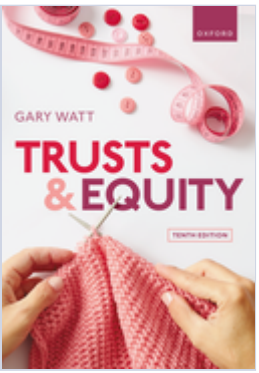

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4. Effective disposition of benefit: constitution of trusts

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Abstract

This chapter explains the reasons why a trust must be completely constituted in order to be valid and discusses the steps that must be taken in order to constitute a trust. Constitution matters because the beneficiaries of an incompletely constituted trust are 'mere volunteers' and therefore will not be assisted by equity. In other words, they do not have any rights in the trust property and thus cannot enforce the trust in court. Following the law, equity 'will not assist a volunteer' and 'will not perfect an imperfected gift'. In order to have a 'perfect' gift, the donor must actually complete the disposition of the subject matter in favour of the intended donee or execute a formal 'deed of gift'. The chapter also considers various modes of constitution of trusts, the court ruling in *Strong v. Bird*, and gifts made in contemplation of death.

Keywords: constitution, volunteers, covenant, Pennington v. Waine, rule in Strong v. Bird, donatio mortis causa, The Contracts Rights of Third Parties Act 1999

Context

Suppose I were to telephone you on your birthday to say, 'I will send you a present tomorrow'. If I decide not to fulfil my promise to send the present tomorrow, I cannot be compelled to send it. At law, a person cannot enforce a voluntary gift, or a voluntary promise made in their favour, and, following the law, equity 'will not assist a volunteer' and 'will not perfect an imperfect gift'. (If equity were to assist volunteers, it would undermine the common law doctrine that requires 'consideration' to be given to render a contract enforceable.) For a gift to be 'perfect', the donor must actually complete the physical transfer of the subject matter to the intended donee or execute

a formal 'deed of gift'. Similar rules and principles apply to the effective disposition of benefits 'on trust' as apply to dispositions by outright gift. Those rules and principles are the subject of this chapter.

Watch the author give a five-minute lecture on the subject of gifts <https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-gifts?options=showName>.

4.1 Introduction

If I give you something or promise to give you something, but you neither give, nor promise to give, anything in return, I am said to have made my disposition or promise 'voluntarily' and you are said to be a 'volunteer'. In other words, a volunteer is a donee or promisee who does not give any 'legal consideration' in return for a disposition or promise made in his or her favour. All is well for the volunteer if an effective disposition is actually made, but what happens if an attempted disposition fails, or if a promise to make a disposition is not fulfilled? Suppose, for example, that I purport or promise to create a trust of £10,000 in favour of a volunteer. The trust will not be enforceable (it will not be 'completely constituted') until I make an effective transfer of the £10,000 to the intended trustees or declare myself to be trustee of the £10,000. Because equity will not assist a volunteer, it will not enforce an incompletely constituted trust. If I actually transfer the £10,000 to the trustees or actually declare myself to be the trustee, the trust will then be completely constituted, and the volunteer will ↵ become a beneficiary of the trust. The moment that a volunteer becomes a beneficiary of a completely constituted trust, the volunteer no longer requires the assistance of equity; the beneficiary is from that moment *entitled* in equity to enforce her beneficial interest against the trustees.

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4.2 Reasons behind the requirement of trust constitution

Only when a trust is completely constituted is the trustee bound by it, the beneficiary entitled under it, and the settlor deprived of the subject matter of it—but *why* must a trust be completely constituted in order to be enforceable? Why is it not sufficient merely to establish that the settlor *intended* to make a trust? There are, in fact, a number of reasons for the requirement that a trust be properly constituted.

4.2.1 It protects the donor against dispositions being created by a mere promise

A person who makes a perfect gift, or a completely constituted trust, thereby makes an irrevocable disposition of his beneficial interest in the subject matter of the gift or trust,[1] except to the extent that he names himself as one of the beneficiaries. It is one thing to promise to make a gift or trust, but quite another thing to actually make it. The requirement of proper constitution ensures that gifts and trusts are not binding on the donor or settlor until he has taken tangible steps to dispose of his beneficial interest.

For a gift, there must be an actual transfer of the subject matter to the donee, or a formally executed deed of gift in her favour. For a trust, there must be an actual transfer of the subject matter to the trustees, or an express declaration by the owner that he will henceforth hold the subject matter on trust for the beneficiaries. In the absence of such clear evidence of the donor's intention to dispose of his beneficial interest, neither law nor equity has any business enforcing voluntary dispositions.

4.2.2 It protects donees from trust obligations

A second reason for the rules on the constitution of trusts is that they prevent the casual imposition of trusteeship on donees. Unless legal title to assets is properly transferred to donees to take as trustees, they will have no legal power to fulfil the trust and can have no obligation to do so. The effect of formally transferring legal title to the trustees is to confer on them legal power to deal with the trust property—whether by way of sale, or mortgage, or lease—and, crucially, to invest the trust property and, ultimately, to distribute it to the beneficiaries.

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4.2.3 It prevents economic inefficiency and unfairness

Voluntary gifts and trusts are economically inefficient and inherently unfair, because the beneficiary of the gift or trust is getting something for nothing. This economic cost and unfairness cannot be justified on the basis of the donor's intention alone, because intention can be mistakenly inferred. Intention must be joined by action. If the donor intends to transfer his assets by gift or on trust, then the disposition ought not to be binding until he has done all that he can to give effect to the intended disposition. The courts have no business completing an inherently uneconomical and unfair transaction, hence the maxim that equity will not lend its active *assistance* to a volunteer. It is somewhat different when a benefactor declares himself to be a trustee of his property for the benefit of a volunteer. In such a case, the role of the court is simply to construe the benefactor's intention from the words used. We have seen that the courts will not hold that an owner has declared himself to be a trustee of his own property unless his intention to create a trust has been expressed in very clear terms.[2]

4.2.4 It supports public interests by raising another barrier to trust creation

The creation of trusts may be objected to on several grounds of public policy (for example, they restrict free alienation of wealth and may be used to achieve secrecy and tax avoidance). Alongside such requirements as certainty and the need to comply with the rule against inalienability of capital, the requirement of trust constitution acts as a further barrier to trusts and the policy concerns that accompany them.

4.3 Modes of constitution of trusts

A valid will automatically constitutes any trust incorporated within it and the trust takes effect upon the death of the testator. *Inter vivos* trusts, on the other hand, must comply with one of the two modes of constitution upon which we touched earlier. The first is a declaration by the owner of property that he henceforth holds the property on trust for someone else. This mode of trust creation is referred to as 'declaration of self as trustee'. The second is where an absolute owner transfers the trust assets to a trustee, or trustees, for the benefit of designated beneficiaries. This mode of trust creation is referred to as 'a trust by transfer to trustees'.

The two modes of trust creation are mutually exclusive, because a settlor cannot intend to create a trust by transfer to trustees and, at the same time, intend to declare himself to be the trustee of the property with immediate effect. Thus, if an intended transfer to trustees is ineffective for any reason, the court will not 'rescue' the trust by ↵ pretending that the unsuccessful settlor had, all along, intended to declare himself to be the trustee.[3] It is incumbent upon the person attempting to create a trust to complete either one of the two modes of constitution; the courts will not assist. Although, there have been signs, as we shall shortly see, that the courts' traditionally strict refusal to spell out a declaration of trust from a failed transfer might be relaxing.

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4.3.1 Mode I: declaration of self as trustee

The simplest mode of constituting a trust is for the absolute owner of certain property orally to declare himself to be the trustee of that property for a certain beneficiary. Such a declaration has the effect of transferring the beneficial interest in the property to the beneficiary, while the legal title remains with the original owner as trustee. Such a declaration is effective to create a trust even when, at the date of the declaration, a nominee, such as a bank, is the formal holder of the owner's legal title.

Because it is so simple to dispose of a beneficial interest in this way, the court will require very clear evidence that an owner had intended to constitute himself a trustee of his own property. You should recall the facts of *Jones v. Lock*[4] from Chapter 3: the case in which Jones produced a cheque in the sum of £900 payable to himself, said 'Look you here, I give this to baby; it is for himself,' and placed the cheque in the baby's hand. He then took the cheque saying: 'I am going to put it away for him.' It was held that there had been no effective gift by transfer and Lord Cranworth LC firmly rejected counsel's alternative argument, that the father had constituted himself a trustee of the £900. His Lordship held that a failed gift cannot be construed to be a valid declaration of trust. The crucial principle is that an owner must not be deprived of his property unless, by making a valid gift or trust, he has demonstrated the seriousness of his intention to dispose of the benefit of his property. As his Lordship said: '*the testator would have been very much surprised if he had been told that he had parted with the £900, and could no longer dispose of it*'.[5] Despite the relaxed theoretical position that an oral '*declaration of trust of personality may be perfectly valid even where voluntary*',[6] the practical implication of the decision in *Jones v. Lock* is that a trust is unlikely to be enforced against a person in Mr Jones's position unless he actually says something equivalent to 'I am trustee' or confirms the declaration by signed writing.[7]

4.3.2 Mode II: transfer to trustees

The law governing constitution of trusts by trustees has changed markedly since the Victorian period in which relevant rules and maxims were strictly applied. It will be convenient to arrange the legal developments according to the century in which they occurred.

