THE EXCEPTION IS THE RULE: DONATIO MORTIS CAUSA

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In conventional terms a *donatio mortis causa* (or what in the USA is called a gift[1] *causa mortis*) is a transfer of property made in contemplation or anticipation of the death of the maker. It involves a type of conditional transfer of property; that is to say, it is a transfer which vests property in the recipient or donee immediately it is made, but subject to a condition that the testator's death should occur shortly thereafter.[2]

There persists much confusion on key issues surrounding transactions of this nature. One fundamental issue has been whether this immediate vesting property under a *donatio mortis causa* is precisely the characteristic of the transaction. Some of the earlier English authorities, emphasising the testamentary nature of the transaction, appeared to suggest that a *donatio mortis causa* gave rise to a gift on condition precedent such that the death of the maker had to occur before the any property vested in the donee at all. American authorities, and later ones in England and elsewhere, have appeared to suggest, emphasising the *inter vivos* nature of the gift, that it gives rise, on the contrary, to a condition subsequent. This condition subsequent is such that the property vests immediately, but might divest if the gift is revoked or if the death does not occur. A condition subsequent appears now to be more clearly established as the basis on which the gift takes effect.[3]

The law pertaining to this type of transaction is part of the received law in those South Pacific jurisdictions which have been influenced by common law. However there have been few occasions where the courts of the region have had to consider it. [4] The basis upon which it might be applied in the future is an open question, as it is to some degree in other common law jurisdictions internationally. It is a category of gift which contains many anomalies and one might well consider whether the South Pacific jurisdictions ought to adopt it at all, without at least substantially refining the basis of its application.

HISTORICAL BACKGROUND

A transaction of this kind is undertaken when, to quote Blackstone, a person 'in his last sickness', 'apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods to keep in case of his decease'.[5] This species of transaction has its origins in Roman law where it appeared to be the product of attempts to avoid the technical or formal elements of succession law. The Roman law permitted transactions of this nature between husband and wife because these were gifts conferred during the course of a valid marriage.[6] In Roman law – unlike the general trend in common law systems - the gift could be made with respect to any kind of property which was capable of being disposed of by will, including land or interests in land.

The *donatio mortis causa* was absorbed into English law seemingly through the ecclesiastical jurisdiction. This jurisdiction was more disposed to the acceptance of Roman law principles than others.[7] However,

the reception was not without some confusion as to the nature of the transaction that was properly to be called a *donatio mortis causa*. To some extent the dispute here was in fact a re-enactment of a similar confusion, or disagreement perhaps, which occurred from time to time amongst Roman lawyers themselves as to the status and effect of the transaction. The problem was then, as it is now, that transactions of this nature seek to take effect outside the framework of testamentary gifts and general succession and inheritance law, and thus to escape formal requirements such as those under the *Statute of Frauds* or the *Wills Acts*.

According to the judgment of Loughsborough L.C. in *Tate v Hilbert*[8], the confusion on this account was taken into early English common law as a result of Swinburne's *Commentaries*. Swinburne referred to three types of gifts as *donationes mortis causa*. As Loughsborough L.C. put it, Swinburne had misinterpreted some of the relevant passages in the *De Donationibus* of Justinian which, although it mentioned the three categories under the heading of *Donatio Mortis Causa*, clearly confined a gift *mortis causa* properly to one of them alone.

The three types referred to by Swinburne, and drawn from the *De Donationibus*, were firstly, a gift in anticipation of death; secondly, a gift moved by imminent danger, which takes effect immediately; and thirdly, a gift where a person in peril of death, gives something but not so that the property is that of the donee, but in case the donor dies. In fact only the first of these is a *donatio mortis causa* at common law as the Lord Chancellor felt compelled to point out. The second type was a gift *inter vivos*, even though it was brought about as a result of expectation of death. A gift *inter vivos* it has to comply with rules pertaining to such gifts. The third type, they said, is a testamentary disposition which must be made in conformity, now at least, with the *Wills Act*.

However that might be, the constituent elements of the *donatio mortis causa* and the rationale for it are all matters which have occasioned some conjecture by the courts ever since. One crucial area concerns the types of property that can legitimately be the subject of the transaction. Does it extend to all types of property including land or limited interests in land? The fact that the transaction has sometimes appeared to require delivery of the subject matter has sometimes led to the suggestion that the gift is somehow modelled on, and perhaps confined to, a gift of goods or chattels that are essentially transferable by delivery. We will return to this issue in a moment.

Another more basic issue has been that of formulating the basic principles justifying the legal enforcement of transactions of this kind. For example, is it a gift and enforceable as for other gifts of property, or does it give rise to some type of trust obligation? If it is a gift, is it properly considered to be in the nature of a gift *inter vivos*, or is it better considered as some form of testamentary disposition? Let us look at some of the elements of a *donatio mortis causa* before going on to consider issues relating to the doctrinal basis for enforcement of it.

THE ELEMENTS OF A *DONATIO MORTIS CAUSA*

According to the authorities there are usually said to be three essential requirements for a transaction concerning property to constitute a valid *donatio mortis causa*. These have been given variant expression by the courts. The variance over time is partly accounted for by the fact that the concept of a *donatio mortis causa* has been expanded by the courts admitting new categories of transaction that will be upheld as such a gift. The original formulation, and one which is often repeated in the cases, is that in *Cain v. Moon*,[9] where Lord Russell of Killowen said:

> ... for an effectual donatio mortis causa three things must combine: first, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death;

> secondly, there must have been delivery to the donee of the subject-matter of the gift; and, thirdly, the gift must be made under such circumstances as shew that the thing is to revert to the donor in case he should recover.[10]

Given later formulations of the relevant conditions it would appear that some modification of this is required. The requirements can now probably be better summarised as follows:

(i) It must be made in contemplation, although not necessarily in the expectation, of the donor's death;

(ii) it must be made subject to the condition that it will only become indefeasible in the event of the donor's death and should the deceased' imminent death not occur the gift will fail; or, put another way, it must be shown to be conditional upon the death of the donor and capable of revocation by the donor until that time; and

(iii) there must delivery of the gifted property to the donee, or delivery of part of the means of getting access to the property, or delivery of what has been termed 'the essential indicia of title'.[11]

So far as matters of proof go, the recipient must establish the required elements of a *donatio mortis causa* on the balance of probabilities. There is authority to the effect that a claim to a *donatio mortis causa* cannot be established without corroboration. However such authority is not reliable and it seems that there is no hard and fast rule to this effect at all. Instead it would appear to be the case that claims to the existence of a *donatio mortis causa*, given their very nature as so-called "death bed gifts" usually made in circumstances where the testator is open to persuasion and influence, are viewed with scepticism and caution by the courts. This does not imply any strict legal rule as to corroboration. For example in *Heitmann v Mace*[12], drawing on various other authorities, the High Court of New Zealand held that there was no requirement as to corroboration in terms of a rule of law. It was simply a requirement of prudence. Likewise in *Cosnahan v Grice*[13] and *Duffy v Mollica*[14] it was held that the requirement was merely one of strict scrutiny by the courts in view of the unscrupulous opportunities and temptations which usually attended the circumstances in which they were made.

