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EQUITY AND TRUST

English Version

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PRELIMINARY MATTERS: DEFINITION OF EQUITY

It should be said at once that the definition of equity is not as simple as it may appear. It may be difficult to give a one-shot definition that will really explore all the contours of the concept. In effect equity may be defined in a broad sense, in a narrow and legal sense as well as in a technical context.

- **In the broad sense**, equity may be defined by reference to the Encyclopaedia Britannica. This document gives us synonyms or defines equity by likening it to the notions of fairness, justice or again kindness and moral rectitude. This conforms to the etymological definition which provides the definition of equity from the origin of the word. In this light, equity comes from a Latin word *aquitas* which may be understood to mean fairness.
- **In the narrow and legal context**, the definition of equity may be obtained from statements like that of Lord Cowper in the famous case of *Dudley and Ward V. Lady Dudley*. In that case the judge had this to say about equity: *"now equity is no part of the law, but a moral virtue which qualifies, moderate and reforms the rigour, hardness and edge of the law and is a universal truth: it does also assist the law where it is defective and weaken the constitution (which is the life of the law) and defends the law from crafty evasions, delusions and new subtleties invented and contrived to evade and delude the common law whereby such as have undoubted rights been made remedies, and this is the office of equity: to support and protect the common law from shifts and crafty contrivances against the justice of the law: Equity therefore does not destroy the law, nor creates it, but assist it"*.
- **From a technical point of view** and in conformity with the above definition by Lord Cowper, equity may be seen as the coat that comes to save the law from the harshness of the winds of insufficiency, the flesh that beefs up the skeletal nature of the law or again, it is the *oil that lubricates the crucking medieval machinery of the common law*. Equity therefore serves a technical function of supportive engine to the law, not an alternative to it.

The above definitions thus presented, it may be comfortable to turn attention now to the weaknesses the deficiencies of the common law that render the arrival of equity unavoidable and more or less not unexpected. So up-next is a highlight of the weaknesses of common law and the origin of equity in consequence (circumstances that lead to the birth of equity).

CHAPTER I: CIRCUMSTANCES THAT LED TO THE BIRTH OF EQUITY

In the first part of this section, we will see some of the rigours and deficiencies of the common law as it operated under the writ system, after which you will then see why and how equity comes to buttress these difficulties.

I. THE WEAKNESSES OF COMMON LAW LED TO THE BIRTH OF EQUITY**A- WEAKNESSES OF THE COMMON LAW (CL) UNDER THE WRIT SYSTEM**

In the first place, it is no news that England is originally a society marked with class stratification. The nobles were the richest and most influential while the bourgeoisie were the middle and working class under which the magistrates, teachers, lawyers and business men fell. In order to maintain his position, the judge who entertains a case brought by anyone of the lower class against the noble will only have to favour the noble who may ever use his position to influence the judge. Even in cases between nobles, one may be more influential than the other, the result is the same. So in this atmosphere of lack of judicial independence but favouritism and segregation, justice was considered only as a piece of commodity which could be bought and sold to the highest bidder. So the less privileged suffered this weakness of the CL.

Again, the CL procedure was very bureaucratic, tedious and lengthy. These characteristics added to the already costly nature of the proceedings. Not only were poor litigants unable to get justice, but those who could afford it were simply discouraged by the seemingly unending nature of proceedings. Another element that discouraged litigants is the fact that some times, even when all the hurdles in the procedure were undergone, at the end, the judgement that obtained was usually unsatisfactory or inappropriate.

In addition, CL under the writ system operated with the system of register. In effect, in order to trigger a civil action, one needed to purchase a writ. The issue was not only the purchase of a writ, but purchase the appropriate one that related to one's cause of action. ***This means that if the litigant did not find a writ appropriate to his cause of action and for which a remedy is available, then his case may go without remedy.*** All of this happened around the era of the Industrial Revolution during which new types of crimes or offences are committed but since the CL register had not made any provision for them and consequently no writ, these new categories of offences sometimes went unpunished. This is confirmed by the popular CL maxim "***ubi remedium ibi jus***" which means ***where there is a writ there is a remedy and logically therefore, where there is no writ there is no remedy, even if there is a wrong.***

In the light of the above, chaos in the legal system was inevitable and so something had to be done. It is therefore under these circumstances that equity come ***as assistance to the defective CL machinery.*** But the coming was not spontaneous; it was through a gradual and unconscious process (as some people hold) which needs to be discussed here under.

B- THE BIRTH OF EQUITY

It is worthwhile mentioning that after the battle of Hastings, ***the King declared himself owner of England and sovereign justiciar, that is the fountain (or all and all) of justice. This means that any case in which the parties do not find satisfaction in the court's judgement and have exhausted all the means of recourse can be brought to the King as last resort.*** This is how many litigants who found dissatisfaction in CL courts petitioned the King directly and on the basis of his conscience, his capacity to distinguish right from wrong, he passed judgement.

But it should also be said that the King, in his capacity as owner of England was a ***centralised administrator who did not share power, so not only was he a supreme judge but an administrator as well.*** Since he had to attend to administrative duties, the power of listening to such cases and passing judgement on the basis of conscience was delegated to the Lord Chancellor otherwise referred to as the "keeper of the king's conscience".

It is in the chancellor's office that cases of unsatisfied litigants were therefore entertained and no sooner, the officer gained the status of a kind of court. This gave the signal that a court or separate house is needed for this purpose since the cases keep crowding the office. No doubt, the Court of Chancery presided over by the Chancellor came to life. Decisions were therefore passed under the new category of remedy that comes from the conscience, not the text as in CL, and this is why the statement "***equity varies according to the length of each chancellor's foot***" soon received much popularity. The new way of administering justice thus on the basis of conscience. The procedure not being as difficult and tedious as under CL, justice was delivered in all fairness and equality.

This practice of rendering justice on the basis of conscience later gained its place as another branch of law having its own well defined principles and remedies, procedure and rights, all different from these of common law. Thus equity even gained codification sooner under the chancellorship of Lord Sterndale in the case of ***Isabella Property V. Edelman.*** It is in this light that justice in England was administered under two jurisdictions, equity and CL, wherein one (equity), by definition comes to assist and complete the other (Common Law). So harmony rather than conflict is expected, but conflict soon becomes unavoidable.

CHAPTER II: CONFLICT BETWEEN EQUITY AND COMMON LAW

I- THE CAUSES OF THE CONFLICT BETWEEN EQUITY AND COMMON LAW

To be brief and precise, the conflict may be explained in the prestige of equity and jealousy of CL judges on the one hand and the issue of struggle over injunctions and consequently struggle for supremacy on the other hand. ***Some have referred to this as the remote causes and the immediate causes.***

A- THE REMOTE CAUSES OF THE CONFLICT

No one may doubt the fact that equity came as a messiah in the dilapidating English legal system (***at that time***). Naturally, equity which came as an appendage to provide remedy for every situation or case to the extent that no sooner, many people preferred the court of chancery to the courts of CL. It is this wild obsession to provide remedy to all cases and to do justice that equity espoused the maxim "***equity will not suffer a wrong to be without a remedy***" as well as "***ubi jus ibi remedium***" which is a reversal of the CL maxim and this one means that ***where there is a right, there is a remedy.*** It just needs that the plaintiff should show the right infringed and equity will provide remedy.

This circumstance, together with the expediency (**timeliness or shortness**) of procedures in equity soon attracted for it much admiration from the litigants on the one hand and jealousy of the CL judges on the other. No doubt Coke LCJ in the case of ***Courtney V. Glanville*** warn that anyone who obtains judgement at common law on a particular case and takes the same case to equity as if on appeal for another judgement will be imprisoned summarily (**without trial**) for contempt of court decision under the statute of ***praemunire***. This notwithstanding, people will even continue to visit equity for some other reason which comes as the immediate cause of the conflict or the reason for its persistence.

B- THE IMMEDIATE CAUSE OF THE CONFLICT

It is already said here above that CL remedies at one point may be insufficient or completely inexistent. So when the CL remedy is inexistent or will not serve good justice in the circumstance, equity will provide a remedy usually contrary to that of CL but relating to the same subject. This obviously lead to inconsistency in the legal system due to contrary judgements in one and same case.

There also came the question of injunctions: ***which court had the competence to pass an injunction enforcing the decision of the other, CL courts or the chancery?*** Whichever way the answer goes, superiority follows, this means that the court to which this power was given was the superior one to the other. ***This is why CL conflicted with equity most of all not to allow this relatively new branch of law to prevail and override the old existing CL.*** So what was done to settle this struggle for supremacy? The attempt to settle the conflict is the next thing that follows.

II- ATTEMPT TO SETTLE THE CONFLICT AND THE REASON FOR ITS PERSISTENCE

Logically, we refer to it as an attempt (futile palliative) because the solution did not really end the conflict. So here under, we will see the attempted solution and on what basis it was made (paragraph A) and the reasons why the conflict continued or the proposed solution was resisted (paragraph B).

A- THE ATTEMPT MADE IN THE EARL OF OXFORD CASE

Because of the growing chaos in the legal system that reached its brim or climax in ***The Earl of Oxford case (1615)***, ***James I (1603-1625)*** called for the heads of CL (***Coke LCJ***) and Chancery (***Lord Ellesmer***) departments to present the situation to the Attorney General (AG) who then was ***Sir Francis Bacon*** for his opinion. Upon his findings, the AG saw that equity served general interest and was preferred by the majority, so on this basis, he said, ***in case of conflict, between equity and common law in relation to one and same case and their remedies, the principles of equity should prevail.*** James I then upheld this opinion as his own position in relation to the conflict, but the matter was far from being settled because the CL judges frowned at the solution. The question that probably begs for an answer now is why did the CL judges resist the proposed solution?

