

Equity & Trust

Principles of Equity

Equity was founded on the inadequacy of the common law. It is a branch of law which came into existence before the Judiciary Acts of 1873 and 1875. Equity was administered by the Court of Chancery, which, before 1873, had almost exclusive jurisdiction but at that time problems arose between the emergence of Equity and the common law. There was a court for the common law and one for equity. You had to have two courts. The rules of equity were not enforced in common law courts.

If a common law action had an equitable defence to it, you had to go to the Chancery to stay the proceeding in the common law courts and start action in the Chancery. Difficulties arose; the Judicature Acts of 1873 and 1875 created the Supreme Court of Judicature.

The High Court exists because we inherited Judicature Acts of 1873 and 1875. Parts of the sources of Sierra Leone law are incorporated in the 1960 Supreme Court Rules.

All the branches of this court exercised both common law and equity. The principles of equity heavily rely on justice and acting in accordance with good conscience. This is the basis of the equitable jurisdiction; justice and good conscience.

Equity has, over the years, established rules for its application and it has developed very rapidly. Originally, you had to petition to the Chancellor and issue a writ for your complaint. That system was rigid in that you could only bring your claim if it fell within the ambit of the writ. This caused hardship and inconvenience to plaintiffs who wanted to bring claims but could not. The writ at that time was very very narrow. It was used to obtain relief where the common law was inflexible and incapable of providing a remedy.

At that time, the Chancellor had tremendous powers and could call you to appear. Failure to appear could lead to imprisonment for contempt. He could subpoena you. But the Chancellor himself had problems of enforcement. E.g. If black acre belongs to A but the land beneficially belongs to B. The Chancellor may order A to convey the land to B or ask him to hold the legal estate for the benefit of B. The Chancellor himself cannot hold the property as owner.

It became difficult for plaintiffs to have remedies and causes of actions had to fall within the ambit of the existing writ. If you could not sue, you had no remedy.

But if the right of Mr. A is undoubted then the Chancellor cannot change the law as the Chancellor only follows the law. He can issue an order to A to convey the land to B or to refrain from interfering with B's rights. His jurisdiction was in *personam*. He interfered on several occasions to compel A to hold the land for the exclusive use and benefits of B. He cannot say that B is the owner but all of the beneficial interest in the land can be given to B. He'll compel A to keep legal title only and give the benefit of the land to B. A becomes the owner at law and B becomes the owner in Equity.

Because of the two courts, there developed the Judicature Acts of 1873 and 1875. The Common Law Procedure Act 1854 gave them powers to give equitable remedies. The Chancery Amendment Act 1858, generally known as Lord Cairn's Act, gave the Chancery power to amend charges in addition to or in substitution for an application or decree of specific performance. If you do not want damages, you can ask for specific performance or ask for both.

The Acts of 1873 and 1875 abolished the old separate courts and created the Supreme Court of Judicature with the High Court division divided into the Queen's Bench, Chancery, Probate, Divorce, Bankruptcy and Admiralty.

The effect and application of this Act was seen in the landmark case of Walsh v. Lonsdale; there was an agreement for a lease which was not reduced into writing. The other party claimed that they never signed in the form of a deed and so there was no tenancy. If the agreement had been for more than three (3) years, it should have been done in the form of a deed. The tenant refused to pay rent and was distressed by the landlord. The

tenant brought an action which failed. The court held that an agreement for a lease was as good as a lease and the tenant was obliged to pay his rent in advance. The distress was ruled to be legal.

This case is to be looked at in relation to the Statute of Frauds Act 1667 and when one needs to put agreements into writing.

It should also be looked at in relation to S.40 of the Law of property Act which provides that contracts for the sale of land must be put into writing.

The actual effect of the Judicature Acts was to enable courts 'to treat as done that which ought to have been done'. Another effect was that it allowed the landlord to use his equitable defence and right to specific performance and to the common law claim.

This maxim of equity is not limited to cases dealing with agreements for leases but is applicable to all cases where there's a contract of which equity can require specific performance or the legal owner to create an equitable estate.

It can also be used in contracts to sell, grant a lease or to mortgage.

Equitable Rights

Rights are referred to as being in *personam*; personal. When they are merged with equity, equity acts in *personam*.

Equitable rights under a trust are in the form of an equitable proprietary interest corresponding to legal estates and the beneficiary can be regarded as being the owner of the beneficial estates or interest.

What is the difference between a Proprietary Interest and a Beneficial Interest? The ownership of a property is a right in rem and a right in rem is used to signify a right as against a specific item of property and is used to distinguish the tracing remedies from a personal action for damages.

It can also be used to distinguish a right to property from a chose in action. A chose in action is value that is not tangible in that it cannot be touched. E.g. shares or stocks.

The basis of equitable jurisdiction is in accordance with the maxim that 'Equity Acts in Personam'. The remedies of specific performance and injunction are decrees in personam. They order a defendant to do or refrain from doing something.

A beneficiary's rights are proprietary but it is not the same to say that legal rights are the same as equitable rights or that equitable ownership is the same as legal ownership. A trustee is the owner legally and the beneficiary is the owner in equity. The question which arises is whether a beneficiary can assert his right through his trustee or do we go back to the maxim 'Equity Acts in Personam', in which case the situation would be unacceptable.

The Judicature Act clearly fused the administration of law and equity by creating the High Court of Judicature exercising both law and equity. The claim that law and equity are fused doesn't mean there is a distinction or difference between legal rights and equities and equitable rights and legal rights. It is clear that legal ownership is different from equitable ownership.

A legal remedy may be given for a breach of an equitable right and an equitable remedy may be given for a breach of a legal right. E.g. an injunction to restrain a nuisance or a tort. So, it can be stated that equity and law are not fused into one.

Bona Fide Purchaser for Value (Equity's Darling)

In the case of Pilcher v. Rawlins, James LJ stated *inter alia*, "such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence and an unanswerable plea to the jurisdiction of the court. Such a purchaser may be interrogated, tested to any extent as to valuable consideration he has given in order to show bona fide or mala fide of purchase in the absence or presence of notice but once he has gone through this and satisfied the plea. To my judgment, this court has no jurisdiction to do anything more than to let him depart in possession..."

In such a case, the purchaser is entitled to hold etc. The legal estate is different from the equitable estate. Also, there is notice. Is it actual or constructive notice? Did the purchaser make reasonable enquiries before purchasing?

8 Equitable Jurisdiction

This covers the administration of estates of deceased persons, dissolution of partnerships, taking of partnerships, redemption or foreclosure of mortgage, claim from payment of money seized by mortgage, delivery of possession of mortgaged properties, execution of charitable and private trusts, rectification of trusts, cancellation of deeds or other instruments, specific performance of contracts between contractors and vendors, between vendors and purchasers of real estate including contracts for leases and partition of sale of real estate. Intestacy, wills, covenants for sale, dissolution of partnerships, sale of properties.

Equitable Remedies

Specific Performance - This is a remedy in personam; you go to court and force me to sign the document personally. This can be a remedy for breach of contract and damages could be awarded either in addition to or in substitution to specific performance. This remedy will be refused if granting it will be unjust to the other party.

If you cannot be easily supervised (musicians), the court will not grant specific performance. However, in a contract for the sale of land or a house etc. the court can order you to sign the conveyance. If you refuse to sign, the Master and Registrar can supervise.

Part Performance - In **Steadman v. Steadman**, the HL ordered specific performance of an agreement even though it was not in writing according to S.40 of the Law of Property Act 1925. The court held that payment of 100 Pounds to the wife of the plaintiff amounted to _____ draft deed of transfer were sufficient acts of part performance.

In the case of Part Performance -

- 1) The act performed must refer to a contract.
- 2) There must be an amount of fraud by the defendants.
- 3) It must be enforced by a court.
- 4) There must be oral evidence.

It is important to note that time is of the essence.

Contracts for the sale of personal property will not usually be specifically performed. E.g. Loans or the purchase of government stocks.

In the case of chattels, specific performance has been used as a form of injunction; **Sky Petroleum Ltd v. VIP Petroleum**; there was a contract for the plaintiff to buy all of his petrol from the defendant company and the defendant would supply the plaintiff with all their requirements. The defendant alleged breach and purported to terminate the contract so that the plaintiff will have little prospect of finding an alternative source. An interlocutory injunction was granted. He was stopped from doing what he was doing so he would be forced to do what he was supposed to do. The judge acknowledged that it amounted to specific performance, the matter being one of substance and not of form. The court had the jurisdiction to order specific performance of a contract to order sale of chattels, although not specific or ascertained where remedy of damages was a disadvantage.

You cannot force anyone to perform a personal contract (musicians) because of the lack of supervision under such circumstances. The court also will not specifically enforce contracts which are *prima facie* illegal or contracts against public policy.

Specific performance has been granted in the case of construction work based on the balance of convenience; **Wolverhampton Corp v. Eamonds**.

It will not be granted for an agreement for a lease already expired by the date of hearing as 'Equity Does Not Act In Vain', or for an agreement of tenancy-at-will or in a partnership-at-will or an expired lease.

A contract to transfer a good will of a business cannot be specifically enforced. Also, you cannot have specific performance for part of a contract but for the whole of the contract.

Specific performance can only be granted under the Principle of Mutuality - If you take specific performance against me, I should be able to take specific performance against you.

There are certain cases in which specific performance can be refused -

- 1) When there is mistake and misrepresentation.
- 2) When you consider the conduct of the plaintiff.
- 3) Where there is delay.
- 4) Where there is hardship.
- 5) Where there is misdescription of the subject matter.
- 6) Under public policy, where there are illegal contracts and contracts which are unenforceable.

In all of these cases, equity will not grant specific performance.

There are cases where specific performance can be granted in lieu of damages or in addition to damages.

Equity has never helped the indolent and people who have acquiesced on their rights for a long time. This was buttressed by the Limitation Act 1961; this Act stops you from initiating action after a period of time. Equity does not help when you've delayed and only assists the vigilant and not the indolent.

Injunction - This is an order to do or to refrain from doing a particular act. The Common Law Procedure Act 1854 gave common law courts the power to grant injunctions in certain cases. By S.25 (8), the court may grant an injunction by an interlocutory order in all cases in which it appears to the court to be just or convenient to do so. The court has to consider the balance of convenience to the parties. E.g. will it be convenient to stop him from publishing all the defamatory articles?

Indemnity of Damages - If the party who has asked for the injunction loses, they must pay damages to the other side.

An interlocutory order for an injunction is an order made prior to the final judgment in the action. The jurisdiction to grant the injunction in such a case must include the power to have a full hearing of the application.

Two (2) Issues the Court Considers Before Granting an Injunction -

- 1) Is it just?
- 2) Is it convenient?

There are various types of injunctions -
Prohibitory Injunctions and Mandatory Injunctions.

Prohibitory Injunction - In the Sky Petroleum case, an injunction restraining the defendants from withholding the supplies of petrol was equivalent to specific performance of the contract.

In a Mandatory Injunction, enforcement and supervision are required and the hardship may be acute.

There are also Perpetual and Interlocutory injunctions.

A prohibitory or mandatory injunction may be Perpetual or Interlocutory.

Perpetual Injunction - This is an injunction which continues in succession and does not die.

Interlocutory Injunction - This is an injunction which only operates during the course of the trial.

Ex Parte Injunction - This is an injunction given where the court has not heard the other side. By virtue of the urgency of the matter, the court could grant such an injunction. This injunction lasts until the other side is heard, at which point it becomes an *inter parte* injunction. The judge makes the decision whether or not to continue the injunction or to discharge the order it had granted before.

Interim Injunction - These operate up to a specific date. They are usually granted *ex parte* but that is not always the case. They are granted for a specified period of time.

Quia Timet Injunction - These are granted in order to prevent the infringement of a plaintiff's life where it is threatened but the infringement has not yet occurred. This is a discretionary remedy which is in personam

and must be given in the interest of the public. They are remedies for which contempt of the proceedings can be gotten. You cannot take an injunction against the Crown or a State.