Let us now examine some of these essential elements a little more closely.

1. A Gift or a Voluntary Transaction

First of all it most often assumed that the transaction must be one of gift of the subject property. The language adopted by the courts in the past has usually been in terms of some kind of gift, and this is consistent with the *donatio* element of the name. So far as this goes, it is traditionally accepted that we are dealing with a voluntary assignment of property, and therefore not one that is referable to any contractual basis. In that sense it does not involve the creation of an express trust whether by declaration or otherwise, as noted earlier. The intention to make a gift, or at least a special kind of voluntary transaction, must be shown. In this vein it will be insufficient if it is just words to the effect of "I give X to you' because these words are words of gift *simpliciter*. A transaction in the terms just mentioned would, on the contrary, most likely be taken as a gift *inter vivos*. As we shall see, the transaction has to be made in anticipation or contemplation of death.

At the same level of analysis it is clear that a *donatio mortis causa* will not arise if it is shown on the evidence that what was brought about was not a transfer of property or dominion, but some kind of bailment or arrangement for the security of the goods in question. Merely putting another person in custody of goods for the purposes of looking after them, or giving someone rights of possession by way of

lien or security over them does not constitute a gift of those goods for the purposes of a *donatio mortis causa* or, of course, a gift *inter vivos*. It is also clear however that in order to distinguish a *donatio mortis causa* from a gift *inter vivos* the intention must not be to pass property in the subject matter of the gift to the donee in any complete sense. It is the alleged incompleteness of the gift pending death is a characteristic of the *donatio mortis causa*. We are not dealing with a situation where the donor intended the gift to take effect as a present or immediate gift or one which takes effect irrevocably and unconditionally regardless of whether the donor lives or dies.

However, let us pause here to ask whether the language of gift is entirely appropriate in all cases. In fact, one can conjecture many reasons why a *donatio mortis causa* ought to be called something other than a gift, even though the language of gift has most often been used in the authorities. Perhaps this only demands that we widen our concept of gift. It is true that we very often associate gifts with the direct and immediate alienation of property to someone else. Gifts occur in situations where we hand over things to others very often with immediate effect. Yet, at the same time, the making of gifts which are conditional, or in which the passing of ownership is deferred, is both common enough in fact and permissible in law. Thus this form of gift need not be excluded from consideration just because they are somehow more complex. However, the question still remains whether the transaction and its effect really amounts to a gift, and this is something to which we will return later on.

1 A. Made in Contemplation of Death

It must be clear that the 'gift' or transaction in question was made by the donor in contemplation of death. It is not enough to show that the donor made the gift because he or she was old.[15] Nor is it enough that the donor has some sense of the inevitability of death. However, it seems to make little difference just what manner of death the donor might have thought was to cause his or her imminent departure. If the donor suffers a different death from that contemplated the gift will still be rendered absolute.[16] However, there are a number of questions that this requirement brings up. Does this mean that the words of gift need to reflect the element of contemplation or anticipation which endow it with the required conditionality or is there are requirement that the words of gift must show that it is conditional in the required sense? Are the two things, contemplation and conditionality related in principle at all? Are there in fact two things, circumstances showing contemplation and conditional words of gift or merely one?

The best view as regards the first of these questions is probably that there is no requirement that the conditional nature of the gift be expressed or implied in the words of gift themselves. There are authorities such as *Gardner v Parker* where the words of gift have been looked at to glean the relevant intention to bring about a *donatio mortis causa*. The required conditions as to incomplete vesting pending death and revocability are matters which can be inferred either from specific words used or from the circumstances surrounding the making of the gift. The factor of contemplation of death is a shorthand way of saying that the gift must be expressly or impliedly made on condition to the effect that the gift is revocable until death and that complete vesting does not occur until the death occurs. There seems no particular reason why words of gift alone have to be looked at in order to determine the issue although they will be just as relevant.

Bartlett v Public Trustee[17] was a case involving a gift that was evidenced in writing. The High Court of New Zealand held that it was appropriate to look outside the document to ascertain the relevant intention to make the gift in anticipation of death. This would be consistent with treating the condition as something to be inferred from circumstances rather something which must appear from the words of gift proper. Similarly in *Northcott v Public Trustee*,[18] following *Lord Advocate v M'Court*[19] it was suggested that the requirement gift must be made 'in circumstances which show that it was to take effect only if the death

should follow'. These circumstances should give rise to an implied obligation to give the property back if the deceased recovers.

The classic statement of the essential elements in *Cain v Moon*, above, posits a difference between gifts made in contemplation of death and cases where there is an "expectancy". It is not enough to establish a *donatio mortis causa* that the donor or maker of it merely had some expectation of dying at the time that he or she made the gift. Also, it is not enough that the maker is shown to have been old, fatigued, weak or ill, or that he or she had some subjective apprehension that his or her condition was frail and likely to lead to imminent expiry. These are, of course, matters of evidence that the courts can take into account as matters from which appropriate inferences can be drawn. What has to be established clearly, whether by direct or circumstantial evidence, is that the gift itself was made in contemplation of death.

Possibility of death and not certainty of death is the required element. In *Northcott v Public Trustee* it was suggested that the gift must be made both in contemplation of possible death and of the possibility of recovery. In other words, the requirement is not one of showing that the deceased apprehended that death was certain. Such an element of certainty might well negate the requirement that the transaction be one which is revocable at any time before death. In *Lord Advocate v. M'Court*[20], it was said that if death was certain, such that the possibility of the donor's revival was absent, there was no possibility of a*donatio mortis causa*. In other words, the purported gift must either be treated as an attempted gift *inter vivos*, or as testamentary in nature requiring a will. On the other hand if the gift were made by the deceased 'in case anything fatal should occur' then the element of contemplation is made out.