B- REASONS FOR THE RESISTANCE TO THE SOLUTION AND PERSISTENCE OF CONFLICT

It is good to remind ourselves here that the judicial authorities were the bourgeoisies among whom we had judge who were the white collar job workers and so had to work so as to be paid. Again, ***to commence an action, one had to purchase a writ and this was a source of income.*** It therefore became clear that if the CL judges accepted the prevalence of equity, many potential cases which were to be tried under CL would go to equity and as such, most of the CL judges will be rendered idle just not to say jobless with this sharing of jurisdiction. An idle man is not paid, and so logically, in order to maintain their status and make ends meet, one would expect a stiff resistance on the part of the common law judges.

Secondly, there is the argument of honour and supremacy. The argument is that CL had existed for a very long time and served justice for a long time as well before becoming defective. It means that ***CL existed even before equity but it may be interesting to know that equity cannot exist alone without CL.*** So naturally, CL judges could not accept the prevalence of this relatively new branch over the mother common law. Equity could not therefore be allowed to operate as some kind of Appellate Jurisdiction over the CL courts.

At this point, it is clear that the conflict was bound to continue. This therefore justifies the intervention of the legislator with the ***Judicature Acts (1873 -1875)*** as a lasting solution, but before we take a look at the ***Judicature Act*** (JA) and how justice was administered thereafter, it may be expedient to see the classification of equity before the coming of this JA.

This classification was done under three heads: *exclusive jurisdiction, concurrent jurisdiction and auxiliary jurisdiction*.

A- EXCLUSIVE JURISDICTION

Here, equity was classified in terms of the remedies available under this branch. Usually, it is common to hear people refer to the exclusive jurisdiction as provision of new remedies. Among these remedies, we have specific performance, injunction, rectification and rescission as well as restitution. These remedies will be defined and explained later under the topic consecrated to the study of equitable remedies.

B- CONCURRENT JURISDICTION

He who says concurrent jurisdiction says the availability of new rights. The new rights at equity include the equitable **right of redemption and the right of a beneficiary** in a trust relationship. The right of redemption operates to redeem property in a transaction which at common law would otherwise be lost automatically on the basis of an agreement. For example, if one gives collateral to obtain a loan and the time agreed for reimbursement passes without the money refunded, the collateral will become the creditor's property even if it is far more valuable than the money (**for instance, a car as collateral for 25,000 FCFA**). In equity, such property may be redeemed by a new agreement to pay a little later and on interest or additional interest.

As concerns the right of the beneficiary, at CL, a beneficiary could not bring an action against the trustee who did not give him the property or rights from the trust agreement once the time was due because CL considered that the contract was strictly between the settlor and the trustee and the beneficiary was not privy to the contract (**he was not *res inter alios acta***). But under equity, when the intention of the settlor is considered, we realise that he intends the property to end with the beneficiary, not that he gives the property to the trustee for dash.

NB: the concept of trust will be discussed later (in Part II of this course) in detail.

C- AUXILIARY JURISDICTION

This one has to do with the new and less complex procedure at equity. There were hardly any interlocutory procedures at inception like discovery of documents, no bureaucracy and comparatively shortened procedures, an element in common law that discouraged many litigants.

One must not go without laying emphasis on the fact that we have been talking of new remedies and new rights, but in effect, it is not as if to say that these rights and remedies were the exact creations of equity; they existed under common law and equity only modified and developed them the more. **Remember equity is not coming to create the law, but to modify it. So equity does not really create rights de 'novo', but develops what she meets under common law.**

CHAPTER 4: THE JUDICATURE ACTS (JA) 1873-1875

I- ADMINISTRATION OF JUSTICE AFTER THE JA (FUSION OF EQUITY AND COMMON LAW)

The Judicature Acts 1873-1875 abolished all equity and common law courts such as the King's Bench, Common Pleas, Exchequer, Chancery, probate, Divorce and Admiralty Division to create a Supreme Court of Judicature consisting of a Court of Appeal and a High Court. **The High Court was divided into three divisions namely the Queen's Bench division, the Chancery division and the Family division.** Each of these divisions exercises both legal and equitable jurisdictions. Thus, any matter could be adjudicated in any division and any point of law or equity could be raised and determined in any division. So as LORD Cairns could put it in **Pugh v. Heath** "**The Supreme Court is neither that of Common law nor equity; it is a complete jurisdiction**". But for administrative convenience, cases were located to the divisions according to their general subject matter. Appeals from these divisions were judged by the Court of Appeal which had competence to receive appeals from the Higher Court and other lower courts like the Shire Courts, County Courts and the Boroughs. **Section 25 (11)** of the Supreme Court of Judicature now replaced by **section 49** of the **Supreme Court Act 1981** provided that "**When there is any conflict or variance between the rules of equity and the rules of common law, with reference to the same matter, the rules of equity shall prevail**".

The first effects of the Judicature Acts were best illustrated by two famous cases namely; Walsh v. Lonsdale and Bercy v. Berry. Rights of the parties following the Judicature Acts were resolved in a single judgement regardless of whether they employed equity or common law rules. These laws permitted the courts **"To treat what is done as what ought to be done"**.

Thus the Administration of equity and common law were fused with the creation of a Supreme Court of Judicature exercising both law and equity while giving supremacy to equity in cases of conflicts.

II- THE FUSION DEBATE

A debatable issue is whether the fusion between equity and common law Courts equally extended to their rules or principles or was it limited only to their administrations?

To that effect some eminent jurists like **Sir George Jessel MR (Master of the Rolls)**, hold that common law and equity are fused. He had this to say in 1881 in Walsh v. Lonsdale; **"there are no two estates as they were formally; one estate in common law by reason of the payment of rent from year to year and an estate in equity under an agreement. There is only one court and the equity rules prevail in it"**. Other less eminent judges (at the time) like **Denning J** and **Lord Evershed** supported the completeness of the fusion.

For others, the changes brought about by the Judicature Acts gave right to neither a form of action, nor new reparation nor defence. In a famous survival metaphor, **Ash Burner** in his book entitled: Principles of Equity, said **"the two streams of jurisdiction though they run in the same channel; run side by side and do not mingle their waters"**. Thus legal rights remained legal rights and equitable rights remained equitable rights though administered in the same court.

In summary, it may be stated that the acts which fused equity and common law acknowledge that the rules are different and that if there is fusion, it is that of administration. Evidence of this is found in **section 49** of the **Supreme Court Act 1979** which replaced **section 25 (11)** to the effect that where there is a conflict between the rule of equity and those of common law, the former shall prevail. Maybe we should adhere to the warning of **Stevenson J** in Cansen Enterprise V Boughton; **"I greatly fear that, the talk of fusing law and equity results in confusing and confounding the law"**.

So in final analysis, whether the fusion between equity and common law was a complete one (**both their administrations and their principles**) remains a question of construction. It means that all depends on the interpretation that we offer to the expression **"complete fusion"**. If complete is interpreted to mean only the administrations were merged and as **Jessel MR** pointed out, there were no separate administrations after the JA, then one may say, with little fear of contradiction, that there was complete fusion. But of complete fusion means both administrations and their principles were merged, then the conclusion that fusion was complete will not go unmolested. This is even more so since the different Statutes acknowledged the superiority of the rules of equity over those of common law and so the question is if there was really complete fusion which includes both rules and administrations, then **sections 25 (11)** and **49** above should be ripe for rejection.

CHAPTER 5: EQUITABLE REMEDIES

I- GENERAL CHARACTERISTICS

From the birth of equity one feature is remarkable namely; its ability and willingness to grant elastic remedies which were not obtainable at common law. These remedies gradually evolved and became settled in their rules and principles. Some common features of these remedies may be deciphered.

A- EQUITY ACTS 'IN PERSONAM'

This is one of the most remarkable and most popular maxims of equity. During its early development, the equitable decree was enforced by acting against the person of the defendant for example by committing him to prison than by acting **"in rem"** against the property involved. The decree of specific performance for example is available against the individual defendant.

If the defendant is within the jurisdiction of the court and can be compelled personally to carry out his obligations, the court may order him to do so even though the subject matter of the contract is outside the jurisdiction of the court. In

Penn v. Baltimore, the plaintiff and the defendant had entered into a contract fixing the boundaries of Pennsylvania and Maryland, the former of which belonged to the plaintiff and the latter to the defendant. The plaintiff sued the defendant in England to have the agreement specifically performed and one of the objections taken by the defendant related to the jurisdiction of the court. This objection was set aside by **Lord Hardwick** on the grounds that: **"...the conscience party was bound by this agreement and being within the jurisdiction of this court which acts 'in personam' the court may properly decree it as an agreement"**. Although the land was not within the jurisdiction, the defendant was, and the court would hold him in contempt, unless he complies.

Lord Selbourne held the same view in the case of **Ewing v. Orr Ewing** when he said that the courts of equity have always been, and will continue to be courts of conscience that render justice **"in personam"**, irrespective of whether the parties are locally **"ratione domicilii"** in England or not.

B- DISCRETIONARY

Generally, equitable remedies are discretionary. At law, a plaintiff who proved his case was entitled as of right, not only to his judgement but also to enforce it by the forms of execution available at law. Little did his conscience appeal to the court, however dialectary he had been and however the result. Furthermore, the judge must grant a remedy on the bases of his conscience and general principles of law because otherwise this would amount to the denial of justice. It is through the help of this characteristic that the judge was able to use and enjoy wide discretion in equity to provide solution to almost, if not all cases that came before the court; thus the maxim **"equity will not suffer a wrong without a remedy"**.

