Trusts & Equity – Law 463
Fall Term 2023

Lecture Notes No. 5

THE THREE CERTAINTIES (cont'd)

(b) Certainty Of Subject-Matter

The general rule is that the declaration of trust must relate to **specific property**, and that property must be **ascertainable** else the trust is void for uncertainty. Moreover, the beneficial interests in that property must themselves be certain.

***Ascertainability and quantification*:**

The trust will be void where the trust property is divided by quantity and there are no specifics provided about which identifiable property is to go to a certain B.

- **There is no problem where the subject-matter of the trust is to be divided in some specific proportions between different beneficiaries but there is an uncertainty problem where the division is made in reference to a *specific quantity of assets*.** Thus, where the settlor declares a trust in relation to 20 out of 80 cases of wine, there can be no certainty of subject-matter as the transfer of title is prevented by the unascertainability of the goods in particular; ***Re London Wine Company* [1986] Palmer's CC 123.**

- But, conversely, a declaration of trust in relation to 50 of 950 shares was held to be valid in ***Hunter v Moss* [1994] 3 All ER 215.**

- [*Re London Wine Company* was preferred in ***Re Goldcorp* [1995] AC 74,** by the Privy Council. It was held that the problem with *Hunter v Moss* is that the court equated *inter vivos* and testamentary gifts. However, whilst one might be able to Will 50 of 950 shares and all shares pass to the executor in any case for distribution, the settlor still retains equitable ownership of the remaining 900 shares in the *inter vivos* case and thus *Hunter v Moss* seems to have wrongly distinguished *Re London Wine Company*.]

'Anything Left':
Re Walker
(1925), 56 OLR 517 (CA)

Conventionally, one can either gift (with or without conditions) or trust – but not both. Thus, a gift with a gift-over clause is one or the other. Here, it was a gift –

thus the trust seemingly intended over that part of the funds given but not yet used at the death of the widow is void. [The better way to produce such a result would have been for a gift to the wife for life (i.e. life-limited interest over income) with an absolute power to encroach on the capital, and a remainder interest to the remainderman.

Beneficiary's Entitlement:
Re Golay's Will Trusts
[1965] 1 WLR 969 (Ch.)

Is there sufficient certainty where S settled a trust to pay "a reasonable income" to B?

The objection taken to the settlement was that S failed to provide guidance as to how the reasonableness of the income was to be determined. Thus, if this was simply a discretionary determination by the trustees, there would be no problem. The question faced by the Court was whether it could determine reasonableness on some articulable standard that would allow it to supervise the trust satisfactorily.

Per Ungoed-Thomas J:

> … the yardstick indicated by the testator is not what he or some other specified person subjectively considers to be reasonable but what he identifies objectively as "reasonable income." **The court is constantly involved in making such objective assessments of what is reasonable and it is not to be deterred from doing so because subjective influences can never be wholly excluded. In my view the testator intended by "reasonable income" the yardstick which the court could and would apply in quantifying the amount so that the direction in the will is not in my view defeated by uncertainty.**

Thus, a concept such as reasonableness may be elastic, but it lends itself to supervision of the court when construed objectively.

(c) Certainty Of Objects

Re Gulbenkian's Settlement Trusts
[1970] AC 508 (HL)

At issue was a power given to the trustees as set out in a rather complex trust settlement:

> ... at their absolute discretion pay all or any part of the income of the property hereby settled and the investments for the time being

> representing the same (hereinafter called the trust fund) to or apply the same for the maintenance and personal support or benefit of all or any one or more to the exclusion of the other or others of the following persons.

Among those persons were

> ... any person or persons in whose house or apartments or in whose company or under whose care or control or by or with whom the said Nubar Sarkis Gulbenkian [the beneficiary] may from time to time be employed or residing.

The House of Lords maintained the difference between an obligation and a mere power; the former must be satisfied, the latter carries no obligation. In defining the class of objects of a power, the trustee or donee need only be able to say whether a particular individual is within the class of objects. However, when a trustee is exercising a power, he or she must take care not to act capriciously.

