Title

The myriad trust applications of equity's maxims have in no way been rendered obsolete by the Uniform Trust Code.

Text

It is professionally unwise for one with only the UTC in hand to endeavor to navigate in the trust space. Recall that the UTC is merely an aggregation of tweaks to fundamental equity doctrine. The trust being a creature of equity, the UTC makes no effort even to define for its purposes, let alone for any other purposes, what a trust actually is. The equitable remedy and the various forms it can take in the trust context, both procedural and substantive, are the subject of Chapter 7 of *Loring and Rounds: A Trustee's Handbook* (2022). The focus of this posting, however, is on equity's "maxims," which have myriad trust applications that have not gone away with the enactment of the UTC. In fact, few if any of the trust-related situations regulated by the maxims are even addressed by the UTC. Here are the maxims that are particularly relevant to the trust relationship:

- Equity will not suffer a wrong to be without a remedy.
- Equity follows the law.
- Where there is equal equity, the law shall prevail.
- Where the equities are equal, the first in time shall prevail: *qui prior est tempore, potior est jure*.
- He who seeks equity must do equity.
- He who comes into equity must come with clean hands. [The public policy that underpins the unclean-hands maxim is taken up in §5.5 of the Handbook].
- Delay defeats equities.
- Equality is equity.
- Equity looks to the intent (substance) rather than to the form.
- Equity looks on that as done which ought to be done.
- Equity imputes an intention to fulfill an obligation.
- Equity acts *in personam*.
- Equity will not aid a volunteer.
- Equity will not suffer a trust to fail for want of a trustee.
- Equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made.

For a collection of the trust applications of these maxims see the footnoting to the catalogue of maxims in §8.12 of *Loring and Rounds: A Trustee's Handbook* (2022), the relevant portion of

which section is reproduced in the appendix below. The Handbook is available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP.

Appendix

§8.12 English Equity and its Maxims; Where the Trust Is Recognized Outside the United States [from *Loring and Rounds: A Trustee's Handbook* (2022), available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP].

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The trust is a creature of equity, an invention of the English court of chancery. By the fifteenth century, the English court system had evolved into two subsystems: the courts of the common law and the chancery courts. See Chapter 1 of this handbook. Equity, an invention of the chancery courts, affords remedies that are generally unavailable at law, such as the injunction and specific performance order. See Chapter 7 of this handbook. The trust is an institution that essentially evolved from an equitable remedy which has some of the attributes of the modern-day remedy of restitution for unjust enrichment.[16]

Equity doctrines ancient and modern. In §8.15 of this handbook we consider the myriad equitable doctrines, ancient and modern, that are the products of the evolution of the trust relationship.

Estoppel. Equitable estoppel in the context of challenging a trust's terms/validity is taken up in §5.5 of this handbook. The doctrine of judicial estoppel is as well.

Maxims. Equity is also an application of maxims that were formulated in decisions of England's chancery courts. These maxims are as relevant today as they were when separate courts of law and equity were the norm.[17] They include the following:

- Equity will not suffer a wrong to be without a remedy.[18]
- Equity follows the law.[19]

[16]*See generally* Restatement of Restitution (1937).

[17]*See generally* Charles E. Rounds, Jr., *Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity's Maxims*, 42 U. Tol. L. Rev. 673 (2011).

[18]Snell's Equity ¶5-02 through ¶5-04. Today, the letter of this maxim is certainly overly comprehensive as a matter of general Anglo-American equity jurisprudence. Not so, however, when it comes to fiduciary matters. The maxim, for example, is what undergirds the comprehensiveness of the regime of breach-of-trust remedies that equity makes available to trust beneficiaries, remedies that are the subject of Chapter 7 of this handbook.

[19]Snell's Equity ¶5-05 through ¶5-07. The resulting trust, for example, is equity's way of replicating the vested legal reversion, legal title being in the trustee.

