical point for the discussions. Therefore, the conflict between the Ames theory and the Scott theory should be considered as the theoretical competing for the purpose of the theories on trusts in the U.S., affecting the features of the Law of Trusts and the Bona Fide doctrine.

Moreover, the meaning of the conflict of theories on trusts should be considered to continue even the present time, for finding more flexible and more reasonable standard for all the actual cases in now and the future.

<4> In Japan, the conflict of theories on trusts is discussed around the situations similar the ones in the U.K. and in the U.S., but the theoretical meaning of the conflict should be quite different. That is, all the theories have the same purpose for integrating the trust relationships smoothly to the system of law in Japan, presupposing the existence of the Trust Code and the system of law.

In the U.K. and in the U.S., the conflict of the theories on trusts should be considered as the conflict of presuppositions of the discussion, such as the system, especially the relationships between the Common Law and the Equity, and the basic notions such as the trust property or the property itself. But such conflict regarding the theoretical presuppositions never occurred in Japan and the conflict of theories in Japan should be considered as the competition for the best theoretical model for the interpretations of the Trust Code, presupposing the basis of the theoretical discussions in common.

Such conflict in Japan would be continued for the future, as every legislature should be in need of the theoretical model for the reasonable solutions for the actual cases in practice.

<5> There may be many subjects remained to be discussed, three of which is as follows.

First, the relationships between the Law of Trusts and the other fiduciary relationships should be considered from the perspective of this article.

Second, especially in Japan, the interpretations for all the provisions of the New Trust Code from theoretical aspect should be considered in detail, in which the meaning of the conflict of the theories in Japan should be reconsidered.

Third, the theoretical essence of the Law of Trusts, in the U.K., in the U.S. and in Japan, should be considered through whole research.

Those subjects above will be examined in the nearest future[276].

[END]

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