Lord Reid:

> **The sole question in this appeal is whether this class of potential beneficiaries is so uncertain that these provisions cannot be operated by the trustees.** It is not disputed that if the description of the class which I have quoted is too uncertain then the whole provision fails even although the other potential beneficiaries are easily ascertainable.
>
> This clause does not make sense as it stands... [b]ut the client must not be penalised for his lawyer's slovenly drafting. Under modern conditions it may be necessary to relax older and stricter standards. If I adopt methods of construction appropriate for commercial documents and documents inter rusticos I must consider whether underlying the words used any reasonably clear intention can be discerned...
>
> One argument, as I understand it, is that because this is admitted to be a mere power, it really imposes no duties on them at all. I find that difficult to understand. **It is a power given not to the individuals who happen also to be trustees but to the trustees as such** so that new trustees duly assumed or appointed can exercise it. In my view it must follow that the trustees are to act in their fiduciary capacity. They are given an absolute discretion. So if they decide in good faith at appropriate times to give none of the income to any of the beneficiaries the court cannot pronounce their reasons to be bad. And similarly if they decide to give some or all of the income to a particular beneficiary the court will not review their decision... But

their "absolute discretion" must, I think, be subject to two conditions. It may be true that when a mere power is given to an individual he is under no duty to exercise it or even to consider whether he should exercise it. **But when a power is given to trustees as such, it appears to me that the situation must be different. A settlor or testator who entrusts a power to his trustees must be relying on them in their fiduciary capacity so they cannot simply push aside the power and refuse to consider whether it ought in their judgment to be exercised. And they cannot give money to a person who is not within the classes of persons designated by the settlor: the construction of the power is for the court.**

If the classes of beneficiaries are not defined with sufficient particularity to enable the court to determine whether a particular person is or is not, on the facts at a particular time, within one of the classes of beneficiaries, then the power must be bad for uncertainty. If the donee of the power (whether or not he has any duty) desires to exercise it in favour of a particular person it must be possible to determine whether that particular person is or is not within the class of objects of the power. And it must be possible to determine the validity of the power immediately it comes into operation. It cannot be valid if the person whom the donee happens to choose is clearly within the objects but void if it is doubtful whether that is so. So if one can reasonably envisage cases where the court could not determine the question the power must be bad for uncertainty. But it is not bad merely because such determination may be difficult in a particular case. The respondents have inserted in their case at the request of the trustees a statement that in the view of the trustees "it must be unlikely that they would in practice be able to exercise the said power or discretion except after obtaining a decision of the court whether any particular suggested object thereof did or did not fall within the said description." That in itself is not sufficient to warrant a decision that the power fails for uncertainty. **It may be that there is a class of case where, although the description of a class of beneficiaries is clear enough, any attempt to apply it to the facts would lead to such administrative difficulties that it would for that reason be held to be invalid.**

Lord Upjohn:

It is curious that there is no long line of decided cases as to what is the proper test to apply when considering the validity of a mere power when the class of possible appointees is or may be incapable of ascertainment, but there is a body of recent authority to the effect

that the rule is, that provided there is a valid gift over or trust in default of appointment... a mere or bare power of appointment among a class is valid if you can with certainty say whether any given individual is or is not a member of the class; you do not have to be able to ascertain every member of the class.

... So I propose to make some general observations upon this matter.