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4.3.2.1 Nineteenth-century strictness

The leading case is *Milroy* v. *Lord*.[8] The facts were that a settlor owned shares in a bank which he purported to transfer to Lord by deed, to be held by him on trust for Milroy. The settlor later passed the share certificates to Lord. Lord was the settlor's attorney and was therefore authorized to transfer the shares to Milroy, but ultimately the transfer could only be completed by registration, at the bank, of Milroy as owner of the shares. This registration never occurred. The issue was whether Milroy could claim the shares under a trust created by the settlor. It was held that no valid trust had been created. Milroy had not provided consideration for the shares, the settlement was therefore made by the settlor 'voluntarily', and Milroy was therefore a mere 'volunteer' under the settlement. Applying the maxim that *equity does not assist a volunteer*, it followed that the settlement would not be binding on the settlor (even if he had wished it to be so) unless the settlor had 'done everything which, according to the nature of the property comprised in the settlement, was necessary to be done to transfer the property'.[9] The settlor had tried to transfer the property to Lord upon trust for Milroy, but the transfer had failed because, according to the bank's own rules, there could be no valid transfer of the shares without registration. What is more, because the settlement was intended to take place *by transfer* the court would not give effect to it *by finding a valid declaration of trust*. It was held that if the settlor's chosen mode of disposition fails, the court will not perfect the settlement by allowing it to take effect by another of the modes.

4.3.2.2 Twentieth-century flexibility

The strict *Milroy v. Lord* test—which required the settlor to do 'everything … necessary to be done to transfer the property' was made a little less strict by requiring the transferor to do 'everything *within his power*' to transfer the property. The decision of the Court of Appeal in *Re Rose*[10] is the leading authority for this point. The case concerned an absolute gift to transferees, but the principle in the case applies equally where the transfer is made on trust. Mr Rose executed formal transfers of company shares on 30 March 1943 and delivered the transfers to the company with his share certificates, but the company did not register them until 30 June. Mr Rose died four years after the execution of the transfers, whereupon the Inland Revenue claimed estate duty (the precursor to inheritance tax) on the ground that the transfers had not been completed before 10 April 1943, which was the relevant date for tax purposes. The Revenue's claim was unsuccessful. The Court of Appeal held that the deceased had done everything in his power to transfer his legal and beneficial interest to the transferees in March. The actual registration of the transfers was outside of his control. Although Mr Rose had retained formal legal title in the shares until the date of registration, he had been unable to assert any beneficial interest in the shares between the date of transfer and the date of registration, the benefit of the shares having already passed to the transferees.

p. 123 The necessary consequence of Mr Rose having passed the beneficial interest whilst retaining legal title was that he became a trustee during the period between the date of transfer and the date of registration.[11] However, the Court of Appeal in no way decided that Mr Rose had constituted himself a trustee by choice and so cannot be accused of having improperly 'rescued' a failed 'trust by transfer' by finding a valid 'declaration of self as trustee'. There was no artificial ascription to Mr Rose of an *intention* to create a trust. Mr Rose's temporary trusteeship between the date of transfer and the date of registration was, in fact, an entirely accidental and unforeseen incident of the company's failure to register the transferees as owners of the shares. The temporary 'trusteeship' was also entirely passive. Mr Rose had no powers: not even a bare trustee's usual power to transfer the trust property to the beneficiaries. His only obligation between the date of transfer and the date of registration was to take no improper advantage of the form of trusteeship, say by borrowing money against it or retaining a dividend declared on the shares.

Since legal title to the shares in *Re Rose* did not pass to the transferees until registration, it must therefore have been in equity that the court recognized the beneficial interest to have changed hands at the moment of transfer. At first sight, this appears to offend the maxims 'equity does not assist a volunteer' and 'equity does not perfect an imperfect gift', but, in *Re Rose*, the assistance given by the court was not of the active sort contemplated by the maxims. If a volunteer donee '*needs to get an order from a court of equity in order to complete his title, he will not get it*',[12] but that was not the situation in *Re Rose*. In March, the donee had received everything he needed to perfect his legal title without assistance from the court.

The facts of *Re Fry, deceased*[13] resembled *Re Rose* in so far as it involved a wartime transfer of shares in an English company, but in *Re Fry* the transferor (Mr Fry) was resident outside the 'sterling' jurisdiction (he was resident in the USA). As a result of wartime restrictions, the English company was prohibited from registering the transfer without Treasury consent.[14] The forms necessary to obtain consent were sent to the transferor to sign, which he duly did, and he returned them to the company. Unfortunately, the transferor died before consent was obtained from the Treasury and the transfer was therefore held to have been ineffective. Although the transferor had done everything within his power to dispose of the shares, the transferee was in no position to complete the transfer; he still required the consent of the Treasury. In coming to the conclusion that the transfer was ineffective, the court noted that the transferor could have frustrated the transfer, even after sending the forms to the Treasury, by simply refusing to respond to questions that the Treasury might have raised between receipt of the forms and granting its consent.

p. 124 ### 4.3.2.3 Twenty-first-century relaxation

If *Re Rose* demonstrates that courts will try to give effect to an intended transfer whenever they can do so without actually making an order to assist the volunteer transferee, the decision of the Privy Council in *T. Choithram International SA v. Pagarani*[15] illustrates just how generous the courts can be when there is a judicial desire that the transfer should succeed. Mr Pagarani was a successful businessman who had been diagnosed as having terminal cancer. He executed a trust deed at his bedside in order to establish a foundation to be an umbrella organization for a number of charities that he had established during his life. Immediately after signing the deed, he stated that all of his wealth would henceforth belong to the foundation. Mr Pagarani was a trustee of the foundation, and the other trustees signed the deed on the same day, or soon after. Not long afterwards, the directors of four companies controlled by Mr Pagarani

passed resolutions confirming that the trustees of the foundation would henceforth be the holders of the companies' shares and assets. After Mr Pagarani's death, the companies registered the trustees of the foundation as shareholders. Members of Mr Pagarani's family brought the present action. They claimed that the donation to the foundation had been ineffective, because Mr Pagarani had failed to transfer the shares before his death. The Privy Council disagreed, stating that, '[a]*lthough equity will not aid a volunteer, it will not strive officiously to defeat a gift*'.[16] Their Lordships held that the words 'I give everything to the foundation' could have meant only one thing in the context of the case—namely, 'I give to the trustees of the foundation'—because the foundation had no identity apart from its trustees. The fact that Mr Pagarani was one of the trustees of the foundation was held to be sufficient to overcome his failure to vest the property in the remaining trustees by formal transfer. It was held that, from the moment of his declaration, it would have been unconscionable for him to assert continuing beneficial ownership in the property and to deny that the subject matter of the donation belonged beneficially to the foundation. In short, this was not a case in which an intention to create a trust had been spelled out of a failed gift; rather, this was a case in which a constructive trust had been imposed on the donor to prevent him asserting an ongoing interest in the property in denial of the transfer. The claim brought by members of Mr Pagarani's family failed, because they could not acquire better title to Mr Pagarani's property than he himself had had at the moment of his death.

The English Court of Appeal has approved the decision in *Choithram*. It did so in the difficult case of *Pennington v. Waine*.[17] Mr Pennington was a partner in a firm of auditors that acted for a private limited company in which Mrs Ada Crampton held shares. She told Mr Pennington that she wished to transfer 400 of her shares to her nephew, Harold, and later signed a share transfer form to that effect, which she gave to Mr Pennington. He placed the form on file and took no further action prior to Ada's death, except to write to Harold enclosing a form for Harold to sign his consent to become a director of the company. The letter also informed Harold that Mr Pennington's firm had ↵ been instructed to arrange for the transfer of the 400 shares and that Harold need take no further action. Ada also informed Harold directly of her intention to transfer shares to him and of her desire that he should become a director of the company. However, when Ada died, her will made no disposition of the shares in favour of Harold, so the question arose as to whether she had made an effective disposition during her life. At first instance, the court noted that there was no evidence that the gift had been intended to take effect in the future[18] or subject to any condition precedent. Accordingly, the court could have held the gift to be ineffective, but instead it held that the gift had been effective immediately the share transfer forms had been executed, even though the forms were never delivered to Harold or to the company.

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The Court of Appeal upheld that judgment and, in doing so, it demonstrated even greater generosity than that which the courts had shown in *Re Rose* and *Choithram*. The decision in *Pennington* was more generous than that of *Re Rose*, because, in *Re Rose*, there had actually been a transfer to the donee and all that remained to be done was to register the donee at the company, a step over which the donor had no control. The decision in *Pennington* was more generous than that in *Choithram*, because, in *Choithram*, it was at least arguable, if one agrees with the Privy Council, that there had been a transfer from Mr Pagarani in his capacity as donor to Mr Pagarani in his capacity as trustee of the donee foundation; in *Pennington*, the donor had merely passed the share transfer form to her own agent, which is like passing it from one's left

hand to one's right hand (there is no true *transfer*). It is hard to see how she could be said to have disposed outright of her beneficial interest in the shares when it remained open to her to revoke her instructions to the agent.

So on what basis was the Court of Appeal able to conclude that Ada Crampton had divested herself entirely of her interest in the 400 shares before her death? Their Lordships' judgments provide two main answers to that question.[19] Clarke LJ held that the execution of the stock transfer form could take effect as a valid equitable assignment without the need for actual delivery of the stock transfer forms or the share certificates, provided that the execution of the stock transfer forms were intended to take immediate effect. If his Lordship is right on that point, then, from the moment at which the forms were transferred, Ada had actually done everything within her power that was required in order to divest herself of her beneficial interest in the shares. However, it is surely doubtful that a donor should be construed to have transferred beneficial ↵ ownership, whilst retaining legal ownership, in the absence of a clear intention to become a trustee of the transferred assets. Arden LJ suggested an even more radical solution. Her Ladyship took the view that it would be unconscionable for Ada to resile from the transfer that she had embarked upon. Arden LJ described 'unconscionability' as a 'policy consideration' that operates in favour of holding that a transfer has been perfected. Whilst it may be broadly accurate to say that unconscionability promotes fundamental policy concerns, such as the prevention of the abuse of legal rights and powers, unconscionability should not be resorted to as if it were itself a policy consideration. On the contrary, it is, as we observed in Chapter 1, an equitable doctrine that operates *in personam* to restrain *particular* instances of abuse of legal rights and powers. Furthermore, even if 'unconscionability' were a policy consideration, it should not lead inexorably to the conclusion that an intended disposition should be binding on the conscience of the donor or settlor. The policy, if it were such, of preventing a donor from unconscionably denying that a disposition has taken place ought generally to be outweighed by the 'policy' that the court will not take active steps to remove assets from an owner when that owner has omitted to carry out the actions normally required to transfer assets of that type.

