

## The maxims of equity

### Aims and objectives

After reading this chapter you should:

- Have an awareness of the nature of equitable maxims and their role.
- Have a knowledge of a range of the equitable maxims.
- Understand the way in which individual maxims have influenced the law in particular areas.

The maxims of equity may fairly be described as a set of general principles which are said to govern the way in which equity operates. They tend to illustrate the qualities of equity, in contrast to the common law, as more flexible, responsive to the needs of the individual and more inclined to take account of the parties' conduct and worthiness. It cannot be said that there is a definitive list of the maxims: different sources give different examples and some works prefer to avoid the term altogether in favour of a broader discussion of the character of equity. Above all, the maxims are applied only when the court feels it appropriate: none of the maxims is in the nature of a binding rule and for each maxim it is possible to find as many instances of its not having been applied as instances where it has been.

The role of the maxims was discussed in the case of *Tinsley v Milligan* [1993] 3 All ER 65, which is considered in detail in Chapter 10 (see page 262). In the Court of Appeal a flexible approach was taken to the application of the maxim, 'he who comes to equity must come with clean hands', but in the House of Lords, this was rejected. Such a flexible approach, depending upon such an 'imponderable factor' as public conscience, would lead to great uncertainty.

It is submitted that this cannot be taken as evidence that every maxim is binding in every situation which would appear to lie within its wording. The true answer may lie in the fact that the maxims are very broadly worded and cannot, as is stated above, be treated without more as binding rules. Rather they are the principles underlying various specific rules, instances of which are given below in the context of each maxim. The case of *Barrett v Barrett* [2008] EWHC 1061, [2008] 2 P & CR 17, discussed below at p. 51, may indicate the reassertion of a more flexible, conscience based approach.

The following is a list of maxims, together with some of the instances of their application. It is not intended to be exhaustive. It will also become apparent that there is much overlap and in some cases contradiction between the maxims.

For more on  
resulting trusts  
see Chapter 10,  
p. 262.

## Equity follows the law

This is an attempt to indicate the relationship between common law and equity, which is a complex one. The traditional role of equity, as stated in ‘Doctor and Student’ 1523 by Christopher St German was ‘to temper and mitigate the rigour of the law’, which implies that equity would intervene and overrule the common law if justice required it. It was stressed, even at that time, however, that it did not attempt to overrule common law judgments, but rather to act *in personam* on the parties to prevent injustice (as explained below, it is also a maxim of equity that it acts *in personam*). This maxim indicates that, where possible, equity will ensure that its own rules are in line with the common law ones. Examples of equity overcoming the effect of the common law are frequent enough, but it should be noted that in most cases the principle is that equity supplements but does not contradict the common law. Thus, in the case of the trust, the interests of the beneficiary are recognised, but so too, of course, is the status of the trustee as legal owner. The trust exists, as it were, behind the legal ownership.

Equally, the courts will in appropriate cases allow the common law effects to stand. For instance, in the case of *Re Diplock* [1948] 2 All ER 318 it was argued that, where money had been distributed to charities under the provision of a will which subsequently turned out to be invalid, the charities should be allowed to retain it. The Court of Appeal stated:

For more on personal remedies see Chapter 16, p. 479.

It is in our opinion impossible to contend that a disposition which according to the general law of the land is held to be entirely invalid can yet confer upon those who, *ex hypothesi*, have improperly participated under the disposition, some moral or equitable right to retain what they have received against those whom the law declares to be properly entitled.

On *Re Diplock* see further at page 479.

## Where the equities are equal, the law prevails. Where the equities are equal, the first in time prevails

These two maxims are concerned with priorities, that is to say which of various interests prevails in the event of a conflict. The general rule, as one might expect, is that interests take effect in order of their creation, but, as regards equitable interests, these may be defeated if a *bona fide* purchaser acquires a subsequent legal estate without notice of the equitable one. This in turn raises the issue of notice, and to that extent the maxims have been affected by legislation on the question of what constitutes notice. For the purchaser of the legal estate to gain priority, however, it will be necessary for him to show that he is *bona fide*. If there is fraud then the equities (of the legal owner and the equitable one) will not be equal and the equitable one will prevail. In *Pilcher v Rawlins* (1872) LR 7 Ch App 250, James LJ explained the position of the *bona fide* purchaser of a legal estate thus:

such a purchaser's [i.e. the purchaser of a legal estate's] plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court [the Court of Appeal in Chancery]. Such a purchaser, when he has once put in such a plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show *bona fides* or

*mala fides* of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then...this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate.

Again, if there is a conflict between a number of equitable interests, they will have priority in order of their creation, again subject to the 'equities being equal' (i.e. both parties not being at fault or guilty of fraud etc.).

The sort of conduct by which a person might lose his priority, i.e. making the equities unequal, was characterised by the Privy Council in *Abigail v Lapin* [1934] AC 491 at 502 thus:

In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which has, or might have had, the effect of inducing a claimant later in time to act to his prejudice.

Ranking after equitable interests in the matter of priorities are mere equities, so that the *bona fide* purchaser of an equitable estate without notice of the equity will take free of it. Mere equities are difficult to define and some writers have said that they cannot bind subsequent purchasers in any event. It is submitted that there are certain defined equities which do bind, subject to the above rule regarding the *bona fide* purchaser. Such defined equities are proprietary interests, including, for example, the right to have a conveyance set aside for fraud, the right to have a contract rectified and a right arising out of estoppel.

It is clear that the question of notice will be crucial in determining priorities, especially where both legal and equitable interests are in conflict. The general principle is that a purchaser is taken to have notice unless he can show he took all reasonable care and made inquiries and did not thereby acquire notice, whether actual, constructive or imputed. Actual knowledge means that he was actually aware of the interest, constructive knowledge that he would have acquired it had he taken all reasonable steps, and imputed knowledge is that which was possessed or should have been possessed by his agent acting on his behalf in the transaction. The detailed rules as to what is considered reasonable inquiry need not be examined here, but it should be remembered that in relation to real property the position is substantially affected by land charges legislation. Under this legislation many charges on land, both legal and equitable, will be void against a purchaser for value unless registered and registration is deemed to be actual notice to all persons of the charge registered. Also important is the principle of 'over-reaching' which has the effect of enabling a purchaser of land held on trust to take free of the beneficial interests even if he has notice of them. This occurs because the trust, and therefore the beneficial interests, attach to the purchase moneys rather than to the land in the case of land held on trust of land under the provision of the Trusts of Land and Appointment of Trustees Act 1996.

## Equity looks to the substance rather than the form

Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it finds that by insisting on the form, the substance will be defeated, it holds it inequitable to allow a person to insist on such form, and thereby defeat the substance.

For more on formalities see Chapter 4, p. 102.

Lord Romilly MR thus expressed this maxim in *Parkin v Thorold* (1852) 16 Beav 59. It should not be thought that this implies that formalities are never required, however. Equity will not enforce or recognise equitable interests where, for example, formalities are required by statute, as explained in Chapter 4 at page 102. Once again, this maxim is in the nature of a general principle only, which implies that equity is generally less concerned with precise forms than the common law. It is not necessary, for example, for the word ‘trust’ to be used before a trust can be created: the court looks not at the words of the settlor, but rather the result he was attempting to achieve.

## Equity will not permit a statute to be used as an instrument of fraud

For more on statutory requirements see Chapter 4, page 111.

