

Trusts & Equity
Fall Term 2018

Lecture Notes – No. 5

CONSTITUTION OF TRUSTS (II)

Direct Transfer and Imperfect Gifts:

Equity will not perfect an imperfect gift:

The court will not order a trust constituted as a curative measure to save a failed trust.

Equity will not assist a volunteer:

As a general rule, the court will not order equitable remedies to cure an otherwise failed trust indirectly.

In *Milroy v Lord (1862)*, 45 ER 1185 (Eng. C.A.), the settlor (Medley) owned shares in a bank (The Louisiana Bank) which he purported to transfer to Lord, who was to hold them on trust for Milroy. Lord was the settlor's agent under a Power of Attorney; he never made the transfer during the settlor's lifetime and paid the dividends to Milroy. When the settlor died, the share certificates were given to the settlor's executor. Milroy argued that Lord held under a valid trust for him; the executor argued that the trust never arose because the shares were never actually transferred to Lord – the company registry never showed a change of ownership of the shares from the settlor to Lord and such a change in registration was necessary for any assignment to be valid in law.

Turner LJ described **the basic rule**: there is no equity to perfect an imperfect gift, and there is also no equity for the court to order complete constitution of a trust in a mode other than that contemplated by S – the settlor must do everything that he can to constitute the trust. **“If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be effectual by being converted into a perfect trust.”**

Re Rose
[1952] Ch 499

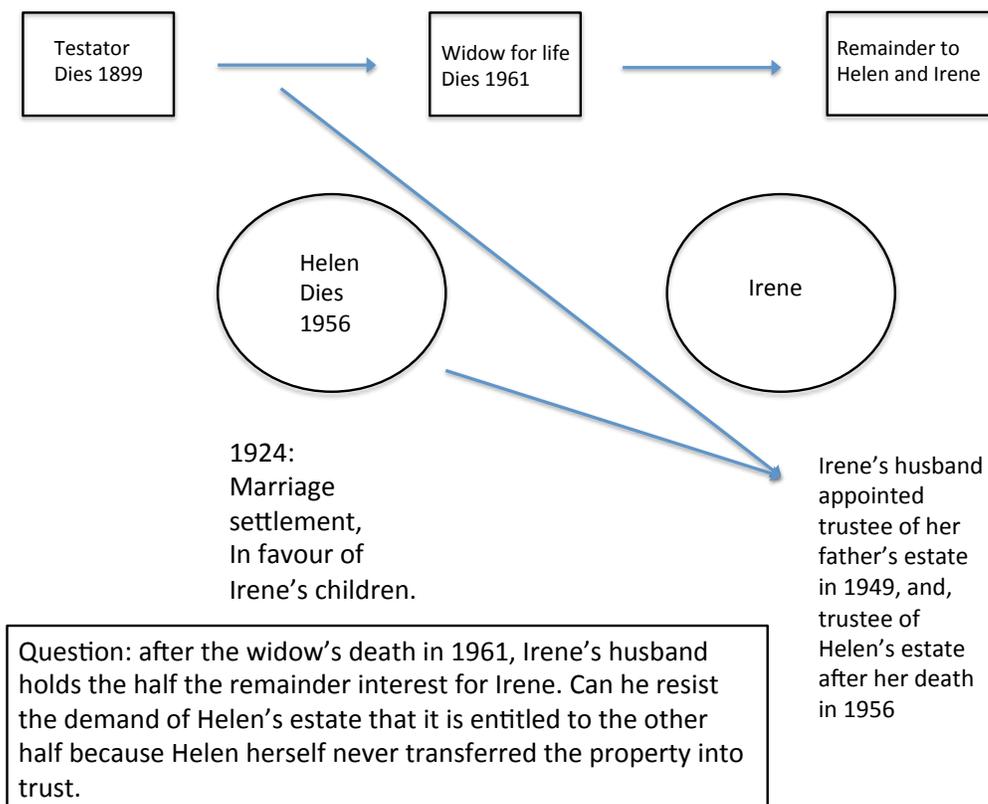
The court modified the rigidity of the rule in *Milroy v Lord* such that where the transfer is not yet complete but where S has done everything that he or she can, S holds for B pending completion. This softened a rigid approach at the time based on dicta in *Milroy v Lord* itself and hence the two cases sit well together.

