E Q U I T Y

TITLE: TRUSTS AND POWERS - A TUG OF WAR ON THE CERTAINTY TEST

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ABREVIATIONS

My & Cr	- Mylne & Craig 1835-1841
S.A.S.R.	- Southern Australia State reports 1921
Ves	- Vesey 1789-1816
Freech	- Freeman (ed. by Hovenden) 1660-1706
Bro P.C	- Brown's parliamentary cases 1702-1801
A.C	- Appeal cases
K.B	- King's Bench
Q.B.	- Queen's Bench
Ch.	- Chancery Division
W.L.R.	- Weekly law Reports
L.T.	- Law **Times**
E.A.	- East Africa Law Reports
C.L.J.	- Cambridge law Journal
N.I.L.Q.	- Northern Ireland Legal Quarterly
L.Q.R.	- Law Quarterly Review
M.L.R	- Modern law Review

INTRODUCTORY NOTE

J. W. Harris in his book "variation of Trusts" In all modern legal systems, legalrights and duties are conferred and imposed upon the citizens directly by official bodies and persons in whom the state vests legislative capacity. In all such systems in which a degree of private enterprise is supported by the state's in stitutions, citizens are allowed themselves to co-operate in the creation of rights and duties, through, the device of legally binding contracts. In systems which derive their legal concepts from English law, a further device of great importance is made available to those possessed of wealth, for creating rights and duties relating to that wealth, which the legal institution of the state will enforce. This device is the settlement by way of Trust".

During the present century the Trust has not only demonstrated its most unlimited capacity to adapt itself to new situations, but it has also been progressively adopted in other legal systems. It is in fact, no longer a characteristically English institution, it has become international.

It is the intention of this paper to concerntrate on one aspect of Trust, namely, the rule as to certainty in the specification of the beneficiaries and their interests under Trusts, which has been the subject of important litigation in the last few years. Cases involving the problem of certainty of objects have been frequently before the courts, particularly when Trusts have been made for the benefit of past and present employees. Sometimes, too, it has not been easy to decide whether it was intended to create a Trust or a power. The distinction between these two is important in the sense that the essence of a Trust is the intention to impose an obligatio and that of a power to confer a discretion.

Therefore for a court to decide the objects of a Trust it must first declare whether the testator intended to impose an obligation or confer a discretion. Contributing to this problem there has in recent times emerged a species of powers admixed with the Trust by the names of discretionary Trusts, powers and powers in the nature of a Trust.

At times the court of Equity may construe a deed as expressing the testator's intention to create a power, yet there is a further intention to vest the donee with an obligation to exercise the power. Worked at from anothe angle, the deed may be construed to create a Trust, but the court, from the express language of the deed may imply a power to execute the Trust. Thus between the two extremes, the court implies a half-way position. This half-way house position may take the form of either of the following: a Trust power, a power in the nature of a Trust and a discretionary Trust. These types of settlement are creatures of True construction of the deed with a view of establishing what the intention of the testator was.

Briefly a power in the nature of a Trust may be defined to be the Trust relationship implied by the court from the language of the deed to the effect that though the testator intended to create a power there is a particular intention to benefit certain individuals.[1] Thus a power in the nature of a Trust is actually a Trust that "masquerades under the guise of a power", to use HOPKIN'S words.[2]

From the outset, the deed may seem to create a power in favour of a general class, but when the deed is closely construed, there appears a general intention to benefit the whole class of objects and "equity being equality" the Trust property is divided equally among all the objects.

A Trust power will take effect where the position is exactly same as in power in the nature of a Trust, but the class is so wide that it is held that it could never have been intended that all the beneficiaries in the class should take equally. Thus, under Trust powers, the duty is on the Trustee to select those among the class who in his discretion thinks they are most deserving. In the event of default on the Trustees part, the court will enforce the Trust by implying Trust for the benefit of only those who would have been selected but for the default. A Trust power could exist in cases where the class of beneficiaries is very wide as where the beneficiaries are employees, past and present of a specified company.[3]

It is difficult to find a reasonable distinction between a Trust power and a discretionary Trust. In Mcphail V. Doulton the two terms were used to interchangeably implying that they are synonymous.
In textbooks such as HANBURY[4] the term Trust power is not used, discretionary Trust is used in the same context as Trust power. In RIDDAL[5] the term discretionary Trust is used. However, PETTIT[6] attempts a distinction on the following lines. He postulates that a Trust power has two bearings:-

i) The court amplies a Trust in default of appointment, where the settlor shows an intention to benefit such persons as would be selected from the class and

ii) Where the court implies a fiduciary relationship between the Trustee and the beneficiaries Pettit recommends that the term "discretionary Trust"

should be used in reference to this fiduary duty form of Trust power.

HOPKIN[7] states that this dichotomy of hearing of Trust power is of no consequence since the effect of failure to execute the Trust in both instances is that the court will execute it.

It is clear that the distinction between Trusts and powers used and still is of prime importance in connection with requirements of certainity of objects. Where a family Trust was concerned as in BURROUGH V. PHILCOX[8] it was held that the nieces, nephews and their children took equally, meaning a power in the nature of a Trust was established. But the situation would be different where the class is a commercial one and therefore wide. Here the court would imply a Trust in default of appointment in favour of only such of the objects as would have been selected but for the default.

The general rule is that the objects of a Trust must be certain or capable of being rendered certain. This whole range of eligible beneficiaries must be capable of ascertainment.

The test for powers was different. It was simply necessary to be able to say with certainty of any individual whether he is or is not a member of the class of beneficiaries.

However, the House of Lords, by a majority is Mcphail V. Doulton has it seems revolutionised the test. It has largely equated the test for Trusts

with that for powers. Lord Wilberforce described the old distinction as "unfortunate and wrong". But although this case has clearly had a decisive impact on this area of the law it has not apparently solved all the problems. It is therefore clear that it has reafirmed that this is the appropiate test for powers. In other respects there may be room for debate. Thus, the important question is does the decision only apply to Trust powers and/or discretionary/Trust? The Trust involved in this case were of this character.

According to Lord Wilberforce's speech it can be infered that the new test applied to all Trusts. It would be regrettable if this were not so, because a Trust power and a discretionary Trust are Trusts, although having close affirnities with powers.

This paper seeks to exploit the differences in approach through case law as far as the test for certainty is concerned and determine whether the test formulated has gone along way to hold sway or there is still room for change.

FOOTNOTES: (For Introductory Note)

1. BURROUGH V. PHILCOX - 1840 5 My & Cr 72
2. HOPKIN - " certain uncertainities" 1971 29C.L.J. 68
3. MCPHAIL V. DOULTON 1971 A.C. 424
4. HANSBURY'S MODERN EQUITY
5. RIDDAL - " The Law of Trusts"
6. PETTIT - " Equity and the Law of Trusts"
7. HOPKIN - Supra
8. Supra.

CHAPTER ONE

ORIGIN AND PURPOSE OF TRUSTS:

The Trust is one of the most important and flexible institutions of modern English Law.

The modern trust is an off-shoot from the Medieval "use"[1] of lands but it has developed a considerable number of distinctive qualities, not possessed by the earlier use, and it has been applied to property of all kinds.

Basically a Trust is a convenient method whereby a limited number of persons may hold property on behalf of other persons, who may be a large or fluctuating body, or who may include persons not yet born. For example, as soon as any voluntary association is called upon to face the problem of owning property it will usually solve it by appointing trustees to hold that property on behalf of its members. The body of members may be fairly small, as in a club, or it may be very large, as in the case of a union, but the Trust is a device which is equally convenient for both. Once the property has been vested in trustees, the latter own the property, but they are compelled by law to exercise their ownership for the benefit of the members.

In Medieval times the "use" as the forerunner of the Trust was used to tie up land or wealth for succeeding generations of the family, and to make provision for dependants. It also had other purposes, for example, the common rule which was of general application that a married woman could not hold property in her own right was overcome by vesting that property in trustees to hold upon trust for her. Likewise, unincorporated associations which are not themselves legal entities and so cannot hold property, would not have developed as they have if it had not been possible for property to be held by Trustees on their behalf.

Inter-alia the principle uses of Trusts today are firstly, to enable property, particularly land, to be held for persons who cannot themselves hold it. Thus the legal title to land cannot be vested in an infant.[2] But there is no objection to land being held upon trust for an infant. The U.K. settled Land Act 1925[3] has now adapted this principle to the extent that a purported conveyance of a legal estate to an infant operates as an agreement for valuable consideration to create a settlement of that land on the infant and in the meantime to hold the land on Trust for the infant.

Secondly, to tie up property so that it can benefit persons in succession. An outright gift may be made to a parent in the hope that on the parent's death that property will go to his child, but there is no guarantee that it will do so. A gift to Trustees to hold upon Trust for the child, will ensure that the child derives a benefit. One cannot normally ensure that the person ultimately entitled will receive the very property that is settled, for the Trustees will almost always have power to sell that property and to re-invest the proceeds. But one can virtually ensure that the person ultimately entitled does receive the receive the benefit which is derived from that property.

Thirdly, to make a gift in the future in the light of circumstance which have not yet arisen. If, for example, a man has three young daughters, he may by his will set up a Trust whereby a sum of money is given to Trustees for them to distribute among his daughteers, either as they think fit, or having regard to stated factors.

In considering the above purposes of a Trust it is immediately realised that a society cannot do without the institution of the Trust which has contrubuted in the development of legal concepts.