C- ENSURING OBSERVANCE

Equitable remedies can never be issued unless the court can ensure that, they would be observed. Since equity does not act in vain, specific performance would be decreed only where defendant is in a position to comply with the order. In **Jones v. Lipmann (1962)**, the defendant entered into a contract to sell some land to the plaintiff. Then he sought to avoid specific performance by selling the land to a company acquired by him solely for this purpose and controlled by him. While specific performance will not normally be ordered for a vendor who no longer owns the property, here the defendant was still in a position to complete the contract because it was the creation of the vendor; a device and a sham; a mask which he held before his face in an attempt to avoid recognition by the eye of the law.

D- COMMON LAW REMEDIES INADEQUATE

Equitable remedies are only available where common law remedies are inadequate. For example, where the obligation is a continuing one, necessitating a series of actions at law for damages, or where the law would be difficult to fortify. But specific performance would not be granted if on the construction of the contract the parties have agreed that a specific sum of money is to be paid as an alternative to performing the contract.

II- TYPES OF REMEDIES

A- SPECIFIC PERFORMANCE

This equitable remedy consists of an order of the court commanding a party to a contract or trust to perform his obligations according to its terms. The basis of the jurisdiction to grant specific performance is due to the inadequacy of common law remedies for damages in the breach of contract or trust. **Lord Selbourn** could say in **Wilson-V. Northampton Junction Railways** that **"The court gives specific performance, instead of damages only where it can by that means do more perfect and complete justice"**. Thus the common law remedy may be regarded as inadequate and specific performance may be available in an appropriate case where only nominal damage could be recovered by an action at law or where there is a continuing obligation which could necessitate a series of actions at law for damages.

Again damages at law can only be awarded for a breach of contract but a breach of contract is not absolutely important for a claim for specific performance. See the cases of **Mark v. Lilley** and **Hasham v. Zenab**.

The commonest cases where the court will readily grant specific performance are those for the sale of land or other transactions related to land for example lease. The court would hardly grant specific performance of a contract for the sale of goods or articles unless these were of exceptional beauty or rarity. Although the court will not order the sales of government stocks to deliver the stocks because government stock is always readily obtainable in the market, it would

order performance of an agreement for sale of purchase of stocks or shares which cannot always be bought in the market; see the case of Duncufft v. Albrecht. Specific performance is not available as of right, but it is discretionary by nature. In Haywood v. Cape, it was held that: "**it must be exercised according to fixed and settled rules**". Words that can be fair to a person may be unfair to another. The refusal of an individual to comply with the decree of specific performance may give rise to criminal sanction for contempt of court.

a- Grounds on which Specific Performance may not be granted or be refused

- For specific performance to be granted, it must be in accordance with the rules of the law of contract and it must involve a contract which is clear and certain. By this we mean that the concluded contract must have respected the essential ingredients of a valid contract under English law namely offer and acceptance, consideration, intention to create legal relations and of course the absence of a vitiating factor such as mistake, threat or duress; the contract must not also be tainted with illegality.
- Where the plaintiff would be adequately compensated by the common law remedy of damages, specific performance may not be granted: Hutton v. Witting. This is to say contracts which require constant supervision especially contracts between employers and employees are excluded. This is because the court may not know the extent or content of the elements of such contract as such damages will be available instead of a decree of specific performance.
- A plaintiff seeking specific performance will obtain the same if only there is before the court any other party to join him in enforcing the contract. This reasoning is sound because as we have earlier seen, equity does not act in vein; see the case of Tito v. Waddel. (voluntary contracts].

b- Defences (Bars) to Specific Performance

- **Mistake or Misrepresentation:** Specific performance may not be granted if it will cause hardship to the defendant, but hardship is however a matter of circumstance to be determined from the facts of each case. It is a matter of discretion. See the cases of Webster v. Cecile and Martins v. Freeman.
- **Lashes or Delay:** Unreasonable delay to an action may be used as a defence against the grant of specific performance since it is well known that "**delay defeats equity**". See to this effect the case of South Comb v. Bishop of Exeter (1947).
- **Misdescription of the subject matter:** The court would not grant specific performance against defendant who proves before the court that there was a misdescription of the subject matter of contract; for example that a certain painting was effected by **A** whose skills in painting are unmatched and is generally known to be so when in fact the painting was effected by **B** who is little known in the field. Thus the court will not force a buyer to receive what he did not contract for, nor will it force a seller to give what he did not promise or what he does no longer possess.
- **Hardship:** If the grant of specific performance will inflict great hardship on the parties or third parties the court will be reluctant to grant same. See the cases of Patel v. Ali and Hope v. Walters.
- **Conduct of the Parties:** The party seeking specific performance must show that he has performed all his obligations under the contract since it is a cardinal rule and maxim in equity that **he who comes to equity must come with clean hands**; see Walsh v. Lonsdale.
- **Public Policy:** Specific performance shall not be decreed for a contract whose execution will be contrary to public policy, see Wroth v. Tyler.

B- INJUNCTIONS

a- Meaning and Background

An injunction is an order of the court directing a person or persons to do or to restrain from doing a particular act or thing. It is an equitable remedy which originally could only be obtained in the Court of Chancery or the Court of

Exchequer. This unavailability gave rise to more duplication of proceedings as where the plaintiff required an injunction as a remedy for legal rights.

The Common Law ***Procedure Acts of 1854*** gave common law courts the power to grant injunctions in certain cases. The present jurisdiction is governed by the ***Supreme Court Act 1981*** replacing the Jurisdiction which vested the jurisdiction of the Court of Chancery and common law in the High Court. ***Section 37 (1)*** of the ***Supreme Court Act 1981*** provides that, "***the High Court may by order (whether interlocutory or final) grant an injunction in all cases in which it appears to the courts to be just and convenient to do so***".

It should be noted that prima-facie or at first sight the jurisdiction is not as wide as it appears to be. It is exercised not on individual preference of the judge but "***according to sufficient legal reasons or settled legal principles***" as pointed out by ***Jessel MR***. Thus a plaintiff with rights or a defeasible course of action cannot obtain an injunction however just and convenient it is, see to this effect the case of ***Gouriet v. Union Post Office Workers (1978)***.

b- Common Types Of Injunctions

Prohibiting and Mandatory Injunctions:

These are the commonest forms of injunctions. A prohibitory injunction is one by which a plaintiff is directed to refrain from doing some particular act while mandatory injunction is one by which a person is enjoined to do a particular act or to do a particular thing. It happens sometimes that an unlawful act had already been committed such that an action restraining its commission is already meaningless. In this case, justice can still be done by issuing a mandatory injunction ordering the act to be revoked; in fact a mandatory injunction is compulsive. It restrains the continuance of wrongful acts by directing the performance of a positive act. However, a lot of caution must be exercised in ordering it.

Perpetual Injunction

This is one which has been granted after the rights thereto have been established in an ordinary action in which both sides have been fully heard and it is intended to settle finally the relation between the parties in connection with the dispute so as to relieve the plaintiff of the need to bring a series of actions as his rights are from time to time infringed by the defendant. The word perpetual does not necessarily signify that the order is to remain permanently effective or must endure forever, it only means that the order would only settle the present dispute between the parties.

This is because in some cases, the defendant may be entitled to request that the operation of an injunction be expressly limited to a particular period as for instance where a man has entered into a valid contract not to enter into competition with his former employer without a defined duration for say 3 years after leaving the employment.

Interlocutory Injunction

It may happen that a plaintiff would not always wait for an action to come on in the normal course; it may be that irreparable damage would be done to him if the defendant is not immediately restrained. If such is the case, the plaintiff will serve to the defendant a notice that on the next action day, his counsel will pray the court for an injunction. This notice may enable the defendant's counsel also to be heard if he wishes, but the hearing would not be a final decision on the merits of the case.

If the plaintiff's affidavit has made up a sufficient case, the judge will grant an interlocutory injunction which is effective only until the trial of the action.

'Ex-parte' injunction (Before the other side is heard)

If the urgency of the case is such that the plaintiff cannot wait until the next trial day or motion day, he can apply for an "***ex-parte***" injunction which he will hold good until the next action day, by which time notice can then be served on the defendant who will then have the chance of opposing the plaintiff's application for an interlocutory injunction.

The phrase "***ex-parte***" means that the court has not had the opportunity to hear the other side of the matter which would be affected by its decision. An "***ex-parte***" is where an action is brought for a debt due against the defendant who is not within the jurisdiction; the court may grant an "***ex-parte***" injunction to restrain the defendant from removing the assets outside the jurisdiction pending trial (which is the original form of the Mareva Injunction).

- **Interim Injunction**

This injunction restrains the defendant not until the trial but until some specified date if for some special reason, it will be unjust to protect the plaintiff beyond that date.

- **Quia timet Injunction**

A quia timet injunction is one which prevents infringement of the plaintiff's rights where the infringement is threatened but has not yet been perpetrated. It exists in relation to perpetual interlocutory injunction. The plaintiff must show a very strong possibility of future infringement and that the ensuing damage would be of a most serious nature.

The most glaring example of a case where this injunction may be granted is where the defendant has yet done no harm to the plaintiff but he is threatening and intending (*so alieges the plaintiff*) to do works which would cause irreparable damage or harm to him or his property if carried to completion. So if it is only a mere probability of future injury or mere speculation of possible mischief which may never happen at all, the court will not grant this injunction, **Worsley V. Swann**. Thus in **Fletcher v. Beale**, a plaintiff failed to make a case of sufficient probability and an injunction was refused to restrain a defendant from polluting a river by depositing chemical from which noxious liquid could flow from a certain land, into a river on the ground that the liquid could be prevented from reaching the river. In **Draper v. British Optical Association**, the court refused to restrain the holding of a meeting to consider the removal of the plaintiff from the defendant association, for it was to be assumed that they could not remove him unless they were entitled to do so for instance by the constitution of the association.

