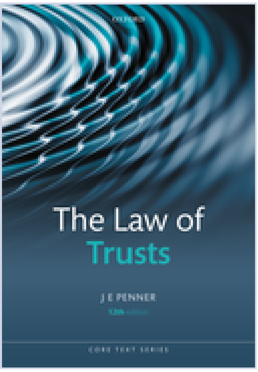

The Law of Trusts (12th edn)

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6. Constitution

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Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. A trust is fully set up, or constituted, only when the property is in the hands of a person who is properly bound to be a trustee. The issues that arise concerning the constitution of trusts are closely tied up with equity's general principles for dealing with gifts. This chapter begins by discussing an important guiding principle of the court of equity. The principle has two main strands: equity will not enforce gratuitous promises; and equity will not perfect an imperfect gift. The focus then turns to covenants, covering the enforcement of covenants to settle by equity and enforcement of covenants to settle at common law. Cases relating to the fortuitous vesting of the trust property are also analysed.

Keywords: constitution of trusts, gifts, volunteers, equitable assignments, covenants to settle, fortuitous vesting, Re Rose principle, rule in Strong v Bird, donationes mortis causa

Summary

'Equity will not assist a volunteer'

- 'Equity will not enforce gratuitous promises'
- 'Equity will not perfect an imperfect gift'
- Equitable assignments of choses in equity and common law choses in action

6.1 A trust is fully set up, or constituted, only when the property is in the hands of a person who is properly bound to be a trustee. The issues that arise concerning the constitution of trusts are closely tied up with equity's general principles for dealing with gifts, and so we shall begin by considering gifts in general. To remind ourselves, a gift is any transaction that benefits an individual who has not paid, ie given any consideration, for it; such an individual is called a 'volunteer' (**2.57**).

6.2 In *Milroy v Lord* (1862), Turner LJ laid down three 'modes' of making a gift:

- an outright transfer of the legal title to the property (or the outright assignment of an already existing equitable interest);
- a transfer of the legal title of the property to a trustee to hold on trust;
- a self-declaration of trust.

However, as we shall see (**6.10** et seq), there are two further, interconnected 'modes' of transferring/creating a beneficial interest in property for another, which substantially complicates this somewhat simple picture, without however, departing from its basic principle.

p. 139 **6.3** In the case of a self-declaration, the constitution of the trust is automatic—the title to the trust property is already in the hands of the trustee when she makes the declaration; but this is subject to our discussion in **5.50** et seq—a self-declared trust is not constituted unless the settlor clearly identifies what property of hers is to be held on trust. Where the settlor transfers property to B on trust for C, he must both effectively declare the trust, and effectively transfer the title to the property to B—it is this second step that constitutes the trust.

'Equity will not assist a volunteer'

6.4 The maxim 'Equity will not assist a volunteer' describes an important guiding principle of the court of equity. The principle has two main strands:

- equity will not enforce gratuitous promises; and

- equity will not perfect an imperfect gift.

'Equity will not enforce gratuitous promises'

6.5 If A promises B that he will give him Blackacre, or if A promises B that he will put Blackacre in trust for him, and A refuses to deliver on his promise, equity will not enforce the promise at B's request. As Hackney (1987, 118) puts it: 'You cannot sue for presents in equity.'

'Equity will not perfect an imperfect gift'

6.6 In *Milroy v Lord*, a man wishing to provide for his niece gave share certificates to a Mr Lord to hold on trust for her. Now this transfer of physical possession of the share certificates (along with a deed of gift which purported to transfer the shares to Lord but was ineffective to do so) did not pass legal title to the shares, so this act did not constitute the trust. But the uncle also gave Lord a power of attorney, which gave Lord the power to get the shares registered in his name. Unfortunately, the uncle died before Lord acted on the power of attorney to register the shares in his name, and the power of attorney was extinguished by the uncle's death, so Lord was thereafter unable to get the shares registered in his name. Thus the trust was never constituted, and the shares fell into the uncle's estate on death. Turner LJ said (at 274):

> *[I]n order to render the settlement [ie the gift] binding, one or other of these modes [**6.2**] must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a*
> p. 140 ↵ *declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.*

6.7 Thus the three 'modes' of conferring a benefit are three mutually exclusive 'modes': equity will not treat the intentions of a donor to make an outright gift, where the property for one reason or another fails to pass from the donor to the donee, as a self-declaration of trust. *Jones v Lock* (1865) and *Richards v Delbridge* (1874) are illustrative. In *Jones v Lock* (**5.8**), the 'cheque for baby' case, the court would not perfect the intended, future gift by treating it as a declaration of trust. Similarly, in *Richards v Delbridge*, the court would not devise a trust in order to perfect the ineffective legal assignment by *Mr Delbridge* of the lease to his mill and the stock-in-trade of his business to his grandson.

6.8 Equity will also not perfect an ineffective transfer of the legal title to property to an intended trustee to constitute a trust by treating the intending settlor as having made a valid self-declaration of trust. If the property fails to get into the hands of the intended trustee, there is no trust. In *T Choithram SA v Pagarani* (2001), however, the UKPC generously construed the words of a rich businessman intending to transfer almost the entirety of his wealth on trust shortly before his death. Having just executed a deed of trust establishing a charitable foundation and appointing himself as one of the trustees, he orally indicated that he 'gave' all his wealth to the foundation. He never executed the necessary documents to transfer legal title in his property to the trustees. The court held that in this context, his words of gift could be interpreted as words of declaration of trust and, being one of the trustees of the foundation, this constituted the trust, although the reasoning can be criticised (see Rickett (2001)).

6.9 But be careful to note what 'Equity will not assist a volunteer' does not mean: it does not mean that volunteers who are already beneficiaries under an existing trust have no rights in a court of equity. As beneficiaries of a constituted trust, they are fully entitled to the benefit of the trust, have equitable proprietary rights in the trust property, have the right to sue the trustees to enforce the trust, and so on. It does not matter whether they are volunteers or not at this stage. After all, most non-commercial trusts are for volunteers, since most trusts are created by settlors to benefit family members who have certainly never paid the settlor for their benefits under the trust. Equity is not in the business of dismantling effectively transferred gifts, or dismantling effectively constituted trusts. In short, equity will not assist volunteers to become donees or beneficiaries under a trust, but once a person is a donee or a beneficiary, it matters not one whit whether he paid for the privilege or got it for free (*Ellison v Ellison* (1802); *Paul v Paul* (1882)).