One of the great advantages of a Trust is the flexibility of purpose for which it can be used. Another is that the rules which govern a Trust are by and large the same whatever the purpose for which it is employed, for example, the rules as to the certainty of a Trust are basically the same in all types of Trusts.

According to G. Keeton[4] "In the rapidly changing social structure of modern English society, there have been almost revolutionary changes in the nature and functioning of the law of Trusts. The Trust, as Maitland long ago pointed out, is a most characteristic product of the English legal genius. It is almost inexplicable without a knowledge of the social enviroment in which it was developed. For example, it is by no means easy to explain in terms of legal rules the defference between the Mediavel "use" and the modern trust.....the eighteenth century decisions which established the Law of Trusts are still our leading cases, although the social conditions in which they were decided have now completely passed away. Even in the nineteenth century, settlors and Trustees were very different people from their eighteenth century predecessors."

Today, settlors and Trustees seem to inhabit a different word in which property is constantly under attack and in which the thriftness and foresight of former generations is frequently denounced as anti-social. As might been expected, this inversion of social values has produced a harvest of navel and difficult problems within the law of Trusts".

Maitland prefaced his discussion of the law of trust with the observation that of all the exploits of equity the largest and most important is the invention and development of the Trust," and he proceeded to demonstrate that it was as necessary and as flexible as the law of contract. In so doing, he emphasised that the law of Trusts was a sphere in which equitable consideration

alone had fashioned the law.

If we may regard the modern law of Trusts as the creation of equity judges it is significant that it remained unaffected almost entirely by statute for nearly two centuries. During that period, there was developed doctrines which regulated both the creation of Trusts and their administration. They defined the whole of a Trustee's duties and powers, including his powers of investment as well as the extent of his liability for breach of Trust. Only the Statute of Frauds had intervened to impose the necessity for evidence in writing of the creation of Trusts of land, and the requirement that assignment of Trusts should be in writing.

From the middle of the nineteenth century there have been important changes and what was formerly the firmly fenced preserve of the equity lawyer has now been repeatedly modified by statute.

Today, therefore, it is necessary to look for the rules applicable to the creation and execution of a Trust in several distinct sources such as statutory provisions in several Acts, in the rules of equity contained in a large and constantly increasing number of decided cases and in the provisions of the particular Trust instrument so far as they do not conflict with statutory provisions. The various statutes partanining to the law of Trusts cover only a portion of the Trusts law. Almost the whole law relating to the formation of Trusts remain unaffected by any statute as does most of the law relating to the breach of Trust both of which have been built up by the decisions of equity judges in the last centuries. The statute law has been concerned almost exclusively with the administration of the law of Trusts. It is principally for this reason that the law of Trusts is still taught in the University and many law schools in close association with the general priciples of equity from which it is derived.

The subject matter of a Trust may be real or personal property. Furthermore, the Trust may be not only of a legal estate but also of an equitable interest in property. But the question remains, who owns the actual Trust property --the Trustee or the beneficiary? This question has not been finally answered.

In Schalit V. Joseph Nadler Ltd[6] it was held that a beneficiary was not entitled to distrain for rent under a lease granted by the Trustee. As the court said: "the rights of the cestui que trust whose trustee has demised property subject to the Trust is not to the rent but to an account from the trustee of the profits received from the Trust." This decision does not give us a clear cut answer as to who is the actual owner of the property but it appears to accord with the True principle as to who owns the actual trust property.

DEFINITION OF A TRUST

As far as the definition of a Trust is concerned, there have been difficulties in providing a comprehensive definition. However, various attempts have been made and these range from definitions provided by textbook writers to those provided by judicial interpretations through case law.

Generally, a Trust has been defined to mean a relationship which subsists when a person called the Trustee is compelled by a court of equity to hold property whether real or personal and whether by legal or equitable title, for the benefit of some persons of whom the trustee himself may be one and who are called cestuique by law, in such a way that the real benefit of the property accrues not to the Trustee, as such, but to beneficiaries or other objects of the Trust. The above is the accepted definition of a Trust but it is necessary that one observes the definitions propounded by various writers as to understand the nature of a Trust in various periods of history.

The earlier definition was that of Lord Coke who saw a trust as a "confidence reposed in some other, not issuing out of the land but as a thing collateral there to, annexed in privity to the estate of the land, and to the person touching the land, for which cestuin-qui-trust has no remedy but by sub-poenain the chancery". It has been submitted that there are some objections to Coke's formulation of a Trust. In the first place, what is a confidence? This expression does not explain precisely the meaning of "Trust". Secondly, the definition imports the idea of a reliance placed by one person in another person. But this may not be universally correct. The beneficiary may be a baby in arms or unborn or ignorant of the Trust, the trust in such cases may still be effective but the beneficiary will place no "reliance" in the Trustee.

Thirdly, it applies only to real property whereas the subject-matter of a trust, may be personal property also. Finally, it is procedurally out of date. The court of chancery no longer exists and all branches of the High Court have jurisdiction in equity.[8] Nevertheless, this early definition still deserves a mention.

Underhill[9] described a trust as "an equitable obligation binding a person who is called a Trustee to deal with property over which he has control which is called Trust property for the benefit of persons who are called beneficiaries or cestuis que-trust of whom he may himself be one and anyone of whom may enforce the obligation." It has to be noted that the definition was approved by Cohen, J in the Marshall's Will Trusts.[10] Further, the definition may be objected that it does not in terms cover charitable Trusts and, moreover, does not provide for the so called trust of imperfect obligation.

A sound definition of a Trust must be capable of containing all types of trusts and therefore it follows that if a definition is unable to do so it is only fair if it is regarded as inadequate and unsuitable for the purposes of the trust institution.

The American Law Institute" adopts a substantially similar definition to that of underhill. It states ———— A trust ---- when not qualified by the word "charitable" ,"resulting" or constructive" is a fudiciary relationship with respect to property subjecting the person by whom the property is held to equitable duties with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. It will be noticed that three important types of trust are excluded in the above definition namely charitable, resulting and constructive trusts.

In the United States, however, the conception of a constructive trust has been developed much further than it has been in England. Charitable Trusts are also treated separately by the American Law Institute although there seems to be no reason why a charitable trust should not be included within the definition offered by them.

According to Halsbury[12] when a person has property or rights which he holds or is bound to exercise for or on behalf of another or others[13] or for the accomplishment of some particular purpose or particular purposes[14] he is said to hold the property or rights in Trust for that other or those others or for that purpose and he is called a Trustee.[15]

The property affected by a Trust called the Trust property or trust estate, must be vested in the trustees whether the property is a legal estate, a legal right[16] or an equitable interest in which case the legal title will be in some other person.

Maudsley[17] says "many attempts have been made to define a Trust but none of them has been wholly successful ---------- it is better to describe than to define a Trust and then to distinguish it from related but distinguishable concepts." To him, a Trust is a relationship recognised by equity which arises where property is vested in a person or persons called cestuin qui or beneficiary. The interests of the beneficiary will usually be laid down in the instrument creating the Trust, but may be implied or imposed by law. The beneficiaries' interest is proprietory in the sense that it can be bought and sold, given away or dispossed of by will, but it will cease to exist if the legal estate in the property comes into the hands of a bonafide purchaser for value without notice of the beneficial interest.

Perhaps the best definition is that adopted in the present edition of Lewin's Trusts.[18] It is based on a definition given by MAYO,J in Re-Scott[19]. According to this formulation "the word Trust refers to the duty or aggregate accumulation of obligations that rest upon a person described as Trustee. The responsibilities are in relation to property held by him or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the Trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking in accordance with equitable principles. As a consequence, the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee, but to the persons called cestuis que trust[20] or beneficiary, if there be any. If not, for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest."

Lord Lindley, L J attempted to provide a judicial interpretation of a Trust in the case of Re-Williams[21] whereby he observed that "a trust is really nothing except a confidence reposed by one person in another, and enforceable in a court of equity. In one sense it is true to say that a trust of property cannot be created by a person who is not entitled to that property. But there is no difficulty in disposing of one's own property upon condition expressed or implied that the person who takes it shall do something himself, e.g. shall dispose of his property in a particular way indicated by the owner of the property he accepts. Moreover, a condition of this kind is enforceable in equity and need not amount to a common law condition, i.e. a condition involving a forfeiture of the property taken subject to the

condition - if that condition is not performed.

Analysing this definition one is led to believe that there is little (if any) difference with the definition formulated by Lord Coke. Therefore the same criterion could apply. However, it may be argued that Lord Lindley's formulation was by around and about way meant to fill the gaps left by Lord Coke so as to suit the modern conditions.

DEFINITION OF A POWER:

As compared to the definition of a Trust, that of a power has not been the subject of contradictions and qualifications so that it was fairly simple to come out with one broad definition which can safely be inferred to be universally accepted. Hence, a "power" or more so "a power of appointment" is a term of art denoting an authority vested in a person called the "donee" to deal with or dispose of property not his own.

A power may be created by reservation or limitation, the dealing or dispossition may be total or partial, and for the benefit either of the donee or of others, and the property may be real or personal. A power is distinct from the dominion that a man has over his own property.[23]

In Freme V. Clement[24] Jessel, M.R. observed that "a power of appointment is a power of disposition given to a person over property not his own by some one who directs the mode in which that power shall be exercised by a particular instrument. I consider that the donor of the power must mean it to be exercised according to the law governing that particular instrument. If, therefore, it is a power to be exercised by deed or will, in my opinion it must be exercised, if by deed, by an instrument executed in the mode in which the law requires a deed to be executed, be subject to the law which governs the deed also, when

construction of a deed."