What needs to be shown is that there was an apprehension on the part of the deceased of impending or possible death which colours the nature of the transaction as a conditional one. It is clear that if this death does not occur within a reasonable time the gift fails. It would also seem that the gift is revocable and the donor might reclaim what he or she purports to have given. In the first case it seems that the gift fails automatically on the recovery of health of the donor without any separate act of revocation.

In the second case, it would seem that the donor can reclaim the subject matter of the gift by an act of express or implied revocation such as by retaking possession of that which has been delivered. Furthermore it might be that the donor can do this even though he or she remains in the condition as to health which existed when the gift was made or in fact some other endangering condition.[21]

1 B. Legal Capacity

One likely contentious issue concerns the capacity to make the gift. Is the test of capacity that which applies in respect of gifts *inter vivos* or is it the rather more idiosyncratic notion of testamentary capacity which applies in respect of testamentary gifts? It would seem that the quasi-testamentary characteristics of a *donatio mortis causa* ought to require that the test of capacity of the donor should not be dealt with by normal rules applicable in respect of gift *inter vivos*. The relevant principles should be those laid down in *Banks v Goodfellow*[22] relating to testamentary capacity.

2. The Conditional Element

The terms of the transaction in question must be such as to show that it was conditional in nature the condition being that it does not vest completely until the death of the maker of it. It is for this reason that the transaction is said to be revocable at any time before the death by the testator and that it fails in the event that the death of the testator does not occur soon after it is made. Whether this condition exists or

not depends on construction of the terms of the transaction itself.

In the Canadian case of *Re Bayoff Estate*[23] the deceased was suffering with cancer. He gave a key to a bank safety deposit box containing savings bonds and coins and the title deeds to real estate, to his wife, the purported donee, and provided her with authority to take to the bank so that she could clean out the contents of it. The Bank refused access to the box on the basis of the authority during the lifetime of the deceased but permitted access after death. The Court indicated that the delivery of the keys to the safety deposit box would have sufficient of itself to constitute a *donatio* in respect of the savings bonds and the coins. However, it held that there were no words used by the deceased such as would indicate that the gift was conditional on death in the required sense.

3. Delivery

The original requirement was usually put in terms of delivery of the subject matter of the alleged gift. The delivery of the goods by the donor in such a way as would pass property in them was required. A delivery merely for the purposes of creating custody or security in or bailment of the goods was not thought to be sufficient. It must be complete although there is no requirement that the delivery be made contemporaneously with the expression of intention to make the gift.[24] The delivery could be made by the donor or some person acting as his or her agent who has possession of the goods under the donor's instructions.[25]

Normally actual delivery is what has been taken to be required, although in cases where that is physically impossible the delivery of the means of obtaining possession of the goods has been held be sufficient.[26] As indicated above, in the case of choses-in-action the delivery of documents relating to the title of the property has been held sufficient at least where it provides access to possession of the property in question. Thus delivery of a savings account pass book has been held sufficient for a*donatio mortis causa* of the funds in the account.[27] This would not be the case where the account is a cheque account where the cheque book alone is delivered, because without a cheque signed by the customer/donee there can be no access to the funds and, secondly, a cheque is merely an order by the donor to the bank. Similarly, a delivery of the deposit book for a cheque account would be insufficient because it provides no access to the funds in the account. It has not as yet been determined what the situation might be with respect to funds which are accessible with the use of bank and credit cards. However, on the principles established it would seem that where the delivery of such a card and the appropriate identification number provides access to the funds themselves, these might be the subject of a valid*donatio mortis causa*.

How far is delivery in fact essential though? On a closer look, the authorities on this issue are by no means free of difficulty. The Canadian decision of *Brown v. Rotenberg*,[28] dealing with a claim to the moneys in a bank account by the delivery of the bank book, maintains that the essence of delivery in this context is to be taken as whether the donor: 'parted with the control and dominion over the contents and with his facilites (sic) for dealing with them... [and whether the recipient thus].. obtained such means and facilities and acquired by possession of the key "a title to claim the real subject of the gift'.[29]

In respect of transactions *inter vivos* there can be actual delivery of the goods in question or where, for example, this is impracticable given the size or bulk of the goods there can be constructive delivery. It has been suggested, however, that in respect of delivery constituting a *donatio mortis causa* there needs to be some element of formal delivery. For example, in *Winter v Winter*[30] Crompton J. said:

Actual delivery of the chattel is not necessary in a gift *inter vivos*. In the case of a donatio mortis causa there is a reason for requiring some formal act. It is sufficient to complete a gift inter vivos that the

conduct of the parties should show that the ownership of the chattel has been changed.[31]

However, these comments should not be taken to imply that it is impossible to constitute a *donatio mortis causa* by constructive delivery. In *Birch v. Treasury Solicitor*[32] it was held where the subject matter of the gift is bulky in nature, the handling to the donee of a key to the box or place where the thing is kept would be sufficient to constitute delivery. It is not to be regarded as merely symbolic. Also in *Cai Guo Xiang v Mok Hang Won Elsa*, above, where the deceased has handed over to the donee a bunch of keys including those to a safety deposit box containing bonds and share certificates this would not be enough without accompanying words to indicate the underlying content of the gift.[33] Likewise delivery of keys to a taxicab[34]; a safety deposit box[35]; and automobile a fishing vessel[36] has been held sufficient provided that the delivery is not merely for custodial purposes. If that element is present there is no intention to make a gift in any event.

In *Costiniuk v. Official Administrator*[37] the Supreme Court of British Columbia was faced with a situation in which the deceased was in hospital. At times she was in considerable distress and often unconscious. At other times she was entirely lucid and understood that she was likely to die soon. She had a long standing relationship with the plaintiffs. She had no immediate family. On an occasion in hospital told them that she wanted them to have everything. Arrangements were made by hospital staff to have a lawyer come to have her execute a will to that effect. However the deceased was unconscious and this did not eventuate.