This principle, which is further discussed in Chapter 4 at page 111, may be taken as a more specific example of the previous maxim regarding formality. It should be stressed that equity will not ignore statutory requirements normally, but only, as the maxim implies, where it would be unconscionable to allow a party to rely on a statutory requirement to another’s detriment. This problem has commonly arisen in situations where contracts are only enforceable if in writing, as required by the Law of Property Act 1925 s 53(1)(b).

### *Bannister v Bannister* [1948] 2 All ER 133

In this case, A conveyed a house to B and B orally agreed to allow A to live in it rent free as long as she wished. This agreement was unenforceable as it was not in writing and B attempted to evict A. The Court of Appeal held that the agreement was enforceable, notwithstanding the requirement of writing and accordingly A was tenant for life.

For more on secret trusts see Chapter 4, p. 112.



This case is not without difficulty, because by holding A to be tenant for life the court gave her much wider powers, including the power to sell the land, than can have been intended. A further problem, that of the nature of the trust that equity imposes to prevent fraud, is discussed in the context of the similar case of *Rochefoucauld v Boustead* (1897) in Chapter 4.

One of the theoretical justifications for **secret trusts** is that not to enforce them would allow a statute, in this case the Wills Act 1837, to be used as an instrument of fraud. This is not, however, the only argument in their favour and accordingly they will be discussed separately in Chapter 4 at page 112 *et seq.*

## Equity imputes an intention to fulfil an obligation

For performance and satisfaction see Chapter 17, p. 497.

This is the basis of the equitable doctrines of performance and satisfaction, which are discussed in detail in Chapter 17 (see pages 497–503), and simply means that where a person has undertaken an obligation his later conduct will, if possible, be interpreted as fulfilment of that obligation.

## Equity regards as done that which ought to be done

This relates most obviously to specific performance. If vendor and purchaser have entered into a specifically enforceable contract (for example, for the sale of land), in equity the purchaser acquires a beneficial interest and the vendor holds the land on constructive trust for the purchaser. However, it should be noted that the duty of the constructive trustee is simply to convey the land to the purchaser in accordance with the terms of the contract. The trustee does not take on all the other duties normal to trusteeship, nor, for example, is the purchaser entitled to rents from the property until sale. As Cotton LJ stated in *Rayner v Preston* (1881) 18 Ch D 1:

An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser, and in so far as he is a trustee he is so only in respect of the property contracted to be sold.

The purchaser was not therefore able, as the law then stood, to recover insurance money obtained by the vendor for a fire which occurred after he had contracted to sell the house (see further at page 309).

The maxim was also applied to a bribe received by a fiduciary in *A-G for Hong Kong v Reid* [1994] 1 All ER 1 (see further at page 289 below).

For more on vendors as constructive trustees see Chapter 11, p. 309.

For more on breaches of fiduciary duties see Chapter 11, p. 289.



## Equity acts *in personam*

It is in the nature of equitable remedies that they generally operate against the person of the defendant, being enforceable by imprisonment for contempt. It is in this way that, as discussed above, equity could claim not to be interfering with the common law. The judgment at law in effect was binding on the whole world and equity intervened only against the individual defendant, who was prevented from enforcing his legal rights. Another feature of this principle is that equitable rights were not enforceable against everybody but could be defeated by the interest of the *bona fide* purchaser.

The *in personam* nature of the operation of equity also has specific relevance in relation to property and interests abroad. As a general rule, English courts will not entertain actions concerning title to foreign land. As Lord Campbell LC stated in *Norris v Chambers* (1861) 3 De GF & J 583:

An English Court ought not to pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a foreign Court, and which in the country where the lands to be charged by it lie would probably be treated as *brutum fulmen* [an empty threat].

The position is otherwise if the intended decree acts *in personam*, as equitable ones do, and also the defendant is within the reach of the English courts. As Lord Cottenham observed in *ex parte Pollard* (1840) Mont & Ch 239:

contracts respecting lands in countries not within the jurisdiction of these courts...can only be enforced by proceedings *in personam* which courts of equity here are constantly in the habit of doing; not thereby in any respect interfering with the *lex loci rei sitae*. If indeed the law of the country where the land is situated should not permit or not enable the

defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate.

For more on search orders and freezing injunctions see Chapter 18, p. 527.

The *in personam* nature of remedies has also been discussed in relation to [search orders](#) and [freezing injunctions](#). See Chapter 18 on freezing injunctions and the effects on property and persons abroad (page 527).

## Equity will not suffer a wrong to be without a remedy

This maxim indicates that equity will not allow the technical defects of the common law to prevent worthy plaintiffs from obtaining redress. It could be seen, therefore, as the opposite of the maxim that equity follows the law. There are numerous examples of the development of equitable doctrines and remedies intended to override the unjust result arising from the enforcement of legal rights. Perhaps the most obvious is the trust itself: the enforcement of the rights of the legal owner as against the person for whose benefit he had agreed to hold the property would clearly lead to injustice and so equity recognised the rights of that beneficial owner. Other examples include the use of specific performance to enforce contracts not enforceable at law and the use of injunctions to restrain threatened wrongs or to protect the plaintiff's interests pending trial.

## He who seeks equity must do equity

Though the previous maxim indicates equity's willingness to intervene where the common law will not, it should not be thought that equity will automatically intervene whenever a certain situation arises. In general, one can say that wherever certain facts are found and a common law right or interest has been established, common law remedies will be available whether that produces a fair result or not. By contrast, equitable remedies are discretionary and the court will not grant them if it feels that the plaintiff is unworthy, notwithstanding that *prima facie* he has established an equitable right or interest. The maxim that he who seeks equity must do equity, together with the next two maxims, concerning 'clean hands' and delay, are aspects of this discretionary quality. It should not be supposed that the discretion is entirely unfettered. As Lord Romilly MR explained in *Haywood v Cope* (1858) 25 Beav 140:

the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised.

So the person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so. In the field of contract, the court will not grant an injunction to prevent breach for the benefit of a party who is not prepared to perform his side of the bargain (see *Chappell v Times Newspapers* [1975] 2 All ER 233). Where a

contract is rescinded the party seeking rescission must be prepared to return all benefits received under it. A creditor may not be able to recover the full amount of a debt if the debtor can set off money owed to him by the creditor. The maxim is also behind the principle of mutuality of remedies (if specific performance is available to one party then it will be available to the other, even though damages would be adequate for that party) and the doctrine of election (see pages 492–7).

For more on the doctrine of election see Chapter 17, pp. 492–7.

This maxim refers to the plaintiff's future conduct, whereas the next refers to his past behaviour.

## He who comes to equity must come with clean hands

The rather picturesque language of this maxim means that a party seeking an equitable remedy must not himself be guilty of unconscionable conduct. The court may therefore consider the past conduct of the claimant. Most cases concern illegal or fraudulent behaviour on the part of the claimant, and it is not clear to what extent the maxim is applicable outside such behaviour. Certainly, in the context of the granting of injunctions, which, like all equitable remedies, are discretionary, the principle has been broadly stated; for example, Wood J stated in *Cross v Cross* (1983) 4 FLR 235:

He who comes to equity must come with a clean hand and any conduct of the plaintiff which would make a grant of specific performance inequitable can prove a bar.