Powers are usually classified[25] (i) in relation to the donee's interest in the property (ii) in relation to the interest conveyed or created and (iii) in relation to the purpose for which the power was created. For the purposes of this paper the third aspect above is more important than the remaining two. Moreover, the third relation fall under two heads viz administrative or managerial powers and dispositive powers or power of appointment. Again, of these, the latter is relevant in this context. Dispositive powers more commonly known as powers of appointment are powers authorising a person to create or dispose of beneficial interests in property. Such powers are usually sub-divided into general powers and special powers, but this division is neither precise nor exhaustive as observed by Clauson, J in the case of Re-Park[26] for there are some powers which may be general for some purposes and not for others or may be regarded as neither general or special but as hybrids.[27]
It is therefore clear that the definitions of a Trust and a power can safely be inferred to have depended more or less on the historical factors i.e. depending on a particular historical period the definitions were formulated to suit such periods.

A sound definition would therefore be one that is universally accepted and has the capability of dominating for a longer period.

DISTINCTION OF A TRUST FROM OTHER LEGAL CONCEPTS

It is essential to distinguish a Trust from certain other relations which it may resemble in some respects.

TRUST AND CONTRACT:

A Trust has some of the characteristics of a contract, especially where it is the result of the act of the parties themselves. Sir Fredrick Pollock[29] indeed suggests that in origin a trust is a form of contract, though it was treated distinctively in eqiuty and now possesses characteristics incompatible with the English theory of contracts.

The distinction between Trust and Contract will be evident from the existence of different legal consequences attached to the two, relations. However, the determination of the question whether a given set of facts gives rise to a Trust or a Contract simply is not easy to determine. This point has not received adequate attention from English textbook writers as compared to their American counterparts.

(1) The general rule is that a contract is not enforceable by a person who is not a party to the contract, whereas a Trust can be enforced by a beneficiary who is not and indeed he rarely is a party to the instrument creating the Trust.
The rule of contract is one of general application and is now firmly established by the leading decision of Beswick V. Beswick[30] but there are some recognised exeptions to it which are founded in statute and have no particular relevance to the law of Trusts.[31]
The courts will not imply a trust where an intention to create one cannot be discovered in the surrounding circumstances. Thus Lord Greene, MR, said in Re-Schebsman[32] "It is not legitimate to import into the contract the idea of a trust when the parties have given noindication that such was their intention."

And in the same case, du parcq,L.J.[33] said--"It is true that, by the use possibly of unguarded language, a person may creat a Trust without knowing it, but unless an intention to create a Trust is clearly to be collected from the language used and the circumstances of the case, I think the court ought not to ve astute to discover indications of such an intention."

In the Re-Schebsman[34], Mr. Schebsman, in retiring from his employment with a foreign company and its English subsidiary, had entered into an agreement with the companies whereby his employment ended upon payment of a fixed sum to him. The agreement also provided that if Schebsman should die within a specified period, the company should pay a sum to his widow, or if she were dead to their daughter. Before the payments from the company to him were completed, Schebsman was adjudicated bankrupt and died shortly afterwards. His trustee in bankruptcy claimed payment to him of all moneys payable, either to Schebsman or his wife and daughter under the agreement, on the ground that the moneys formed part of the estate of Schebsman. The court of Appeal rejected this contention and in so doing, considered at length whether Schebsman could be regarded as the Trustee for his wife and daughter for the benefits to which they were entitled under the agreement.

The Court of Appeal held that he was not. Whilst this decision freed the wife and daughter from possible claims by the trustee in bankruptcy, it also in the view of the Court of Appeal had the consequence that neither Mrs. Schebsman nor the daughter could enforce their benefits under the contract which, as regards them, were gratuitous payments by the company.

It would appear from the above decision that the courts are now reluctant to interpret a contract as creating a Trust in the absence of the clearest possible evidence that a Trust was intended. It is certainly unwise to place any reliance in the trust concept as providing a loophole in the principle of privity of contract.[35] It is note-worthy that no reliance was placed on it in the recent House of Lords decision in Beswick V.Beswick[36] where relief was only obtained as a result of the highly fortuitous facts of that case. The facts were that a nephew was employed by his uncle on his business as a coal merchant. An agreement was made between them whereby the uncle assigned the business to the nephew in return for the latter's promise to pay the uncle a certain sum of money a week for the rest of his life and when he died to pay the uncle's widow a weekly annuity. The uncle died, and after making one payment to the widow, the nephew stopped all payments. The widow sued the nephew both in her personal capacity and as **administratrix** of her husband's estate. It was held that she had no claim in her personal capacity because she was not a party to the contract. But because she was administratrix she could enforce the provisions of the agreement for the benefit of herself in her personal capacity by specific performance. If she could not have been the administratrix and the widow of the promisee, she would have been without a remedy. The case shows up the unsatisfactory state of the law regarding third party beneficiaries.[37] Privity & Contract.

A further problem associated with the relationship between Trusts and contracts is based on the equitable maxim that "equity will not assist a volunteer" who is not a party to the contract. even though it is made under seal. Despite the argument of academic writers that in such a case an enforceable trust of the contract may have been constituted, thereby obviating the application

agency may be terminated on the death or at the will of either party, whilst a trust may not.

TRUST AND BAILMENT:

In his commentaries Blackstone[39] defines a bailment as ----- "a delivery of goods in trust, upon a contract expressed or implied that the trust shall be faithfully executed on the part of the bailee". The question is whether a bailment is a Trust or a contract.

The use of the term "Trust" is misleading for in English law the term has been appropriated to denote a relation which is only recognised and enforced in equity, whilst a bailment creates a binding legal obligation, enforceable at common law.

In bailment, the bailor does not divest himself of ownership. Under a Trust, the trustee acquires full ownership of the property subject to it, and therefore the creator of such of the Trust ceases to have any rights in the property at all, yet at the same time the trustee becomes owner only because he has undertaken to carry out the purpose. Which conditions his ownership. Bailment extends only to personal chattels whilst there may be a trust of all kinds of property.

TRUST AND POWER:

The basic distiction between a trust and a power of appointment will be considered in the next chapter.[40]

CLASSIFICATION OF TRUSTS AND POWERS:

In a Medieval case Cook V.Fountain[41] Lord Nothingham attempted a classification of trusts in the following terms---All trusts are either trust, express trusts, which are raised and created by act of the parties, or implied Trusts, which are raised or created by act or construction of law, again express Trusts are declaredi either by word or writing, and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts, and that is, when the court upon consideration of all circumstances presumes there was a declaration, either by word or writing though the plain and direct proof thereof be not existent. In the case in qu question there is no pretence of any proof that there was a Trust declared either by word or in writing, so the trust, if there be any must either be implied by law, or presumed by the court.

What Lord Nottingham calls a presumptive trust is today called an implied trust, and his "trust" implied by law is the modern constructive trust.

This classification of trusts by Lord Nottingham is today not completely exhaustive for the Law of Property Act 1925[42] has created a new class of statutory Trusts, i.e. those declared by the act whereever a certain relationship exists.

Basing the classification of Trusts on that provided by Lord Nottingham, it is clear that there are only two types of Trusts, i.e. Trusts created by the operation of law and Trusts created by the act of the parties.

From the two broad classifications springsother smaller sub-divisions of the trust. Thus under trusts created by the act of the parties falls the following:- An express trust which is one intentionally or explicitly created by the act of the settlor.

An express private trust is a trust established to benefit certain specified persons.

A secret trust is created by will and is implied from that the terms of the will. Here the trust property is property vested in trustees but they alone know the beneficiaries and the terms of the trust.

An express public trust is one established to benefit certain public bodies or purposes. A charitable trust is a public trust established for purposes designated as charitable in law.

A Trust of imperfect obligation is a trust for some person or body but lacks a defined beneficiary and is not therefore directly enforceable. A Precatory trust is a trust inferred from the use of precatory word(e.g. I hope", I desire", etc) by the settlor rather than imperative words. Three requirements are necessary for its enforcement namely the intention to create the trust, subject matter of the trust in clear terms and objects of the trust. All these are jointly called certainities.

An implied trust is a Trust which a court will infer from the conduct of the parties in a particular case and by enforcing itrseeks to give effect to the presumed intention of the parties.

Trusts created by the operation of law include the following=: constructive trust which is an unlimited trust and arises where a person in a fiduciary position obtains an advantage from which it would be unconxionalbe for him to make some private gain.

Hence the courts require him to hold his advantage as Trustee. Resulting Trust which is a limited Trust and arises following a disposition where either not all the property available for disposition is actually used or where a trust is made for objects which fail or where the circumstances show that the grantee is only or and is presumed to hold the property or property undisposed off on a resulting trust to the grantor. It is noteworthy that a resulting trust is always in favour of the grantor.

Although their classification with the exception of charitable Trusts, Trusts are subject to the three certainities, those of words, subject matter and objects for their validity. If a trust fails to satisfy the above certainities it fails.[43]

CLASSIFICATION OF POWERS:

Powers are classified in accordance to their purposes. In ecuity there are basically three types of power. These include a General Power whereby the donor or giver of that power may appoint any person with regard to his property. Since this power is discretionary no action can be brought against the donee if he fails to exrcise it. In a special power the donee of the power is authorised to appoint property in respect of which the power has been created, to a designated class of persons. This power is capable of taking effect as a Trust in that respect.

An intermediate or hybrid power comes between a general and a special power. It is general power subject to exclusion.[44] This too is capable of taking effect as a Trust power.

RECEPTION OF EQUITABLE PRINCIPLES IN KENYA:

The basic provision governing the application of equitable doctrines and substance of the common law is the 1967 Judicature Act.[46] However, this emerged as the final document.