Brooke J. was satisfied that there was an intention to make a gift in contemplation of death. The real question was whether there had been any delivery. The keys to the deceased's house had been delivered to the plaintiffs some years before the death of the deceased. However this was merely to enable the plaintiffs to look in on deceased to make sure that she was alright. Hence he held that the delivery of the keys was neither delivery of possession nor symbolic of the delivery of possession. However the deceased had also delivered to the plaintiffs the keys to three safety deposit boxes. These contained various a State of Title Certificate to the house (not actually a duplicate certificate of title required to effectuate registration of a transfer), stock certificates, some valuable stamps, a receipt for a fund deposit and other personal items of the deceased. The delivery took place about one month before the deceased entered hospital. At the time the deceased said that she would get them back if ever she wanted them. According to judgment, the delivery of the keys to the safe deposit box signified more than simply delivery for safekeeping purposes. At the time the deceased was unwell and having difficulty with her breathing. The words of the deceased at the time were taken to be sufficient to demonstrate that Ms. Cripps' wished the plaintiffs to keep the keys unless she asked that they be returned to her.

Brooke J. held the delivery of the keys to the boxes to be effective as regards the personal items, the stock certificates and the stamps. It was not effective delivery in respect of the house or the fund deposits as the documents in the boxes appeared not to instruments 'necessary' for transfer. He said:

I am satisfied that the contents of the three safety deposit boxes pass tothe plaintiffs as a donatio mortis causa. In the result, the plaintiffs are entitled to delivery of the contents of the three safety deposit boxes. In practical terms however, the plaintiffs will have the benefit of the value of the stamps, the British Columbia Resources Investment Corporation stock certificate, and the personal papers. There was no suggestion that the Scotia Fund RRSP receipt was required as part of the means of effecting a transfer of that RRSP nor of course is a State of Title Certificate necessary to pass title to land. (Had the Duplicate Certificate of Title been found in the safety deposit box then the nice question would have been raised of whether its presence was sufficient to support an order compelling the Official Administrator to deliver a transfer of land to the plaintiffs which together with the Duplicate Certificate of Title would have enabled the plaintiffs to obtain title. I need not concern myself with this question in the circumstances.)[38]

Is there are requirement that the intention to make a *donatio mortis causa* should occur contemporaneously with the delivery? It appears not. In *Cain v. Moon*, above, it was suggested that the delivery could take place after the intention to make the gift had been formed. In that case the deceased, during an illness from which she recovered, gave the defendant a deposit note and asked her to retain it. The subject matter stayed in the possession of the recipient thereafter. About two years afterwards, the deceased became suffered a relapse of the illness and died. During this time the deceased informed the recipient that the bank note was hers in the event that she died. There was held to be a valid *donatio mortis causa* even though the delivery of the note took place before the making of the gift. This principle appears to have been adopted in the Canadian decision of *Chauvel v. Adams Estate*.[39]

Does the delivery have to be exclusive? It appears that this is not necessarily so. The situation commonly arises with respect of a *donatio mortis causa* effectuated by the delivery of keys. Where one set of keys is delivered to the donee with intention to effectuate a gift in contemplation of death and another set is retained by the donor the main problem will be that of establishing that the pretended donee was set up with dominion or control as against the donor because the possession is not exclusive. It is apparent that the donor must relinquish dominion. Seemingly however much will depend on whether, from a practical point of view, the donor is effectively unable to gain access to the subject matter notwithstanding retention of a duplicate of the keys.[40]

A variant of this situation is where the putative donor is has more than one set of keys but provides one set to the putative donee and another to a third party. In *Re Goodale Estate*, above, it was held that there was a valid *donatio mortis causa* of a vehicle even though the set of keys that had been given to the donee were subsequently obtained by a third person for purposes of storage of the vehicle and in fact thereafter retained by the latter individual. It was held that the donor had clearly indicated an intention to give the vehicle to the donee. The *donatio mortis causa* was not defeated by the fact that another person had gained actual possession of the keys. The donor had effectively parted with dominion at the relevant time such that the subsequent course of possession of the keys was itself something under the control of the donee. A similar situation was dealt with in *Chauvel v. Adams Estate*.[41] In that case the facts were that there were two sets of keys to a fishing boat and certain other items. The first set of keys was given to a person for custodial purposes. Tit was contended that the second set was later given to the plaintiffs, or more strictly to one of them on behalf of both, as a delivery of the subject matter of the gift. Thus at death, there were two parties with keys to the fishing vessel of the deceased.

3 A. The Subject Matter of a *Donatio Mortis Causa*

The issue here goes both to the subject matter of the ‘gift’ and what might be effective to pass ownership of it. The two things are clearly different, although related. For example, a requirement of delivery is tied to the idea that a *donatio mortis causa* is only possible in respect of property which was capable of transfer by delivery of possession. Delivery can sometimes be of the thing itself or, under certain circumstances, of things which are sufficiently representative of the underlying subject matter.

As noted above, the early authorities appeared to suggest that a *donatio mortis causa* was only possible in respect of property which was capable of transfer by delivery of possession. This included mainly goods and chattels. However it was always open to argument that it might include other kinds of property which was alienable by the delivery of something which constituted the indicia of title. It has been held for example that the delivery of a bank book may be sufficient to constitute a gift of the moneys in the account.

As discussed above, the authorities have established that a wide range of property can be the subject

matter of a *donatio mortis causa* Furthermore that property can be passed not only by actual delivery of possession but by delivery of a key or set of keys in so far as it constitutes sufficient rendering up of dominion or control over the subject matter of the gift.

In *Birch v Treasury Solicitor*[42] it was held that it was not necessary in the case of a*donatio mortis causa* of savings bank pass books that passbooks should set out all of terms of the deposit or conditions of withdrawal. Presumably the same logic applies to other documents of this kind. In *Tawil v Public Trustee of New South Wales*[43] the Supreme Court of New South Wales considered the question as to whether bank statements contained in a paper bag handed by the deceased to the plaintiff in a taxi on the way to the hospital where the deceased was confined and later died, could be the subject matter of a valid *donatio*. The Court held that to accept the claim of the plaintiff would involve an anomalous extension of an already anomalous doctrine. Furthermore such an extension could no be justified on the basis of the amendments to the *Wills Acts* permitting the admission to probate of wills which did not comply with the formal requirements. Whilst it was accepted that the a *donatio* could be created with respect to applied to the likes of bank passbooks and share certificates, the doctrine could not be applied to bank statements presumably on the basis that these were not sufficient indicia of the title to the moneys in the bank and nor did they provide access to the funds in the bank accounts.