Equitable assignments of choses in equity and common law choses in action

6.10 English property law recognises property rights to things other than property that can be physically possessed, like chattels, goods such as mobile phones, or pints of milk. It also recognises rights in intangible
p. 141 property, such as debts one is owed, or intellectual property rights, which cannot be physically possessed. Rights to these types of property are dubbed 'things or choses (French for 'thing') in action', because they are enforced by bringing a legal action against, eg the debtor who fails to pay the debt. By contrast, rights to tangible things are called 'choses in possession'. Because the beneficiary's right under a trust is, as we have seen (**2.43**), not a possessory right either, but can only be enforced in a court of equity, by parity of nomenclature the beneficiary's right is sometimes called a 'chose in equity'.

6.11 Remind yourself that equity always regarded a definable interest under a trust, that is not a mere *spes*, or expectancy (**3.6**), as a property interest held by the beneficiary of that interest. This 'chose in equity' could therefore be 'assigned', which just means transferred (**2.43**). So, to take a simple example: If T held assets on trust for A for life and then for B, either or both of A and B could assign their equitable interests. If A assigned her interest to C, called the 'assignee', C would be entitled to the income of the trust until A died. As we shall see (**9.19** et seq), legislation now imposes formality requirements on the assignment of trust interests, but in keeping with the maxim 'Equity looks to intent not form' (**5.4**), equity itself did not impose any formality requirements on such an assignment. Equity just looks at the substance of the particular transaction to determine whether an assignment was made.

6.12 An assignment is effective to transfer the beneficial interest even before notice of the assignment is given to the trustee, but the trustee is protected by a rule that the trustee was not liable for paying the assignor until it received notice of the assignment (*Donaldson v Donaldson* (1854)). So in our simple example, T would not be liable if he continued paying A the income after the assignment unless and until A or C informed it of the assignment.

6.13 The situation was quite the opposite regarding common law choses in action. Choses in action, like the right to be paid a debt, were *not assignable* at common law. Different explanations for the rule against assignment have been given, but the fundamental idea turns on 'privity of contract'. When a contract is made between two contracting parties, only they are bound under their contract. Neither of them can unilaterally alter the contract, but this is just what an assignment does. If a creditor A, assigns to C her right to be paid a contractual debt owed to her by B, A has unilaterally introduced a third party into the contract. This is not allowed. If A purported to do this, the 'assignment' would be invalid at common law. A second, public policy reason against assignment, was that a person should not be able to 'sell' their right of action against their debtor to another person (which fell under the prohibitions of 'maintenance' or 'champerty' (Bridge (2015), 233)).

6.14 But equity also developed a doctrine of the '*equitable* assignment of *legal* choses in action', in particular the assignment of contractual debts. Again, being an equitable assignment, there were no formal requirements—an oral assignment was perfectly valid—equity looked only to the substance of the transaction (*Brandt's Sons & Co v Dunlop Rubber Co* (1905); Bridge (2015), 235).

p. 142 **6.15** Notice that this form of assignment is not a 'true' assignment in the sense that C just steps into the shoes of A, as in the case of an equitable assignment of a trust interest, or in the case of any other transfer of title to property, as when A gives C her wristwatch, or transfers her company shares to C. Here, A stays in the picture, because C does not get what A had. C *does not* get A's *legal* right to be paid by B under an equitable assignment. Rather, the situation is rather trust-like: A now holds her legal right to be paid by B *for C*, and correspondingly, C's equitable right is a right to or in A's right to be paid, ie to enforce the debt (recall **2.43**). Moreover, C cannot enforce his interest directly against B, as if, again, this were a true assignment in which C got A's right, stepping into A's shoes. If B refuses to pay C, A (if willing) must join C's action against B as co-plaintiff, and if A is unwilling, C must join A as a co-defendant alongside B (Bridge (2015), 233–234). Note the resemblance here to the *Van de Pitte* procedure (**2.16**) which is invoked when a beneficiary sues his trustee to enforce the trustee's legal rights against a third party (see also McFarlane & Stevens (2010), 6–8).

6.16 Although the relationship between A and C is trust-like, A is not a trustee for C. That is, the general rules governing trusts are not applied to this relationship. Rather, equity treats the relationship as much as it can as equivalent to an assignment of an equitable interest. Under the Law of Property Act 1925, s 136, legal choses in action such as debts may now be assigned at law, but equitable assignments of legal choses in action still occur.

Invalid assignments, consideration, and the maxim 'equity looks upon as done that which ought to be done'

6.17 Although it seems that in the past there was some doubt about whether equitable assignments of legal choses in action required the assignee to give consideration for the assignment, the modern view is that a gratuitous assignment of a legal chose in action is perfectly valid (Bridge 2015, 237–239). But consideration has a significant role to play because of other reasons why an assignment might be invalid, and the general rule is that where an assignment fails for some reason, but the assignee has given consideration for the assignment, equity will come to the aid of the assignee.

Future property

6.18 A clear example is the case of purported assignments of 'future property'. Future property is property that someone might receive, such as a legacy under a will by a testator still alive, or future royalties from the sale of a book, or a future distribution under a discretionary trust or power of appointment. (As we shall see, promises to transfer property on trust, or 'promises to settle', often involve future or 'after acquired' property (**6.51** et seq).) The case of future property provides an example of equity's willingness to perfect an imperfect legal transaction where consideration is given. Because future property does not exist, it obviously cannot be transferred. Thus, if I execute a deed whereby I purport to assign to you all the royalties from a book not yet published, that deed assigns nothing, for no royalties exist; thus, an assignment of future property is totally p. 143 ineffective. If you give no consideration in return for the assignment, then equity, under the principle that equity will not assist a volunteer, will not take any steps to make the intended assignment to you effective. If, however, you give consideration for the assignment, then equity will treat the assignment of future property as a contractual obligation to assign the future property if and when it is received (*Tailby v Official Receiver* (1888); *Re Ellenborough* (1903)).

6.19 Besides treating the assignment of future property for consideration as a valid contract *to assign* the property when received, equity also applied the maxim 'equity looks upon that as done which ought to be done', decreeing that the assignor holds that asset to be assigned on constructive trust for the assignee from the moment he acquires title to it. We shall consider the merits of this maxim further (**17.10** et seq).