The 1907 East African order in council provided a legal base for the application of English law. It provided that the civil and criminal jurisdiction in connection with British settlers shall be governed by the laws of India[47] applying in Kenya subjects there to the substance of the common law, the doctrines of equity and statutes of general application in force in England on the 12th August, 1897.

This order in council was therefore the foundation of the introduction of Equity in Kenya.

The 1921 Kenya Order in council added a provisal by providing that the common law, the doctrines of equity and the statutes of general application shall only apply so far as the circumstances of Kenya and its inhabitants permit and subject there to such qualification as those circumstances may render necessary.

The 1911 East African Order in Council gave the law an indigenous recognition by providing that if an action in the court involved "Natives" or Africans, then in all circumstances the court shall be guided by principles of customary law in so far as those principles were not inconsistent with any written law nor repugnant to justice and morality.

S.3(1) of Judicature Act 1967 deals primarily with the Jurisdiction of the courts in Kenya. It also provides for the sources of law in Kenya which are arranged as follows:-

(i) The constitution

(ii) Subject to the constitution, all other written laws

(iii) Subject to the provisions of all written laws and the constitution and so far as the same do not extend or apply the substance of the common law, the doctrines of equity and statutes of general application in force in England on the 12th August 1897.

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject there to such qualification as those circumstances may render necessary.

S.3(2) provides for the position of the African to the extent that the court shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.

The doctrines of Equity as far as provided in S.3(1) mean that system of law derived from the court of Chancery in England. In Re Tanganyika National Newspaper Ltd. 1959[48] a company was incorporated in Tanganyika to manage and publish three vernacular newspapers which had previously been published for the government of Tanganyika by its public relations department. The government subscribed at par for 44,000 shares of 20 shillings each which were the only shares issued and these were transfered to trustees appointed by a deed dated 12th March, 1958 to ensure the continued publication of the journals. The deed also provided that the main function of the papers was to disseminate fairly and impartially news and other matters of public interest with fair comment thereon

and generally to spread information and stimulate thought among the people of Tanganyika.

The company having made substancial losses tried to arrange for continued publication of the papers in association with a Kenya company, and an agreement was prepared recording the arrangements between the parties upon the terms of which the trustees then sought the approval of the court and, if the court were to hold the proposed agreement to be Ultra-Vires the trustees, authority to settle a scheme whereby the trustees could enter into the agreement.

It was held that the Trust established could be regarded as being substantially for the purpose of advancing education.

The issue in the case above was whether the Tanganyika National Newspaper Ltd. could benefit from the Trust given it as a donation and it was said by the court that whether a gift will pass as a charitable trust will depend on the English law of Trust.

It can therefore be asserted that basically the English Law of Trusts applies in Kenya but that it is subject to the qualification prescribed by the Judicature Act. This can be evidenced by the tremendous number of English cases that are refferd to whenever any issue pertaining to a Trust or Equity for that matter arises in this country.

CHAPTER TWO

TRUSTS AND POWERS - A DISTINCTION

As it has been seen[1] power sometimes overlap with Trusts and it is therefore necessary that a distinction is drawn between the two.

As a preminary remark, almost all trusts involve the exercise of a power or discretion by the Trustees. So, depending on the circumstances of any particular Trust, trustees will often have powers which include those to vary the investments of the Trust, to grant a lease of property which is subject to the Trust, to apply income for the support of an infant beneficiary or to accumulate it etc but not necessarily a discretion as to which beneficiaries are to benefit.

Trustees can be given a power to select, which of a group of persons shall receive any benefit at all from the Trust. Alternatively, while the trust instrument may provide that each member of a class of beneficiaries is to receive some benefit, the Trustee may be given the power to determine how much each beneficiary will receive. Further, the trustees may have the powers to decide whether to distribute income, or, to accumulate it. Where it is left to the trustees or others to decide whether a persom shall receive a benefit, from the trust, at all, or the extent of that benefit, the trustees discretion will depend on whether they are under obligation to exercise it. If they are under obligation to exercise it, it is known as a Trust power. Where they are not under such an obligation, it is known as a mere power, or sometimes, as a power collateral.

The question therefore arises:-

(i) Must the Trustees consider whether the power should be exercised?

(ii) And if the powers should be exercised, how should they?

Trustees must consider whether to exercise all the powers and this is so whether they are mere powers or trust powers. They may decide not to exercise a mere power but it is a must that they exercise a Trust power and the question is how then that power to be exercised?

It is to be noted that the essence of a Trust is the intention to impose an obligation, that of a power to confer a discretion. Therefore, the question whether or not a Trust or a power has been created is essentially on of the construction of the instrument. The distinction may be a fine one in any individual case, because the trust instrument may give what on the face of it appears to be a mere power, but which is in fact a Trust power. Hence, the distiction between Trusts and powers have in recent years, led to a good deal of judicial bewilderment. The distinction still exists but, after the case of Mcphail V.Doulton,[2] certain of its principal consequences have since disappeared.[3]

The distinction falls under the following lines:-

A Trust imposes a duty upon a trustee, a power confers a discretion upon a donee. The former is imperative, the latter discretionary.

Thus the cout will enforce a Trust to divide property among a class of beneficiaries. It will however, not compel the exercise of a power to do so.[4] But, the court will normally interfere in an exercise of the power only on the ground of fraud or excessive or defective execution of a power in the nature of a Trust, where the donor has manifested an intention that in any event the property shall go to the objects of

the power but nothing short of this will suffice. This is best illustrated in the case of Burrough V. Philcox.[6] From the above distinction certain consequences appear to flow. In the case of a Trust, all the potential beneficiaries need to be ascertained or to be ascertainable since the court must know with sufficient certainty the objects of the beneficence of the donor so as to execute the trust.[7]

The objects of a Trust must therefore be certain if the trust is to be valid. On the other hand certainty of objects is not an essential requirement of the validity of a power. If the donee of a power has a discretion whether or not to distribute a fund among an unascertainable class the power is good provided the donee knows of any given time whether any particular claimant is or is not an object of the power.[8]

Somewhere midway between Trusts and powers however, is the so called "power in the nature of a Trust"[9] which were described by Lord Eldon in Brown V. Higgs[10]. But perhaps the best description is that one given by Lord Cottenham,LC in Burrough V.Philcox when he said "When there appears to be a general intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the court will carry into effect the general intention in favour of the class. When such an intention appears, the case arises ..... of the power being so given as to make it the duty of the donee to execute it, and, in such a case, the court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens on the property a trust for their benefit."

The power in the nature of a Trust is regarded really as a Trust which masquerades under the guise of a power.[12]

The distinction between powers and a power in the nature of a Trust rests upon the settlor's true intention. Thus in Burrough V. Philcox[13] a testator gave property to trustees on trust for his two children for their lives, remainder, to their issue and in default of issue, the survivor of them was to have power to dispose of the property by will "amongst my nephews and nieces or their children, either, all to one of them, or to as many of them as my surviving child shall think proper." The testator's children having died without issue, and without any appointment having been made by the survivor, it was held that a trust in favour of the testator's nephews and nieces and their children had been created subject to a power of selection and distrubution.

Where there is a power, with a gift over to other persons in default of appointment i.e. the power remains a mere power, the presumption that there is a trust in favour of the persons who are the objects of the power is negatived. Even if there is no gift over it is not automatic that the courts will execute the powers as a Trust for the test is whether the settlor has demonstrated an intention to benefit the class in any event. This was clearly emphasised in De-Vesker Settlement[14] whereby a woman gave property by will to her husband for life, with power to dispose of it by will amongst their children. The court held that there was no gift to such of the class as the husband might appoint but a mere power to appoint with no general intention to benefit the class in any event.

This decision indicates that the actual intention of the testator will finally determine whether a trust or a mere power was intended. This point is also well illustrated by the case of Re-Combe[15] in which a testator devised and bequeathed residuary reality and personality[16] on certain trusts and then in trust for his only son for life, and from and after his death, "In trust for such person or persons as my said son ..... shall by will appoint but I direct that such appointment must be confined to any relation or relations of mine of the whole blood." It was held that there was no gift over in default of appointment TOMLIN, J.Observing[17] Am I bound to imply a gift to that class in default of the exercise of the power? Or ought I approach any other will and endeavour to construe it and arrive at the testator's meaning by examining the words expressly used, only implying those things which are necessarily and reasonably to be implied? Justice Tomlin decided that in this case a Trust had not been intended and had not been created.[18]

The distinction between a power and a Trust is extremely fine. As Lord Russel, L.J. said in Re-Leek[19] the proper approach is to see what the language of the instrument apparently mean in order to discover whether a duty has been imposed or a power conferred, but as Lord Wilberforce pointed out in McPhail V.Doulton[20], "What, to one mind may appear as a power of distribution coupled with a trustto dispose of the undistributed surplus, by accumulation or otherwise, may to another appear as a Trust for distribution coupled with a power to withhold a portion and accumulate or otherwise dispose of it."

According to Lord Reid in re-Gulbenkien's settlement Trust[21] this led to "narrow and technical distinctions ..... in this chapter of the law."

But then, it was upon such very distinctions that the validity of instruments depended. It is this very distinctions that it is possible to determine whether a power or a Trust was intended through theconstruction of the instrument.