Interlocutory Injunctions will not be granted unless a plaintiff can show it was more likely than not that it would succeed in obtaining a final injunction. The case of **American Cyanamid Co v. Ethicon Ltd** concerned the application of a quia timet interlocutory injunction to restrain the infringement of a patent. It was unanimously held that there was no rule requiring a plaintiff to establish a prima facie case. The court must be satisfied that his case is not frivolous or vexatious and that there's a serious question to be tried.

The governing consideration of the courts is the balance of convenience. Inadequacy of damages is a significant factor in assessing the balance of convenience. What is the balance of convenience? The court asks what will happen to the defendant if the injunction is given. The court is also concerned about the effect on the defendant of not granting the injunction. The court strives to maintain the status quo. This is the factor which is used even in Sierra Leone today.

In the case of **Fellows and Son v. Fisher**, the plaintiff was a firm of solicitors who sought to restrain a breach of a restrictive covenant in the contract of a former employee. The majority of the Court of Appeal, on the balance of convenience, favored a refusal of the injunction.

Regarding a quia timet injunction, refer to **Redland Bricks Ltd v. Morris**; here the HL allowed the defendant's appeal against the grant of a mandatory injunction on the ground that it did not specifically or exactly state what the defendant had to do. Four principles arose from this case -

- 1) The plaintiff must show a very strong probability that grave damage will accrue to him in future and that damages will not be adequate and the cost to the defendant to do the work to prevent the occurrence of a future apprehended wrong. The court must see that the defendant knows exactly what he has to do.

An application could be refused where -

(i) There's a delay.

(ii) Under the Limitation Act 1961, where there's acquiescence by the party, it is easy to establish where the right is equitable only. Where it can cause hardship and the conduct of the plaintiff himself will be considered; has he delayed/acquiesced? Is his claim frivolous/vexatious? Does he have a claim? Will granting the injunction cause a hardship?

An injunction could be granted to restrain the commission or continuance of a tort. It could be asked for in the case of a nuisance, trespass or libel.

An injunction can be granted to the Attorney-General, if application is made, to restrain an act illegal or detrimental to the public; a public wrong.

Anton Piller Injunction - This ensures that a defendant does not dispose of any articles in his possession which would be prejudicial at the trial. It is useful to a plaintiff who is a victim of commercial malpractice such as a breach of confidence, breach of copyright or passing off. In the case of Anton Piller KG v. Manufacturing Processing Ltd, the court made an *ex parte* order to permit the plaintiff to enter the defendant's premises to inspect documents relating to the equipment and an injunction restraining the defendant from breaching their copyright or making improper use of confidential information.

There are three (3) rules considered before granting this order -

- 1) The plaintiff must show that he has an extremely strong *prima facie* case.
- 2) The PL must show actual or potential damage of a very serious nature.
- 3) The PL must show that the defendant has incriminating documents or things and a real possibility of their destruction before an *inter partes* application or documentation can be made.

Mareva Injunction - This was granted in Mareva Cia Naviera SA v. International Bulkcarriers SA. A mareva injunction was granted in a case where a plaintiff has brought an action against a foreign defendant and the latter has money or chattels within the jurisdiction which, if he were not prevented from doing so, he would be free to remove out of the jurisdiction before the plaintiff could bring the action to trial, and if successful, obtain and enforce a judgment against him.

The purpose is to ensure that there will be property of the defendant available out of which judgment obtained by the plaintiff can be satisfied.

A mareva injunction is interlocutory and not final but available *ex parte*. Speed is a critical component. It is granted wherever it is just and convenient to do so. A plaintiff must satisfy the test in American Cyanamid; he must have good cause and the balance of convenience must favor the grant of the injunction. The guidelines considered by the courts are -

- 1) The plaintiff must have an arguable case.
- 2) The injunction must not be limited to money but goods.
- 3) The injunction is used to compel a defendant to provide security.

The plaintiff himself must make full and frank disclosure of all material facts. The particulars of the claim must be stated; its _____ and _____. The plaintiff must prove that he has grounds to believe that the defendant has assets within the jurisdiction and that there is a risk of removal before the claim is satisfied. An undertaking of damages must be made by the plaintiff where his case is proved unsuccessful; he must indemnify the defendant. The plaintiff may ask for security for costs by the foreign defendant to be paid into court in the event that there is a judgment against him.

In Barclay-Johnson v. Vil, it was held by Megarry VC that the fact that a defendant is neither foreign nor foreign-based is no bar to the grant of a mareva injunction. The defendant owed 2,000 Pounds to the plaintiff, went abroad and could not be contacted. An injunction was granted to restrain the removal of 2,000 Pounds presently in a U.K. bank, outside the jurisdiction. The subject matter of a mareva can include money, ships, airplanes and it operates in personam. It gives no proprietary rights in the amount or priority over other creditors.

Equitable Doctrines

Election - There must be an intent to dispose of some property. Does the will purport to dispose of property? Was that property the testator's to dispose?? And the property must be the property of another that is to be disposed.

The gift of the property must be given to the person electing. The testator should, in the same instrument, have given some property of his own to A. The property given to A should be given beneficially and in such form to be available to _____ if A elects to take _____ the will. But if the property is not effectively _____ then no election will arise.

*-Election may be expressed or implied as by receiving of rents or by the selling of the property but must be made with the full appreciation of the issues involved. It mostly applies or is derived from the doctrine of mistake.

Satisfaction - This doctrine deals with the maxim that "Equity imputes an intention to fulfill an obligation". Satisfaction is decided on presumptions of an intention founded in the terms of the will. The value of the property arises and is important. I pay you not all the amount but something near to what I owe you. I have given something near to the debt. The presumption would only come where a debt exists prior to the making of a will.

It does not apply to a running account. It also does not apply if the will contains a direction to pay debts. It applies if a legacy is in the sum as great as or greater than the debt and is in every circumstance as beneficial as the debt but equity leans against double portions. For the doctrine to operate there must be an unsatisfied portion debt and a testamentary position by way of a portion. The two provisions must normally have been made by and for the same persons.

The rule applies to a father and a legitimate child. The presumption of satisfaction may be rebutted by extrinsic evidence as well as evidence of an intent in the will.

Performance - This is closely intertwined with satisfaction and they are most times used together. Performance is also traced back to the maxim that "Equity imputes an intention to fulfill an obligation". The term "Ademption" is also similar to performance. Performance is either exactly to the terms of the contract or almost to the intent of the parties. It goes to the intention and obligation of both parties.

Performance is associated with covenants to purchase and settle land. See Lord Lechmere v. Lady Lechmere. The doctrine is also associated with intestacy. It can also extend to cases where there is a covenant to be followed by a legacy. A legacy is property left over by a testator.

S.9 of the Wills Act 1937 provides that a will should be attested by two witnesses. The importance of the section is that it prevents a person from contravening the Statute of Frauds 1677.

Conversion - This embodies the maxim that "Equity looks on that as done which ought to be done". It applies to not only expressed trusts but also enforceable contracts for the sale of land. Conversion depends upon a valid and imperative trust and you must have someone to enforce it. If there is a total failure of beneficiaries, then no conversion will take place. The property can be reconverted depending on the intention of someone who can enforce it; Re Coop; it was held that the trust for sale had terminated. The house was reconverted into land and did not pass under the will as personal estate.

Equitable Remedies

Fraud - This is used synonymously with deceit. Equity has used fraud to embrace a much wider variety of activities. We can see the use of fraud in equity in secret and half-secret trusts. Equity can also intervene by reason of a defendant's undue influence or dominance over the plaintiff in procuring his execution of a document. This is done when there is undue influence on one party. This is exerted to secure a specific objective.

Equity can also apply undue influence in two different cases -

1) Where it readily perceives the possibility of undue influence in cases such as parent and child, ward and guardian, doctor and patient & religious advisor and pupil.

Equity requires positive proof of the influence having been asserted. In both cases, the question thus will be whether the defendant had taken advantage of his position. There is always a special relationship which will exist

between the parties for there to be undue influence. There must be a special relationship between the plaintiff and the defendant. Sometimes that influence results in fraud.

Fraud, Secret Trusts and Half-Secret Trusts

The Statute of Frauds came about in order to prevent fraud in secret trusts and also to prevent undue influence etc. Statutes have controlled certain contracts. For example, the Unfair Contracts Act 1977. Lord Denning, in the case of Lloyd's Bank Ltd v. Bundy, gave five (5) categories of instances of influence -

- 1) Duress of goods.
- 2) Where the stranger is in possession of goods under a legal right as in a pledge of distress.
- 3) An unconscionable transaction such as _____.
- 4) Issue of Undue Influence.
- 5) Under Pressure.

Misrepresentation - Equity, in some circumstances, has developed a _____ Whereby a defendant is compelled to make good certain representations that he had made. A defendant might be required to make compensation if representation could not be made good. The remedy of rescission of a contract is used in cases of misrepresentation. There are several contract cases which fall under the Misrepresentation Act 1967.

Mistake - This is not a ground for rescission but when coupled with a misrepresentation that induced it, then the contract can be rescinded. In Sully v. Butcher, there was a common mistake which existed to both parties. The lessee sued to recover the rent paid in excess of the amount permitted by the Act. He failed. The landlord obtained a rescission of the lease on just and equitable terms on the ground of mistake.

The primary intention of the court is to make sure that both parties can go back to their prior positions without losing. The mistake must be common to both parties and they must have acted on the common incorrect assumption and it must result in something being contracted for where, but for the mistake, no such contract would have been made.

Rectification - If an instrument contains a manifest mistake, neither the common law nor equity is prevented from discerning the fact and substituting the words that were intended to be there. It is the duty of the court to construe an instrument correctly.

There must be convincing proof of an agreement; what the parties actually had decided at the time of reaching their agreement. This remedy exists only to correct an instrument but not to improve it. Rectification may occur where there are grounds for rescission.

The 12 Maxims of Equity

- 1) Equity will not suffer a wrong to be without a remedy.
- 2) Equity follows the law.
- 3) Where there is equal equity, the law shall prevail.
- 4) Where there are equal equities, the first in time shall prevail.
- 5) He who seeks equity must do equity.
- 6) He who comes to equity must come with clean hands.
- 7) Delay defeats equity.
- 8) Equality is equity.
- 9) Equity looks to the intent rather than to the form.
- 10) Equity looks on that as done which ought to have been done.
- 11) Equity imputes an intention to fulfill an obligation.
- 12) Equity acts in personam.
- 1) **Equity will not suffer a wrong to be without a remedy.**

The idea is no wrong should be allowed to go unredressed, if it is capable of being remedied by the courts of justice. On this maxim, the court of chancery based its interference to enforce Uses and Trusts.

Where A conveyed land to B to hold for the use of, or on trust for, C. Before the Statute of Uses, C had no remedy at law, if B claimed to keep the benefit of the land to himself. Yet, such an abuse of confidence was most distinctly a wrong, and a wrong capable of being easily redressed in a court of justice.

The Court of Chancery had an auxiliary jurisdiction, by virtue of which, suitors at law were aided in the enforcement of their legal rights. Without such aid, these rights would often have been "wrongs without remedies".

A successful plaintiff could not have legal execution against the property of the judgment debtor, because his interest in the property was equitable only. For example, an Equity of Redemption. The Court of Chancery interfered and gave equitable relief in the nature of execution, by the appointment of a receiver, supplemented if necessary, by an injunction restraining the debtor from dealing with the property.

2) Equity follows the law.

This has two meanings -

A) Equity is governed by the rules of law, as to legal estates, rights and interests.

B) Equity acts in analogy with legal rules with regards to equitable estates, rights and interests. When an analogy exists, equity does not interfere with a man's legal right until it will be unconscientious on his part, to take advantage of them. Equity acts on the conscience. It is only when there is some important circumstance disregarded by the common law that equity interferes.

3 & 4) Where there is equal equity, the law shall prevail and where there are equal equities, the first in time shall prevail.

Qui prior est tempore, potior est jure; he who is earlier in time is stronger in law.

These two maxims govern all questions of the priority of rival claimants to the same property in equity. The owner of the property creates several mortgages on it and the property is insufficient to cover all of them. The general position is said that the person in possession of the legal estate will be entitled to priority over any equitable interest, whether it's attached to the property before or after he acquired the legal estate, unless it would be inequitable for him to take advantage of the possession of the legal estate.