Some of the items mentioned above been ruled out as the possible subject matter of a *donatio mortis causa* at various times this applies land or certain interests in land, shares both in proprietary companies and building societies, and promissory notes. Later authority appears to have reversed many of these decisions. However, those still excluded would appear to be the likes of cheques payable to the deceased him or herself or to bearer, annuity receipts on the basis that these do not constitute either property or sufficient indicia of the title to the subject matter in question. Conjectures still exist as regards the likes of credit cards, key-cards which might be delivered without providing other means of access such as a personal ID number or access code. But it is suggested that would be a mistake to exclude these altogether as a matter of principle for reasons which will appear in due course. Let us take up the issue regarding real estate.

Can there actually be a *donatio mortis causa* of real estate or interests in real estate? There are two leading authorities usually cited on this issue are two cases were cited, namely *Duffield v. Elwes*[44] and *Sen v. Headley*.[45] In 1827 in *Duffield v. Elwes*, which was followed in *Wilkes v Allington* without contributing anything to the debate, the House of Lords stated, although *obiter dicta*, that land could not form the subject matter of a *donatio mortis causa*. However, it did find that a debt which was secured by a mortgage deed over land and a bond was capable of being so delivered and hence creating a *donatio mortis causa* in respect of the debt. Lord Eldon purported to draw a distinction between land and substantive interests in land, on the one hand, and security interests in land the substantive aspects of which were to provide secure the payment of money, the interest in the land being "accidental". In that regard he drew on comments of Lord Hardwicke in *Richard v Syms* which postulated a difference between 'absolute estates' in fee or for a term of years and conditional estates for securing the payment of a sum of money. In respect of the former the creation parol interests such as by a *donatio mortis causa* could not be entertained. But according to Lord Eldon, in respect of mortgage interests, on the discharge of the mortgage such a parol interest always arises such that the mortgagee will hold the legal estate land on a trust arising by operation of law in favour of the mortgagor. Thus the mortgagee's estate in the land is conditional only. The primary interest is in the moneys secured by the mortgage, which could on that basis be the subject of a *donatio mortis causa*.

The conventional view after this was certainly that it was not possible to create a *donatio mortis causa* over real estate or interests in it. However, the question was to some extent arguable, given that the logic which appeared to develop regarding transactions of this nature was that delivery was not required of all of the fundamental means of access to the property in question, nor in fact of all of those things which

would enable the transfer of the title to the property to be effected. It appeared in fact that only part of the means of accessing the property or of gaining full title by prescribed means was required to effectuate such the gift and render it binding on the legal personal representatives of the deceased. In fact, the cases tended to be saying that a *donatio mortis causa* could be constructed by the delivery of some appropriate *indicia* of the title to property in such a way as would lead to the imposition on the legal personal representatives of the deceased of a trust in favour of the so-called donee.

If this were the position then why could it not be extended to real estate and interests in real estate? The relevant logic could be applied to many such interests just as easily as it could be applied to personal property. There has been some apparent resistance to this. In Australia the sanctity of the registration requirements which are central to dealing with realty interests under the Torrens system were held to stand in the way of a implying a *donatio mortis causa* as regards interest affected by that title. This was so in *Watts v Public Trustee*[46] and *Bayliss v Public Trustee*.[47] But these decisions appear not to acknowledge that the elements of a*donatio mortis causa* might be justified on the basis of the imposition of a trust obligation on the legal personal representatives arising out of the delivery of the indicia of title. Clearly enough a constructive trust can be imposed with respect to Torrens title land.

In *Sen v. Headley*,[48] however, the English Court of Appeal decided that the title deeds to unregistered freehold property could form the subject matter of a*donatio mortis causa*. In that case, the key was to a locked box containing the title deeds to the house. The court held that the gift of the keys to the box was an effective delivery of the title deeds. In turn the title deeds were, as one would expect, essential indicia of the title to the real estate. It was held that the delivery and the subsequent death of the testator were sufficient to create a trust obligation on the legal personal representatives of the testator as regards the real estate itself. Clearly this was unregistered and not Torrens title land so the decision could be distinguishable on that basis from the Australian cases just mentioned. However it is also clear that the Court of Appeal proceeded on a different basis using the notion of creation of a trust on the legal personal representatives as fundamental to the construction of the donee's rights.

In *Re the Estate of Bayoff deceased* (above) the issue could have been raised in that the safety deposit box in question contained the title deeds to real estate, but the parties did not raise the issue. It was raised in the Hong Kong case of *Cai Guo Xiang v Mok Hang Won Elsa* where the deceased handed over, a set of keys including those to a flat in Hong Kong. The issue was left undecided however on the basis that when the deceased handed over the keys to the flat as well as keys a safe deposit box (which contained another set of keys to the flat) there was ambiguity as to what was intended as regards the flat. Similarly in the Canadian case of *Costiniuk v. Official Administrator*[49] discussed further below the issue of a *donatio mortis causa* of real estate was effectively side-stepped.

ANOMALIES AND EXCEPTIONS

From the discussion thus far it is apparent that many of the elements of a *donatio mortis causa* are less than settled in their ambit. Many of them have undergone substantial revision by the courts over time. Furthermore the doctrinal basis for the enforcement of the transaction remains unsettled. Before moving on to the question of the underlying rationale for the recognition and enforcement of transactions of this nature let us focus on their allegedly anomalous or exceptional nature. This might enable us to draw out more precisely the features of that with which we are dealing.

A *donatio mortis causa* is in fact well acknowledged by the authorities to be an anomalous concept in a number of key respects. According to Buckley J. in *Re Beaumont; Beaumont v Ewbank*[50] such transactions – or gifts as he referred to them - have an 'amphibious nature'. So it was also in Roman law

prior to the appearance of the passages in *Justinian* mentioned at the beginning of this article. Perhaps we should not overplay this anomalous character. These transactions are no less anomalous than is that of a trust in a common law system which, like the *donatio mortis causa*, has a history being accorded exceptional status.[51] Trusts are standing exceptions to the need for compliance with legal formalities as regards either creation of a proprietary interest or the disposal of one already created, to the requirement of consideration, and to compliance with the otherwise strict rules applying to the legal and equitable recognition of gifts. We could lay some store by the fact that it has been courts of equity which have developed both the trust and the *donatio mortis causa* and this may well account for their exceptional character. The difficulty is of course that equity's traditional distaste for the recognition and enforcement of gifts as opposed to trusts, even those which are the product of purely voluntary transactions, is difficult often to explain.