Perfecting an imperfect gift

6.20 Despite the long-standing authority of *Milroy v Lord*, there are circumstances where equity will perfect an imperfect gift.

The *Re Rose* principle

6.21 In *Re Rose* (1952), Mr Rose properly executed a share transfer form and delivered it, with the appropriate share certificate, to his wife, who was then entitled to have the shares registered in her name. The court held that, in equity, such a gift is valid from the time that the donor does everything he is obliged to do on his part to transfer the shares. This has since become known as the *Re Rose* principle. The CA distinguished *Milroy v Lord* on the basis that in that case, the uncle had not done everything in law that he was required to do to transfer his title. Under the principle, after the donor (of shares for instance) has done everything he himself is required to do to pass title, and until such time as the shares are registered in the donee's name, the donor holds the shares on constructive trust for the donee. If a dividend were declared in the interim, the donor would accordingly hold the dividend payment upon trust for the donee as well.

6.22 The case is odd, and should be read to get a sense of the judges' reasoning. To begin with, this was not a case where the wife needed equity to perfect this gift at all; the share transfer was duly registered in the books of the company, so the legal transfer of the title to the shares took effect in the normal way. The case turned on the timing of the transfer for the purposes of tax liability. At the time, a deceased's estate was charged estate duty calculated by the value of the estate. This valuation included the value of gifts the deceased made within a certain period prior to his death. In *Re Rose*, if the gift was effective when Mr Rose handed the share transfer documents to his wife, then the gift would have been outside this period, and the value of the shares would not be part of his estate for the valuation of duty. If the effective date of the gift was the day the transfer p. 144 was registered with the company, the shares would have been caught for the duty valuation. The result of the CA's holding was that, since the beneficial interest in the shares passed at the time the donor had done everything he was required to do, duty was not payable.

6.23 The main focus of the judgments of both Evershed MR and Jenkins LJ was on the question, '*When* did Mr Rose give the shares to his wife', which they treated as '*When* did he act to do so?' Both Evershed MR and Jenkins LJ suggested that as a matter of common sense this was when he filled out the transfer form and gave it with his share certificates to his wife (at 506–507 per Evershed MR; at 514, 515–516 per Jenkins LJ). On this point, the court placed weight on the thought that had Mr Rose changed his mind about the gift, he could not stop Mrs Rose from presenting the transfer forms and the certificates to the company nor stop the company from registering them. In particular, the court clearly opined, albeit obiter, that a court of equity would not grant Mr Rose, in this circumstance, an order against the company enjoining it from registering the shares (per Evershed MR at 508). The judges also considered that Mr Rose could not have refused to hand over any dividend he might have received between executing the transfer form and the company's registration of the shares. As Evershed put the point (at 512–513):

> *How could he, in the face of his own statement under seal, deny the proposition that he had, on March 30, 1943, transferred the shares to his wife?—and by the phrase 'transfer the shares' surely must be meant transfer to her 'the shares and all my right title and interest thereunder.' Nothing else could sensibly have been meant.*

Both the point about a transferor's inability to restrain a company from registering the share transfer and his inability not to transfer any dividend received before registration seem to be forms of an 'estoppel' argument, ie that Mr Rose could be stopped, or 'estopped', from exercising in his own favour whatever rights remained to him as legal title holder prior to the registration of the shares in Mrs Rose's name. But, as we shall see (**17.37** et seq), there are rules which govern the operation of an estoppel, and where a legal title holder is estopped from relying upon her legal rights vis-à-vis another, that does not generally generate a trust over that right in favour of that other. So it is not clear that either of these points contribute to the finding of a trust over Mr Rose's legal title to the shares in Mrs Rose's favour, rather than just bolstering the court's finding that this reading of what Mr Rose did, and when he did it, was sufficient for finding in favour of Mrs Rose for the purposes of the taxing statute.

6.24 Other aspects of the reasoning are difficult too. At one point, Jenkins LJ (at 518–519) seemed to suggest that, as between the donor and donee, the legal title passes with the handing over of the shares and the completed transfer certificate, the company just recording the donee's legal ownership, which is just wrong in law. For his part, Evershed MR strongly suggested (at 513) that, given the form of the transfer document, Mr Rose declared an express trust of his legal title to the shares in favour of his wife until she managed to get the legal title transferred into her own name. Now, of course, a donor can perfectly well declare a trust of his legal interest in this way until legal title passes, but if this is the true reasoning in the case then there is nothing to perfect, and the 'principle' in *Re Rose*—that a transferor of a legal interest in shares hold the shares on *constructive* trust—has no foundation.

p. 145 **6.25** At several points, both Evershed MR (at 506, 510) and Jenkins LJ (at 515, 517) stated that Mr Rose had transferred both his legal and equitable interests in the shares. Perhaps at the time it was not uncommon for lawyers and judges to believe that where a legal title to property is held outright, the owner has both a legal and equitable interest. As we know (recall **2.9**), that is fallacious, and confuses the notion of a beneficial interest with an equitable one. An outright owner of a legal title has no equitable interest in his own legal title, and so has no equitable title to transfer. All he can do so far as equity is concerned is to declare a trust over that title, or make an equitable assignment of it. He has no pre-existing equitable interest to transfer. So, in so far as the court's reasoning turned on this idea, it must be rejected.

6.26 *Re Fry* (1946) provides something of a contrast. In that case, a donor of British company shares who was resident in America was required by law to obtain the consent of the British Treasury before he could effectively transfer his legal interest. While the donor had done everything he could, in that he had completed the transfer form in favour of his son and had submitted the necessary forms to the Treasury, he died before the Treasury had given permission for the transfer. Romer J held that the donee had obtained no interest in the shares, and applying *Milroy v Lord*, refused to treat the transaction as having passed the beneficial interest in equity. Romer J thought that it was up to the donor to obtain, not just apply for, Treasury permission, and that furthermore, since the Treasury might have sought further information before granting permission, the donor might well have had an opportunity to scuttle his own gift by failing to provide that information; therefore the donor had not done everything necessary to divest himself of his interest in the shares nor relinquished his power over them.