In the comparatively rare cases before 1926 where there were two or more legal mortgages of a legal estate in land created by the grant of successive leases, the second mortgage would prima facie be postponed to the first, for the second lease would take effect in reversion upon the first, and a legal estate in reversion was postponed to one in possession. Again, where there are two competing equitable interests, the general rule of equity is that the person whose equity attached to the property first will be entitled to priority over the other. Where the equities are equal and neither claimant has the legal estate, the first in time prevails.

The rule was illustrated in the case of **Re Samuel Allen & Sons Ltd.**, (1907); a company hired machinery from A under a hire-purchase agreement whereby the property in the machinery was not to pass to the company until all installments had been paid, and a right was given to A to remove the machinery on the company's failure to pay an installment. The machinery was fixed on the business premises of which the company was the legal owner, and so the legal interest in the machinery vested in the company. Afterwards, the company created an equitable mortgage of the premises in favour of B who had no notice of the hire-purchase agreement. It was held that A's right to remove the fixtures was an equitable interest in the land, and that as it had attached before B's equitable mortgage was created, it had priority over B's rights.

The Purchaser without Notice

A legal right is enforceable against any person who takes the property, whether or not he has notice of it, except where the right is overreached or is void against him for want of registration. If V sells to P land over which W has a legal right of way, P takes the land subject to W's right even if he was ignorant of it.

In the case of equitable rights, it's different; a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law; the purchaser's conscience is in no way affected by the equitable right. Where there is equal equity the law prevails. The onus of proving the purchase of a legal estate without notice rests on the purchaser.

In the case of Cave v. Cave, (1880); a sole trustee of a marriage settlement, used the trust funds to purchase land in breach of trust, and took the conveyance in the name of his brother. The brother created a legal mortgage in favor of A and an equitable mortgage in favor of B, neither A nor B having notice of the trust. It was held that A's legal mortgage had priority over the equitable interests of the beneficiaries, but that those interests had priority over the equitable mortgage.

A purchaser for value consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority at equity, as well as at law, but certain conditions must be fulfilled -

A) It is necessary that the defendant should have obtained the legal estate or that it should be vested in some person on his behalf.

B) The defendant must have given value for the property. A volunteer always takes subject to any equities attaching to the property, at the time when the legal interest is transferred to him. Squatting is not value, so that a party is bound by the equitable interest created by the restrictive covenant, even though he had acquired the legal estate without notice of it.

C) The defendant must have no notice of the equitable interest, at the time when he gave his consideration for the conveyance. There is one case in

which a purchaser, for notice of an equitable interest, will nevertheless not be bound by it, and that is where he purchases from a person who himself was a purchaser without notice.

S.3 of the Conveyancing Act 1881 provides that a purchaser was not to be prejudicially affected by notice of any instrument, fact or thing, unless it is within his own knowledge or would have come to his knowledge, if such inquiries or inspections had been made, or in the same transaction in respect of which a question of notice to the purchaser arises. It has come to the knowledge of his counsel as such, or of his solicitor or other agents as such, or would have come to his knowledge, if such inquiries and inspections have been made by the solicitor or other agent.

A purchaser is affected either by *constructive notice* or *actual notice*.

Constructive Notice - A purchaser will be treated as having constructive notice of all that a reasonably prudent purchaser would have discovered.
2 main heads -

(1) Where the purchaser had actual notice that the property was in some way incumbered, in which case he will be held to have constructive notice of all that he would have discovered if he had investigated the incumbrance; **Jones v. Smith**, (1841).

(2) Where the purchaser has deliberately or carelessly abstained from making those inquiries that a prudent purchaser would have made.

Actual Notice - It must be given by a person interested in the property and in the course of negotiations, that it must be clear and distinct, and vague reports from persons not interested in the property will not affect the purchaser's conscience.

An example of a constructive notice is the case of **Bisco v. Earl of Banbury**, (1676); a purchaser had actual notice of a specific mortgage but did not inspect the mortgage deed, which referred to other encumbrances. He was held to be bound by those encumbrances, for he would have discovered their existence if he had inspected the deed as any prudent man would have done.

Where neither the plaintiff nor the defendant has the legal estate but each of them has an equitable estate only, the rule is that the person, whose equity attached to the property first, will be entitled to priority over the other.

In cases of the equitable interests in pure personalty, priority is determined not by the respective times at which the interests were created, but by the respective times by which notice was given to the legal owner of the fund.

5) He who seeks equity must do equity.

The rule is illustrated by the wife's equity to a settlement; If a husband sought the aid of the Court of Chancery to obtain possession of property to which he was entitled in right of his wife, the court refused to assist him except on the condition that he made a fair settlement of part of the property on his wife and children.

The rule is also illustrated in the case of illegal loans as in the case of **Lodge v. National Union Investment Co. Ltd.**, (1907); A borrowed money from B, an unregistered moneylender, and mortgaged certain property to him, as security for the loan. A sued B for declaration that the contract was void and for delivery of his security. The court refused to order B to deliver up the securities, except upon terms that A should repay the money which had been advanced to him, for A was asking for an equitable relief and must therefore do what was right and fair.

6) He who comes to equity must come with clean hands.

This maxim seems not unrelated to the *ex turpi causa non oritur actio* ('no action arises from a base cause') of the common law but differs from it in looking to the past rather than the future. The plaintiff not only must be prepared now to do what is right and fair, but also must show that his past record in the transaction is clean; for, as was said in the case of **Jones v. Lenthall**, (1669); "he who has committed Iniquity...shall not have Equity".

In the case of **Overton v. Bannister**, (1844); an infant fraudulently concealing her age, obtained from her trustees, a sum of stock to which she was entitled only upon coming of age. She instituted a suit against the

trustees, to compel them to pay over again the stock, which had been improperly paid by them to her, after her minority.

It was held that the infant could not enforce payment over again of the stock, for though the receipt of an infant is ineffectual to discharge a debt, yet the infant, having misrepresented her age, could not set up the invalidity of the receipt.

The maxim must not be taken too widely. Per Brandeis J. in the case of Loughran v. Loughran, (1934); "Equity does not demand that its suitors shall have led blameless lives." What bars the claim is not a general depravity but one which has "an immediate and necessary relation to the equity sued for."

7) Delay Defeats Equity or Equity Aids the Vigilant and Not the Indolent

This maxim has no application to cases to which the Statutes of Limitations are applicable. There are certain statutory provisions applicable to equitable claims. For example, S.8 of the Trustees Act 1881 provides limit in time, within which an action must be commenced against a trustee for 'breach of trust'. In all cases where the statutes of limitations apply, equity follows the law and allows at the same time, for enforcing the rights, whether legal or equitable as a court of law, and delay short of the statutory period is no bar to the claim, whether legal or equitable.

Delay will be fatal to a claim for equitable relief, if it may have resulted in the destruction or loss of evidence by which the claim might have been rebutted, or if it is evidence of an agreement by the plaintiff to abandon or release his rights, or if the plaintiff had so acted, as to induce the defendant to alter his position, on the reasonable faith that he has released or abandoned his claim.

8) Equality is Equity

This maxim has long been illustrated by equity's dislike of a joint tenancy. On the death of one joint tenant, the whole estate belongs to the survivor, and the representatives of the deceased take nothing. There is here no equality except, perhaps, an equality of chance.

Equity, therefore, leans in favor of the 'tenancy in common' as regards the beneficial interest, so that although at law the survivor is entitled to the whole estate, he will hold in part as trustee for the representatives of the deceased.

In general, the maxim will be applied whenever property is to be distributed between rival claimants and there is no other basis for division. For example, in the case of Jones v. Maynard, (1951); after a divorce, the court refused to dissect meticulously the joint bank account which both the husband and wife drew upon and paid their income into, and instead divided the balance equally between them. The principle does not apply while they are still living together, for then their rights in a joint bank account aren't meant to be attended by legal consequences and each will be sole beneficial owner of any property which he or she buys with money drawn from the said account.

Purchase in Unequal Shares - For example, if A and B purchase property and find the purchase money in unequal shares, and take the conveyance to themselves jointly, on A's death, B becomes entitled to the whole of the property at law, but in equity, he is treated as a trustee for A's representatives, proportionately to the extent of the share of the purchase money advanced by A.

But if the purchase money had been advanced equally, B would have been entitled to the whole estate in equity, as well as at law. For where two purchasers advance the money equally, they may be presumed to have purchased with a view to the benefit of survivorship.

Loan on Mortgage - If a mortgage is made to A & B jointly, it is immaterial whether the money is advanced equally or unequally; the mere circumstance of the transaction being a loan is sufficient to repel the presumption of an intention to hold the mortgage on a joint tenancy, and the survivor is therefore a trustee for the representatives of the deceased mortgagee to the extent of his proportion of the loan.

Partnership - Where partners acquire property, they are presumed to hold it as beneficial tenants in common. *Jus accrescendi inter mercatores locum non habet.*

9) Equity Looks to the Intent Rather Than to the Form

There are equitable doctrines governing mortgages, penalties and forfeitures.

In the case of **Parkin v. Thorold**, (1852); it was said that "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 find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance." Thus if a party to a contract for the sale of land fails to complete on the day fixed for completion, at law he is in breach of his contract, whereas in equity it will usually suffice if he is ready to complete within a reasonable period thereafter. Whether equity regards an agreement as being negative depends not on the precise language but on the substance of the agreement.

10) Equity Looks at That as Done Which Ought to Have Been Done

Equity treats a contract to do a thing, as if the thing were already done but only in favor of persons entitled to enforce the contract specifically and not in favour of volunteers.

All agreements for value are considered as performed, as from the time when they ought to have been performed, and they have all the same consequences, as if they had been completely performed.

For example, a person who enters into possession of land under a specifically enforceable agreement for a lease is regarded in any court which has jurisdiction to enforce the agreement as being in the same position as between himself and the other party to the agreement as if the lease had actually been granted to him.

Other examples of the maxim will be found in the enforcement of an imperfect trust made for value, the qualified trust for a purchaser imposed by equity upon the vendor, the rule in **Howe v. Earl of Dartmouth**, (1802), and the doctrine of conversion.

The rule in **Howe v. Earl of Dartmouth** - It is the duty of a trustee to preserve the trust property. It is also his duty to hold the scales evenly between the beneficiaries, and not to favour one at the expense of another.

Accordingly, under this rule, where there is a residuary bequest of personal estate to be enjoyed by persons in succession, the trustees must, unless the will shows a contrary intention, realize such parts of the estate as are of a wasting character (copyrights) or of a reversionary nature (interests subject to subsisting life interests), or are otherwise not investments authorized by the general law or by the will, and invest the proceeds in some authorized security.

The trustees must do this despite the absence of any express direction to convert in the will; for in the absence of a contrary intention, the court assumes that the testator intended his legatees to enjoy the same thing in succession, and so requires the property to be converted into permanent investments of a recognized character. Wasting and hazardous securities are to be converted in the interest of the remaindermen, reversionary interests for the benefit of the tenant for life.

But this duty to convert does not arise where the property is settled by deed, nor where the bequest is not residuary but specific; nor does the duty apply to realty or to property passing on intestacy, although in this case, statute imposes a trust for sale with power to postpone sale. Where the duty exists, the conversion must, in general, be effected within a year from the testator's death.

The duty to convert may be excluded either by an express direction to the contrary in the will or by a sufficient indication in the will of the testator's intention to exclude it.

11) Equity Imputes an Intention to Fulfill an Obligation

Where a man is under an obligation to do some act and he does some other act, which is capable of being considered as a fulfillment of his obligation, the latter act will be so considered because it is right to put the most favorable construction on a man's acts and to presume that he intends to be just before he affects to be generous.

For example, suppose that a husband covenants with the trustees of his marriage settlement to pay to them the sum of 50,000 Pounds, to be laid out by the trustees in the purchase of lands in the county of Devon which are to

be settled upon the trusts of the settlement. In fact, the husband never pays the money to the trustees, but after the marriage purchases lands in Devon for 50,000 Pounds, and has them conveyed to himself in fee simple; and he then dies without bringing the lands into settlement. The purchased lands are in equity presumed to have been purchased by the husband in pursuance of his covenant, and as being in fact his performance of that covenant, so that they become subject to the trusts of his marriage settlement; **Sowden v. Sowden**, (1785).