- **The Anton Piller Injunction**

The first time courts had the opportunity to grant this injunction was in the case of **Anton Piller K.G v. Manufacturing Processes (1976) Ch 55**. The salient ingredient of this type of injunction is its surprise element. It is granted to the plaintiff to enable him and official authorities to enter and search the defendant's premises and to gather evidence or proof that will be eventually used against that defendant in a court action. The order is passed with the intention of taking the defendant by surprise. Its aim or major objective is to prevent the defendant from destroying proof and this justifies its surprise nature. So this injunction will only be granted in special circumstances.

- **The Mareva Injunction (freezing order)**

This injunction was created in the case of **Mareva Compania Naviera S.A v. International Bulkcarriers SA (1975) 2 Lloyd's Rep 509**. This injunction prevents a defendant who may be but who has assets within the jurisdiction of the court from removing his assets with the intention of frustrating the execution of court judgement when it is eventually handed down against him.

C- PRINCIPLES GUIDING THE ISSUE OF INJUNCTION

The principles that will guide the court in the grants of an injunction are not different from the general characteristics of equitable remedies which we examined earlier. It must however be added here that contempt of court would guide the courts in the grants of an injunction. As far as contempt is concerned, the general principle is that non-compliance with an injunction is contempt of Courts punishable by imprisonment, sequestration of property or payment of fine, see the case of a **Re-supply of Ready-made Concrete no 2 and the Director of General Fair Trading v. Buckler (1990)**.

A burning question is whether third parties can be charged for committing contempt. The answer is debatable. If a third party acts ignorantly of an injunction, he will not be charged for contempt of court. However if the third party knowingly acts contrary to an injunction, he would be charged for committing contempt. In **Attorney General v. Times Newspaper Ltd (1992)**, the newspaper published confidential materials which other newspapers had been forbidden from publishing were held guilty of contempt.

The Equitable Remedy of Rescission is an equitable remedy by which a specific contract or other transaction is rendered unenforceable in law. It is, in a sense, a decree of specific non-performance. This remedy has been described (by Woodeson, R. for instance) as one of the most common and natural occasions for the exercise of equitable jurisdiction.

An important precondition for the grant of rescission is that “*restitutio in integrum*” must be possible (*putting the parties in the position in which they were before they entered the rescinded agreement*). But in case of breach of a fiduciary relationship (*such as trust, insurance and agency*), the requirement of “*restitutio*” is not absolutely needed. So on grounds of public policy, the court may do what is practically just even if she will not be able to bring the parties back to their integral positions (*see the case of Erlanger v. New Sombrero Phosphate Co (1879) 3 App Cas 1218 by Lord Blackburn*). The decision in the above case was retaken much later on in the case of O’Sullivan v. Management Agency and Music Ltd (1985) 3 All ER 351, CA.

D- SUBROGATION

Literally speaking, subrogation means asking for something in another person's right. The remedy is usually described in metaphorical terms as “*standing in another's shoes*”, such as it was the case in Banque Financière de la Cite v. Parc (Battersea) Ltd (1999) 1 AC 221, 226.

The well-settled principles of subrogation were set out by **Walton J** in the case of Burston Finance Ltd v. Speirway Ltd (1974) 1 WLR 1638. The operation of the remedy is rather simple, if a third party - T pays off a debt owed by a debtor -D to a creditor - C, it means that T can step into D's shoes and claim any assets which were held by C to secure the payment of the debt by D, although T can only claim those assets to the extent that his money discharged C's claim against D.

E- RECTIFICATION

This form of equitable remedy is available as a relief against mistake as **Millett J** pointed out in the case of Gibbon v. Mitchell (1990) 1 WLR 1304 [see also the more recent case of Gallagher Ltd v. Gallagher Pensions Ltd (2005) EWHC 42 (Ch)]. The remedy may also be available to rectify a situation of fraud as seen in the early case of Collins v. Elstone (1893). However, the remedy of rectification has proved to be more effective in the case of mistakes concerning contracts and wills (*see Holtam v. Holtam (2004) All ER (D) 408*). The effectiveness of the remedy is also seen in the general types of transactions in which a party's adviser should have appreciated that the party did not understand the terms of the arrangement. In the case of Bhatt v. Bhatt (2009) EWHC 734 (Ch) for instance, the mistake arose from the party's poor grasp of the English Language.

It should be highlighted however that the courts have insisted on the fact that the remedy must be specifically pleaded (*by the party seeking rectification - it is not automatic*) and proved. Examples of cases demonstrating this insistence of the courts include: Chartbrook Ltd v. Persimmon Homes Ltd (2009) UKHL 38, [2009] 1 AC 1101, House of Lords; as well as the case of Cherry Tree Investment Ltd v. Landmain Ltd (2012) EWHC Civ 736; [2012] 2 P & CR 10, Court of Appeal. But in some special cases, the court may order for rectification of its own power. This is the case in transaction that do not carry the clear intentions of the parties, such as the intention of the settlor or testator in trust relationship. In this case, the court may order for rectification because “*equity looks to substance not form*” (*see the case of Re Segelian (deceased) (1996) 2 WLR 173*). We notice a sharp contrast with common law here because under that branch, documents are construed according to their form with little regard to the prior intentions of the parties (*see BCCI v. Ali (2002) 1 AC 251, HL*, as well as the case of Cambridge Antibody Technology v. Abbott Biotechnology Ltd (2004) EWHC 2974 (Pat), Ch D (Patents C)).

F- THE EQUITABLE REMEDY OF ACCOUNT

Account in this context is the process by which the court assesses sums due from one party to another, it also describes the remedy of payment that is ordered at the end of the assessment process. An action for an account was, at one time, available at common law, but the Chancery procedure for taking accounts, was *so superior that by the 18th Century the common law action for an account had come to be superseded by equitable proceedings for an account* (statement made by the court in the case of Tito v. Waddell (No. 2) [1977] Ch 106).

For our present purpose, an account is a good remedy which may be available for the beneficiary against a defaulting trustee. In this case, through the remedy, the trustee will have to present his financial accounts and then give an account of his dealing with the trust property as well as to consequently make up any shortfall in the fund. It should be noted that a trustee will also be liable to make an account for unauthorized profits realized during his trusteeship. It was stated

in the case of **AG v. Guardian Newspapers Ltd (No. 2) (1990) 1 AC 109** that the remedy of account may also be available against a defendant for him to disgorge profits made from unauthorized use of confidential information.

G- EQUITABLE SET-OFF

It may be appropriate to end our discussion on equitable remedies by looking at an equitable remedy which can work on a ‘self-help’ basis without judicial intervention. ***Before the Judicature Acts of 1873-1875, a court of equity could sometimes restrain a party who had brought an action at law from proceeding to trial if, for example, the defendant had an arguable cross claim.*** Since the passage of the JA, it is no longer possible, as *Morris LJ* pointed out, to obtain an injunction to restrain a pending action but equity can instead order equitable set-off on the basis that neither the claim nor the counterclaim ought to be insisted upon without taking the other into account (*see the case of Hanak v. Green (1958) 2 QB 9*).

In a more precise manner therefore, equitable set-off will be available where a cross-claim is ‘so closely connected with [the claim] that it would be manifestly unjust to allow [the claimant] to enforce payment without taking into account the cross-claim’ (as per Lord Denning in the case of **Federal Commerce and Navigation Co Ltd v. Molena Alpha Inc (The Nanfri) (1978) 2 QB 927**). The same position was taken in the case of **Geldof Metallconstructie NV v. Simon Carves Ltd (2010) EWCA Civ 667, CA** ;

III- SOME EQUITABLE MAXIMS

A- EQUITY ACTS IN PERSONAM

This maxim has been discussed earlier on in these notes, but a few more clarifications are pending.

At first, unconscionability was conceived along medieval ecclesiastic lines as a burden on individual or personal conscience. It was therefore assumed that equity, like private conscience, could only act against the individual defendant in person (*in personam*). However, we have seen that equity came to accept that the rights of a beneficiary under a trust are binding not only upon the individual conscience of trustees and third parties, but upon the trust assets themselves. So equity began to act by analogy to the common law idea of entitlement to property. Despite that development, this maxim is still used, just as it was in the **Earl of Oxford's Case (1615) 1 Rep Ch 1** to justify equitable intervention when the equitable jurisdiction comes into conflict with another jurisdiction.

B- EQUITY WILL NOT SUFFER A WRONG WITHOUT A REMEDY

The maxim ‘prima facie’ suggests that equity is the healer of every form of wrongdoing. But the reality is that equity is concerned with only one type of remedy here which is the ‘unconscionable’ reliance on common law. So in clear terms, equity will not go ahead to remedy a wrong which is not recognized in law. So no matter how morally wrong a particular social action or behaviour might be, it is not appropriate for equity to label it as being generally wrong in law if the law itself will not do so.

In its early history, it was the practice of Chancery to hear certain claims precisely because there was no established common law writ or ‘form of action’ (under the writ system for instance) covering the case. So this is how equity was then perceived as the jurisdiction that will not suffer a wrong without a remedy, just in a bid to contrast the situation with that which obtained under common law at the time.