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However that may be, it is notable that Arden LJ's actual decision in the case seems to owe more to the orthodox *in personam* view of unconscionability than to any policy-based analysis of the concept, in so far as her Ladyship identified a number of specific facts that, in her judgment, would have made it unconscionable for the particular donor in this case to have denied the donee's beneficial interest in the 400 shares. Those facts were as follows:

1. Ada made the donation of her own free will.
2. She signed the share transfer form and delivered it to Mr Pennington to secure registration.
3. She told Harold about the gift.
4. Mr Pennington told Harold that he needed take no further action to perfect the gift.
5. Harold signed a form by which he agreed to become a director without limit of time, which he could not do without shares in the company.

If the first three facts, taken together or individually, were sufficient to bind Ada's conscience, it would surely never be safe for a competent person voluntarily to promise to make a gift, and still less to instruct their agent to take steps preliminary to making a gift. We must conclude, it is submitted, that the first three facts could have had no impact on Ada's conscience. That brings us to facts (4) and (5). Fact (4) was no doubt a representation, but was it a representation upon which Harold had relied to his detriment so that Ada's conscience must be affected? That is doubtful. There was nothing that Harold could have done to perfect the gift in his favour, so his omission to do that which he could not have done can hardly be regarded as detrimental reliance. What then of fact (5)? Here, at last, is a candidate: by accepting the directorship, it is certainly arguable that Harold acted to his detriment in reliance on an expectation that he would acquire some shares in the company.

p. 127 ↵ However, even if there had been a representation plus detrimental reliance thereon, this would normally be said to raise an estoppel binding on the conscience of the representor—but their Lordships made no reference to estoppel, preferring instead to base their decision on the more general notion of unconscionability. That, it is respectfully submitted, will not suffice where a concept as vague as 'unconscionability' is being applied in relation to something as dependent upon certainty as the transfer of beneficial ownership. The court should have said what unconscionability means in this context[20] and why unconscionability arose on the facts of the present case. Despite this concern, Schiemann LJ agreed with Arden LJ's reasoning without discussion and Clarke LJ agreed that:

> if unconscionability is the test … it would have been unconscionable of Ada, as at the time of her death (if not earlier), to assert that the beneficial interest in the 400 shares had not passed to Harold.[21]

4.3.2.4 A new orthodoxy?

The Court of Appeal in *Kaye v. Zeital*[22] followed the approach laid down in *Milroy v. Lord* by holding that an intended transfer of the beneficial interest in company shares failed because the transferor had not done the actions necessary to effect such a transfer. He had not declared himself a trustee of the beneficial interest, neither had he assigned it in writing by way of gift or trust. This might be considered a return to the old orthodoxy, or it may be more accurate to conclude that the old orthodoxy has always been the default rule whenever it has produced a workable and just outcome in the particular case. *Kaye v. Zeital* was followed in *Curtis v. Pulbrook*[23] in which Briggs J acknowledged that *Pennington v. Waine* had identified three ways to perfect apparently imperfect donations:

> The first is where the donor has done everything necessary to enable the donee to enforce a beneficial claim without further assistance from the donor … The second is where some detrimental reliance by the donee upon an apparent although ineffective gift may so bind the conscience of the donor to justify the imposition of a constructive trust … The third is where by a benevolent construction an effective gift or implied declaration of trust may be teased out of the words used.[24]

In summarizing the law in this way, the judge seems to acknowledge that the old orthodoxy of *Milroy v. Lord* will work in some cases (the first of his three examples), but that the more relaxed approach in *Pennington v. Waine* has become the new orthodoxy in other cases (those falling within the second and third of the judge's examples).

Despite the very benevolent construction adopted in *Choithram* and *Pennington*, it is doubtless still true
p. 128 that a settlor should at least *try* to do everything in his power ↵ necessary to transfer property of the type intended to be subject to the trust.[25] Accordingly, in the following sections, we will identify how the prerequisites for transfer vary according to the type of trust asset.

4.3.2.5 Transfer of land

It is necessary to transfer the property by the method generally employed for transferring legal title to property of that type.[26] Subject to certain exceptions,[27] legal title to land will only pass where it is transferred by deed.[28] The deed must be signed, witnessed, delivered, and apparent on its face that it is a deed.[29] In *Richards v. Delbridge*,[30] the tenant of business premises purported to make a gift of a lease to his infant grandson by indorsing the following signed memorandum on it: 'This deed and all thereto belonging I give to Edward Bennetto Richards from this time forth, with all the stock-in-trade.' He then delivered the deed to Richards' mother to hold for her son. He made no reference to the gift in his will, so, upon his death, the question arose whether the lease and business had passed to Richards either by *inter vivos* gift or by trust. If they had not, they would pass to other persons under the will. Sir George Jessel MR held that the transfer had been legally ineffective for lack of a deed and refused to hold, in the alternative, that the tenant had declared himself to be a trustee:

> It is true he need not use the words, 'I declare myself a trustee' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.[31]

Where legal title to land is registered, it is not finally transferred until the transferee is registered as the new proprietor.[32] Nevertheless, once the transferee has received the deed of transfer together with the transferor's land certificate, the transferee has everything he needs to register his title and the transferor has no power to stop him.[33] Accordingly, if the transfer had been made on trust, the trust will be completely constituted and binding upon the transferor at the moment he delivers the documents.

p. 129 4.3.2.6 Transfer of company shares

According to Holdsworth, it was not until the seventeenth century that moveable property acquired the '*permanent character of land*', because it was then that accumulations of capital were first invested in the form of transferable stock.[34] Land and shares in companies are still the most valuable forms of property that most people will ever own, and the transfer of legal title to shares is subject to safeguards similar to those that apply to registered land. In the case of shares in private companies, the transferor must execute

a stock transfer form and deliver it to the transferee with the share certificate, at which point the transfer is binding on the transferor and legal title will not vest in the transferee until the company actually registers him as the new shareholder,[35] although, since the introduction of the CREST system on the London Stock Exchange in 1996, a great deal of share dealing takes place electronically.[36]

Shares in *public* companies must be transferred via the stock exchange.

4.3.2.7 Transfer of ordinary chattels

Chattels are moveable items of personal property, including such things as jewellery, books, furniture, and cattle (from which the term is derived). To transfer legal title in a chattel, there must be physical delivery prior to, contemporaneous with, or subsequent to the words of gift. Alternatively, legal title to a chattel can be transferred by a properly executed deed of gift or trust.

In *Re Cole*,[37] a man bought a house in London while his wife and family were living elsewhere. When the time came to show his wife around the house, she was especially impressed by a particular silk carpet and a certain card table. At the end of the tour, her husband announced that the house and its contents were all hers. Some 16 years later, the husband was declared bankrupt and the following year his wife sold the moveable contents of the house. An action was brought by the trustee in bankruptcy to recover the proceeds of sale from the wife.

It was held that, words of gift being insufficient to perfect a gift of chattels, the wife would have to prove some act of delivery or change of possession such as would demonstrate unequivocally that the husband intended to transfer title to her. In the absence of evidence of such an act, legal title to the chattels remained with the husband and vested in his trustee in bankruptcy. The Court of Appeal rejected a novel argument submitted by R. E. Megarry QC that it is enough for the transferee to be brought to the chattels, rather than the chattels to the transferee. Harman LJ did accept, however, that, if the chattels are numerous or bulky, there may be '*symbolical delivery*'. He gave the example of a case involving a church organ, '*where the donor put his hand upon it in the presence of the donee and accompanied his gesture with words of gift*'.[38] In some circumstances, even symbolic physical delivery of the chattel may not be needed. In *Jaffa v. The Taylor Gallery*,[39] a trust of a painting had been declared in a document (not a deed), of which
p. 130 ↵ the trustees each had a copy. The trust was held to have been validly constituted even though the painting had not been physically transferred to the trustees. The judge held that it would be absurd to insist on physical transfer when '*one trustee was in Northern Ireland*' and '*another in England*'.

4.3.2.8 Transfer of a legal 'chose in action'

A chose ('thing') in action is a personal right of one person against another that can be sold, given away, subjected to a trust, etc., as if it were property. Common examples include a company share, a patent and contractual rights and obligations including debts:

> The scope of the trusts recognized in equity is unlimited. There can be a trust of a chattel or of a chose in action, or of a right or obligation under an ordinary legal contract, just as much as a trust of land.[40]

Indeed, the scope of trusts is so 'unlimited' that even when rights under a contract are non-assignable according to the terms of the contract, the very benefit of *being a party to the contract* may be held on trust.[41] According to established principles, a trustee will hold any benefit arising from his trusteeship—including the benefit of being a contracting party (such as renewals of the contract) on trust for the beneficiaries.[42]

Most choses in action are capable of being assigned, but it is worth noting that an assignment of a chose in action will fail if the underlying purpose of the transaction is to allow the assignee to finance the litigation of the assignor's action (the action to which the 'chose' relates). As a general rule, the law does not permit the 'maintenance' of another person's litigation.[43]

Statute will sometimes prescribe the appropriate method of assignment for specific forms of chose in action. Thus the Bills of Exchange Act 1882 provides that an unconditional order in writing requiring one person to pay money to another must be endorsed in favour of the transferee[44] and the Copyright Act 1956 requires that a copyright must be assigned in writing. In the absence of specific statutory provision, the general statutory and non-statutory rules laid out in the following sections will apply.

