

- Problem that this justification doesn't extend to all cases within what is effectively the blanket ban on secret trustees relying upon the formalities of s9 – in some cases, the secret trustee might be fraudulently trying to deny the existence of the trust by relying on the lack of formalities, but for instance in **Muckleston v Brown**, the secret trustee was trying to rely on the s9 formality requirements to prevent the intended charitable trust from failing under another old statute (entirely altruistic, honest trustee) – so fraud cannot justify this blanket ban
- Answering argument is that the ban is preventative rather than curative – focuses on the potential for abuse of the system rather than undoing it when it occurs – but even this only applies to fully secret trusts
- For half-secret trusts, there is no possibility of denying its existence, so there is no potential for fraud, and that justification fails
- However, it would seem odd that an apparent gift to X (fully secret trust) could create trust obligations informally expressed, but that the slightly more formally expressed gift with secret trust terms could not constitute a trust – seemed to be the reasoning in Blackwell – shouldn't be the case that the closer you get to obeying the s9 formalities without actually doing so, the less likely you are to successfully create trust obligations – therefore if secret trusts are allowed under the fraud justification, then half-secret trusts should be allowed to tag along as well – the difficulty in the ex post facto rationalisation shouldn't be allowed to make any practical difference

Challinor on debunking the myth of secret trusts

- The de hors theory, as Critchley points out, cannot account for the departure from the Wills Act despite its explanation as to why secret trusts fall outside of wills, since they are still testamentary
 - On which note, they are therefore NOT inter vivos trusts, though the declarations of them clearly have to be
 - So the fraud theory is the only one that can justify (at least fully) secret trusts
- The fraud maxim was originally applied only in interpretation, and now that it is being used to entirely circumvent the Wills Act
 - However, this is not inconsistent with the fraud maxim's use in other areas of law, like in **Rochefoucauld v Boustead** under the formalities and constitution topic
 - But it doesn't explain half-secret trusts, as above under Critchley
- However, Hodge argues that it is not the personal fraud of the purported legatee, but a general fraud committed upon the testator and the beneficiaries by reason of the failure to observe the intentions of the former and of the destruction of the beneficial interests of the latter, which secret trusts seek to avoid (in response to the argument that not all of the trustees' reliance upon s9 will be fraudulent)
 - But this is nothing more than an assertion that the settlor's wishes should be respected even if he does not construe them correctly according to statute – trusts fail frequently for that very reason, so it cannot be enough per se
 - Given that the role of equity has never been to subvert clear legislative intent, it would seem that the law of equity has gone too far in the area of secret trusts
 - However, even the commentators who argue this recognise that the doctrine of secret trusts is now far too well established to be overruled but by Parliament