If a donor (be he a settlor or testator) directs trustees to make some specified provision for "John Smith," then to give legal effect to that provision 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 guess at it. 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.
Then, taking it one stage further, suppose the donor directs that a fund or the income of a fund should be equally divided between members of a class. That class must be as defined as the individual; the court cannot guess at it. Suppose the donor directs that a fund be divided equally between "my old friends," then unless there is some admissible evidence that the donor has given some special "dictionary" meaning to that phrase which enables the trustees to identify the class with sufficient certainty, it is plainly bad as being too uncertain. Suppose that there appeared before the trustees (or the court) two or three individuals who plainly satisfied the test of being among "my old friends," the trustees could not consistently with the donor's intentions accept them as claiming the whole or any defined part of the fund. They cannot claim the whole fund for they can show no title to it unless they prove they are the only members of the class, which of course they cannot do, and so, too, by parity of reasoning they cannot claim any defined part of the fund and there is no authority in the trustees or the court to make any distribution among a smaller class than that pointed out by the donor. The principle is, in my opinion, that the donor must make his intentions sufficiently plain as to the objects of his trust and the court cannot give effect to it by misinterpreting his intentions by dividing the fund merely among those present. **Secondly, and perhaps it is the more hallowed principle, the Court of Chancery, which acts in default of trustees, must know with sufficient certainty the objects of the beneficence of the donor so as to execute the trust.** Then, suppose the donor does not direct an equal division of his property among the class but gives a power of selection to his trustees among the class; exactly the same principles must apply.

The trustees have a duty to select the donees of the donor's bounty from among the class designated by the donor; he has not entrusted them with any power to select the donees merely from among known claimants who are within the class, for that is constituting a narrower class and the donor has given them no power to do this.

But when mere or bare powers are conferred upon donees of the power (whether trustees or others) the matter is quite different. As I have already pointed out, the trustees have no duty to exercise it in the sense that they cannot be controlled in any way. If they fail to exercise it then those entitled in default of its exercise are entitled to the fund. Perhaps the contrast may be put forcibly in this way: in the first case it is a mere power to distribute with a gift over in default; in the second case it is a trust todistribute among the class defined by the donor with merely a power of selection within that class. The result is in the first case even if the class of appointee among whom the donees of the power may appoint is clear and ascertained and they are all of full age and sui juris, nevertheless they cannot compel the donees of the power to exercise it in their collective favour. If, however, it is a trust power, then those entitled are entitled (if they are all of full age and sui juris) to compel the trustees to pay the fund over to them, unless the fund is income and the trustees have power to accumulate for the future.

Re Hay's Settlement Trusts
[1982] 1 W.L.R. 202 (Ch)

Megarry J:

I propose to approach the matter by stages. First, **it is plain that if a power of appointment is given to a person who is not in a fiduciary position, there is nothing in the width of the power which invalidates it per se. The power may be a special power with a large class of persons as objects; the power may be what is called a 'hybrid' power, or an 'intermediate' power, authorising appointment to anyone save a specified number or class of persons; or the power may be a general power. Whichever it is, there is nothing in the number of persons to whom an appointment may be made which will invalidate it. The difficulty comes when the power is given to trustees as such,** in that the number of objects may interact with the fiduciary duties of the trustees and their control by the court. The argument of counsel for the defendants carried him to the extent of asserting that no valid intermediate or general power could be vested in trustees.

That brings me to the second point, namely, the extent of the fiduciary obligations of trustees who have a mere power vested in them, and how far the court exercises control over them in relation to that power. In the case of a trust, of course, the trustee is bound to execute it, and if he does not, the court will see to its execution. A mere power is very different. Normally the trustee is not bound to exercise it, and the court will not compel him to do so. That, however, does not mean that he can simply fold his hands and ignore it, for normally he must from time to time consider whether or not to exercise the power, and the court may direct him to do this.