Here the settlor held two blocks of shares and transferred them to a trustee under a deed of settlement of a trust. The transfer met the company's regulations for change in share ownership. The date of the transfer of ownership was made by the company 3 months later. The settlor died 5 years later. A tax was payable on voluntary disposition of property made within 5 years of death. The date of the transfer on the company's registry fell within

that 5 year period. Was the transfer effective on the date of the delivery of the share assignment form to the company (and thus outside the tax window) or on the date of the change on the registry (and thus tax was payable). Held: No tax liability as the transfer was effective on the date on which the settlor did all that he could to give effect to the trust.

Indirect Transfer – Third Parties

Re Ralli's Will Trusts [1964] Ch 288



Here the testator left his residuary estate to his wife for life, remainder to his two daughters (Helen and Irene). Helen made a 'marriage settlement' under which she promised to settle property that she held and would obtain in future for Irene's children.

1892: Testator's Will executed.

1899: Testator dies – to wife for life, remainder to two daughters absolutely.

1924: Helen's marriage settlement in favour of Irene's children.

1946: Irene's husband appointed trustee of marriage settlement, and, trustee of testator's estate.

1956: Helen died.

1961: Testator's widow died.

In 1961, then, the trustee of the testator's estate was Irene's husband. He held the title to the trust property. Helen was now dead. Helen's estate claimed a half-share of the remainder of the testator's estate arguing that the marriage settlement had failed given that she had never herself transferred property to the trustee of her marriage settlement, and thus her share ought to revert to her estate.

It was held that once the trustee has the property – under either trust – the obligations from both trusts could be enforced. Equity here was not needed to vest the trust property in the trustee, however equity will enforce the trust however as it is fully constituted – if there was improper conduct in constitution, the result may be different. In any case, that is not the case here and the terms of the marriage settlement were binding on the trustee.

Buckley J:

In my judgment **the circumstance that the plaintiff holds the fund because he was appointed a trustee of the will is irrelevant. He is at law the owner of the fund, and the means by which he became so have no effect upon the quality of his legal ownership. The question is: For whom, if anyone, does he hold the fund in equity?** In other words, who can successfully assert an equity against him disentitling him to stand upon his legal right? It seems to me to be indisputable that Helen, if she were alive, could not do so, for she has solemnly covenanted under seal to assign the fund to the plaintiff, and the defendants can stand in no better position. It is, of course, true that the object of the covenant was not that the plaintiff should retain the property for his own benefit, but that he should hold it on the trusts of the settlement. It is also true that, if it were necessary to enforce performance of the covenant, equity would not assist the beneficiaries under the settlement, because they are mere volunteers; and that for the same reason the plaintiff, as trustee of the settlement, would not be bound to enforce the covenant and would not be constrained by the court to do so, and indeed, it seems, might be constrained by the court not to do so. As matters stand, however, there is no occasion to invoke the assistance of equity to enforce the performance of the covenant. It is for the defendants to invoke the assistance of equity to make good their claim to the fund. To do so successfully they must show that the plaintiff cannot conscientiously withhold it from them. When they seek to do this, he can point to the covenant which, in my judgment, relieves him from any fiduciary obligation he would otherwise owe to the defendants as Helen's representatives. In so doing the plaintiff is not seeking to enforce an equitable remedy against the defendants on behalf of persons who could not enforce such a remedy

themselves: he is relying upon the combined effect of his legal ownership of the fund and his rights under the covenant. That an action on the covenant might be statute-barred is irrelevant, for there is no occasion for such an action.