To understand this, it is vital to take note of Lord Wilberforce's statement in Mcphail V. Doulton "To say that there no obligation to exercise a mere power and that no court will intervene to compel it, whereas a trust is mandatory and its execution may be compelled may be legally correct enough, but the proposition does not contain an exhaustive comparison of the duties of persons who are trustees in the two cases. A trustee of an employee's benefit, whether given a power or a trust power, is still a Trustee and he would surely consider in either case that he has a **Fiduciary** duty, he is most likely to have been selected as a suitable person to administer it from his knowledge and experience, and will consider he has a responsibility to do so according to its purpose ..... Any trustee would surely make it his duty to know what is the permissible area of selection[22] and then consider responsibly in individual cases, whether a contemplated beneficiary was within the power and whether in relation to other possible claimants, a particular grant was appropriate. Correspondingly a Trustee with a duty to distribute particularly among a very large class, would surely never require the preparation of a complete list of names which anyhow would tell him little that he needed to know.

He would examine the field, by class and category, might indeed make diligent and careful inquiries, depending on how much money he had to give away and the means at his disposal, as to the composition and needs of particular categories and of individuals within them, decide on certain priorities or proportions, and then select individual's according to their needs or qualifications ..... such distinctions as there would seem to lie in the extent of the survey which the trustee is required to carry out, if he has to distribute the whole of a fund's in one, he must necessaruly make a wider and more systematic survey than if his duty is expressed in terms of a power to make grants. But just as, in the case of a power, it is possible to underestimate the Fiduciary obligation of the trustee to whom it is given so, in the case of a Trust (Trust power) the danger lies in overestimating what the trustee requires to know or to inquire into before he can properly execute his Trust."

From the above statement it is clear that the distinction between a Trust and a power is important for the purposes of determining the extent of the trustees obligation in distributing any trust propety that has been conveyed to them.

If the instrument is construed to mean a Trust power, the trustees are bound to make a selection and if they do not do so, the court will as settled do the selection.

The beneficiaries as a group do not have any interest in the Trust fund until the duty of selection is fulfilled. If the court chooses not to select the beneficiaries it may in the alternative appoint new Trustees to carry out the same duty.

Sir R.P. Arden, M.R. in Brown V. Higgs[23] said "however difficult it may be to select the person intended to benefit and though it must depend from the nature of the Trust upon the opinion of the Trustees as to the merits of the persons who are the objects, yet the court will execute even a Trust of that nature if the trustee shall either neglect to execute or be disabled from executing or shows by his conduct any intention not to execute as the testator intended."

Commenting the same point Lord Wilberforce in Mcphail V.Doulton said,"The court if called upon to execute a Trust power, it will do so in the manner best calculated to give effect to the settlor's intentions ..... It may do so either by appointing new trustees or by authorising or directing representatives persons of the classes of beneficiaries to prepare a scheme of distribution or even should the proper basis for distribution appear, by itself directing the trustee so to distribute."

From the above statements it is noted that the distinction between Trusts and powers notwithstanding "how narrow and in a sense artificial"[24] it is, indeed very important for the purposes of determining the duties pertaining to trustees and donees.

Moreover, it is realised that a wider and more comprehensive range of inquiry as to the range of objects is called for in the case of Trust powers than in the case of powers.

CHAPTER THREE

REQUIREMENTS FOR CERTAINTY

The distinction between Trusts and powers is of prime importance in connection with the requirements of certainty of objects. The general rule for private trusts is that the objects must be certain or capable of being rendered certain. But this rule was interpreted strictly to mean that the whole range of eligible beneficiaries must be capable of ascertainment. In short, the trustees had to be able to make a list of the beneficiaries and if they could not, the trust would fail for uncertainty.

The Test for powers was different. It was, and is, simply necessary to be able to say with certainty of any individual whether he is a member of the class of beneficiaries. The House of Lords by a majority in Mophial V. Doulton,[1] has, it seems, changed the rule as far as certainity of Trusts is concerned. It has largely equated the test for Trusts with that for powers. Lord Wilberforce with whom Lord Reid and Viscount Dilhrne agreed described the old distinction as "unfortunate and wrong". Lords Hodson and Guest dissented.

Inspite if its impact on the law of Trusts Mophial V. Doulton has not been able to solve all the problems. To understand this, regard must be heard to the decision's background and the problems created therein.

CERTAINTY OF OBJECTS

The modern shape of the rule derives from Re-Gestetner Settlement[2], where Harman, J. as he later regretted,[3] established the distinction between discretion powers and discretion by Trusts In this case, capital was held in Trust for such member or members of a specified class as the trustees might think fit. The specified class comprised of certain named individuals, any person living or thereafter born who was a descendant of the settlor's father or uncle any spouce, widow or widower of any such person, five charitable bodies, and former employee of the settlor or his wife or widow or widower of such employee, and directors or employee of a named company.

Harman, J. said if the trustees had been under a duty to distribute "there was much to be said for the view that they should be able to review the whole field in order to exercise their judgement properly. But it was held that there was no duty on the trustees to appoint among members of the specified class. They merely had the obligation to consider the merits of such persons of the specified class as were known to them and if they thought fit, to give them something. It was therefore a power and not a Trust power. The material question was held to be whether it could be ascertained with certainty of any given "postulant" that he was, or was not, entitled to receive the settlor's bounty. It was accordingly unnecessary in a power of this kind to establish that the objects themselves were all capable of ascertainment. In this case the power in question

to valid. Since this decision, the question whether Harman, J.'s test should be applied or whether it should be modified attracted detailed scrutiny in subsequent cases.

Essentially the question was whether the Gestetner Test should be applied strictly so that if one did not know whether a given individual was within the power, it would fail even though other classes were clearly within it. Or, alternatively, whether another relaxed test should be adopted with the result that difficulty is saying whether a person was or not within the category should not be fatal, provided that somebody was clearly within it. The Gestetner test was supported by a preponderance of authority[5] and only on isolated occasions was the other test used, notably by Lord Denning, M.R.[6]

The position remained uncertain until the decision of the House of Lords in Re-Gulbenkians settlement[7]. This case involved the construction of a clause in a work of precedents used by the profession. It was to the effect that a special power of appointment could be exercised for the maintenance and personal support of all or anyone or more of the following; "The husband wife, children or remoter issue or any persons in whose house or apartments or in whose company or under whose care and control or by whom the husband might from time to time be employed or residing as the Trustee should in its discretion think fit."

The clause had been considered before in Re-Gresham's settlement[8] where it was again held by Harman, J. that the provisions were void for uncertainty because there might be a number of persons of whom it could not be postulated that they were within the ambit of this unusual construed clause.

The case was distinguished from Re-Gestetner because there, although one did not know all the persons who were within the class specified one could say whether any given person was within the class or not, but in Re-Gresham even this could not be done.

However, the House of Lords in Re-Gresham overruled this case and held that the clause was sufficiently certain to be valid within the Gestetner Test.

Lord Upjohn, in affirming the latter test, was unable to accept the relaxed test put forward by Lord Denning, M.R. in the Court of Appeal. It was generally agreed and may be taken as established that the requirments for certainty will be satisfied if it can be said of "any given postulant" that he is or is not a member of the class of beneficiaries.

In other words, a power will not be void for uncertainty unless the description of the class is so vague that one simply cannot tell whether a person is within it or not.

Lord Upjohn was unable to accept the broader proposition advanced by Lord Denning, M.R. since the donee or the court must be able to say with certainty who is within and who is without the power.

CERTAINTY OF TRUSTS:

The rule relating to Trusts that the objects must all be ascertainable was a much more stringent one than that required for powers of this nature. It has already been observed that Harman, Jin Re-Gestetner indicated that there was a distinction in this matter between Trusts and powers.

The distinction was, however, definitely established by the court of Appeal in IRC V. BROADWAY COTTAGES TRUST[10] which was, unlike Re-Gestetner a case of Trust. It was held, upon a true construction of the instrument, that this created a Trust in favour of the specified class and was void for uncertainty on the ground that the class was unascertainable at any given time, the whole range of objects eligible for selection must be ascertained or capable of ascertainment.

The basis of the decision was that the court, if called upon to execute the trust, could only do so on the basis of equal division unless all the members of the class were known.[11]

This case has now been reversed by McPhail V. Doulton[12] and much of the learning which had developed appear to have been redundant. But even before this the unnecessary complexity of this branch of the law was judicially recognised. In the court of Appeal in the same case, Harman,L.J. felt a "sense of frustration" at the emptiness of the question and that the distinction was "absurd and embarrassing."

There was also doubt about the precise application of the broadway test to a recognised text for suggestion had been made that a probability of complete ascertainment was sufficient[13] and that common sense should come into the matter.[14] The time has therefore a arrived for the text of certainity for Trusts and powers to be equated. The case for rigid rules for trusts is admittedly persuasive one and had been stated earlier by Lord Upjohn. The imperative nature of trusts should entail the consequences that all the objects should be known[15]. But, as Lord Wilberforce indicated in Mcphal V. Doulton the law should take account of practicalities, particularly the narrow distinction between trust powers and mere powers.

The theory specifically poshilated in IRCV. BROADWAY that the court can only execute a trust by ordering equal distribution in which, every beneficiary shares was rejected as inappropriate "equal division among all may, probably would produce a result beneficiary to none.[16]

It is clear that Mcphail V. Doulton applying the "given postulant text" to trusts has re-affirmed that this is the appropriate text for powers. An important question may be, whether the decision applied to the type of trust in question only i.e. a trust power. According to Hanbury's modern Equity (9th edition) the rule should not be thus extended, but there seems to be no reason in principle why it should not be. Just as an order for distribution can be made by the court in the case of a discretionary trust so also one would have thought, it could be made in the case of a fixed trust where one or more of the beneficiaries are not ascertainable.