It appears, however, that the 'uncleanness' must relate directly to the matter in hand, otherwise anyone might be denied a remedy simply because he was of bad character.

### *Dering v Earl of Winchelsea* (1787) 1 Cox 318

This is illustrated in the case of *Dering v Earl of Winchelsea*, where Sir Edward Dering, the Earl and another had acted as surety for Dering's brother, Thomas, for the due performance by Thomas of the office of Collector of Customs. Thomas defaulted and the Crown obtained judgment from Sir Edward for the amount lost. Sir Edward then sought to obtain a contribution from the other sureties. The Earl claimed that Sir Edward could not claim the share because of his own misconduct. Eyre LCB (having itemised some of Sir Edward's misconduct, including encouraging his brother to gamble, knowing his brother was using government money for this) did not accept that argument and stated that:

...such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward to come into this Court under these circumstances:... A man must come into a Court of Equity with clean hands; but when this is said, it does not mean a general depravity: it must have an immediate and necessary relation to the equity sued for, it must be a depravity in a legal as well as a moral sense.

He concluded that though Sir Edward might morally be the author of his own loss he could not be said to be so legally, so his conduct did not prevent him from recovering the contribution. A similar point was made more recently in *Argyll v Argyll* [1965] 1 All ER 611: the Duchess's immoral attitude towards her marriage did not prevent her obtaining an injunction to stop the Duke publishing an account of it.

The application of this maxim to situations where a claimant seeks the recognition of an equitable proprietary right was considered in the case of *Tinsley v Milligan*, referred to in the introduction to this chapter.



*Tinsley v Milligan* [1993] 3 All ER 65

The facts of this case were that the plaintiff and defendant each contributed to the purchase price of a house, on the mutual understanding that it was owned jointly between them. However, the conveyance was made into the sole name of the plaintiff only in order to enable the defendant to make fraudulent claims to housing benefit. After an argument, the plaintiff Tinsley moved out, claimed possession and asserted her legal title. Milligan, who admitted making the fraudulent claims, now sought a declaration that Tinsley held the house on trust for both of them. Tinsley contended that, since Milligan could not make her claim without admitting the evidence of her fraud, the court would automatically refuse to enforce a trust in her favour.

The Court of Appeal adopted a flexible approach and held that the fraudulent purpose was not relevant.

This approach was rejected by the House of Lords. The decision was, however, by a bare majority, and subject to strong dissent by Lord Goff.

It was clear that, according to ordinary resulting trust principles, Milligan would have had an equitable proprietary right to half the house on the basis of her contribution to the purchase price and the mutual understanding between herself and Tinsley that the house was jointly owned; these principles are discussed further in Chapter 10 (see pages 253–75).

What difference did the fact of the illegal purpose make? The House clearly rejected the idea of assessing the quality of the illegality and of exercising a discretion to ignore it, as the Court of Appeal had done.

The majority in the House reached the conclusion that a party could assert an equitable title provided they could do so without relying on their own illegality. On the facts here Milligan could prove the existence of a resulting trust in her favour by virtue of her contributions and the mutual understanding: she did not have to *rely* on the illegality as it was not relevant why she had come to this arrangement with Tinsley. The case was thus distinguishable from cases such as *Tinker v Tinker* and *Gascoigne v Gascoigne*, where ordinary equitable principles presumed an outright gift to the legal title holder which could be rebutted only by evidence of the donor's purpose: if that purpose were an illegal one, the donor would not be allowed to use it to establish a trust in his favour.

In his dissenting judgment, however, Lord Goff argued powerfully against this approach and in favour of the broad principle, laid down by Lord Eldon in *Muckleston v Brown* (1801) 6 Ves Jr 52, to the effect that any plaintiff guilty of illegal or unconscionable conduct should be refused relief in equity. Accordingly, as Lord Eldon put it: 'Let the estate lie where it falls.' On these facts, Tinsley, as the legal owner, would have sole title. In Lord Goff's view, this should apply notwithstanding the unfair gain that Tinsley would thereby make, and that the consequences of the illegality, which they had both connived at, would fall solely on Milligan. His Lordship expressed some sympathy for Milligan, but, as he said:

This is not a principle of justice; it is a principle of policy, whose application is indiscriminate.

Lord Goff did nevertheless acknowledge that there were exceptions to the general rule, one of which, upheld in *Tribe v Tribe* [1995] 4 All ER 236, is that a man may rely on evidence of his illegal purpose where that purpose has not, in fact, been carried out.

For more on  
resulting trusts  
and co-owners  
see Chapter 10,  
pp. 253–75.



The recognition of an equitable right under a resulting trust despite an illegal purpose in *Tinsley v Milligan*, can be contrasted with the approach to the recognition of a constructive trust based upon an alleged agreement in support of an illegal purpose, in *Barrett v Barrett* [2008] EWHC 1061 (Ch) [2008] 2 P & CR 17. In this case Thomas was declared bankrupt, so his brother John purchased Thomas' house from the trustee in bankruptcy, so that Thomas could go on living in it. John was thus the legal owner, and later John sold the house and purported to transfer some of the sale proceeds to his sister. Thomas claimed a constructive trust based on an agreement with his brother and his paying the house expenses. He did not allege a contribution to the purchase price (thus distinguishing the case from *Tinsley v Milligan*). Any attempt to rely on an agreement inevitably meant that Thomas revealed the purpose of the agreement, which was to defeat his creditors and was thus illegal, so Thomas was not allowed to plead the agreement. The maxim was thus reasserted, and with it the broader concept of conscionability.

## Delay defeats equity

Two matters must be noted here. First, the time in which an action for equitable relief may be sought may be governed by the Limitation Act 1980 and, second, even where there is no statutory **limitation**, it will be governed by the equitable principle of **laches**.

For more on  
limitation  
see Chapter 16,  
p. 462.

The Limitation Act 1980 lays down limitation periods in connection with the enforcement of trust matters. For example, s 21(3) provides, as a general rule, that an action by a beneficiary to recover trust property or in respect of any breach of trust shall not be brought after the expiration of six years from the date the right of action accrued. However, the section also provides, for example, that no time limit shall apply to an action by a beneficiary in respect of fraud by a trustee or an action by a beneficiary to recover trust property or its proceeds from a trustee. The other main types of equitable claims regulated by the Act are claims to the personal estate of deceased persons, claims to redeem mortgaged land and claims to foreclose mortgages of real or personal property. Equity may in very limited cases apply the same limitation to situations analogous to the express statutory ones. No statutory limitations apply to actions for breach of a fiduciary duty, or to setting aside for undue influence or to actions for rescission. In addition, the Limitation Act 1980 s 36 provides that nothing in the Act shall affect any equitable jurisdiction to refuse relief on the grounds of acquiescence or otherwise. Time limits are considered further in Chapter 16 at page 462.

Delay may be evidence of **acquiescence**, so the two issues cannot be separated. A failure to bring an action may tend to confirm other slight evidence that the innocent party has accepted or agreed to the breach of contract or other ground for seeking relief, thus preventing him from enforcing his right to remedies for that breach.

Whether the court will regard the claim as barred will be a matter to be determined on the facts. As with all equitable principles, flexibility is important. As the Privy Council stated in *Lindsay Petroleum v Hurd* (1874) LR 5 PC 221:

The doctrine of laches in the Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as waiver of it, or where by his conduct and neglect he has, though perhaps not waived that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards

to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, ... the validity of the defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause the balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy.