…

That brings me to the third point. How is the duty of making a responsible survey and selection to be carried out in the absence of any complete list of objects? This question was considered by the Court of Appeal in *Re Baden (No 2)*. That case was concerned with what, after some divergences of judicial opinion, was held to be a discretionary trust and not a mere power; but plainly the requirements for a mere power cannot be more stringent than those for a discretionary trust. The duty, I think, may be expressed along the following lines: I venture a modest degree of amplification and exegesis of what was said in *Re Baden (No 2)* [1972] 2 All ER 1304 at 1310, 1315, [1973] Ch 9 at 20, 27. The trustee must not simply proceed to exercise the power in favour of such of the objects as happen to be at hand or claim his attention. He must first consider what persons or classes of persons are objects of the power within the definition in the settlement or will. In doing this, there is no need to compile a complete list of the objects, or even to make an accurate assessment of the number of them: what is needed is an appreciation of the width of the field, and thus whether a selection is to be made merely from a dozen or, instead, from thousands or millions. (Incidentally, in order to avoid the relevant passage in the judgment of Sachs LJ being self-contradictory I think a comma needs deletion: the words 'it refers to something quite different, to a need to provide ... ' should read 'it refers to something quite different to a need to provide ... ', or, preferably, 'it refers to something quite different from a need to provide ... ': see [1972] 2 All ER 1304 at 1310, [1973] Ch 9 at 20). Only when the trustee has applied his mind to 'the size of the problem' should he then consider in individual cases whether, in relation to other possible claimants, a particular grant is appropriate. In doing this, no doubt he should not prefer the undeserving to the deserving; but he is not required to make an exact

calculation whether, as between deserving claimants, A is more deserving than B: see *Re Gestetner (deceased)* [1953] 1 All ER 1150 at 1155, [1953] Ch 672 at 688, approved in *Re Baden (No 1)* [1970] 2 All ER 228 at 243-244, [1971] AC 424 at 453.

If I am right in these views, the duties of a trustee which are specific to a mere power seem to be threefold. Apart from the obvious duty of obeying the trust instrument, and in particular of making no appointment that is not authorised by it, the trustee must, first, consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments. I do not assert that this list is exhaustive; but as the authorities stand it seems to me to include the essentials, so far as relevant to the case before me.

…

SUMMARY RE CERTAINTY OF OBJECTS

Fixed Trusts

- Where there is uncertainty as to objects (Bs), a resulting trust arises.

- This is not the same as the 'beneficiary principle' (every non-charitable trust must have a human beneficiary) described in *Re Astor's Settlements* [1952] Ch 534, though the policy rationale is the same. Similarly, *Leahy v AG for NSW* [1959] AC 457 (where the trust has certain objects, the court can enforce it. Where the trust is charitable, the AG can enforce it. Where the object is not charitable and the B not human, no one can enforce it including the court).

- Where the trust is a fixed trust, all beneficiaries must be ascertainable or can be ascertainable when the time comes for distribution of the property or income.

Discretionary Trusts

- For a discretionary trust, the test for ascertainability is the same test as is applied for discretionary trusts; ***McPhail v Doulton*** **[(Re Baden's Deed Trusts (No 1)] [1971] AC 424.**

- The class as specified must be conceptually certain, thus *dependants* is permissible, but *relatives* somewhat suspect; ***Re Baden's Deed Trusts (No.2)*** **[1973] Ch 9**. The court can look to outside opinion as provided for in the instrument, i.e. the Chief Rabbi delegated to decide who is Jewish under the terms of the trust; *Re Tuck* [1978] Ch 49.

- **There is some authority that the class must be administratively workable**; see *McPhail v Doulton* ("all the residents of London" as an example of one that would not be OK). The trustee is under no obligation to ascertain the class to list certainty, but cannot merely choose whomever comes to hand first - "what is required is an appreciation of the width of the field, whether a selection is to be made from a dozen, or instead, from thousands or millions…"; *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (re mere power to appoint anyone in the world except a small class). However, and notwithstanding the modern approach not to interfere with S's wishes and a well drafted discretionary trust, in *R v District Auditor, ex parte west Yorkshire MCC* [1986] RVR 24 ("all or some of the inhabitants or West Yorkshire"), the trust was void as the court could not frame an order that would fit within the terms of the trust (the trust was also void as a pure purpose trust).