According to the speech delivered by Lord Wilberforce the new text applies both to trust powers and discretionary trust which have close affinities with powers.

A further problem still not wholly resolved relates to the question of certainity itself.[17] In Re-Gulbenkian's settlement Lord Upjohn posed the distinction between linguistic and or semantic uncertainity which, if the court cannot resolve it renders the gift void, and here evidential difficulty, such as the existence or whereabout of members of the class, which the court can deal with on an application for directions. This distinction was adopted in Mcphail[18] by Lord Wilberforce who also added a third class, vis where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form anything like a class so that the trust is administratively unworkable.

Difficulties are not normaly likely to arise with regard to whether a case falls within the third situation instanced by Lord Wilberforce, at any rate in the case of a special power.

As to hybrid or intermediate powers, the position is not, however, so clear-cut, such powers, particularly if they contain a power to admit new members to a class are apparently becoming increasingly popular.

It has been said that they arm the trustees with a weapon which will enable them to consider all development and all future mishaps and disasters.[19] For example, In Blausten V. IRC[20] the trustees had powers to introduce to the class of beneficiaries any person other than the settlor. The argument that the power was void for uncertainity was rejected on the ground that although the trustees had this admittedly wide power it could only be excerised with the written consent of the settler and hence during his lifetime.

Therefore, it could not be said that the settler had failed to set "metes and bounds" to the beneficial interests which he intended to create or permit to be created under the settlement.

This reasoning is, however, difficult to reconcile with the decision of Templeman, J. in Re-Manisty's settlement.[21] In this case, the trustees had the power to add beneficiaries and to benefit the person so added, and the power was exercisable in favour of any one in the world except the settler, his wife and other persons. It was not a general power in favour of anyone, nor a special power exercisable in favour of a class, but a hybrid or intermediate power exercised in favour of anyone with certain exceptions. It was held that the power did not fail for uncertainity even though there was no expressed restriction s on its operation by the trustees. Even more fundamental problems could still emerge from the distinction between linguistic (also called conceptual) uncertainty and evidential difficulty. In Re-Baden's deed Trusts NO2[22], the sequel to Mcphail V. Doulton the court of Appeal was faced with the problem of deciding whether the trust in question was in fact, valid, applying the new test of certainty laid down by the House of Lords. In the result it was unanimously held to be valid but contraversy centred around the meaning of the words "Or was not" in the test (whether one can say with certainty whether any given individual was or was not a member of the class).

Sachs and Megaw, L.J.J. held that, when considering whether a candidate was a member of a class, if he could not establish that he was a member, then he must be held not a member. This might be thought a somewhat simplistic approach and Stamp, L.J. was of the opinion that one had to say affirmatively whether a given individual was within the class or whether he was outside it.

How then were these respective interpretations of the test to be applied to relatives in the clause in question? Sachs and Megaw, L.J.J. held that upon the widest meaning attributable to the word i.e. descendants of a common ancestor, there was no conceptual uncertainty

attaching to the word, and moreover no evidential difficulty in ascertaining whether a candidate was a relative. Stamp, L.J. applying his own interpretation of the test, held that if the word was given this wide meaning the trust would fail for uncertainty, because one could not say with certainty whether any given individual did not fall into this category, but he eventually decided that the trust was valid on the basis that relatives meant the next of kin, in which event there would be no conceptual or evidential difficulty. That there is still doubt about the test as applied to conceptual uncertainty, may yet require a further decision from the House of Lords to clarify its won decision. Re-Baden (1902) was, of course a complex case and it must not be thought that problems of this kind will always arise as D.B. Parker[23] would like us to believe.

The problem as to the certainty test is more pronounced due to the existence of an intermediate class of powers, known as powers in the nature of trusts, which have some of the characteristics of both trusts and powers. They are described in "Farwell on powers"[24] in language founded on that used by Lord Eldon in the leading case of BROWN V. HIGGS.[25]

Where there is a power in the nature of a trust, theobjects of the power will in any case get the property as in Burrough V. Philcox. Where there is a mere power, they will not get anything unless the the donee of the power acts, and accordingly one important distinction between the two types of power is the existence of a gift over in default of appointment, for this indicates what the donor wishes to happen if thepower is not exercised.

If there is a gift over in default of appointment there is appresumption that the power is a mere power.[26] In order to deprive the power of the character of a trust, the gift over must be in default of appointment and not for any other event. Thus in the absence of a gift in default of appointment a gift over on the failure of the appointees or any of them to reach a spedified age will not necessarily prevent the power from being coupled with a **trust**.[27] Where there is no gift over in default of appointment, power my be coupled with a Trust or it may not accor ding to the true intention of the settler. Thus in Burrough V. Philcox[28] the power was held to be in the nature of a Trust. Lord Cotternham, L.C. being of theopinion that a general intention to benefit the class of appointees as a whole in any event had been manifested, but in Re-Weekes settlement[29] and Re-Combe[30] the powers were held to be mere powers. Also in Re-peronwne[31], Harman, J. refused to imply a trust where a testatrix gave and bequethed a life interest in property to her husband, knowing that he will make arrangement for the disposal of my estate, according to my wishes, for the benefit of my family after his death." He held that the effect of the bequest was to give a life interest to the husband with a power of appointment among the testatriex's family, that a purpoted appointment among the widows of the deceased brothers of theTestatrix was excessive and void, since "family" when regarded as the objects of thepower meant blood relations, and that, the power not having been exercised by the husband, thecourts would not exercise it for him since it was a mere power in the nature of a Trust. Had the court been able to inply a Trust it would have extended it in favour of the statutory class of blood relations.[32]

In answer to the question when is a power not a mere power but a power in the nature of a Trust? It can be said that the general principle seems to be that everything depends upon the intention of the settlor and that this intention will be ascertained by the courts in accordance with the ordinary rules of construction.

So far as certainty of objects was concerned, powers in the nature of Trusts have hitherto been assimilated to fixed private trusts. In the words of Lord Denning, M.R in Re-Gullbenkian's, if the clause creating the power in the nature of trust is so uncertain that the trustees cannot identify everyone of the persons who are to benefit, then it is bad for uncertainty.

Lord Denning expressed his hope that these type of cases may be reconsidered and this is exactly what was done in Mcphail V. Doulton.

On the other hand it had been recognised in a succession of cases since Re-Ogden[33] that where there was a mere power, it was not necessary for its valid exercise that the trustees should be able to identify every member of the class. It is sufficiant if the court can identify any particular person as a member of it. This was finally affirmed by the House of Lords in Re-Gulbenkian's.

In Mcphail V. Doulton the deed established a trust of a number of shares as the nucleus of a fund for the benefit of the staff of a company, their relatives and dependants.

There was some difference of judicial opinion whether the clause in the deed governing the distribution of the income of the fund created a trust, a mere power or a power in the nature of a trust. Ultimately the House of Lords held that the clause created a Trust, with a power in the trustees to accumulate surplus income.

But the variation in judicial opinions shown in determining the true effect of this Trust deed underlines the difficulty of drawing the line between a Trust and a power. These, as Lord Upjohn pointed out in the Gulbenkian case, maybe considerable, for the use of inappropriate language may not be decisive.

Nevertheless, the decision of this question has frequently settled the fate of funds which have been established often for the employees and past employees of firms and their relations, for in the case of a Trust, it was necessary for validity for the objects to be ascertained whilst in the case of power a different test was applied.

In McPhail V. Doulton it was argued that the test for the validity of a mere power should be extended to trust powers. The majority held that it should but Lord Guest in his dissenting speech analysed the basis of the view of those who thought that the two tests should be assimilated. He said, "the distiction between a mere power and a trust power is fundamental. The court, apart from malafide exercise of a mere power, has no control over the exercise of the power by the donee or trustees, as the case may be. If it is not exercised or fails for invalidity the fund goes to those entitled in default, under the settlement or on a resulting trust, as the case may be.

It is very different in the case of a trust power. There the trustees are under a fiduciary duty to exercise the power. The beneficiaries can compel the trustees to exercise the power by application to the court if necessary. If the benficiaries agree among themselves to equal divisions they could compel the trustees to distribute the whole fund .. .."Equity is equality". This basic conception is challenged by reference to what is know as the "relation" cases. It is said that the court in these cases, has instead of making an equal division made selection in the exercise of its discretion. This shows, it is said, that the principle of equal division is not a necessary result of the exercise of a Trust power by the court. I regard the relation cases as special for this reason. That in all of them some guide was given to the trustees as to the manner in which that discretion was to be exercised ..... e.g. in Clarke V. Tumer[34] the devise was to "such of the relations of the testor as he should think best, and most reputable for his family". The court chose the heir as the most reputable. In Warburton V. Warburton[35] a very extraordinary case as described by the Master of the Rollsin[36]Kemp V. Kemp[37] the discretion was among the executors, their brothers and sisters according to their needs.

The court gave a double share to the heir. Richardson V. Chapman[38] was not a "relation" case, but depended on its very own special facts. Granted that the court did not in these cases direct an equal division, it by no means follows that a non-relation case where the trustees are given the discretion to distribute amongst a wide class of objects with no guidelines the court would exercise a power of selection. The court has no discretion and is given no guidelines upon which to exercise a discretion. It is on the trustees that the settlor has conferred the discretion. The court can in these circumstances only order an equal division. I consider that the reliance on the relation cases is based on an insecure foundation. Moreover, in none of those cases was it even suggested that the class of objects was not ascertainable the test of validity never therefore arose".