It is on this maxim that the doctrines of performance and satisfaction are founded.

12) **Equity Acts in Personam**

Common law court judgments were enforced by one of the ordinary writs of execution by means of which the plaintiff was forcibly put into possession of the property to which he was entitled under the judgment. But, originally, the Court of Chancery did not itself interfere with the defendant's property, but merely made an order against the defendant personally, and if he failed to comply with it, punished him for his disobedience by attachment or committal for contempt, i.e., by "execution *in personam* peculiar to the Court of Equity."; **Lever Brothers Ltd. v. Kneale**, (1937). However, in some cases, imprisonment proved ineffectual to compel compliance with its orders, and the Court of Chancery afterwards had recourse to the writ of sequestration, under which sequestrators were appointed to take possession of the property in dispute, and eventually of all the defendant's property, until he did the act which he had been ordered to do. But that was all; a defendant who refused to comply with an order to deliver up a document for cancellation might languish in prison, but in the meantime the document remained valid at law.

Enforcement by sequestration or committal has been supplemented by statute. Thus, the court may make vesting orders or appoint a person to execute a transfer. Furthermore, where a person neglects or refuses to comply with the court's judgment or order to act, the court may nominate some person to do the act for him. Since the Judicature Act, orders from the chancery division can be enforced by any legal writs of execution. For example, payment of a sum, by a *Writ of Fieri Facias*. Further, the court may

administer a trust fund to which a claimant is a foreign sovereign against whom personally no order can be made.

Although not confined to acting *in personam*, equity's jurisdiction is primarily over the defendant personally. It is therefore immaterial that the property in question is not within the reach of the court, provided that the defendant himself is within the jurisdiction, or is capable of being served with the proceedings outside the jurisdiction, and that there is some equitable right which the plaintiff could have enforced against him had the property been here. Accordingly, in the case of **Penn v. Lord Baltimore**, (1750); specific performance was ordered of an agreement relating to the boundaries of land in America, the defendant being in England.

In the case of **Ewing v. Orr Ewing (No.1)**, (1883); it was said that "The courts of Equity in England are, and always have been, courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so as to land in Scotland, in Ireland, in the Colonies, in foreign countries."

Licences

A licence is a permission which may be expressed or implied. There were inadequate remedies at common law dealing with the protection of licensees. The licensee obtains a proprietary interest which the licensor clearly could not revoke. However, a licence is not a proprietary interest and so the licensee could not be protected.

If a licensor could not lawfully revoke the licence, equity could grant an injunction to restrain him. The protection of the licensee against the licensor raised the question of whether the licensee should be protected against a third party not being a bona fide purchaser of the legal estate for value without notice.

Where the licensee is protected against 3rd parties, the question is whether it becomes an interest in land. A simple permission to enter the licensor's

land gives no contractual or proprietary right to the licensee but a licence coupled with a grant of a proprietary interest is irrevocable.

At common law, difficulties arose with contractual licences. For example, if A, licensor, contracts for valuable consideration to allow B, licensee, to enter his land for a particular purpose or for a particular period of time and A, in breach of contract, orders B to leave and, perhaps, forcibly ejects him, the common law held that B had become a trespasser and could be ejected. The common law did not provide adequately for the problem of the protection of the licensee, nor were its remedies adequate.

In the case of Wood v. Leadbitter, (1845), the court distinguished between a mere licence, as in this case, which was revocable and a licence coupled with an interest, which was not. Nothing was granted to the plaintiff. The reasoning of the common law in this case was that a licence was revocable unless it validly granted a proprietary interest. In the absence of such a grant, though the licensor had no right to revoke, he had a power to revoke and could then turn the licensee into a trespasser.

In a later case after the Judicature Act 1845, Winter Garden Theatre (London) Ltd v. Millennium Productions Ltd, it was finally established that the right of the parties must be determined upon the proper construction of the contract. The HL held that the licence was terminable on the giving of notice, the length of which must be reasonable in all the circumstances. The general rule is that before equity will grant an injunction, there must be, on the construction of the contract, a negative clause, expressed or implied. The contract, the court held, could be enforced by an injunction and damages for breach of contract were awarded in the common law.

An alternative is to restore to the licensee the unjust benefit which he has received by the wrongful termination of the contract. In Tanner v. Tanner, the defendant was the mistress of the plaintiff and bore him two daughters. In 1970, the plaintiff purchased a house for her and her children. The relationship ended in 1973 and the plaintiff offered her 4,000 Pounds to vacate. She refused, claiming that she could stay in the house until the children left school. The CA held that the defendant's remedy was in the form of compensation for the loss of the licence. It requires the plaintiff to make restitution for the unjust benefit which he had received. It was not

practicable to grant an injunction as the court had made an order for possession and the defendant had been re-housed by the local authority.

An example of a Constructive Trust is found in Fallow v. Fallow.

An injunction will not be granted to a licensee who is himself in breach of the term of the licence. A licensee who himself misbehaves will not be protected. It will not be granted when it will have the effect of compelling persons to live together in circumstances which are intolerable.

Parties may, therefore, have rights under common law to sue for breach of contract. The CA enforced a contractual licence by specific performance in the case of Verrall v. Great Yarmouth Borough Council; the National Front entered into a contract in April 1979 with the conservative dominated council to hire a hall for the Front's national two day conference. In May, 1979, the political complexion of the council changed and the new socialist controlled council purported to revoke the licence. Specific performance was granted. The National Front was entitled to the benefits of the contractual licence. It shows that specific performance is a remedy based on the inadequacy of damages and can be used to enforce a contract which does not create a proprietary interest.

It is the duty of the court to protect, where it is appropriate, any interest; whether it be an estate in land or a licence by injunction or specific performance. The court can grant a prohibitory injunction to restrain the wrongful revocation of a contractual licence or to grant a mandatory injunction to reinstate a licensee where a licence has been revoked in breach of contract. In both Hardwick v. Johnson and Chandler v. Kelly, the licensee required protection and the court held that there was a contractual licence which was irrevocable for a period of time. The licensee got protection. The daughter-in-law in Hardwick v. Johnson was entitled to protection by injunction for an indefinite period of time and Mrs. Kelly was entitled to remain in possession under the contractual licence for a period determinable upon twelve months notice.

A similar result could have been reached by the application of the doctrine of Promissory Estoppel. The question is whether a licensee who is protected against a licensor will be protected also against an assignee of the licensor.

This would depend on the type of licence. A mere/bare licence is not binding. A licence which creates a proprietary interest in land, whether by way of constructive trust or proprietary estoppel, is binding on the 3rd party in that the licensee is the owner of an equitable proprietary interest which is so binding.

In the case of a promissory estoppel, the protection given to the licensee by means of an injunction to restrain the licensor is held to be available to 3rd parties. The jurisdiction to apply an injunction against a 3rd party is seen in the case of **Tulk v. Moxhay** (Restrictive Covenant____ with the land) on the enforcement of a licence against a 3rd party.

In **Errington v. Errington and Woods**, the father of a young man about to be married purchased a house, made a down payment and told the young couple that the house was theirs when they had paid all the installments which fell due. They went into possession and paid all the installments. The father died, leaving his property to his wife. The son returned to his mother who took steps to evict the daughter-in-law. She failed. The daughter-in-law was held to be a licensee who was entitled to protection, not only against A in his lifetime but also against the wife, taking as a volunteer. The case is one of estoppel, for the daughter-in-law acted to her detriment in reliance of the father's promise.

In **Binion v. Evans**, there was enforcement of an occupier's right against a purchaser who not only had express notice, but who purchased expressly subject to them. Mrs. Evans, an employee, made an agreement with her employers in which she would be allowed to reside in a cottage rent free for the rest of her life. She kept the cottage in repairs. Two years later, the employers sold the cottage to Mrs. Binions, expressly subject to the agreement. The purchase price was reduced and the purchasers claimed possession. Lord Denning held that the purchasers were bound by Mrs. Evans's contractual licence and also by a constructive trust in her favor. Two justices looked upon the agreement as creating a life interest. She bought a life interest and was protected by the **Settled Land Act 1925**.

A few cases on licences have been decided under the doctrine of constructive trusts. In **Bannister v. Bannister**, the defendant was the sister-in-law of the plaintiff. She owned two cottages and sold them to the plaintiff at a favorable price under an oral agreement that the plaintiff

would allow her to stay in one of the cottages rent free as long as she wished. In 1941, she only occupied one downstairs room. The plaintiff claimed possession on the ground that she was a tenant-at-will only. Though the party's intention is clearly to benefit the defendant, an expressed trust of land is required to be in writing. This according to S.53(1) of the Law of Property Act 1925. The CA held that it would be a fraud to disregard the oral trust and found a constructive trust to permit her to occupy the cottage as long as she wanted to do so.

Different Types of Estoppel

1) **Estoppel by Representation** - This operates under the common law and in equity. A person who makes a representation by words or conduct of an existing fact and causes another party to act to his detriment in reliance on the representation will not be permitted subsequently to act inconsistently with that representation.

A principal who holds out another as his agent will be liable to be sued as if the agency existed and an agent who holds himself out as possessing an authority will also be liable.

A company which issues a share certificate will be estopped from denying as against a purchaser without notice that the person named therein is the owner of the shares and from alleging that the shares are not fully paid; **Robertson v. Minister of Pensions**; an officer claimed a pension relying upon a statement by the war office that his disability had been accepted as due to military service and he forgot to obtain an independent medical opinion. It was held that the Crown, through its minister, could not go back on the statement previously made.

2) **Promissory Estoppel** - It is a doctrine including not only representation of facts but also intentions or promises. In **Central London Property Trust Ltd v. High Trees House Ltd**, the plaintiff company, in 1937, leased to the defendant a block of flats for 95 years at a rent of 2,500 Pounds per year. In early 1940 and because of the war, the defendants were unable to find tenants for the flat and so were unable to pay the rent. The plaintiff agreed to reduce the rent to 1250 Pounds from the beginning of the term. By the

beginning of 1945, all the flats were rented and the plaintiff claimed full rent as from the middle of that year. They succeeded. Denning J held that they would have been estopped from claiming full rent for 1940-45 on the grounds that though not technically bound because of a lack of consideration, the plaintiff had intended the defendants to rely on the promise and the defendants had acted on the faith of it.

Three (3) things to note about a Promissory Estoppel -

- 1) The representation must be one of intention and not of fact.
- 2) The requirement of detriment to the representee is less stringent.
- 3) The effect of the estoppel may not be permanent.

3) Proprietary Estoppel - This is estoppel by encouragement or acquiescence. This doctrine applies where one party knowingly encourages another to act or acquiesce in the other's actions to his detriment and in infringement of the 1st party's rights. He will be unable to complain later regarding the infringement and may indeed be required to make good the representation he encouraged the other party to rely on.

The doctrine may create a claim and entitlement to a positive proprietary right. In Dillwyn v. Llewellyn, a father encouraged his son to build a house on the father's land and signed a memorandum purporting to convey the land to the son but it was not sealed. The father left a will, leaving all of his real estate upon certain trust in favor of others. The son spent 14,000 Pounds building a house on the land with the father's knowledge and approval. Upon the father's death, the HL held that the son was entitled to the conveyance of the fee simple.

There is a doctrine based on encouragement and acquiescence under which the court of equity will adjust the rights of parties to do substantial justice between them. In Wilmot v. Barber, Frye J. laid down the principle in detail that the plaintiff must have made a mistake as to his legal rights. Also, that the plaintiff must have expended money or done some act on the faith of his mistaken belief. The defendant, possessor of a legal right, must know the existence of his own right which is inconsistent with the right claimed by

the plaintiff. Also, the defendant must know of the plaintiff's mistaken beliefs in his rights.

The defendant must have encouraged the plaintiff in his expenditure of money or in the other acts which he had done, either directly or by abstaining from asserting his legal rights. In Inwards v. Baker, Mr. Baker's son, Jack, decided to build a bungalow upon land he hoped to purchase but which proved to be too expensive. Mr. Baker suggested that Jack should put the bungalow on the land already owned by him. Jack could build a bigger bungalow and Jack did that, living there for forty years before these proceedings in 1963. The father died in 1951, leaving a will dated 1922, under which realty was left to trustees on trust for sale in favor of others. The CA held that the son should not be disturbed as long as he wished to stay.