Be that as it may, we can be clear about two clearly exceptional features of a *donatio mortis causa*. On the one hand, and as far as we need to treat them as gifts at all, a *donatio mortis causa* appears to provide an exception to the requirement that gifts that are to take effect on the death of the maker of them must comply with the requirements as to a valid will imposed by the statutory regime under the *Wills Act*s. However, looked at more closely, this is no exception in the strict sense at all, because the 'gift', as we shall see, does take effect *inter vivos*, although conditional on death. In other words, it is not properly a transaction which is testamentary in nature. On the other hand, it does assume some of the characteristics of a testamentary disposition in that it is, strictly speaking, revocable at any time prior to the death of the donor, just as is a will.[52] Normally this revocation will take effect by way of the testator reassuming control or dominion over the property which was the subject of the transaction.

This element of revocability,[53] which might be brought about either by an act of the donor, or by the recovery to health of the donor within a reasonable time, is not enough to make the gift testamentary in nature, and this is essentially because there is a vesting of property *inter vivos*. For the purposes of the general law, as we noted at the outset, the property which is the subject of a *donatio mortis causa* vests in the recipient immediately, but nonetheless subject to a condition as to revocation. It is in a defeasible state until death. However, it will not be included in the estate of the deceased person either as specific or residuary property because the gift takes effect when the property, or something appropriately representative of it, is delivered to the recipient. However, for the purpose of schemes of death duties it is often the case that property subject to a *donatio mortis causa* is vested by the relevant legislation in the executor so as to make it available for the purposes of payment of death duty.[54]

The allegedly non-testamentary nature of the disposition seems to mandate that there is no need to comply with the *Wills Act* formalities in relation to the making of valid wills, but there may be consequences of another nature. For example, where there is a contract to dispose of property by will, the making of a *donatio mortis causa* would not, on normal principles, constitute a breach of that contract. The usual approach to questions such as this is that, where there is a contract to leave property to a person by will or a contract not to revoke a will, there will be a breach of that contract only where another testamentary transaction is entered into which is inconsistent with the contractual obligation. This is subject to the construction of the particular contract in question, which might on its own specific terms be breached by other type *inter vivos* or non-testamentary transaction. However, the normal position is that the transaction constituting the breach must be testamentary in nature, according to principles laid down in *Russell v Scott*[55] and *Palmer v Bank of New South Wales*[56].

This position has been well established at least since *Gregor v. Kemp*[57] In that case a mother covenanted in a marriage contract executed in consideration of the marriage of her eldest son that she would by her last will leave one fourth of her estate to that son, his executors or administrators. The marriage took place as anticipated. Notwithstanding the covenant, the mother, had concerns that, as a result of her son's death, the relevant share of her estate would to others. Thus she set about disposing of $2,000 in cash a short

time before her own death. These cash gifts were made partly to her daughter and partly to trustees for her grandchildren. The Court took the view that the contract to leave property by will did not prevent the mother 'from disposing of her estate in any way in her lifetime.' However it did say that she could not make 'a distribution on purpose to defeat the covenant.'[58] It was suggested that that the dispositions of the mother were 'a plain fraud'.[59] However, it was held that that, even so, the gifts were each a*donatio mortis causa* and that the covenant in the marriage contract had been 'eluded by a disposition a day or two before death.'[60]

In so far as it can to be treated as a gift, a *donatio mortis causa* would have to be considered at the very least one of a special kind. It is accepted that it does not need to comply with the normal rules relating to gifts of property *inter vivos*. It is clear that a particular voluntary transaction or gift might fail as a *donatio mortis causa* and yet be upheld as an absolute gift *inter vivos* or, in fact, vice versa.

A *donatio mortis causa* usually takes place orally, but it could be evidenced in writing. However, it does take effect without any need to comply with formal legal requirements that might be laid down by law or statute as to the creation of an interest in property or, more especially, as to the transfer of the subject matter of the gift. This includes requirements which might otherwise pertain as to writing under the Statute of Frauds. It is immune from these requirements, such as they might be. But further it arises outside any other requirements or formalities that could pertain to an *inter vivos* gift of the type of property specifically involved. For example, in the Canadian case of *Chauvel v Adams Estate*[61] it was held that there could be a valid *donatio mortis causa* in respect of a fishing vessel even though the Canada Shipping Act required transfer either by bill of sale or in writing. It was suggested, in fact, that to put the transaction in writing may well be counter-productive in so far as it might suggest that the gift was intended either to be one *inter vivos* or a testamentary disposition rather than a *donatio mortis causa*.

Does a *donatio mortis causa* create a trust? It certainly does not create an express trust, either by declaration or by settlement. It is regarded as in the nature of a gift or voluntary alienation which is conditional in nature. It is arguable, on current authority, that the circumstances of its creation do in fact give rise to a constructive trust. We will return to that point later on. However, it is clear that it involves no intention to create an express trust nor is there a trustee. The intention is to vest the property conditionally, but directly in the donee without the intervention of a trustee to hold the title to the property.

Up to this point, then, the character of a *donatio mortis causa* as traditionally articulated appears as that of a peculiar type of gift lurking somewhere between the categories of *inter vivos* gifts, on the one hand, and testamentary gifts, on the other. It is certainly not an express trust and is not intended as such. It falls into a category which appears, in most respects, to be *sui generis*.

This exceptional character arises within equity itself which has long imposed restraints on the recognition and enforcement of voluntary transactions unless there was some clear equitable basis to do so. Equity, it is said, will not assist a volunteer or, put another way, equity will not perfect an imperfect gift. It is quite clear, however, that a *donatio mortis causa* may in fact be enforced by the volunteer or so-called donee, and that courts of equity will enforce it.

There are in fact many exceptions in equity to the rule against assisting volunteers; a rule which appears no less anomalous than many of the exceptions to it. Indeed in *Morris v Handley* Young J. of the Supreme Court of New South Wales mentioned seven clear exceptions, including a *donatio mortis causa*, were listed as follows:

1. A fully completed trust or a resulting trust can be enforced by a volunteer: *Ackroyd v Smithson* (1780) 1 Bro CC 503; 28 ER 1262; *Corin v Patton* (1990) 169 CLR 540, 557.

2. A *donatio mortis causa* may be enforced by a volunteer: *Duffield v Elwes* (1827) 1 Bli (NS) 497, 530; 4 ER 959, 971.

3. A volunteer who, in the expectation engendered by the purported donor, spends money on property is assisted in equity: see *Dillwyn v Llewelyn* (1862) 4 De G F & J 517; 45 ER 1285.