It might be thought that Lord Guests's analysis was too formidable, when linked with earlier expressions of high judicial opinion, to be overcome, but this is exactly what was done in Lord Wilberforce's speech, with which Lords Reid and Dilhorne were in full agreement. In a most lucid introduction to the substance of his opinion, Lord Wilberforce said, "It is striking how narrow and in a sense artificial is the distinction in cases such as the present, between Trusts or as the particular type of Trust called Trust powers and powers.

It is only necessary to read the learned judgements in the Court of Appeal to see that what to one mind may appear as apower of distribution coupled with a trust to dispose of the undistributed surplus, by accumulation or otherwise may to another appear as a Trust for distribution coupled with a power to withhold a portion and accumulate or otherwise dispose of it. A layman and I suspect, also a logician would find it hard to understand what differences there is"

Lord Wilberforce regarded it as unsatisfactorythat the entire validity of a disposition should depend upon such delicate shading and he thought the distinction was even less significant if one considered how in practice reasonable and competent trustees would act. He added, "differences there certainly are between trusts (trust powers) and power, but as regards validity, should they be so great as that in one case complete, or practically complete, ascertainment is needed, but not in the other? Such distinction as there would seem to lie in the extent of the survey which the trustee is required to carry out, if he has to distribute the whole of a fund's income, he must necessarily make a wider and more systematic survey than if his duty is expressed in terms of a power to make grants. But just as in the case of a power, it is possible to underestimate the fiduciary obligation of the trustee to whom it is given, so in the case of a trust power, the danger lies

in overstating that the trustees requires to know or to inquire into before he can properly execute his trust. The difference may be one of degree rather than of principle."

In abandoning the Broadway cotages test, the House of Lords has brought English law into harmony with the views of leading American authorities, for Professor Austin Scott has stated? "It would seem that if a power of appointment among the members of an indefinite class is valid, the mere fact that the testor intended not merely to confer a power but to impose a duty to make such an appointment should not preclude the making of such an appointment - It would seem to be the height of technicality that if a testor authorises a legatee to divide the property among such of the testator's friends as he might select, he can properly do so, but that if he directs him to make such a selection he will not be permitted to do so[39]."

Lord Wilberforce stressed that the assimilation of the validity test does not involve the complete assimilation of trust powers with powers. For example in respect of mere powers he says "although the trustees may and normally will be under a fiduciary duty to consider whether or in what way they sould exercise their power, the court will not normally compel it's exercise.

It will ..... the court, if called upon to execute the trust power will do so in the manner best calculated to give effect to the settlor's or testor's intentions. It may do so by appointing new trustees or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even should the proper basis for distribution appear, by itself directing the trustees so to distribute. The books give many instances where this has been done, and I see no reason in principle why they should not do in the modern field of discretionary Trust ..... then, as to the trustee's duty of inquiry or ascertainment in each case the trustees ought to make such a survey of the range of objects or possible beneficiaries, as will enable them to carry out their fiduciary duty. A wider and more comprehensive range of inquiry is called for in the cases of trust powers than in the case of powers".

It is therefore safely to in far that the test for validity of trusts and powers has somehow been assimilated. It remains difficult to draw a line between the conflicting test. However, there is still room for the courts to improve the test.

CHAPTER FOUR

The Conclusion:

In Re-Gestetner settlement[1] it was decided that different tests of certainty of objects were to be applied to discretionary arrangements contained in settlements, depending on whether, as a matter of construction they were held to fall either into the category of trusts or in the category of powers.

Given that the function of Trusts is to confer a benefit it must follow that for the gifts to be effectual there must be some beneficiary in whom the gifted may vest or on whom the benefit may be conferred and the trustees or the court must be able to ascertain from the description provided by the donor who that beneficiary is. If they cannot ascertain then the gift must fail for uncertainty.

This principle was explained by Lord Upjohn in Re-Gulbenkian's settlement Trust[2] to the extent that "If a doneor (be he a settlor or a testator) directs trustees to make some specified provisions for "John Smith" then to give legal effect to that provisions it must be possible to identify "John Smith". If the donor knows three John Smiths then by the most elementary principles of law neither the trustees nor the court in their place can give effect to that provision, neither the trustees nor the court can guessit.

It must fail for uncertainty unless of course admissible evidence is available to point to a particular John Smith as the object of the donor's bounty"

So, the trustees must know exactly who the beneficiaries are if they are to administer their trust.

They must know whom to pay and how much to pay them

In a gift to an individual, that individual must be ascertain and in a gift to a class all members of that class must be ascertained.

Therefore for the donor's intention to be implemented there must be at all costs the certainty of the members of a class that is to be benefitted or of an individual who is to be benefitted.

If the donor's intention is not to benefit all members of a class but only such of them as maybe selected, whether the selection process is mandatory as in the case of a Trust power or discretionary as with a mere power, different considerations seem to apply[3].

Here the emphasis is on the appointer's choice and whether that choice is within the designated class. In so far as the appointment is concerned all other members of the class are irrelevant[4].

It was realised that thetest for certainty of objects created problems as a result of the standard of measure applied in the determination of objects of the Trust.

Indeed, this standard proved very rigid for simple reasons that if the certainty was not total then the trust failed. It therefore became necessary that a new test had to be formulated, that is, a test whose standard would be flexible and perhaps relaxed as compared to the standard of totality.

The House of Lords in Re-Gulbenkians[5] and in Mcphail V. Doulton[6] reversed the decision of the Court of Appeal in IRC V. Broadway Cottage Trust[7] so as to adopt a new standard which is coined the standard of "intermediate certainty".

This standard was applied to powers in the case of Re-Gulbenkian's and to Trust in Mcphail V. Doulton.

The standard of "intermediate certainty" was described by Harman J. in Re-Gestetner[8] and approved by Lord Wilberforce in Mcphail V. Doulton in the following terms:-

"The settlor had good reason to trust the persons who he had appointed as Trustees, I have no doubt, but I cannot see that there is here such a duty as to make it essential for these trustees, before parting with income or capital, to survey the whole field and consider whether A is more deserving of bounty than B.

That is a task which is, and which must have been known to the settlor to be, impossible, having regard to the ramification of the persons who might be members of this class.

If therefore there is a duty to distribute, but only a duty to consider, it does not seem to me that there is any authority binding on me to say that this whole trust ..... is bad. In fact, as has been admitted, there is do difficulty in ascertaining whether any given postulant is a member of the specified class, if that could not be ascertained, the matter would be quite different, but of John Doe or Richard Roe it can be postulated whether he is or is not eligble to receive the settlor's bounty. There being no uncertainty in that sense, I am reluctant to introduce a notion of uncertainty in the other sense by saying that the trustees must survey the whole world from China to Peru when there are perfectly good objects of the class .....in England."

The essence of this intermediate certainty is the requirement that the terms of the description must be such as can be applied to all comers and when so applied to any given person it must be clear whether or not that person is within the class.

On the basis of such a test a description which made it difficult or impossible to say of any given candidate whether or not he was within the class would not meet the standard of certainty required even though one or more persons might clearly be within the designation[9].

It is further submitted[10] that the purpose of any rule as to certainty of objects is to ensure that there are objects on whom the donor's benefit can be conferred and who, as a consequence can take action to enforce the Trust.

If one discards the total certainty concept as inappropriate because it is unnecessary for the shares of each member of the class to be qualified, then provided the designation throws up some members of the class, it is surely irrelevant whether the designation is capable of universal application, so as to make a determination possible in every case since there will be some persons on whome the donor's bounty can be conferred if the donees of the power so choose.

If it is not though necessary to require a complete list of class members, then by the same token, provided that some class members exist, it must be unnecessary that a decisive determination be possible in the case of every candidate since the conferment of benefit and its extent depend on selection rather than mere class membership.

The question therefore is whether there should exist any difference between powers and Trusts, as far as the certainty test is concerned. I submit that the difference should not exist because the House of Lords decisions in Re-Gulbenkian's and Mcphail··V. doulton effectively impose the standard of intermediate certainty on objects clauses involving powers and trusts.

It has been seen[11] that the distinction between trusts and powers is indeed fine as far as the test for certainty is concerned. It can safely be inferred the distnction is a matter of artificiality depending on the construction of any particular instrument and more so depending on the judge who is kept into task trying to impose his own interpretation.

It is clear that most of the cases that I have mentioned in this paper are English decisions. The reasons for this are simple in that the Kenyan law of trusts is basically the English law of trustswhich we inherited through the Judicature Act 1967. The Kenyan courts therefore have no alternative but to consider the English decision when confronted with any **matter** dealing with the law of trust. It is further clear that the English decisions were arrived at by considering the sociological factors that exist in England or to put it more clearly these cases were decided according to the English way of life.

It is therefore unnecessary to apply the English sociological factors into the Kenyan sociological factors which are radically different. But this could be difficult because we have become victims of the colonial relic and hence the position still remains.

I mention sociological factors because I submit that the test as regards certainty would be more relevant in England where the law of Trusts has advanced tremendously than it would in Kenya. Whereas it is important that the objects of a Trust are ascertained this is not so in customary Trusts whereby we have the concept of communal ownership found mainly in land cases. It would be unwise if not sheer injustice if the courts apply the test for certainty to customary Trusts which are basically African and do not need to borrow the English test of certainty. As regards the certainty test generally it is my submission that the tug of war between Trust and powers should be exterminated and one test should be formulated that will suit both Trusts and powers.