- Where there is equal equity, the law shall prevail.[20]
- Where the equities are equal, the first in time shall prevail: *qui prior est tempore, potior est jure*.[21]
- He who seeks equity must do equity.[22]
- He who comes into equity must come with clean hands.[23] [The public policy that underpins the unclean-

[20]The maxim's application is best exemplified by equity's forbearance when it comes to bona fide purchasers for value or BFPs, a topic that is covered in §5.4.2, 8.3.2 and §8.15.63 of this handbook:

> Undoubtedly, the reason why the chancellors refused to give relief to a cestui que use against a bona fide purchaser derived from considerations of conscience. Equity refused to give a remedy unless there was an affirmative reason in point of justice for giving it. The cestui que use and the bona fide purchaser were equally innocent, and the chancellor refused to interpose. 3 Scott & Ascher §13.1.

[21]Snell's Equity ¶5-08. Assume a trust beneficiary transfers for full value his equitable interest to *X*, a transferee in good faith, and then later purports to transfer for full value the same equitable interest to *Y*, who is also wholly innocent. *X* will generally prevail in equity, the transfer to him being the prior one. *See* §8.15.63 of this handbook (doctrine of bona fide purchase). *See generally* Rock Springs Land and Timber, Inc. v. Lore, 75 P.3d 614, 622 (Wy 2003).

[22]Snell's Equity ¶5-09 through ¶5.14. This maxim is closely related to the clean-hands maxim, but looks to the future rather than to the past. For an example of the application of the maxim "He who seeks equity must do equity," *see* §3.3 of this handbook (involuntary trustees), specifically the discussion of remedial constructive trusts. For other trust-related applications of the maxim, *see* 4 Scott & Ascher §§22.1.3 (trustee in default) (noting that "there is no reason why a trustee who has properly incurred an expense and made good any loss that has resulted from a breach of trust should not be entitled to indemnity"), 25.2 (liability of beneficiary to trust estate) (noting that "[t]he interest of a beneficiary who is under a liability to pay money into the trust is subject to a charge for the amount of the liability," that is "a person entitled to participate in a fund and also bound to contribute to the same fund cannot receive the benefit without discharging the obligation"). *See, e.g., In re* Stout Trust, No. 323535, 2015 Mich. App. LEXIS 2386 (Dec. 15, 2015) (unpublished) (trust beneficiaries may not retain overpayments; but should there remain a deficiency once overpayments have been redistributed, the trustee shall be personally liable for distributions that should have been made but in breach of trust were not).

[23]Snell's Equity ¶5-15. *See, e.g.*, Vincent J. Fumo Irrevocable Children's Trust for the Benefit of Allison Fumo, 2014 PA Super. 235, 104 A.3d 535 (Pa. Super. Ct. 2014) (U.S.); Overton v. Banister (1844) 3 Hare, 503; 8 Jur. 906; 67 Eng. Rep. 479; 28 Digest (Repl) 494, 118 (an infant who had fraudulently hid from the trustees his infancy, and in so doing received an improper distribution from the trust estate, unsuccessfully sued the trustees for a duplicate distribution upon his attaining the age of majority, his unclean hands having deprived him of the usual protections equity affords infants). Note, however, that a trustee's own misconduct ordinarily does not prevent the trustee from maintaining a suit against a cotrustee to remedy a breach of trust. This is because the purpose of the suit is not to benefit the trustee but to benefit the beneficiaries. *See generally* 4 Scott & Ascher §24.4.2. On the other hands, the clean hands doctrine may well mean that a trustee who commits a breach of trust in bad faith is entitled neither to contribution nor indemnity from his cotrustees. *See generally* 4 Scott & Ascher §24.32.3; Restatement (Third) of Trusts §102(2). *Cf.* Restatement (Third) of Restitution and Unjust Enrichment §63

hands maxim is taken up in §5.5 of this handbook].

- Delay defeats equities.[24]
- Equality is equity.[25]
- Equity looks to the intent (substance) rather than to the form.[26]

(Equitable Disqualification (Unclean Hands)) ("Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct in the transaction that is the source of the asserted liability."). On the other hand, "[i]f a trustee from whom contribution is sought *also* acted in bad faith, contribution is required…. A bad-faith trustee may not hide behind another's unclean hands." Restatement (Third) of Trusts §102 cmt. d.