## Equity will not allow a trust to fail for want of a trustee

It would clearly be absurd if, a settlor having created an otherwise valid trust, that trust could not take effect because no one had been appointed to act as trustee. The rules as to who has the power to appoint trustees are dealt with in detail in Chapter 13 at pages 386–93 but it should be remembered that the court has a residuary inherent jurisdiction to appoint trustees in circumstances where the settlor has failed to appoint, or has appointed persons who are now dead and has not given anyone else the power to appoint. It will thus ensure that the trust does not fail. It should also be noted that in practice the court will normally appoint under its statutory powers under the Trustee Act 1925, so the inherent jurisdiction will not normally need to be invoked. The application of the maxim in relation to testamentary trusts is dealt with in Chapter 13 at page 387.

For more on appointment of trustees, see Chapter 13, pp. 386–93.

For more on testamentary trusts see Chapter 13, p. 387.

## Equality is equity

In the absence of any evidence to the contrary, equity will tend towards the adoption of equal division of any fund to which several persons are entitled. One example of this and one which it will be seen has wide-reaching implications, is to be found in *Burrough v Philcox*, discussed in Chapter 5 at page 125. The testator having left his estate to certain relatives or such of them as his child should nominate, and the child having failed to nominate, the court held that the funds were held on trust for all the relatives in equal shares. There is even some authority for the proposition that, upon failure of an express trust for uncertainty of beneficial share, the property is to be held on trust for all the beneficiaries equally. Another instance is the division of a joint bank account upon divorce where it is impractical to make an accurate division of the fund between husband and wife: the court will order equal division. The adoption of equal division is, however, subject to any evidence to the contrary; so, for example, the court in *McPhail v Doulton*, discussed in Chapter 5 at page 126, would not order equal division, which in any event would have been impossible, because it was clearly not what the settlor intended.



For more on trust powers see Chapter 5, pp. 125.

For more on consideration see Chapter 4, pp. 96–102.

## Equity will not assist a volunteer

A volunteer in this context is a person who has not given consideration for a bargain. We shall see in Chapter 4 at pages 96–102 in the context of constitution of trusts that equity will not enforce a covenant to create a trust in favour of a volunteer. This is also an instance of the next maxim.

## Equity will not perfect an imperfect gift

For more on imperfect gifts see Chapter 4, p. 94–6.

Unless consideration is given, an undertaking to give something is unenforceable, being a mere gratuitous promise. Therefore, unless property in the thing promised has been transferred, the intended donee can do nothing to enforce. Likewise, where there is a gratuitous promise to create a trust the property must have been vested in the trustees for the trust to be enforceable. This issue is discussed at length in Chapter 4 at page 91.

There are, however, certain recognised exceptions to the rule that equity will not perfect an imperfect gift, which will now be considered in detail. If one of these exceptions can be applied, it will mean that the various formal rules as to the transfer of different types of property, as discussed in Chapter 4 (see page 91), do not apply.

### The rule in *Strong v Bird*

Where a donor intends to transfer ownership in personal property to another and maintains that intention until his death but fails to make an effective transfer during his lifetime, if, on the death of the donor, the property becomes vested in the intended donee as the donor's executor, that vesting is treated as completing the gift. This is the effect of a line of cases beginning with *Strong v Bird*.

#### *Strong v Bird* (1874) LR 18 Eq 315

B borrowed money from his stepmother and it was agreed that repayment was to be made by reducing by £100 per month the amount that she had previously paid B in rent. For six months she paid at the reduced rate, but thereafter went back to paying the full rent for a further three-and-a-half years until her death. The stepmother appointed B as her executor.

This was sufficient evidence of her intention to release him from the debt, but her right to sue was never formally surrendered. However, the court took the evidence as sufficient, since the stepmother was by her actions voluntarily surrendering her right to sue. B was not therefore obliged at common law to account for the debt and, under the subsequent case of *Re Stewart* [1908] 2 Ch 251, equity treated the gift as perfected. The reasoning in that case was given by Neville J:

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 beneficiaries under the will, the testator having vested the legal estate in the executor.

The executor holds the legal estate but, normally, subject to the equitable rights of the beneficiaries. Here there is sufficient evidence that those equitable rights are overturned.

It must be remembered that the donor's intention must be, and be evidenced to be, to give some specific immediate benefit to the donee: it is not sufficient that he intends to benefit him in some vague, general sense, or that he intends a benefit to take place only at the time of the donor's death.

Thus, in *Re Gonnin* [1977] 2 All ER 720, where a mother expressed the intention to transfer her house to her daughter but, believing that she was unable to do this, wrote out a cheque in her daughter's favour instead, the necessary specific intent in respect of

the house was lacking. Similarly, in *Re Wale* [1956] 3 All ER 280, a mother entered into a covenant to settle the benefit of certain shares on her children but never actually made the transfer. She could not be said to have a continuing intent to benefit the children under the settlement because later, apparently forgetting about the existence of the settlement deed, she treated the shares as her own and took the dividends for herself or gave them to her children as presents.

Where the supposed intended donor appoints the intended donee as his executor, it can be said that by a voluntary act he has completed the transfer of the property. Can the same be said where the intended donee is appointed administrator, since this appointment is not made by the donor himself? This was doubted, *obiter*, in *Re Gonin*, but the rule was applied to administrators in *Re Stewart* and it is submitted that this is the better view, in the light of Neville J's second ground, that the equity of the beneficiaries should countervail.

The rule has also been applied to trustees of an incompletely constituted trust.

### *Re Ralli's Will Trusts* [1963] 3 All ER 940

In 1924 Helen had covenanted in her marriage settlement to assign all after-acquired property to the trusts of that settlement for the benefit ultimately of her nephews and nieces (who were volunteers). Under her father's will she was entitled to half the remainder of his estate after her mother's life interest. This remainder interest never came into her hands during her lifetime, since Helen died in 1956 and her mother in 1961. P was the sole surviving trustee of Helen's marriage settlement. So it was to P that Helen had covenanted to transfer the remainder but she never did this. It happened, however, that P was also the sole surviving trustee of Helen's father's estate. In other words, he held half the legal estate on trust, after Helen's mother's death, for Helen. The question was whether he was obliged to hold that interest for Helen's estate or on trust for the marriage settlement. It was held that he must hold it for the marriage settlement. P had acquired the legal estate, which is what Helen had covenanted to transfer to him. It was not relevant that he had acquired it by a different route. The marriage settlement was thus fully constituted and so enforceable by the beneficiaries.

Buckley J explained the situation thus:

In my judgment the 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. The question is: for whom, if any one, does he hold it in equity? In other words, who can successfully assert an equity against him disentitling him to stand on his legal right? It seems to me indisputable that Helen, were she alive, could not do so, for she has solemnly covenanted under seal to assign the fund to the plaintiff and the defendants can stand in no better position. It is of course true that the object of the covenant was not that the plaintiff should retain the property for his own benefit, but that he should hold it on the trusts of the settlement. It is also true that, were it necessary to enforce performance of the covenant, equity would not assist the beneficiaries under the settlement, because they are mere volunteers; and that for the same reason the plaintiff, as trustee of the settlement, would not be bound to enforce the covenant and would not be constrained by the court to do so, and indeed, it seems, might be constrained not to do so. As matters stand, however, there is no occasion to invoke the assistance of equity to enforce the performance of the covenant.