6.27 *Mascall v Mascall* (1984) is a case applying the *Re Rose* principle to transfers of land. There the court held that the intending donor had made a complete gift in equity to his son by executing the registered land transfer document and handing it, with the land certificate, to him. As it turned out, the father later reacquired the land certificate, thus putting him in a position not to go ahead with the gift, and indeed he did not want to having since fallen out with his son. Nevertheless, the court held that as soon as he had executed the transfer form and had given it with the land certificate to his son the gift was complete in equity, and so he was ordered to hand over the land certificate to the son so the latter could complete the transfer of the legal title into his own name.

6.28 We come next to the CA decision in *Pennington v Waine* (2002). There a shareholder, Ada, properly completed a share transfer form in favour of her nephew, Harold, but instead of passing this to the company for registration, she delivered it to one of the company's auditors, a person not an officer of the company. The transfer in question did not meet the requirements of the company's rules, since any shareholder before making a transfer to a third party had first to offer the shares to the other shareholders, and the company's auditor had to set a fair price on the shares, at which price any other shareholder could purchase them. This is sometimes known as a 'pre-emption' provision. Ada and the auditor were not aware of this company regulation at the time Ada executed the transfer form, and she told Harold that she had transferred the shares
p. 146 to him. On the strength of this and a statement from the auditor, Harold became a director of the company, a

position that required a shareholding. Ada died, and no transfer of her legal title to the shares had ever been completed. Clearly, in this case, unlike *Re Rose*, the transferor had not done 'everything in her power' to secure the share transfer—the transfer was in fact void from the outset for failing to meet the pre-emption provision, and even if the transfer were otherwise valid, handing the form to the auditor did nothing to further the transaction. The CA held, however, that the shares were held on trust for the nephew.

6.29 For the majority, Arden J expanded the ambit of the *Re Rose* principle, holding that even where the intending transferee has not done everything she herself has to do to complete the transfer, she will hold the property on trust where she executes the requisite transfer form with the intention that the transfer is to have immediate practical effect in circumstances where it would be 'unconscionable' for the transferor to renege on the transaction.

6.30 It is not clear how 'unconscionability' helps to explain equity's willingness to perfect imperfect gifts in these cases. There was no unconscionability whatsoever in *Re Rose* itself, although the court thought, as we have seen, that it would be unconscionable if Mr Rose had kept any dividends that accrued after he had executed the deed of transfer. The gift was completed, and the only effect of the rule was a tax saving. It is also not clear why it was unconscionable for the father to change his mind about making a gift of land to his son in *Mascall*. The decision makes the rule now very uncertain, and we can expect all kinds of imperfect transactions to reach the courts on the basis that it would be unconscionable if they were not perfected (see also Garton (2003)). In *Kaye v Zeital* (2020) and *Curtis v Pulbrook* (2011) the courts considered *Pennington* but refused to perfect purported transfers; in both cases the evidence supporting the purported transfers was very unsatisfactory.

6.31 In his concurring decision, Clarke LJ appeared to confuse the application of the *Re Rose* principle and the doctrine of equitable assignments (**6.10** et seq). Under the *Re Rose* principle, once a transferor of legal title has completed all the formal requirements he himself is required to complete for transferring that legal title to the transferee, once that is, the actions of other parties, the transferee and a third party, such as the company registrar or the land registrar, can complete the transfer of the legal title, he holds his legal title on constructive trust for the transferee until such time as the transfer of the legal title is perfected, eg by registration of the transfer of title in the company register or at the Land Registry. These conditions were not met in *Pennington*, thus the resort to unconscionability to expand the doctrine.

6.32 But Clarke LJ also invoked (at [72], [81]–[117]) the law regarding equitable assignments (**6.10** et seq), which is an entirely separate issue, and not clearly relevant on the facts. As we have seen (**6.18**), equity will come to the aid of a person who has given consideration for a proposed assignment, and it will do so
p. 147 creatively, treating, eg, an ineffective assignment of future property *as* a valid contract to assign the property if and when received. So, had Mrs Rose in *Re Rose* or Harold in this case provided consideration for the share transfer, then the court could have construed the share transfers forms *as* a valid equitable assignment of the legal title in the shares, and that would have been no departure from prior equitable doctrine. In *Re Rose*, Evershed MR raised the possibility that given the nature of the shares in question, Mrs Rose could be seen as having provided a form of consideration for the transfer, but this point was not pursued. But no one argued in *Pennington* that Harold provided any form of consideration. And whilst the decision in *Re Rose* clearly can be

criticised, it doesn't violate the *Milroy v Lord* principle that *in the case of volunteers* you cannot construe one form of transaction, eg an intended transfer of shares, *as* a different form of transaction, eg an express declaration of trust.

6.33 But this is precisely what Clarke LJ seemed to regard as a possibility, that Ada's intended transfer of the legal title to shares could be construed as an equitable assignment of her legal title. With respect, Clarke LJ seemed to have got completely lost in the weeds over this, asking himself whether the assignor had to provide the assignee with some sort of writing for the assignment to be effective—he was trying to incorporate the 'done everything in his power' idea of *Re Rose* into the doctrine of equitable assignments of a legal interest, where it has no role to play: an equitable assignment, as we have seen, has *no* formality requirements (**6.11**) outside any imposed by legislation. So Clarke LJ's concurring opinion should probably be disregarded.

The rule in *Strong v Bird*

6.34 At common law, the appointment of a debtor to be one's executor had the effect of cancelling the executor's debts to the estate. This result was determined by the application of the following technical reasoning: the executor, on becoming the owner of the testator's property and the successor to all of the testator's rights in action, was placed in the position of having to sue himself to recover the debt; since one cannot have a right of action against oneself, the debt was effectively cancelled. Originally, equity prevailed over this rule and made the executor account for the money to the deceased's estate, but in *Strong v Bird* (1874) the Court of Equity held that the common law rule should prevail, if, and only if, the testator had manifested an intention to forgive the debt in his lifetime and this intent continued up to his death. This is something like the perfecting of a gift, since the debt is regarded as discharged without a formal release of the debt being made.

6.35 The rule was extended in *Re Stewart* (1908) to apply not only to imperfectly released debts but also to imperfect gifts, again if, and only if, the testator had manifested an intent to give the gift in his lifetime and this intent continued up to his death. Whatever the merits of this extension of the rule, it should be understood that with this extension, equity is now positively assisting a volunteer. In *Strong v Bird* itself the
p. 148 court simply allowed the common law rule to stand in particular cases, ie where the continuing intention of the testator was to release the debt. But there has never been any common law rule whereby an ineffective attempt to make a gift during the testator's life is made effective upon the putative donee's being appointed his executor. Equity is acting off its own bat to assist a volunteer in this case.