[24]Or equity aids the vigilant and not the indolent: *vigilantibus, non dormientibus, jura subveniunt*. Snell's Equity ¶5-16 through ¶5-19. *See* §§3.6 of this handbook (in part discussing statutes of limitation and laches in contract and tort actions by the trustee and/or trust beneficiaries against third parties and in equitable actions by beneficiaries against third parties for participating with the trustee in breaches of trust), 7.1.3 of this handbook (trustee's defense that beneficiary failed to take timely action against trustee), 7.2.10 of this handbook (limitation of actions by beneficiary against trustee: (laches and statutes of limitation)), and 8.15.70 of this handbook (laches doctrine generally).

[25]Snell's Equity ¶5-20 through ¶5-23. In England, when a court is compelled to take over the work of the trustee of a discretionary trust because of the trustee's nonexecution, the court will be inclined to invoke the equality is equity maxim and effect an equal division. Lewin on Trusts ¶29-96. In the U.S., the spirit of the maxim often manifests itself in the context of the apportionment of tax obligations (1) between and among classes of takers under a will, (2) between and among classes of trust beneficiaries, (3) between a trust and a probate estate, and (4) between a trust and other trusts. *See generally* §§8.15.62 (doctrine of equitable apportionment) and 8.20 of this handbook (tax apportionment within and without trust). The "equality is equity" maxim also informs tracing doctrine, particularly in cases where the assets of multiple trusts are wrongly commingled in a single fund. *See, e.g.*, *In re* Mich. Boiler & Eng'g Co., 171 B.R. 565 (Bankr. E.D. Mich. 1993).

[26]Snell's Equity ¶5-24. *See, e.g.*, Pizarro v. Reynoso, 10 Cal. App. 5th 172 (2017) ("It would elevate form over substance to reject the financing agreement as a violation of trust provisions when the transactions achieved an end permissible under the trust."); Vincent J. Fumo Irrevocable Children's Trust for the Benefit of Allison Fumo, 2014 PA Super. 235, 104 A.3d 535 (Pa. Super. Ct. 2014) ("Since paragraph 14 expressly proscribes Father from appointing himself as successor trustee, this provision implicitly prohibits the appointment of Father's alter egos to this position."). As employed by the Pennsylvania court in the *Fumo* case, the term *alter ego* is essentially a synonym for agent. The rule that equity will aid the defective exercise of a power of appointment, a specific application of the general maxim that equity looks to substance (intent) rather than to form, is taken up in §8.15.88 of this handbook. In Inglis v. Casselberry, 137 So. 3d 389 (Fla. Dist. Ct. App. 2013), the court, invoking the maxim that equity will not countenance an argument that elevates form over substance, ruled that the trustee had voluntarily submitted to the court's jurisdiction by participating in the litigation, such as by moving the court to grant requests materially beneficial to himself and the trust beneficiaries. Since equity looks to the intent rather than the form, "there is no need for any technical expression to be used in order to constitute a trust." Philip H. Pettit, Equity and the Law of Trusts 48 (12th ed. 2012). Conversely, a recitation of the word trust in a statute or elsewhere will not necessarily give rise to a trust "in the equity

- Equity looks on that as done which ought to be done.[27]
- Equity acts *in personam*.[29]
- Equity will not aid a volunteer.[30]
- Equity will not suffer a trust to fail for want of a trustee.[31]
- Equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made.[32]

Equity survived the American Revolution. "Just as the thirteen original states adopted substantially the entire common law of England, so they took over with little change the English system of equity

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sense." *Id*. n.30. The Social Security trust fund, the subject of §9.9.3 of this handbook, is a prime example of a statutory regime that is a trust in name only. For another example of one see Bd. of Trs. of Tobacco Use Prevention & Control Found. v. Boyce, 941 N.E.2d 745 (Ohio 2010).