Assignment of a chose in action at common law

Legal title to a debt or other legal chose in action may be assigned in writing, but for the assignment to be effective at law it must be 'absolute',[45] which means that the *entire* chose in action must be assigned[46] and that the assignment cannot be by way of mere security for a loan made by the assignee to the assignor.[47] The assignment is not fully effective until the date on which express notice of the assignment is given to the debtor, ↵ or other person from whom the assignor would have been entitled to claim such debt or thing in action.[48] If the assignor fails to give written notice to the debtor, the assignees (the trustees) can perfect their legal title to the chose in action by giving written notice of the assignment to the debtor.[49]

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Assignment of a chose in action in equity

Both the requirements for assignment at law – 'absolute assignment' of the whole debt and 'writing under the hand of the assignor' – must be complied with. If one or both requirements is not complied with, the assignment will nevertheless be effective *in equity* if the assignment is made for legal consideration. Consideration brings equity into play because of the burden it places on the conscience of the assignor. If such an assignment is *not* made for consideration, the Australian position is that it is not effective in equity,[50] but there are old English authorities to the contrary.[51] The English authorities hold that an assignor who intends to make an *immediate* assignment of an existing debt or chose in action is deemed to have declared himself a trustee of it for the benefit of the assignee. These older English authorities were raised in argument by counsel in *Jones v. Lock*.[52] One might have expected Lord Cranworth to dismiss them in the light of the decision in *Milroy v. Lord* which, only three years previously, had held that a declaration of trust should not be spelled out of a failed transfer; in fact, his Lordship cast no doubt on the older cases and it is arguable that they remain law.[53] However, for the avoidance of doubt, any person wishing to

assign only *part* of a legal debt or chose in action should clearly and unequivocally declare himself to be a trustee of that part for the benefit of the assignee, or else contract with the debtor to renew the debt on the basis of the desired apportionment between assignor and the assignee.

Once a legal chose of action has been transferred in equity, it will thereafter be an equitable chose in action, which means that, in future, it can only be assigned in writing.[54] There is no rule that the equitable assignment of a chose in action is ineffective without giving notice to the debtor (or other person subject to the chose in action), but, by giving notice to the debtor, the assignee acquires priority over obligations that the debtor might subsequently incur.[55] This is the so-called rule in *Dearle v. Hall*:[56]

> The rule is based upon the inequity of allowing an assignee, who has taken no steps (by giving notice to the trustees to whom inquiry might be made) to protect subsequent assignees against the possibility of fraud on the part of the assignor, from setting up his prior assignment against those who have been deceived.[57]

p. 132 ↵ The case of *Re McArdle*[58] demonstrates that the courts will not spell out a valid equitable assignment from a failed contract. A testator left his residuary estate upon trust for his widow for life, with the remainder to his five children in equal shares. During the lifetime of the widow, one of the children, Monty, carried out improvements to a farm forming part of the testator's residuary estate. The testator's other children then signed a document in these terms:

> To Monty ... in consideration of your carrying out certain alterations and improvements to the ... Farm ... at present occupied by you, we the beneficiaries under the will of William Edward McArdle hereby agree that the executors ... shall repay to you from the said estate when so distributed the sum of £488 in settlement of the amount spent on such improvements.

When the widow died, the other children refused to accede to Monty's claim to the £488. The Court of Appeal held that transfer of the relevant part of the residuary estate would only be effective if Monty (in fact, Monty's widow by this time) could establish that the signed document had been a binding contract or a valid transfer of an equitable interest. The court held that it was neither. The works of improvement had been completed before the execution of the document, so that the consideration for the contract was entirely in the past, thus rendering the contract legally unenforceable. However, the document had been in form and intent a contract, so the court refused to construe it as a valid equitable assignment. Lord Evershed MR regretted that the other children had been able '*to evade the obligation which they imposed on themselves in 1945*', but that, he said, '*is a matter for their conscience and not for this court*'.[59] Jenkins LJ added that, in the absence of consideration or a perfected transfer, the donor of an imperfect gift (each of the 'other children' in this case) '*has a* locus poenitentiae *and can change his mind at any time*', thus '*no question of conscience enters into the matter*'.[60] This approach provides a stark contrast to the expansive approach to 'unconscionability' taken by the Court of Appeal in the case of *Pennington v. Waine*, considered earlier.[61]

4.3.2.9 Transfer of 'future' or 'after-acquired' property

Normally, a transferor already owns property before purporting to transfer it to another, but is it possible to transfer property that one has not yet acquired? On its face, such a transfer is nonsensical and, at common law, '*it cannot take effect as an actual transfer, but can be effective at most as a promise or contract to transfer*'.[62] Equity, on the other hand, looks to the substance of a purported transfer of property that has not yet been acquired. It sees as done that which ought to be done and will order specific performance of the transfer in favour of any person who has given valuable consideration.[63] The transfer will be effective in equity to pass the beneficial interest the moment the transferor acquires the subject matter of the transfer.[64]

p. 133 ↵ Examples of 'future' property include future income,[65] royalties from books that have not yet been sold,[66] copyright in songs that have not yet been written,[67] and an heir's expectation of a legacy.[68] A covenant to transfer the *entirety* of one's after-acquired property may not be enforceable.[69]

The rationale for equity's recognition of a purported present assignment for valuable consideration of future property was explained by Buckley J in *Re Ellenborough*:[70]

> An assignment for value binds the conscience of the assignor. A Court of Equity as against him will compel him to do that which *ex hypothesi* he has not yet effectually done.[71]

It follows that a different rationale is required to govern the case of a transferor who does not purport to make a present transfer at all, but merely promises that he will transfer the property *when, in the future, he acquires it*. The law reports are full of cases of this sort. Usually, the promise is made in a deed and is therefore known as a 'covenant'.

Covenants to settle after-acquired property

Most reported cases of covenants to transfer after-acquired property concern marriage settlements of the sort that were especially popular in nineteenth-century England. The parties to a typical marriage settlement were the man and woman engaged to be married, and the intended trustees of the settlement. The terms of a standard marriage settlement would provide that the trust property should be held for the wife for her life, then for her husband for his life, and then for their children. If the husband predeceased his wife, the property would pass directly to their children on the wife's death and, if there were no children of the marriage, the property would pass to the wife's next of kin. The original trust property was typically given by the woman's parents to the trustees of the settlement to be held according to its terms.

The original purpose of marriage settlements was to make secure financial provision for a wife and her children in the days before a married woman could hold property absolutely in her own right. There is not much call for marriage settlements nowadays, but the reasoning in the older cases is as useful as ever for illustrating the interplay of law and equity.

The marriage settlement may sound like a standard trust, but the distinctive feature of a marriage settlement was that, in a typical case, the woman would covenant to transfer her after-acquired property to the trustees of the marriage settlement to be held according to its terms.[72] In theory, the trustees could enforce such a covenant against her the moment she acquired the 'after-acquired property', because the trustees would have been parties to the trust deed and, as such, would be deemed to have given nominal legal ↵ consideration for the promise.[73] However, because enforcement of the covenant by the trustees would completely constitute the trust of after-acquired property, thereby vesting interests in beneficiaries who may possibly be mere volunteers, the courts do not permit trustees to enforce such covenants unless the beneficiaries have themselves given consideration. If the trustees were allowed to enforce the trust, the beneficiaries would obtain indirectly that which, as volunteers, they would have been unable to obtain directly.

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If the trustees cannot enforce the covenant in favour of volunteer beneficiaries, the question naturally arises: who *can* enforce the covenant? The answer is that any beneficiary who has given consideration for the covenant, and who is therefore not a volunteer, may enforce it without any question of having to resort to the assistance of the trustees. This is because equity considers the covenantor's conscience to be burdened by the consideration received from the non-volunteer beneficiaries. In the traditional marriage covenant, the covenantor's husband can enforce the covenant, because a spouse is said to give 'marriage consideration' by the very act of marriage.[74] The issue of the marriage can also enforce such a covenant, for by a deliberate legal 'fiction'[75] the issue of the marriage is also said to fall within the 'marriage consideration'. 'Issue' obviously includes immediate children of the marriage, and it can also include grandchildren,[76] but children of a previous relationship do not come within the marriage consideration unless their interests are 'interwoven' with those of the children of the marriage,[77] as would be the case, for example, if stepbrothers or sisters had been brought up together from an early age. It should be noted that marriage consideration, like all forms of consideration, is ineffective if it was given in the past in exchange for a present promise. For a settlement to be made in consideration of marriage, it must be made before the marriage takes place; although one exception may be if the marriage settlement is made after the marriage, but in accordance with a premarital (antenuptial) agreement to make it.[78]

An intended volunteer beneficiary who was a party to the deed containing the covenant is a 'party to the covenant' and may take action on the covenant at common law, even though he has given no consideration.[79] The deed supplements the lack of consideration at common law. Equity, on the other hand, does not consider the covenantor's conscience to be burdened by the claims of a person who, being merely a party to the deed, has given only nominal consideration to the covenantor. The upshot is that the intended volunteer beneficiary will be able to take action on the covenant, but he will be restricted to the common law remedy of damages for breach of the covenant.[80] Equity will not grant an order for specific performance of the covenant, so the covenantor will ↵ not be required to settle her after-acquired property on the trustees *in specie*. The claimant will also be required to bring his claim within the limitation period set down for the common law action.[81]

p. 135

If a covenant is enforced by a person who has provided valuable or marriage consideration, or by trustees on their behalf,[82] equity will require the covenantor's after-acquired property to be transferred to the trustees of the marriage settlement, at which point the trust of the after-acquired property will be

completely constituted. At the moment the trust is completely constituted even *volunteer* beneficiaries under the trust will be entitled to claim their interests under it, even though they themselves had been unable to enforce the covenant.[83] Thus, if intended beneficiaries who are children of the marriage (and are therefore within the marriage consideration) enforce the covenant for their own benefit, intended beneficiaries who had not given consideration (such as relations who lie outside the marriage consideration)[84] will become fully fledged beneficiaries as a by-product of the children's action.