C- EQUITY FOLLOWS THE LAW (AQUITAS SEQUITUR LEGEM)

Equity does not supplant the law; this is the idea that derives from the various definitions of equity through which we learn that equity does not come to compete with, but to complete the law. *Gary Watt* pointed out that: ‘if the law was a stone, the function of equity will be to smooth away the sharp edges by which the law causes injustice and to fill in the cracks where the legal remedies are inadequate and to fill in the cracks where the legal remedies are inadequate’. Equity will smooth the law, but not to the point of eroding it completely or to overfill the cracks so as to make the stone uneven.

It is also said that *equity follows the law, but not sheepishly*. If equity sometimes goes a little further than the common law, it does so only because the common law has carried it most of the way. Aesop strengthens this assertion by stating that: *even a wren can fly further than an eagle if the wren rides on the eagle's back until the eagle is exhausted*. This

is why sometimes, equitable remedies for breach of contract (*specific performance and rescission*) may be superior to what is available at common law in the same context (*compensation or damages*), but, at it has been pointed out already, equitable remedy will only come in if it is clear that the common law remedy will be insufficient.

Why?

It is so because *equity follows the law*.

D- EQUITY LOOKS TO SUBSTANCE, NOT FORM

This maxim does not tell us the functional distinction between equity and the law, unless it is to say that equity will not permit a party to rely upon a legal form, or the formal wording of a law, in a way that will be substantially unconscionable. We should however be clear about what the maxim does not mean. ***It does not mean that equity looks only at substance because equity also respects the form that legal deeds and contracts take since we have just seen that equity follow the law.*** It does not therefore mean that equity never insists on the form and this is why today in England, ***S.2 of the Law of Properties (Miscellaneous Provisions) Act 1989*** now provides that equity cannot grant specific performance of a contract to sell land unless the contract was in writing, containing all relevant terms and signed by both parties. On the contrary, one should not also go with the idea that the common law always looks only at the form. Therefore, common law also looks at substance. In the case of ***Street v. Mountford (1985) 1 AC 809*** for instance, ***Lord Templeman*** held a form of 'licence to be in substance a lease.

E- EQUITY WILL NOT PERMIT A STATUTE TO BE USED AS AN INSTRUMENT OF FRAUD

At first, it may be very hard to reconcile this maxim with the principle of parliamentary sovereignty. Normally, a statute must be applied according to the proper interpretation of its words, no matter how just or unjust the consequences of doing so may be and in this way, no court is expected to disapply it or admit exceptions to it.

On a closer examination however, we see that this maxim is applied to instead uphold the integrity of the statute rather than to undermine it. The maxim is usually applied in relation to statutory formalities. A party seeking to avoid an informal or insufficiently formal transaction is ordinarily entitled to refer to, and rely upon, the other party's failure to comply with the necessary statutory formalities, but the maxim prevents the defendant from so pleading where it will be unconscionable for him so to do: see the case of ***Shah v. Shah (2001) 3 WLR 31, CA.***

F- THOSE WHO COME TO EQUITY MUST COME WITH CLEAN HANDS

This maxim, it should be said, is retroactive by nature and so it looks at the past inequity that the person coming to seek for equity has done. In ***Lee v. Haley (1869) 5 LR Ch App 155*** for instance, the claimant sought the discretionary equitable remedy of an injunction with a view of protecting their trade as coal merchants. The old court of Chancery refused to grant the injunction, because the claimant had "***'unclean hands'***", not because of the coal, but because he had "***'systematically and knowingly'***" sold his customers short on weight. The judge held that equity would not grant a remedy for the protection of a fraudulent trade.

It should be noted that this maxim only applies where the discretionary relief is sought; it does not apply to prevent a claimant from enforcing his equitable entitlement to property (***Rowan v. Dann (1991) 64 P & CR 202***). However, the maxim has the potential to deny specific performance of an estate contract as it was held in the case of ***Coastworth v. Johnson (1866) 55 LJQB 220, [1886-90] All ER 547***. So even if the defendant's behaviour towards the claimant has been intolerably bad, the maxim cannot be used to deprive that defendant of his equitable interest to property.

G- THOSE WHO COME TO EQUITY MUST DO EQUITY

Just like the previous maxim, this one also applies only in relation to the discretionary remedies such as specific performance and rescission. But unlike the previous maxim, this one is more oriented to the future and seems to be more precautionary. In ***Vadasz v. Pioneer Concrete (SA) Pty Ltd (1995) 69 ALR 678***, the maxim was applied when a guarantor sought rescission of his guarantee on the ground that he had been induced by a misrepresentation to give a guarantee more extensive than he had intended to give. The High Court of Australia granted rescission but held that the claimant would have to "***'do equity'***" by returning, or paying for, goods that the defendant had supplied to the guarantor

since the date of the guarantee. This judgement was in approval of the English Court of Appeal decision in **O'Sullivan v. Management Agency Ltd (1985) QB 428. 5.3.8**

H- EQUITY SEES AS DONE THAT WHICH OUGHT TO BE DONE

It should be said at once that "*ought*" is a dangerous word to use in any branch of law. Equity does not use the ought in any moral sense; its only morality is that the law ought to be followed.

So what then is the importance of this maxim?

Although equity will sometimes require an obligation to be performed when the common law would be content to award compensation for failure of performance, law and equity are basically in agreement that a legal obligation ought to be fulfilled. In **Tilley v. Thomas (1867) LR 3 Ch App 61 at 72**, it was held that: contracts "*ought*" to be performed. To break them, and to propose compensation for the breach by damages, is not complete justice. So the key lies in equity's ability to see that which ought to be done as if it had already been done.

I- EQUITY IMPUTES AN INTENTION TO FULFILL AN OBLIGATION

This maxim is similar to the last but unlike the previous one which allows the court to adopt the fiction that an obligation has been fulfilled which ought, in future, to be fulfilled, this maxim introduces the lesser fiction that an obligation has already been fulfilled which ought already to have been fulfilled. The essence of this maxim is equity's refusal to accept that a legal or equitable obligation has not been met. So for instance, when a trustee mixes trust money with his own money and spends part of the mixed fund, it is assumed that the trust money remains in the unspent part of the fund wherever such an assumption is necessary to fulfill the trustee's obligation to the trust (see **Re Hallet's Estate (1880) LR 13 Ch D 696, CA**)

The maxim can be applied in the face of clear evidence that the party subject to the obligation had no intention whatsoever of fulfilling it. This is because the requisite intention is imputed, not merely implied.

J- WHERE THE EQUITIES ARE EQUAL, THE FIRST IN TIME PREVAILS

This maxim is sometimes paraphrased as the first in time is the first in right because it is essentially employed to determine priority between competing claims to equitable proprietary rights to asset, usually to land. In **Liverpool Marine Credit Co v. Wilson (1872) LR 7 Ch App 507 at 511**, the court held that whereas a legal owner's right is paramount to every equitable charge not affecting his own conscience, an equitable owner, in the absence of special circumstances, takes subject to all equities in date to his own estate or charge.

K- WHERE EQUITY AND LAW CONFLICT, EQUITY PREVAILS

This is not so much a maxim as a rule that determines the jurisdictional priority of equity. The rule can trace its origins back to the *Earl of Oxford's Case*, but today, it also appears in statutory form. This **Supreme Court Act 1981** provides in its s.49 that *in case of conflict between equity and the law, the rules of equity should prevail and this is in the same connection with the provisions of s.25 of the Judicature Acts 1873-1875*.

L- DELAY DEFEATS EQUITY

This maxim may also appear in another form: *equity aids the vigilant and not the indolent* (*vigilantibus non dormientibus jura subveniunt*). So for purposes of fresh evidence and exactitude or nearness to it in the testimonies of witnesses, where one's rights are infringed, he should make hay in bringing the action. *If such person stays for some unreasonable time and without any concrete justification without bringing the action in court, his action will be said to be time-barred.*

I. DEFINITION OF THE CONCEPT OF TRUST

One of the most helpful definitions was proposed by Maitland in his book entitled: *Equity: A Course of Lectures (2nd Edn) 1936*. The author in that book says that: "**when a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose, he is said to have these rights in trust for that other or for that purpose and he is called a Trustee**".

Basically, the idea is that one person (**the trustee**), acts on behalf of another person (**the settlor**), in the interest of an identified person (**the beneficiary**). The definition proposed by the author does not mention the issue of property in the trust relationship (*which does not mean that property is not subject to trust*). May be the reason is because property itself is difficult to define and it should be pointed out that property is not the only subject matter of trust. So mentioning property in the definition may suggest that trust always involves property only.

There is no denying the fact that it is easy when trust is constituted on tangible items, such as a car, but the subject of trust may also be intangible, such as debt. Probably, that is why Maitland defines the subject matter of trust in terms of rights rather than property. In this way, it will be easy to talk of the right to use money (*intangible*) and the right to use a piece of land (*tangible*).

II. HISTORICAL DEVELOPMENT OF TRUST

"**Use**" is said to be the progenitor of trust. The trust of land began when the medieval monks wished to enjoy the benefits of land without infringing their vow of poverty by actually being owners of land. In the early days, land owners went on religious crusades and pilgrimages leaving behind their families and land. So before "**taking up the cross**", the crusader legally passed on land to a trusted friend who, despite that status, knew that he was to return the land to the crusader on return, but meantime, he had to hold the land for the benefit of the crusader's family. In this transaction, it should be pointed out that if the trustee refused to give accounts on the land to the crusader's family, such as for rents perceived on the land, or otherwise exercised his legal entitlement to the land in bad conscience, the beneficiaries (**the family**) had no legal claim or rights against such bad faith trustee. However, they had a small corridor of hope as they were permitted to petition to the King (**sovereign justiciar**) for justice in the light of the circumstances of the particular case. If the king was moved by the claim, he could ask a recalcitrant trustee to simply fulfil his duties. In any case, the fact remains that under the common law at that time, the beneficiaries had no property rights in the trust assets.