4. The principle does not apply where the contest is not between the donor and the volunteer, but between two volunteers or the volunteer and a third party: Holt v Bishop of Winchester (1694) 3 Lev 47; 83 ER 570.

5. The rule in Strong v Bird (1874) LR 18 Eq 315 is another exception to the general proposition.

6. Equity will relieve against accident where a volunteer has a power which he wishes to exercise and does as much as he can to exercise but is thwarted by circumstances from exercising it in due form: see *Montague v Bath* (1693) 3 Chancery Cases 55, 68; 22 ER 963, 971, where the Court said that if a person has a power which can only be exercised in front of four Privy Councillors and the principals sent him to Jamaica where there are no Privy Councillors, equity will allow the person to exercise the power informally even though he is a volunteer.

7. More importantly for the present case, equity may assist a volunteer when to decline to do so would be against the conscience of the defendant, who would be taking advantage of his own wrong; see Gilbert's Lex Pretoria at page 306 ...

It may be questionable in many cases whether, under a particular *donatio mortis causa*, there is any imperfection at all. If the property, the subject of the transaction, vests conditionally in the recipient - that is where the transaction vests subject to a condition subsequent as to vesting (the death of the maker of it) - then the title is complete at the moment of the death. This of itself is sufficient to enforce it against any claim to title by the legal personal representative.

There might be cases, however, where the method of assignment itself can be regarded as incomplete in some more radical sense. In all cases, the donor will not have done everything in his or her power to complete the gift by compliance with the normal legal rules relating to alienation of property that is the subject of the gift. The position is that the gift is ultimately enforced for the benefit of the volunteer even though it is imperfect in that precise sense.

As the maxims themselves imply, the general position of equity as regards voluntary assignments is quite strict. Where there are gifts of equitable property this is less so perhaps because assignability is predominantly a matter of intention, although in some cases such as beneficial trust interests, writing might be required. However, where the gift is of legal property the rule in *Milroy v Lord* comes into play to determine the effectiveness of the purported assignment in equity. There have been variant formulations as to how this rule, of particularly the first leg of it, is to be applied. Yet, even following the more moderate formulations of it by Griffith C.J. or Latham J. in *Anning v Anning*,[62] for example, it is still quite onerous.

In this particular context, express trusts usually evince an equally voluntary character on the part of those who create them, and yet they are both clearly outside the scope of the rule in *Milroy v Lord*[63] and outside the operation of the two maxims mentioned above. It is perhaps more unusual when it appears that, on a substantive view, only to be that it is only the setting up of the trustee which makes any difference between a voluntary alienation or gift of property and the creation of a trust. Whatever the case, a *donatio mortis causa* occupies a similar place of privilege here as far as equity is concerned and this is because it fits into a category of transaction where there is sufficient equity to justify its enforcement against other legal claimants to title. Whilst clearly they are not express trusts, it might well be that the

proper basis of these transactions, and the interest to which they give rise in the hand of the recipient, is better understood in terms of some kind of trust obligation arising by operation of law. Seen in this light, the *donatio mortis causa* is probably no less an exceptional voluntary transaction than is a trust.

REVIEWING THE RATIONALE FOR A *DONATIO MORTIS CAUSA*

The allegedly ambivalent or anomalous character of such a type of dealing with property has as much to do with the attempt to squeeze transactions of this nature into a particular conceptual box. This box is the gift box into which the relevant transactional elements do not quite fit. The alternative is the testamentary disposition box, but it does not fit neatly into that one either. The language of gift has perhaps served its purpose, but it is put under severe strain by the very nature of those transactions which the courts have themselves attempted to legitimate in this area.

The *donatio mortis causa* has always had an exceptional character in the sense that it operates as an exception to formal legal principles including those pertaining to gifts both *inter vivos* and by will. However, as was indicated earlier there is nothing new in this regard when one puts the whole context for their elaboration within the context of equity jurisprudence rather than the narrow confines of the common law of property. In a common law system equity has long been prepared to enforce transactions where the requirements of general equity, justice and good conscience required it. And clearly it has been quite prepared to do so in situations where the formal requirements of the law, such as those under the *Statute of Frauds* and its derivatives, have not been complied with by the parties to the transactions; that is, where the transaction is legally incomplete in a formal sense.

In *Sen v Headley*, above, the court suggested that the rationale for a *donatio mortis causa* was better considered as a type of constructive trust, or perhaps a case of estoppel, rather than in terms of the conventional narrative of a gift of exceptional quality. In other words, it has to be regarded as a type of transaction which gives rise to some equity, as indefinable and unlimited as that might be, which would bind the executors of the now deceased maker of the transaction (the alleged donor). When one considers the reasons for the enforcement of a *donatio mortis causa* are not too dissimilar in principle at least from the grounds upon which mutual wills are treated as giving rise to an enforceable equitable interest by way of constructive (also binding on the legal personal representatives) notwithstanding the legal interests in the deceased's property at common law.[64]

In paying due regard to the expansion of the concept of a *donatio mortis causa* into new territory, such as we have discussed above, it is in fact highly appropriate to acknowledge recent developments in equity in the area of constructive trusts and equitable estoppel, such as was acknowledged in *Sen v Headley* itself. The expansion referred to here is not merely the extension of this category of property dealing into the area of real estate interests. It is a matter which has evoked considerable criticism no less perhaps than the recognition of the interests of *de facto* partners in real estate by way of constructive trust.[65] It is, instead, the general widening of the principles involved in the *donatio mortis causa* itself, an extension which has severely strained the now largely inadequate, though perhaps historically relevant language of gift.

Will the courts of the Pacific region be inclined to adopt this approach? It is difficult to tell. They have certainly be slow to adopt full scale the developments in the area of constructive trusts and equitable estoppel such as have occurred in other common law jurisdictions. The reasons for that are no doubt complex. One could certainly argue that this reluctance is unreasonable on the basis that a creative role for equity should be taken as one of the means whereby the law or regional jurisdictions can be appropriately moulded to local circumstances and conditions. We await the realisation of that possibility, particularly in the jurisdictions of the South Pacific region where there is ample opportunity to dispel some of the anomalies of the past.

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[1] For the time being I have used the terms 'gift' and 'transaction' rather indiscriminately to refer to a *donatio mortis causa*. One of the issues raised later in the paper is whether the language of gift is appropriate to dealings of this kind at all.

[2] See *Re Craven's Estate* [1937] Ch 423; *Dufficy v Mollica* [1968] 3 NSWR 751.