- **The trustees of a discretionary power may not act capriciously or irrationally**, for example exercising the power based on the fact that the object was tall or a resident of Toronto. Thus, the power itself cannot be capricious in the sense that an exercise within the terms of the power would necessarily be capricious by definition - "a capricious power negatives a sensible consideration by the trustees of the exercise of the power" per Lord Templeman in *Re Manisty's Settlement* [1974] Ch. 17.

(d) Constitution of Trusts

The trust is generally constituted by:

1. the settlor declaring himself or herself to be trustee in respect of property; or

2. the settlor transfers the property to the trustee directly; or

3. the settlor transfers the property to the trustee indirectly.

In general, a court will not enforce an incompletely constituted trust based on the maxims ***Equity will Not Assist a Volunteer*** and ***Equity Will Not Perfect an Imperfect Gift***. The rationale is the preservation of the proprietary interest of the settlor in the trust property; that is, the law will not disturb ownership without a compelling reason.

Sometimes a court will assist and order the trust be constituted. For example, there was a promise that is enforceable (and, like contract, we look for consideration to bring the beneficiary outside the category of a 'volunteer'). At other times, the court may hold it would be unconscionable not to assist, principally when the settlor has done everything he or she can and something outside his or her control prevents the trust being constituted.

(a) Self-Declaration of Trust

The settlor must clearly intend to become a trustee of the property, as a matter of fact.

(a) **Richards v Delbridge (1874) LR 18 Eq 11** (S endorsed a lease on premises 'this deed and all thereto belonging I give to Edward Bennetto Richards from this time forth with all stock in trade' and dies. Held: no trust).

(b) **Jones v Lock (1865) LR 1 Ch App 25** (S produced a cheque for £900 payable to himself, and said 'look you here, I give this to baby; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it.' Held: no trust).

(c) **Paul v Constance [1977] 1 WLR 54 :** S and B lived together. S opened a bank account in his name alone, with his common law spouse having a right to withdraw or deposit such that their joint bingo winnings were paid in and their joint Christmas expenses were withdrawn, there is a trust where S said to B 'the money is as much yours as mine' - these were simple people who the court found intended a trust obligation.

Carson v Wilson
[1961] OR 113 (CA)

In this case deeds of conveyance were executed by the testator during his lifetime and the deeds were lodged with his solicitor pending the testator's death. As inter vivos gifts, the deeds failed for want of delivery. As testamentary gifts, they failed for non-compliance with formalities of the wills legislation. As trusts, they failed as the testator had not intended that he be obligated as a trustee by virtue of his execution of the deeds.

Per Schroeder JA:

> I refer also to *Richards v. Delbridge* (1874), L.R. 18 Eq. 11. There the owner of leasehold business premises and stock in trade shortly before his death purported to make a voluntary gift in favour of his grandson, who was an infant and who had assisted in the operation of the business, by the following memorandum signed and endorsed on the lease: "This deed and all thereto belonging I give to E. from this time forth, with all the stock-in-trade." The lease was then delivered to the mother of E on his behalf. Holding that there had been no valid declaration of trust of the property in favour of the grandson, Sir G. Jessel, M.R., stated at p. 14:
>
> **The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.**

Direct Transfer and Imperfect Gifts:

Equity will not perfect an imperfect gift:
The court will not order a trust constituted as a curative measure to save a failed trust.