His Lordship concluded that the plaintiff could not withhold the benefit of the marriage settlement from the beneficiaries of that settlement, because it would be unconscientious to do so.

Again, it will be noted that it was not the settlor (Helen) who did an act which gave the trustee the legal estate: this happened because the terms of Helen's father's will provided for it. Once again, however, it appears that the equity of the beneficiaries of the marriage settlement prevails over the equity of the next of kin.

## *Donationes mortis causa*

*Donationes mortis causa* are gifts made in contemplation of death. They are often referred to as hybrid gifts being midway between an *inter vivos* gift and a gift by will. In **Re Beaumont** [1902] 1 Ch 889, Buckley J said of a *donatio mortis causa* that it is –

...a singular form of gift. It may be said to be of an amphibious nature, being a gift which is neither entirely *inter vivos* nor testamentary.

In **Sen v Headley** [1991] 2 All ER 636, Nourse LJ said:

the three general requirements for such a gift may be stated very much as they are stated in *Snell's Equity*. First the gift must be in contemplation, although not necessarily in expectation, of impending death. Secondly, the gift must be made upon condition that it is to be absolute and perfected only on the donor's death, being revocable until that event occurs and ineffective if it does not. Thirdly, there must be a delivery of the subject matter of the gift, or of the essential indicia of title thereto, which amounts to a parting with dominion and not merely physical possession over the subject matter of the gift.

Again in **Re Craven** [1937] Ch. 423 Farwell J said:

Generally speaking, it is not permissible by the law of this country for a person to dispose of his or her property after his or her death except by an instrument executed in accordance with the provisions of the Wills Act, 1837. One exception to the general rule is the case of a *donatio mortis causa* but in order that it may be valid certain conditions must be exactly complied with; otherwise the attempted *donatio* is not effected and the property remains part of the property of the testatrix at her death passing under her will. The conditions which are essential to a *donatio mortis causa* are, firstly, a clear intention to give, but to give only if the donor dies, whereas if the donor does not die then the gift is not to take effect and the donor is to have back the subject-matter of the gift. Secondly the gift must be made in contemplation of death, by which is meant not the possibility of death at some time or other, but death within the near future, what may be called death for some reason believed to be impending. Thirdly the donor must part with dominion over the subject-matter of the *donatio*.

As stated above, *donationes mortis causa* are peculiar, hybrid gifts, being somewhere between an *inter vivos* gift and a gift by will. They have some similarities with gifts by will. A *donatio mortis causa* resembles a testamentary gift in that it is revocable until death and takes effect only on death.

But a *donatio mortis causa* is not revoked by a later will – by the time the will becomes operative (the date of death) the *donatio mortis causa* has become absolute. However, it can be revoked by the express revocation of the donor during his lifetime or by the donor resuming dominion over it. Additionally, the *donatio mortis causa* will be revoked if the danger or cause of the feared death ends before the donor dies.

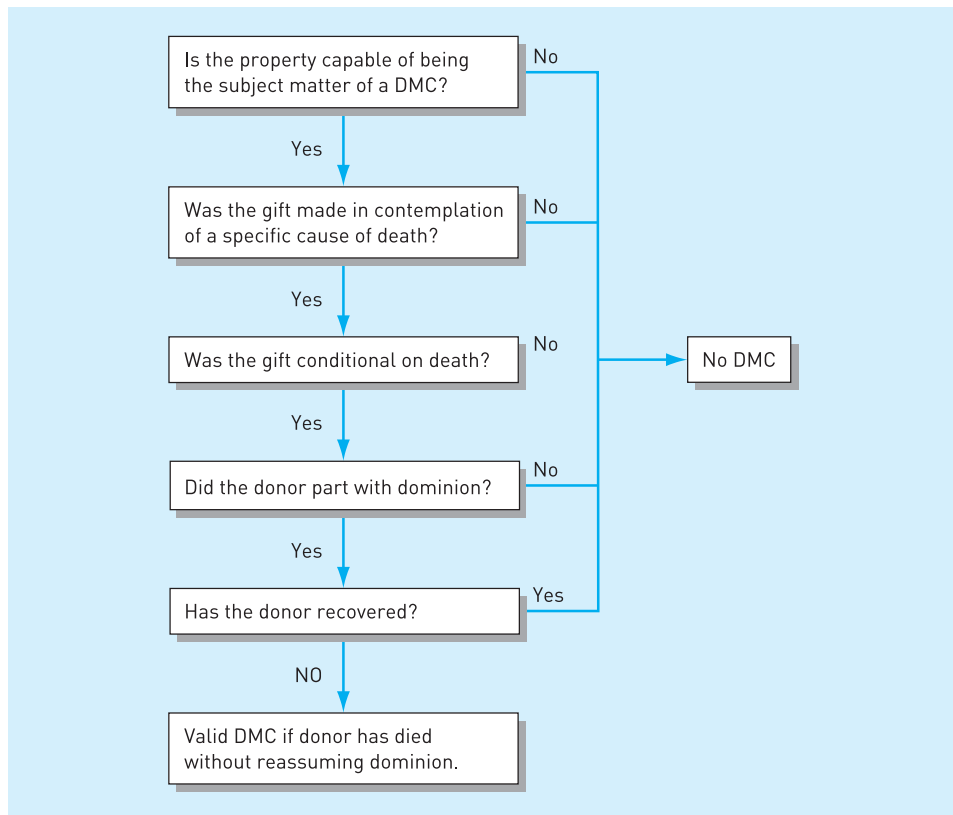
Unlike a testamentary gift, however, which passes under the will and through the personal executors, under a *donatio mortis causa* property passes to the donee outside the will and not through the personal representatives.

In many cases, after the death of the donor, the cooperation of his executors is not needed to make the gift perfect, e.g. a gift of a chattel which has been delivered to the donee will be perfect on the death without any further action. However, in some cases it will be necessary for the executors to act to perfect the gift. For example, if the subject matter of the *donatio mortis causa* is land the executors will be required to effect whatever transfer or conveyance is needed to perfect the gift. If necessary the courts will compel the executors to act. This is an example of an exception to the general rule that equity will not perfect an imperfect gift.

## Requirements

### A gift made in contemplation of death

There is a requirement that the gift shall be in contemplation of death. This means that the donor must have some specific cause in anticipation. It is not necessary to think that



**Figure 2.1** *Donatio mortis causa* (DMC)

dying from the contemplated cause is inevitable. It is widely thought that contemplation would be equally satisfied if the donor were, for instance, undertaking a dangerous journey and foresaw, not that death was inevitable, but that it was a strong possibility. It is thought that the test is subjective. Although this point has not been expressly decided in an English case, some support can be found in *Re Miller* (1961) 105 Sol Jo 207. But in *Thompson v Mechan* [1958] OR 357, the risk of normal air travel did not satisfy the requirement of contemplation of death. It is not sufficient merely to recognise that death will occur sometime: there must be some specific illness, cause or hazard in view, but it does not then matter if the death occurs in a way other than that contemplated, as in *Wilkes v Allington* [1931] 2 Ch 104, where the donor was suffering from an incurable disease (cancer), his contemplated cause of death, but in fact died of something else (pneumonia).