Following the logic of the previous point, one might suppose that volunteer beneficiaries would become fully fledged beneficiaries as a by-product of action taken by *trustees* to enforce the covenant on their behalf. That, however, as we noted earlier, is not what happens. Even though trustees, as parties to the deed, are deemed to have given notional consideration and therefore have the legal power to enforce the covenant, the courts insist that trustees should not exercise that power unless the intended beneficiaries have given real consideration.[85] It is deemed inappropriate that volunteers should acquire by indirect means that which they could not have acquired directly. An inventive volunteer might argue that, although the trustees have the legal power of enforcement, the benefit of the power must belong to the intended beneficiaries of the trust. On that basis, the volunteer, as one of the intended beneficiaries, might claim to be able to compel the trustee to enforce the covenant. Older decisions, such as *Fletcher v. Fletcher*,[86] allowed this argument, but later courts were surely correct to deny volunteers the possibility of compelling trustees in this way. What is harder to understand, however, is why modern courts took the additional step of depriving the trustees of the right to enforce the covenant of their own volition[87] and even went so far as to state that trustees should not even sue for damages for breach of the covenant.[88] There is no equitable ground for restraining the trustees' exercise of their legal power; certainly it could hardly be described as 'unconscionable' for a trustee to exercise it, so the suspicion arises that there may be policy reasons why trustees are so restrained. Simon Gardner may have been correct when he suggested that the reluctance of modern courts to assist in the enforcement of marriage covenants to settle after-acquired property can be attributed to judicial recognition of women's increasing autonomy in property ownership, as well as to the promotion of unfettered participation of property in the free market.[89]

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The Contracts (Rights of Third Parties) Act 1999

According to the Contracts (Rights of Third Parties) Act 1999, a person who is not a party to a contract may enforce a term of the contract in his own right if (a) the contract expressly provides that he may; or (b) the contractual term purports to confer a benefit on him,[90] although (b) will not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.[91] As a result of the Act, mere volunteers, who previously would have been unable to enforce covenants to settle after-acquired property for their benefit, will be able to enforce post-1999 Act[92] covenants in their own right,[93] provided (as will always be the case with beneficiaries) that they are expressly identified in the covenant by name, as a member of a class, or as answering a particular description.[94] It does not matter that at the date of the covenant the beneficiaries were yet to be born.[95]

The Act provides that, for the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party (the volunteer beneficiary) any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract, and that the rules relating to damages, injunctions, specific performance, and other relief shall apply accordingly.[96] It follows from this

that the Act does not put the third-party beneficiary in a better position than the other parties to the contract. Accordingly, if the covenant had been 'voluntary' (not made for valuable or marriage consideration), the volunteer beneficiary will be restricted to the remedies available to other parties to the covenant—namely, common law damages for non-performance. The equitable remedy of specific performance will not be available, just as, prior to the Act, it had been unavailable to parties to voluntary covenants.[97]

4.3.2.10 The rule in *Strong v. Bird*

Strong v. Bird?[98] illustrates how facts can sometimes combine fortuitously to perfect what would otherwise have been an imperfect gift. Bird had borrowed £1,100 from his stepmother, with whom he shared his house. She paid him a quarterly rent, so it was agreed that he would repay the loan by reducing her rent by £100 per instalment. The deduction was made on two consecutive quarter-days, but, on the third quarter-day, the stepmother insisted upon paying her full rent without deduction. She continued to make full payments of rent on every quarter-day up until her death four years later, whereupon Bird was appointed to be the sole executor of his stepmother's estate. The stepmother's next of kin, Strong, alleged that Bird ought to repay the £900 balance of the loan, but Sir George Jessel MR held that no debt was owed to the stepmother's estate, because the testatrix had made her debtor her executor and had thereby released the debt at law. To succeed under the rule in *Strong v. Bird*, there must be: (1) evidence of ↵ the donor's intention to make an immediate *inter vivos* gift (if the gift were testamentary, it would fail for lack of formality);[99] and (2) evidence that the intention to make the gift continued throughout the entire period up until the donor's death.

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Of course, this is not a case of equity assisting a volunteer:

> [E]quity will not aid the donee, but on the other hand if the donee gets the legal title to the property vested in him he no longer wants the assistance of equity and is entitled to rely on his legal title as against the donor or persons claiming through him.[100]

Furthermore, for the rule to apply, the donor must not have treated the property as his own during that period, for example, by giving part of it away to someone other than the claimant.[101] *Re Stewart*[102] confirms that the rule is not restricted to the release of a debt: it can apply to a regular gift. It can also apply if the intended donee is not a sole executor, but one of many. Nor is the rule restricted to cases in which the donee is an executor.[103]

However, according to Walton J in *Re Gonin*, the application of the rule to benefit an administrator (or administratrix) goes too far, because the appointment of an administrator is '*not an act of the deceased but of the law*' and '*it is often a matter of pure chance which of many persons equally entitled to a grant of letters of administration finally takes them out*'.[104]

Day v. Royal College of Music[105] illustrates the application of the rule. It concerned a dispute between the adult children of the composer Sir Malcolm Arnold and his former carer, Mr Day. The dispute related to manuscript musical scores which had been deposited with the Royal College since the 1980s. Mr Day

claimed that he had become owner of the manuscripts through a 1998 document executed by Sir Malcolm which recorded a gift in Mr Day's favour. However, Mr Day conceded that he never had physical possession of the manuscripts and that the 1998 document had not been executed as a deed. The Court of Appeal upheld the judge's decision that the Rule in *Strong v. Bird* operated to perfect the formal imperfections of the gift when, upon Sir Malcolm's death, Mr Day became an executor under Sir Malcolm's will.

The rule in *Strong v. Bird* permits the fortuitous, even accidental, perfection of imperfect gifts. In theory, therefore, it might be possible, on parallel facts, fully to constitute an incompletely constituted trust. Cast your mind back to the 'double character' of the rule in *Strong v. Bird* as set out in *Re Stewart*. On the first line of reasoning—that the vesting of the property in the executor at the testator's death completes the imperfect gift made in the lifetime—there would appear to be no reason, in principle, why the rule should not be effective to transfer legal title to trustees. On the second line of reasoning—that the intention of the testator to give the beneficial interest to the executor is sufficient to defeat the equity of beneficiaries under the will—there should likewise be no difficulty in applying the rule to give effect to an *inter vivos* declaration of trust. The equities of the beneficiaries under that trust would take priority over the equitable claims of the ↵ beneficiaries under the will, because the first equity in time will prevail where the equities are equal.[106]

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In *Re Ralli's Will Trusts*,[107] the testator, Ralli, left his residuary estate to trustees on trust for his wife for life, with remainder to his daughters H and I. Later, by a separate marriage settlement, H covenanted that, when she came into possession of her share under Ralli's will, she would settle her share on trustees for the benefit of her own children and, ultimately, for the children of I. A clause of H's marriage settlement declared that all property within the terms of the covenant should be subject to the terms of the trusts pending assignment to the trustees. In the event, H died childless. Some time later, I's husband, who had been a party to, and was nominated to be a trustee of, H's marriage settlement, was appointed to be a trustee under Ralli's will trust. He therefore asked the court whether he had the power to hold H's share of her father's residuary estate on the trusts of the marriage settlement. He claimed that he did have the power, which was hardly surprising given that his own children stood to benefit under the trusts of H's marriage settlement. H's personal representatives disagreed. They claimed that H's interest under Ralli's will trust should be held by I's husband for the benefit of the persons entitled to the residue of H's estate under H's will.

The court held that I's husband was free to hold H's share of Ralli's estate on the trusts of the marriage settlement. Those trusts had become completely constituted the moment legal title to the property had, quite fortuitously, vested in I's husband in his capacity as trustee of Ralli's will trusts. If it had been necessary to enforce performance of the covenant, equity would not have done so at the request of the beneficiaries under the settlement, because they were mere volunteers, but, in the present case, there had been no need to invoke the assistance of equity to enforce performance of the covenant. On the contrary, it had been for the defendants to invoke equity to show that it would be '*unconscientious*'[108] for I's husband to exercise his legal power to hold the property on the trusts of the marriage settlement. This they had failed to do. As with the rule in *Strong v. Bird*, the state of the defendant's ownership took priority over the obligations inherent in his office:

> [T]he circumstance that the plaintiff holds the fund because he was appointed a trustee of the will is irrelevant. He is at law the owner of the fund and the means by which he became so have no effect on the quality of his legal ownership.[109]

We might think that the 'quality' of his legal ownership is not really the point. We might think that equitable (beneficial) ownership is the real issue, and that in equity the 'circumstances' under which legal title comes to be held is never irrelevant. However that may be, Buckley J was, in fact, prepared to dispose of the case on the straightforward assumption that H's remainder interest under Ralli's will had been vested, not after-acquired, property at the date of execution of the marriage settlement. On that view, by executing the marriage settlement, H would have done everything in her power to divest ↵ herself of her remainder interest under Ralli's will, so the execution of the marriage settlement would have been a declaration of trust immediately binding upon H pending transfer of her interest to the trustees of the settlement. This 'immediate' binding effect supplies the clearest point of distinction between *Re Ralli's Will Trusts* and *Re Brooks' Settlement Trusts*.[110] In the latter case, a person with a contingent interest under a trust purported to divest himself of that interest by voluntary settlement. The settlement was held to be not binding on him because his share was not yet his to give at the time of the purported voluntary settlement. His interest was at that time still contingent or specious because it would only pass to him in default of appointment to another.

