TRUSTS NOTES

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5. CONSTITUTING THE TRUST

- *The requirement of constitution*:
    - For a trust to be valid, the trust property must be vested in the trustee. It will be sufficient if the property vests in the trustee in equity.
    - Constitution is not typically an issue in trusts by declaration — the trustee already owns the property in such cases.[87]
- *Gifts and trusts*: Because trusts by transfer usually involve the voluntary transfer of property, the rules governing gifts determine whether the trust property has vested in the trustee.
- *The assignment of property rights in equity*:
    - *Law vs. equity*: Equity's approach to the assignment of property rights differs from that of the common law in two respects, namely: (1) equity may regard an assignment of legal property as complete in equity even though the common law would regard it as incomplete; and (2) equity regards as transmissible certain property that the common law does not.
    - *Equity — general principle*: Equity regards an assignment as complete when the assignor's conscience is bound.

***Property Law Act 1958* (Vic) s 134**
134 Legal assignments of things in action Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, shall be and shall be deemed to have been effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice— (a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same; and (c) the power to give a good discharge for the same without the concurrence of the assignor; Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice— (a) that the assignment is disputed by the assignor or any other person claiming under him; or (b) of any other opposing or conflicting claims to such debt or other thing in action— he may, if the thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the *Trustee Act 1958*.

- *The effect of s 134*: Section 134 requires that in order to be effective at law, assignments of choses in action be:
    - absolute (ie not partial);
    - in writing;
    - signed by the assignor;

[87] See, eg, *Paul v Constance* (at [2.2.1]).

- accompanied by express notice in writing to the person against whom the right incident to the chose in action is enforceable against.

Gifts of property at law

Thomas v Times Book Company Court of Chancery 1961
FACTS
• *On the accepted evidence*: o Thomas had lost the original manuscript to his play 'Under Milk Wood' at a pub somewhere in London. o The producer in charge of the broadcast of the play, one Cleverdon, had had copies made, and gave three copies to Thomas prior to his departure to the US. At this point, Cleverdon told Thomas that the original 'meant an awful lot to him' and that it was 'an awful pity' it had been lost. Thomas replied that the original was probably in one of half a dozen pubs, and that if Cleverdon could find it, he could 'keep it.' o Cleverdon found the manuscript in a Soho pub and kept it. Thomas died abroad shortly after. • *The action*: Thomas' widow and administatrix sued the Times Book Co, who had since purchased the manuscript, for possession of the manuscript. She alleged, inter alia, that there had been no gift and that Thomas' words meant merely that Cleverdon could keep the manuscript in safe keeping until such time as Thomas could resume possession of it.
ISSUE
• Assignment of property rights in equity – gifts of property at common law.
HELD
• *The elements of a gift*: (1) The intention of making a gift ('*animus donendi*'). (2) Delivery of the subject-matter of the gift. • *Delivery*: Delivery need not be delivery in the literal sense, i.e. the subject-matter being handed by the donor (or someone acting on his behalf) to the donee. A case such as the present satisfies the delivery requirement. • *Onus of proof*: The onus is on the donee to prove affirmatively (on the BOP) that a gift was made. • *Language of gifts*: The words and phrases 'keep,' 'keep it,' 'have it,' 'welcome to have it,' or 'keep it for yourself' are all sufficient to effect a gift by parol. • *In the present case*: Times Book Co had succeeded in discharging the onus of proving that Thomas had intentionally made a parol gift of the manuscript to Cleverdon. Cleverdon's coming into possession of the manuscript upon finding it at the Soho pub constituted sufficient delivery of the manuscript. Accordingly, the gift was effectual.

Re Stoneham Court of Chancery 1919
FACTS
• On July 3, 1914, the testator made his last will and thereby, *after confirming the gift he made to the claimant* 'of the furniture and effects in his possession at Beredens,' gave all his furniture and effects to his executors (incl. the claimant and the applicant) upon certain trusts. The testator died in 1915.

- A declaration was made that certain goods (viz. oak furniture, arms and armour) which formerly belonged to the testator and were then in possession of the claimant were given by the testator to the claimant in the former's lifetime and did not belong to him at the time of his death. The claimant alleged that the testator had verbally given him the chattels in question, and also relied on the confirmation in the will.
- The chattels in question had been in the possession of the claimant for some time, the claimant having resided at Beredens for 5 years. The testator occasionally visited Beredens, but the claimant was the occupant.
- *Argued*:
  - *Applicant*: Where a parol gift of chattels in the possession of the intended donee is made, the property in the chattels does not pass unless there is some further act of delivery or constructive delivery or change of possession or manner of possession.
  - *Claimant*: Where chattels capable of delivery are in the possession of the intended donee, the parol gift of them by the donor completes the gift and passes the property, and no further act of delivery is necessary.
- *Issue*: Is a parol gift of chattels in the possession of the intended donee effectual to pass the property in such chattels without more, or is it an essential constituent of such a gift that the donor should first regain possession of the chattels and then hand them back to the donee, or should do some other act equivalent to a further delivery of such chattels?