In Bascoe v. Turner, the plaintiff and defendant lived together in the plaintiff's house. The plaintiff purchased another house and they both moved in. The defendant expended money on repairs to the plaintiff's knowledge. The relationship ended and the plaintiff gave the defendant two month's notice to determine the licence. The CA held that the defendant occupied the house as a licensee and there was valid declaration of the trust in her favor but an estoppel operated in her favor.

In Griffiths v. Williams, a CA decision, it was held that Mrs. Williams should be protected under the doctrine of estoppel.

Equitable Interest & Equities

A tenant for life has an equitable interest under the Settled Land Act 1925. Some rights over the land of another have the characteristics that they can be made to benefit and burden land in the hands of successors in title to the creators of the right. This is so for certain legal rights as easements and profits. Also, equitable interest such as restrictive covenants, lien, equitable interests and estate interests.

The manner in which they can be found varies whether equitable or legal. Where the interest is equitable only, it is defeated if in the hands of a

bona fide purchaser of the legal estate for value, actual or constructive of equitable interest.

Notice may be the essential factor in enabling rights to be binding on 3rd parties but not the sole factor. Covenants affecting the use of personalty do not constitute equitable interests in the sense of binding the personalty in the hands of 3rd parties.

A contract to sell a specific chattel or to pay a debt out of specific property segregated by the debtor for that purpose is capable of creating an equitable interest in personalty in favor of the purchaser or the creditor.

Equity will not interfere to protect a party without according to said party any interest which can be described as equitable. By S.3 of the Settled Land Act 1892, a tenant for life may sell settled land or any easement or rights.

S.2 (g) defines tenant for life as one under a settlement who is beneficially entitled to possession of settled land for his life.

To sell land, the tenant for life must comply with S.4. He is given special powers to transfer encumbrances in land sold under S.5.

By S.6 and S.12, he can accept surrenders and grant new leases.

By S.20, a proviso is made for completion of the sale.

By S.31, he can enter contracts.

A purchaser of a legal estate without notice of an equitable interest takes free of them. The purchaser of an equitable interest takes free of all equities. Between equitable interests, the prior in time prevails but as between equitable interests and equities, an equitable interest prevails.

An equitable interest suggests something of a proprietary nature. A right in the context of a licence acquires the characteristics of an equitable proprietary interest if it is held to be binding on third parties. It is argued that the dividing line between an equitable interest and mere equities is the discretionary character of the latter. Equitable interests are immediately enforceable against the land, through the estate owner for the time being, whereas until rectification, even the court must act on the deed as it stands.

Estoppel is essentially an equity entitling the victim for certain rights as protection against persons on whose statements or promises he relied.

Estoppel by Representation and Promissory Estoppel are capable of giving negative protection only. For example, in Inwards v. Baker, the son, who had acted in reliance upon the father's representation, was entitled to protection from eviction for the rest of his life or for so long as he wished to stay in the bungalow. He was not given a life interest nor did he have any interest which he could sell. The estoppel worked as an equity. He was protected against a 3rd party volunteer and against 3rd parties other than a bona fide purchaser for value without notice. In Cave v. Cave, a sole trustee of trust funds used part of the funds to buy land in the name of his brother who obtained loans on security of the land from legal and equitable mortgagees who had no notice of it. Frye J. held that the rights of beneficiaries under the trust to follow the money representing the trust assets into the land was an equitable interest of equal quality with the rights of the equitable mortgagees so that as between those two, the 1st in time, namely the rights of the beneficiaries prevailed but the rights of beneficiaries did not prevail against the legal mortgagee.

The Equity of Redemption

The equity of redemption was a proviso super imposed on equity for mortgages. It yields only to equity or statute. It yields to equity through sale of foreclosure, and to statute through the effusion of time. There is also a contractual right to redeem.

Time is usually six months or it could be longer. Lord Greene, in the case of Knightsbridge Estates Trust v. Byrne, stated that mortgages are not subject to rules against perpetuities and so no matter how long the period of redemption is postponed, the transaction cannot be impugned on that score. Also, the courts can cancel such a stipulation on the ground that the length of time of the period is unreasonable. The agreement must also contain no restrictions on the equitable right to redeem. Anyone standing in the shoes of the mortgagor can redeem.

Before 1926, a mortgage of freehold land was made by conveying the whole fee simple to the mortgagee subject to the proviso that the mortgagor should repay the loan with interest at the end of six months. At the end of the period, the mortgagor had a contractual right to redeem but if he allowed the moment to pass without repayment, the mortgagee became the absolute owner at law. However, equity provided the mortgagor with an equity of redemption which would endure until destroyed in some way of which equity itself would approve.

Before 1926, in the mortgage of a leasehold interest by assignment of an entire term or by sub-lease, the latter was more satisfactory though you would be bound by restrictive covenants under the Rule in Tulk v. Moxhay.

On a second mortgage, the mortgagee has only an equitable mortgage, that is, he was in the position of the transferee of the equity of redemption. The mortgagor still had the equitable right of redemption and retained his equitable estate but in order to get back the legal estate, he would have two mortgages instead of one, to redeem.

An equitable mortgage can be created by the deposit of title deeds or by an agreement to give a legal mortgage, provided it can be proved by a sufficient memorandum or act of part performance or by an agreement supported by sufficient evidence in writing or act of part performance to appropriate a certain piece of property as security for a money loan.

A mortgagor in possession has a right to receive the income and apply it to his own use. A mortgagor's power of leasing can be excluded by the mortgage deed.

The equity of redemption may be terminated in five (5) ways by -

- 1) Purchase by the mortgagee.
- 2) Redemption by the mortgagor.
- 3) Foreclosure or judicial sale.
- 4) Sale by the mortgagee under statutory power of sale.
- 5) Lapse of time or statute of limitation.

S.18 of the Limitation Act 1961 provides, *inter alia*, that the period of twelve (12) years for the recovery of sums due and foreclosure actions.

The Rule in Dearle v. Hall 1828

This rule has settled competing claims of mortgages of interest in personal trust funds and chose in action. It is stated that as between two encumbrances of an interest in a trust fund or pure personality, priority belongs to that one who was the first to give notice to the debtor or trustee and it is immaterial which was first in time. This rule will operate only if the equities are in other respects equal.

There are two (2) basis for the rule; a cestuis que trust might otherwise be empowered to commit a fraud on a first mortgage by assigning his interest to a second mortgagee who could not by any communication with the trustees discover the existence of the first mortgage.

If the trustee is not to be safe in paying any assignee for fear that there may be another prior equity affecting the property, he will never be safe in paying anybody at all. Such a result would stultify the whole doctrine of assignment of a chose in action in equity.

Trust

A trust is a relationship recognized by equity which arises where property is vested in the person called a trustee, which that trustee is obliged to hold for the benefit of beneficiaries. It is a proprietary relationship; the beneficiary is the equitable and beneficial owner of the property.

Agents must act personally in agency and are accountable to their principals as are trustees to beneficiaries for any profits made out of properties or business entrusted to them.

A trust is an _____ which can arise independently of an agreement or a contract. It is more of a relationship of principal and agent. Under the Trustees Act 1925, a trustee includes a personal representative. A personal representative is under fiduciary duties which are very similar to those of a trustee. The fiduciary duties of a personal representative are to preserve the assets, to deal properly with them and to apply them in due course of administration for the benefit of those interested. For example, creditors, death duty authorities, legatees of various sorts and residuary legatees.

Powers, on the other hand, are discretionary, unlike a trust which is imperative. The objects of a power own nothing unless and until the donee of the power makes an appointment in their favor. A trust for sale of land imposes on the trustees an obligation to sell equity, treating that as done which ought to have been done. This turns the land notionally into money from the moment at which the instrument creating it takes effect. There are two (2) applications here -

- (a) "Equity looks on that as done which ought to have been done" is being applied.
- (b) The doctrine of Conversion is applied.

There is difficulty between a power and a discretionary trust. This depends on the construction of the instrument. With both trusts and powers, it is necessary for the beneficiaries or the objects to be defined with sufficient certainty to enable the trustees or the donee to examine their functions and for the court to supervise them.

If there is a problem with a trust, you apply to the court, by Originating Summons, to determine the issues.

Classification of Trusts

Private trusts are divided into Expressed Trusts - One intentionally created by the creator of a trust. They are sub-divided into Executed and Executory Trusts.

Executed Trust - The testator or settler has marked out in appropriate technical expressions what interests are to be taken by all the beneficiaries.

Executory Trusts - The testator or settler has indicated to his trustees a scheme for a settlement.

Expressed Trusts - These must be completely constituted.

Implied Trusts - These are trusts where a court finds an intention to create a trust even though there is no proof of intention by evidence of expressed words. A trust is implied where the formalities necessary for the creation of a trust are lacking.

Resulting Trusts - These exist where property has been conveyed to another but the beneficial interest returns or results to the transferor. It is an implied trust even though it may arise automatically by operation of law.

Constructive Trusts - These arise by operation of law and the legal owner of the property holds on trust for the others.

The Requirements of an Expressed Trust

An intention to create a trust must be manifested. The evidence of writing as required for the creation of a trust of land and all testamentary trusts must be in writing, signed by the testator and attested by two (2) witnesses. See S.9 of the Wills Act 1837.

By S.53 (1) (b) of the Law of Property Act 1925, trusts in respect of land must be in writing.

See also S.40. Failure to comply with both renders the trust unenforceable and not void.

S.53 (1) (b) replaces S.7 of the Statute of Frauds 1677.

By S.53 (1) (c) of the Law of Property Act 1925, every disposition of an equitable interest must be in writing. In Vandervell v. IRC, the CA was of the view that the trustee company held the dividends of the trusts of the children's settlements.

Three reasons were given -

- 1) That the trustees used the funds of the children's settlement to exercise the option.
- 2) That the trustees and Vandervell showed an intention that shares should be held on the trust of that settlement.
- 3) Resulting Trust is attached to the option and not to the shares and the trust of the option ended with the exercise of the option.

It was held that neither the extinction of the trust of the option nor the creation of the new trust of the shares or the two viewed as one amounted to a disposition by Vandervell of an interest within S. 53 (1) (c).

To create a Testamentary Trust, S.9 of the Wills Act 1837 provides that the will should be in writing and attested in the presence of two (2) or more witnesses.

For a private trust to exist there must be three (3) certainties present; Certainty of Intention, Certainty of Subject-Matter and Certainty of Objects, per Lord Langdale in Knight v. Knight.

On the intention of the testator, the nature and _____ of the gift is important. This can be compared to Precatory Trusts where precatory words are used where a gift to which certain words attached fails to create a trust, then the gift takes effect as an absolute gift. If the intention is to establish a trust but the beneficiaries are unable to take then a Resulting Trust arises.

On the issue of subject-matter, the interest in land, whether in possession or remainder or reversion, chattel, money, chose in action or debt.

On beneficiaries (objects), they must be ascertainable. On the future interests, beneficiaries must be ascertained within the perpetuity period. With _____ trusts, you must ascertain all of the beneficiaries otherwise the trust is void.

With Discretionary Trusts, the HL, in **McPhail v. Doulton**, held that the test is "can it be said with certainty that any individual is or is not a member of a class?"

A Fixed Trust is one in which the share or interest of the beneficiaries is specified in the instrument.

A Discretionary Trust provides discretion to the trustees in selecting beneficiaries. For example, dependents and relatives - are they certain? How do you qualify as a dependent or relative?

In **Re Baden's Deed Trusts (No 2)**, the court held that there is a difference between conceptual uncertainty and evidential difficulties.

Transfers

A transfer to the trustee must accord with the rules applicable to the property concerned. Legal estates in land must be transferred by deed. Shares must be transferred by the appropriate form of transfer. Equitable interests and copyrights must be transferred by writing. Chattels, by a deed of gift or an intention to give coupled with a delivery of possession. A bill of exchange must be transferred by endorsement. In **Milroy v. Lord**, it was held that the correct transfer for an equitable interest is vital to create a trust of that equitable interest. It must be in writing.