### Conditional on death

The gift must be intended to take effect only on death. If the donor recovers the gift cannot take effect. Any attempt to make an immediately effective gift cannot be *donatio mortis causa*. It must be clear that the donor expects that if he survives, then no transfer will occur. It is not necessary that this is expressed as it may be inferred if the gift is made in contemplation of death. In *Gardner v Parker* (1818) 3 Madd. 184 Sir John Leach V-C said: 'If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death.' This seems to be the case even if the donor knows he is going to die when it could be argued that as the donor does not expect to recover an intention that the gift is conditional on death on the donor's part would be odd.

### Parting with dominion

The donor must either hand over the thing to be given, or the documents which constitute the essential evidence of title, with the intention of surrendering dominion over the thing and not, for example, merely for safe keeping. Dominion is obviously not the same as ownership, since if the donor gave up ownership the gift would not be effective only on death. If the item is a chattel, delivery of the chattel itself will suffice, provided there is the right kind of evidence of intent to make a gift of it conditional on death.

Equally effective would be delivering the only means to obtain the chattel, such as the only key to a safety deposit box where the chattel was kept. The normally accepted view is that surrendering one of several keys will not be regarded as parting with dominion (see *Re Craven's Estate* [1937] 3 All ER 33 below). But in *Sen v Headley* and *Woodard v Woodard* (both below) the courts adopted a robust approach to this issue and did not regard the retention by the donor of a second set of keys to a house (*Sen v Headley*) or a car (*Woodard v Woodard*) as necessarily preventing there being an effective *donatio*. In both cases, as will be seen, the retention of physical dominion was merely theoretical rather than real. In both cases the donor was in hospital and dying. In both cases there was no evidence that the keys were kept with the intention of retaining dominion over the property. In reality the use of the retained keys to gain access to the property (thus asserting continued dominion) was so unlikely as to be ignored. Of course, had the donor retained the second set of keys with the intention of retaining dominion there could have been no effective *donationes* in these cases.



The requirement of parting with dominion was considered by Farwell J in *Re Craven's Estate* [1937] 3 All ER 33. A testatrix was about to enter hospital for a serious operation. In her will she had given her son a power of attorney over some shares and money in a bank account. She told her son to get the property transferred into his name as she wanted him to have it if anything should happen to her. The son, using the power of attorney, had the shares and the money transferred into his name. His mother died a few days later. Farwell J decided that when his mother instructed him to transfer the property into his name, having already given him a power of attorney, there was sufficient parting with dominion to satisfy the requirement for a valid *donatio mortis causa*. Farwell J said that the reason underlying the requirement to part with dominion was that the subject matter of the *donatio* must be some 'clear, ascertained and definable property'. It must not be open to the donor to alter the subject matter of the *donatio* or substitute other property between the date of the *donatio* and death. As long as the subject matter remains within the dominion of the donor such changes are possible. Farwell J said: 'However that may be, it seems to me that there must be such parting with dominion over the chattels or the property as to prevent the subject matter of the *donatio* being dealt with by the donor between the interval of the *donatio* and either his death or the return of the articles by the donee to the donor.' Farwell J said that, in the case, the mere granting of a power of attorney would not, itself, have been sufficient. An attorney simply acts as the agent of the donor and there is nothing to prevent the donor from dealing with the property but in the instant case there was more. The evidence was that the mother had instructed her son to have the property transferred into his name which he did. 'By so doing and getting the shares transferred into the son's name, the testatrix did what was necessary to part with dominion.'

In the case of many assets (e.g. chattels), it is easy to deal with the requirement of parting with dominion simply by handing over the asset. How does the law deal, however, with assets that are incorporeal such as bank accounts and accounts in building societies? In such cases the Court of Appeal in *Birch v Treasury Solicitor* [1951] Ch 298 decided that what has to be delivered is something which constitutes 'the essential indicia of title, possession of which entitles the possessor to the money or property purported to be given'. In the case of a building society account the pass book would satisfy the requirement. In *Re Weston* [1902] 1 Ch 680, handing over a Post Office savings bank book was sufficient.

### *Sen v Headley* [1991] 2 All ER 636

This case covers a number of points, including the issue of delivery, parting with dominion and whether or not land could be the subject matter of a valid *donatio mortis causa*. The main issue on appeal was this last matter.

Mr Hewett had for many years had a close relationship with Mrs Sen. In 1986 he was taken terminally ill, was admitted to hospital and knew that he had not long to live. In response to Mrs Sen's enquiry as to what she should do with his house in the event of his death, he replied, 'The house is yours, Margaret. You have the keys. They are in your bag. The deeds are in the steel box.' The keys in question had been brought to Mr Hewett at his request by Mrs Sen. After his death she found them in her bag and assumed that he had put them there without her noticing. One of these keys was apparently the only key to a steel box at the house, in which the title deeds were kept. Mr Hewett had a set of keys to the house and Mrs Sen had another set. Mr Hewett knew that he did not have long to live and the 'contemplation of death' requirement was found to have been satisfied.

Nourse LJ said:

It cannot be doubted that title deeds are the essential *indicia* of title to unregistered land. Moreover, on the facts found by the judge, there was here a constructive delivery of the title deeds of 56 Gordon Road equivalent to an actual handing of them by Mr Hewett to Mrs Sen. And it could not be suggested that Mr Hewett did not part with dominion over the deeds. The two questions which remain to be decided are, first, whether Mr Hewett parted with dominion over the house; secondly, if he did, whether land is capable of passing by way of a *donatio mortis causa*. [Nourse LJ was unwilling to find that land was not capable of being the subject matter of a *donation mortis causa*. This aspect of the case is dealt with below – see page 61.]

It is true that in the eyes of the law Mr Hewett, by keeping his own set of keys to the house, retained possession of it. But the benefits which thereby accrued to him were wholly theoretical. He uttered the words of gift, without reservation, two days after his readmission to hospital, when he knew that he did not have long to live and when there could have been no practical possibility of his ever returning home. He had parted with dominion over the title deeds. Mrs Sen had her own set of keys to the house and was in effective control of it. In all the circumstances of the case, we do not believe that the law requires us to hold that Mr Hewett did not part with dominion over the house. We hold that he did.

In *Woodard v Woodard* [1995] 3 All ER 980, one of the issues was that of delivery. A father was terminally ill in hospital. He had given his son the keys to his (the father's) car in order that the son could give his mother lifts to hospital. The father said several times that the son should keep the keys as he would not be driving the car any more. The father did not hand over the car registration document. The son later sold the car and the widow, who was the personal representative of the deceased, brought an action claiming the proceeds of sale for the estate. At first instance it was held that the father had made an *inter vivos* gift of the car to his son. The plaintiff appealed to the Court of Appeal where the son changed his defence to a plea of *donatio mortis causa*. The appeal was dismissed on the basis that there had been an effective *donatio mortis causa*, it being accepted that if there was an *inter vivos* gift it was conditional and made in contemplation of impending death. It was accepted that the words of the father were words of gift rather than, for example, an instruction to keep the car keys in order that the son would be able to use the car to visit hospital without there being an intention to give. It was, said the court, understood that if the father came out of the hospital he would have the car again. The main dispute was whether the deceased had parted with dominion over the car. One problem was whether a potential donor was able to make a gift when the object of the potential *donatio* was already in the possession of the donee as a bailee. It was argued that the only way that it was possible was if the potential donee handed the object back to the donor who then redelivered it to the donee. The court held that a gift was possible in such circumstances. The words operated to change the nature of possession from that of a bailee to that of a donee. This could result in an effective *donatio mortis causa*.