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Although the constitution of incompletely constituted trusts in a case such as *Re Ralli's* parallels closely the perfection of imperfect gifts by the rule in *Strong v. Bird*, it would be putting it too high to say that *Re Ralli's* was an *application* of the rule in *Strong v. Bird*. The '*Strong v. Bird* case' *Re James*,[111] was referred to by way of illustration in *Re Ralli's*, but the rule in *Strong v. Bird* was not mentioned directly. No reported case has overtly applied the rule in *Strong v. Bird* to trusts.

4.3.2.11 Gifts made in contemplation of death ('donationes mortis causa')

The law takes a generous approach to gifts made in contemplation of death. In the case of soldiers and mariners on active military service, it is even possible to make an informal 'nuncupative will' by simply making an oral declaration in the presence of a witness. The law does not go as far as that in the case of ordinary citizens,[112] but, in certain circumstances, an imperfect gift will be perfected if it is made in contemplation of the donor's death.

The doctrine of *donationes mortis causa* (gifts made in contemplation of death) is often cited as an exception to the maxim 'equity will not assist a volunteer' to perfect an imperfect gift. There is support for this view in the many judgments that suggest the doctrine is effective in English law by means of an implied or constructive trust.[113] In truth, however, the doctrine was imported virtually without alteration from Roman law.[114] Analysis of the doctrine in terms of common law and equity, although necessary to the integrity of English jurisprudence, is inevitably strained and imprecise.

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↵ The requirements for a valid DMC in English law, as confirmed by the Court of Appeal in *King v. Dubrey,*[115] are:

(1)

the donor 'should be contemplating his impending death', which means 'death in the near future for a specific reason';[116]

(2) the form of the gift must be such that it 'will only take effect if and when his contemplated death occurs. Until then D has the right to revoke the gift'[117] (in DMC the donor 'reserves the right to revoke the gift at will' and it will lapse automatically if the donor 'does not die soon enough' or if the donor 'recovers or survives');

(3) the donor should deliver 'dominion' over the subject matter. Jackson LJ, acknowledging that 'dominion' has been called 'amphibious' and 'slippery', concluded that it means 'physical possession of (a) the subject matter or (b) some means of accessing the subject matter (such as the key to a box) or (c) documents evidencing entitlement to possession of the subject matter'.[118]

The two major distinctions between the English formulation and the Roman formulation are, first, that delivery of the subject matter of the gift is always essential to a valid DMC in English law, and, second, that there has never been a requirement in English law that *donationes mortis causa* be witnessed.[119] The definitive Roman statement of the doctrine appears in *Justinian's Digest*,[120] in which, in addition to the basic statement of the doctrine, there appears the following commentary:

> A gift mortis causa differs considerably from the true and absolute sort of gift which proceeds in such a way that it can in no circumstances be revoked. In that sort of case, of course, the donor wishes the recipient rather than himself to have the property. But the person who makes a gift mortis causa is thinking of himself and, loving life, prefers to receive rather than to give. This is why it is commonly said: 'He wishes himself rather than the recipient to have the property, but, that said, wishes the recipient rather than the heir to have it.'[121]

In *Wilkes v. Allington*,[122] a widow granted a mortgage over her interest in a farm. After her death, the mortgagee passed the deeds to the farm, except the mortgage deed, to the ↵ widow's executors (who happened to be the mortgagee's nieces). When it later emerged that the mortgagee was dying of an incurable disease, he passed the mortgage deed to his nieces in a sealed envelope. Some short time later, the mortgagee died of pneumonia. His executors, claiming that the mortgage was a subsisting security enforceable against the nieces, brought the present action. Lord Tomlin held that the mortgage could not be enforced. The otherwise imperfect gift of the mortgage to the nieces was made perfect by a valid DMC, because it was clear that the gift was only to become binding on the donor's death (an intention could be implied that the property should be returned to him if he recovered). It did not matter that the donor died from a different disorder from that which had caused him to make the gift in contemplation of death.

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In a later case, it was held that the doctrine could apply to gifts of land other than mortgages,[123] a point that had previously been in doubt. The facts were, briefly, that Mrs Sen, who had lived with a man for several years in a house owned by him, was given a set of keys as he lay on his deathbed. The keys unlocked a box containing the deeds to the man's house. As he passed the keys to her, the dying man stated that the house was to be hers. It was held that passing possession of the deeds was sufficient to effect the *donatio*,

because there had been '*a parting with dominion over the essential* indicia *of title*'.[124] (The notion of 'dominion', like the doctrine itself, is imported directly from Roman Law.) In holding that the doctrine was applicable to land, Nourse LJ said:

> Let it be agreed that the doctrine is anomalous, anomalies do not justify anomalous exceptions … to make a distinction in the case of land would be to make just such an exception. A donatio mortis causa of land is neither more nor less anomalous than any other. Every such gift is a circumvention of the Wills Act 1837.[125]

Whether DMC is applicable to registered land, since the Land Registration Act 2002 reduced the importance of the land certificate, remains debatable.[126] The same concern applies to a DMC of shares. There had been some doubt that the doctrine could apply to company shares,[127] but, if the share certificates (being 'the essential indicia or evidence of title') are transferred, there seems to be no good reason why the doctrine should not apply in such a case.[128]

The Court of Appeal in *King v. Dubrey* noted that '[e]ven Roman jurists found the concept of DMC perplexing' and called it a somewhat surprising survivor of 'the fall of the Roman Empire'.[129] The court stressed that it is important to keep DMC within its proper bounds so as to safeguard the purposes for which the Wills Act was created. Why does the doctrine survive? The answer seems to be that for all its conceptual difficulties, it addresses the real practical problem of deathbed dispositions and therefore fulfils a '*deep felt need of mankind*'.[130]

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4.3.3 Summary

Figure 4.1 provides a summary of the ways in which donations to unincorporated associations have been construed by the court.

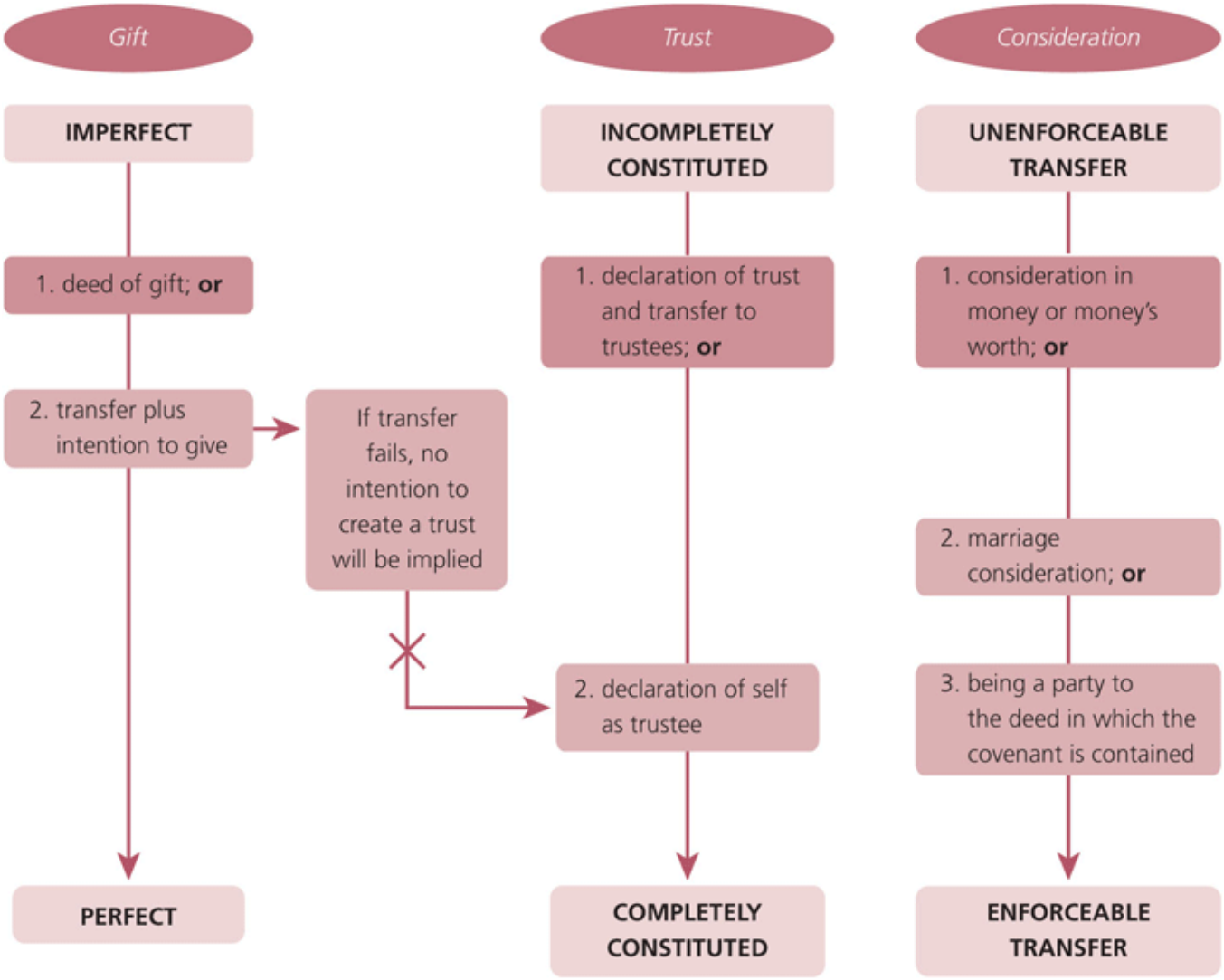

Figure 4.1 Summary flow chart: constitution of trusts, perfection of gifts and contractual consideration