Legal Title to Shares

A legal title to shares is transferable by a written document signed by the transferor and followed by registration in the share register of the company. If the transaction is for consideration, the purchaser becomes the

equitable owner of the shares from the date of the execution of the document of transfer and is entitled to dividends declared after that date.

In a private company, transfer is restricted and the company's articles provide that directors shall have the power at their discretion to refuse to register the transfer. If they refuse, under Milroy v. Lord, the trust will be incompletely constituted and a nullity.

Exception to the rule that "Equity will not assist a Volunteer"

The Rule in Strong v. Bird, (1874); B, Mrs. Bird, borrowed one thousand one hundred pounds from A's stepmother. She lived in his house, paying 212 Pounds 10 Shillings a quarter for board. He had agreed to deduct 100 Pounds from each quarter's payment. A died four years later and she continued payment. B was appointed her sole executor and proved the will. A's next-of-kin claimed the balance of the debt. It was held that the appointment of B as executor released the debt.

Donatio Mortis Causa

A donatio mortis causa is a gift made *inter vivos* which is conditional upon and which takes effect upon death. There are three essential elements for it to exist as stated by Lord Russell CJ in the case of Cain v. Moon; he stated *inter alia* that the gift must be in contemplation of death. Also, the subject matter of the gift must have been delivered to the donee. And the gift must be made in circumstances as to show that the property is to revert to the donor if he should recover.

Secret Trust

The terms of a secret trust are not expressed in a form which complies with the formal requirements of S.9 of the Wills Act 1837. What should be done when an intended trustee fraudulently shelters behind provisions of statute? Equity will not permit a statute to be a cloak for fraud. All courts must obey a statute.

The question is whether equity acting in personam against the fraudulent party prevents the fraud without disregarding the statute. For example, A conveys land to B on an oral trust for C. B will be compelled to hold on trust for C.

To create secret trusts, the testator will usually arrange to leave a legacy to a trusted friend who undertakes to hold it upon certain trusts or he may give it to him to be held upon such trusts as have been declared to him.

In **Blackwell v. Blackwell**, the enforcement of a half-secret trust was justified by saying that the intention of the testator was clear and that it was communicated to and acquiesced in by the legatee.

To justify enforcement of a secret trust, the trust must have been declared *inter vivos* and it is constituted by the testamentary gift to the legatee. If a testator declares to the legatee that he is to hold legacy on trust but does not disclose the terms of the trust before his death, the legatee will hold on resulting trust for the estate.

A testator must communicate not only the trust and its terms but the identity of the trust. The type of property etc. must be communicated before your death. In **Re Collins Cooper**, a secret trust may impose an obligation not only to hold on trust for a beneficiary on the testator's death but also an obligation to make provisions for an intended beneficiary after the legatee's death.

In **Ottaway v. Norman**, a fully-secret trust of land was held valid on parol evidence. In this case, the trust seems to have been treated as constructive rather than express, but there was no discussion of this point, and no reference was made to any possible requirement of writing. However, even if a secret trust is express, it is arguable that it should be enforced notwithstanding the absence of writing by an application of the maxim that "equity will not permit a statute to be used as an instrument of fraud".

There is a difference between a tenancy-in-common and a joint tenancy half-secret trust. In **Blackwell v. Blackwell**, the testator _____ for purposes indicated by me to them. The HL enforced the trust. The _____ was communicated before the will and was stated to have been so communicated.

The primary rule is the rule that evidence as to the alleged half-secret trust is inadmissible if it contradicts the terms of the will. Thus in **Re Keen**, the testator bequeathed 10,000 Pounds to X and Y "to be held upon trust and disposed of by them among such person, persons or charities as may be notified by me to them or either of them during my lifetime". As a matter of construction it was held that the will referred to a future notification, and the court held that evidence of a prior notification was inadmissible as it would be inconsistent with the express terms of the will.

Resulting Trusts

This is a situation where a transferee is required by equity to hold property on trust for the transferor or for the person who provided the purchase money for the transfer. The beneficial interest results or comes back to the transferor or to the party who makes the payment.

Resulting trusts are not subject to the rules of expressed trusts but they are subject to the rule against perpetuities.

Resulting trusts arise in the following situations -

1) Where the trust is implied where A transfers to B. In circumstances where it is clear from the acts or statements of the parties that A intended that B should hold on trust for him, B would hold on resulting trust.

In **Hodgson v. Marks**, the plaintiff had transferred a house to one Evans, it being orally agreed between her and Evans that the house was to remain hers though in Evans' name. At first instance, no attempt was made to rely on S. 53 (2), which excludes from the operation of S. 53 (1) resulting, implied and constructive trusts. In the CA, the actual decision was on the basis of S. 53 (2), but the court seems to have taken the same view as Ungood-Thomas J on the point being discussed for it was observed: "Quite plainly, Mr. Evans could not have placed any reliance on S. 53, for that would have been to use the section as an instrument of fraud".

A resulting trust arises for the grantor of any part of the beneficial interest not disposed of. It also arises in a voluntary conveyance. The conveyance to a stranger will, in some circumstances, give rise to a resulting

trust to the transferor. Also where the purchase money is held on resulting trust.

_____ but some or all of the purchase money is provided by B. Or where _____ jointly but the purchase price is provided _____. It can also arise in situations to arrive at a just result.

Where it would be in the interest of justice and it requires that the transferor should hold the property on trust for the transferor. For example, if transfer is obtained by fraud, you hold the transfer on trust, as in the case of Banister v. Banister.

A resulting trust could also arise where an express trust fails. In the case of Re Ames Settlement, (1946), it was held that property was held on resulting trust for the executor of the _____.

It can also arise when failure to provide _____ leaves the beneficial ownership incomplete. The _____ arises when a gift is anonymous and there are many beneficiaries as in Re Gillingham Bus Disaster fund, where it was held that a resulting trust arose.

A resulting trust can also arise for the members of a society as in the case of Re Printers and Transferors Society, (1899), where it was held that a resulting trust arose in favor of those who had subscribed to the fund and the money was divisible amongst the existing members at the time of the dissolution. The same view was expressed in Re Hobourn Aero components Ltd's Air Raid Distress Fund, that if moneys are paid on the basis of a contract, then no resulting trust can arise.

This is seen in Re West Sussex Constabularies Widows children and Benevolent fund Trust, where it was held that the fund was held *bona vacantia*.

Where the property is conveyed to persons in circumstances in which they are intended to take as trustees, then if no beneficial interests are declared, they will hold on resulting trust for the grantor as where a transfer was made to a nominee.

It is important to remember that a resulting trust is one which the testator never intended but is as a result of not being clear in his _____ or the beneficiaries are not certain.

The Presumption of Advancement

This presumption arises where certain relationships exist in situations where the donor or purchaser is obligated to support or provide for the person advanced. It arises if the person to whom a voluntary conveyance is made is the wife or the child of the donor or someone in *loco parentis*. The presumption can be rebutted by evidence that the donor intended to keep the beneficial interest for himself. In situations of husband and wife, the presumption applies. See **Pettitt v. Pettitt** and also **Tinker v. Tinker**.

The presumption can be rebutted by evidence; **Heseltine v. Heseltine**.

The presumption also arises in the case of father and child, especially so in the case of a legitimate child; **Re Roberts**, (1946) and **B v. B**, (1976). The position is not so clear in the case of grandparents, aunts and uncles etc.

In matrimonial cases, the question is the contribution of each spouse and whether each spouse had a share. A house was conveyed to the husband who will prima facie be the owner of the whole of the beneficial interest as seen in **Gissing v. Gissing**, per Viscount Dilhorne.

But a wife may claim a share of the beneficial interest if there is an express contract or a trust in her favor, evidenced by writing, or she may rely upon a resulting trust arising in her favor by means of contributions in money's worth or upon an agreement based upon evidence of her husband's intentions.

The presumption of advancement arises when a wife makes a contribution to the purchase of the property. If the purchase price is equal, then a joint tenancy arises in her favor. If it is unequal, then they become tenants-in-common. The payment must be in money or money's worth but where contribution to the family's expenses will not suffice. Recent CA cases suggest that indirect contribution will be enough to find an inference of an agreement to share; **Davis v. Vale**. See also **Hazel v. Hazel**.

Constructive Trusts

This arises by operation of law and not by reason of the intention of the parties, whether expressed or implied. The principle is that where a person who holds property in circumstances in which in equity and good conscience should be held or enjoyed by another, he will be compelled to hold the property on trust for that other. This is applied where the court desires to impose a trust and no other suitable category is available.

A constructive trustee does not have the same duties as a trustee. For example, in the case of investments, if a person purchases land with constructive but not with actual notice of the trust, he will take as a constructive trustee.

A trustee who obtains a benefit for himself in breach of trust may be compelled to hold, on constructive trust, the specific property which he wrongly obtained. In certain cases, a constructive trust is regarded as a remedial rather than substantive institution. It becomes one of the equitable proprietary remedies. It prevents unjust enrichment by the constructive trustee; **Keech v. Sandford**; a trustee took a lease for his own benefit and it was held that the trustee must hold the lease on trust for the minor.

The principle is that a person in a fiduciary position, such as a trustee, may not make use of his position to gain a benefit for himself. The liability imposed upon him is that any person, who receives into his hands trust moneys, not being a purchaser for value without notice, becomes a trustee of them. Liability can arise where he does not know but ought to know; that is, he is deemed to have constructive knowledge.

On agents as constructive trustees, see the case of **Mora v. Brown**, where Bennet J. said that an agent in possession of money which he knows to be trust money, so long as he acts honestly, is not accountable to the beneficiaries interested in the trust money unless he intermeddles in the trust by doing acts which are characteristic of a trustee and outside the duties of an agent.

An agent or other fiduciary may be liable to make good the loss to a trust without the trust property being vested in him and without him purporting to act as trustee, as where an agent fraudulently participates with a trustee in a breach of trust.

The agent must have knowledge of the breach and the test of liability is that of actual participation in any fraudulent conduct of the trustee to the injury of the beneficiary and assisting with knowledge in a dishonest and fraudulent design on the part of the trustee.

Mutual Wills

This is where a husband and wife may agree that on the death of the first to die, all of their property shall be enjoyed by the survivor and that after the survivor's death, by nominated beneficiaries, they may make mutual wills to that effect. It can be inferred from _____.

If the agreement is broken by the first party to die, the estate will be liable in damages to the survivor. If the survivor of an agreement to make a mutual will destroys his will, he will die intestate. If he makes a new will, the later one will be admitted to probate.

There are three (3) possibilities when the trust can arise -

- 1) When the agreement was made.
- 2) When the first testator died.
- 3) When the survivor dies.

It seems that the trust arises on the death of the first person to die.

There is also a fourth situation when the trust arises; where the survivor receives the benefit under the first will.

When property is subject to a trust, anyone who takes the property does so subject to the trust unless he can sustain the onus of proving that he was a bona fide purchaser of the legal estate for value without notice.

A purchaser of a chattel under a contract induced by fraud takes a voidable title and he can pass a valid title to a bona fide purchaser for value without notice.

There is a new model of constructive trust which has arisen over the years and the principle is that it may be imposed regardless of established legal rules in order to reach the result required by equity, justice and good conscience. We can see that applied in the case of **Hussey v. Palmer**, where the court held that a constructive trust is a trust imposed by law whenever justice and good conscience require it.

It is a liberal process founded on large principles of equity. It is an equitable remedy by which the courts can enable an aggrieved party to obtain restitution. This new model of constructive trust opens up the possibility of finding a constructive trust in any situation in which the established rules lead to a result inconsistent with equity, justice and good conscience. In the case of **Eves v. Eves**, (1975), the parties were not married. In a strict sense, she had no claim upon him whatsoever but the court held that it would be most inequitable for him to deny her a share in the house. The law will impute or impose a constructive trust by which he was to hold it in trust for both of them. She was entitled to a quarter share of the property.

In **Heseltine v. Heseltine**, the CA held that the husband held sums of money on constructive trust for his wife.

In **Re Sharpe (a bankrupt)**, Mrs. Johnson was held to have a right as against the bankrupt to remain in occupation while the loan was outstanding and an interest by way of constructive trust against the trustee. The courts, in these cases, are involving the constructive trust equitable remedy to do justice, *inter partes*.

