such as *Guardhouse* v. *Blackburn* (1866), of a century or so ago. Those old cases had developed a rule whereby, in the absence of fraud, a capable testator who had read the will or codicil before executing it was presumed to have known and approved its contents. That supposed rule, however, like another one—*viz.*, that a testator who had employed a draftsman to draft his will or codicil may be bound, in the absence of fraud, by the draftsman's erroneous wording of it—appears now to be of doubtful authority. In *Crerar* v. *Crerar*, for instance, Sachs J. had said " . . . it is not the law of this country that the testator can give testamentary validity to a testamentary disposition by accepting, without understanding its effect, something put forward by another."

Consequently, Latey J., in *Re Morris, decd.*, felt able nowadays to hold both (i) that even where a testamentary document which contains a draftsman's slip or mistake was read and/or accepted by the testator before he executed it, the crucial question today is whether the testator did in fact understand and approve its contents; and (ii) that, in so far as the testator did not really know and approve them, the probate court's power to omit them from the grant of probate applies.

S. J. BAILEY.

TRUSTS—DISCRETIONARY TRUSTS—CERTAINTY OF OBJECTS

IN *Whishaw* v. *Stephens* [1970] A.C. 508 (noted at [1969] C.L.J. 30), the House of Lords at last brought to an end a period of uncertainty in the law of the certainty of objects of a power of appointment, by holding that a mere or bare power of appointment is valid if it can be said with certainty whether any given individual is or is not a member of the class of objects, and that such a power does not fail merely because it is impossible to ascertain every member of the class.

That decision did not affect the same question posed in relation to a trust. A trust being imperative, unlike a mere discretionary power, all the possible objects had to be ascertainable (or at least the court had to be satisfied " that it is probable that the class can be or has been ascertained," *per* Cross J. in *Re Saxone Shoe Company Ltd.'s Trust Deed* [1962] 1 W.L.R. 943, 953), not least because the court would, in default of execution of the trust by the trustees, imply a trust in favour of all the beneficiaries equally (*Burrough* v. *Philcox* (1840) 5 My. & Cr. 72, 92, *per* Lord Cottenham L.C.), inappropriate though this might appear in the case of a trust set up for the employees of a company and their dependants. If all the objects of a trust could not be ascertained with reasonable certainty, if a complete list of them could not be drawn up, then the trust itself would be void: *Re Saxone* (above), *Re Leek* [1969] 1 Ch. 563 (C.A.) and, in

such a case, it was not open to the court to spell a valid power out of such invalid trust: *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1953] Ch. 20.

The distinctions between trusts and powers are fine ("very nice," *per* Sir R. Arden M.R. in *Brown* v. *Higgs* (1800) 5 Ves.Jun. 495, 505) and arise from the very nature of trusts and powers (see *Whishaw* v. *Stephens*, *per* Lord Upjohn at p. 525) and the question of the validity of an instrument depended upon the application of these distinctions in view of the materially different requirements of certainty for trusts and powers. This result led to a degree of judicial irritation ("contrary to common-sense," *per* Lord Denning M.R. in *Re Gulbenkian's Settlements* (*No.* 1) [1968] Ch. 126, 135, "far from satisfactory," *per* Lord Reid in *Whishaw* v. *Stephens* at p. 519, "absurd and embarrassing," a characteristically trenchant aphorism, *per* Harman L.J. in *Re Baden's Trust Deeds* [1969] 2 Ch. 388, 395) and the grounds for such irritation are well stated in Scott, *The Law of Trusts*, 3rd ed. (1967), Vol. 2, p. 921:

> "It would seem . . . that if a power of appointment among the members of an indefinite class is valid, the mere fact that the testator [or settlor] 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 to hold that if a testator *authorizes* 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."

Various expediencies suggested themselves to the court in order to avoid holding a trust void for uncertainty—the qualification suggested by Cross J. in *Re Saxone* (though it could not save the instrument in that case), a readiness to construe an instrument as a power rather than as a trust (see *Re Baden's Trust Deeds* [1967] 1 W.L.R. 1457, Goff J., [1969] 2 Ch. 388, C.A.—though contrast *Re Leek*, above), a suggestion from Lord Denning M.R. in *Re Gulbenkian* (*No.* 1) to "bring into line" the trust cases with those on powers and a like plea from Lord Reid in *Whishaw* v. *Stephens* at p. 518 where he also pointed out that the two types of instrument are often not as different as is usually thought since donees of powers are frequently termed "trustees" who are, as such, fiduciaries in relation to their powers. These straws in the judicial wind have proved to be signs of a veritable gale of change for in *McPhail* v. *Doulton* [1970] 2 W.L.R. 1110 (the appeal from *Re Baden*, above), the House of Lords, by a bare majority (Lord Wilberforce, with whom Lord Reid concurred, and Viscount Dilhorne, Lords Hodson and Guest dissenting) has assimilated the test for certainty of objects

in trusts with that laid down for powers in *Whishaw* v. *Stephens*. The full results of this assimilation remain to be seen; further judicial clarification is awaited with interest.

In *McPhail* v. *Doulton*, a settlor had transferred property to trustees who "shall apply the net income in making at their absolute discretion grants at such times and on such conditions as they think fit" for the benefit of the staff of a company, their relatives and dependants. The trustees were not bound to exhaust the income in any one year and were directed to accumulate surplus income; they were also empowered to raise capital in the event of the income being insufficient for their purposes in any year. The House of Lords held, unanimously, that a trust had been created rather than a power (a trust "for the distribution of the whole [income] with power to accumulate," *per* Lord Hodson at p. 1115) and thus approved the vigorous dissent on this point of Russell L.J. in the court below. Lords Hodson and Guest then proceeded to approve the traditional reasoning in such cases and to hold the trust void for uncertainty since no complete ascertainment of all the objects of this trust was practicable.