Another issue raised in *Woodard v Woodard* was whether a *donatio mortis causa* was possible given that there might have been another set of car keys. In *Re Craven's Estate* [1937] 3 All ER 33, the court had doubted if the parting with dominion requirement would be satisfied where a donor handed over a key to a locked box and retained a key for himself. In the instant case the court said that there was no evidence that there was another set and even if there was a second set it was probable that it was not with the deceased at hospital. If there had been another set of keys the court decided that

whether or not dominion had been handed over would be a matter of deciding on the donor's intention. If the second set was retained to keep dominion over the car then the requirements of a *donatio mortis causa* would not have been satisfied. In the instant case where the donor was in hospital suffering from a very grave illness it would be unreal to conclude that there had not been a passing of dominion simply because there was or might have been a second set of keys in the donor's home which he was unable to use (and which he would remain unable to use unless circumstances changed dramatically).

The fact that the father had not handed over the registration document (or the certificate of insurance or service records) did not prevent there from being a *donatio mortis causa*. These documents were not essential indications of title: handing them over would simply go towards proving intention. (Megaw LJ doubted if the judge at first instance was correct in finding an intention to give the car either *inter vivos* or by way of a *donatio mortis causa*. However, he said that he did not feel sufficiently confident that the judge was wrong to lead him to dissent. He added that as to the other matters in the case he was fully in agreement with the rest of the court.) It was rather fortunate for the son that the court found that the car had passed to him as he had sold it and spent the £3,900 proceeds. While the case raises some interesting legal issues, it is, perhaps, an example of litigation which is rather difficult to justify. Dillon LJ thought it to be 'about the most sterile appeal that I have ever come across'. Both parties were on state benefits and legally aided and, had the son lost, there was no prospect of his satisfying the judgment.

### Subject matter of a *donatio mortis causa*

Another problem which arises is what kind of property can be the subject of a *donatio mortis causa*. This is closely linked with the previous issue since one could not have a *donatio mortis causa* of property over which it is not possible to surrender dominion. It seems therefore that the donor's own cheque made out to the donee cannot work as a *donatio mortis causa* since it always remains possible to cancel it, so the donor has not given up dominion over the money represented by the cheque. It is often said that there cannot be a *donatio mortis causa* of stocks and shares. This view is usually based on **Ward v Turner** (1872) 2 Ves Sen 431. In this case the court held that there was no effective *donatio mortis causa* over some South Sea annuities. It is possible that the decision was based on an inadequate delivery. In the case, only a symbol of title was delivered, not some essential indication of title or of the document needed to obtain possession. Here, only the receipts for the annuities were delivered. It may be that if the actual annuity documents had been handed over the decision would have been different. However, **Ward v Turner** has been followed in subsequent cases as being authority for railway stock not being subject to the doctrine (**Moore v Moore** (1874) LR 18 Eq 474) and for building society shares not being subject to the doctrine (**Re Weston** [1902] 1 Ch 680). But in **Staniland v Willott** (1852) 3 Mac & G 664, it was held that shares in a public company can be subject to a *donatio mortis causa*. There remains some doubt in this area. It may be, however, that the authority of **Ward v Turner** is not absolute and should be treated with caution. Additionally, as stated below, in **Sen v Headley** the court based its decision to include land within the classes of property that can be subject to a *donatio mortis causa*, at least in part, on the argument that to exclude land would be an anomaly. It may be that a similar argument could be used to support the case to include stocks and shares.

For many years it was assumed, on the basis of nineteenth-century *dicta*, that land could not be the subject of a *donatio mortis causa*, and this was the main issue in **Sen v Headley**, which finally concluded that it could. The problem arises because though the title deeds are good evidence of title, the owner is not prevented from acting as the owner, for example by declaring himself trustee for another, after he has surrendered them. This the Court of Appeal did not feel was crucial, though it will be remembered that they were also careful to point out that Mr Hewett had also in practice given up control of the house itself. The Court of Appeal decided that the doctrine of *donatio mortis causa* was anomalous and they were not willing to except land from it, as to do so would be itself anomalous.

## Problem areas

A number of problems have arisen with respect to the *donatio mortis causa*.

Is it possible to make a *donatio mortis causa* when contemplating suicide? The answer used to be probably not. In the Irish case of **Agnew v Belfast Banking Co** [1896] 2 IR 204, the court held that a *donatio mortis causa* was not possible where the contemplation involved the then criminal offence of committing suicide as that would be against public policy. This view was adopted in **Re Dudman** [1925] 1 Ch 553. However, suicide is no longer a crime (Suicide Act 1961) and so, if the basis of **Agnew v Belfast Banking Co** and **Re Dudman** was that a gift cannot be given effect to by a criminal act, the law should now permit an effective *donatio mortis causa* in these circumstances. There may, of course, be public policy objections to such a gift. Additionally, it may be argued that since, presumably, one who attempts suicide rarely contemplates surviving, the requirement that the gift is intended to be conditional on death and that it will revert to the donor on recovery will be absent. It is to be assumed that in any case if death is contemplated from, for example, an illness and the donor later commits suicide, which was not contemplated when the gift was made, the gift would be good (see **Wilkes v Allington**, above).

Can a *donatio mortis causa* only be made when the cause of death contemplated is disease or illness as opposed, for example, to a hazardous journey? Most of the cases do involve deaths from illness or disease. In **Agnew v Belfast Banking Co** [1896] 2 IR 204, it was said that the death must be from natural causes or incurred in the course of discharging some duty, possibly including self-sacrifice. This suggests that *donationes mortis causa* are possible in cases other than illness or disease.

In **Re Miller** (1961) 105 Sol Jo 207, a woman who was about to fly to Italy bought a policy of life assurance from a machine at the airport and then posted the insurance document to her sister. The plane crashed over Italy and she was killed. It was argued that she had made a *donatio mortis causa* of the policy. The executors asked the court to determine if there had been an effective *donatio mortis causa* or if the proceeds belonged to the estate. This argument that it was a valid *donatio mortis causa* was not upheld, Plowman J deciding that she had not intended a *donatio mortis causa* (or indeed any gift at all) but that she had posted the insurance documents to her sister for safekeeping only. Additionally, Plowman J doubted whether there was sufficient delivery as the letter was not delivered to the sister until after the woman was dead. The judge said there was no reason to apply the post rule and treat posting as the equivalent of delivery. But it is interesting to note that the court did not deny that a *donatio mortis causa* could have been made in these circumstances.

In **Thompson v Mechan** [1958] OR 357, the dangers of a normal air journey did not satisfy the requirements for a *donatio mortis causa*. Presumably, the contrary could be

argued if the flight was unusually hazardous, perhaps using a light aircraft to fly over mountains or using an airline with a very poor safety record. Possibly the contemplation of a dangerous military mission could found a *donatio mortis causa*: *Agnew v Belfast Banking Co* [1896] 2 IR 204.

It has been argued that a *donatio mortis causa* is not possible if death is certain on the basis that if death is certain how, in any meaningful way, can the requirement of the gift being conditional on death be met? The argument is that in such cases the only possibilities are an immediate *inter vivos* gift or an attempted testamentary gift (which would fail for non-compliance with s 9 of the Wills Act 1837).