Purpose Trust

The question is whether a trust is for persons and purposes. For example, a trust for the education of children of X can be construed as a trust for which the children of X are the beneficiaries. Grant MR in the case of **Morris v. Bishop of Durham**, stated that every other trust I.e. non-

charitable trust must have a definite object; specified beneficiaries. There must be someone for whom the court can decree specific performance.

A trust is an obligation but you cannot have a trust unless there is a correlative right in someone else to enforce it. This is voidable unless there are human beneficiaries capable of enforcing the trust. Non-charitable purpose trusts are only valid if the purposes are expressed with sufficient certainty to enable the court to control the performance of the trust. The test for specific purposes like feeding the testator's animals or maintaining a tomb or monument is valid.

A charitable trust may last forever. A non-charitable trust is void if it is to continue beyond the perpetuity period. Perpetual non-charitable purpose trusts would conflict with the policy of the perpetuity rule which is the prevention of the tying up of property for too long a period. In Re Hooper, the gift was upheld for the period of 21 years. The court held that after 21 years, it goes. But in Re Endacott, the CA held that the gift is void. The trust, though specific, in the sense that it indicated a purpose capable of expression but it was of far too wide and uncertain a nature to qualify within the class of cases cited. It shows the strict approach to purpose trusts.

A trust for masses could be valid. Purpose trusts have failed under the beneficiary principle on the ground of uncertainty. For unincorporated associations, property may be owned beneficially by the members either under a trust or under the members' contractual rights or it may be held upon trust for the purposes of the association.

Charitable Trusts

Charitable purposes are the relief of poverty, advancement of education and religion and other purposes beneficial to the community. To earn a concession as a charity, the trust must be of a public nature or benefit to the public and not merely to private individuals.

Charitable trusts are purpose and public trusts. Though the purposes of the trust must be solely charitable, the objects need not be certain. Once a gift

is charitable, the trust will continue even if the purposes become impossible of fulfillment; the property will be applied Cy-pres.

Lord Macnaghten in Income Tax Special Purposes Commrs. v. Pemsel, defined charities into four groups; trusts for the relief of poverty, education, religion and other purposes beneficial to the community.

What is poverty? It does not mean destitution. It may mean persons who have to go short; a matter of degree. Persons may need help; they could be victims of disaster and persons of limited means. It must not cover just specified individuals.

Advancement of Education - It could include the maintenance of learning, scholars of universities and it covers worthwhile instruction or cultural advancement. There must be sharing, teaching or dissemination of information for educational purposes; some way of knowing that the public benefits. It could include medical and scientific research and the research must be of educational value to the researcher. But a trust for artistic purposes is not charitable.

Sports could be included as education but sports out of educational facilities and services are not charitable. An educational institution cannot be charitable if operated for profit. A private school is a charity if it does not operate for profit.

The Advancement of Religion - Religion requires a spiritual belief, a faith, and recognition of some higher unseen power which is entitled to worship. It may include morality or a recommended way of life. The trust must be for the advancement of religion and it includes the promotion of spiritual teachings in a wide sense. Trusts for Roman Catholics, Unitarians, Jewish religions, Baptists and Methodists have all been accepted. It will also include the Islamic faith.

Other Purposes Beneficial to the Community - You must show that selected purposes are beneficial. Not every object of public general utility must necessarily be a charity. It must be beneficial as regards the law of charity. The courts will consider all the evidence available. Trusts for the relief of the sick and hospitals are valid. Trusts for the relief of the impotent, aged and poor people are also valid.

A gift for recreational grants for the public is generally upheld as charitable. In **IRC v. Baddeley**, land was conveyed for the social and physical well-being of persons resident in West Ham and Leighton. The HL held that the purposes were not exclusively charitable because of the inclusion of social purposes and also that the requirement of public benefit was not satisfied.

Trusts for animals are generally upheld but not for specific animals. Gifts for agriculture, the preservation of natural amenities and environmental objects are charitable.

For public benefit, you ought to distinguish between a gift to a group of persons and a gift to a class. A gift to relations who are poor or in special need or in needy circumstances is valid. The court is of the view that the trust will only be charitable if it is for the benefit of the community or an appreciable important class of the community. In the case of **Oppenheim v. Tobacco Securities Trust Co Ltd**, the trust failed and Lord Simmons said, "To constitute a section of the community, possible beneficiaries must not be numerically negligible and secondly, that the quality which distinguishes them from members of the community must be a quality which does not depend on their relationship to a particular individual.

The notion of public benefit in religious trust is similar to that in education. In **Gilmour v. Coats**, the HL held that the purposes were not charitable because they lacked the necessary public benefit. It is a question of degree and it cannot be by itself decisive of the question whether the trust is a charity. Much depends on the purpose of the trust. The charitable nature of a trust does not affect the status of the trustees.

In **Re Rumball**, a gift to a bishop for the time being of the diocese of the Windward Islands to be used by him as he thinks fit in his diocese was upheld as charitable. But in **Farley v. Westminster Bank**, a gift to a vicar for parish work was held as invalid.

In **Re Coxen**, a substantial gift to a charity included provision for an annual dinner for the trustees was held charitable as being ancillary to the better administration of the charity.

In London Hospital Medical College v. IRC, a student union was held to be a charitable trust where its predominant object was to further the purposes of the college.

Where words in a trust are applied partly for charitable and partly for non-charitable purposes, the courts will apply a doctrine of severance separating the good from the bad and allow the former to stand and the latter to fail.

On severance, see the case of Salisbury v. Denton, where a testator bequeathed funds to his widow to be applied by her in her will in part towards the foundation of a charity school and as to the rents, towards the benefit of the testator's relatives. The widow died without making any appointment. It was held that relying on the maxim that 'Equality is Equity', the court will divide the fund into two halves.

The Cy-Pres Doctrine

This doctrine, where it applies, enables the court to make a scheme for the application of the property for other charitable purposes as near as possible to those intended by the donor; cy-pres. This doctrine was available only where it was impossible or impracticable to carry out the purposes of the trust. However, a distinction is to be made between the initial failure of a charitable trust and a failure after the time when the trust has since been in operation. Cy-pres can be easily applicable in the latter case. In the case of initial failure, the gift will lapse unless there is, on the proper construction of the instrument, a paramount intention to benefit a charity.

The court will apply Cy-pres where it finds a wider intent, a paramount or general charitable intention. In Re Rymer, a legacy of 5,000 Pounds 'to the rector for the time being of St. Thomas's Seminary for the education of priests in the diocese of Westminster for the purposes of such seminary'. At the time of the testator's death, the seminary had ceased to exist and the students had been transferred to another seminary in Birmingham. The CA held that the gift failed. It was a gift to a particular seminary. There was no wider intent.

In Re Harwood, it was held that where the gift was for a non-existent charity, the court found it easy to find a general charitable intent. In this case, there was no evidence that the Peace Society of Belfast had ever existed. But the court was able to find an intention to benefit societies who had as their object the promotion of peace and cy-pres was applied.

Cy-pres can be applied in favor of a specific charity which has ceased to have separate existence and has amalgamated with a similar charity by scheme or have been reconstituted under more effective trusts.

In Re Lysaght, though there was no general charitable intent but only an intent to found a particular medical studentship, a condition attached to the gift that would otherwise have led to the studentship not being initiated, could be deleted. Cy-pres is, thus, a remedy as well as a doctrine.

The width of a charitable intent becomes irrelevant the moment that a dedication to a charity takes effect. In Re Wright, the testator who died in 1933 provided for the foundation, on death, of a tenant-for-life, a convalescent home for impecunious gentle women. A tenant-for-life died in 1942. The CA held that 1933 was the crucial date. At that date, the scheme was practicable. Deduction to charity occurred and the possibility of a lapse or resulting trust was excluded. Cy-pres was available in 1942 irrespective of the width of the charitable intent. See S.13 of the Charities Act 1960.

Trustees: Capacity, Appointment, Removal, Retirement and Control of Trustees

A trustee is required to observe the highest standards of integrity and a reasonable standard of business efficiency in the management of the affairs of the trust. He is subjected to onerous personal liability if he fails to reach the standards set.

A distinction must be made between a trustee's duties and his powers or discretions.

A duty is an obligation which must be carried out. They are imperative and he must perform them with the utmost diligence. A power is discretionary; it

may be exercised or not. In exercising his power, the trustee must act honestly and must take, in managing trust affairs, all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own. For example, in investing, he must select the type of investment. Sections 1-9 of the Trustees Act 1893 gives the trustees power to invest. A trustee may disclaim his appointment by deed.

Powers of a Trustee to Invest - When Can a Trustee Invest?

By S.1, a trustee may, unless expressly forbidden by the instrument creating the trust, invest any trust funds in his hands.

By S.2, a trustee may invest in any of the securities mentioned in S.1, notwithstanding that they may be redeemable at a price exceeding the redemption value.

By S.3, a trustee may retain, until redemption, any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act.

S.5 provides for an enlargement of the trustee's express powers of investment. He shall be deemed always to have had this power to invest.

S.7 which is not applicable now, provides that the trustee may not convert under certain circumstances.

S.8 provides that a trustee should have the report on the value before giving out a loan on the property. He should get an independent surveyor; a person whom he should reasonably believe to be such a person capable of valuing the property; reasonable man test. The loan he gives must not exceed 2/3rds of the value of the property.

S.9 provides that where the trustee loses any money by improper investments, he will have to make good any loss advanced with interest.

Appointment of Trustees

S.10 of the Trustee Act 1893 provides that the first trustees will be trustees ordinarily appointed by the settler or the testator in the deed or will creating the trust.

The trustees hold as joint tenants and if one of the general trustees die, the survivors are the trustees; they and their successors retain the same powers and duties as the original trustees.

An original trustee is one whose appointment was made when the deed was prepared.

A substituted trustee comes in later for various reasons.

A non-resident trustee out of jurisdiction for more than 12 months is undesirable.

In the case of a death etc. the surviving trustee or persons who could nominate new trustees could apply/appoint another to replace the dead trustee or trustee who has gone away for 12 months etc. If the trust deed does not give you the power to appoint, you must go to the court.

On the death of a sole trustee, his personal representative could become trustee. If he dies intestate, the trust estate will vest pending the grant of administration. But the trust instrument may also include an express power to appoint.

As seen in S.10 (1) of the Trustee Act 1893 and S.36 (1) & (2); though not applicable, know it.

Beneficiaries must be *sui juris* (of age).

The Trustee Act gives statutory powers of appointment of trustees; usually, the surviving trustee or the continuing trustees do appoint.

By S.10 (2) (a), at least there should be two trustees and you can replace only the missing trustee. This differs in S.36 (6) of the Trustee Act 1925, where the number is increased to four trustees.

The court may appoint a trustee. The court has such power under S.25 (1) of the Trustee Act 1893.

S.25 (2) provides that as soon as you are given the position, you must and you will be held liable; property automatically becomes vested in you.

S.25 (3) states clearly that the court has no power to appoint an executor or administrator.

S.41 (1) of the Trustee Act 1925 gives a similar provision; the court has power to replace a trustee against his will. It has no jurisdiction to appoint a new trustee against the wishes of the persons who have a statutory power to appoint. Even in a case where an application has been made to wit by a majority of the beneficiaries.

In an appointment by the court, as in Re Tempest, the courts will consider 3 main factors -

- 1) The wishes of the beneficiaries.
- 2) The interests of all the beneficiaries.
- 3) The efficient administration of the trust.

A relative of one of the beneficiaries is not a desirable appointment. Also, the solicitor to the trust or to one of the beneficiaries is not desirable, as there might be conflict of duties when no other persons can be found to undertake the position.

Persons out of the jurisdiction are not appointed except where the beneficiaries are also out of the jurisdiction. In practice, it is common for the beneficiaries and other members of the beneficiaries' families and for solicitors to the beneficiaries to be appointed.

See also S.38 of the Settled Land Act 1882 and by S.39, where the court can appoint not fewer than two.

On the issue of the vesting of trust property, no matter the type of trustee, he has the power to vest trust property. His power is stipulated by S.26 (1) of the Trustee Act 1893 which provides, *inter alia*, that the court can make vesting orders as to land. See provisos A and B.

By S.27, the High Court may make orders as to the contingent rights of unborn persons.