The principal judgment, which will repay close study, however, was that of Lord Wilberforce who was of opinion, first (at p. 1126) that the primary distinction between a trust and a power to distribute is that if the trustee-donee "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." There is here, perhaps, a blurring of the distinction between "duty" and "power," but his Lordship then proceeded to the second stage of his argument. In the case of a trust, the trustees have a duty to select from within the class of objects, the members of which they must, of course, make strenuous efforts to ascertain. But there is no reason why they may not discharge their duty without knowing all the members of the class: they can appoint within such members of the class as they have identified. The immediate stumbling-block in the way of this argument, is the *Broadway Cottages Trust Case* (above), which the majority, accordingly, overruled (see, in especial, Lord Wilberforce at p. 1130). The main obstacle, however, is more fundamental, for, even before *Morice* v. *Bishop of Durham* (1805) 10 Ves.Jun. 522, it had been assumed that the whole number of beneficiaries had to be known, since the court must be able to order equal distribution between them all. Yet if a trust is to be valid notwithstanding the anonymity of some of its objects, the court will be unable to distribute on a basis of equality: is it then to substitute its own discretion for that of the trustees?

Such a proposition might make any save the most progressive Chancery lawyer blench, but Lord Wilberforce was not deterred and relied upon a number of eighteenth-century and earlier cases (some of which probably turn upon the claim of an heir-at-law under the old Statutes of Distribution), in especial, *Mosley* v. *Mosley* (1673) Fin. 53, *Clarke* v. *Turner* (1694) Free.Ch. 198 and, above all, *Warburton* v. *Warburton* (1702) 4 Bro.P.C. 1 of which he said, at p. 1127: "on a discretionary trust to distribute between a number of the testator's children the House of Lords [held] . . . that the eldest son and heir, regarded as necessitous, should have a double share, the court exercising its own discretionary judgment against equal division." This case, which seems to have been the only one to have gone so far, has been severely criticised. In *Kemp* v. *Kemp* (1801) 5 Ves.Jun. 849, Sir R. Arden M.R. described it as "very extraordinary" and continued at p. 856: "It seems as if [the court] exercised the [trust] power themselves; a power which of late the court has disclaimed; and, I hope, that will always be followed." And according to Sugden, *Powers*, 1st ed. (1821), p. 503, "the court exercised a dangerous discretion . . . but this power the court has of late very properly disclaimed"; see also 8th ed. (1861), p. 601. There can be little doubt that the majority of the House of Lords has resurrected an old power and perhaps, now, the Chancellor, or at least some of the Lords of Appeal, wear shoes of a size different from that which they have prevously taken.

Quite how the court will distribute in a situation in which the trustees fail to do so, is uncertain (the dissenting members of the House of Lords declared themselves mystified), though Lord Wilberforce suggested, at p. 1132, that "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 testator'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." What precisely are the duties of the trustees of a valid but "uncertain" trust remains to be seen; how a trust for distribution of capital rather than of income will be affected by the decision is still to be determined. And it will be interesting to see whether *McPhail* v. *Doulton* applies to any save discretionary trusts; certainly, few such trusts will be void for uncertainty in future. Lord Wilberforce suggested by way of example, at p. 1133, that a trust for "all the residents of Greater London" would be, but not one "for 'relatives' even of a living person."

What is clear is that trust powers have been assimilated to mere powers only in relation to certainty of objects and that the *Broadway Cottages Case* has been overruled upon that point alone. The case is of the highest importance and the judgment of Lord Wilberforce one of the most stimulating upon trusts of recent years. Amidst the uncertainties which the case generates, two things are quite clear: it is good that a number of trusts has been saved from invalidity and it is certain that the names *McPhail* and *Doulton* will join that small but select group of names known to every student of the law of trusts.

JOHN HOPKINS.

FAMILY PROPERTY—NO COMMUNITY YET

THE decision of the House of Lords in *Gissing* v. *Gissing* [1970] 3 W.L.R. 255 must be taken with that of the same court in *Pettitt* v. *Pettitt* [1970] A.C. 777, noted at [1969] C.L.J. 191. Together they mark the ending of judicial attempts to introduce almost universal community of family assets. In *Pettitt* the House held that a spouse who effected improvements to property owned by the other did not thereby become entitled to a beneficial interest in that property. (It must be noted that such spouses now acquire beneficial interests thanks to section 37 of the Matrimonial Proceedings and Property Act 1970.) Now in *Gissing* the House, although devoid of any Chancery judge, has held that a husband was solely entitled to sell his former matrimonial home after his marriage had been dissolved, despite the fact that while he had paid for the house his wife had paid for certain household equipment without which the family would have been much less comfortable.

The complete novice might be forgiven for thinking that such a decision was inevitable in view of the principle of separation of property rights laid down in the Married Women's Property Act 1882. However our novice would only have to read certain recent decisions of the Court of Appeal, including that in *Gissing* itself, to appreciate that some members of the bench have been only too anxious to attack that principle, because it is thought to be out of touch with modern social and economic realities and to cause injustice. The injustice has not lain in the principle itself so much as in one or other consequence of that principle. Thus if the wife is the sole owner of a piece of property she alone has the right to any increase in its value, she alone has the right to the current enjoyment of the property (although she cannot treat her husband as a trespasser—see *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175), she alone is entitled to be concerned in the management of the property, and if the property is sold she can make good title