[3] See R A Brown, *Brown on Personal Property* (1955) 134ff.

[4] On the general reception of law and equity in the South Pacific jurisdictions see Jennifer Corrin Care 'Cultures in Conflict: The Role of the Common Law in the South Pacific' (2002) JSPL Vol 6 No. 2. It has not been possible to find instances where the South Pacific courts have specifically dealt with this category of transaction. However, in Fiji, for example, the *Gift and Estate Duties Act* [Cap 203] includes in the definition of 'successor' a person who on the death of another 'has become entitled to any property forming part of the dutiable estate of the deceased as a beneficiary under any gift or *donatio mortis causa*'. Section 5(1)(a) of the same Act includes in the estate of the deceased for the purpose of computation of death duty any property to which the deceased has become entitled 'under any gift or *donatio mortis causa.*'

[5] William Blackstone, *Commentaries on the Laws of England*, Book 2, Chapter 32, para 6. http://www.lonang.com/exlibris/blackstone (Accessed 31st July 2003). According to Blackstone the concept 'so far differs from a testamentary disposition; but seems to have been handed to us by the civil lawyers, who themselves borrowed it from the Greeks.' .

[6] *quæ conferuntur in tempus soluti matrimonii*, Pothier, *Pandectæ Justinianeæ*, XXIV, t. i, xix.

[7] Although this claim has itself occasioned conjecture from time to time.

[8] (1793) 2 Ves. Jun. 111. Lord Loughsborough LC was following the earlier judgment of Lord Hardwicke in *Ward v Turner.*

[9] [1896] 2 Q.B. 283.

[10] Ibid. at p. 286.

[11] See *Public Trustee v Bussell* (1993) 30 NSWLR 111; *Harneiss v. Public Trustee* (1940) 40 SR(NSW) 414 at 416-417; 57 WN(NSW) 157 at 157-158; *Dufficy v. Mollica*, above note 2 at 758; *Sen v. Headley* (1991) Ch. 425 at 431; cf. *Bentham v. Potterton* [1998] IEHC 84 (28th May, 1998) para 8; *Re Mulroy* (1924) 1 IR 98.

[12] (1903) XXXXI NZLR 1242.

[13] (1862) 15 Moo P.C.C. 215.

[14] Above note 2.

[15] *Smallcombe v Elders Trustee Co. Ltd.* [1963] WAR 3.

[16] *Wilkes v Allington* [1931] 2 Ch 104.

[17] [NZLR] 1040.

[18] (1903-1923) XXXI NZLR 1242; See also *In re Griffin* (1899) 1 Ch 99; *In reDillon* 44 Ch D 76 and *In re Hodgson* 31 Ch D 177.

[19] [1952] All ER 184.

[20] Above note 19.

[21] See, for example *Bentham v. Potterton* [1998] IEHC 84.

[22] (1870) LR 5 QB 549.

[23] 2000 SKQB 23

[24] *Cain v Moon* [1896] 2 QB 283.

[25] *Re Weston* [1902] 1 Ch 680; *Dufficy v Mollica*, above note 2.

[26] *Birch v Treasury Solicitor* [1951] Ch 298.

[27] *Public Trustee v Young* (1940) 40 SR (NSW) 233; *Harneiss v Public Trustee*, above note 11.

[28] [1946] O.R. 363 (C.A.).

[29] See also *Hawkins v Blewitt* ER LLXX489 and *Greenidge v Bank of Novia Scotia* (1984) 38 WIR 63.

[30] (1861) 4 LT 639.

[31] Ibid. at p. 640.

[32] Above note 26.

[33] Ibid.

[34] *Shebaylo v.Crown Trust and Guarantee Company* [1948] 2 W.W.R. 1 (Man. K.B.).

[35] *Brown v. Rotenburg* [1946] 4 D.L.R. 139 (Ont. C.A.).

[36] *In re Goodale Estate* [1946] 3 W.W.R. 545 (Man. K.B.); *Chauvel v. Adams Estate* [1998] BCSC B950691 (29/4/98) http://www.canlii.org/bc/cas/bcsc/1998/1998bcsc10684.html (Accessed 23/2/04).

[37][2000] BCSC 1372 (18/9/00) http://www.canlii.org/bc/cas/bcsc/2000/2000bcsc1372.html (Accessed 23/2/04).

[38] Above note 36 at para. 22.

[39] Above note 36.

[40] See *Woodard v. Woodard* (March 15, 1991) The Times Law Reports 137, [1992] R.T.R. 35.

[41] Above note 36.

[42] [1951] Ch 298.

[43] [1998] NSWSC520 (1 July 1998) http://www.worldlii.org/au/cases/nsw/supreme_ct/1998/520.html (Accessed 23/02/04).

[44] (1827) 1 Bli NS 497.

[45] [1991] 2 All ER 636.

[46] (1949) 50 SR (NSW) 130; 67 WN (NSW) 29.

[47] (1988) 12 NSWLR 540.

[48] [1991] 2 WLR 1308.

[49] Above note 37.

[50] [1902] 1 Ch 889.

[51] In the sense that the long history of recognition of trusts shows that they were set up, often deliberately, to avoid the requirements of the formal common law relating to the recognition of property interests and the alienation of property.

[52]*Harneiss v Public Trustee* (1940) 40 SR (NSW) 130; *Watts v Public Trustee* [1949] 50 SR (NSW) 130.

[53] Which, as is well known is also a characteristic of wills, and thus reinforces the testamentary character of a *donatio mortis causa*.

[54] See note 4 above.

[55] (1936) 55 CLR 440.

[56] (1975) 133 CLR 150.

[57] (1722) 3 Swans 482 (36 ER 926).

[58] (1722) 3 Swans, at p. 482; 36 ER at p. 926.

[59] (1722) 3 Swans, at p. 482; 36 ER, at p. 926.

[60] (1722) 3 Swans at p. 482; 36 ER at p. 927.

[61] Above note 36 at para. 35.

[62] (1907) 4 CLR 1049.

[63] (1862) 4 de G F & J 264; 45 ER 1185.

[64] It has been suggested that *Sen v Headley* can be isolated and treated as if it were explicable on the basis that it was dealing peculiarly with unregistered land in the United Kingdom. There is, however, nothing in the judgement which supports such an argument.

[65] For example, in *Baumgartner v Baumgartner* (1987) 164 CLR 137.