[27]Snell's Equity ¶5-25. For the maxim's application in the context of delayed trust terminations and distributions, *see* §8.2.3 of this handbook (termination and distribution issues). The doctrine of equitable conversion has been offered as another of the maxim's applications, a topic that is discussed in §8.15.44 of this handbook (equitable conversion doctrine) and §9.9.11 of this handbook (a contract to convey land is not a trust). *See, however*, 3 Scott & Ascher 13.1.1 (suggesting that the maxim "equity regards as done that which ought to be done" is a "fictitious" explanation of the equitable conversion doctrine). In the trust context, the equitable conversion of land that the trustees have been directed to sell is an application of the maxim "Equity sees as done that which ought to be done." The word "ought" is employed not in the moral sense but in the legal/equitable sense. The rights to the land having already been re-ordered by the terms of the trust, equity sees to it that "the land will devolve as personalty irrespective of the precise time at which the sale takes place, thus preventing the devolution of beneficial interests from being altered by failure or delay on the part of the trustees in executing this duty to sell." Hanbury & Maudsley, Modern Equity 277 (10th ed. 1976). A direction to purchase also might implicate equitable conversion doctrine.

[29]Snell's Equity ¶5-27 through ¶5-28. A judgment in an action at law creates rights in the plaintiff, whereas a decree in equity imposes duties on the defendant. *See generally* 1 Scott on Trusts §1.

[30]Though a court of equity generally will not enforce a gratuitous promise to create a trust, it will enforce a present gratuitous declaration of, or transfer in, trust. 1 Scott & Ascher §3.3.2.

[31]2 Scott & Ascher §11.4. *See, however,* 2 Scott & Ascher §11.4.1 (noting that the maxim is inapplicable if the settlor intends for the trust to continue only so long as the designated trustee continues as trustee).

[32]Richard Francis, Maxims of Equity 44 (London, Bernard Lintot 1728) (maxim no. 12). This maxim is cited in support of the proposition that a court may not assess punitive damages against a trustee in an equitable action for breach of trust. *See generally* §7.2.3.2 of this handbook (punitive or exemplary damages). A legal action in contract or tort brought by a third party against the trustee would be another matter. Equity's disfavor of forfeitures also has been said to underpin the principle that *in terrorem* (no-contest) clauses are to be strictly construed. *See, e.g.*, Heslin v. Lenahan, 836 S.E.2d 793 (S.C. Ct. App. 2019); Sandstead-Corona v. Sandstead, 415 P.3d 310 (Colo. 2018), Ruby v. Ruby, 2012 Il App (1st) 103210, 973 N.E.2d 361 (Ill. App. Ct. 2012). *In terrorem* (no-contest) clauses are taken up generally in §5.5 of this handbook.

jurisprudence, a portion of which was the subject of trusts."[33] In some jurisdictions, however, it took some time before trusts were judicially enforced. It was not until 1877, for example, that "equity won full recognition as a complementary part of the judicial system of Massachusetts."[34]

Equity is not statute-based. While it is said that equity affords relief when there is no common law remedy, equity is still very much a creature of case law. It is far from a "code" as that term is understood in France, Germany, Italy, and the other civil law jurisdictions. One commentator has articulated the case against codification:

> The main argument against codification is immobility…. A code corresponds to the state of legal developments at a given moment and it aims to fix that state so that it will not be changed….The settled text can, at the very most, be the object of interpretation….The fixing of the law by codification causes internal contradictions and intolerable tensions within a society. Every codification therefore poses a dilemma: if the code is not modified, it loses all touch with reality, falls out of date and impedes social development; yet if the components of the code are constantly modified to adapt to new situations, the whole loses its logical unity and increasingly exhibits divergences and even contradictions. These dangers are real, for experience shows that the compilation of a new code is a difficult enterprise that rarely meets with success.[35]

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[33]Bogert §6.

[34]Edwin H. Woodruff, *Chancery in Massachusetts*, 5 The L.Q. Rev. 370, 383 (Oct. 1889).

[35]R. C. van Caenegem, An Historical Introduction to Private Law 14 (D. E. L. Johnston trans., Cambridge University Press 1992) (1998). *See also* David Wessel, *The Legal DNA of Economics*, Wall St. J., Sept. 6, 2001, at 1 (suggesting that "rule-laden civil-law countries aren't well adapted to cope with change").