6.36 Here are the oft-quoted words of Neville J in *Re Stewart* (at 254):

> *The reasoning ... [is] first that the vesting of the property in the executor at the testator's death completes the imperfect gift made in the lifetime and secondly that the intention of the testator to give the beneficial interest to the executor is sufficient to countervail the equity of the beneficiaries under the will, the testator having vested the legal estate in the executor.*

The first leg of this reasoning emphasises the ‘fortuitous’ vesting of the property: equity will perfect the imperfect gift just because it gets into the hands of the person it was intended for. The second leg appears to state that the rationale for perfecting the gift is that the gift was intended for the donor’s executor, as if a donor’s appointment of someone to be his executor has special significance in this regard. While one may presume that a testator has faith in the trustworthiness and competence of his chosen executor, it is fanciful to believe that many, or indeed any, testators pick their executors in the knowledge that in doing so they will perfect any invalid gifts or releases of personal debts made to them during their lifetime. The rule seems to work purely on the basis of the ‘fortuitous’ vesting of the property in the hands of the executors.

6.37 This view supports the extension of the rule in *Re James* (1935) to imperfect gifts made to someone who on the intestacy of the donor is appointed one of the administrators of the deceased’s estate. This extension was doubted in *Re Gonin* (1979) by Walton J, who would restrict the application of the rule to executors, because they are chosen by the testator, while administrators are chosen by the court, usually from amongst a number of people who might serve. Extending the rule to administrators turned the rule into ‘something in the nature of a lottery’. The rule in *Strong v Bird* itself creates an unprincipled lottery, however, because one cannot truly suppose that the appointment of a person to be one’s executor indicates anything about the testator’s intentions to perfect imperfect gifts—how many solicitors, do you think, advise their clients about the rule in *Strong v Bird* when instructed to draw up a will? As a rule by which imperfect gifts are perfected by fortuitous vesting, it applies just as much to the administrator as to the executor. The original reaction of equity to the common law rule regarding the release of the executor’s debts is the right one: he should account to the estate for the debts he owes it. Once *Strong v Bird* overturned this sensible attitude of equity, then there could be nothing but a lottery in which some individuals will have imperfect gifts perfected, and others not, purely on the basis of who ends up, by hook or by crook, as the personal representative of the deceased. The rule has nothing to recommend it and the HL has never affirmed it; the UKSC should overrule it the first chance it gets.

p. 149 **6.38** Applying the rule depends upon showing that the deceased had a ‘continuing intention’ to release the debt or make the gift. It is important to understand what ‘continuing intention’ means. In *Re Pink* (1912) Kennedy LJ said (at 638):

> *[A] continuing intention on the part of the testator means ... a continuing intention that the gift should have been given at the time it was given.*

Thus the deceased’s intention must be that he had made an immediate gift that he thought was effective, and maintained that view up until his death. Thus properly understood, the deceased’s intention is better framed as his continuing belief that he had released the debt or made an outright gift. The doctrine specifically does not cover an intention to make an *inter vivos* gift in the future, a promise to make a gift, or the intention to give the property at one’s death. Hayton (2001b, 258–259) questioned whether the restriction to failed immediate gifts is consistent, since once equity has gone so far as to assist volunteers simply because of fortuitous vesting, why should it not allow the perfection of promises or intentions to give *inter vivos* or testamentary gifts? Kodilinye (1982) points out that the present rule at least reflects the situation as the deceased understood it to be—ie his view was that he had given away the property or released the debt, while the suggested extension would enforce promises that the deceased knew full well that he had not complied with.

6.39 The rule in *Strong v Bird* requires that the property of a gift to be perfected is specific and identifiable as subject matter that might have been previously transferred in accordance with the deceased's beliefs/intentions. Thus ineffective gifts of or promises to give future property (**6.18**) or sums of money cannot be perfected by the rule.

6.40 Following *Re Ralli's Will Trusts* (1963), in which Buckley J made reference to the rule in *Strong v Bird* in finding that a trust was constituted when the property fortuitously came into the hands of the trustee, it appears that the rule applies not only to imperfect gifts but also to unconstituted trusts where the deceased's personal representative is also the intended trustee. Again, the deceased must have maintained the continuing belief or 'intention' that he had constituted the trust, although in fact the transfer to the trustee was ineffective.

Donationes mortis causa

6.41 *Donationes mortis causa* (singular *donatio mortis causa*) (DMCs), also called 'deathbed gifts', are gifts that are made *inter vivos*, but which are conditional, only taking effect on death. If the donor revives and demands the property back, he is entitled to it. Conditional gifts of tangible personal property, like a book or a bicycle, have always been possible at common law; the gift transaction takes place in the normal way by the transfer of possession, but on condition, and on death the condition is perfected and the gift becomes absolute. The intervention of equity is necessary, however, to perfect gifts of things such as bank accounts, or shares, or title to land, which cannot simply be handed over on one's deathbed, but require more to transfer title.

p. 150 **6.42** The law on DMCs was reviewed in detail by the court of appeal in *King v Dubrey* (2015). Per Jackson LJ:

> *[50] ... It is clear that there are three requirements to constitute a valid DMC. They are as follows. (i) D [for donor] contemplates his impending death. (ii) D makes a gift which will only take effect if and when his contemplated death occurs. Until then D has the right to revoke the gift. (iii) D delivers dominion over the subject matter of the gift to R [for recipient].*

6.43 As to (iii), the donee must in some respect receive the property in question before the death of the donor. What this amounts to turns on the nature of the property: for a chattel, the donee must take possession or acquire the means to do so (eg the key to a box in which it is held). Receiving some clear token of the property will suffice, as in *Woodard v Woodard* (1995), where receiving the keys to a car, although not the logbook, was sufficient. For a bank account, some 'indicia of title' must be transferred, such as the deposit book; in the case of shares, the delivery of share certificates has been held to work (*Dufficy v Mollica* (1968)); in the case of land, handing over title deeds have been regarded as sufficient (*Sen v Headley* (1991); *Vallee v Birchwood* (2013), *King v Dubrey* (2015)).