A- HISTORICAL RELATIONSHIP BETWEEN TRUST AND "USE"

As early as the 7th and 8th Centuries, the Common Law had a form of "**use**" in relation to chattels and money under which money had and received by "**A**" for the use of "**B**" subjected "**A**" to a common law obligation in relation to the use of the money. Under this relationship, if "**A**" refused to account to "**B**" for the money, the latter could bring an action against the former to account for the money which came to resemble something like the modern action for breach of trust. So this form of common law trust known as "**use**" was enforced by the courts long before the Chancery even started recognising trust of land. Land could not be included in the common law scheme of uses but the chancellor was prepared to enforce the same transaction of use over land. As such, by the early 13th Century, land was acknowledged as a practical device for separating legal title from beneficial enjoyment. That is why if "**A**" had to go for a crusade he was permitted to convey his land ("**the feoffment of uses**") to his trusted friend "**B**" ("**the feoffee to uses**") for the use and benefit of "**A**'s family until '**A**' returned and recovered his property. So this sort of transaction from all indication did not therefore give "**A**'s family legal rights to the property but only beneficial rights which were based on the confidence that "**A**" had reposed on "**B**'s conscience. This is where the chancellor came in to make sure that "**B**" did not place an unconscionable reliance on his legal title to the detriment of "**A**" and his family (*note that the king only did this in rare circumstances if he was moved*).

Henry VIII enacted a *Statute of Uses in 1536* to permit the transfer of legal title of assets in the trustee's possession to the beneficiary of the use (**the so-called cestui que use**) thereby ensuring proper "**execution of the use**". However, the limitation of this statutory effort was that its scope was only limited to use that was constituted in relation to land.

B- HOW WAS TRUST CONSTRUCTED?

a- Declaring oneself to be Trustee

The simplest way by which trust was (and can be) created was for the absolute owner of the asset to declare that he holds the asset for the benefit, at least in part, of someone else. So it will be common in this circumstance to hear one say that "***I hold this book, with immediate effect, on trust for my room-mate***". Once the original absolute owner becomes the trustee, the room-mate becomes the sole beneficial owner or '***equitable***' owner of the book and as such, the room-mate can insist that the book be transferred to him or her.

b- Transferring Property to the Trustee on Trust

This is the most classical manner of creation of trust. The original owner transfers legal title to a designated trustee in the interest of a beneficiary (***of course there can be several beneficiaries and several trustees***).

Under a traditional settlement trust, the trustee who receives property holds it for the interest of one beneficiary for the lifetime of that beneficiary whom we refer to as the life tenant (***or life beneficiary***) who has the right at any appropriate time to ask that property be transferred to him or to continue receiving income from such property. Where this sole beneficiary dies, a second type of beneficiary comes in known as the remainderman (***or the remainder beneficiary***). It should also be noted that there may be many lifetime tenants and many remainders.

CHAPTER 2: DISTINCTION BETWEEN TRUST AND OTHER LEGAL CONCEPTS

I. TRUST AND CONTRACT

For a contract to be formed, it requires that both parties enter an agreement which in turn creates a personal right that each party holds against the other.

In general, and in its classical form, ***the creation of trust depends on the intention of the settlor or testator***. Once the trust is created, it creates both proprietary and personal rights for the beneficiary which he holds against the trustee. This is a serious deviation from the old contract rule of privity of contract according to which one can only have rights in a contract if he or she was a party to it at the time of formation or by adherence. Under trust, we see that the beneficiary is clearly a third party and not involved in the transaction taking place between the settlor and the trustee but that third party beneficiary at the end of it is entitled to rights which he can enforce in court out of a transaction to which he is not originally a party.

Another angle of distinction is that for breach of contractual obligations but in trust, the settlor (***as one party to the trust***) cannot sue the trustee once the relationship is created because upon contract, one party may sue the other conveying property to the trustee, the settlor loses all legal rights and claims thereto.

In any case, the dividing line between the two concepts is however blurred in modern forms of transactions. There are many cases in which a trust relationship results from a purely contractual relationship. This is the case for instance with ***Pension Fund Trust*** which results from a simple contract of employment.

II. TRUST AND BAILMENT

Both trust and bailment are legal transactions in which one person engages to look after property for another. ***But in trust, the trustee exercises trusteeship for the beneficiary while in bailment, the bailee secures the property for the bailor (the person who gave the property to the bailee in the first place).***

So from this close connection between the two concepts, we see that it is the location of ownership that strikes the ***distinguo***. In effect, the bailee who holds the property in bailment has no legal title or ownership over the property in his keeping unlike the trustee who retains legal ownership of the property upon reception of it. This means that if the bailee sells the property without authorisation, he can be sued for conversion even if the buyer was a ***bona fide*** purchaser because, it should be noted, purchasing the property in good faith does not annihilate the bailor's proprietary rights over the property. In a trust relationship on the other hand, if a trustee sells trust property to a ***bona fide*** purchaser, the sale dissolves the beneficiary's equitable (***not legal***) proprietary interest and this is why there can be no action for conversion. The beneficiary will have to sue the trustee under another head; breach of trust for instance.

III. TRUST AND AGENCY

The opening phrase must clearly point to the fact that both trust and agency are fiduciary relationships by nature. An illustration of the fiduciary nature of both concepts lies in the fact that both the trustee and the agent are forbidden from making secret profit. Once again, we may have to make recourse to the location of proprietary rights in order to draw the dividing line.

Normally, the principal maintains title even if he confers property to the agent. If the principal confers legal title to the agent, then that principal loses even the equitable proprietary interest and in this case, the agent will only be liable to give accounts to the principal for the value of the property. This consequently creates a debtor / creditor relationship between them.

It should however be pointed out that it is possible for an agency relationship to transform into one of trust. This is the case for instance where the agent receives property either from the principal or third party to hold on trust for the other, even though this also depends on the intention of the principal if he decides to give the agent such power which still makes it look all the more like trust because in a trust relationship as well, whether the trustee has power to hold property on trust depends on the intention of the settlor.

IV. TRUST AND ASSIGNMENT

A simplistic understanding of assignment is that it is a transaction in which one person (the assignor) transfers rights to another person (the assignee). A clear illustration is where A owes B. then B assigns the debt to C such that A now owes C instead of B. From this, we see that in essence, the purpose of the assignment is to transfer existing rights from one person to the other which is not the case in trust. Under trust, it is a new right that is created when the relationship is established.

Trust can however be created as a means to limit the assignment of rights as seen in the case of **Don King Productions Ltd v. Warren (2000) Ch. 291.** See also the case of **Barbados Trust Co. v. Bank of Zambia (2007) EWCA Civ. 18.**

V. TRUST AND GIFTS

Although traditional trust involves the transfer of property to the trustee in the interest of the beneficiary who has furnished no consideration for it, the whole transaction may be perceived as a virtual gift from the settlor to the beneficiary, but something is different.

In a transaction that involves gifts, we have two parties basically; there is the donor (***who makes the gift***) and the donee (***who receives property absolutely and beneficially***). A trustee on the other hand is bound to hold the property for the beneficiary since he the trustee did not receive the property beneficially so it cannot be considered to have been a gift made to him. Instead, the property may be considered to have been a gift to the beneficiary through the mechanism of trust.

In trust however, for the property to end up with the beneficiary, there is a condition which depends on the intention of the settlor. It is interesting to also indicate here that the nature of the condition in question will determine whether the transaction was intended to be a gift or trust (see the case of **Attorney-General v. The Cordwainer's Co (1833).**

CHAPTER 3: CLASSIFICATION OF TRUSTS

Trusts can be classified either on the basis of the event or on the basis of context. These two will therefore be the axis of the classification we operate here under.

I- CLASSIFICATION BY EVENT

Classification of trust based on event has to do with those events that determine when the trust arises. These events include the expression of consent. So when the settlor and trustee need to agree on the creation of the trust, until such consent is expressed, the trust may not come into existence. Once the consent of both parties is obtained, we call that resulting trust. Other such events include wrongdoing, unjust enrichment or other events that condition the creation of a specific trust which we cannot make an exhaustive list of at present.

II- CLASSIFICATION OF TRUST BY CONTEXT

A- EXPRESS TRUST

Express trust is the major form of trust. This can be created either by the settlor or by the testator. It should be pointed out at once that a testator is one who determines the sharing of his property upon his death by use of a will (**testament**). In this case, the testator may name the trustees and the beneficiaries in the will, Express trust is created by a settlor when he either declares that he holds his property on trust for another person or where he actually conveys the property to another person (**trustee**) to hold on trust for a named beneficiary(s).

B- FIXED TRUST

A fixed trust arises where the settlor of trust fixes or identifies the interest that the beneficiary will have through the trust instrument (**document showing the existence of the trust**). This is the case where one declares for instance that: "**I hold this property on trust for my children in equal shares**", This means that the property will be shared in equal proportions to the children in question.

It is also possible to create a fixed trust in which the interest of the beneficiary in the trust property is successive over time. For instance, M may say: "**I give this property to my wife B for life and the remainder to my children B,**".

C- DISCRETIONARY TRUST

This form of trust allows the trustee the discretion to determine how to give out the benefits of the property to the beneficiary. For instance, a trust relationship may allow the trustee to use money from the trust to pay the fees of the children of an employee. In this case, the trustee may use his discretion to open a trust fund for each child entitled, to benefit from the payment of school fees from the trust money.