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

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

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

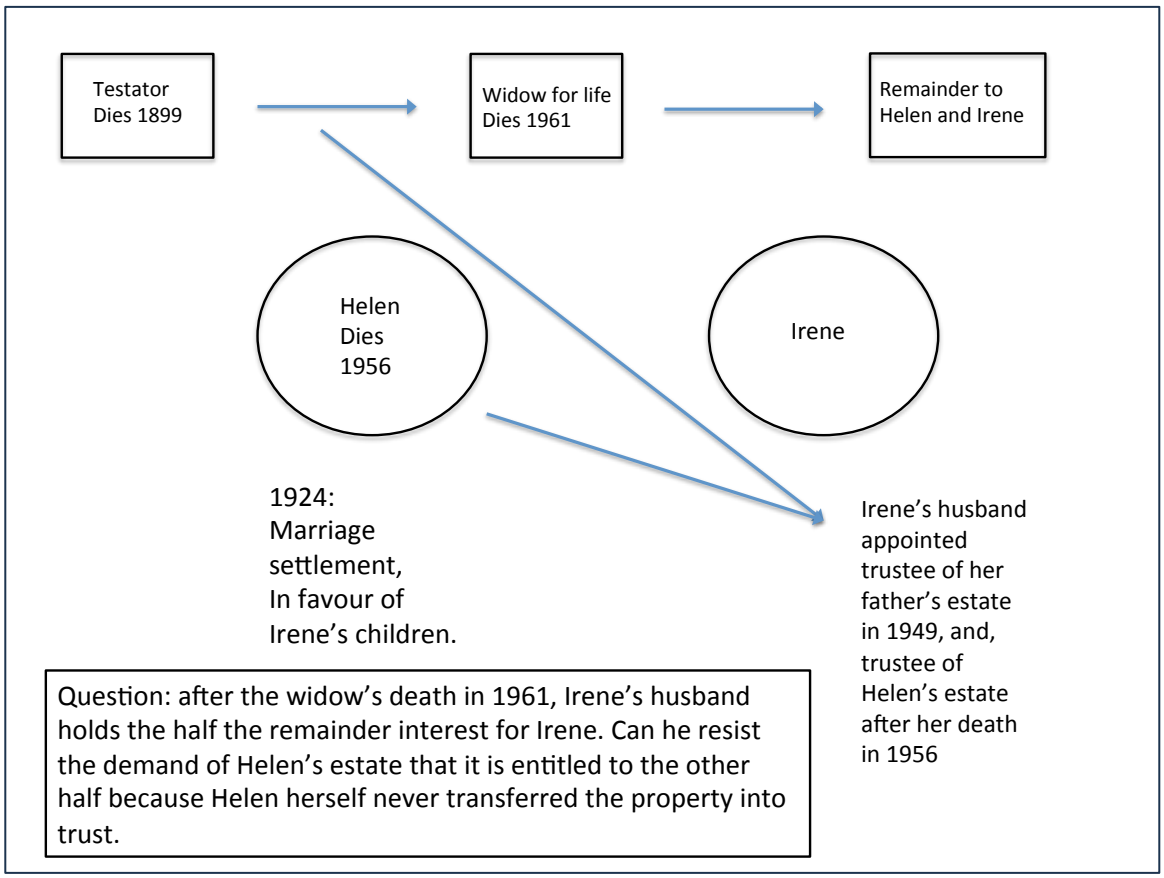
Re Rose
[1952] Ch 499

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

Here the settlor held two blocks of shares and transferred them to a trustee under a deed of settlement of a trust. The transfer met the company's regulations for change in share ownership. The date of the transfer of ownership was made by the company 3 months later. The settlor died 5 years later. A tax was payable on voluntary disposition of property made within 5 years of death. The date of the transfer on the company's registry feel within that 5 year period. Was the transfer effective on the date of the delivery of the share assignment form to the company (and thus outside the tax window) or on the date of the change on the registry (and thus tax was payable). Held: No tax liability as the transfer was effective on the date on which the settlor did all that he could to give effect to the trust.

Indirect Transfer – Third Parties

Re Ralli's Will Trusts
[1964] Ch 288



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

1892:	Testator's Will executed.
1899:	Testator dies – to wife for life, remainder to two daughters absolutely.
1924:	**Helen's marriage settlement in favour of Irene's children.**
1946:	Irene's husband appointed trustee of marriage settlement, and, trustee of testator's estate.
1956:	Helen died.
1961:	Testator's widow died.

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

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

Buckley J:

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