4.4 Concluding remarks

We concluded Chapter 3 with the observation that courts take a pragmatic approach to the creation of trusts. We noted that, when asked to determine whether a trust or an absolute gift had been intended, judges do not approach the question in a logical vacuum and do not always produce the result demanded by strict theory. Judges reach their judgments in the light of all the facts, some of which may not have been foreseen by the settlor, with the aim of producing an outcome in conformity with the settlor's underlying intentions. In this chapter, we have considered the question of constitution, which, in essence, is the question of whether the settlor has done enough to transfer the trust property to the trustees, or to constitute himself a trustee. The constitution of a trust is not merely a matter of intention; it is a question of action or transaction, especially if the trust was intended to take effect by transfer of trust property to trustees. For this reason, ↵ the traditional approach of the courts to questions of constitution has tended to be less flexible or 'creative' than their approach to the issue of certainty of intention. There are exceptions in which the courts have taken a very generous and pragmatic approach to reach the conclusion

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that a trust has been completely constituted. In *Re Rose*, it will be recalled that a gift was said to have been completed before legal title had actually been transferred to the transferee. However, the fact that legal title had been registered in the names of the transferees by the time the matter came to be considered by the court may have been a significant factor in persuading the court to act pragmatically in holding that the gift had been perfected before registration. *Re Rose* was not a case in which the volunteer claimant actually required the active assistance of the court to complete the gift. The courts have also taken a generous approach to cases such as *Strong v. Bird* and *Re Ralli's*, in which legal title was successfully transferred by accident or good fortune, but in these, again, the courts' active assistance was not required to complete the gift or constitute the trust.

There has, however, been a sea change in the law relating to the constitution of trusts. It is difficult, if not impossible, to accept that the successful constitution of the trusts in *Choithram* and *Pennington* could have been achieved without the active assistance of the Judicial Committee of the Privy Council and the Court of Appeal, respectively. The settlor in each case had taken some active steps to demonstrate a serious intention to constitute a trust, but neither had done everything within their power actually to transfer legal title in the relevant property to the intended trustees. In fact, in both cases, the settlors had died before they could carry out the necessary formal transfers to the intended trustees. Leaving aside exceptional cases such as criminal confiscation and compulsory purchase, it is a fundamental principle of justice—not to mention a pillar of property law—that an owner of property cannot be deprived of the ownership of his property unless he disposes of it by a legally recognized mode of disposition. Even if an owner takes serious steps to dispose of his property, he has the right to change his mind right up until the moment at which he actually transfers everything that the transferee needs to perfect his title. The courts in *Choithram* and *Pennington* seem to have been content to assume that the transferors, had they lived, would not have changed their minds about making the transfer. The courts could not admit that they were assisting settlors to do that which the settlors had themselves failed to do, so, in both cases, the courts employed a different technique to ensure the successful constitution of the trusts. That technique was to hold that the settlors had so conducted themselves that they had bound their consciences to complete the dispositions which they had embarked upon (but had failed to complete) during their lifetimes. This burden of conscience became, in turn, a burden on the settlor's personal representatives. At the risk of sounding flippant, it would appear that the lesson for property owners is simple: do not take serious steps towards disposing of your property unless you are sure that you will not change your mind and, if you might wish to change your mind, try not to die in the meantime.

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4.5 Further reading

In addition to the following print sources, expand your learning with web links <https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-4-web-links?options=showName> to further reading on this topic.

BAKER, J. H., 'Land as a *donatio mortis causa*' (1993) 109 LQR 19.

BARTON, J. L., 'Trusts and covenants' (1975) 91 LQR 236.

BORKOWSKI, A., *Deathbed Gifts: The Law of* Donatio Mortis Causa (Oxford: Blackstone Press, 1999).

DU PLESSIS, P., *Borkowski's Textbook on Roman Law*, 6th edn (Oxford: Oxford University Press, 2020).

GARTON, J., 'The role of the trust mechanism in the rule in *Re Rose*' (2003) 67 Conv 364.

HOPKINS, J., 'Constitution of trusts: a novel point' (2001) 60(3) CLJ 483.

JACONELLI, J., 'Problems in the rule in *Strong v. Bird*' (2006) 70 Conv 432.

OLLOKAINEN-Read, A., 'Assignments of equitable interests and the origins of *Re Rose*' (2018) 63 Conv 63–73.

RICKETT, C., 'Completely constituting an *inter vivos* trust: property rules' (2001) 65 Conv 515.

ROBERTS, N., '*Donationes mortis causa* in a dematerialised world' (2013) 77 Conv 113–28.

Notes

[1] *Re Bowden* [1936] Ch 71.

[2] See *Jones v. Lock* (1865) LR 1 Ch App 25, discussed later.

[3] *Milroy v. Lord* (1862) 4 De G F & J 264.

[4] (1865) LR 1 Ch App 25. See Chapter 3.

[5] Ibid. at 29.

[6] Ibid. *per* Lord Cranworth LC at 28.

[7] This is a *requirement* whenever a trust is declared of land (Law of Property Act 1925, s. 53(1), (6)).

[8] (1862) 4 De G F & J 264.

[9] *Milroy v. Lord* (1862) 4 De G F & J 264, *per* Turner LJ at 274.

[10] *Re Rose, Rose v. IRC* [1952] Ch 499. This case approved the authority of *Re Rose, Midland Bank v. Rose* [1949] Ch 78, but the cases are otherwise unrelated. To add further confusion, Jenkins J appeared in the earlier case and also, by this time as Jenkins LJ, in the later case.

[11] *Re Rose, Rose v. IRC* [1952] Ch 499 at 513.

[12] *Mascall v. Mascall* (1985) 50 P & CR 119, *per* Browne-Wilkinson LJ at 126, CA.

[13] [1946] Ch 312, Ch D.

[14] Defence (Finance) Regulations 1940, reg. 3A(1), (4) (Statutory Rules and Orders 1940, No. 1254).

[15] [2001] 1 WLR 1. Noted J. Hopkins (2001) 60(3) CLJ 483.

[16] Ibid. *per* Lord Browne-Wilkinson at para. [31].

[17] [2002] 1 WLR 2075.

[18] The form had not been signed in escrow. A document executed 'in escrow' will take effect in the future, usually upon the happening of a particular event such as payment. See, for example, *Security Trust Co v. Royal Bank of Canada* [1976] AC 503, PC, in which a conveyance and mortgage were held in escrow pending payment.

[19] In addition to her major line of analysis, discussed next, Arden LJ made brief reference to two alternative justifications for their Lordships' conclusion that the gift in this case had been effective during Ada's lifetime. The first was to apply the principle that a court should take a benevolent construction in order to give effect to the donor's clear intentions. This, of course, depends upon a benevolent view of the court's ability to second-guess the donor's intentions, despite her failure to take irrevocable steps towards giving effect to them. The second, which her Ladyship described as being an application of the first, was that '*Ada and, through her, Mr Pennington became agents for Harold*'.

[20] See Chapter 1.

[21] [2002] 1 WLR 2075 at 2094A–B, 2105G. It is interesting to note that, in the event, the transfer to Harold was ineffective due to a breach of the company's articles (*Brian Hurst v. Crampton Bros (Coopers) Ltd* [2002] 2 P & CR D 21).

[22] [2010] EWCA Civ 159; [2010] 2 BCLC 1.

[23] [2011] EWHC 167 (Ch); [2011] 1 BCLC 638.

[24] Ibid. at para. [43].

[25] See *Milroy v. Lord* (1862) 4 De GF & J 264 at 274 and *Re Rose* [1952] Ch 499 at 511.

[26] *Mascall v. Mascall* (1985) 50 P & CR 119.

[27] Including '*assents by a personal representative*', '*conveyances taking effect by operation of law*' (including conveyances in satisfaction of a proprietary estoppel: see *Pascoe v. Turner* [1979] 1 WLR 431, in Chapter 8), '*leases taking effect in possession for a term not exceeding three years … at the best rent which can be reasonably obtained without taking a fine*', and certain '*disclaimers*' and '*surrenders*' (Law of Property Act 1925, ss. 52(2), 54).

[28] LPA 1925, s. 52(1).

[29] Law of Property (Miscellaneous Provisions) Act 1989, s. 1. Thus the old rule that a deed must be signed, *sealed*, and delivered is replaced by a new rule that the deed must be signed, *seen*, and delivered (taking *seen* to mean both 'witnessed' and 'apparent').

[30] (1874) LR 18 Eq 11.

[31] Ibid. at 14.

[32] Land Registration Act 1925, s. 19(1) (freehold); s. 22(1) (leasehold).

[33] *Mascall v. Mascall* (1985) 50 P & CR 119.

[34] W. S. Holdsworth, *An Historical Introduction to the Land Law* (Oxford: Clarendon Press, 1927) at 145.

[35] Stock Transfer Act 1963, s. 1; Companies Act 2006, s. 771 and Part 21. See *Milroy v. Lord* (1862) 4 De GF & J 264 and *Re Rose* [1952] Ch 499. But see *Pennington v. Waine* (earlier).