D- TESTAMENTARY TRUST

This form of trust is created when one person (the testator) writes a will and transfers property to a beneficiary named in the will. Once the testator's estate is administered and all his debts discharged, the estate or property may then be conferred absolutely to the beneficiary: The technical name given to the beneficiary in this case is "**legatee**" or "**divisee**".

E- PENSION TRUST FUND

An employee's contract may provide that instead of his contributions (**to the CNPS in the case of Cameroon**), the employer will instead pay him pension on retirement or a lump sum in case of his death. In any case, the pension scheme is very important as it manages large amounts of money contributed by employees or workers. These funds are held on trust by the CNPS in capacity as trustee for the benefit of employees who receive payment in the form of pension following their retirement.

F- RESULTING TRUST

In certain cases, the trustee may hold property on trust for the person who gave him the property and in this case, the property will result back to the settlor and this situation is known as **resulting trust**. This may happen when the settlor settles out property to the trustee in view of creating an express trust but it fails, as such, the property results back to the settlor.

It should be noted that express trust is created because it was expressly intended while resulting trust arises because the transferor the person who transfers property to the other (**transferee**) is presumed to have intended that the property should be held on trust on him or her.

G- CONSTRUCTIVE TRUST

Constructive trust arises by application of legal rules and not necessarily through the intention of the settlor (**whether the intention is express or presumed**).

A. THE RIGHTS OF THE SETTLOR

Before trust is constituted, the settlor has legal rights over the property such as land which is registered in his name that gives him legal title to it. In addition, he has beneficial title that permits him to enjoy the benefits that accrue from the property.

Upon constitution of the trust relationship, the settlor convey the land to the trustee and once this is done, he loses both rights indicated above and literally falls out of the picture. It should however be noted that if the trust has not been validly declared yet, legal title over the property will be that of the beneficiary but an equitable proprietary interest will be created in for the trustee. This happens when an express trust (***expressly declared***) fails, thus giving room to what is known as resulting trust.

B. RIGHTS OF THE TRUSTEE

Once trust is created with property transferred to the trustee, the latter only retains legal title and not the beneficial interest. It should however remain clear that it is not in all cases that the trustee will have legal title to the property conveyed to him. For instance, A may receive some money to hold it for B who in turn may decide to declare his or herself a trustee of her equitable interest in the property for C. So B declares that he holds the equitable proprietary interest he has in the property as a trustee for C. In this case, A will be said to have legal title to the money which he holds for B while B on his part has decided to hold his equitable interest in the property on trust for C. As such, B becomes a trustee (for C) but does not have any legal title to the money for instance, since legal title is in A.

C. THE RIGHTS OF THE BENEFICIARY

The beneficiary to a trust property has both equitable rights in that property as well as beneficial interest in it. This means that depending on the type of trust, he may decide to ask the trustee to confer the property to him so that he enters possession of it, or he may decide to leave it with the trustee and continue to receive income obtained from the property.

a- Nature of the Rights of the Beneficiary

It has already been said that from a trust relationship, the beneficiary gets equitable rights which may both be proprietary and personal. All beneficiaries are permitted to enforce this right against the trustee as a basic equitable rule otherwise we cannot say there is a trust relationship as *Millett LJ* pointed out in *Armitage v. Nurse (1998)*.

It is common understanding that no one is compelled to accept a gift he does not want and so the beneficiary is permitted to disclaim his or her rights in the trust property and this disclaimer can be oral or in writing: *Re Paradise Motor Co. Ltd (1968) 1 WLR 1125*. If a beneficiary learns of the rights that he has in a trust relationship and stays silent, it will be inferred that he has accepted them, as seen in the case of *Standing v. Bowring (1885)*. This goes without saying that rejection (***of rights in trust***) must be unequivocal and timely as well.

The nature of the beneficiary's rights depend on the nature of the trust relationship even though there are some rights that are common to all beneficiaries. Examples of such rights include the right for the trustee to act in good faith and exercise his duties in the interest of the beneficiary [see *Armitage v. Nurse (supra)*].

In a fixed trust for instance, the beneficiary has both proprietary and personal rights. The personal rights include the proper administration of trust, the right to be informed, rights resulting from breach of trust, rights against third parties, tortious rights and a right to trust documents.

I. TYPES OF TRUSTEES

A. AMATEUR TRUSTEE

When a trustee is not paid, logically, less is expected of him in the accomplishment of his duties even though these duties still remain onerous. In the context of small family trusts, the trustee is usually a family member or a trusted

friend who is not expected to be paid but who assumes his responsibilities as a sense of duty that he owes to the family as stated by *Brighman J* in the case of *Bartlett v. Barclays Trust Co Ltd (No. 1) (1980)*. From such amateur trustees therefore, one should expect less professionalism, skill and diligence.

B. PROFESSIONAL TRUSTEES

Previously an issue between trusted friends and family members and the settlor on the other hand, trust has increasingly become important in commercial transactions in which large funds are tied up with so much administrative bureaucracy. This is how professional trustees (*such as Banks and solicitors*) consequently emerged, advertised as such and paid for their services.

According to **section 28 (5)** of the *English Trustee Act (2000)*, anyone who acts in the course of a profession or business that involves providing services in connection with the management or administration of trusts can be referred to as a professional trustee. *Lord Millett* again in the case of *Dubai Aluminium Co. Ltd v. Salaam (2002) UKHL 48* pointed out that: "*trusteeship too has become more professional. Clients no longer look to their trustees to be philosophers, guides and friends. They expect them to be professional fund-managers and even, sometimes, businessmen*".

C. PENSION TRUSTEE

A pension trustee has the same responsibilities as a trustee will have in a private trust but the pension trustee has some particularities such as the fact that he cannot delegate some of his investment functions. In addition, some of his duties may be added to him by the national legislation that governs pension scheme.

D. JUDICIAL TRUSTEE

The judicial trustee comes into the scene when the administration of trust by the trustees has broken down. In this case, the court may take full administration of the trust which will be very time-consuming and expensive according to *Jenkins J* in the case of *Re Ridsel (1947)*. In order to avoid the court acting as trustee, the settlor, beneficiaries or trustees can apply to the court for the appointment of a judicial trustee either for him to come and assist the existing trustees or replace them simply, as seen in *Thomas and Agnes Carvel Foundation v. Carvel (2007) EWHC 1314*.

The judicial trustee is a person who may be considered by the courts to have aptitude to exercise the duties, or failing which, a court official can also assume the functions. It is the court that supervises his activities and gives him orders, but this does not in any way confiscate the discretionary powers which he has as trustee.

E. TRUSTEE DE SON TORT

In some circumstances, someone may not have been appointed as trustee (as in *Taylor v. Davis (1920) AC 365*), but he takes upon himself to carry out duties akin to those of a trustee and actually discharges the duties of a trustee to other people as seen in *Dubai Aluminium (supra)*. In this case, we say he has become a trustee de son tort which means of his own wrong.

For trust to arise in this case, the person must have been assuming such duties in fact, and must have intended to be a trustee. Equally, the person must have such command and control [*Mara v. Browne (1896)*] over property as to cause title to be vested in him [see *Re Barney (1892)*].

II. APPOINTMENT OF TRUSTEES

A. APPOINTMENT BY THE SETTLOR

The settlor has the right to appoint anyone of his choice, including himself as trustee, but a child cannot act as trustee as it was held in the case of *Re Vinogradoff (1935) WN 68*. We may like to know the number of person who may be appointed as trustees in a trust relationship. The settlor can appoint as many (*or as few*) persons as he or she wishes. However, considering that the trustees will have to act in unanimity, it is advisable limit the number of trustees due to the practical difficulty of bringing them all together in order to have unanimous decision all the time.

Once the settlor has appointed trustees, he or she cannot determine subsequent appointments unless that settlor retained such a power in the trust instrument.

B. APPOINTMENT BY THE TESTATOR

Similar rules regarding appointment by the settlor apply for declaration of trust in a will. When both the trustee(s) and executor(s) are appointed in the will, at the death of the testator, the executors will hold the property immediately in the testator's estate until the property is vested to the trustees appointed in the will. If all the trustees in the will have predeceased the testator, his personal representative will hold the property on trust until new trustees are appointed as it was the case in **Rc Smirthwaite's Trust (1871).**

C. APPOINTMENT BY PEOPLE WHO HAVE THE POWER TO APPOINT TRUSTEES

This form of appointment only happens when the trust instrument confers such powers to identified people. Usually, this sort of relationship is governed by statute and the statute actually outlines the scope of power that each person has in terms of appointment of trustees.

D. APPOINTMENT AT THE DIRECTION OF THE BENEFICIARIES

The rule in **Saunders v. Vautier (supra)** gives the power to adult beneficiaries of a trust relationship who are between them absolutely entitled to the beneficial interest in the property to terminate the trust and to direct the trustee to transfer the property to them if they are of full capacity. This does not however give all such beneficiaries the yardstick to interfere with the trust. In the case of **Re Brockbank (1948) Ch. 206**, beneficiaries were not allowed to control the trustee's power to appoint new trustees. Beneficiaries were also prevented from using their power to replace existing trustees with their own appointee(s).

So if beneficiaries wish to exercise the power to appoint trustees, they can terminate the trust by virtue of the rule in **Saunders v. Vautier** and then settle the property on new trusts for themselves with nominated trustees. This however may be an extremely complicated and difficult manoeuvre with considerable tax consequences. To avoid the convoluted process therefore, the beneficiaries may exercise their rights indirectly by proposing the appointment of other trustees to the existing ones.