Indeed John Hopkins in his article[12] concludes by saying that distinction between mere powers and Trust powers between powers and duties, clearly remain, but it seems clear that whereas before Mcphail V. Doulton there was "tension between the older principle of requiring sufficient certainty to ensure the effectiveness of control by the courts ....

and the newer principle providing only a general framework within which a certain type of Trust can be successfully administered"[13], the primary manifestation of that tension has been removed. Even in what might be termed the older style family and relations Trusts, arbitrarry limits were placed upon the membership of classes (and in some early cases the courts itself assumed a fairly wide discretionary jurisdiction) in order to provide for relatively straight forward enforcement.

No such device was possible in, for example Trusts for the benefit of company employees. The House of Lords, to meet that situation, boldly reformulated principle and returned to a formulation which perhpas Lord Nottingham would readily have recognised. "I prefer not to suppose that the great masters of equity, if faced with the modern trust for employees, would have failed to adopt their creation for its practical and commercial character" said Lord Wilberforce.

Certainly, Lord Wilberforce himself did not hesitate to restate the law, in doing so, he has caused a number of pre-conceived notions to be re-examined and also has opened up a number of further uncertain view for the future delectation of the courts.

As a final submission it should be noted that the function of the court is to construct the terms of the instrument so as to give effect so far as is possible to the intention of the settlor. Accordingly on general principles if the instrument has an intelligible meaning the function of the court should be/put it into effect ~~/to~~ so that a gift should be held good so long as it can be given an intelligible and ascertainable content. It is not to be held bad for uncertainty unless that uncertainty is such as to make the clause meaningless[14].

The emphasis here is on the true and precise construction of the instrument which should be/cardinal principle to ~~/the~~ determine the validity of a Trust.

Where a fund is to be divided among members of a class is is essential that the total membership of that class be ascertained since the quantum of each individual share obviously depends on the number of members of the class.

The difficulty in such cases is clearly that of ascertaining who the class members are. In one sense this is merely a question of administration or evidence and as such should never cause a class gift to fail[15].

To minimise the problem of certainty perhaps the above recommendations may serve to reduce the imbalance between Trusts and Powers and create a test that would be acceptable both in determining the validity of a Trust or a power and avoid the contradictions that never seems to end.

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FOOTNOTES (CHAPTER ONE)

1. The modern Trust grew out of the Medieval custom of putting land and other forms of property to use. The use being the equivalent of the trust as it is known today.
2. Law of Property Act. 1925 S19.
3. S. 27
4. Modern development in the law of Trusts pg. 10
5. See latham (1954) 32 can. B.R. 520 on the question generally
6. (1933) 2 K.B. 79
7. Parker and Mellws - The Modern Law of Trusts 3rd ed. pg. 5
8. Supreme Court of Judicature (Consolidating) Act 1925 S. 4 (4).
9. Underhill's law of Trusts and Trustees (12th ed. 1970) P.3
10. (1945) ch217 at 219
11. Restatement of the Law of Trusts pg. 6 para. 2
12. Halsbury's Laws of England 3rd ed. Vol. 38 pp 809-810
13. The persons on whose behalf the rights are to be exercise are called cestuis-qui trust (Beckeford V. Wade (1805)) 17 Ves 87 p.c. at p.95 per Grant, M.R).
14. Within the category of purpose trusts come trusts for charitable purposes.
15. This is an expression of the definition of Trust given in Naitland's Equity 44.
16. i.e. a right to call for the transfer of property - see Re-Bamey (1892) 2 Ch. 265 at pp 272, 273
17. Hanbury's Modern Equity 9th ed. pp.85
18. 16th ed. pg. 1
19. (1948) S.A.S.R. 193 at 196.
20. Plural
21. 1897 2 ch 12 at 19 (C.A.)
22. For further judicial interpretations see also Sturt V. Mellish (1743) i Eden 177 at 223 per Lord Mansfield, C.J

23. Re-Amstrong exparte Gilchrist (1886) 17Q B.D 521, Stamp-duties Comm. V. Stephen (1904) A.C. 137.
24. (1881) 18 ch. D 499 at 504
25. Ibid
26. 1932 1 ch 580 at 584
27. Re-Jones (1945) ch 105 at 106 per Vaisey. J.
28. Principles of Contract (13th ed.) pg.166-7
29. Prof Winfield - The province of the law of Torts pp 104-8
30. (1968) A.C. 58
31. Married Women's property Act 1882, Law of property Act 1925. The Occupier's liability Act 1957, The Insurance (Motor Vehicle third party risks) Act cap 405 LK.
32. (1944) ch 83 at 89
33. at pag 104
34. Supra
35. See corbin (1930) 46 LQR 20, Williams)1944) 7 MLR 124 Elliot (1960) 76 LQR 109 HORNBY (1962) 79 LQR 228, Matherson (1966) 29 MLR 397.
36. Supra
37. See 1967 83 LQR 465
38. The most notable one being the rule in Strong V. Bird 30LT 745
39. 2 Commentaries chap 30, S.2
40. Chapter II
41. (1676) 3 Swanx 581, 591
42. S. 34
43. Certainty of objects will be considered chap.III
44. See Re-Manisty's settlement (1973) 3NLR 341
45. Cap 8 LK S.3(1)
46. S.3(1)
47. Which were directly imported from England
48. 1959 E.A. 1057.

CHAPTER II

1. Ante - classification of powers
2. (1971) A.C. 424
3. Hopkins - Vol. 29 1971 C.L.J. 68
4. Brown V. Higgis 1803 ves 561
5. Farwell, powers 3rd ed. 1916 chapters 6-8
6. (1840) 5My & Cr 72
7. Re-Gulbekian (1970) A.C. 508 524 per Lord Upjohn
8. Re-Gestetner settlement 1953 ch 672
9. See Marshall - "Trust and Powers" 35 can. B.R. (1957) 1060
0. Supra
. Supra
. Ante - Introductory note
. Supra
. (1897) ch. 289
. (1925) ch. 210
. Real and Personal Property
. at page 216
. See also Re-Perowne (1951) ch. 785
. (1969) 1 ch. 563, 581
. Supra
(1970) A.C. 508, 519
. In all dicretionary trusts, Trustees are given a discretion to pay or apply income to or for the benefit of all or any one of a specified group of persons, no benficiary being able to claim as a right that all or any part of that income is to be paid to him or applied for his benefit. Here the Trustees have a discretion to select. The question therefore is, whether there is a power or a duty? It is submitted, if it is a power, then this is a power in the nature of a trust. But if it is a duty then it is more a kin to a Trust power.
. Supra
. Per Lord Wilberforce in Mcphail V. Doulton.

CHAPTER III

1. (1971) A.C. 425
2. (1953) ch. 672
3. Re-Baden's Dead Trusts 1962 2ch. 388 at 397
4. Re-Gestetner settlements 1953 ch 672 at 685
5. Re - Coates (1955) ch 495, Re-Safer Trust (1957) ch 423 Re-Gesham's Settlement (1956) 1 W.L.R. 573, Re-Allan (1958) 1 N.L.R. 220, Re-Hain's settlement(1961) 1 N.L.R. 440 at pg. 445 per Evershad M.R.
6. Re-Gulbenkian's settlement Trusts 1968 1 ch 126 at 134 E
7. Re-Gulbenkian's settlement Trust 1970 A.C. 508
8. (1956) 1 N.L.R. 573
9. (1968) ch 126, 134. 138
10. (1955) ch 20
11. IRC V. Broadway Cottages Trust at 36 per Jenkins L.J.
12. Supra
13. Re-Saxone Shoes Co. Ltd Trust deed (1962) 1N.L.R. 943 per cross J., Re-Hains settlement 1961 1 N.L.R. 440 per Eversheд M.R.
14. Re-Hains settlement per Eversheд M.R.
15. Re-Gulbenkians settlement
16. (1971) A.C. 424 at 451 per Lord Wilberforce
17. The Modern Law of Trusts (3rd ed. 1974) by D.P. Parker
18. 1971 A.C. 424 at 457
19. 1973 3 W.L.R. 341 at 349 per Templeman J.
20. 1972 ch 256
21. 1973 3 W.L.R. 341
22. 1973 ch 9
23. The Modern Law of Trusts (3rd ed 1974) Parker and Mellows
24. 3rd ed. 1916 pg 525
25. 1803 8 ves 561
26. Re-Mills 1930 1ch 654
27. Re- Uewellyn's settlement 1921 2 ch 281
28. (1840) 5 Myl & Cr 72
29. (1897) 1 ch 289
30. 1925 ch 210
31. 1951 ch 785

32. Harding V. Glyn 1739 1 Atk 469
33. 1933 ch 678
34. 1694 2 Free ch 198
35. 1702 4 Bro P.C. 1
36. Sir Richard Arden
37. 1801 5 ves 849 at 857
38. 1760 7 Bro P.C. 318
39. "A bridgment of the law of Trusts 1960 (founded on the second Edition of the Restatemnt of the law of Trusts 1959) S. 122 pg. 239.

CHAPTER IV

1. Supra
2. (1970) A.C. 508, 523
3. Ante Chapter II
4. Those members that are not selected
5. Supra
6. Supra
7. (1955) ch 20
8. (1953) ch 672 at 678
9. Robert Burgess - N.I.L.Q. 30, 1979 p. 24
10. Ante: chapter II
11. "Certain uncertainities of Trusts and Powers" 1971 C.L.J. Vol. 29 p.68
12. J.D. Davies - Annuel survey of commonwealth law 1969 pg 369
13. Per Lord Denning M.R. in Re Gulbenkian's (1968) ch 126 at 134
14. Per Lord Wilberforce in Mcphail V. Doulton (1971) A.C. 444 at 457.