ISSUE

- Assignment of property rights in equity – gifts of property at common law.

HELD

- *Parol must be accompanied by delivery*:
  - In order to constitute a perfect gift by parol of chattels capable of delivery, the donee must have the chattels delivered into his possession by the donor or someone on his behalf.
  - It does not matter whether the delivery is antecedent or subsequent to, or concurrent with, the parol.
- *Where donee is already in possession of the chattel*:
  - Where the chattel the subject-matter of the parol gift is already in the possession of the donee at the time the parol is made, a further delivery or change of possession is unnecessary in order to render the gift effectual.
  - This same rule applies if the donee first came into possession of the subject-matter of the gift as a bailee or in any other capacity, so long as the subject-matter is in the donee's possession at the time of the gift to the knowledge of the donor.
- *Nature of possession*:
  - In the same way as no further delivery is required to effectuate a gift, no change in the nature or extent of the use of the chattel by the donee following the parol is needed.
  - The nature or extent of the use of the chattel may be relevant only insofar as it is probative of a gift having in fact been made.
- *In the present case*:
  - The goods were effectually gifted to the claimant by the deceased, and accordingly did not belong to the deceased at the date of his death.
  - *In obiter*: Even if the parol gift had not been effectual for any reason, the confirmation in the will would have operated to remedy this defect.

Incomplete gifts of property in equity

Jones v Lock Court of Chancery 1865
FACTS
• *Background*: o Jones (J) had a child by a second wife. When the child was a nine-month-old infant, J wrote a cheque for £900, handed it to the infant and said 'I give this to the baby, it is for himself, and I am going to put it away for him'. J placed the cheque in a safe. o J had — before the birth of the infant — made a will whereby he left all his property to the children he had by his first marriage. o J died. On the day of his death, J hold his solicitor that he wished to alter his will so as to provide for the infant. o A, the executor of J's will, obtained payment of the £900 as part of J's estate. • *Proceedings*: The mother of the infant (R) made a claim against J's estate for the £900. R succeeded at trial on the grounds that there had been a valid declaration of trust by J for the infant. A appealed.
ISSUE
• Assignment of property rights in equity — equity and incomplete gifts of property.
HELD
• *Equity will not perfect an imperfect gift*: Equity will not assist a volunteer where an imperfect gift is concerned. • *Parol declarations of trust*: A parol declaration of trust will be enforceable, even where the claimant is a volunteer. • *In the present case*: J did not intend to make a declaration that he held the cheque on trust for the infant, nor did he intend to make a gift of the cheque to the infant. He merely expressed an intention to provide for the infant, and 'his giving the note to the child was symbolical of what he meant to do … [T]he 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'. [The above notes are taken from the judgment of Lord Cranworth LC.]

Milroy v Lord Court of Appeal (Chancery Division) 1862
FACTS
• *Background*: o M purported to transfer 50 shares in a bank to R to hold on trust for A. o M delivered the share certificates to R, but did not comply with the formalities required for transfer by the bank's constitution. M gave R a power of attorney, but that power of attorney did not arm R with sufficient authority to sign the transfer without further reference to M. o R paid dividends to A.

- When M died, R delivered the share certificates to M's executor.[88]

- *Proceedings*: The Court was required to determine whether the shares had been validly settled on trust, or whether they remained the property of M's estate.

ISSUE

- Assignment of property rights in equity — equity and incomplete gifts of property.

HELD

- *Requirements for an effective transfer of property*:
  - *Rule*: '[I]n order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him'.
  - *Applicability*: The rule applies to (1) legal transfer of title, (2) legal transfer of title to a trustee, (3) self-declarations of trust.
- *Court may not alter mode of effectuation*: '[I]f the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes'. For eg, a court will not hold an invalid intended transfer to operate as a declaration of trust.
- *In the present case*:
  - *Vesting of trust in R invalid*: M had not done everything necessary to be done to render R a trustee: legal title to the shares had not been vested in R.
  - *Mode of effectuation not altered*: M did not purport to transfer the shares to A, nor did he intend to constitute himself a trustee of the shares for A. It is clear M intended to vest the trust in R. Accordingly, the Court refused to hold that M was a trustee of the shares for A.

[The above notes are taken from the judgment of Turner LJ.]

Corrin v Patton
HCA 1990

FACTS

- *Background*:
  - R and his deceased wife (W) were registered joint proprietors of land. W wished to sever her joint tenancy (presumably to ensure that her children obtained an interest in the property), and so executed a transfer of her interest in the land to her brother (A). A also signed the transfer. The executed transfer was left with W's solicitor, who was acting for both of W and A in the transaction.
  - The State Bank of NSW (qua mortgagee) held the DCT, and W took no steps to have it produced so the transfer would be registered. W was the only person who could call for its production.
  - W executed a deed of trust under which A would hold the property on trust for her.

[88] Nb: R's daughter had been M's wife. It may be surmised that the beneficiaries of M's estate were R's daughter or perhaps her children.