E. APPOINTMENT BY THE COURT

It is a sacrosanct rule of trust law that trust will not fail for want of trustee. So where the trustee or anyone with the power to do so fails to appoint a trustee, the court can come in with its power of appointment. It should be noted that the court only exercises this power as a matter of last resort as it was held in the case of **Re Gibbon's Trust (1882) 30 WR 287.**

In **Re May's Will Trusts (1941) Ch. 109**, even though one of the trustees was in Belgium at the time of the German invasion of that city during World War II, there was no evidence she was incapable of exercising the power of appointment, so the court was unable to exercise her power of appointment. Good examples of situations in which the court will be able to exercise her power of appointment is if the trustee dies intestate or the person who receives the power to appoint trustees is underage, as it was the case in **Re Parsons (1940) Ch. 973.**

III. THE PAYMENT OF TRUSTEES

A. REIMBURSEMENT OF EXPENSES

The reimbursement of the trustee for expenses incurred in carrying out his duties may be done either with money from the trust fund or from the beneficiaries.

a. Reimbursement from the Trust Fund

From this fund, trustees are not bound to make any payments to the beneficiaries until their expenses have been reimbursed; see the case of **Scott v. Milne (1884)**. In effect, trustees even have what we call a lien on the trust property which permits them to secure their right of reimbursement as indicated by **Lightman J** in **Alsop Wilkinson v. Neary (1996)**.

If a trustee is unsure whether he has to be reimbursed from the trust fund, he can apply to the court for directions. The right for trustees to be reimbursed from the trust fund only makes them to retain part of that fund such that they cannot

entertain a cause of action in debt or damages against the fund. This is the reason why they cannot claim interest on the reimbursement that they retain. See **Foster v. Spencer (1996) 2 All ER 672.**

b. Reimbursement from the Beneficiaries

Where the trust fund does not have sufficient money with which to reimburse the trustee, he may turn to the beneficiaries. The beneficiaries will have to indemnify him for expenses incurred in holding the trust property even if the expenses are more than the value of the trust property.

It was held in the case of **Hardoon v. Belilios (1901) AC 118, 123** by **Lord Lindley** that the plainest principles of justice require that the beneficiary who gets the full benefits of the property should bear its burden unless he can show good reason why his trustee should bear them himself. In **JW Broomhead (Vic) Property Ltd v. JW Broomhead Property Ltd (1985) VR 891,** it was held that if the trustee incurred liability when he was not acting on behalf of the trust, the beneficiaries may still be liable to indemnify the trustee, but only if they requested this liability to be incurred. So in the case of **Bush v. Highman (1728),** a trustee was entitled to be indemnified by the beneficiary for interests when he had borrowed money at the request of the beneficiary.

B. REMUNERATION FOR SERVICES PROVIDED

a. Remuneration Authorised by the Trust Fund

The form of remuneration from the trust fund is especially available for trustees acting in their professional capacity: **Re Spurling's Will Trusts (1966) 1 WLR 920.** The (**professional**) trustee who is entitled to remuneration from the trust fund will still be entitled even if the services could have been provided by a lay trustee.

b. Remuneration Authorised by Statute

This form of remuneration is available when the trust agreement makes no provision for remuneration and when there is no other legal text that makes such provision. In England, the **Trustee Act** makes provision for payment to be obtained from the trust fund if the trust instrument does not provide so in case of a professional trustee or a corporation acting in that capacity. This means that the Act excludes charitable trusts from this form of remuneration. When a Statute authorises remuneration of the trustee from the trust fund, such remuneration must be commensurate the service rendered.

c. Remuneration Authorised by the Court

The court can exercise her power to order for remuneration in two circumstances:

- When the trustee is in breach of his fiduciary duties, it is still possible for the court to order for what is known as "**equitable balance**". This payment is meant to reflect the work that the trustee has done irrespective of the breach.
- The second circumstance under which the court can exercise this power is when the trust agreement is silent to this effect and statutory power is not engaged or does not order for payment in the circumstance, for instance where the trustee is not a professional.

CHAPTER 6: IMPORTANCE AND TERMINATION OF TRUST

I. SOCIAL AND ECONOMIC IMPORTANCE OF TRUST

A- EMPLOYMENT

Most of the law dealing with employment is governed by contract and statute and so at first sight, we may fail to see clearly where property and trust come. But it should be said already that employment is an asset, even though it is not an item of property. Employment has the characteristics of an asset in that employment cannot just be transferred from one employee to the other.

Trust performs a crucial employment-related function such as by way of pension schemes, Trade Unions and recreational facilities. Usually, the employee is under a sort of fiduciary (*'trust-like'*) duty to make sure that his actions do not conflict with his employer's interests.

B- PENSION

Pension schemes are instituted under the social security system. Basically, when a worker gets registered by his employer in the National Social Insurance Fund (*in French CNPS*), that employer at the end of each month will have to pay in some small percentage of the worker's salary to *CNPS*. This institution then holds the money on trust for the worker who, after paying this contributions each month for fifteen years, shall benefit from a monthly pension upon retirement. So one may compare the employer who contributes to the Fund on behalf of the trustee to a settlor, then the Fund to which the contribution is paid is compared to the trustee and the employee who gets the pension upon retirement is like the beneficiary.

C- TAXATION

Trust can be used as a tool for proper planning of taxation. Basically, if a settlor puts property on trust in order to avoid tax (*which is possible*), the property may still fall under taxable reservation of benefit. Usually, courts have limited power to enforce taxes when it comes to *'offshore'* trust or *'non-resident'* trusts.

When we entrust money (*in the form of taxes*) in the hands of administrative authorities, it is in order for them to use that money for the purpose of development and our welfare. This is what *Megarry VC* referred to in the case of *Tito v. Waddell (No2) (1977)* as *'trust in the higher sense' (or what other refer to as governmental trust)*. It should however be pointed out that this form of trust is not justiciable in court in same way as a private trust.

It should be indicated that trust serves the purpose of tax avoidance. When a settlor passes on property to a trustee, the tax rates will be reduced, but this is not tax evasion which is an operation through which one seeks to avoid tax which is already due. In effect, *tax avoidance is not an offence but tax evasion is a criminal act* as *Lord Nolan* pointed out in the case of *IRC v. Willoughby (1997)*.

D- TRUST AND INSOLVENCY

When a person (*human or corporate*), becomes insolvent, any property to which he is beneficially entitled will be divided among his creditors according to a strict (*statutory*) order of priority. Considering that commercial transactions have the risk of insolvency, it is always possible for one party to guard against such risk. But how can this be done? Consider the following illustration.

If *A* sells property to *B* upon the latter's promise to pay the money later, then it means that *A* has only obtained a personal right against *B* while *B* gains beneficial interest in the property. At law, such a right is only as good as *B*'s promise to pay, and nothing more. The problem with the personal right is that the right exists only against *B* and not against the property itself. So if *B* becomes insolvent and does not pay for the property, such property will be made available for *B*'s creditors and it will be shared among them by order of priority. Now if *A* secured his personal right of repayment, in case of *B*'s insolvency, *A* will have priority over the other unsecured creditors. It should however be recognised that there may also be some other secured creditors who may also take priority over *A*.

So in order for to come out unscathed in case of *B*'s insolvency, *A* has to make sure that *B* does not gains beneficial interest in the property sold on credit until *A* receives payment. How can this be done?

A can actually enter a *'return of title clause' (in case of non-payment of the price)* which will permit *A* to maintain both ownership and beneficial title over the property until payment is done.

Another outlet is that *A* can, upon conclusion of the sale with *B*, instead transfer legal title over the property to *B* and then maintain the beneficial interest over the property. At this point, *A* will then have to create an express trust with *B* in the contract of sale in which *A* will transfer legal title of the property to *B (as a trustee)* while *A* keeps the beneficial interest (*as the beneficiary*) so that in case of *B*'s insolvency, *A* still has good and protected claim over the property. This is how trust and insolvency therefore intermingle in a contract of sale. So trust can be used by the seller to protect his interest in property in the event of the buyer's insolvency.

E- SEGREGATION OF ASSETS

Once property is settled out on trust, the property in question no longer falls within the properties owned by the settlor. So putting property on trust protects the property against the consequences of the settlor's insolvency. This is because if the settlor becomes insolvent, the trust property cannot be made available for his creditors since it is now the trustee who has legal title over them.

In the same way, if the trustee also runs insolvent, that will not affect the trust property even though he is the legal owner because in this case, the property will not actually belong to him, but to the beneficiaries in equity.

II. TERMINATION OF TRUST

Any adult beneficiary of sound mind can order the trustee to transfer property to him or her. Basically, this is the rule that was laid down in the famous case of ***Saunders v. Vautier (1841)***. When such transfer takes place between the trustee and the beneficiary, then it means the trust relationship has come to an end. This rule was further expanded in the **20th Century** where two or more beneficiaries are involved. In effect, if the interest of one of the beneficiaries can be severed without prejudice to the rights of the other beneficiaries, then the rule can still apply as the cases of ***Re Sandeman's Will Trusts (1937) 1 All ER 368*** and ***Lloyd's Ban Ble v. Diker (1987) 1 WLR 1324***. In the latter case, the beneficiary inherited through succession. In that succession, one of the beneficiaries was a life tenant and the other was a remainder. For the rule to apply in the case of several beneficiaries, all of them have to agree that the trustees transfer the trust fund to them; it is not the singular decision of one of the beneficiaries only (***Arson v. Potter (1879)*** and ***Re White (1901) 1 Ch. 570***).