6.44 In *King*, an elderly widow gave the title deeds to her house to her nephew, telling him it would be his on her death. The nephew's claim that she had made a DMC failed first, because though frail, she was not facing impending death, and second, her subsequent writing of two wills leaving her entire estate to her nephew (wills which were invalid) was inconsistent with having made a DMC to him.

6.45 In *King*, Jackson LJ also said the following:

> *[60] The doctrine of DMC is only applicable if the three requirements set out above are met. Because the doctrine is open to abuse, courts should require strict proof of compliance with those requirements. The courts should not permit any further expansion of the doctrine.*

(For a recent case applying these principles see *Davey v Bailey* (2021).) Jackson LJ further stated ([56], [60]) that *Vallee v Birchwood* (2013) had been wrongly decided because the donor, while elderly, did not make the purported DMC in contemplation of his death from a known cause in the near future.

6.46 Two final points: first, the gift must be made conditional on the donor's impending death; that is, the property is to revert to him if it turns out that he recovers. It is a common error in exams to assume that all imperfect gifts following which the donor soon dies can be perfected as DMCs—only gifts conditional on the donor's death may be. Second, a DMC was held valid where the donor died from pneumonia rather than from the incurable disease in contemplation of which the gift was made (*Wilkes v Allington* (1931)); this case is generally understood to stand for the proposition that, so long as the gift is made in contemplation of impending death, it does not matter whether the testator dies in the particular way he expected.

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Covenants to settle

6.47 Covenants are promises formally expressed by being written in a deed. Formerly, deeds needed to be sealed, typically by a blob of wax or a red wafer affixed to the document; now (Law of Property (Miscellaneous Provisions) Act 1989, s 1), deeds must be signed and witnessed, and seals are no longer required. If the covenantor, the party who makes the promise in a deed, fails to perform what he promised, the covenantee, the party to whom the promise was made, may enforce the covenant at common law. Covenants are very much the product of formal legal thinking: the deed itself was all-important. If the seal fell off the deed, then the covenantee could not sue upon it. If after having the covenant enforced against him, the covenantor left the deed undefaced in the covenantee's possession, the covenantee could sue on it again (**1.5**). Thus, covenants are expressions of voluntarily undertaken obligations that, because they are expressed in a particular form, can be enforced at common law.

6.48 Covenants must be distinguished from contracts. The modern law of contract developed entirely separately from the law of covenants. The modern law of contract does not require any formal expression of an agreement for it to be legally binding (except in so far as formality requirements have been imposed by statute, eg Law of Property (Miscellaneous Provisions) Act 1989, s 2 requires contracts for the sale of land to be in writing). In the course of their development of contract law, the courts developed the doctrine of consideration. Why and how it particularly arose is complicated, but in its modern formulation it essentially requires that in order for a voluntarily undertaken obligation, roughly, a 'promise', to be legally binding, the person to whom it is made, the promisee, must have given value or 'consideration' for it. The doctrine of consideration has nothing to do with the law of covenants. A covenant is a formal means by which the common law allows persons to make legally binding promises, regardless of consideration. In view of this, while promises under seal are sometimes called 'specialty' contracts, covenants are not governed by the law of contract per se; of course, the rules governing covenants will in many respects be similar or identical to the rules governing contracts, for example in measuring damages. This is of some importance, because covenants to settle are arrangements between two parties, the covenantor/settlor and the covenantee/trustee, for the benefit of a third party, the beneficiary. If they are truly contracts, then they will be governed by the Contracts (Rights of Third Parties) Act 1999, which, basically for the first time in modern English legal history, allows third-party beneficiaries of a contract to bring an action upon it. However, if covenants are not truly contracts, then the Act will not apply. No case has considered the point.

6.49 While equity will not assist a volunteer, equity will in many cases assist those who have given consideration by, for example, ordering the specific performance of a contract in certain circumstances. But combine the maxim 'Equity looks to intent not form' with 'Equity will not assist a volunteer' and it is clear that in equity a gratuitous promise is a gratuitous promise whether in a deed or not, and so equity will not p. 152 enforce a promise just because it is in a deed even if the common law will. If I make a legally binding contract to buy your Rembrandt, I will have given good consideration, and so not only may I sue you for damages if you fail to deliver the Rembrandt, but I may also get an order for specific performance from equity (now governed by Sale of Goods Act 1979, s 52) because it is unique and money damages would be inadequate. If, however, you promise to give me the Rembrandt in a covenant, although I can still sue you at common law for money damages if you fail to deliver, I cannot get specific performance from equity, because equity will not assist a volunteer. This marked distinction looks even more odd in light of the fact that neither the common law nor equity (*Bassett v Nosworthy* (1673); *Midland Bank Trust Co Ltd v Green* (1981)) is concerned about the 'adequacy' of consideration, ie whether the amount paid for the property is substantial or trivial. Thus if I contract with you to provide you with a lease in return for your paying me a peppercorn, equity will specifically enforce that contractual obligation, but if I make the same promise in a covenant for no consideration, it will not.

Covenants to settle and marriage settlements

6.50 A 'covenant to settle' is simply a covenant to create a trust, such as 'I, X, hereby covenant with Y that I shall transfer Blackacre to Y on trust for Z'. While X may covenant with Y to transfer property to him on trust for Z in any circumstance, covenants to settle were typical provisions in marriage settlements. A marriage settlement is a trust created by a man and a woman in contemplation of marriage. Normally the property is vested in separate trustees, but in certain cases the husband would be the trustee. Marriage settlements were popular amongst the propertied classes in the nineteenth century, and essentially allowed the wife of the marriage to have control over the property she brought into the marriage, because at common law a married woman's property became her husband's; it could thus be squandered by a wastrel husband, and if the wife were to die before her husband without 'issue', ie without having had children, the property brought into the marriage would pass to him and thence to his heirs. Thus the families of wives settled property upon them in trust, first, to allow the woman control over the property she brought into the marriage because the settlement would give the wife certain powers over it and, secondly, the trust would direct that the property of the wife would be held on trust for her next of kin, ie her own relations, if she should die without issue, thus keeping the property in the wife's family.

6.51 Typically marriage settlements included covenants with the trustees of the settlement by both the husband and wife to settle 'after-acquired' property on the trusts of the settlement. 'After-acquired property' is simply property acquired after the date of the marriage, and such covenants typically restricted the obligation to property above a certain value. Coming from rich families, both the husband and wife were likely to inherit significant wealth only after the marriage began, and the inclusion of such inherited wealth in the marriage settlement would naturally be 'part of the bargain' that established their position in the dynastic line of both families. Thus both the husband and wife would make a covenant with the trustees to transfer to them, on the trusts of the marriage settlement, any property they would receive over, say, £100 in value.