By S.28, the High Court may make a vesting order in place of conveyance by an infant mortgagee.

By S.29, the High Court may make a vesting order in place of conveyance by heir, devisee of heir and/or personal representative of a mortgagee.

By S.30, the High Court may make a vesting order consequential on judgment for sale or mortgage of land.

S.31 is similar to sections 44-56 of the Trustee Act 1925. It provides that the High Court may make a vesting order consequential on judgment for specific performance.

The effects of such vesting order are seen in S.32; it may have the same effect as if the persons who before the appointment were trustees (if any) had duly executed all the proper conveyances of the land for such estate as the High Court directs etc.

By S.33, the High Court may, if it thinks fit, appoint a person to convey the land or release contingent right etc.

What must be noted is that a relative of one of the beneficiaries is not a desirable appointment. Also, a solicitor to the trust or to one of the beneficiaries is not desirable as these might be conflict of duties unless no other person can be found to undertake the position.

Persons out of the jurisdiction are not desirable except where the beneficiaries are also out of the jurisdiction.

In practice, it is common for solicitors to beneficiaries to be appointed.

By S.38 of the Settled Land Act 1882, trustees may be appointed by the court. The court may appoint the trustee on an application of the tenant-for-life.

By S.39 of the Settled Land Act, there should be two trustees and capital money will not be paid to less than two trustees. To avoid fraud, it is better to have a minimum of two trustees.

Retirement of Trustees

By retiring, a trustee is discharged of any further responsibilities or liabilities under the trust. He should not retire in the face of disputes amongst beneficiaries.

S.11 of the Trustee Act provides for retirement of trustees. It provides specifically that a trustee should ask for his retirement by deed. His colleagues could covenant by deed to his discharge, in which case, the property will be vested in the others.

A trustee shall also, by deed, be discharged in compliance with this legislation. This is similar to S.39 (1) of the Trustee Act 1925.

The court could also allow a trustee to retire when it is proper for him to do so. For instance, ill-health or when he travels outside the jurisdiction, as he cannot, then, administer the trust efficiently.

Removal of Trustees

The court has an inherent jurisdiction to remove a trustee compulsorily. Actual misconduct on his part need not be shown but the court must be satisfied that his continuance in office would be prejudicial to the due performance of the trust and so to the interest of the beneficiaries. A trustee can be removed where he's ignoring one of his recognized duties.

A trustee can also be removed where he sets up a rival business as he himself is put in a position where his duty and interest are bound to be in conflict. The court has a range of powers in removing a trustee. It can, during the proceedings, remove him if it considers such removal necessary for the preservation of the trust estate or for the welfare of the beneficiaries. Notwithstanding that such removal has not been expressly asked for by the pleadings.

The court considers three important issues, as laid down in the Tempest case, and the interest of the beneficiaries is paramount. If the trustee is not seeking their interest then the trustee must go. A trustee must act as a reasonable, prudent and diligent man and he must not be lethargic.

Trustees usually do not give reasons for their choice of selection in, for example, an investment. However, a court will always look into the exercise of their discretion if it appears to be wholly unreasonable. If fraud is proved or if the exercise of the discretion is shown to be capricious, the court will declare a trustee's decision as void.

Duties of a Trustee

A trustee must, upon appointment, acquaint himself with the terms of the trust and the state and details of the trust property. He must also check that the trust fund is invested in accordance with provisions of the trust deed and that securities and any chattels are in proper custody.

A newly appointed trustee must make all reasonable inquiries to satisfy himself that nothing has been done by his predecessor and the continuing trustees which amount to a breach of trust.

S.10 (3) provides that as soon as he is appointed, he has the same powers etc. as his successor; he can act as if he was in the trust deed originally.

A trustee must regard his duty as one of safeguarding trust assets and that must be his continuing duty. On investments, he is to invest money in the purchase of anything from which interest or profit is expected.

A trustee must consider the interest of a tenant-for-life who is entitled to the income and also of the remainder-man who is interested in the capital.

Two Types of Investments

- 1) A Loan at a rate of interest.
- 2) Profit-making activity - A fixed investment can have value of a capital which does not fluctuate and there are fixed interest securities with fluctuating capital value.

A floating charge is a debenture which is an acknowledgement of indebtedness by a company and this is supported in practice by a charge upon the undertaking and assets of a company.

A trustee may be given wider power by the expressed term of the trust instrument to select investments or his selection may be left to investments authorized by the general law. Refer to sections 1-9 of the Trustee Act 1893.

A trustee could invest in equities. The rule governing investment is that trustees must avoid all risk to the capital of the fund and that the value of the currency will remain stable.

By S.16 of the Trustee Investment Act 1961, its object, generally, is to permit trustees to invest a portion of trust funds in equity.

The trustee's duty to invest was examined in Speight v. Gaunt: "As a general rule, a trustee sufficiently discharges his duty if he takes, in managing trust affairs, all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own".

In Leroyd v. Whitley, it was established that trustees are under a duty, not only to ensure that the chosen investments are authorized, but also that they are properly selected for the trust in accordance with the standard of a prudent business man. They are also to avoid all investments of that class which are attached with hazard.

The word "may" is generally used to give the trustee discretion, as in S.2.

The Speight case has put a burden on the trustee to act as a reasonable prudent man; the objective test.

S.5 wording is different from the previous ones; his powers are enlarged and he may invest in mortgages etc.

S.6 is similar in that he is given powers to invest, notwithstanding that the same mortgaged property has got charges.

S.8 provides for the situation where he is in breach but he will not be charged for a breach of trust. The reason why he will not be held liable for such a breach is if he acted with the reasonable man standard, relying on expert advice.

By S.6 of the Trustee Investment Act 1961 the trustee should have regard to the suitability of the investment proposed. He is required to have regard, both to the need for diversification of investments and to the stability of the trust, of the types of investments proposed and of each investment as an investment of that description.

A trustee should take expert advice before investing. In the case of **Bartlett v. Barclays Bank Trust Co. Ltd**, the bank was a trustee of the Bartlett Trust. The Board embarked upon speculative investments, one of which was a disaster because certain permission could not be obtained. The bank was held liable. It was not sufficient that they believed the directors to be competent and capable of running a profitable business. Their duty was to conduct the business of the trust with the same care as an ordinary prudent man of business would extend to his own affairs. As they were moving to speculative investments, they should get the fullest information on the conduct of the business and not merely be content with the supply of information which they received as share holders. In **Re Benjamin**, a procedure was known as the Benjamin Order and its purpose was to protect those who were responsible for distributing the assets. If those entitled, who have received nothing under the distribution, eventually come forward to establish their own claim, they may still be able to proceed within the period of limitation against the person wrongly paid or against the property itself. This order will only be made after all practicable enquiries have been instituted.

S.21 of the Settled Land Act 1882 gives a tenant-for-life power to invest capital money. There are 11 ways in the section. There are similar powers of investment in numbers 2,3,4,5 etc. This is similar to what the trustee can do under a mortgage.

By S.33 of the Settled Land Act, money in the hands of trustees in a settlement may be invested at the option of the tenant for life. Provided when under a settlement after _____ when money is in the

hands of trustees, then in addition to his general powers of dealing _____ at the option of the tenant-for-life, must now apply the same as capital money under this Act.

By S.34, moneys from a lease or reversion can be assimilated or invested.

Trustees may, notwithstanding anything in the Act, require anything to be laid out etc.

All the profits accruing from the reversionary estate are assimilated and invested.

By S.45 of the Act, the tenant-for-life gives notice to trustees when he intends to sell, exchange, partition, lease or mortgage; he should give notice to his trustees.

Duties of Trustees to Beneficiaries

A trustee is under a duty to act impartially between the tenant-for-life and the remainder man. This duty applies to his selection of investments and rules governing investments and he should strike a balance between the provision of income for the tenant-for-life and the provision of capital for the remainder man.

The tenant-for-life takes the income and the remainder man's interest is the capital. In Howe v. Earl of Dartmouth, the issue concerned the duty to convert authorized investments. The rule establishes that, subject to a contrary provision in the will, there is a duty to convert where residuary personalty is settled by will in favor of persons who are to enjoy it in succession. Trustees should convert all such parts of it as are of a wasting of future or reversionary nature or consist of unauthorized securities into property of a permanent or _____-bearing character.

This rule is of limited application. it does not apply to property settled inter vivos nor to specific residuary bequests nor to freehold land, nor to leaseholds held for a term exceeding 60 years, for these are now authorized investments.

The tenant-for-life's interest is fixed at 4%. If interest received is less than 4%, the balance should be paid up out of subsequent income or from the proceeds of the unauthorized investments when sold. This rule shows the duties of trustees to beneficiaries.

An express trust to convert normally carries with it the duty to apportion the income received pending conversion.

The Rule in Howe v. Earl of Dartmouth applies to residuary leaseholds where there is no express trust to convert. The Rule excludes the duty to apportion. It applies to sale and re-investments.

The Rule in Al Hussein v. Withheld strikes a balance between the tenant-for-life and the remainder man in respect of the payment of the debt of an estate. It provides that the tenant-for-life should make a contribution where an authorized mortgage security is sold and the proceeds are insufficient to satisfy the principal and interest in full. It is necessary to determine the way in which the loss is to be shared between the life tenant and the remainder man. The sum apportioned must be shared between both in the proportion which the amount due for arrears of interest is to the amount due in respect of the principal.

Powers of Trustees

Trustees may exercise the powers given to them by the trust instrument or by statute. A power is distinguished from a duty in that its exercise is permissive but is discretionary and not compulsory. See S.1 of the Settled Land Act 1925.

Land is held in fee simple absolutely entitled under a settlement or a trust for sale. Settled land is vested in the tenant-for-life upon the trust of the settlement. Of course, the tenant-for-life can sell; S.38 of the Settled Land Act 1925.

S.2 (10) (1) of the Settled Land Act 1882 provides that land includes incorporeal hereditaments and undivided share in land. Whereas, income includes rents and profits and possession includes receipt of income.

A tenant-for-life has the power to sell chattels settled to devalue with settled land with the consent of the court and purchase money paid to the trustees as capital money. See sections 3 & 4 of the Settled Land Act 1882.

S.3 specifically gives him the power to sell.

S.4 gives him the power of enfranchisement and partition.

By S.4 and S.22 of the Settled Land Act 1882, provision is made for the investment of capital money arising under the Act. This could be done by the trustees or by the court.

By S.22, regulations are provided in relation to investment, devolution and income of all securities.

Trustees are under a duty to obtain the best price for the beneficiaries. If they fail to do so, the beneficiaries may ask the court for an injunction restraining the sale.

S.13 of the Trustee Act 1893 gives the trustee the power to sell. He can purchase and sell by public auction or private treaty by contract subject to title.

He must consider any other matter he deems fit before selling. He also has the power to vary any contract or to bind any auction or to rescind any contract for sale and to re-sell without being answerable for the loss.

By S.14 of the Trustee Act 1893, it is provided that a beneficiary may not impeach a sale unless it is unnecessarily deprecatory. He must prove breach by the trustee. The sale will be impeached by a beneficiary unless he can prove that the sale was unnecessarily deprecatory and that the consideration was inadequate.

After a trustee has sold and executed a conveyance, the sale may not be impeached against the purchaser upon the ground that the sale was unnecessarily deprecatory when it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

It further provides that no purchaser upon any sale by trustee shall be at liberty to make any objection to the title upon any of the forgoing. By S.17 of the 1893 Act, he has the power to appoint a solicitor or banker to issue a receipt. Compare that to S.14 of the Trustee Act 1925, which gives a trustee the power to issue receipts.

By S.20 of the Trustee Act 1893, a trustee is given power himself to issue receipts.

See also S.40 of the Settled Land Act 1882 which also gives trustees of a settlement the power to issue receipts. This Act also specifically makes provision for the tenant-for-life.

By S.19 of the Trustee Act 1925, he is given the power to insure but this does not apply where the beneficiaries are absolutely entitled and *sui juris* (of the age of maturity).

By S.18 of the Trustee Act 1893, a trustee has power to insure a building. He could do so against damage by fire of the building or other insurable property to an amount not more than 3/4ths of the value of the building. He could pay a premium out of profits without the permission of those entitled wholly or partly to the income.