[36] Part 21 of the Companies Act 2006 further facilitates this.

[37] [1964] 1 Ch 175, CA

[38] Ibid. at 187.

[39] *The Times*, 21 March 1990.

[40] *Lord Strathcona Steamship Co. Ltd v. Dominion Coal Co. Ltd* [1926] AC 108, *per* Lord Shaw at 124.

[41] *Don King Productions Inc. v. Warren* [2000] Ch 291, CA (affirming Lightman J [1999] 3 WLR 276 at 279). The chose in action in that case was the benefit of being a party to a contract to promote boxing. See, also, *Pathirana v. Pathirana* [1967] 1 AC 233, PC, and *Thompson's Trustee in Bankruptcy v. Heaton* [1974] 1 WLR 605.

[42] *Don King Productions Inc. v. Warren* [2000] Ch 291, CA, at 317.

[43] See *Trendtex Trading Corporation v. Suisse* [1982] AC 679, CA.

[44] Section 31.

[45] Law of Property Act 1925, s. 136(1).

[46] *Foster v. Baker* [1910] 2 KB 636, CA.

[47] *Durham Bros v. Robertson* [1898] 1 QB 765.

[48] Law of Property Act 1925, s. 136(1).

[49] H. Beale (ed.), *Chitty on Contract*, 28th edn (London: Sweet & Maxwell, 1999) at 200–16; *Van Lynn Developments Ltd v. Pelias Construction Co Ltd* [1969] 1 QB 607 at 615.

[50] *Olsson v. Dyson* (1969) 120 CLR 365.

[51] For example, *Ex p Pye* (1811) 18 Ves Jr 140; *Kekewich v. Manning* (1851) 1 De G M & G 176.

[52] Note 5.

[53] *Palmer v. Carey* [1926] AC 703, PC.

[54] Law of Property Act 1925, s. 53(1)(c). See Chapter 6.

[55] *Raiffeisen Zentrabank Osterreich AG v. Five Star Trading LLC* [2001] QB 825, CA.

[56] (1828) 3 Russ 1.

[57] *United Bank of Kuwait plc v. Sahib* [1997] Ch 107, *per* Chadwick J at 119 (approved at 132, CA).

[58] [1951] 1 Ch 669.

[59] [1951] 1 Ch 669 at 676.

[60] Ibid. at 677. *Locus poenitentiae* means 'place (i.e. opportunity) to repent'.

[61] See earlier.

[62] P. S. Atiyah, *Introduction to the Law of Contract* (Oxford: Clarendon Press, 1961) at 192–3.

[63] *Re Brooks' Settlement Trusts* [1939] Ch 993, *per* Farwell J; following *Lovett v. Lovett* [1898] 1 Ch 82 and *Re Ellenborough* [1903] 1 Ch 697. *Raiffeisen Zentrabank Osterreich AG v. Five Star Trading LLC* [2001] QB 825, CA.

[64] *Collyer v. Isaacs* (1881) 19 Ch D 342, *per* Jessel MR at 351.

[65] *Re Gillott's Settlement* [1934] Ch 97.

[66] *Re Trytel* (1952) 2 TLR 32.

[67] *Performing Rights Society v. London Theatre of Varieties* [1924] AC 1, HL.

[68] *Hobson v. Trevor* (1723) 2 Peere Wms 191.

[69] *Re Turcan* (1888) 40 Ch D 5, CA.

[70] [1903] 1 Ch 697.

[71] Ibid. at 700.

[72] Until 1907, a husband could make this covenant on his wife's behalf and without her confirmation under a *jus mariti* preserved by the Married Women's Property Act 1882, s. 19. The husband's *jus mariti* was finally removed by the Law Reform (Married Women's and Tortfeasors) Act 1935, s. 2.

[73] Gratuitous promises made in deeds were binding long before English law recognized the binding nature of contracts by exchange of promises: P. S. Atiyah, *Introduction to the Law of Contract* (Oxford: Clarendon Press, 1961) at 22–3.

[74] Marriage consideration has been described as '*the most valuable consideration imaginable*' (*AG v. Jacobs Smith* [1895] 2 QB 341, *per* Kay LJ at 354, CA).

[75] *Re Cook's ST* [1965] Ch 902, *per* Buckley J at 916B.

[76] *Macdonald v. Scott* [1893] AC 642, HL (SC).

[77] *AG v. Jacobs Smith* [1895] 2 QB 341, CA.

[78] Ibid.

[79] *Cannon v. Hartley* [1949] 1 Ch 213.

[80] Ibid. at 217. Damages for breach of covenant will be fixed at a level calculated to compensate for the loss of the anticipated interest under the trust (*Re Cavendish-Browne's Settlement Trusts* [1916] WN 341).

[81] A covenant is a 'specialty' within the Limitation Act 1980, s. 8, breach of which is subject to a 12-year limitation period. For limitation, generally, see Chapter 13.

[82] *Pullan v. Koe* [1913] 1 Ch 9.

[83] *Paul v. Paul* (1882) 20 Ch D 742; *Re D'Angibau* (1880) 15 Ch D 228.

[84] *Re Plumtree* [1910] 1 Ch 609.

[85] *Re Cook's Settlement Trusts* [1965] 1 Ch 902.

[86] (1844) 4 Hare 67.

[87] *Re Pryce* [1917] 1 Ch 234.

[88] *Re Kay's Settlement* [1939] Ch 329.

[89] *An Introduction to the Law of Trusts* (Oxford: Clarendon Press, 1990) at 70.

[90] Section 1(1).

[91] Section 1(2).

[92] The Act applies to contracts entered into on or after 11 May 2000—or 11 November 1999 in the case of contracts in which it had been expressly provided that the Act should apply.

[93] The issue of having to rely upon trustees to enforce the covenant (*Re Pryce* [1917] 1 Ch 234) does not arise.

[94] Section 1(3).

[95] Ibid.

[96] Section 1(5).

[97] *Cannon v. Hartley* [1949] 1 Ch 213.

[98] (1874) LR 18 Eq 315.

[99] See Chapter 6.

[100] *Re James* [1935] 1 Ch 449, *per* Farwell J at 451.

[101] *Re Gonin, decd* [1979] Ch 16.

[102] [1908] 2 Ch 251.

[103] *Re James* [1935] 1 Ch 449.

[104] [1979] Ch 16 at 35A–B.

[105] [2013] EWCA Civ 191; [2014] Ch 211, CA

[106] See Chapter 16 on maxims of equity.

[107] [1964] Ch 288.

[108] Ibid. *per* Buckley J at 302.

[109] Ibid. at 301.

[110] [1939] Ch 993.

[111] [1935] Ch 449. In *Re Gonin* [1979] Ch 16, Walton J cast doubt on the correctness of the decision in *Re James* [1935] 1 Ch 449.

[112] For the statutory formalities governing testamentary dispositions, see Chapter 6.

[113] See, for example, *Sen v. Headley* [1991] Ch 425, *per* Nourse LJ at 440C, CA.

[114] Henry de Bracton, *De legibus et consuetudinibus Angliae*, Book 2, folio 60. Justinian's Digest recites that '[i]t is permissible to make a gift mortis causa not only on grounds of weak health, but also on grounds of impending danger of death' (Citation 39.6.3–6) and that 'a gift mortis causa differs considerably from the true and absolute sort of gift which proceeds in such a way that it can in no circumstances be revoked' (Citation 39.6.35.2). Unsurprisingly, Civil Law jurisdictions such as France have their equivalents (see H. Mantle and J. Pinto, 'Donation entre epoux / donationes mortis causa' [2018] 2 *PCB* 60–3).

[115] *King v. Dubrey* (also known as *King v. Chiltern Dog Rescue*) [2015] EWCA Civ 581, CA, at paras [50]–[60]. For an earlier formulation of DMC in English law see *Cain v. Moon* [1896] 2 QB 283, *per* Lord Russell of Killowen CJ at 286.

[116] It is helpful to note that '[p]ossibility of death and not certainty of death is the required element', Bob Hughes, 'The exception is the rule: donatio mortis causa' (2003) 7(2) Journal of South Pacific Law (online).

[117] On this point compare *Re Lillingston* [1952] 2 All ER 184, *per* Wynn-Parry J at 187.

[118] *King v. Dubrey*, at para. [59]. Followed in *Keeling v. Keeling* sub nom. *Re Exler (Deceased)* [2017] EWHC 1189 (Ch).

[119] A. Borkowski discusses these and other distinctions in *Deathbed Gifts: The Law of* Donatio Mortis Causa (Oxford: Blackstone Press, 1999) at 22–3.

[120] The Byzantine Roman Emperor Justinian (527–65 ad) oversaw the codification of Roman Law into the *Corpus Juris Civilis*, the major part of which was named in his honour.

[121] Citation 39.6.35.2. Cited in A. Borkowski, *Deathbed Gifts: The Law of* Donatio Mortis Causa (Oxford: Blackstone Press, 1999).

[122] [1931] 2 Ch 104, Ch D.

[123] *Sen v. Headley* [1991] Ch 425.

[124] Ibid. at 438A.

[125] Ibid. at 440.

[126] N. Roberts, 'Donationes mortis causa in a dematerialised world' [2013] 2 Conv 113–28.

[127] *Re Weston* [1902] 1 Ch 680.

[128] *Staniland v. Willott* [1852] 3 Mac & G 664.

[129] *King v. Dubrey* [2015] EWCA Civ 581, CA, at para. [37].

[130] J. H. Baker, 'Land as a *donatio mortis causa*' (1993) 109 LQR 19 at 19 (a note on *Sen v. Headley* [1991] Ch 425).

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