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Marriage consideration

6.52 These covenants were not made for any consideration recognised at common law. Equity, by contrast, regarded marriage as 'the most valuable consideration imaginable' (*A-G v Jacobs-Smith* (1895), 354), and so, although equity would not enforce these promises to settle because they were formalised as covenants, it would enforce them because 'marriage consideration' had been provided. Furthermore, equity regarded the issue of the marriage and their issue, ie the children and grandchildren, to be within the marriage consideration, and thus able to enforce the covenants. The doctrine of marriage consideration applies only to marriage settlements, that is settlements made in contemplation of marriage. A husband and wife who are already married who set up a trust for themselves and their children do not create a marriage settlement, and the children are not within any marriage consideration.

The enforcement of covenants to settle

6.53 Because equity recognises marriage consideration, it is willing to enforce covenants to settle in marriage settlements, that is it will order the covenantor to transfer the property to the trustees of the settlement, thus constituting the trust over the property specified in the covenant. *Pullan v Koe* (1913) is a typical case. The settlement included the usual covenant by the wife to settle after-acquired property of £100 or more. The wife received £285; she spent part of it and put the rest into bonds in her husband's name. On the husband's death, the trustees of the settlement sued his executors for the transfer of the bonds to them so they could hold them on the marriage settlement trusts. The court held that it was the duty of the trustees to enforce the covenant, and equity would order specific performance of the covenant, as there existed beneficiaries of the marriage settlement who were within the marriage consideration. The court held further that the £285 was impressed with the trust the moment the wife received it, equity looking upon that as done which ought to be done (**6.17**, **6.19**). Thus, not only would equity insist on specific performance of the covenant, but that the trust was constituted by way of constructive trust the minute the covenant could be performed.

6.54 *Re Plumptre's Marriage Settlement* (1910) is a counterpart case: here, the next of kin, who were to take the property if there were no issue of the marriage, sued to enforce a covenant to settle after-acquired property. Their suit failed. The court would not order specific performance, as they were volunteers, not being within the marriage consideration. Eve J relied upon the unanimous CA decision in *Re D'Angibau* (1879), in which Cotton LJ emphasised the distinction between a fully constituted trust, under which volunteer beneficiaries have just as much right as beneficiaries who have given consideration, and a gratuitous promise to create a trust, which will not be enforced against the promisor at the suit of volunteers.

6.55 What happens if a wife receives after-acquired property (bound by a covenant to settle) at a time when p. 154 there are children of the marriage, but she never transfers the property to the trustees, and later the children die? Can the next of kin argue that the trust was immediately constituted by way of constructive trust as in *Pullan* when the wife received the property, since at that time the covenant was specifically enforceable, there being children of the marriage within the marriage consideration? Once a trust is constituted, it is constituted for all the beneficiaries, volunteers or not (**6.9**); even if it is constituted as a result of a beneficiary who has given consideration suing to enforce the covenant, once the trust is constituted by the covenantor transferring the property to the trustees, it is constituted for non-volunteer and volunteer beneficiaries alike (*Davenport v Bishopp* (1843)). So if the wife had transferred the property to the trustees, the trust would have been constituted for all the beneficiaries, and if the children died the next of kin would have a perfect right to their benefits under the terms of the settlement. Therefore, does the application of the maxim 'Equity looks upon that as done …' to constitute the trust immediately via a constructive trust also constitute the trust for the next of kin?

6.56 Alas, no. Apparently, the trust constituted by the constructive trust becomes unconstituted again, believe it or not, when those within the marriage consideration disappear, because the constructive trust evaporates. According to Eve J in *Re Plumptre's Marriage Settlement*:

> *[T]he argument founded on the rule that equity looks on that as done which ought to be done is, in my opinion, met and disposed of by [the view that], this rule, although usually expressed in general terms, is by no means universally true. Where the obligation to do what ought to be done is not an absolute duty, but only an obligation arising from contract, that which ought to be done is only treated as done in favour of some person entitled to enforce the contract as against the person liable to perform it.*

So volunteers such as the next of kin cannot rely upon any constructive constitution of the trust.

6.57 So far we have considered the equitable enforcement of promises to settle; so long as consideration for the promise was given (including marriage consideration). The form in which the promise was expressed is relevant. But the form in which the promise is expressed is relevant to the common law, for covenants, promises expressed in deeds, are enforceable at common law. How does enforcement at common law work (or not work) when the trustee/covenantee tries to enforce the covenantor's obligation to transfer property to her on trust?

6.58 Consider the standard covenant to settle. S, the settlor/covenantor, promises to transfer the property to T, the trustee/covenantee, on trust for B, the beneficiary, who is not himself a party to the covenant, and who is a volunteer. The question now is whether T should be able to enforce the covenant at common law, and what this would mean. At first glance, there appears no reason why he should not. At common law T is a covenantee, and therefore the promisee of a legally enforceable promise. Can he not therefore bring a common law action for breach of covenant against the covenantor, thereby getting money to the value of the property that ought to have been transferred on trust into his hands, and thereby constitute the trust himself?

p. 155 **6.59** Before answering that question, a few points about bringing an action on a covenant must be addressed. If the trustee/covenantee brings an action at common law for breach of covenant, he may recover on either of two bases. First, 'for breach of a covenant to pay a certain sum, the measure of damages (if that is the appropriate expression) is the certain sum.' (Elliot (1960)). The same is true of the law of contract: generally the remedy in an action for an agreed sum is the payment of that sum (see Treitel (2003), 1013). Alternatively, according to the normal rule of common law damages for breach of contract, the damages will be measured by the covenantee's loss. The common law would not order the transfer of property unless it was land (**1.15**). Here the award would be for money damages measured by the value of the promised property. So it would seem that the trustee/covenantee ought to be able to enforce the covenant and constitute the trust for the beneficiaries. It is here where things start to fall apart.