## Proprietary estoppel

Where a person spends money on property or otherwise acts to his detriment in reliance on a misrepresentation, the owner may be prevented from asserting his own rights against the person so relying. It may thus sometimes be an example of equity perfecting an imperfect gift, as the court may convey the property to the victim of the misrepresentation. However, it should be noted that the court has a wide discretion to take whatever steps are appropriate in the case to 'satisfy the equity' created by the [estoppel](#). It should also be noted that proprietary estoppel of this nature is a cause of action in itself, rather than being a mere shield to liability, as is the case with other forms of estoppel such as promissory or common law estoppel.

An example of this principle, and its relationship to constructive trusts, is *Yaxley v Gotts* [2000] 1 All ER 711,

### *Yaxley v Gotts* [2000] 1 All ER 711

In this case the plaintiff entered into an agreement with Gotts senior, that Gotts senior would purchase a certain house in need of refurbishment, and that the plaintiff would carry out the repair work and convert the property into flats, in return for which Gotts senior would transfer the ground floor flat to the plaintiff. In fact the house was purchased by Gotts senior's son, Alan, but the plaintiff did not know this at the time. However, when he discovered it, the plaintiff continued the renovation work that he had already begun and, when the flats were let, acted as agent in collecting the rents etc. After an argument the plaintiff was excluded from the property and told by Alan that he had no interest in it. The plaintiff sought the granting of a 99-year lease of the ground floor flat.

The main issue was whether a proprietary right could be created in land, notwithstanding that the agreement for the plaintiff to receive an interest was oral, and so in breach of s 2 of the Law of Property (Miscellaneous Provisions) Act 1989. The Court of Appeal held that such a right could be created, though whether this was a result of estoppel or constructive trust is not entirely clear.

The preconditions for the operation of this doctrine were set out in *Willmott v Barber* (1880) 15 Ch D 96 by Fry J:

In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a

For more on  
proprietary  
estoppel  
see Chapter 11,  
p. 318.

knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right... Nothing short of this will do.

What constitutes a sufficient act of detrimental reliance depends on the nature of the case and a wide range of different types of act have been accepted.

### *Dillwyn v Llewelyn* (1862) 4 De GF & J 517

In this classic case a father allowed his son into possession of land and purported to convey the land to the son, though the conveyance was in fact ineffective as it was not contained in a deed. In reliance on the mistaken belief that the land was his, the son spent £14,000 on building a house on the land, which the father encouraged him to do. The reliance here was quite clear and the son was entitled to have the land conveyed to him.

It appears that once it has been shown that the guilty party gave an assurance to the innocent one that the innocent party had an interest, acts which could have been done in reliance on this will readily be presumed to be done in reliance and the onus is on the person who gave the assurance to prove that the acts were not done in reliance on it. As Browne-Wilkinson V-C stated, *obiter*, in *Grant v Edwards* [1986] 2 All ER 426:

In many cases it is impossible to say whether or not the claimant would have done the act relied on as a detriment even if she thought she had no interest in the house... Once it has been shown that there was a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to the joint lives of the parties is sufficient detriment to qualify. The acts do not have to be inherently referable to the house. The holding out to the claimant that she had a beneficial interest in the house is an act of such a nature as to be part of the inducement to her to do the acts relied on. Accordingly, in the absence of evidence to the contrary, the right inference is that the claimant acted in reliance on such holding out and the burden lies on the legal owner to show that she did not do so.

The courts will clearly have to be careful to consider the exact nature of the claimant's belief if such a generous attitude to reliance is to be taken.

The recent trend has been away from strict adherence to the *Willmott v Barber* approach towards a more flexible approach, as indicated by Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897 at 915:

The application of the principle requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment.

This unconscionability is established by the fact of the plaintiff's acting to his detriment in reliance on the assurance of the legal owner. This encouragement by the legal owner may be active, as in an assurance that the mistaken party has or will be granted an interest, or it may be passive, as in looking on while the mistaken party acts to his detriment. The acts done by the mistaken party must then be shown to have been done in reliance on that assurance. This is a matter of causation: it may be readily assumed, as in *Grant v Edwards* (above), but equally, depending upon the facts, it may be clear that

causation has not been established, particularly where there are other plausible explanations for why the claimant behaved in the way he did. In *Wayling v Jones* [1993] EGCS 153, a particularly generous approach to the establishment of detrimental reliance was applied. W had remained living with J, and working for him for low wages, for many years. He had also been assured by J that J would leave him some property in his will, which he did not in fact do. It seemed clear from W's evidence that he would have remained with J even if the promise about the property had not been made. Balcombe LJ stated that there must be a sufficient link between the promises and the detriment, but that the promises did not have to be the sole inducement for the detriment. Given W's statement above, what degree of inducement was present here? A sufficient link was held to be established by the fact that W also stated that if J, having made the promises, had then stated that they would not be kept, W would have left. It is respectfully submitted that it is hard to see this as establishing 'but for' causation as it is usually understood.

The question of estoppel and its relationship to constructive trusts in the context of shared property is considered further in Chapters 11 at pp. 318 and 12 at page 359.

For more on constructive trusts and estoppel see Chapters 11 at pp. 318 and 12, p. 359.

## Summary

The equitable maxims provide a set of general principles which can be said to have influenced the development of equity. This chapter gives an overview of a selection of these maxims, examining them in varying amounts of detail and identifying many of the particular areas of the law which have been affected, and which are dealt with later in the book. These include, for example, the maxim 'where the equities are equal the first in time prevails', and its effect on priorities and conflicting interests, and the maxim 'equity acts *in personam*' and its effect on the operation of the law outside the jurisdiction. The chapter also deals in detail with certain specific principles, such as the rule in *Strong v Bird*, *donationes mortis causa*, and estoppel, both in their own right and as instances of exceptions to the operation of particular maxims.

## Further reading

### The relationship between common law and equity

J E Martin, 'Fusion, fallacy and confusion' [1994] Conv 13

### The equitable maxims

S Gardner, 'Two maxims of equity' [1995] CLJ 60

M Halliwell, 'Equitable proprietary claims and dishonest claimants: a resolution?' [1994] Conv 62

M Halliwell, 'Equitable property rights, discretionary remedies and clean hands' [2004] Conv 438–452

P H Pettit, 'He who comes into equity must come with clean hands' [1990] Conv 416

### The exceptions to the maxim that equity will not assist a volunteer

P V Baker, 'Land as a *donatio mortis causa*' [1993] 109 LQR 19

Barlow A C H 'Gifts *inter vivos* of a chose in possession by delivery of a key' (1956) 19 MLR 394



- C Davis, 'Proprietary estoppel: future interests and future property' [1996] Conv 193G  
 G Kodilinye, 'A fresh look at the rule in *Strong v Bird*' [1982] Conv 14  
 Pawloski M 'Death bed gifts' (1994) 144 NLJ 48  
 A Samuels, 'Donatio mortis causa of a share certificate' [1966] 30 Conv 189

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Use Case Navigator to read in full some of the key cases referenced in this chapter with commentary and questions:

- McPhail v Doulton* [1971] AC 424  
*A-G of Hong Kong v Reid* [1994] 1 AC 324  
*Rochefoucauld v Boustead* [1897] 1 Ch 196