6.60 A line of cases appear to deny the trustee's right to bring an action on the covenant, though these cases have been extensively criticised. The principal case is *Re Pryce* (1917), where Eve J held that covenantees/trustees ought not to enforce a covenant to settle in favour of next of kin who were volunteer beneficiaries. Eve J reasoned as follows (at 241–242):

> *[V]olunteers have no right whatever to obtain specific performance of a mere covenant which has remained as a covenant and has never been performed: see per James LJ in* In re D'Angibau. *Nor could damages be awarded either in this Court, or, as I apprehend, at law, where, since the Judicature Acts, the same defences would be available to the defendant as would be raised in an action brought in this Court for specific performance or damages. In these circumstances, seeing that the next of kin could neither maintain an action to enforce the covenant nor for damages for breach of it, and that the settlement is not a declaration of trust constituting the relationship of trustee and* cestui que *trust between the defendant and the next of kin, in which case effect could be given to the trusts even in favour of volunteers, but is a mere voluntary contract to create a trust, ought the Court now for sole benefit of these volunteers to direct the trustees to take proceedings to enforce the defendant's covenant? I think it ought not; to do so would be to give the next of kin by indirect means what they cannot obtain by any direct procedure, and would in effect be enforcing the settlement as against the defendant's legal right to [the property in question].*

6.61 The statement from *Re D'Angibau* (1879) that volunteer beneficiaries may not obtain the equitable remedy of specific performance of a covenant, whilst true, is not obviously relevant: it does not dispose of the question whether a trustee/covenantee may sue on the covenant at common law either for payment of a certain sum or for damages for the failure to transfer other kinds of property. To the extent that the sentence that follows indicates that damages would be unavailable not only in equity but also at law for breach of covenant following the Judicature Acts, it is just wrong (see Elliot (1960)). If Eve J only means that the volunteer beneficiaries would be unable to get damages in equity (because volunteers) or damages at common law (because not parties to the covenant), then again, this is true, but as with the preceding statement, not obviously relevant.

6.62 The real heart of the decision lies in the statement that by allowing the trustee/covenantees to sue at
p. 156 common law, the next of kin would achieve by indirect means what they could not achieve directly, and this would in effect allow the enforcement of the covenant to settle by volunteers, in violation of the general principle. The case is most easily criticised by pointing out that Eve J here seems to have allowed equitable

principles to exceed their proper jurisdiction. The general principle, recall, is that 'Equity will not assist a volunteer', not 'Equity will stand in the way of a volunteer'. By ordering that the trustee/covenantees may not sue, Eve J appears to trench upon the trustee/covenantee's common law rights. What has equity to say about whether a covenantee at common law sues upon his covenant? The covenantee is not seeking the assistance of equity at all; he is not asking for specific performance, but for the common law remedy to which he is entitled by his common law right to enforce the covenant. From this perspective, Eve J has no jurisdiction to direct the covenantee one way or another, and so the case is wrongly decided.

6.63 Two authorities appear to go the other way. In *Fletcher v Fletcher* (1844), a father had covenanted to transfer property upon trust to named persons as trustees for his sons, but did not do so. Wigram VC held (at 567) that the covenant was enforceable by either the named trustees or the intended beneficiaries:

> *According to the authorities I cannot, I admit, do anything to perfect the liability of the author of the trust, if it is not already perfect. This covenant, however, is already perfect. The covenantor is liable at law, and the Court is not called upon to do any act to perfect it.*

6.64 In *Re Cavendish Browne's Settlement Trusts* (1916) Younger J held that trustees were entitled to substantial damages for the breach of a covenant to settle. The case is badly reported, so it is difficult to determine how much weight it should be given.

6.65 *Re Pryce* was followed in *Re Kay's Settlement* (1938) (albeit reluctantly by Simonds J), and the latter was followed in *Re Cook's Settlement Trusts* (1965), so the principle that trustee/covenantees may not sue the covenantor at common law for damages must be regarded as authoritative. All the cases here were first-instance decisions, which will doubtless be carefully reviewed if a suitable case ever comes before the higher courts.

6.66 It is important, however, to distinguish the question whether equity will allow a trustee to pursue his common legal rights under a covenant to constitute the trust from the case of a party to the covenant who sues, not to use the proceeds to constitute the trust, but as damages for the loss suffered when the covenant is not carried out. *Cannon v Hartley* (1949) is such a case. A man, on separating from his wife, covenanted with both his wife and daughter to settle after-acquired property upon them, but did not. The daughter, who had given no consideration but was a party to the covenant, brought an action on the covenant at common law. Romer J awarded the daughter substantial damages for her father's failure to settle the property, stating:

> *In the present case the plaintiff, although a volunteer ... is a direct covenantee under the very covenant upon which she is suing. She does not require the assistance of the court to enforce the covenant for she has a legal right herself to enforce it. She is not asking for equitable relief but for damages at common law for breach of covenant.*

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Further reading

Elliot (1960)

Garton (2003)

Hornby (1962)

Kodilinye (1982)

MacNair (1988)

Rickett (2001)

Must-read cases: *Milroy v Lord* (1862); *Re Rose* (1952); *Re Stewart* (1908); *Re Pryce* (1916); *Re Kay's Settlement* (1938); *Cannon v Hartley* (1948); *Pennington v Waine* (2002)

Self-test questions

1. In what circumstances will equity perfect an imperfect gift? Are any reforms in the law indicated?
2. In what situations should the *Re Rose* principle be preferred over the principle established in *Milroy v Lord*?
3. In 1985, Fred and Barbara created a settlement on their divorce for their then minor children, Claire and Eric. The trustee of the settlement was Tony, Barbara's brother. The settlement was originally constituted by the transfer of £100,000 to Tony, and in the trust instrument were included covenants by both Fred and Barbara to settle one half of any property either might thereafter acquire by legacy or inheritance.

   In 1987, Fred made a separate covenant with Tony to transfer one half of any royalties on his new book, to be held on the trusts of the settlement. The book earned £50,000, but Fred never transferred any money into the settlement.

   In 1988, Barbara received a legacy of £250,000 in shares of G Ltd. She has always paid the dividends to Claire, and said on numerous occasions that she intended to give the shares to Claire. On 10 July 1995, she made an appointment in early August with her solicitor for the purpose of executing the share transfer to Claire.

   On 13 July 1995, Fred and Barbara both died from food poisoning after attending Eric's university graduation. Fred left all his property to his brother Stuart, who is also the executor of his will. Barbara died intestate, and Tony and Claire have been appointed administrators of her estate.

   Advise Eric.

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